THE

UPPER CANADA JURIST;

CONTAINING

ORIGINAL AND SELECTED ARTICLES ON LEGAL SUBJECTS;

SOME IMPORTANT DECISIONS

IN BANKRUPTCY AND CHANCERY IN UPPER CANADA,

AND IN THE

ENGLISH COMMON LAW COURTS.

WITH AN

ALPHABETICAL LIST OF CASES, AND INDEX OF PRINCIPAL MATTERS.

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INDEX OF PRINCIPAL MATTERS

IN

VOL. I.—PART II.

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COLONIAL DIVORCE.

Public attention has been directed with much interest, to the proceedings which have taken place during the last session of the legislature on the subject of divorce, and as it must be admitted that the law of divorce is one which affects some of our best and dearest interests, and as the power of a colonial assembly to legislate upon it, has been much questioned, we conceive that an inquiry into the principles on which such legislation proceeds in Great Britain, may be beneficially made; as upon their applicability to colonies possessing legislative powers, must depend the propriety and justice of colonial legislation. In all countries laws of divorce afford but a mournful remedy, and in England both the spiritual courts and the legislature interfere with a very unwilling spirit. Every facility is there given to marriage, consistent with a proper performance of the ceremony and the due prevention of fraud; and every attempt to dissolve the sacred tie is looked upon with suspicion and alarm, both from its effects upon the legitimacy of children, and the consequences of that legitimacy being impeached in the eyes of the world. It is in this spirit, that if a party seek to annul a marriage, or any of the obligations consequent upon it, every argument is weighed, and every device encouraged, in support of the union, and in bar of its alteration or dissolution. Not only collusion between the parties, but the want of clean hands on the part of the accuser, or forgiveness, express or implied, or even delay in prosecuting legal redress, create in themselves personal disabilities. If the injured husband or wife altogether omit to prosecute the right of divorce, the law never interferes, however flagrant the adultery may be. It is upon the same principle, that divorce is regarded as a mere personal cause of complaint, in which no third individual, and

not even the public, has any business to interfere. If the privilege be not claimed by the innocent party, or if it be abandoned before it be fully established, the marriage continues to subsist with all its rights and privileges, its obligations and consequences, undisturbed. The necessity of providing for the care and education of the young; the fear of affording scope to the selfish passions, and the danger of allowing the least possibility of separate interest to spring up between husband and wife, are unanswerable arguments for encouraging adherence to the contract of marriage, and discouraging its dissolution. From the very nature of man we are obliged to consider that the permanence of the bond of the union between husband and wife, must be calculated upon rather from our weaknesses, than confided in from our virtues. "Men are less likely to struggle against the obligation, where they know that they cannot free themselves from it; and the fewer causes that are recognized in a state, as sufficient to serve for the dissolution of the marriage contract, the less likelihood is there of men being dissatisfied with their condition under it. If facilities are given for the severance of the marriage tie, pretexts can always be found to enable the parties to avail themselves of those facilities, and the state of society in the Roman empire, as described by Gibbon in the fifth volume of his history, is a true picture of the consequences that would inevitably ensue: "Passion, interest or caprice, suggested daily motives for the dissolution of marriage: a word, a sign, a message, a letter, the mandate of a freedman, declared the separation: the most tender of human connections was degraded to a transient society of profit or pleasure. According to the various conditions of life, both sexes alternately felt the disgrace and injury: an inconstant spouse transferred her wealth to a new family, abandoning a numerous, perhaps a spurious progeny, to the paternal care and authority of her late husband: a beautiful virgin might be dismissed to the world old, indigent and friendless: but the reluctance of the Romans, when they were pressed to marriage by Augustus, sufficiently marks, that the prevailing institutions were least favourable to the males. A specious theory is confuted by this free and perfect experiment, which

demonstrates, that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence, and inflame every trifling dispute: and the minute difference between a husband and a stranger, which might so easily be removed, might still more easily be forgotten." In Christian communities, the force of religion adds sanctity to the marriage bond. God is called to witness the civil contract, and the vow spoken in the face of heaven is the ratification of the agreement made before men. "It is a great mistake," says Lord Stowell in his judgment in Dodson's report of the case of Dalrymple, "to suppose that because marriage is a civil contract, it cannot therefore be a religious one." From its consideration as a religious contract, has arisen the opinion of the indissoluble nature of the tie among many divines, and by the Church of Rome it is regarded as a sacrament, and its inseparable nature is settled and insisted upon by the Council of Trent. *Si quis dixerit ecclesiam errare, cum docuit et docet se, matrimonii vinculum non posse dissolvi se anathema sit.* But though the Church of Rome pronounces against the dissolution of the marriage tie, it gives to the ecclesiastical judge the power of decreeing a separation between man and wife, as complete as if a divorce were pronounced, in all but the power of marrying again; and surely this destruction of the whole matrimonial relation, is as inconsistent with the religious engagement of the parties to remain united for life, as the laws of the reformed and Greek churches, which allow the engagement to be annulled. "*Separantur*," says the canon law, "sed remanent conjuges;" but if they be separated *a mensâ et toro*, they are surely almost as much released from each other as if the marriage were annulled. And, if the question be treated as one of expediency, it must be better for the interests of religion and society that the offending party should be punished, and the injured relieved, than that a perpetual separation should be decreed, which must place both on the same footing, and prevent the innocent from ever again entering into the marriage contract, which has been forfeited by no fault of theirs. And, as far as the religious part of the contract is concerned, there seems to be no just reason why,

when the vow solemnly pronounced before God is broken, the crime committed by the perjury should not discharge the innocent party from the obligation, which the civil contract has imposed. The commission of adultery is a direct violation of the vow; and to sanction the continuance of the marriage against the injured party afterwards, were to punish the innocent and not the guilty. We cannot but disapprove of the laws of those countries which allow a dissolution of the marriage contract upon reasons depending upon the mere will or disposition of the parties; but the law of England proceeds upon no such insufficient grounds. "There can be no question," says Lord Stowell in Proctor *v.* Proctor (2 Hagg. Cons. Rep. 296), "that the legal nature of the marriage contract in this country had its entire root in the ancient canon law of Europe; not, indeed, since the reformation, to the full extent of that law, which considered it an absolute sacrament, but to the extent of considering it in such case an act highly spiritual, consecrated by divine authority, and, as such, indissoluble by human power for any cause whatever;" and the same judge adds, in another part of the judgment, "It is notorious that this country, at the Reformation, adopted almost the whole law of matrimony, together with all its doctrines of indissolubility, of contracts 'per verba de presenti et per verba de futuro', of separations 'a mensâ et toro', and many others; the whole of our matrimonial law is, in matter and form, constructed upon it; some canons of our church may have varied it, and a higher authority, that of the legislature, has swept away some of the important parts of it. But the doctrine of indissolubility, remains in full force. The very practice of our legislature, in granting by special acts, particucular divorces in particular cases, affirms the indissolubility, as existing in the general law, and to be maintained by the courts in their dispensations of justice." The theory, therefore, of the law of England, is according to the law of Roman Catholic countries; its practice agrees with that of the Reformed and Greek churches; and although in Foljambe's case, (2 Burn's Eccles. Law, 496,) the spiritual court dissolved the marriage, yet since that decision, in the 44th year of the reign of Queen Elizabeth, no other similar decree has

been made. The law of England, then, allows separation in three cases, by divorce a vinculo matrimonii, a mensâ et toro, and by the act of the legislature; the two former are obtained in the spiritual courts, the latter by legislative authority. The first is called a declaration of nullity, or that the marriage never existed in fact, and the grounds upon which it proceeds are common to the codes of all countries, and rest upon fraud, force or fear, so as to invalidate the consent of either party to the union, an existing union of either party undissolved by divorce or death, error regarding the individual or sex, insanity, idiotcy, impuberty, and relationship by birth or marriage, which in England cannot be nearer than the fourth degree by the civil law, and of the second by the canon law; the second is the release of the parties from the conjugal duties, or the necessity of living together, but without any severance of the marriage tie; and the third is the complete rupture of that tie, so as to give to each party the right of contracting a second marriage, as if the first had never been solemnized. As in this country we have no ecclesiastical court, it is clear that neither divorce a vinculo, nor a mensâ et toro, can be obtained, although in collateral proceedings, in which the question of the legality of a marriage, which might be dissolved in England by a decree a vinculo in the spiritual courts, might come up, the courts here might perhaps look at the position of the parties, as if no form of contract had ever been entered into between them; as for divorce a mensâ et toro, as that must be obtained in all cases by proceedings before the court, if compulsion be necessary, it certainly cannot be obtained here; and if such a separation is desired, it can only be by the consent of the parties themselves, and must rest entirely upon their own engagements. The forms or ceremonies which accompany marriage, in any particular state, must depend upon the laws of that state, and are of no force or validity beyond its limits, except as far as they are received in all countries in the world, as a test of the due performance of the contract. But the commune jus gentium, has given to those particular forms and ceremonies the same effect universally, which is granted to the essential requisites of marriage. In Scrimshire v. Scrimshire, (2 Hagg. Cons. Rep. 417,) the

court say, "From the infinite mischief that must necessarily arise to the subjects of all nations, with respect to legitimacy, succession and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, it has become jus gentium, that is, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries: that is, the law where the contract is made. By the observance of this law, no inconvenience can arise, but infinite mischief will ensue from its neglect. If countries do not take notice of the laws of each other, with respect to marriages, what would be the consequence, if two *English* persons should marry clandestinely in *England*, and that should not be deemed a marriage in *France?* might not either of them, or both, go into *France* and marry again, because by the *French* law, such a marriage is not good? and what would be the confusion in such a case! Or again: suppose two *French* subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage, undoubtedly the wife, though *French*, would be entitled to all the rights of a wife by our law; but if no faith should be given to that sentence in *France*, and the marriage should be declared null, because the man was not domiciled, he might take a second wife in *France*, and that wife would be entitled to legal rights there: and the children would be bastards in one country, and legitimate in the other." All marriages, therefore, which are contracted in any foreign country, according to the laws of that country, are valid in England, however repugnant to the genius and policy of her institutions; unless, indeed, such marriages in any way violate morality or religion, by sanctioning polygamy or incest. But there are also, in England, many forms and ceremonies connected with the contract of marriage, which are enjoined by acts of parliament, and their non observance may frequently render the marriage null and void; and many of these forms and ceremonies are required in this country. The more the contract of marriage

is guarded by ceremonies, introduced to prevent the unwary of either sex from being made the dupes of profligates and knaves, the greater opportunity it may be said, in another sense, is given to the perpetration of villany and fraud, inasmuch as it is easy to imitate forms, and by ostentatiously putting forth a pretended compliance with them, to accomplish at once the double purpose of putting the innocent off their guard, and of invalidating the rite. But Lord Stowell has observed in Hawke v. Corri, (2 Hagg. Cons. Rep. 289,) speaking of a wedding, at which it was supposed a false license had been used, "It seems to be a generally accredited opinion, that if a marriage is had by the ministration of a person in the church, who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties, who come to be married, are not expected to ask for a sight of a minister's letters of orders; and if they saw them, would not be expected to inquire into their authenticity. The same favourable principle might not unjustly be applied on behalf of an innocent young woman, to this ostensible minister, though officiating in a private house, where the office is authorized, by the special license, to be performed with the same validity as in a church. And even if the license were false, it might perhaps be considered by some as likewise an arguable point, whether the same principle, which in favour of innocent parties, supports the acts of a pretended clergyman, might not be invoked to uphold the authority of a suppositious instrument of license, obtruded upon a party deceived by so cruel a fraud; for it can as little be expected that a young woman should ascertain the authenticity of the instrument under which her marriage is to pass, as the ordination of the minister who is to pass it. Upon such points I give no further opinion, than by saying that the court would listen, without impatience, to any argument (whether successful or not), which had for its object, to protect an innocent young woman from the effects of so detestable a fraud." In England, then, the contract of marriage having been once legally entered into, can only be dissolved in the life-time of the parties, by the act of the legislature, and the legislature never interferes to annul the contract, unless

in cases of adultery. On the presentation of a petition for leave to introduce a bill of divorce, (which usually originates in the House of Lords), an official copy of a separation *a mensâ et toro*, must be delivered at the bar of the house on oath. Upon the second reading of the bill, the petitioner must attend at the house to be examined touching any collusion with the other party. When the bill reaches the Commons, evidence of the petitioner having obtained judgment in an action for damages, must be given in committee, or a sufficient reason shown why such action has never been brought, or has failed. About the year 1810, an order was made in the House of Lords, that a clause should be inserted in all bills of divorce, to prohibit the marriage of the adulterer with the adulteress: which is the rule of the civil law. But the order was only enforced in one instance, where the parties were within the prohibited degrees; a clause is usually inserted in the bill, expressly enabling the petitioner to marry again; but though silence is preserved respecting the other party, this does not preclude the legality of that party's marrying with the associate in guilt, or with any one else. Such are the principles upon which bills of divorce are entertained in the Parliament of the United Kingdom. The Legislature of Canada is empowered by the Imperial Act giving Canada a constitution, to make laws for the peace, welfare, and good government of the province, not repugnant to the provisions of that act, or of any act of the Imperial Parliament, by express reference or necessary intendment applicable to the province. There is nothing, therefore, in the Constitutional Act, to prevent the legislature of this province, from entertaining bills for divorce for adultery, and acting upon the same principles in passing laws for the dissolution of the marriage contract, that would be acted upon in England. The legislature of Upper Canada passed a divorce bill, and after being reserved for the royal assent, it ultimately became law, and there are certainly no less powers in the legislature of United Canada, than there were in the legislature of Upper Canada, before the union of the provinces. If the colonial legislature were to assume the power of dissolving the marriage tie for other causes than adultery, there can be little doubt that the law officers of the

crown in England, would advise that the royal assent should be withheld from such bills, for no other reason, than to prevent the conflict that would necessarily arise between the Imperial and Colonial laws, upon a subject, respecting which, both proposed to act upon the same principles. Too many difficulties have arisen out of the difference in the methods of obtaining divorce in England and Scotland, to allow us to desire that divorce should be granted in the colonies for any other cause than adultery. In Scotland the courts have the power of granting an absolute separation of the marriage tie, a power that is exercised in cases of desertion as well as of adultery; and it is no uncommon course for parties to resort to Scotland merely to obtain a divorce with less delay and expense than must necessarily be incurred by their prosecuting their remedy in their own country, or to obtain it for reasons which, in England, would be held insufficient to entitle them to the redress they sought. In Lolly's case, Russ. and Ry. 237, an Englishman by birth and domicile, after procuring a divorce of this kind from the courts of Scotland, married again in England, and was indicted and punished for bigamy. The law of this case is not altogether acquiesced in, but we are not aware that it has ever been overruled, although it has been severely commented on by Lord Brougham, and we see that there is thus a conflict produced between the laws of two neighbouring countries, the evils of which, in their worst and most aggravated form, cannot fail injuriously to affect the people of the whole British Empire; evils, which cannot be made to injure us, so long as the legislature confine the remedy of divorce, to the cases in which it is applied for in consequence of the commission of adultery.

LAW AND FACT.

The well known elementary rule "ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores," very clearly defines the provinces of the court and of the jury. However intimately connected questions of law and fact may be by legal definition or allegation, although the terms of the

issue to be tried involve both, yet upon the trial, the distinction is usually made without confusion or difficulty; the power and duty of the jury being confined and invited wholly to the question of fact, and their decisions being expressed, either simply by means of a special verdict, to which the court afterwards applies the law in giving judgment, or being embodied in a general verdict; in which case, although such verdict comprise matter of law, as well as matter of fact, as where they find a defendant guilty of a conversion, or a criminal guilty of theft, their office is still confined merely to the facts. In delivering a verdict which contains matter of law, they act only according to the direction of the court, that the facts if proved, constitute a conversion in law in the one case, or a larceny in the other. So far, the application of the general rule is plain and clear; nor could it be well otherwise, so long as the functions of a jury are confined to the finding of mere facts, as distinguished from such conclusions as will presently be noticed. Doubts which arise whether a particular question be one of law or fact, as contradistinguished from each other, seem to concern only such general conclusions from facts as are essential to a conclusion in law, but which do not themselves depend upon the application of any rule of law. It will be proper to premise a few remarks upon the origin of such questions. The administration of the law consists in annexing defined legal consequences to defined facts. The facts so defined must be expressed in terms of known popular meaning, or be capable of translation into such terms by virtue of legal interpretation. If technical expressions were not so convertible into ordinary language, they could not be explained to a jury so as to enable them to apply those expressions, and embody them in a general verdict; nor could the court, a special verdict being found by a jury, detailing facts in ordinary popular terms, determine their legal value. But where facts are numerous and complicated, the law cannot be defined by an enumeration of particular and minute facts and circumstances, but yet may be capable of sufficient definition by means of conclusions drawn from facts, however complicated they may be. Thus, the right may be made to depend on the question or conclusion, whether an act has been done in

reasonable time, whether due and reasonable caution has been used, or due and reasonable diligence exerted; for such questions or conclusions, although not the subject of testimony by eye or ear witnesses, are capable of ascertainment, in a popular sense, by the aid of experience and knowledge of ordinary human affairs. One consideration then presents itself, how these questions stand in relation to the general elementary rule concerning questions of law and fact; whether all such conclusions are to be referred either to the judge or the jury: and if not exclusively to either, how the distinction is to be determined. Such questions seem to be properly questions or conclusions in fact: they are conclusions or judgments concerning mere facts, founded by the aid of sound discretion upon experience and knowledge of the ordinary affairs of life, and of what is usual or probable in the course of those affairs. Such conclusions are formed, and the relations which they determine exist, independently and without the aid or application of any rule of law. What is reasonable or unreasonable, usual or unusual, diligent or negligent, probable or improbable, is the same, be the legal consequences annexed what they may: such consequences may be altered at the will of the legislature, while those conclusions and relations remain unchangeable. A conclusion or judgment in law always involves the application of some rule of law, that is, the annexation of some legal artificial consequence to an ascertained state of facts; but those now under consideration, are wholly independent of any legal rule or definition: the very absence of any such rule or definition constitutes the necessity for resorting to them; for when the law defines what is reasonable, diligent or probable, the conclusion by any other rule, or according to any other mode of judging, is immaterial. In the absence of any such rule, the conclusion, so far from being founded on any legal rule or judgment, is one of the foundations on which the legal conclusion is built. When, therefore, conclusions concerning facts, but which are essential to a legal judgment, are expressed in popular terms, the sense of which is not controlled or restricted by any legal rule or authority, they must, it seems, be regarded as conclusions in fact. And where such terms are used, but are to a limited and partial extent restricted

by technical rules, they must of course, to the extent to which they are so limited, be questions of law; but beyond those limits, must still be understood in their natural and ordinary sense as conclusions in fact. And therefore, when a doubt arises in any such case, whether the question or conclusion be one of fact or law, the real question seems to be, whether there exists any rule or principle of law which controls or limits the plain and natural import of the terms, and so converts what is apparently a question of fact for the jury, into a question of law to be governed by the technical rule. It may not perhaps be deemed irrelevant in this place to observe, that the same reason does not exist for abstracting matters of fact from the decision of the judge, which applies to the exclusion of a jury from the decision of matters of law: the latter rule is properly founded on the presumed incapacity of jurors so to decide. Judges, on the contrary, are qualified in an eminent degree, to decide on matters of fact; in consequence of their knowledge and experience in ordinary affairs arising from forensic habits and long practice. At present, however, the question is not whether the general elementary rule be founded in consummate wisdom, but as to the proper application of the rule, consistently with its principle; and however desirable it might possibly be to refer to the judge, and not to the jury, those conclusions which seem to us to be mere conclusions in fact, the advantage cannot be attained without violating the general elementary rule in one branch, when in the other, which confines the decision of matters of law to the judgment of the court, it seems to have been inflexibly applied. The construction of all acts of parliament, of all written instruments which possess any artificial or legal force or authority, and which do not operate simply as mere evidence, tending to the proof of a fact, belongs undoubtedly to the court. The inspection of all records, and of all matters determinable by such inspection, is also a matter peculiar to the decision of the court. It falls also within the province of the court to decide, in all litigated cases, whether the particular facts alleged in order to establish a claim or charge, are sufficient to satisfy the general terms or requisites of the law on which the right or liability depends. So it is for the court in all cases to

decide on questions of variance, and to determine whether the facts which are proved, or which the evidence tends to prove, satisfy the averments on the record, and which are put in issue by the pleadings. So it is a well established rule, that questions occurring collaterally in the course of a trial, are determinable by the court, although they involve questions of fact. For, as has been already intimated, even an encroachment on the elementary rule, in referring matter of fact to the decision of the court, when it is essential to a decision in fact, is not so much open to objection, as an enlargement of the functions of the jury, in referring any question of law to them, would be; the ordinary exclusion of the former being founded principally on considerations of legal economy and convenience, not on incapacity. Thus, all questions as to the competency of witnesses, the reception of secondary evidence of the contents of a written instrument on proof of the loss of the original, of evidence of a declaration made by a party *in extremis*, are to be decided by the court, and not by the jury. The last of these instances involves the consideration of a simple fact, of a nature peculiarly fit for the consideration of a jury—the belief of the declarant that his dissolution was impending. This, however, and such other facts as are usually for the decision of the courts, in order to warrant their interlocutory judgments, are generally so simple as regards proof, and in their own nature so little subject to conflict, that they form no material exceptions to the general rule. The numerous decisions upon the question of reasonable time, accord mainly with the general elementary rule, and with the positions above advanced; in the absence of any special rule applicable to particular cases, the conclusion is one of mere fact, to be made by a jury. The law cannot prescribe in general, what shall be a reasonable time, by any defined combination of facts; so much must the question depend upon the situation of the parties, and the minute circumstances peculiar to individual cases, which from their multitude and variety, are incapable of such a selection as is essential to a precise and particular law. If a man has a right by contract to cut and take crops from the land of another, it is obvious that the law can lay down no rule as to the precise time when they shall be cut

down and removed: all that can be done is, to direct or imply that this is to be done in a reasonable and convenient time; and this must necessarily depend on the state of the weather and other circumstances, which cannot, from their nature and multiplicity, form the basis of any legal rule or definition. The question as to reasonable time was much considered in the case of Eaton v. Southby, Willes, 131. The plaintiff in replevin pleaded to an avowry, justifying the taking of goods as a distress for rent in arrear, that he took the growing crops in execution, and afterwards cut the wheat, and let the same lie on the premises, until the same, in the course of husbandry, was fit to be carried away; and that the defendant distrained the same before it was fit to be carried away. It was objected by the defendant on demurrer to this plea, that the plaintiff ought to have set forth how long the corn lay on the land after it was cut, that the court might see whether it was a reasonable time or not. But the court decided that the objection was untenable: for though in Co. Lit. 56, b., it is said that in some cases the court must judge whether a thing be reasonable or not, as in case of a reasonable fine, a reasonable notice or the like, it would be absurd to say that the court must so judge in a case like the present; for if so, it ought to have been stated in the plea, not only how long the corn lay on the ground, but what weather it was during that time, and many other incidents which it would be ridiculous to insert in a plea. And the court was of opinion that the matter was sufficiently averred, and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been proper judges of it. In Bell v. Wardell, Willes, 202, the defendant pleaded in justification to a declaration in trespass, a custom for the inhabitants of a town to walk and ride over a close of arable land at all *seasonable* times; the plaintiff replied *de injuriâ*, and the defendant demurred. The court held that seasonable time was partly a question of fact, and partly a question of law; and that as the custom was laid, if it were not a seasonable time, the justification was not within the custom; and that though the court may be the proper judges of this, yet, in many cases, it

may be proper to join issue upon it, that is, in such cases where it does not sufficiently appear on the pleadings whether it were a seasonable time or not. Before a precise and definite rule had been established on the subject, it was held that the question as to reasonable notice of the dishonour of a bill of exchange, was one of fact for the consideration of a jury. And in Fry v. Hill, 7 Taunt. 397, it was held, that where no established rule of law prevails, the question whether a party has been guilty of laches in not presenting a bill payable at sight, or a certain time after, was a question for the jury. So likewise, whether tithes have been removed within a reasonable time.—Facey v. Hurdom, 3 B. & C. 213. And the same point in the removal of a distress.—Pitt v. Shew, 4 B. & A. 206. And although the question whether a particular covenant was an usual covenant in a lease, might at first view seem to be of a legal character, yet it has been held to be one proper for determination by a jury.—Doe v. Sandham, 1 T. R. 705. Upon inquiries concerning homicide, where the question arises whether the party charged used due and reasonable care to prevent mischief, it is ordinarily one for the decision of the jury.—Fost. 264, 265. There are numerous decisions and dicta to the effect that reasonable time *may be* a question of law, and that it *is* a question of law in all cases where any such rule has been laid down, and perhaps also in all cases where a rule warranted in legal principle *can* be laid down. The former general position is so notorious, that the instances require no particular attention; it being clear in principle, as has been already observed, that expressions of known popular meaning used in the definition of a right or liability, must *primâ facie* be understood in that sense; and that whenever that meaning is controlled by a legal rule, which either alters or limits the sense, or renders the case an absolute and peremptory exemption to the general elementary rule, defining the provinces of the court and jury, the technical rule must prevail. Questions as to reasonable fines, customs and services, have frequently been held to be for the decision of the court. "Quam longum (tempus) esse debet non definitur in jure, sed pendet ex discretione justiciariorum:" and this being said of time, the like, says Lord Coke, may be

said of things uncertain, which ought to be reasonable; for nothing that is contrary to reason is consonant to law.—Co. Lit. 56, b. A reasonable time for countermanding a writ was held to be a question of law.—1 B. & P. 388. In many instances, where no doubt could exist upon the question of reasonable time, whether it were to be referred to one tribunal or another, the courts have, of their own authority, decided the question; there being in truth no such doubt as to justify the trouble and expense of a trial by the country, and the merits being so clearly in favour of the determination one way, that a finding by a jury on the other, would have seemed to be extravagant. Power having been given to the lessor's son, to take a house to himself on coming of age, it was held that he was bound to make his election within a reasonable time; that a week or a fortnight was reasonable; a year, unreasonable.—Doe v. Smith, 2 T. R. 436. The court held on demurrer to a plea justifying an imprisonment on suspicion of felony, that the detention of the prisoner for three days, to give the prosecutor an opportunity for collecting witnesses, was an unreasonable time.—Wright v. Court, 4 B. & C. 596. In Stodden v. Harvey, Cro. Jac. 204, six days were held to be a reasonable time for removing the goods of a lessor by his executors after his death. In Hunt v. Royal Exchange Assurance Company, 5 M. & S. 47, five days were held to be too long after intelligence of the loss, before notice of abandonment was given. The terms negligence and gross negligence, are terms of popular import, and involve conclusions drawn from conduct and circumstances which ordinarily are mere conclusions in fact, being independent of the application of any rule of law. The question of negligence is therefore one which is usually left to the jury; but the question may be one of law, and is so where the case falls within any settled rule or principle of law; and where no such rule or principle is applicable, the conclusion seems to be one of mere fact. A medical practitioner is bound to exercise a reasonable and competent degree of art and skill; and in an action against such a person by a patient, for damages arising from improper treatment, it is for the jury to decide whether the injury is attributable to the want of that degree of skill.—

Lanphier v. Phipos, 8 C. & P. 475. In an action against an attorney, for negligence in the conduct of a cause, it is a question for the jury, whether the defendant has used reasonable care; and it was so left to them by Abbott, C. J., in Reece v. Rigby, 4 B. & A. 202. This, it is observable, is a strong instance of the extent to which such questions are to be regarded as questions of fact. A question as to the conduct of a cause by a legal practitioner, might at first sight appear to be rather a matter for legal consideration than a question for "lay gens." Where the master of a vessel filled the boiler of a steam-engine with water, at night, in winter, and a frost ensuing, the water was frozen, and a pipe burst, and the water, in consequence, escaped and did damage; it was held, that the jury were warranted in finding that the loss was occasioned by the negligence of the master, and not by the act of God.—Siordet v. Hall. 4 Bing. 607. In an action by a merchant, against his agent, for negligence in not insuring goods, Lord Mansfield directed the jury generally, that if they thought there was gross negligence, or that the defendant had acted *malâ fide*, they should find for the plaintiff; otherwise, for the defendant.—Moore v. Mourgue, Cowp. 479. But conclusions of this description, like all other general conclusions, may be governed by rules and principles so far as they extend. If mice eat the cargo, and thereby occasion no small damage to the merchant, the master must make good the loss, because he is guilty of a fault; yet if he had cats on board, he shall be excused.—Abbott on Shipping, 241. Wherever any promise, duty or course of conduct, whether express or implied, is prescribed by law, the mere omission to perform it, must in point of law, amount to negligence, without any conclusion of negligence in fact. Whether particular acts or conduct occasion nuisance or hurt to another, is also an ordinary conclusion of fact, independently of any law which gives a remedy for, or punishes the author of, such nuisance or hurt. And in this popular sense these terms are usually to be understood, where essential, by definition or otherwise, to a legal claim or liability without any legal restraint or limitation. But if a new market be erected near to, that is, within twenty miles of, a pre-existing legal market,

and be held on the same day, the conclusion that the former is to the nuisance of the latter, has been deemed to be a mere conclusion or inference of law. But it may be within that limit, and yet not necessarily be a nuisance; "et poterit esse vicinum et infra predictos terminos et non injuriosum."—Com. Dig. Market, c. 3. It is, in such a case, a question for the jury, whether the new market be to the nuisance or detriment of the owner of the pre-existing market or not. But if the new market were erected beyond the limit of twenty miles, the law would not infer that it was a nuisance, though held on the same day. We shall hereafter examine the general rule as applicable to questions of malice and probable cause.

THE TESTATUM WRIT ACT.

This act is considered, by most of the profession residing in the country, to have made an exceedingly beneficial alteration in the law; as they will be enabled, by its provisions, to retain in their own pockets, a large portion of the fees which they have been yearly paying to their agents in Toronto; and may hope to have their proceedings very much facilitated by its provisions. There can be no doubt, that the mere filing the præcipe for the testatum writ, and issuing the writ thereon, can just as well be performed by the attorney in the country, as by his agent in town, and therefore we can see no objection to the first clause of the act; but we think that it would have been much better, and more convenient for the profession, as well as much more advantageous for the public, to have carried on all the subsequent proceedings at Toronto, as heretofore. The first and second clauses of the act provide:

1. That it shall and may be lawful for the clerk of the crown, from time to time, and he is hereby required, to supply his deputies in each and every district of Upper Canada, with the original and *testatum* writs of *mesne* and final process, excepting writs against lands and tenements, and that the same shall and may be issued by such deputies in any district, in the same manner as may be done in the principal office at Toronto.

2. That the notice on the copy of *mesne* process to be served on a defendant or defendants, shall be in the form already by law provided; and that all proceedings upon any suit so instituted in any district, shall be continued and carried

on in such district, to final judgment: Provided always, that the service of papers shall be made upon the defendant or defendants, or, if he or they appear by attorney, then upon such attorney, *at his office*, in the usual mode, or upon his agent at Toronto, according to the existing practice of the Court of Queen's Bench: Provided always, that the Court of Queen's Bench, or any judge thereof, in chambers, on making an order to change the *venue* in any suit, may order the papers in such suit to be transmitted to and filed in the office of the clerk of the crown, at Toronto.

It will be observed, that the second clause is not confined to suits commenced in an outer district, by testatum writ, but applies to *all* suits; and will have the effect of entirely doing away with the rule of court, Mich. Term, 4 Geo. IV.: "Where the attorney, in any cause depending in this court, resides without the district where the action is brought, all notices and demands, and other papers or pleadings, to be served on such attorney, shall be deemed regular by being put up in the crown office in the district wherein such action is brought, unless such attorney have a known agent in the same district; in which case, service on the agent shall be required." By the operation of this clause, where the defendant resides in the district where the action is commenced, and appears by an attorney in another district, all proceedings in the suit must be served either upon that attorney *at his office*, or upon his agent in Toronto; but cannot be served by affixing in the crown office in the outer district, as they might have been under the rule of court. In nine cases out of ten, where the defendant appears to a testatum writ by an attorney of another district, the papers in the cause will be served upon the town agent, and if he wishes to be satisfied of the regularity of the proceedings, he must send to the office in the outer district, and experience great delay and trouble in procuring the necessary information. The object principally desired by the country practitioner would have been gained, if the deputy clerks of the crown had been empowered to issue testatum writs, the appearance of the defendant, and all the subsequent proceedings in the cause, being filed in the principal office; and no confusion would then have taken place, nor would the difference in outlay to agents, which would hardly ever have exceeded five shillings in an ordinary suit, be considered of

any importance, in comparison with the delays and difficulties which it will soon be found will be attendant upon the new form of proceeding.

3. It shall and may be lawful, for such deputy clerk of the crown in each district, to tax the costs, and enter final judgment in all suits commenced within such district where a *cognovit* shall have been executed, and also in cases of *non. pros.*, and where judgment shall be final in the first instance; and to issue an original or *testatum* writ of *fieri facias*, or *capias ad satisfaciendum*, according to the practice of the Court of Queen's Bench: Provided always, that it shall be lawful for either party, in any suit, to sue out a rule from the principal office at Toronto, for the taxation of costs in such said suits by the master.

The first difficulty that appears in this clause, seems to arise from the words "within such district, *where* a cognovit shall have been executed;" and must turn upon the construction put upon the word "where," whether it shall apply to place, or be read "in case." If it should be held to apply to place, then both the commencing the suit, and the giving the cognovit, must happen in the same district; and the defendant, who desires to save costs, be driven to make a journey, perhaps from one end of the province to the other, to effect that object, instead of being allowed to confess the action, as formerly, in the district where he resided, and have his confession transmitted to the plaintiff's attorney. He must now, too, be put to the additional expense of a suit, as a confession cannot be taken, and judgment entered upon it, in an outer district, until after "suit commenced;" whereas, as the law stood before, no suit was necessary. But the greatest difficulty springs from the proviso: it shall be lawful for either party "to sue out a rule from the principal office at Toronto, for the taxation of costs in such said suits by the master." But who ever heard of such a rule? How is it to be obtained, and what is to be its effect? The master can grant a rule to be present at taxation, but this is to be a rule of a different nature; but whether side bar, or without counsel's signature, or only by judge's order, is left entirely to conjecture. But if it be issued, is the service of a copy to stay the entry of judgment, until the costs are taxed, or cause the transmission of all the papers to Toronto for the entry of judgment there, or may

the plaintiff enter his judgment in the outer office, if he chooses to forego his costs? All these are nice questions, and may require another statute to be passed, to settle them satisfactorily.

4. The deputy clerk of the crown, in each district, shall transmit to the office of the clerk of the crown, at Toronto, all judgments by him entered, and the papers thereto belonging, immediately after entering the same; and upon receipt thereof, such judgments shall be entered of record, and docquetted in the principal office.

5. It shall and may be lawful for the clerk of the crown at Toronto, in all cases pending in the said court, where papers are transmitted to him without any charge thereon, to receive and file all such papers in the same manner as if the same had been taken to the said office by the attorney or agent of the attorney requiring the same to be filed.

6. All alias and subsequent writs of final process, and all writs against lands, shall be sued out in the office of the clerk of the crown at Toronto.

7. The office of such deputy clerk of the crown in each district, shall be held in the court-house of each district, if room shall be provided for the same therein; and such deputy shall not be a practising attorney, or an articled clerk to any practising attorney.

8. In all cases where a writ shall have been sued out of the office of any deputy clerk of the crown, for any district east of the Home District, into any district westward thereof, or from such deputy in any district west of the Home District into a district eastward thereof, the time for filing an appearance, and for pleading, replying and rejoining therein, shall be extended to twelve days, any existing provision to the contrary notwithstanding.

The second clause of the act gives the form of notice to appear under the King's Bench Act, which is within *eight* days after the return of the process; this clause, we suppose, is intended to extend the time to twelve days after the return day; but as the act is silent as to the time from which the twelve days are to commence, we are left to conjecture this, in the same manner as we are to conjecture that the extended time allowed for pleading, replying and rejoining, means after demand made, in the several instances.

9. It shall and may be lawful, for each and every such deputy clerk of the crown, to issue rules upon the sheriff,

coroners, or elisors of his district, for the return of any mesne or final process.

This clause gives power to the deputy clerk of the crown, to issue the rule, but does not authorize the sheriff, &c. to return the writ to his office; the return must be made to the crown office, at Toronto, as formerly.

CASES IN THE ENGLISH COURTS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(Present, Lord BROUGHAM, Lord LANGDALE, the MASTER of the ROLLS, Vice-Chancellor Sir JAS. KNIGHT BRUCE, the Right Hon. Dr. LUSHINGTON, and the Right Hon. Mr. PEMBERTON LEIGH.)

JOHN COUNTER, Appellant, *v.* JOHN MCPHERSON, SAMUEL CRANE, and ALEXANDER FERGUSON, Respondents.

Where appellant had entered into a contract to demise certain premises for a term to the respondents, and previously to the commencement of the term to repair the old premises and build a new warehouse; and the respondents entered accordingly at the day agreed upon, but before the appellant had completed the building and repairs, and before the lease was executed, and a fire soon after destroyed the premises: Held, that the respondents were not bound to execute a lease and rebuild the destroyed premises, the appellant not having completed his contract, and that till such completion the premises were at his risk. (*a*)

This was an appeal from a decree of the Executive Council of the province of Canada, bearing date the 20th day of February, 1843, whereby the decree of the Court of Chancery for the province of Upper Canada, pronounced by the Vice-Chancellor, and bearing date the 9th day of December, 1841, was reversed, and the bill of complaint of the present appellant was dismissed with costs. The object of the suit, which was instituted by the present appellant on the 27th day of July, 1840, was the specific performance of an alleged agreement entered into between him and the present respondents for a lease, to be granted by him to the respondents for five years, from the

(*a*) As to the decisions at law on this subject, see the case of Walton v. Waterhouse (2 Wms. Saund. 421, and the notes).

1st of April, 1840, of a wharf and warehouses in the town of Kingston, which after the 1st of April, 1840, but before the appellant had duly performed the agreement on his part, were destroyed by accidental fire. By the agreement, which appears to have been only partially reduced into writing, the appellant was under an obligation to erect, according to a plan agreed upon, a new warehouse upon part of the ground to be demised, and to put the old stores or warehouses into repair; and the amount of the rent was to be determined with reference to the amount of the appellant's expenditure in erecting the new warehouse. One of the principal grounds of the resistance, on the part of the respondents, to a specific performance of the agreement insisted on by the appellant was, that at the time of the fire the appellant had not completed the building and repairs, which, according to the alleged agreement, he had agreed to execute; and was not therefore in a condition to call upon the respondents to accept a lease, or to execute a counterpart, containing the usual covenants to repair, and for payment of rent. The agreement was contained in a series of letters between the appellant and respondents. The counsel for the appellant were, *Bethel* and *Shabeen;* for the respondents, *Kindersley, G. Turner* and *E. J. Lloyd.* The case was some time ago argued at great length on both sides; and the judgment of the Lords of the Privy Council was delivered on Monday last, by Mr. PEMBERTON LEIGH. As the judgment, which is of great length, contains a review and history of the whole case, and of the arguments on each side, the judgment only is reported.

JUDGMENT.

In this case a bill was filed by the appellant in the Court of Chancery in Canada, seeking the specific performance of an agreement entered into by the respondents. The Vice-Chancellor made a decree in favour of the plaintiff. From this decision the respondents appealed to the Governor-General in Council, who reversed the decision of the Vice-Chancellor, and dismissed the plaintiff's bill, with costs. From this order the present appeal is brought. The terms of the agreement between the parties are to be collected from a correspondence which began in the month of August, 1839,

and terminated on the 3rd of January, 1840. That these letters constitute a valid agreement is not disputed by the respondents, although it has been contended on their behalf at the bar that the contract is one with respect to which a court of equity ought not to interfere, and that the parties should be left to their legal rights and remedies. The case appears to be this:—The appellant was the owner of a wharf and three stores at Kingston, in Upper Canada. Upon part of the property the appellant carried on what is called a "forwarding business." One of the stores was in the occupation of a Mr. Jackson, and another in the possession of the respondents, under a sub-contract with a public company, who had taken a lease from the appellant, and whose interest would expire on the 1st of April, 1840. In this state of circumstances, the respondents entered into a negotiation for a lease of the whole of the premises for a term of five years from the 1st of April, 1840. After much discussion, it was finally agreed between the appellant and respondents, that the appellant should put in order the existing stores, and should build a new store, or warehouse, according to a plan referred to in the correspondence, but not proved in the cause; that these works should be completed by the 1st of April, 1840, and that the respondents should then take a lease for the term of five years from that day, at a rent of 250*l.* per annum, if the sum expended by the appellant in the erection of the new buildings should not exceed 600*l.*; and if the sum so expended should exceed 600*l.*, then at an additional rent, calculated at the rate of 12 per cent. upon the excess. Possession of the whole of the property was to be delivered to the respondents on the 1st of April, 1840, and they were to engage to restore the premises at the end of the term in as good a condition as that in which they were when possession was taken. It appears, also, that the appellant was to relinquish his "forwarding business" in favour of the respondents. In pursuance of this arrangement, the building of the new warehouse was commenced, but when the 1st of April arrived, it is admitted on all hands, that the warehouse was far from being completed, and the evidence shews, in our opinion, that the necessary repairs to the old buildings had not been done; and as to

part of these buildings had not been commenced. No complaint, however, or at all events no objection to the completion of the contract, was made on that ground by the respondents, and if time was of the essence of the contract, we have no doubt that all right of objection on that score was waived by them. They continued in possession of that part of the premises which they previously held, which, but for the contract, they should have given up on the 1st of April, and the works in progress were continued with their approbation. In this state of things, on the 1st of April, 1840, the rights of the parties stood thus. The appellant was bound by his contract to perform his agreement by putting the old stores in order, and completing the new building in reasonable time; and upon this being done, the respondents were bound to accept a lease according to their agreement. But they could not be required to accept a lease until the works were done, nor could the rent, until that time, be ascertained. If the appellant refused to perform the works, or neglected to do so within a reasonable time after notice, the respondents would be at liberty to put an end to the agreement. The obligation on the defendants to accept the lease was conditional on the appellant's putting the premises into the state in which he had contracted to demise them to the respondents. The waiver of the respondents extended not to the works being done, but only to the time within which they were to be completed. After the 1st of April the appellant accordingly continued the works which had been begun, and commenced repairs upon the old buildings; but while the works were in progress an accident occurred which has given rise to the present litigation. On the 18th of April, 1840, a fire broke out upon the premises, which destroyed or materially injured all the stores. The appellant insisted that the respondents, at their own expense, should rebuild and restore what had been destroyed or injured, and accept a lease on the terms of their agreement. This the respondents refused to do, and on the 27th of July, 1840, the present bill was filed. It is material to attend to the allegations of the bill, and the relief sought by it, in order to understand the real nature of the question, and of the only question which it raised. After stating the correspondence

and some other matters with respect to which there is no dispute between the parties, it alleged that "the respondents, in the month of April, 1840, entered into possession of the premises, and continued in possession up to the time of filing the bill." It stated that, "in the same month of April, part of the premises were destroyed by fire, and other parts materially injured thereby, and that the appellant had applied to the respondents specifically to perform their agreement, and to accept a lease upon the terms of such agreement, and to rebuild and repair the said premises accordingly," which they refused. After some charges, not material to the present purpose, the bill charged, "that the said warehouse was erected and fit for occupation, on the 1st day of April, or within a few days thereafter, and that the respondents had actually taken possession of the said warehouse for many days before the same was burnt down and destroyed, and had actually caused the inside thereof to be boarded up or lined for the reception of wheat in bulk, and had erected, or were erecting, machinery to convey wheat in bulk to the upper stories, whereby the appellant was prevented from completing the said warehouse. And the bill charged that the respondents received goods as custom-house warehousemen after the 1st of April, 1840, and deposited the same in the said warehouse, and also deposited therein a considerable quantity of flour, and not less than 4,000, 3,000, or 2,000 barrels, and accepted, took and retained the possession of the key of the said warehouse." These allegations, though not perhaps in all respects quite consistent with each other, appear to amount to this, that previously to the fire, the appellant had substantially performed his agreement, by erecting and making fit for occupation the new warehouse; and the bill accordingly contained no suggestion of anything remaining to be done in that respect by him. The prayer of the bill was, that the said agreement might be specifically performed and carried into execution, and that the said respondents might be decreed to accept a lease of the said premises from the said appellant, and to execute to the said appellant a counterpart thereof upon the terms of the aforesaid agreement, the said appellant being ready and willing and thereby offer-

ing to execute such lease, and in all other respects to perform his part of the said agreement; and that an account might be taken, by and under the direction and decree of the court, of all sum and sums of money paid, laid out, and expended for or on account of the said improvements, and that in the said lease the rent of the said premises might be fixed and determined at the said sum of 250*l.*, and together with an addition thereto, at the rate of 12 per cent. per annum, upon such sum of money as should appear to have been expended upon the said improvements over and above the said sum of 600*l.*; and that the said respondents might be decreed to repair and rebuild the said premises, and to enter into all the usual and necessary covenants, and to keep and leave the same in good and sufficient repair, and for general relief. The respondents denied that they had ever taken possession of any part of the property under the agreement, and they insisted that they were not bound under the circumstances either to rebuild the stores or warehouse, or to accept any lease with that obligation. Upon a record so framed, the substantive question between the parties was this—which of them was to suffer by the fire which had taken place; and unless the appellant was justified in requiring the restoration of the property by the respondents at their own expense, he was not entitled to any relief upon his bill. With respect to the only questions of fact in dispute, namely, the condition of the buildings when the fire took place, and the acceptance of possession by the respondents, the parties went into evidence the result of which appears to us to be as follows:—We think that, after the 1st of April, the possession remained very much as it had done before; the respondents continued in the occupation of that portion of which they were previously in possession, although their old title to such possession had ceased. The appellant remained in possession of that part which he held, and a part seems to have been unoccupied. The old buildings had not been repaired, and the new warehouse was so far from being completed and fit for occupation, that at the time of the fire it had neither doors nor windows, the floor of the second story was not laid, and that of the first was not complete. On the other hand, it appears that the delay had arisen in part from

some alterations in the plan which had been suggested by the respondents, to which the appellant had assented, provided they were done at the expense of the respondents. Of the unfinished building (as far as any possession could be had of it), both the appellant and the respondents seem to have had the use, by placing under the shelter of the roof such goods as they found it convenient to deposit there. Upon this state of the record and of the evidence, the Vice-Chancellor pronounced the following decree:—That the agreement contained in the letters set forth in the bill, and bearing date the 19th day of August, 1839, the 29th day of August, 1839, the 20th day of August, 1839, the 1st day of January, 1840, the 2nd day of January, 1840, the 3rd day of January, 1840, and the 3rd day of January, 1840, ought to be carried into execution, save and except the putting in order of the stores therein mentioned before the commencement of the lease thereby agreed to be executed, which was waived by the defendants, and did decree the same accordingly: and it was ordered that it be referred to the Master of the said court to inquire and state to the said court what amount was expended by the plaintiff on the new buildings in the pleadings mentioned, beyond the sum of 600*l.*; and it was further ordered, that a lease should be executed by the appellant to the respondents, of the premises in question in the said cause, for the term of five years from the 1st day of April, 1840, at the yearly rent of 250*l.* and 12 per cent. per annum on such sum as the said Master should find to be expended by the plaintiff on such new building as aforesaid beyond the sum of 600*l.*; such lease to contain a covenant on the part of the defendants for the payment of the said rent during the said term, and to restore the said premises at the expiration thereof in the same plight and condition as the same were at the commencement of the lease, and such other provisions as should be conformable to the said agreement, save as aforesaid; and the said respondents were to execute a counterpart of the said lease, and they were thereby enjoined from shewing in any action at law that such lease was not delivered on the day of the date thereof. And it was further ordered, that the said lease should be settled by the Master in case the parties should differ about the same,

and that the respondents should pay unto the appellant, or his solicitor, the costs of the said suit, to be taxed by the said Master. An appeal was brought by the present respondents against this decision, to the Governor-General in Council, who, on the 20th of February, 1843, reversed the decree, and dismissed the bill, with costs. The propriety of this last order we have now to consider. The case was argued on both sides before us with great ingenuity and ability. On the part of the appellant it was contended, that he was entitled to have the buildings restored by the respondents to the condition in which they were when the fire broke out; but as upon the evidence it was impossible to argue that the appellant had completed the works which he had contracted to perform, it was admitted, that after the respondents had restored the buildings to their imperfect state, the obligation of completing them would rest with the appellant. The appellant's claim was rested on the principle, that a party who has entered into a binding contract for the purchase of an estate, becomes in equity the owner of it, and is entitled to any profit, and subject to any loss which may afterwards occur to it; and it was said that in this case, although the period at which the works were to be done had passed before they were completed, yet, that the respondents having waived any objection on that score, the contraet was still subsisting, and the principle was to be applied. The case of Pain v. Miller, (6 Ves.), was particularly relied on. In that case the defendant had contracted for the purchase of a house; the house was destroyed by fire after the period had passed within which the title was to be made out and the contract completed; but further time to make out the title had been allowed by the purchaser, who had accepted it before the fire took place, and, under these circumstances, the purchaser was held bound to pay his purchase-money. The more familiar cases of the purchase of a life annuity, and the annuity dropping before the assignment, and the purchase of estates held upon a life, and the life dropping, were also referred to. (Mortimer v. Capper, 1 Bro. 156; and Kenny v. Wixham, 6 Mad. 355.) We have carefully examined these cases and several subsequent authorities on the same subject, the last of which is Vesey v. Ellgood (3 Drury & Warren, 76).

Of the general doctrine so stated we apprehend that there is no doubt; but the question is, whether that principle, or any doctrine to be found in any of the authorities, maintains the appellant's claim in this case. In ordinary cases of absolute and unconditional contracts, the risk is the risk of the purchaser, because that which is the subject of the risk is in equity considered to be the property of the purchaser. But treating the contract to take a lease as a contract to purchase, the warehouse was never in that sense purchased by the lessees until it was completed by the lessor; and until that had been done, therefore, it was not the property of the lessees. They had never contracted to take an unfinished warehouse; they had never engaged to do any repairs, or to accept or restore any unfinished or dilapidated buildings; and although after the 1st of April, 1840, the contract was still binding in equity, provided the appellant performed it on his part, yet until he had so performed, no obligation attached on the lessees. They could not object that the lessor had not performed his engagement within the time limited, but they had a right to require that he should perform it before they were called on to accept a lease. They were to receive a complete building at the commencement of the term, and to restore a complete building at the end of it, and to pay a rent calculated upon the amount of the expenditure. The accident of the fire interrupted and delayed the completion of the work, but it could not relieve the appellant from his obligation to complete it. It was said that this case was decided by the judges of appeal upon some rules acted upon by courts of common law, but inconsistent with the principles of courts of equity. We are not aware that upon the main question in this case there could be any difference between the decision of a court of law and a court of equity. The question is, was it or not incumbent on the appellant to repair the old buildings and complete the new before he could require the respondents to accept a lease according to their agreement? If he was so bound, there is, in our opinion, nothing in the circumstances of this case which could relieve him from that obligation. The fire could have no such effect, nor would the circumstance that the delay in the completion of the building was in part

attributable to the appellant's compliance with the suggestions of the respondents. The contract, in equity, was subsisting, although by the omission of the appellant to complete his part of it by the time stipulated, it might have become void at law; and if the appellant had been willing to restore the buildings, the obligation of the respondents to accept a lease might have been differently determined in law and in equity. But the construction of the contract, or the liability of the appellant within *some* time to perform what he had engaged to do before he called upon the respondents to accept a lease, was not at all altered. Had our opinion upon the main question been different from that which we have found, it would have been necessary to consider several points of great importance which have been discussed at the bar, and in particular, as has been contended on the one hand, that the court ought so to modify the relief prayed by the bill, or could so modify it, as to do substantial justice between the parties; or whether, as has been insisted on the other hand, having regard to some of the terms of this contract, the alleged want of mutuality of remedy, and the difficulty (or as it has been called, impossibility) of placing the parties by any decree in the situation in which they ought by the contract to stand, the appellant should have been left to any legal remedy which he might have. The view which we take of the rights of the parties makes it unnecessary for us to enter into any discussion of these questions, further than as an examination of the relief which it has been proposed to ask appears to us to elucidate the principle upon which our decision is founded. It was said that there were two modes in which substantial justice might be done; one was by decreeing a lease to be executed, dated on the 1st of April, 1840, containing covenants by the appellant to repair and complete the buildings, and by the respondents to keep in repair and restore them at the end of the term, and it was said that there would then be a subsisting lease, and an action against the appellant for the non-performance of his engagement to build and repair. But, in the first place, the respondents never entered into any such engagement, they never agreed to accept the appellant's covenant to do the work after the commencement of the term;

and if they had, the obligation on the appellant to complete the building, notwithstanding the fire, would have remained precisely the same. Another mode suggested was this; that the lease should be dated as on the day of the fire, and that the respondents should be considered as taking the premises as they stood before the accident on that day, and should undertake, by some covenant, an obligation to restore them to that condition; and that the appellants, on the other hand, should covenant to complete them when restored. Now, it is obvious, that this is to impose upon the parties a contract which they never entered into, either by expression or implication; and although where a binding contract is subsisting, the completion of which, in its exact terms, becomes impossible through accident, without any default of the party seeking relief, a court of equity will struggle with points of form, it cannot, for that purpose, alter the substance of the agreement, or impose upon either party obligations totally different from those which by the agreement, he had contracted to perform. In this case there is no reason why the court, upon any principle of moral justice, should at all desire to interfere. Both parties are equally innocent; and the only question is, upon which of them the loss arising from an inevitable accident is to fall. The claim to relief has accordingly been very fairly rested in argument by the appellant, upon the general principle that the buildings, when the fire took place, were, in equity, the property, and therefore standing at the risk of the respondents. For the reasons assigned, we are of opinion that this principle is not applicable to the case, and that the decision appealed from is right, and must be affirmed. With respect to the costs, as there have been conflicting decisions below, the case was very naturally brought here by appeal; but we think that, upon the main question, the respondents have, from the beginning, been right; and that some material allegations of the bill, which must have been within the knowledge of the appellant, are directly contradicted by the evidence; we do not think, therefore, that there is any reason for excepting this case from the ordinary rule, and we think that the appeal must be dismissed with costs.

THE

UPPER CANADA JURIST.

THE INSOLVENT LAW.

In the first number of THE UPPER CANADA JURIST, we published an article on the subject of Imprisonment for Debt, and we then called attention to a law that had been recently placed on the statute book, abolishing arrest in execution, and making various other changes in the mode of pursuing remedies between creditor and debtor; a law that we prophesied it would soon be found necessary to repeal, or very materially modify, as many of its provisions would be discovered to be almost impracticable. Its repeal has now taken place, and no part of it is embraced in the new law, except the form of affidavit to arrest on original process, and that is so modified, that the creditor is obliged to swear only to his debtor's intention to leave Upper Canada, instead of swearing to his belief of his intended departure from Canada, which deprived the creditor of the power of arrest, even though he might be well aware that it was his debtor's design to leave the Upper part of the province to reside in the Lower, with the very determination of defrauding him of his debt if possible. The obnoxious act has been superseded by the Insolvent Debtor's Law, which has introduced a new system into the province, which we have every reason to believe will be found on the whole highly beneficial in its operation; though we think that in many matters of detail advantageous alterations might be made. In all right and rational legislation upon the duties and liabilities of parties, arising out of failure to perform their contracts and engagements, the first and most important object will always be, to diminish the loss and inconvenience which the creditor is made to suffer through the insolvency of the debtor, and to place him as nearly in the position, in which by his engage-

ments with his debtor he ought to stand, as the altered circumstances of the debtor will permit; and this being effected, care must then be taken that no greater amount of suffering shall be allowed to fall upon the debtor, than may be necessary to give the creditor satisfaction, in such degree as it may be obtained from the debtor's property, and may prevent the encouragement of imprudence, fraud or dishonesty in others in the contraction of debts. In Upper Canada, as in England, the measures that have been introduced at various times into the legislature on the subject of debtor and creditor, have not been framed in accordance with this principle; and indeed there has been no attempt at systematic legislation, for at one time we see a bill becoming a law, which has no object in view but providing a more stringent remedy for the creditor than he had before; and at another, as a kind of balance of power, an act receiving the sanction of parliament, with ample provisions for relieving the sufferings of the debtor, but with little or no consideration for the safety of the creditor. It was for the want of attention to this principle, that we were so strenuous in our objections to the now-repealed act for abolishing imprisonment in execution for debt, and our first objection to the law by which it has been repealed is, that it has not repealed *all* the existing laws relating to insolvency, and reduced the hitherto conflicting legislation to one graduated system. There are several statutes in force in Upper Canada, by which insolvent debtors in custody, both on original and final process, are enabled to obtain relief by a weekly money payment from their creditors, unless it is made to appear to the court that they are withholding their property, or have so disposed of it for some fraudulent purpose, that the creditors cannot make it available as a means of payment. These statutes should have been repealed by the new law, and the whole subject of insolvency placed within the same jurisdiction; while at the same time the extended remedies given against property in England by the act of 1 & 2 Vic., c. 110, might have well been made a part of our law. Arrest on execution has been restored, and may now be made in the same manner as under the old King's Bench Act, with the exception of the form of the affidavit of debt, where the arrest

is founded on the presumed intention of the debtor to evade payment of his debt by leaving Upper Canada, and we think that it is better that the law should be placed on this footing. The common law commissioners in England recommended the abolition of arrest, both on mesne and final process, but their recommendation was not adopted as to the latter, because it was probably considered that no writ of fieri facias or other process could be effectually brought to bear upon property which the debtor had invested in the names of others, or which though standing in his own name, was placed in foreign funds and securities, wholly without the reach of process from the courts, and that therefore the fear of the suffering and disgrace of imprisonment must still be left as a means of enforcing that payment from debtors which might be sought for in vain from their sense of justice. We do not pretend to deny that great evils would not arise from an unrestrained power given to the creditor over the debtor's person, but the former insolvent acts prevented any great abuse of the power, and the new law gives a most summary and effectual remedy against it, by the proceedings that may be taken before the judge or commissioner. By the act, which is 8 Victoria, ch. 9, four classes of persons are entitled to be relieved from actual, and protected against impending imprisonment. The description applied to the first class of persons relieved and protected from imprisonment is, "any person not being a trader within the meaning of the statute now in force relating to bankrupts." The description of the second class is "any person not having been such trader before the passing of the said act." The description of the third class is, "any person having been a trader before the passing of the said [bankrupt] act, but excluded from the operation thereof." And the description of the fourth class is, "any person, being such trader, but owing debts amounting in the whole to less than 100*l.*" The first and fourth classes of persons are of the same descriptions, except in the fourth class that the sum of 100*l.* is substituted for 300*l.*, as those brought within the operation of the insolvent acts in England, 5 & 6 Vic. ch. 116, and 7 & 8 Vic. ch 96, and the second and third classes are introduced in consequence of the

Bankrupt Act having no retrospective force, and its provisions not extending to cases of bankruptcy or insolvency before it was passed. Many of the imperfections in the Insolvent Act might have been easily avoided, by a more careful examination than seems to have taken place of the provisions of the English Insolvent Acts above referred to, and from which most parts of our act have been closely copied. In one class of cases the judge or commissioner appears to have no power to relieve, under circumstances in which it cannot have been intended to withhold relief. Where a trader is indebted in 100*l.* to parties who are indebted to him in any amount less than that sum, the actual amount of debt owing from him will be 100*l.*, although the available amount may not be more than 50*l.*, or even 20*l.* or 10*l.* In this case the trader would most probably not be considered entitled to the benefit of the Insolvent Act, though no fiat could issue under the bankrupt law. And a question may also well be raised, whether a person who has contracted debts while a trader, but who has ceased to trade before the presenting of his petition, is entitled to the benefit of this act as a non-trader, though as the discontinuance of the trade, whether *bonâ fide* or resorted to solely with reference to this act, would not exempt the party from the operation of the bankrupt law, or deprive him of the advantage which that law affords; and as the intention of the legislature seems to have been to restrict the insolvent law to the cases of persons who could obtain no relief under the bankruptcy law, it may be presumed that the act would not be available to him. The *trader* who applies for his discharge, or who seeks for protection under this act, must be a person owing, in the whole, debts to a less amount than 100*l.* An allegation to this effect is contained in the trader's petition, but no mode is prescribed for testing the truth of the allegation, nor is there any provision, except an indictment for perjury upon the affidavit, as to the consequences of such an allegation being shewn to be untrue. If it should be discovered at any time that the debts of the trader did in fact amount to 100*l.* at the time of presenting the petition, then all the proceedings before the judge or commissioner will be void, as the case was not within their jurisdiction; and cer-

tainly such a contingency might have been easily provided for, by directing that the decision of the judge or commissioner upon the first examination, should be so far binding, as to legalize all conveyances &c., under the interim and final orders of protection, and should be incapable of being impeached, except by a proceeding before the judge or commissioner by whom the order was granted. This is the more necessary, as a debt might exist which the debtor might have considered entirely inoperative; as, for instance, a debt barred by the Statute of Limitations, because that statute does not extinguish the debt, which remains as before, but only takes away the *remedy by action;* and as there is no limit set to proving the proceedings under the insolvent law null, they may be disturbed under such circumstances at any distance of time. The debtor, whether in custody or at large, who comes within the description applied to any one of the four classes mentioned above, is entitled to be discharged from custody or protected against arrest, unless as to the latter the arrest is made under a judge's order, upon the presentment of a petition in the form prescribed by the schedule to the act, and the granting of an interim order of protection, whether the facts contained in the petition are true or false. No notice is required to be given to the party at whose suit the debtor is in custody, though a notice must be give to one-fourth in number and value of the petitioner's creditors. There is no reason, indeed, for requiring notice, either where a suit has been commenced, or where no legal proceeding has been taken, since, supposing it to be given, the judge or commissioner has no power under the act to inquire into the truth of the matters alleged, when the discharge or order for protection is applied for. When, therefore, the petitioning debtor sees reason to apprehend that any material statement will be successfully impugned, he has only to content himself with the opportunity afforded him by the interim order of protection, to remove himself and his property into the United States or elsewhere, out of the reach of his creditors and the jurisdiction created by the act, before the day appointed for his examination, and thus save both judge, commissioner and creditors the trouble of taking any further proceedings against

him. This is again legislating contrary to the principle which we stated at the commencement, and which is the only true principle on which legislation between debtor and creditor ought to proceed. The indulgence is all granted to the debtor; the security of the creditor is not regarded even for a moment, and yet the evil would have been easily remedied, by providing that the petitioner if in custody should remain there, or if at large, should give security for his appearance, or place himself in the custody of the court until the examination had taken place. The judge or commissioner is empowered to direct, in the final order, that some allowance shall be made for the support of the petitioner out of *his* estate and effects. By this is meant that the petitioner is to be supported out of an estate *once* his, but which has been transferred to his creditors in satisfaction of larger amounts due to them. It is a tax for the support of the insolvent, to be levied exclusively upon those who have already suffered by his insolvency, instead of throwing the burden of his subsistence on his friends or the public. This is borrowed from the English bankrupt law. In France, and other continental countries, the allowance of maintenance to the insolvent and his family, depends upon the decision of a majority of the creditors; though, if that decision is favourable, the *amount* of the maintenance, and the mode of affording it, is left to the authorities: yet in those countries there is no bankruptcy fund as there is in England, and as there might be here, and out of which the allowance might be taken without harshness to the debtor or injustice to the creditor. Upon obtaining the final order, the petitioner is protected from actions for debts contracted by him before the time of filing his petition; and, on the other hand, all property acquired by the petitioner after the order, may, under certain conditions, be made available for the payment of his debts. This seems to be a much more convenient course than that provided by the Roman law of *cessio bonorum*, through which Cæsar sought and obtained popularity among the poorer citizens. The *Lex Julia* protects from imprisonment the insolvent debtor not chargeable with fraud, who *withdraws himself* from his property (*cedit bonis*), or in other words, abandons it to his

creditors. This law of *cession*, which has been adopted with respect to non-traders in Scotland, France, and nearly all the continental states, after taking the debtor's present property, protects his person, but leaves him open to actions, and also to executions against his after-acquired property, at the suit of individual creditors, both old and new. The system introduced by the act is also preferable to the continental law of bankruptcy, under which, unless there be a composition (concordat) the bankruptcy is worked by distributing the effects, leaving the bankrupt after the final dividend liable to the action of each creditor for the unsatisfied portion of his claims, and it is also preferable to the system introduced by the English law of bankruptcy. By the first section of the act, the petitioner must have resided "twelve calendar months in the district" in which his petition for relief or protection is presented, but out of what period of his life the twelve calendar months are to be taken no where appears. The legislature may have intended, and from the form of the petition, we presume did intend, that the twelve months' residence should be *next* before presenting the petition, but as this intention has not been expressed, there can be no doubt that any twelve months, though not consecutive, will be sufficient, and that they might be, for anything that appears to the contrary, the first twelve months of his existence. Neither is it necessary that the petition should be presented to the judge or commissioner of the district in which he is residing at the time his petition is presented, as the act only requires that the petition should be preferred before the judge or commissioner of "the district wherein he may have resided twelve calendar months," and the petitioner complying with the other requisites of the statute as to notice, &c., may be living at one end of the Upper Province, and his petition may be presented to a judge or commissioner at the other. The petition is required to be signed by the petitioner in the presence of a person described as attorney or "agent in the matter of the said petition." It may be presumed, from the frequent use of the word "agent," when coupled with the word "attorney," as denoting an attorney who acts for the attorney immediately employed by the client,

that the agent referred to in this form must be an attorney, and such has been the construction that the insolvent commissioners have put upon the same form of attestation under the insolvent acts in England, because they have felt the inconvenience that would almost inevitably arise from allowing insolvents to be in the hands of persons, over whom no salutary controul could be exercised. After the expiration of the time allowed by the interim order, or any renewal thereof, the petitioner who has been discharged from custody under it, may be again taken in execution. It is not stated whether fresh process must issue in such a case. There seems to be no reason why the sheriff should not be empowered to retake the petitioner, or his property, if they can be found, upon process already executed, unless such process has been returned. By the 17th section of the act, it is enacted, that when the assignee accepts a lease, or an agreement for a lease, to which the petitioner is entitled, "the said petitioner shall not be liable to pay any rent accruing after the filing of his petition, nor be in any manner sued after such acceptance, in respect of any *subsequent* non-observance or non-performance of the conditions, covenants or agreements therein contained." According to strict grammatical construction, the word "subsequent" would refer to the acceptance, whereas in practice it ought to refer to the filing of the petition; as there can be no reason why liability to conditions, covenants and agreements should continue longer than liability to rent. The extent of the protection afforded by the final order under the 29th and 31st sections does not seem to be very clearly or properly defined. The 29th section protects the petitioner against the claims of indorsees or holders of negotiable securities, but it contains no provisions in respect of the claims of parties, who as drawers, indorsers or acceptors, may be called upon to pay the amount of bills, for which the petitioner may be ultimately liable. The 31st section enumerates several species of debts which are to disentitle to the benefit of the act, and these seem to have been copied from the English acts without much consideration. There is no mention made in this section of damages for a malicious prosecution, nor the costs of a vexatious defence, nor is the petitioner excluded by

fraudulent preference. A voluntary preference may be legally fraudulent, without involving moral guilt; but it may exist in a form quite as odious as fraud in contracting a debt. A judgment for a malicious trespass is one cause of exclusion, but as the statute by which a judge certifies a trespass to be malicious is not in force in this province, it is difficult to understand how that cause of exclusion can apply. A breach of trust is also a cause of exclusion, and this is properly so, where the breach of trust is fraudulent, or for the personal benefit of the trustee, but it will have equal effect in excluding him from the benefit of the act, where, to save the *cestuique trust* from ruin, he has, at his own personal risk, advanced money upon leasehold security, &c., where he was authorised only to take freehold security. The act contains no provision respecting the property of the petitioner in case the final order is refused; and the imperial act 5 & 6 Vic., ch. 116, was open to the same objection, which was, however, removed by 7 & 8 Vic., ch. 96, which, upon such refusal, revested the property in the petitioner, subject to the acts done by the assignee. This we consider quite as objectionable as the omission in the former statute, as there can be no reason why, after an adjudication that the petitioner is not entitled to his discharge, the property remaining in the hands of the assignee should not be applied in a rateable diminution of the liabilities which he has improperly incurred. Our objections to the Insolvent Act are merely against what appear to be errors in detail, which can easily be remedied by an amending act in the next session of the legislature, when the suggestion that we have thrown out for the entire repeal of all the old insolvent acts might also be adopted. We shall probably revert to this act at a future opportunity, as our object is to assist, as much as is in our power, in carrying out the important principle to which we have referred in the commencement of this article—a principle which we are convinced every one must believe it is most necessary to keep in view, in making alterations in the existing laws of debtor and creditor.

LAW AND FACT.

Malice, in the ordinary popular sense of the term, means simply an evil disposition of mind to cause misery, hurt or suffering. The law, however, distinguishes between malice in law, and malice in fact. Malice in law, imports a legal inference, but it is one which is made by the law whenever a hurt or damage is wilfully done without any lawful authority or excuse. It is founded, therefore, on that which is ordinarily mere matter of fact—the wilful doing of a hurtful act, which is prohibited to be done except where the law sanctions the doing. The adjudication, therefore, that any act is maliciously done, in a legal sense, involves the conclusion that the law does not sanction the act. It frequently, however, happens, that the law does not prohibit the doing of an act altogether, although its tendency may be to cause hurt or annoyance, but only *sub modo:* as where it is not done *bonâ fide*, but on the contrary, with the disposition to occasion hurt, pain or suffering; that is, where it is done of malice in fact, or malice in the ordinary popular sense of the term. Thus the law prohibits the malicious publication of a writing hurtful to the character of another person: if such a writing be in fact published wilfully, and moreover without anything to warrant or excuse the act, malice is a mere inference of law from the facts; but if the publication had been on an occasion which would have furnished an excuse, provided the act were done *bonâ fide* with a view to the occasion, then the question being as to the existence of an actual malevolent design to injure, would be a question of malice in the ordinary popular sense of the term. In all such cases, the question of malice in law, involves the question of malice in fact. A peculiar and technical meaning is annexed to the term malice in the law of homicide. By constructive malice, or malice in law, is meant (according to Mr. Justice Foster) that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, and carry with them the plain indications of a heart regardless of social duty

and fatally bent upon mischief. The words of this description seem to be too indefinite to furnish any certain rule or test for mere legal decision; and, expressed as they are in popular terms, they would rather seem to describe matter of fact for a jury, than matter of law for the court. It must, in every such case, be an important and material question, in point of natural justice, whether the accused did not wilfully place the life of the deceased or some other person in jeopardy by a wilful act or unlawful omission. If he did so, the case seems properly to fall within the description of one regardless of social duty, fatally bent on mischief. If he did not so wilfully put life in peril, it is difficult to suppose any case which would properly fall within this description of malice. It may be observed that this doctrine of constructive malice, which thus makes the inference of malice to be one of law, to be drawn by the court from the circumstances, without any inference in fact as to the mind and disposition of the accused in doing the act, has not been free from inconvenience in practice; and that in some instances the court, for want of such a conclusion in fact, has been unable to pronounce any judgment. The question of fraud admits of a distinction analogous to that incident to malice, viz., fraud in law and fraud in fact. It was observed by Lord Ellenborough, in the case of Doe v. Manning, 9 East., 59, that fraud or covin is always a judgment of law upon the facts; but a fraudulent intention is usually a question of fact. Upon an issue taken generally on an allegation of fraud it is a question of fact, and there being in such case no fraud in fact, there is none in law; per Buller, J., in Pease v. Marlow, 5 T. R., 80. Whether the taking of a tenement was in fraud of the laws relating to settlements of the poor is a question of fact; so also, whether a bill of exchange was obtained by fraud.—Grew v. Bevan, 3 Stark., N. P. C., 134. The cases which have been referred to, and many others which might be cited, seem for the most part to consist with the positions already advanced, it remains to advert to a class of cases in respect of which much doubt has been expressed. In actions for malicious prosecution, it is well known that the negation of probable cause is essential to the maintenance of the action, and the difficulty has been to determine whether

this is a question of law or fact. As to the term probable itself, it is no doubt one of known popular meaning; and if we look to the nature of the inquiry which this conclusion involves, it is one to which the powers of a jury are well adapted, and which are exercised by juries in analogous cases. It is one of the most important duties of the jury to decide whether the probabilities raised by the evidence in criminal cases be sufficient to warrant a verdict of guilty, and in other instances to determine on which side the probability preponderates. It is seldom, indeed, that questions of probability can be measured by any legal rule or test, or are capable of any other decision than by the sound sense and discretion of those who enquire. The existence of all those circumstances which tend to crimination are undoubtedly matters of fact; and the law has no better means of fixing the precise point where the force of such evidence shall be sufficient to warrant a prosecution, than it has for determining by rule, what shall be sufficient to warrant a conviction. Where, indeed, any rule of law intervenes, and perhaps where any such rule can be laid down, that rule must prevail, as in all analogous cases. According, however, to several modern authorities, the question, in the absence of any such rule, is a conclusion of fact for the jury. In Davis v. Russell, 5 Bing. 354, the judge directed the jury to consider, whether the circumstances afforded the defendant *reasonable ground* for supposing that the plaintiff had committed a felony, and whether in his situation they would have acted as he had done: and the court held, that the direction was substantially correct, and Best, J., observed, that it was for the jury to say whether they believed the facts, and if they believed them—whether the defendant was acting honestly. In Beckwith v. Philby, 6 B. & C., 637, Littledale, J., directed the jury to find for the defendants, if they thought on the whole that the defendants had reasonable cause for suspecting the plaintiff of felony. And Lord Tenterden said, whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury. In Macdonald v. Rook, 2 Bing. N. C. 217, it was held that

the judge was warranted in leaving the question of want of probable cause to the jury, that question depending upon a chain of facts; and Tindal, C. J., observed, there are some cases, no doubt, in which a judge may be expected to tell the jury, whether or not a defendant had probable cause for proceeding against a plaintiff, as in case of a threatening letter or the like; but where the probable cause consists *partly* of facts and partly of *matter of law*, a judge would be warranted in leaving the question to the jury. In James v. Phelps, 11 Ad. & El. 453, the defendant had prosecuted the plaintiff under the stat. 7 & 8 Geo. IV., ch. 30, sec. 6, for maliciously and feloniously obstructing a mine, and the plaintiff was acquitted on the ground that he effected the obstruction under a claim of right by his employer, and by the employer's direction. It appeared in the evidence on the trial of the action, that there had been disputes between the defendant and the employer on the subject before the obstruction, and that the defendant knew from the plaintiff that the obstruction was intended as an assertion of the employer's alleged right. The judge at the trial nonsuited the plaintiff, but it was held, on motion to set aside the nonsuit, by the Court of Queen's Bench, that the judge was wrong in nonsuiting in such a case, that the question was one for the jury; and a new trial was granted. Lord Denman, in giving judgment, said, "Malice is a question that must go to the jury. The question whether there be or be not reasonable or probable cause may be for the jury or not, according to the particular circumstances of the case." It is clear, however, in the first place, that the question of probable cause is subject to several legal rules. The question as regards the defendant is, whether he had probable cause to excuse or justify what he did; and the existence of facts which alone, if known and acted upon, would warrant the conclusion of probable cause, cannot support it, if they were unknown to the defendant, or though known, if he also knew other facts which shewed that there was in truth no probable cause.—Sir Anthony Ashley's case, 12 Co. 92. So in an action against a magistrate for a malicious conviction, the question is not whether there was in fact probable cause for convicting, but whether *he* had probable cause for convicting.—

Burley v. Bethune, 5 Taunt. 580. There are also authorities which shew not merely that probable cause is a conclusion of law in particular instances, but generally, however numerous and complicated the facts may be. In Johnstone v. Sutton, 1 T. R. 545, it was said, that the question of probable cause, is a mixed question of law and fact; that whether the circumstances alleged, to shew it probable or not probable, existed, is matter of fact; but that whether, supposing them to be true, they amount to probable cause, is matter of law. In Davis v. Hardy, 6 B. & C. 225, which was an action for a malicious prosecution for embezzlement, the judge nonsuited the plaintiff, and the court refused to set the nonsuit aside. In Blackford v. Dodd, 2 B. & Ad. 179, the action was brought by the plaintiff, an attorney, against the defendant, for a malicious prosecution, on a charge of sending a threatening letter, which was produced and read at the trial; the judge nonsuited the plaintiff, on the ground that there was reasonable and probable cause for preferring the indictment; and the Court of Queen's Bench held, that the nonsuit was correct; that the evidence did not raise a question for the jury. There are also many other cases where the court has decided on the question of probable cause, many of which were capable of decision as matters of law, falling within the rules noticed in the case of Panton v. Williams, 2 Q. B. 169. In this case, it appeared that Panton had indicted Williams, and two others, for having forged a will; Williams, after an acquittal, brought an action for a malicious prosecution; Panton pleaded not guilty; and on the trial, a great mass of evidence was produced, as to the existence of probable cause. Lord Denman, before whom the cause was tried, having summed up the evidence, directed the jury that it was not a question of law, in a case of that sort, whether there was reasonable and probable cause, but that it was altogether a question of fact, for the jury. The counsel for the defendant tendered a bill of exceptions on this ruling, and the jury found for the plaintiff, 300*l.* damages. Tindal, C. J., on giving judgment, thus expressed himself: "Upon this bill of exceptions, we take the broad question between the parties to be this: whether, in a case in which the question of reasonable or probable

cause depends, not upon a few simple facts, but upon facts that are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge; and we are all of opinion that it is the duty of the judge so to do." With respect to the inferences drawn from the course of pleading, according to the older cases, it is observable, that such authorities do not by any means prove that the question of probable cause is *always*, and in the absence of any specific rule or principle, adequate to the decision, to be regarded as a question of law, but only that such a rule or principle was applicable in the particular case. It seems however to be pretty clear, that formerly *all conclusions* as to what was reasonable or the like, were considered to be questions of law for the decision of the court, and of course the pleadings were framed accordingly, and they now prove no more than that such questions are dealt with as questions of law. Lord Coke seems to have argued, all laws must be reasonable, and therefore, what is reasonable is matter of legal determination: this is however by no means a necessary, or as it seems, a just inference; it consists not only with reason, but with law, that matter of fact should be decided by a jury: this is what the great elementary rule which we have chosen for our text requires; and the question resolves itself ultimately into this—whether the conclusion of probable cause be in its own nature one of fact or of law. According to the older authorities, the questions not merely of reasonable and probable cause, but of reasonable time, and other such conclusions, seem as already intimated, to have been regarded as questions of law. The rule has already been adverted to—"quam longum esse debet (tempus) not definitur in jure sed pendet ex discretione justiciariorum." And this position as to reasonable time was to be also applied to *all things uncertain* which ought to be reasonable; for nothing that is contrary to reason is consonant to law. It was therefore held that any such question should be determined by the judges,

in order that legal consistency and uniformity might be preserved. The difficulty attending this doctrine, and the inconvenience which must necessarily result from a multiplicity of legal decisions on matters so uncertain as to *exclude* legal definitions, had been then experienced but in a small degree in comparison with that which has been felt in modern times. It was then, and has afterwards been, as it seems, too hastily inferred, that because reasonable time has in particular instances been deemed to be a question of law, it was to be so treated in all. In the case of Darbishire v. Parker, 6 East. 18, Lawrence, J., expresses himself to that effect, because in the case of Tindal v. Brown, 1 T. R. 167, the jury found merely the circumstances. It has been already seen that this general doctrine has been shaken by many more recent authorities. Lord Coke's comment on the very case mentioned in the text of Littleton, sec. 69, is materially impugned by modern authorities. It is there laid down generally, that "executors shall have reasonable time to take the goods of their testator from his mansion; and this reasonable time shall be adjudged by the discretion of the justices before which the cause dependeth, for reasonableness in this case belongeth to the wisdom of the law." A court would, no doubt, in the present day, under particular circumstances, pronounce upon such a question without the aid of a jury: they might hold that an hour was too short, a year too long a time to be reasonable; but in a case of real doubt the question would probably be considered to appertain to a jury. Several authorities have already been cited which militate against the more ancient doctrine. In Tindal v. Brown, to which Lawrence, J., refers in Darbishire v. Parker, the court held that there was sufficient foundation for *laying down a legal* rule, then but imperfectly established, as to giving notice of the dishonour of a bill of exchange. Lord Mansfield there observed, that "what is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts, such as the distance which the parties live from each other, the course of post, &c., but whenever a rule can be laid down with respect to this reasonableness, *that should be decided by the court, and adhered to by every one for the sake of certainty.*

Lord Mansfield does not say that reasonable time ought *always* to be an inference of law from the facts, but only that it is to be such where a *rule of law can be laid down* as to reasonableness. So, according to the judgment of Lord Kenyon, in Hilton v. Shepherd, and Hope v. Alder, 6 East. 14 & 16, where no acknowledged rule or principle of law defines the limits between reasonable and unreasonable, the question seems to be for the jury under all the circumstances of the case. In Smith v. Doe dem. Lord Jersey, Abbott, C. J., said, "I conceive that, in this as well as in all other cases, courts of law can find out what is reasonable, and that in some cases they are absolutely required to do so. In many cases of a general nature, or prevailing usages, the judges may be able to decide the points themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite." General as these observations are, they are available to shew that the learned judge did not consider such questions to be exclusively questions either of fact or of law; and they clearly tend to shew the distinction between cases where a general rule can be laid down by reason of the generality of their facts, or an actually existing usage which requires only legal sanction to be a law, and all others, which depending on a multitude of special facts and circumstances, are for the decision of a jury. As it appears to be clear from the decisions and dicta to which we have referred in the course of the preceding observations, that the more ancient doctrine on this subject cannot be now generally sustained, we cannot but regret that it was found to be necessary to decide the case of Panton v. Williams upon authorities deemed to be incontestable, without much consideration whether the question of probable cause was in its own nature to be regarded as one of fact or of law, or whether the rule as there laid down was to be considered as generally applicable to all general conclusions from facts of the like description, or as founded on considerations peculiar to the particular class. We propose to conclude with a few observations as to the comparative advantages or disadvantages likely to result from referring such conclusions to one of these modes of decision rather than the other, and on the question which course best consists with

the important elementary rule on the subject, disregard of which would probably be attended with much inconvenience. There can be no doubt that where a plain practicable rule can be laid down for the decision of such questions, although it be of an arbitrary and artificial character, as in the case of putting an end to a tenancy by a six months' notice to quit, instead of leaving reasonable notice in each case to be decided upon its own circumstances, according to the ancient practice; or that of substituting a general rule as to the time of giving notice of the dishonour of a bill of exchange, in place of a decision on the peculiar facts of each case, such a rule is useful and beneficial. It is plain, on the other hand, that to refer such questions to the decision of the court, when they depended on a multitude of facts and circumstances too numerous, and of too complicated a nature to be susceptible of any definite and convenient rule, would be attended with inconvenience; legal, but almost imperceptible distinctions would be multiplied to an excessive and indefinite extent. Under such circumstances, uniformity of judgment would be impracticable, and many conflicting decisions would necessarily result. Whenever the court decided upon circumstances, the decision would become a precedent and rule of law; and as each decision would afford room by comparison for a great number of distinctions, the obvious effect would be to multiply precedents to an inconvenient and unlimited extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting, in others, the inference of the jury in point of fact, substantial justice is administered, and the law is relieved from the perplexity occasioned by nice and subtle distinctions. The practice of referring the question of probable cause to the court in all cases, although no rule or principle of law be applicable, is open to much objection. A class so constituted, is in truth, as regards the general elementary rule, of an anomalous character. Described, as every such conclusion is, in popular terms, and capable of being decided in that sense by a jury, it is *primâ facie* a question of fact: it would seem therefore to be anomalous to deal with it as a question of law, where there was no law to govern it, although undoubtedly

whenever any such rule is applicable, the popular sense of the term merges in the legal sense, and the elementary rule applies as in other instances of applying a legal rule. It would be necessary, in pleading it as a defence to an action of trespass, to state all the circumstances which might possibly be necessary to enable the court to draw the conclusion. It might be requisite therefore, in some instances, to set forth on the record a great body of circumstantial evidence, consisting of those varied and numerous combinations of minute circumstances, which tend in evidence to a conviction on a criminal charge. Trials on such charges are often very long, and upon an action for a malicious prosecution, it would, in a doubtful case, be as impolitic to omit the allegation of any circumstance tending to criminate the plaintiff, as it would be to omit proof of it in evidence on the trial of an indictment. The question of probable cause frequently depends on evidence as to identity, similarity of handwriting, tracing of footsteps, &c., and sometimes not merely on the fact of similarity, but on the extent and degree of similarity; an adequate and correct statement of which on the record, in order to enable the court to judge of the effect which such evidence ought to produce on the mind of the prosecutor, would be impracticable. The practice of referring any such class of questions to the court, would be to impose on the latter the frequent burthen of deciding in the same cause many questions of this nature, in order to meet the state of facts that might ultimately be found by the jury. When the number of witnesses, and of facts and circumstances, were great, much labour would thus be incurred in exhausting all the different combinations which might possibly result, and precedents would be accumulated to an inconvenient extent. It is indeed necessary, in ordinary cases, that, to enable a jury to find a general verdict, the court should state the law, to enable them to apply it to the facts: this, however, requires only an exposition of the known existing law, which governs the right or liability in question, and seldom requires that such multiplied phases of the case should be exhibited to the jury, as would be necessary for their instruction as to a general conclusion, such as probable cause, when it was governed by no general law; but the effect of

each combination of facts depended on the mere discretion of the court. It may perhaps be said, that although the ordinary rule may be that reasonable time and other such conclusions, should be for the jury; yet, that in particular instances, such as that of probable cause, the question may, by a positive rule, be for the decision of the court, as of matters arising collaterally in the cause. It is obvious, that if this were so held, it would still amount only to a dispensation with the rule, or to an exception from it in respect of the particular class of cases. The questions or conclusions thus referred to by the court, would still, when they were not governed by any rule of law, be in their own nature questions of fact, which, in analogous cases, could be decided by the jury, and the functions of the court and jury would be in great danger of being confounded. It would seem better that all conclusions of a general nature, as to matters of fact, where no known or positive rule of law can be applied to them, should be decided upon by a jury, a tribunal which, if not the best for the decision of matters of fact, is one which tends to keep questions of law and fact distinct from each other, and to prevent the evil consequences which the confusion would entail, not the least of which would be much uncertainty, much vexatious litigation, and of course large additions to the already daily accumulating mass of conflicting and frequently unsatisfactory decisions.

CASES IN THE ENGLISH COURTS.

MARTIN *v.* GRANGER.

2 Dowl. & Lown. 268.

The affidavit in support of a motion to set aside process served in a wrong county, stated that the process had been served more than two hundred yards from the boundaries of the proper county: Held, sufficient, without adding that there was no dispute as to boundaries.

A rule had been obtained by *Channell*, Serjt., calling upon the plaintiff to shew cause why the copy of the writ of summons issued in this action should not be set aside for irregu-

larity. The affidavit upon which the rule was granted, stated that the defendant had been served at Garraway's Coffee House, in the City of London, being a place more than two hundred yards from the boundaries of the county of Middlesex, with a copy of a writ of summons issued into that county.

Dowling, Serjt., shewed cause. The affidavit is insufficient. It ought to have stated the place to have been more than two hundred yards from the boundaries, and also that there was no dispute as to boundaries; Webber v. Manning (*a*). [*Maule*, J. —When the place is near the boundaries of another county, it may be necessary to swear that there is no dispute about them; but surely there can be no occasion for such an allegation, when the defendant positively swears that the place is more than two hundred yards from the boundaries of the proper county. *Tindal*, C. J.—The argument would be the same, if the place were five miles off.]

Channell, Serjt., contra. Where the party making the affidavit, merely states his belief that the place is more than two hundred yards from the boundaries, he ought to add that there is no dispute about the boundaries; otherwise he might be stating his belief on a disputed point. Here, however, he swears positively that Garraway's Coffee House is more than two hundred yards from the boundaries of the county of Middlesex; Harrison v. Wray (*b*).

PER CURIAM.

Rule absolute.

TOWNSON v. JACKSON.

2 Dowl. & Lown. 369.

In an action for goods sold, &c., the particulars of demand stated the action to be brought "to recover the sum of 37*l.*, the balance of an account of 108*l.*," (giving no credit for any specific sums.) The defendant pleaded as to 5*l.*, parcel, &c., a set-off to that amount. Held, that it was a question for the jury to say, whether the balance claimed meant a sum, after giving credit for the 5*l.* set-off.

This was an action for goods sold and delivered, and for money due on an account stated. The defendant pleaded the general issue and payment, to the whole declaration; and as

(*a*) 1 Dowl. 24. (*b*) 1 D. & L. 366: See S. C. 11 M. & W. 815.

to the sum of 5*l.*, parcel of the moneys in the declaration, a set-off.

The particulars of demand stated the action to be brought "to recover the sum of 37*l.*, being the balance of the following account;" then followed various items for goods sold, amounting to 108*l.*, but no credit was given in express terms for any sums which reduced the 108*l.* to 37*l.*

At the trial before *Pollock*, C. B., at the last assizes at Appleby, the plaintiff proved by the admission of the defendant, that a balance of 37*l.* odd was due. The defendant proved his set-off of 5*l.*, and contended that the set-off was pleaded to so much of the balance claimed by the particulars, and that therefore the 5*l.* should be deducted from the 37*l.* The learned judge left it to the jury to say whether the balance claimed, meant a sum after giving credit for the set-off. A verdict was found for 37*l.*

Atkinson moved for a new trial, on the ground of misdirection, and submitted that the learned judge ought to have decided as a question of law that the set-off was pleaded to the balance. He cited Eastwick v. Harman (*a*), Tuck v. Tuck (*b*), Reg. Gen. Trin. T. 1 Vict. (*c*).

POLLOCK, C. B.—It was proved at the trial that the parties met together, and that the defendant then admitted a balance of 37*l.* to be due. I thought it was a question for the jury, whether the set-off was taken into consideration, when the defendant admitted the balance. The rule of court is, that a defendant need not plead payment of a sum for which credit is given in the particulars; but still it must be an open question for the jury to say, whether a balance exists upon the whole account between the parties. Lamb v. Micklethwaite (*d*) is quite decisive of this case; the only difference is, that that was a case of payment, this is one of set-off. Where a party demands a balance, without stating how that arises, if the defendant plead payment, the plaintiff may show that in his balance, credit has already been given for the sum pleaded. A set-off is not even within the rule of court, and

(*a*) 8 Dowl. 399; See S. C. 6 M. & W. 13.
(*b*) 7 Dowl. 373; S. C. 5 M. & W. 109. (*c*) 8 A. & E. 280.
(*d*) 1 Q. B. 400; See S. C. 1 G. & D. 136; 9 Dowl. 531.

so the difficulty does not arise; but supposing it did, Lamb v. Micklethwaite is a decisive authority, that though a defendant ought not to plead payment of a sum for which credit is given; yet if he pleads payment, when the plaintiff claims a balance, it is a question for the jury, to say whether or not in such balance, credit has not already been given for the sum pleaded. Divested of technicalities, the matter stands thus: the plaintiff says, "You owe me 100*l.* on the balance of account;" the plaintiff says, "I have paid 50*l.*, and have a set-off to the amount of another 50*l.*" At the trial, the plaintiff proves, by the admission of the defendant, that 100*l.* is due upon the balance of account: the defendant then proves payment of 50*l.*, and a set-off of another 50*l.*; the plaintiff then calls a witness to prove that the 50*l.* paid and the 50*l.* set-off are both included in the balance.

PARKE, B.—A set-off is not within the operation of the rule; consequently, when the plaintiff says that he claims a balance, he only means to say, he is willing to take that sum; but he is at liberty to prove any part of his demand, and is not bound to prove the extent of his demand. For instance, if he claims 100*l.*, and says that he is willing to take the balance amounting to 37*l.* odd; if he proves any part of the balance, he is entitled to a verdict. When he gives credit in this form in the particulars, he only means to say, "I am willing to take that sum stated as the balance." The plea of set-off was to part of the 100*l.* demanded, not to the 37*l.* demanded. My lord was quite right in leaving it to the jury to say, whether or not the set-off had not been taken into account when the defendant admitted the balance. It is perfectly settled that the new rule does not apply to cases of set-off, but only to cases of payment.—Rowland v. Blaksley. (*a*) Independently of that question, supposing the pleas of set-off and of payment to stand on the same footing, this particular does not give credit for any specific sum set off or paid; but only claims a balance.

Rule refused.

(*a*) 1 Q. B. 403; S. G. 2 G. & D. 734.

BROWN v. NELSON.

2 Dowl. & Lown. 405.

Where a cause, and all matters in difference, are referred to an arbitrator, who is to make an award, the costs of witnesses, &c., attending before him are costs of the reference, and not costs of the cause.

This was an action against a surveyor for negligence in superintending certain repairs, alterations, and additions to a rectory house. The declaration contained three counts, and there were several pleas, upon which issues were joined. The cause, and all matters in difference, were referred by a judge's order to an arbitrator, the costs of the cause to abide the event, and the costs of the reference and the award to be in the discretion of the arbitrator. The arbitrator found all the issues for the plaintiff, and assessed the damages at 280*l.* He also found that there were no matters in difference between the parties, other than the several causes of action in the declaration mentioned, and directed that the costs of the reference should be borne by each party in equal moieties. The master allowed the plaintiff the costs of the pleadings as costs in the cause; but refused to allow him more than a moiety of the costs of the witnesses before the arbitrator, his attorney's charges and counsel's fees; on the ground, that such expenses were to be considered as costs of the reference, and not costs in the cause.

Fish moved for a rule, calling on the defendant to shew cause why the master should not review his taxation. The costs of maintaining the issues before the arbitrator, must be considered as costs in the cause. In Mackintosh v. Blyth (*a*), the arbitrator omitted to certify as to the costs of the reference, and it was held that they followed the verdict. [Pollock, C. B.—The certificate of an arbitrator is a totally different matter, for in that case all expenses are considered to be expenses in the cause. But where there is a reference to an arbitrator, who is to make an award, all proceedings before him are proceedings in the reference, and not in the cause.] The case of Tregoning v. Attenborough (*a*), is in point. There, in an action of trover, a verdict was taken

(*a*) 7 Bing. 733; See S. C., 5 M. & P, 453; 1 Dowl. 225.

for the plaintiff for the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, subject to the determination of an arbitrator under an order of Nisi Prius, as to the amount of the deterioration; the amount, together with the costs of the cause, to be paid by the defendant; it was held, that the expenses of the witnesses before the arbitrator were costs in the cause. Taylor v. Gordon (*a*), may seem at variance with the position contended for, but in that case, there was a reference of matters dehors the cause, and that fact is relied on by Tindal, C. J., who says, "Here a very large field of inquiry was opened before the arbitrator, quite independent of the question at issue in the cause." But in the present case, the arbitrator has expressly found, that there were no matters in difference, except those in the cause.

POLLOCK, C. B. — If the arbitrator intended that the plaintiff should have these costs, he ought to have awarded them.

PARKE, B.— Costs in the cause are costs up to the time of the reference.

Rule refused.

WALTON v. MASKELL.

2 Dowl. & Lown. 410.

A declaration stated that one J. was indebted to the plaintiff in 17*l.* 11*s.*, and thereupon, in consideration that the plaintiff would, for and on account of the said sum, accept the joint and several promissory notes of J. and one E., for payment of 17*l.* 11*s.* six months after date, and would thereby give time to J. for payment of the said debt; the defendant promised to pay the sum of 17*l.* 11*s.*, if the said promissory note were not duly honoured and paid. It then averred the acceptance of the note, and the non-payment of it when due, although the said J. and E. were afterwards requested so to do; and notice of the premises to the defendant; and alleged for breach the non-payment of 17*l.* 11*s.* by the defendant. The plea traversed the request to J. and E. *Held*, on demurrer, that the plea was bad. The giving a bill "for and on account," of a debt is, prima facie, an agreement to forbear enforcing payment of the debt, until the bill be due.

Assumpsit: the declaration stated, that before and at the time of the making of the promise, &c., one J. Johnson was indebted to the plaintiff, in a large sum of money, to wit, 17*l.* 11*s.*; and thereupon theretofore, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant,

(*a*) 9 Bing. 570; See S. C. 2 M. & Scott, 725; 1 Dowl. 720.

would, for and on account of the sum of 17*l.* 11*s.*, so due and owing from Johnson, accept and receive of and from Johnson, and one J. G. Elptrick, the joint and separate promissory note, in writing, of the said Johnson and Elptrick, bearing date the day and year aforesaid, whereby Johnson and Elptrick, jointly and separately, promised the plaintiff, six months after the date thereof, to pay to him, the plaintiff, or his order, the sum of 17*l.* 11*s.*; and would thereby give time to Johnson for the payment of the said debt of 17*l.* 11*s.*, until the said promissory note should become due and payable, according to the tenor and effect thereof; the defendant did then guarantee and promise the plaintiff to pay the sum of 17*l.* 11*s.* to the plaintiff, if the said promissory note for that amount was not duly honoured and paid by Johnson and Elptrick, or either of them, when the same should become due and payable, according to the tenor and effect thereof. It then averred, that the plaintiff, confiding in the said promise, did then accept and receive the said promissory note, of and from Johnson and Elptrick, for and on account of the said sum of 17*l.* 11*s.*, so due to him from Johnson as aforesaid, and did give time to Johnson for payment thereof, from thence until hitherto. That although the said promissory note afterwards, and before the commencement of this suit, to wit, on, &c., became due and payable according to the tenor and effect thereof; and Johnson and Elptrick were then, to wit, on the day and year last aforesaid, requested by the plaintiff so to do; yet that Johnson and Elptrick have not, nor hath either of them, paid the said sum of 17*l.* 11*s.* in the said note specified, or any part thereof, to the plaintiff; and the said note hath been from thence hitherto, and still is, in the hands of the plaintiff, overdue, and unpaid; of all which premises the defendant then, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the said sum of 17*l.* 11*s.*; but the defendant hath not paid the same, or any part thereof. Plea: That the plaintiff had not requested Johnson and Elptrick, modo et formâ. General demurrer, and joinder therein. The plaintiff's points for argument were, that the plea is no answer in law; for that it was not necessary in law to

make any request to the said Johnson and Elptrick for the payment of the amount of the note; that as makers of the note, they were liable and bound to pay the same, without any request. The defendants gave notice of the following objections to the declaration. That the defendant was only to be liable, if the note were not duly honoured and paid, an expression which implies that the holder was to present the note, and no presentment is averred. That the request ought to have been made by the holder, and when the note was due: neither of which points are averred. That the plaintiff was only to give time "thereby," (*i. e.* by taking the note) until the note became due; and he does not state that he gave time, by taking the note; and he does by the word "hitherto," aver that he gave time for too long a period.

Knowles, in support of the demurrer. Hitchcock v. Humfrey (*a*) is an authority to shew that the plea is bad. There the defendant guaranteed the payment of goods supplied, "in consideration of the plaintiff extending the credit already given to his son, and agreeing to draw upon him at three months:" the defendant pleaded that the bill was not duly presented for payment, and that he had no notice of non-payment. *Tindal*, C. J., in delivering judgment, says, "This turns upon the question, whether one who guarantees the due payment of a bill, drawn upon a third person for the price of goods supplied to him, stands in the same situation as if he were in fact the drawer of the bill: for if such be his true position, then undoubtedly he is not liable to an action, unless there has been a due presentment of the bill, and he has had due notice of dishonour. But I can find no case that at all warrants that position. On the contrary, Warrington v. Furbor (*b*), and Swinyard v. Bowes (*c*), are authorities to shew, that one who is no party to a bill is not entitled to notice of its dishonour." The Court called upon

Martin to support the plea. First, the request is a material and traversable averment. The contract of a guarantor has always been construed strictly, and his liability does not arise, except upon performance of a condition precedent.

(*a*) 6 Scott, N. R., 540; See S. C. 5 M. & G., 559.
(*b*) 8 East, 242. (*c*) 5 M. & S. 62.

When a person guarantees the payment of a bill of exchange or promissory note, he understands that the bill or note requires a presentment for payment. This promissory note is payable to order, and there is no allegation that it was in the hands of the plaintiff at the time it became due. Suppose the bill had been indorsed over by the plaintiff, can it be supposed that the defendant is bound to search out the holder? [*Parke*, B.—Your argument only goes to shew that the defendant has made an improvident bargain: he ought to have specified the place of payment.] The word "dishonour" has a technical meaning, and implies that the bill has been duly presented. [*Parke*, B.—That is as against the drawer.] There is no reason for putting a different construction on the word "dishonour," in the case of a party liable on the face of the bill, and of one liable on a collateral undertaking. The meaning of the word is explained in Lewis v. Gompertz. (*a*) [*Pollock*, C. B.—The plea traverses the request to pay. In an action against the parties themselves, the allegation of a request is mere form.] It is conceded, that when a party is primarily liable to pay, an allegation of request is unnecessary, the action itself being in law a request; but in this case the defendant only undertakes to pay if the bill be not *duly* honoured. The word "duly," means a non-payment on request. Secondly, the declaration is bad for want of an averment that the note was presented for payment. A party whose debt is secured by a bill of exchange or promissory note, stands in a different situation from creditors holding other securities.—Hansard v. Robinson. (*b*) If the bill or note be lost, he cannot recover, and the party paying a bill or note has a right to the possession of it. The declaration is also defective in this; that the consideration stated is not that the plaintiff would give time; but that he would accept a promissory note, and "thereby" give time.

Pollock, C. B.—I am of opinion that the plaintiff is entitled to the judgment of the court. With respect to the last objection, the declaration expressly shews not only that the plaintiff did give time by receiving the note; but that he

(*a*) 6 M. & W. 399. (*b*) 7 B. & C. 90; 9 D. & R. 860.

received it under circumstances, which compelled him to give time; the case of Kearslake v. Morgan, (*a*) having decided that a creditor, who receives a negotiable instrument "for and on account" of a debt, is presumed to have received it in present satisfaction, and the receipt operates as a suspension of the remedy on the debt. As to the other question, it chiefly turns upon what the parties meant by the words "duly honoured and paid"—whether they intended anything more than the mere tautology, without any specific or definite meaning; or whether they meant "honoured," by being presented on the day when the note was due, or "paid" at any time afterwards. I cannot help thinking that the word "honoured" meant that the note should be presented at any time; and if "paid" at any time, the defendant should be discharged. The real question we have to decide is, whether the averment of a request has a different meaning in a declaration against the maker of a note, and in a declaration against a guarantor. It means the same thing in both cases, and it would be inconvenient to hold the contrary. As against the makers of the note, the allegation would be mere form, and it would be sufficient to say that they had not, nor had either of them, paid the sum of money in the note specified. If sufficient as against them, it would be equally so against the guarantor. The contract in substance is, that the defendant guarantees that the makers of the note shall pay according to its tenor and effect, and they are bound to find out the holder and pay him. Inasmuch, therefore, as a presentment and request are immaterial, there must be judgment for the plaintiff.

PARKE, B.—I am of the same opinion. The first question is as to the validity of the plea. The declaration is on a guarantee, and states that in consideration that the plaintiff would receive the promissory note of two persons, and thereby give time for the payment of a debt, the defendant promised to pay the debt, if the note were not duly honoured. It then proceeds to aver, that before the commencement of the suit, the note became due and payable according to its tenor and effect; and although the makers were requested so to do, they

(*a*) 5 T. R. 513.

did not pay it; of which the defendant had notice. The plea traverses the request. Now, a request is quite immaterial, unless the parties to a contract have stipulated that it shall be made; if they have not done so, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him. It is clear, that the defendant is bound to pay the amount of the note when due and dishonoured; unless there be some condition precedent on the part of the plaintiff which has not been performed. Then it is argued, that the condition precedent is, that the note should be presented for payment; but it seems to me, that the words "honoured" and "paid" are tautologous, and simply mean, that the note shall be paid when it becomes due. What I am reported to have said in the case of Lewis v. Gompertz (*a*), coupled with the facts of the case, is perfectly correct. There is no doubt that a merchant reading the plea in that case, would necessarily conclude that the bill was presented when due. A request is not necessary to charge the maker of a note,—he is bound to pay it when at maturity, and is bound to find out the person in whose hands the note then is. Upon this contract, the word "dishonour" means nothing more than the words "not duly paid." As to the other point, the giving a bill "for and on account" of a debt is primâ facie an agreement to forbear enforcing payment of the debt, until the bill become due. I am, therefore, of opinion that the plea is bad, and that the declaration is good.

GURNEY, B., and ROLFE, B., concurred.

Judgment for Plaintiff.

JOYNES v. COLLINSON.

2 Dowl. & Lown. 449.

An affidavit in support of a rule for security for costs, stating that the plaintiff resides out of the jurisdiction of the court, *as this deponent is informed and believes*, is insufficient: and such application being discharged on account of a defective affidavit, cannot afterwards be renewed upon an amended affidavit.

Temple had obtained a rule, calling on the plaintiff to shew cause why he should not give security for costs. The rule

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(*a*) 6 M. & W. 399.

was obtained on the affidavit of the defendant, which stated, "that he has been informed, and verily believes, that the residence of the plaintiff is at Glasgow, in the kingdom of Scotland; and that he now, as this deponent has been informed and verily believes, resides there, out of the jurisdiction of this court."

Pashley shewed cause. The affidavit is insufficient. In *Archbold's Practice*, (*a*) it is said, "that when the affidavit proceeds upon the information and belief of the deponent, it should shew from what source his information is derived, and upon what his belief is founded." It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff "has been informed, and believes," that the defendant is in insolvent circumstances.—Symes v. Amor, (*b*) Mann v. Williamson. (*c*) And Sandys v. Hohler, (*d*) expressly decides, that, in order to obtain a rule for security for costs, it must be positively stated that the plaintiff is resident out of the jurisdiction, and "belief" to that effect is insufficient. This affidavit would be satisfied by the fact of the defendant having told a third person to come and inform him that the plaintiff resided abroad.

Temple, in support of the rule. Where a deponent speaks to a fact, which must necessarily be more in the knowledge of the other party, it is sufficient to depose upon his "information and belief."

PARKE, B.—According to the books of practice, that is not enough. There can be no difficulty in making a positive affidavit; for the defendant has only to take out a summons, to be furnished with the plaintiff's residence.

Rule discharged, with costs.

The defendant, having subsequently delivered pleas, obtained an order from a judge at chambers, requiring the plaintiff to give security for costs. Whereupon,

Pashley obtained a rule to rescind the order, with costs, on the ground that the motion having been once made,

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(*a*) p. 1018, 7th ed. (*b*) 8 Dowl. 773; S. C. 6 M. & W. 814.
(*c*) 8 Dowl. 859; S. C. 7 M. & W. 145. (*d*) 6 Dowl. 274.

and refused, the defendant had no right to bring it forward again.

Temple shewed cause; and contended that the application was not the same, being on an amended affidavit.

PARKE, B.—The rule has already been disposed of on the ground of the defect in the affidavit, and the court ought not again to entertain the motion. If the court ought not to do so, much less ought a judge at chambers. There is a rule of the Court of King's Bench, Hilary Term, 3 Jac. 1, which orders, "that if any case shall first be moved in Court, in the presence of the counsel of both parties, and the court shall then thereupon order between those parties; if the same cause shall again be moved, contrary to that rule so given by the court, then an attachment shall go against him who shall procure that motion to be made, contrary to the rule of the court so first made: and that the counsel who so moves, having notice of the said former rule, shall not be heard here in court in any cause in that term in which that cause shall be so moved, contrary to the rule of court in form aforesaid.

Rule absolute. (*a*)

(*a*) Tidd's Prac. 506, 9th ed.; Cooper v. Jagger, 1 Chit. Rep. 445; Phillips v. Weyman, 2 Chit. Rep. 265; In re Hellyer v. Snook, *Ibid.*; and The Queen v. The Great Western Railway Company, ante, Vol. 1, p. 874; See also Withers v. Spooner, ante, Vol. 1. p. 17; S. C. 6 Scott. N. R. 692; 5 M. & G. 721.

THE

UPPER CANADA JURIST.

CHITTY ON PLEADING.

Chitty's Treatise on Pleading and Parties to Actions; with Second and Third Volumes, containing Modern Precedents of Pleadings and Practical Notes. In 3 vols. The seventh Edition, corrected and enlarged, by Henry Greening, Esq., of Lincoln's Inn. S. Sweet and V. & R. Stevens & G. S. Norton, London; and Andrew Milliken, Grafton Street, Dublin. 1844.

Mr. Chitty's work on pleading has been now so long before the profession (the first edition having appeared in 1808), its merits and, may we add, its deficiencies are so well known, that it would be out of place were we, in noticing a new edition of it, to do more than touch incidentally upon the work itself. We shall therefore confine ourselves to the labours of the learned editor of this edition, giving him credit where credit is due, and not sparing censure where censure is deserved: as we hold it to be the bounden duty of the reviewer to exercise his calling without fear or favour, and more particularly in reference to new editions of works which have earned for themselves a professional reputation and standing, because such editions, if imperfect, are a wrong to the professional world, being as it were false lights to lure them to destruction.

Any one who has paid the least attention to the progress of pleading law must be fully aware that a new edition of the above work was not uncalled for. It has been observed with considerable truth, that the law is in a transition state, and if this observation be true generally, how much more correct does it become when applied to the law of pleading, which has within the last ten years been so extensively altered by new acts and rules and the decisions thereupon, that the old pleader finds himself in a new world of "nice point and cher-

ished technicalities;" his former crotchets banished from Westminster, his many counts cashiered, his favourite general issue superseded by special pleas, and his rare skill in sham pleading a despised knowledge, bringing his "actions," if exercised, but to an untimely end, or himself into the labyrinth of special demurrers, which is, as all pleaders know, a kind of golgotha, where there are more skulls than brains.

This (the seventh) edition professes to be a corrected and enlarged edition, and the learned editor in his preface states, "that he has endeavoured to interfere as little as possible with the text of the author, and has not (he believes), except in the instances mentioned in the preface, made any important alteration without the authority of an act of parliament, a rule of court, or the decision of a common law court or judge." The learned editor then notices the alterations which he has made in the text, which he states will be found "to consist principally in striking out those portions which were more historical than useful in practice; such as the account of the ancient numerous and perplexing modes of commencing personal actions; the parts relating to bailable process, and the old forms of commencing declarations, as well as the account of the defence admissible under the general issue before the Pleading Rules of Hil. T. 4 Will. IV. contained in the seventh chapter of the last edition;" in the place of which he says he has endeavoured to give the present law and practice, using of course as much of the old material as he found applicable to the subject. The learned editor further observes, that "As to the notes to the first volume, it would be superfluous to observe on the labour which must necessarily have been bestowed on this part of the work," and says "he can only hope that the correction of the references and the insertion of the names of the cases, will be considered an improvement, and that the other additional matter will be found of considerable use and value." As regards the second volume —the learned editor claims a new arrangement of the forms of commencements of declarations in actions in inferior courts, and in actions removed from such courts to the superior ones, which in the former editions were intermixed with the commencements of declarations in actions originally brought in

the superior courts, but in this are separated; he also claims to have expunged the forms of affidavits to hold to bail, introduced in the last edition, but now rendered useless, and to have given in their place forms of particulars of demand, with notes containing references to some of the most recent decisions on the subject; and further, he claims to have struck out such forms as have become useless in consequence of recent statutes, and to have corrected some few decided to be defective, and to have given new forms where rendered absolutely essential by changes in the law. The learned editor claims, too, to have supplied an acknowledged deficiency in the forms of counts on promissory notes and bills of exchange contained in the second volume of former editions, by the addition of nearly *sixty* new forms, and to have inserted various new forms of conclusions in debt, and to have given in the notes references to forms of a special nature introduced in reported cases, which he has abstained from inserting at large, in order not to increase the bulk of the work. The learned editor also states that he has made considerable additions to the notes of the second volume, which he believes will be found of great use to the practitioner. As regards the third volume, the principal alterations are stated to be the striking out those forms which have been decided to be bad, as amounting to the general issue, or as included in a common traverse, and the introducing new forms selected from reported cases, giving the references to such cases in the notes. In conclusion the learned editor observes, "When it is considered that the work has been accomplished in a comparatively short space of time, and that since the last edition was published *a completely new system of pleading has been carried out in practice*, and consequently more numerous and important decisions pronounced on the subject than in double the same space of time in any other period of our legal history, I hope I may be permitted to ask for myself that indulgence in respect of inaccuracies which the learned author himself experienced through so many editions and during so many years."

We have been thus particular in distinguishing as to what the learned editor lays claim in this edition, that we may not

visit upon him sins of which he has not been guilty. It would be an easy matter, were we so disposed, to point out the faults and omissions in the design and arrangement of the original work, and then to censure Mr. Greening for not having remedied them. This, however, would not be fair, as we should then (to use a legal expression) be travelling out of the record, and blaming this gentleman as to matters with which he has not professed to deal. If, therefore, the learned editor has done that which he in his preface professes to have done, with due skill and diligence,—if he has corrected, enlarged and altered the text in those places where alteration was rendered essential by new statutes, rules of court or cases, —if he has corrected the former references and added such new notes as time has rendered necessary,—and if in the second and third volumes he has weeded and pruned and added to the various forms and notes in the manner alluded to in the preface, then we assert that in bestowing this edition upon the profession he has bestowed upon them a boon of no mean worth, and has deserved at their hands a reward corresponding in value to the extent and arduous character of his labours; for we consider that any gentleman who publishes for the advantage of his professional brethren, either a new work upon an intact subject, or a new edition of a standard old work, deserves well at their hands, provided in the former case the work is of standard excellence, and that in the latter case the new edition is equal in character to the original work, bringing it down to the period of such edition, and is not merely a reprint, with large pretensions but slight merits, rich in preface but poor in cases, extremely well executed as regards type and other mechanical appliances, but ill-performed in the departments where mind and industry should have appeared.

We have perused this edition with considerable care, anxious to extend to the learned editor that indulgence which he solicits in respect of inaccuracies, could we do so consistently with an honest judgment. We well know the labour attendant upon the editing efficiently a work of this sort, treating as it does upon a multitude of matters, many of them upon abstruse subjects, and involving a mass of fresh material, arising out of

new cases, which requires the greatest industry to interweave with the original text. In the present case, the new decisions have been, as we have before hinted, unusually numerous and important. And we are sorry to be obliged to state that, as regards the *first volume*, the learned editor has not introduced, or in any way referred to, many of great authority, intimately bearing upon the subject-matter treated of. Had these omissions been few and far between, we should have extended to them the indulgence craved in the preface; but when we find them so numerous as seriously to compromise the value of the work, we are in duty bound not to pass them over in silence; and however painful it may be to ourselves, and still more painful it must be to the learned editor, we are compelled to give an unfavourable judgment upon this edition. It is by no means what it ought to be; nor is it that which the professional public had a right to expect in a new edition of this work.

That we may not be considered as condemning without cause, or wantonly pronouncing an unfavourable judgment without sufficient warranty, we shall proceed to notice some of those omissions which have forced us to this opinion. At page 12, where the right of a covenantee not executing a deed to sue thereon is discussed, the case of Aveline v. Whisson, C. P. 21 L. J. R. 58, is omitted, and the important cases of Cardwell v. Lucas, 2 M. & W. 111; and Gooch v. Goodman, 2 G. & D. 159, are merely noticed incidentally in a note; the principle upon which those decisions turn, and which it would have been of advantage to the student at least to have explained, not being touched on. At pages 133, 134, where the subject is again introduced, Aveline v. Whisson is certainly quoted in a note, and a little more light is thrown upon the subject; but in neither the one place or the other are the cases quoted in such a way as to be intelligible to any one not well acquainted with the subject. At page 4 is discussed the very important question whether or not an *entire* stranger to the consideration can sue upon a simple contract. Mr. Chitty, although it is difficult to collect accurately the full extent of his meaning, the whole of the passage bearing upon this subject being (as we conceive) studiously obscure, evidently leans to

the opinion that a stranger to the consideration might sue upon a simple contract when the contract was made for his sole benefit; and he cites some old cases in support of that view. Now we venture to assert that no legal proposition is more clear, than that an *entire* stranger to the consideration cannot sue upon a simple contract. The old cases upon the subject, and they are numerous, are collected in Viner's Abridgement, and the great weight of authority even there is against a stranger to the consideration so suing. In more modern times, the question has been beyond doubt, it being laid down as well settled in 2 Saund. 137 d, note b, citing Bourne v. Mason, 1 Vent. 6; and Crow v. Rogers, 1 Stra. 592; and in the late case of Price v. Euston, 4 B. & Adol. 433; 1 Nev. & M. 303, the same principle was adhered to; besides, we conceive the reason of the rule to be plain; a simple contract is a nudum pactum, without consideration to support it; and it is consequently, a nudum pactum as regards any party suing thereon, who cannot bring himself within the line of the consideration, but is a stranger thereto. The only exceptions to the rule are bills of exchange, promissory notes, cheques, and other cases, where by statute the assignee of a chose in action may sue in his own name. At pages 33 & 66, where the right and liability of a married woman to sue and be sued in certain cases as a feme sole are discussed, the distinction drawn in the case of Barden v. Keverberg, 2 M. & W. 61, between the wife of an alien enemy and an alien ami, is not alluded to, that case being merely named in the note (at page 66) without further notice. Now at page 66 it is stated in the text that "a woman by birth an alien, and the wife of an alien, cannot be sued as a feme sole, if her husband has lived with her in this country, although he has left her here and entered into the service of a foreign state." This text is not now correct. The rule, as laid down by the above case of Barden v. Keverberg, is, that the wife of an alien enemy may be sued as a feme sole, because the wife of an alien enemy cannot lawfully be in England; but that the circumstances of the husband being an alien ami, who has never been in England, *semble*, does not render the wife liable as a feme sole, because a wife is only liable as a feme sole on

account of her husband being abroad, *when he is civiliter mortuus*, which an alien ami is not. The text, therefore, required modification, and the distinction between the wife of an alien enemy and an alien ami might well have been noticed. At page 41, where an agent's liability to be sued personally on a contract made by him in those cases in which he has exceeded the authority given him by his principal is treated of, two most important cases upon the subject are altogether omitted, viz. Wilson v. Barthrop, 2 M. & W. 863, and Smout v. Ilbery, 10 M. & W. 1. The last case is quite a leading authority, having defined in what cases he is or is not so liable, as it may be collected from it that he is in like manner liable when he exceeds his authority, whether he has fraudulently misrepresented his authority with an intention to deceive; *or* knowing he had no authority, has, notwithstanding, made the contract as having such authority; *or* bonâ fide believing that he has such authority vested in him, when he had in fact no such authority, has simply entered into the contract in mistake of his own powers: and the reason given for such liability in these cases is, that in all of them he equally commits a wrong; in the two first knowingly, and in the last, by representing as true that which he does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that it will ultimately turn out correct. The case also decides that an agent who exceeds his authority is not liable personally, unless guilty of some fraud, or unless he made some statement knowing it to be false, or represented as true that which he did not know to be so, omitting at the same time to give to the party contracting with him such information as would enable him to judge of the agent's powers equally with himself. Again, at page 42, in noticing what is such an appropriation by an agent of money received by him to be paid to a third party, as destroys the right of the party ordering it to be so paid to countermand his order, and sue the agent for money had and received to his use, the cases of Lilly v. Hayes, 1 N. & P. 26, and 5 A. & E. 548, and Walker v. Rostron, 9 M. & W. 411, both bearing materially upon the question, are omitted.

At page 47, the liability of a lunatic upon his contracts is mentioned. The text amounts to just two lines and a half,

and there is only one case cited in the note, viz. Baxter v. The Earl of Portsmouth, 5 B. & C. 170. Now as the question has been much discussed and elucidated since the last edition by the cases of Tarbuck v. Bispham, 2 M. & W. 6; Dane v. Viscountess Kirkwell, 8 C. & P. 679, and as there are many other important cases upon the subject, in addition to the one case cited, either an alteration and enlargement of the text, or a note illustrating the cases, would have been desirable, inasmuch as the effect of leaving the matter as it at present stands is to compel the practitioner to go to other works for his information, this being so very bare as to be of no service.

At page 48 the law as to the liability of a retired partner for the old debts of the firm is laid down, and we find that the old text is left in statu quo, for which a single authority is given in the note, viz. David v. Ellice, 5 B. & C. 196, an authority so much shaken as virtually to be overruled by the later cases of Thompson v. Percival, 3 Nev. & Man. 167, and 5 B. & Ad. 925; and Hart v. Alexander, 2 M. & W. 484. Parke, B. in the latter case observing, "in David v. Ellice, the retired partner was held liable; but the court was substituted for a jury in that case, and I much doubt whether twelve merchants would have determined it as the court did. *The authority of that case*, as well as of Lodge v. Dicas, *has been much shaken* by Thompson v. Percival." How is it, we inquire, that the above authorities, with Kirwan v. Kirwan, 2 C. & M. 626; Thomas v. Shillibeer, 3 C. M. & R. 128; S. C. 1 M. & W. 124; and Wilson v. Bailey, 2 Scott, N. R. 115, are not introduced, authorities that have rendered the text inapplicable to the law as it now stands, and that contain the law upon the subject? Can we, in the face of omissions such as these, giving damning evidence of want of attention or want of knowledge, say that the editor has performed his duty well, or that the edition is a valuable one? Again, in treating of the liability of dormant partners at page 49, the case of Beckham v. Drake, 9 M. & W. 79, is not in any way noticed.

At page 51, in note (*q*), it is laid down that "the court will not permit the striking out the names of one or more defendants to cure the defect" of a misjoinder of too many defendants in an action ex contractu. This is the old note, and unfortunately is not correct, as since the last edition the case

of Palmer v. Beale, 9 Dowl. P. C. 529, which is not at all noticed, has been decided, the marginal note of which is, that "where a plaintiff has made too many persons defendants, the court will, previous to trial, allow the name of one to be struck out of the proceedings subsequent to the writ, on payment of costs, the remaining defendants being allowed to plead de novo."

At page 55, in touching on the liability of the consignor and consignee for freight, the cases of Sanders v. Vanzeller, 2 G. & D. 244; Coleman v. Lambert, 5 M. & W. 502; Sir John Tobin, Knight, v. Crawford, 5 M. & W. 235: and Amos v. Temperley, 20 Law Jour. Rep. 183, are omitted.

At pages 57, 123, and 131, it is stated in the text that debt will not lie against the assignee of part of the land demised by a lease, but only against the assignee of the whole: this is much too broadly stated, as debt lies against the assignee of a part of the land for the *whole* term; 2 Saund. 182, note l.

At page 62, it is asserted that where a promise made by a bankrupt to pay a debt barred by his certificate is conditional, that, *semble*, it is not sufficient for the creditor to declare upon the original promise, but that he must declare specially. This position is incorrect, as it is proper to declare upon the original promise, though the plaintiff must *prove* performance of the condition in evidence. The same rule holds good in the case of a conditional promise, to take the case out of the Statute of Limitations; and the reason is, because when the condition is once performed the promise becomes an absolute one to pay the original debt, and may be treated accordingly: Irving v. Veitch, 3 M. & W. 90, 110–112. This case might have been referred to, and quoted with advantage.

At page 63 it is said, "that a certificate under an Irish commission of bankruptcy, though it be since the Union, is no discharge of a debt contracted in England." This is the old text of the sixth edition, and the authorities given are the same as those quoted in that edition. Since then, however, the case of Fergusson v. Spencer, 2 Scott, N. R. 229, and 1 Man. & G. 987, has been published, which decides "that a certificate under the Irish Bankrupt Act, 6 & 7 Will. IV. c. 14, operates as a bar as well of debts due from the bankrupt in

England or Scotland as of those incurred by him in Ireland;" being just the reverse of that which is in this edition stated to be the law.

. In referring to the statute 11 Geo. IV. & 1 Will. IV. c. 47, (the late act relating to heirs and devisees,) at p. 60, it is not noticed that the act is confined to wills, &c. made by persons then (at the time of the passing of the act) in *being*, or thereafter to be made by any person whatsoever, (see sect. 2.) It does not in any way affect the wills of parties who died before the passing of it.

At page 73, where the rule is laid down as to the right of partners to sue jointly for slander of their joint interests, the case of Harrison v. Bevington, 8 C. & P. 708, is omitted.

At page 81, where it is laid down "that a party may support trover or trespass against his assignees, if he were not liable to the fiat," no mention is made of the 5 & 6 Vict. c. 122, s. 54, which provides that no official assignee shall be personally liable for any act done by him or by his order or authority in the execution of his duty as such official assignee, by reason of the debt, trading, and act of bankruptcy, or either of such matters, being insufficient to support the adjudication.

At page 88, the case of Wright v. Maude, 10 M. & W. 527, which bears upon the matter treated of, is omitted.

At pages 91 and 92, where the important question of a master's liability for the acts of his servant when driving a carriage or other vehicle, is discussed, the case of Lamb v. Palk, 9 C. & P. 629, is omitted.

At page 92, the old text, that "where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the court were equally divided in opinion upon the question, whether the owner of the carriage was liable to be sued for such injury," is retained, though the question has since been decided, and is now beyond doubt: true it is, that in a note it is mentioned that the question has been since decided, and the cases are given, but neither in the text or the notes is noticed the leading case upon the subject, of Maclaughlin v. Pryor, 4 Scott, N. R. 655. Again, since

the sixth edition, several cases have been decided as to how far a master is liable for the acts of a person he is bound by law to employ, or who exercises an independent calling, such as licensed drovers and pilots: there are the cases of Lucy v. Ingram, 6 M. & W. 302; Milligan v. Wedge, 4 P. & D. 714; Rapson v. Cubitt, 9 M. & W. 710, &c. &c., all laying down or elucidating important principles upon an interesting branch of the subject, which it is not too much to expect that the editor should have noticed in this edition; yet they have no place therein, not even in a note, and a person trusting to this edition for his law would consequently be quite unconscious that the circumstance of the person employed being employed by compulsion of law, or of his exercising an independent calling, could in any way affect the question.

At page 92, in treating of the liability of a sheriff for the act of his bailiff, the case of Smart v. Hutton, 8 A. & E. 568, note, is omitted, and the distinction between a special bailiff and another is not noticed, it being stated generally that a sheriff is liable for the misconduct of his bailiffs in the course of the execution of their duties, whereas in the case of a special bailiff, he is not so liable; Ford v. Leche, 1 N. & P. 737; his responsibility in such case only commencing when the prisoner is delivered into his actual custody.

At page 113, in stating that assumpsit will not lie to recover back money paid to redeem goods distrained damage feasant, the case of Cowne v. Garment, 1 Scott, 275, is omitted.

At the same page, in stating that assumpsit lies upon foreign judgments, it is not noticed that it lies upon Scotch decrees, and the late cases of Cowan v. Braidwood, 2 Scott, N. R. 138, and Russell v. Smyth, 9 M. & W. 810, and 1 Dowl. N. S. 929, are omitted. And at page 113, where the same subject is again touched on, though it mentions that assumpsit lies upon Scotch decrees, yet the above case of Cowan v. Braidwood is omitted, and the case of Russell v. Smyth is only cited in a note, it being a case well worthy of more full notice, inasmuch as Parke, B. in his judgment lays down "a principle," which, wherever found in the common law, should not be lost sight of, as principles in this branch are so scarce and so entirely the exception, and small points so rife and so much the rule,

that where met with, they should be cherished as gems of some price—Parke, B. lays it down that "when the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country."

Again, at the same page, in note (*n*), the Tithe Act is misquoted as cap. 44 instead of 74.

Again, at the same page, in touching upon awards, the late case of Hoggins v. Gordon, 2 Gale & D. 656, deciding that an arbitrator may maintain an action of assumpsit upon an *express* promise to pay him the costs of a reference, is omitted, so that in this unfortunate page there are no less than *four* errors of commission and omission.

At page 114, the old text is unaltered, and *now* erroneous. It states that the executor of a tenant for life may recover a proportion of the rent up to the day of the death of his testator, where the tenancy determined on his death, "though, where the tenant held under a lease granted in pursuance of a leasing power, the remainder-man must sue for the whole rent on such lease." This distinction has been got rid of by the statute 4 Will. IV. c. 22, s. 1, which enables an executor or administrator to recover such proportion of the rent in all cases, whether the leases were made by the life tenant and determined with his life, or whether, being under a power or otherwise, they do not so determine.

At page 115, it is said that "where a party has different securities of different descriptions for the same debt or demand, and from the same person, he must found his action on that security which is in law of the higher nature and efficacy." This rule is much too broadly laid down, as if such security of a higher nature have been taken, not in satisfaction of the lower one, but as a collateral and additional security, the lower one is not merged, and an action will lie upon it notwithstanding the higher security, and so if the higher security be void.

The cases of Davies v. Davies, 9 C. & P. 87, and West, clerk, v. Turner, clerk, 1 N. & P. 612, are not anywhere noticed, either under the title of assumpsit or elsewhere, nor is the late case of Ritch v. Russell, 3 Gale & D. 198, men-

tioned, which decides that a physician may recover on an *express* contract to remunerate him for his attendance.

At page 124, in treating of the action of debt for the arrears of an annuity, the case of Randall v. Rigby, 4 M. & W. and 6 Dowl. P. C. 650, is omitted.

At page 125, it is stated, that "upon the proceeding by scire facias upon a recognizance of bail, the bail are not liable to the costs of the scire facias, *unless they appear and plead thereto.*" This is the old text, and *was* the law, but it has been altered by the statute 3 & 4 Will. IV. c. 42, s. 34, which gives the plaintiff his costs in scire facias on a judgment by *default*, as well as after plea pleaded, or demurrer joined. Of this alteration no notice whatever is taken.

At page 129, it is stated that judgment in the plaintiff's favour in debt, is final at common law in *all* cases. This is not correct. Thus, in debt on the statute of Edward the Sixth for tithes, and in debt for foreign money, there must be a writ of inquiry, 2 Saund. 107 a, note b.

At page 152, in treating of nonfeasance, and whether case will lie for a nonfeasance founded upon a contract, the cases of Young v. Tewson, 8 C. & P. 55, and Boorman v. Brown, 2 Gale & D. 793, are omitted. The last case, which was decided upon error in the Exchequer Chamber, may be considered a leading authority upon the vexed question, whether an action of tort will lie for a nonfeasance, amounting merely to a breach of contract.

At page 164, where the law as to whether trover will lie for fixtures is mentioned, the late cases upon the point, in which the question has received much elucidation, are merely quoted in a note. This however is better than the omission of them altogether, though they throw so much new light upon the matter, that it would have been still better had the learned editor diffused its rays a little for the benefit of his readers.

At page 175, in treating of the right of one tenant in common to bring trover against another, the following passage (being the old text) occurs: "It seems to be questionable whether the mere sale by one of two joint owners of a ship, is a sufficient conversion to enable his companion to maintain trover against him, for such sale could not in law affect or pass more than the interest of the seller." In the note to this pas-

sage the case of Farrar v. Beswick, 1 M. & W. 688, is simply named, though in that case there are some valuable observations by Parke, B., on the point, he having observed, "I have always understood, until the doubt was raised in Barton v. Williams, 5 B. & Ald. 395, that one joint tenant or tenant in common of a chattel, could not be guilty of a conversion by a sale of that chattel, unless it was sold in such manner as to deprive his partner of his interest in it; a sale in market overt would have that effect." The distinction therefore (there is little doubt) is between a sale in market overt and not in market overt, the former being such a destruction in law as entitles one joint tenant or tenant in common to maintain trover against his fellow; the latter giving no such right, not amounting to a destruction of the thing in common, because a sale not in market overt does not alter the right of property therein.

At page 181, where the question of damages in trover is discussed, the late case of M'Leod v. M'Ghie, 2 Scott, N. R. 604, is omitted, and nothing is said as to the effect of a return of the goods converted before action on the amount of damages. While treating of trover, we may observe, that the case of Whitmore v. Robinson, 8 M & W. 463, and Skey v. Carter, 11 M. & W. 571, the great importance of which it is unnecessary to enforce, are not alluded to, although at page 173 we find that in note (*e*) the 2 & 3 Vict. c. 29, is quoted, "as rendering valid executions bonâ fide executed and levied before the date and issuing of the fiat, notwithstanding a prior act of bankruptcy, provided the execution creditor had not at the time notice of any prior act of bankruptcy committed by the defendant." Now here was a tempting opportunity for the mention of the above cases, which it is a mystery to us the learned editor could resist. We are satisfied he must have had a hard struggle with himself to do so, and had most cogent *reasons* for the omission. Be that however as it may, we take it that the profession would have been more gratified had he deferred his own feelings on the subject to theirs, and introduced the cases.

The case of George v. Chambers, 11 M. & W. 149, is not noticed in treating of replevin.

At page 186, in reference to whether trespass will lie for

an assault committed out of the Queen's dominions, the case of Glyn v. Sir William Houston, 2 Scott, N. R. 548, is omitted.

At page 207, it is laid down that "trespass is the proper form of action, if there be a misnomer in the process, which has not been waived, though it be executed on the person or goods of the party against whom it was in fact intended to be issued." Now here the case of Fisher v. Magnay, 3 Dowl. N. S. 40, is omitted; the above is the text of the sixth edition, since which the case has been published. In that case, which was an action of trespass for false arrest, brought against the sheriff by the plaintiff in the name of F. W. F., the defendant pleaded a justification under a ca. sa. issued on a judgment obtained against the plaintiff. At the trial the writ produced authorized the arrest of F. F., and it appeared that in the original action the plaintiff was so described, and that he had taken no means to procure the correction of his name, but that he had sworn an affidavit therein, in which he described himself as F. W. F., sued as F. F. Held, that the plea of justification was supported by the production of the writ, and of evidence of the identity of F. W. F. and F. F., and that the issue of the identity of the plaintiff, and the defendant in the former action, was sufficiently raised by the plea, without any averment that the plaintiff was known as well by one name as the other, and that the plaintiff having omitted to take advantage of the misnomer in the first action, had precluded himself from raising any objection on the ground of the misstatement of his name in the writ.

At the same page (207) it is said, when an officer arrests without warrant, "that trespass is the remedy against the informer, if there were no warrant, although it appears that some person had committed the offence, and it be one for which an arrest might legally be made without a warrant, provided there was not reasonable or probable cause for charging the plaintiff with having committed the offence." The late cases of West v. Smallwood, 3 M. & W. 418, Hopkins v. Crowe, 7 C. & P. 373, and Wheeler v. Whiting, 9 C. & P. 262, are here omitted, and the rule as laid down, is not correct. The law is, that if the informer *participates* in the

arrest, he is liable in trespass, if the arrest be wrongful; but if he merely makes a statement to the officer, but does not participate in the arrest, if he leave it to the discretion of the officer to arrest or not, and he arrests, the informer is not liable in trespass, though the arrest be wrongful; the remedy against the informer (in those cases where there is any) being case.

We are, however, fatiguing our readers by this painful enumeration of instances, or if we chose to deal in pleading phrases, we might aptly call it this assignment of errors. And as our only object in citing them at all was to show that we were not actuated by any malice prepense against the learned editor or the work itself, but that our opinion was founded upon the merits or rather demerits of this edition, and upon them alone, we consider that we have done enough in this way to make out our case, and shall therefore abstain from further notice of specific defects; suffice it for the above object, that we have shown the omission of above fifty important cases in 207 pages of the first volume. In the face of these omissions, it is impossible for us to come to any conclusion other than that we have arrived at, especially as the same want of attention and omission of cases, though in a modified degree, runs through the remaining portion of the first volume, which, being the volume that comprises the treatise portion of the work, is perhaps the one of the greatest general importance; the second and third volumes, comprising the forms, being of utility chiefly to the pleader by profession, though occasionally to the other branches of the profession as books of reference.

Of the second and third volumes we are happy in being able to speak in much more favourable terms than of the first volume. And if we may be allowed to express an opinion upon the subject, we should judge that by far the greater portion of the time and care devoted to this edition has been bestowed upon these volumes. We find more careful revision, and more copious and useful notes. Had the same attention been paid to the first volume we meet with here, we should, instead of using the sword, have perhaps been enabled to present the laurel; as it is, however, the errors of the first volume are so serious, both as to number and quality, in

consequence of its not being brought down to the present time, that they more than counterbalance any improvements or merits contained in the last two volumes, and cast their taint upon the whole edition, the two last volumes, without the first, being of value to a comparatively small number of practitioners. As a whole, therefore, we must pronounce this edition a decided failure; and, in the name of the profession at large, must charge upon the learned editor the having done them a grievous wrong in putting forth an almost useless edition of a standard work, and thus depriving them, for some time at least, of a more perfect edition; as, until this is in a measure sold off, another edition is more than we dare expect.

B.

—*Law Magazine.*

SIR EDMUND SAUNDERS'S REPORTS.

The Reports of the most learned Sir Edmund Saunders, Knight, of several Pleadings and Cases in the Court of King's Bench in the time of Charles the Second. Edited by John Williams, Serjeant-at-Law. The Fifth Edition by John Patteson, Esq. (now one of the Judges of the Court of Queen's Bench), and Edward Vaughan Williams, Esq. The Sixth Edition by Edward Vaughan Williams, Esq. London: Benning & Co. 1845.

THE Terence of reporters, as Saunders was happily termed by the great Lord Mansfield, may be said to have met with a Bentley for his annotator in the person of Mr. Vaughan Williams. The terse, concise and simple elegance of the Latin classic was not more richly illustrated—the *curiosa felicitas* of his sentences not more dexterously set off, and embellished—sometimes even overlaid—by the copious learning of the slashing critic, who selected those luminous pages for his text, than have the dramatic reports of our legal classic, with their clear simplicity and exquisite precision, been adapted to the use of the modern student, by the exercise of an erudition at once extensive and profound, a judicious arrangement of new materials, and a discriminating choice of

topics the best calculated to initiate the pleader in the doctrines and mysteries of his great master.

Whilst Mr. Williams equals, however, the mighty Aristarch in the learning, diligence, accuracy and acquirements essential to the due discharge of his labours as editor, he is free from the defects which marred the character of the ancient scholar, without a single particle of his arrogance, rashness, or conceit, and may be trusted by the student, as a sure interpreter and safe guide.

The reports of Saunders were printed originally in folio in the year 1686 in the Norman French, when Jeffreys and the other Judges gave the *imprimatur* to their publication. A modern reader of the majority of reports would not loudly complain were such an *imprimatur* necessary now; he might not even feel excessive disappointment though they were printed in the same uncouth jargon, or in a similar unwieldly form. From its clear method and judicious choice of topics the work has formed ever since a pass key to open the treasures of the science—the text book of the pleader, what the Black-letter Bible with its marginal references was to the theologian, or Euclid to the geometrician. A new edition was called for in 1722, and printed in the octavo size. It was a happy thought of Serjeant Williams, at the distance of more than a century from the original publication, himself a distinguished pleader and the pupil of Baron Wood, to illustrate with his mature knowledge and daily experience the then state of practice and pleading, and to comment on the lucid text in a series of detached disquisitions varying in their length and frequency by no fixed standard, but in the way his judgment deemed best to elucidate the law, as it was then interpreted and administered. To use his own words: "It occurred to the editor that if he could further recommend this book by making it a kind of introduction to the rules and doctrine of pleading, applied to practice, he should be employing his leisure time usefully to the profession, and advantageously to himself. With this view he has translated the entries into English, and, in order to induce the student to read them with attention, has to many of them subjoined notes, in which he has endeavoured to explain from authorities the grounds

and principles upon which the rules are founded; has in some instances illustrated those rules by practical examples, and has pointed out the difference, when any such exists, between the present manner of pleading, and that which is used in the entry. When a note was begun, he was tempted to investigate the whole subject in the best manner he was able, from a hope at least, that a full discussion, though it much increased his labour, would be found more useful to the student, than mere references to cases, unaccompanied with any introductory observations." His able efforts at explanation and guidance were approved by a fourth edition in 1809, and admirably seconded afterwards by Mr. Justice Patteson and the son of Serjeant Williams, who completed the fifth edition in 1824. "They added all the cases which had been decided since the last edition upon the subjects treated of in the former notes; and some few notes upon subjects not before discussed, which appeared to them to be connected with the matters contained in these reports." More than twenty years have elapsed since then; the two most memorable decades in the history of the law, far more replete with judicial and legislative improvement than even the memorable epoch of Charles II.'s reign, which preceded the publication of the reports in the text. Were the amount of these changes and additions determined by their weight and bulk alone, they would be deemed most considerable. Nine quarto volumes of Ruffhead's Statutes at Large—as great a number as the whole series from the ninth of Henry III. to the beginning of the reign of George III.—have been since heaped upon the already unwieldly mass of legislation. Twenty-nine volumes of reports by Barnewell and Cresswell, Barnewell and Adolphus, and Adolphus and Ellis, have been accumulated to a series still "stretching to the crack of doom," not to mention the labours of the duplicate, often triplicate, sets of reporters in each court. But the real importance of these legislative reforms and judicial decisions cannot be duly estimated by weight and rule, or measured out by statistics. Since the former edition of this work a completely new system of pleading has been introduced—matured—perfected, requiring increased ability in the draftsman, and additional wariness in

his instructors. The Administration of Justice Act, 11 Geo. IV. & 1 Will. IV. c. 70, gave a plenary power to the judges of making orders, which in six months might have the force of laws, and they wisely exercised the discretion entrusted to them by framing rules in Trinity Term, 1831, and Hilary Term, 1832, to assimilate the practice of the different courts —to abolish useless forms and empty verbiage—to render the proceedings in an action more clear, and precise, and definite—to accelerate the determination of the cause, and to diminish its costs to suitors. There may have been occasional harshness in the manner in which a judge has exercised his arbitrary will at chambers, limiting the plaintiff to a single count, and the defendant to one plea, when the exigencies of the case at the trial required a greater latitude of statement, but the general effect has been, beyond question, certainty, economy, and dispatch. By limiting the plaintiff to one count for each distinct cause of action, and the defendant to one plea for each separate ground of defence, each party is compelled to ascertain and state his case with accuracy and precision, divested of any superfluous allegations, which his proofs may be inadequate to support, and yet sustained by averments which may have been anxiously introduced in order to meet the scrutiny and objections of his adversary. When several counts or several pleas upon the same principal subject-matter could be adopted—when the same fact might be varied in shape or form at pleasure, it mattered little to the pleader that parts of his pleadings were incorrect; he was not bound to concentrate his case, and he sought refuge from the consequences of his ignorance of the facts, or of their legal operation, in the diversity and variety of his claims or defences. (*a*)

To exhibit pleading in its new and well-adjusted shape, attired as it has been in a novel garb, required the tact and facility of a practised and dexterous hand, and with such it is no idle compliment to say that Mr. Williams has always invested his subjects. We may instance the following clear and practical comments upon nice points of pleading.

(*a*) Jos. Chitty's Introduction.

"As an example of the proposition contained in the above note, that every traverse must be of matter of fact, and not of law, it may be mentioned, that where the declaration states certain facts, and then proceeds to allege that a duty on the part of the defendant arose therefrom, the defendant cannot plead, by way of traverse, that it was not his duty as alleged; for that would be a traverse of a mere inference of law, and therefore bad. 3 Bing. N. C. 334, Trower v. Chadwick; 3 Scott, 699, S. C.; 5 A. & E. 647, Cane v. Chapman; 1 Nev. & P. 104, S. C. And it should seem that, properly speaking, the rule as to a *virtute cujus* not being traversable, is but another example of this proposition; the reason for the rule being, that the *virtute cujus* only collects the matter alleged before, and draws a conclusion from it, and then being mere matter of law, it is not traversable. And in this point of view the rule is fully sustained by modern authorities, 9 A. & E. 292, Dangerfield v. Thomas; 1 Perr. & Dav. 287, S. C. Therefore, it if were alleged that A. was in custody of the sheriff at the suit of B., and that C., who had a judgment against him, delivered a ca. sa. against him to the sheriff, whereby he became and was in custody of the said sheriff at the suit of C., a traverse that he *thereby* became in custody at the suit of C. would be clearly bad; because the law says in such case he *does* become in the sheriff's custody at the suit of C. (see 1 Q. B. 525, Barrack v. Newton), and the traverse therefore would be a traverse of a mere matter of law. 10 Bing, 193. But although an allegation of a mere result of law is not traversable, yet an allegation, compounded of law and fact mixed, may be traversed. 6 A. & E. 482, Ransford v. Copeland; 1 Perr. & Dav. 671, S. C.; 11 A. & E. 529, Drewe v. Lainson; 3 Perr. & D. 245, S. C.; 8 Mees. & W. 1, Rutter v. Chapman. For example, an allegation in a plea that a company were illegally associated to more than the number of six as bankers, is traversable. 6 A. & E. 482. And accordingly it is now settled that a *virtute cujus*, where it is mixed with matter of fact, and does not put in issue a mere conclusion of law, is traversable. 4 Bing. 729, Lucas v. Nockells; 2 Y. & J. 304; 1 Moo. & P. 783, S. C.: 10 Bing. 158; 3 Moo. & Sc. 627; 7 Bligh, N. S. 140, S. C. in Dom. Proc. Thus, if in an action of trespass the defendant pleads in justification a seizure of goods as sheriff by virtue of a writ of *fi. fa.*, the allegation of the seizure of the goods *by virtue of the writ* is not a matter of law, but of fact, and is therefore traversable. Lucas v. Nockells, ubi supra; 8 A. & E. 872, Carnaby v. Welly; 1 Perr. & D. 98, S. C. And by a replication to such a plea, admitting the writ, and adding de injuriâ absque residuo causa, the plaintiff may raise the question of fact, whether the sheriff seized by virtue of the

writ or not; and may show under that traverse that the acts of the defendant were not really done under or in execution of the writ, but for another purpose under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods. Lucas v. Nockells, ubi supra; 1 Bing. N. C. 387, Price v. Peck, per Tindal, C. J.; 1 Scott, 217, S. C." (*a*)

But the diligence and research of Mr. Vaughan Williams are not restricted to points of pleading alone. Upon all the collateral topics of law and practice, to which the commentaries of the former editors have been directed, there have devolved so many and such important statutory enactments, as to form a new era in legislation: the series of acts which bore the respected name of Lord Tenterden,—the acts for limiting the period of undisturbed possession, and facilitating transfers, of real property; the Will Act, the Copyhold Act, the Prescription Act, have produced most extensive and salutary reforms, and have been followed by more numerous and weighty decisions, than in tenfold the same space of time during any other period of our legal history.

Equally great, if not greater, changes have swept over the form, and constitution, and doctrines of the common law. Not to mention the vast alterations in the criminal law, the poor law, the law of the constitution from the Reform and Municipal Corporation Acts, as generally inapplicable to the subject of the present work, what an expanse of improvement has been opened by the law for abolishing arrest on mesne process, for allowing amendments in the record, and increasing arbitrations by preventing parties from revoking their submission; by those very useful and important statutes 3 & 4 Will. IV. c. 42, s. 1, and 1 & 2 Vict. c. 100, enabling the judges by any rule or order to make such alterations in the mode of pleading as to them may seem expedient; by the law of interpleader, entitling the sheriff to relief against doubtful claims; by the law which affords to judgment-creditors more effectual remedies against the real and personal estates of their debtors; by directing writs of trial to the sheriff for sums under 20*l.*; by preventing delays to creditors

(*a*) Vol. i. 23 a.

from frivolous writs of error; by the Attorneys' and Solicitors' Act; by the Act for the Confirmation and Prolongation of Patent Rights; by the law of Tithes, and the law of Libel.

To render the text of Saunders correct, and the former commentaries intelligible, it became absolutely necessary that the present editor, from the affluence of his commonplace book, should furnish a copious accompaniment of corrective, and supplementary, and explanatory notes, at the foot of almost every page.

"Quæcunque in foliis descripsit
Digerit in numerum."

Of the ample measure "pressed down and running over" with which he has illustrated and explained these progressive amendments, the following forms an excellent specimen;

"In some of the cases above cited, and likewise in the subsequent cases of Young v. Timmins, 1 Cr. & J. 331, and Horner v. Graves, 7 Bing. 735; 5 M. & P. 768, S. C., the judges appear to have considered that *adequacy* of consideration was essential to support a contract in restraint of trade. But later authorities have repudiated this doctrine, and have established that the court cannot inquire into the *extent* or *adequacy* of the consideration; 6 A. & E. 438, Hitchcock v. Coker; 1 N. & P. 796, S. C.; 6 A. & E. 959, Archer v. Marsh; 2 N. & P. 562, S. C.; 3 M. & W. 545, Leighton v. Wales. The law now is, that total restraints of trade are absolutely bad; and that all restraints, though only partial, if nothing more appear are presumed to be bad. Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which rendered such a contract reasonable, the instrument is void; 11 M. & W. 665. But if there are circumstances recited in the instrument, (or probably, if they appear by averment,) it is for the court to determine whether the contract be a fair and reasonable one or not; and the test appears to be whether it is prejudicial or not to the public interest; for it is on grounds of public policy alone that these contracts are supported or avoided; Ibid. Partial restraints of trade in the instance of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place, (which is in effect the sale of a good-will), and in that of a tradesman, manufacturer, or professional man, taking a servant or clerk into his service, with a contract that he (the servant or clerk) will not carry on the same trade or profession within certain limits, have

been supported as being, not injurious to trade, but rather securities necessary for those who are engaged in it; provided the limits within which the restraint is to operate are not unreasonable; for, where the restraint is larger than the protection of the person with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void; 7 Bing. 743; 6 A. & E. 454; 2 M. & Gr. 32, 33; 5 M. & W. 561; 11 M. & W. 667. In the application of this latter test, twenty miles round a place has been held a reasonable limit in the case of a surgeon; 2 Chitt. Rep. 407, Hayward v. Young: London, and one hundred and fifty miles round, in the case of an attorney; 4 East, 190, Bunn v. Guy. Five miles from Northampton Square, in the county of Middlesex, in the case of a milkman; 2 M. & Gr. 20. Proctor v. Sargent; 2 Scott, N. R. 289, S. C.; and London in the case of a dentist; 11 M. & W. 653, Mallan v. May. But in the last case a restriction of carrying on the business in 'London or any of the towns or places in England or Scotland, where the plaintiffs or the defendant on their account *might have* been practising before the expiration of the said service,' was held unreasonable, and therefore void as to the latter part (though the former part, as to not practising in London, was valid, and not affected by the illegality of the latter). It must further be observed, that the principle on which restraints of trade, *partial in point of space*, have been supported, has not been applied to restraints *general in point of space*, but *partial in point of time*; for that which the law does not allow is not to be tolerated because it is to last for a short time only. Therefore, a restraint in the case of a coal-merchant's town traveller and clerk, that he should not follow or be employed in the business of a coal merchant *for nine months* after he should have left the service, was held void; 5 M. & W. 548, Ward v. Byrne. So a covenant by the lessor of a brewery, that he would not, "*during the continuance of the demise*, carry on the business of a brewer, or merchant, or agent, for the sale of ale in Sheffield or elsewhere or in any other manner howsoever be concerned in the said business," was held void; 1 M. & Gr. 195, Hinde v. Gray; 1 Scott N. R. 123, S. C. (But see contra, 3 Beav. 383, Whittaker v. Howe, in which case Lord Langdale, M. R., held, that an agreement by a solicitor for a valuable consideration not to practise as a solicitor in any part of Great Britain for twenty years was valid.) Further authorities confirming the doctrines above stated will be found in 3 Y. & J. 318, Wickens v. Evans; 3 Bing. 322, Homer v. Ashford; 11 Moo. 91, S. C.; 2 M. & W. 273, Wallis v. Day; 3 M. & W. 545, Leighton v. Wales. The question whether

the contract is unreasonable or not is for the court and not for a jury; 11 M. & W. 653." (*a*)

And again:

"As to the right to set dog-spears or other engines for destroying dogs in the pursuit of game, see 7 Taunt. 489, Deane v. Clayton; 2 Marsh. 577, S. C., and 1 B. Moore, 203, S. C., in which case the Court of Common Pleas was divided in opinion. (The Court of Exchequer have lately decided in favour of the right; 8 Mees. & W. 782, Jordan v. Crump.) And as to man-traps and spring-guns, see 3 B. & A. 304, Holt v. Wilkes, in which it was holden that a person *having notice* that spring-guns were set in a wood, and nevertheless trespassing in it, could not maintain an action for an injury sustained from them. But the general question was not settled. (The action was afterwards held maintainable in a case where the plaintiff had no notice that the gun was set, on the principle that setting spring guns without notice was an unlawful act, independently of the statute 7 & 8 Geo. IV. c. 18 (which had passed in the interval between the commencement of the action and the argument); 4 Bing. 628, Bird v. Holbrook; 1 M. & P. 607, S. C. Some doubt has been entertained whether that principle was correct; 8 Mees. & W. 789. The statute, however, has made the setting or placing of spring guns, man traps, or other engines calculated to destroy human life, or inflict grievous bodily harm, with intent that or whereby the same may destroy human life or inflict grievous bodily harm (except in a dwelling-house at night), not merely an unlawful act, but a misdemeanor. (See further on this subject, 1 Q. B. 37, Lynch v. Nurdin. (*b*))"

The task must have been one of no slight difficulty to interweave with the notes a clear exposition of the law as it stands, upon the various topics which these multifarious, judicial and legislative reforms have explained or qualified, reversed or confirmed. Sometimes the labyrinth has been too intricate and tortuous for the skilful commentator to find a clue; confusion too much confounded for even his acumen to extract a clear principle, or decide ex cathedrâ what is the law. Unable to discover a safe resting place for the anxious inquirer from this conflict of adverse decisions, Mr. Williams, a sort of ductor dubitantium, is thus compelled to confess his perplexity and disappointment.

"But the defendant may prove under the general issue in mitigation of damages, rumours previously current. 2 Camp.

(*a*) Vol. ii. 156 a. (*b*) Vol. i. 84 a.

251, Lord Leicester v. Walter. It was determined by the Court of Exchequer in 11 Price, 235, Jones v. Stevens, that evidence of the plaintiff's general bad character was not admissible in mitigation of damages under the general issue, (and the court seemed to deny Lord Leicester v. Walter to be law.) Nevertheless, it is mentioned in 2 Stark. Ev. 642, note (e), 3rd ed., that in Mawby v. Barber, Lincoln Summer Assizes, 1826, Lord Tenterden admitted general evidence of the plaintiff's bad character, and that such evidence was also received by Lord Denman after consulting Park, B., in Moore v Oastler, York Spring Assizes, 1836, and by Coltman, J., in Hardy v. Alexander, Liverpool Summer Assizes, 1837. The distinction above taken by Chambre, J., appears to have been disregarded by Lord Tenterden in Mawby v. Barber, Stark. ubi supra. And yet, in an action of slander for imputing felony, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue and also pleas in justification of the slander, averring that the charge of felony was true, his lordship held that evidence of general good character was not admissible for the plaintiff, and observed that if such evidence was admitted then the defendant must be allowed to go into evidence to prove that the plaintiff was a man of bad character. R. & Moo. 305, Cornwall v. Richardson. So that the law on the subject appears to be very unsettled." (*a*)

In this unsettled and unsatisfactory state several departments of the law may be expected for some period to remain. The hand of the legislative and judicial reformer having been at least as active in pulling down as in building up, in demolishing as in re-constructing.

"Diruit, ædificat, mutat quadrata rotundis."

Meantime, extreme circumspection is necessary to prevent stumbling between the ruins of the former, and the rising buildings of the modern, system.

Instead of reconciling the old state of the law with the new, and guiding his readers over a ground almost impeded with innovations, the present editor might have abbreviated the amount of his labours by expunging from the work all the learning that had been rendered nugatory, and the notes that were become obsolete—and by rejecting disquisitions on subjects that had lost with the process of amendment their practical interest. This plan would have rendered the work

(*a*) Vol. i. 131 a.

of more instant utility as a companion in court, would have given it the charm of ready access to a practitioner, and enabled him to ascertain that, which in general forms the height of his ambition—what the law actually is on any given subject, not what it was or what it ought to be. This method would have been accompanied with a diminution in bulk, which, in the estimation of the majority, who incline to the truth of the proverbial axiom, "a great book a great evil," might be considered unmitigated good. Indeed it must be conceded that the limit on the title-page of these ponderous but valuable tomes "In two volumes" is a legal fiction!

It would have saved the constant foot-note after a learned commentary on scire facias; "but the law in this respect has been altered by statute 1 Will. IV. c. 70, s. 8."(*a*) The beginner would not have been tantalized after reading some excellent antiquarian lore on the courts of Great Sessions in Wales by seeing, when he glanced below, "these courts were abolished by statute 1 Will. IV. c. 70, s. 14." (*b*) The constant "But now"—"But see," recur with fearful frequency, though to these amendments we cannot apply the saying that, "*But* is a malefactor."

In one instance, where the serjeant had revelled in a learned disquisition upon the question of nine returns between the teste and return of the summoneas ad warrantizandum, had proved conclusively that the tenant cannot vouch in an assize, and had shown how the statute of Gloucester provides for foreign vouchers by tenants impleaded for lands in London, &c.,—the son feels himself compelled to add, after re-printing all this obsolete learning, in a sort of mournful postscript, "In consequence of the abolition of real actions by statute 3 & 4 Will. IV. c. 27, the learning of the note above has lost much of its importance."(*c*) Flat contradictions might also have been spared, e. g. first note: "The better opinion seems to be, that in debt for rent eviction may be given in evidence under the general issue." Second note: "Since the new rules it must be pleaded." And again, "In a declaration for libel, if the words are in a foreign language *it is safer* not to

(*a*) Vol. ii. p. 71 a. (*b*) Vol. ii. p. 101 b. (*c*) Vol. ii. part 1, p. 32.

translate the words." Note second: "But it should seem that it would now be held necessary to set out a translation in the declaration. 3 Br. & B. p. 201." There can be no doubt that a translation must be set out, or the declaration would be bad on general demurrer.

Notwithstanding those objections, which seem so plausible in statement, we have arrived at an honest conviction that the method pursued by Mr. Vaughan Williams is the most useful, as the most generally instructive, the safest and best. The main design of the work was to teach the student and pleader in chambers at the commencement of their career, and they would be only half taught were the view of the former state of the law and a retrospect of the changes it has undergone omitted. In order to understand the full force and effect of the new rules, it was necessary to show the exact manner in which they have operated on the preceding system; that a full comparison might be instituted between new forms of pleading and the old it became essential to trace and contrast principles, and thus enable the learner to ascertain for himself how far they are now more distinctly developed and more consistently applied. It would be difficult to conceive a better course of discipline than the review of conflicting decisions, which may thus be instituted, and the patient investigation of the reasons to which a lawyer is invited, why they were given and why they were overruled.

An objection equally plausible may be started, that the learning is too exuberant. After citing forty-five cases to prove that the consideration to support an assumpsit must move from the plaintiff—must be such as he has the means of performing, or causing to be performed—must not contravene any rule of the common law, the express provisions of any statute, or the general policy of the law, and must not be contaminated with any illegal transaction, the learned editor, weighed down with forty-five cases, appears to have thought that he had bestowed his tediousness beyond all bounds of moderation, and adds, "see also the cases collected, *ante*, vol. i. p. 309, b. c., note (6)" Armed for the task as patient reviewers, we turned back with some misgiving to this erudite note, and found there comprised only forty-one more cases,

and extracts from two statutes. It might be considered expedient to conceal the whole length of his ascent and toil from the student at starting, lest perceiving what Alps on Alps were to arise, he should lie down in despair. An impertinent doubt will perforce intrude, whether it is necessary to collect and bind together a fasciculus of all the cases that have ever been decided, when the subsequent decisions are pronounced on the authority of the preceding. The objection seems in some degree founded on a true principle of criticism, first applied by Bekker and Poppo, that the authority of a reading does not depend on the number of MSS., for if out of twenty MSS. agreeing in any reading, nineteen can be proved to have been copied from the twentieth, the reading does not rest on the authority of twenty, but of one. If the later decisions were indeed pronounced without assigning reasons, this crowding of the page with case on case would be open to just animadversion: but as a general rule, the authorities are examined and commented on, and some doctrine is suggested in the argument or judgment to which the student may usefully refer. This copiousness of citation, l'embarras des richesses, can scarcely be dispensed with at a time when more deference is paid to authority than to principle, nor can it be a good ground of complaint against an elementary work, that all the sources of information are pointed out. There may be, and doubtless is, mischief in this multiplication of reported cases, but for this admitted evil the editor of Williams's Saunders is not responsible. Approving of the plan of his work, we can bestow unqualified praise on its execution; the one being as free from inaccuracy as the other from real defect. None but those who have perused the present with the former editions in their hands, can adequately appreciate the care with which mistakes have been corrected, omissions supplied, references verified, new cases introduced, and doubtful points suggested for consideration.

We have minutely collated the first volume with one of the preceding editions, in which, we believe, all the authorities are carefully noted up, and have ascertained very few omissions; errors and mistakes there are comparatively none. The few following additions might be made with advantage:

Page 28.—unless limited, a plea is taken to be to the whole declaration. 3 Ad. & E. 699; 2 M. & W. 72.

Page 33 (*a*).—Trott v. Smith, 10 M. & W. 453, where a demand was held necessary.

Page 336.—"Duly requested." These cases should be noticed. Even after verdict the word "duly" will not supply the place of a material averment. Everard v. Paterson, 2 Marsh. 304, and Williams v. Germaine, 7 B. & C. 468.

Page 67 (*b*).—Note of Serjeant Williams, "But it seems it is not necessary that the plaintiff should swear to the truth of his debt," there should be added, 1 M. & G. contrà.

Page 84.—To the note Vere v. Lord Cawdor and another, 11 East. 568, holden that a game-keeper could not justify killing a dog which was pursuing a hare in his lordship's manor, add, see 1 & 2 Will. IV. c. 32, s. 10.

Page 103 (*a*).—Text. The court said that the replication in this case was well concluded, quod mirum videtur. The reporter's wonder is now confirmed, see Thorne v. Jenkins, 12 M. & W. 614.

Page 154.—Add at the end of the note, As to an action for money obtained by fraud on a life policy, where the funds of the insurance society are invested in the names of the trustees, according to the trust deed, and they executed the policy, Lefevre v. Boyle, 3 B. & Adol. 877.

Page 228.—Where a plea states a parol agreement, it will not be intended that it was under seal. 2 M. & G. 405.

Page 236.—Add, It is necessary that a parol agreement between landlord and tenant, to determine the tenancy, should be acted upon in order to be effectual; 2 Camp. 103; 2 Starkie, 379; 8 Taunt. 270. The landlord's putting a bill in the window is not sufficient; 3 Esp. 224.

Page 264, note (l).—It is held, that a consideration executed, and part, as in the present case, of the service performed by the plaintiff for the testator, in his life-time, for several years then past, is not sufficient to maintain an assumpsit, unless it was moved by a precedent request and so laid. To this sentence there might be added, "Not so where the consideration is executory;" 2 C. M. & R. 48. Not necessary that a precedent request should be laid in all cases, e. g. an action for money lent; Victors v. Davies, 12 M. & W. 758.

Page 346.—Case of Beadsworth v. Torkington, 1 Q. B. 782. Since the Municipal Boundary Act it is a variance to claim the right for resiants within the borough, instead of the ancient limits.

We have only discovered one reference to be wrong, at p. 28. In the reference to Chitty on Pleading, vol. i. p. 511, it ought to be p. 453. The reference might now and then be more neatly put; at p. 57, where the statute 8 & 9 Will. III. c. 11, s. 8, is cited about summoning a jury *before the justices of assize*, and the note is added, see statute 3 & 4 Will. IV. c. 42, s. 16, *post*, p. 58 g, n. (*i*); instead of all these mystical letters, would it not be better and shorter to say at once, *before the sheriff?*

A clear and full index to the notes is given, which will be found in the exigencies of practice of extreme value. There is a mistake under the head of Bankrupt—Assignees of, where the author says, "Statute 2 & 3 Vict. c. 29, does *not* protect an execution on a judgment on a warrant of attorney." On referring to the statute it will be found that the execution is protected. It may be doubted whether the editor is not in error in the following note: "As to whether the simple fact of possession is *conclusive* evidence, and constitutes a complete title *in all cases* against a defendant, who is a mere wrongdoer, as it does in actions of trespass to real property, see 7 M. & W. 312, Elliott v. Kemp, per Parke, B."(*a*) The learned editor appears to have overlooked the case of Brown v. Dawson, 4 P. & D. 355, confirmed by the case of Williams v. Hughes and others, Trin. T., Q. B., not yet reported, that the simple fact of possession is not conclusive evidence of title, and that a mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects.

In the note upon Convictions, vol. i. 262 d, the following dictum is no longer law: "However, it has of late been held, that if it appear on the conviction that the evidence was given on the *same day* that the defendant appeared and pleaded, the court will *presume* that it was given in *his presence*; 3 Burr.

(*a*) Vol. ii. 47 f.

1785, R. v. Aickin; In re Tordoft, Carrow's Sessions Cases, vol. i. p. 179. It is only a trifle, we confess, but as this is the work of a scholar, we hope to see Cam. Scacch. erased from the 7th edition, which will probably be soon called for. Instead of this gallipot Latin, if we are to have a dead language, let it be abacus or tabula lusoria, which would sound less harshly, and scarcely more pedantic,—but better than all "Exchequer Chamber," in good honest English.

These are the few defects—the scattered weeds in a large field—which a diligent search has enabled us to collect; and we show them with the less scruple, as their want of importance, and fewness of number, lead irresistibly to the conviction that this is an excellent and most elaborate edition of an excellent work,—a reprint of the great classic in pleading, auctior atque emendatior, alike worthy of the author and editor,—deserving the very favourable reception it has met with from the profession, and rivalling the care, accuracy, and research which Mr. Vaughan Williams expended upon the Law of Executors.—*Law Magazine.*

THE

UPPER CANADA JURIST.

HINTS AS TO THE EXAMINATION OF WITNESSES.

1. *Hints to Witnesses in Courts of Justice.* By a Barrister. London: 1815.
2. *Quintilian's Institutes of Oratory, Book* 5, *Chap.* 7, *concerning Witnesses; containing his Rules for their judicious Examination and Cross Examination. Translated with Notes, &c.* By William M. Best, Esq. of Gray's Inn, Barrister at Law. London: 1836.

THE treatment of some of the witnesses (neither the most reputable nor disinterested of mankind) at Courvoisier's trial, has been the means of giving shape, body and expression to a grievance, or supposed grievance, time immemorial sustained by the public at the hands of the practising members of the bar. Seldom, if ever, within our recollection or in our presence, has the effect of forensic habits on mind and manner been discussed, without some one expatiating on the recklessness with which counsel are wont to wound the feelings of witnesses, though the murmurs were neither general nor loud enough to justify us in volunteering either apology or reproof. At length, however, they have swelled into something very like an outcry, and it becomes necessary to consider whether the profession or their alleged victims are to blame.

The tracts named at the head of this article appear well calculated to throw light on this inquiry, and we have accordingly rescued them from the neglect and oblivion to which on their first appearance they were undeservedly condemned. The first is from the pen of Mr. Baron Field, now judge of the Vice-Admiralty Court of Gibraltar. The second is the chapter to which Blackstone alludes when he speaks of Quintilian as laying down "very good rules for the examination of witnesses *vivâ voce.*"

Mr. Baron Field thinks that the annoyance experienced by witnesses is principally attributable to their own awkwardness, confusion, inaccuracy, and conceit; and it may be as well to consider, in the first instance, to what extent this opinion is founded upon truth.

He starts by roundly charging the public with a culpable degree of indifference and consequent inexperience regarding judicial proceedings:

"Ever since it has been my lot to attend courts of justice, I have been of opinion, that he who would devote half an hour to the drawing up of a few *Hints to Witnesses*, who for the most part, have never been in a court of justice in their lives before, would save those courts a great deal of everlasting admonitory trouble, and would, in that regard, confer no small benefit upon the profession and the public. Whether it proceeds from the smallness and inconvenience of our courts of justice, or from a want of forensic curiosity, I know not; but it is a fact, that in London particularly, nobody goes into a court of justice, unless he has business there. In Ireland, I am informed, the courts are frequently attended by all orders of the public, out of mere rational curiosity, and that it is rare to meet with an Irishman who cannot discuss the talents of the leading barristers. In England, when a man is subpœnaed as a witness, he generally has to make his *debut* in a court of justice; and the bar and the court are put to the never-ending and still-beginning trouble of drilling the witness into a testifying attitude, voice, and phrase; half of which trouble might be saved, if people would but condescend to think they may pick up some useful information in a court of justice, and that there is more common sense in a trial at law than good men would suppose. This absenting themselves from courts of justice is in no case so apparent and flagrant, as when the public are called upon to serve as jurors. For an Englishman who is liable to act as a juror, never to have been in a court of justice before, (as I have seen many jurors who have not,) is as monstrous as for a Christian never to have been in a church; and I could mention many glaring instances of ignorance in such jurors of the very fundamental principles of the constitution and the dearest rights of Englishmen. If common jurors are taken from a class of society, from which education, and reading upon the subject of trial by jury, must not be expected, surely it cannot be too much to ask them to attend the courts now and then, and observe what will be expected of them when it shall come to their turn to act as jurors. This unusedness to be present in a court of justice is in nothing

so palpable as in the total ignorance which witnesses betray even of the forms of an oath, as to taking the book in their ungloved right hand and kissing it, or of addressing the judge, whom the vulgar and unhabituated generally call "Sir," instead of "My Lord,"—a mistake quite as ill-sounding and ill-bred as that of the poor ignorant country witness, who calls the barrister "your Lordship." But if witnesses will persist in refusing to go into court till they shall actually receive conduct-money thither, let them at least commute the trouble and time of such an attendance for the sum of one shilling in hand well and truly paid to my booksellers, before the delivery of these presents, and let them improve the few following well meant *Hints.*"

The reason why English courts of justice are not attractive is obvious enough. The business is transacted in a quiet, matter-of-fact, unostentatious manner, with strict attention to the subject under discussion. There are no dramatic or melodramatic displays; no shedding of tears, no appeals to heaven, no premeditated bouts of sparring with witnesses. Even when a cause of the exciting order is set down for trial, it is hardly ever possible to ascertain beforehand when it will actually come on; and a matter of the highest moment, which has been a standard topic in the newspapers for weeks, may be disposed of, parenthetically as it were, by a mystical telegraphic communication between the bench and the bar, whilst an action for a grocer's bill is going off or one for a linendraper's coming on.

An Irishman lounges into a court of justice, partly out of sheer idleness, and partly from that affectation of dialectic cleverness which pre-eminently distinguishes him. He has the national character for quickness to support, and attends to take a lesson in repartee or blarney from his favourite "counsellor." But the advantage of the habit, as regards either the administration of justice or the individual, is problematical at best; and we believe it must be admitted, that the use to which an Irishmen applies his practical knowledge in this walk, is not to tell a plain story without confusion, but to bother the examining counsel and elicit a roar from the galleries. With all due deference to the Vice Admiralty judge, we prefer the Englishman with his ill breeding and hesitation—his ungloved hand and *Sir*—to the glibness, dexterity and unhesitating effrontery of Pat.

Mr. Field continues:

"I. And, first, I always said that if ever I published such a pamphlet as this, I would place in the very head and front of it, in capital letters, these words—'SPEAK OUT LOUDLY.' The experience of the whole bar will unite with me in saying, that the purposes of justice would be better furthered, if these words were even to displace the admonitions against bearing false witness, which are inscribed upon the walls of some of our courts of justice. There is no phrase so constantly in the mouths of both the bench and the bar as this; insomuch that if the court finds it necessary to employ an *usher* to command silence in the spectators, they ought also to employ a sort of *blowpipe* to insure audible utterance in the witness. This lowness of tone in witnesses does not arise so much from diffidence, as from an unusedness to pitch the voice for public speaking. Here is another of the evils of not previously attending the courts. If witnesses would do so, they would find that whispering, or even conversing, witnesses are no witnesses at all, and might, as the judges are irritated to say every day, *just as well stay at home.* Never having been in a court of justice before, a witness comes into the box as if the court were a private room; and when he is asked the first question, which would perhaps inquire into the nature of his Christian name or situation in life, bows and answers in a most well-bred whisper. Now his name and quality are doubtless exceedingly familiar to him; but unfortunately, the judge does not know the various branches and callings of all his numerous family, however 'unknown' it may 'argue himself.' And there are besides twelve gentlemen sitting at some distance, called a *jury*, who form a convenient (not to say a necessary) branch of our courts of judicature; and, as the counsel iterate all day long *these gentlemen must hear all that witnesses say.*"

A very useful suggestion, but by no means so easy of practical application as is supposed. A man or woman who has never had occasion to address a formal audience of any kind (and unless the lady belonged to the Society of Friends and had sometimes been moved by the spirit, one does not see how *she* should), is stuck up in an elevated box or pulpit, and expected to detail occurrences, or reply to a series of complicated inquiries, in the precise key and at the exact rate of utterance best adapted for twelve gentlemen in one part of the court to hear, and another gentleman in another part of the court to copy; though the art or habit of carrying on

a narration or train of thought in a loud evenly-pitched tone, is one of the grand attainments of rhetoric. Surely, if any thing beyond *yes* and *no* is required, those repeated injunctions to speak up must militate sadly against the main object, which we presume to be the elucidation of the truth. A witness may hesitate and even contradict himself, as Lord Listowell and Mr. Charles Ross blushed, from innocent embarrassment; and it is far more important to be able to watch the natural working of the features and inflexions of the voice, than to have a got-up statement clearly recited by an individual duly exercised in the most approved style of giving testimony, or be bawled at by some unhappy wight reduced by constant goading to the last stage of bewilderment.

We know full well the extent and provoking character of the inconvenience, but it is rather aggravated than alleviated by irritability; and if the witness, instead of being harshly rated at the commencement, were allowed a few moments to recover himself and get accustomed to the sound of his own voice, and were then told quietly that it was necessary to speak louder, the desired object would be much more frequently and much more satisfactorily obtained. Mr. Baron Field, however, will have it that the entire blame lies with the chief sufferers, and endeavours to account for their pertinacity on an hypothesis more ingenious than just.

"II. The great mistake of witnesses, and the chief cause of their not raising their voice above conversation-pitch, is that they will not impress their minds with the conviction that they are called upon to give their evidence as a matter of *business* only. The court does not sit for the *pleasure* of hearing them converse with the counsel, let the manner and matter of witnesses be ever so interesting. The witness should leave all his bows and undertones in the drawing-room, counting-house, or counter, from whence he came; and should consider himself, from the first moment of his entering the box, as the dictator of necessary and material evidence, to be recorded by the judge who presides at the trial; he should never for a moment suffer himself to forget that his lordship writes down every answer he gives; and therefore when he *bows* to the question, whether his name be John Nokes, instead of proclaiming that 'it is'—what does he? Can his lordship hear a bow? or if he could, is he to record it among his notes by hieroglyphics? Really those who are to give a

verdict upon oath, according to the evidence, must have more than a bowing acquaintance with the facts of the cause."

Pleasure, indeed! We believe nineteen witnesses out of twenty would say with Lord Ellenborough, when an eminent conveyancer asked when it was their lordships' pleasure that he should proceed with his argument—"pleasure is altogether out of the question." They know very well, that they are on serious business, and what is play to others is often death to them. Those bows and undertones generally betoken any thing but gratification or self-complacency.

But there is another bad consequence:

"Besides, if witnesses in courts of justice are suffered to degenerate into conversers with barristers, they will be apt to forget that they are testifying upon oath; and though their minds may be sufficiently upright to preserve them from direct falsehood, whether they are speaking upon their oath or not, yet when they are suffered to lose sight that they are bearing witness under a solemn engagement to tell 'the whole truth, and nothing but the truth,' and are permitted to descend into conversation, they will naturally argue and fence, and colour, and conceal, and give way to bias, and blind themselves through interest. It is not in human nature, when off its guard of the sanction of a judicial oath, to refrain from these infirmities; and therefore it becomes important that the witness should never be suffered to forget himself for a moment, by the slightest deviation from an audible tone of responsive deposition. If any proof were wanting of the truth of my remark, as to this conversational mistake of witnesses, I would adduce the phrases 'upon my *honour*,' and 'my dear sir,' which are often in their mouths, and which shew a complete forgetfulness that they are 'giving evidence' upon their *oaths*, and 'to the court and jury.'"

It is astonishing that so acute an observer, and generally just a thinker, as Mr. Field, should alloy his valuable suggestions by such fallacies. The inference drawn from the casual use of the phrase "upon my honour," is about as conclusive as that drawn by Bishop Thurlow from his brother's frequent appeals to the Redeemer when suffering from the gout, which he adduced as evidences of the chancellor's belief in Christianity. A strong interest, stimulus, or excitement of any kind, causes conventional forms to be forgotten or disregarded; and we should be the more inclined to believe a witness from his being hurried unconsciously into his habi-

tual tone, manner, and character. In the case of a made-up story, the only chance of eliciting the truth is to make the witness forget himself.

The next suggestion is one which cannot be too frequently impressed.

"III. If witnesses were never to permit themselves to indulge in this conversational style, they would not be so apt, upon adverse or cross-examination, to *fence*, as the practice is called at *the bar*: and one of the most serious and important assurances I would give them is, that they never will gain any thing for their cause or their credit by this practice. The court, the bar, and even the jury, are too well used to the artifices of witnesses to be imposed upon for a single moment, by the most dexterous parrying in the world; and a fencing witness will injure his friend's case more by such demeanour than he will benefit it by all the partiality and reserve of his guarded and unwilling evidence. The court and jury have at least enough of common sense and knowledge of the world to make due deduction from the credit of such a witness; for long experience of the value of vivâ voce testimony has taught them that the *manner* of witnesses is often more important than the *matter*; and their demeanour is always justly taken into consideration and appreciated in estimating their credibility, upon which it is, and not upon the mere strength and extent of their swearing, as it appears upon paper, that the verdict of the jury depends. A witness cannot therefore more effectually damn a friend's case than by *costiveness*, as it is expressively called, and pugnacity on the one hand, or by eagerness and overleaping on the other. I remember seeing a pert woman overthrow a whole pile of evidence by a flippant snappishness of the former kind —a fighting with every question; and she flounced about, and looked round for applause at the end of every retort, till Lord Ellenborough told her 'not to throw herself about as if she was in estimation, for there was nobody admiring her.'"

Almost the only recorded instance in which pertness and flippancy met with any positive success or applause, was during the inquiry into the alleged malversations of the late Duke of York as commander-in-chief, when the notorious Mary Anne Clarke played off a succession of airs and impertinencies to the amusement of the younger members, and the occasional confusion of her interrogators.

Courts of justice, however, are constituted very differently from popular assemblies, and a pert flippant witness is pretty

sure to throw discredit on the cause—much more what Mr. Field calls a fencing witness, who generally combines dishonesty with conceit. Provincial wits, male and female, are carefully to be eschewed, and we should think little of an attorney's discretion who should insert one of them, without an emphatic note of caution, in a brief. Mr. Field gives a specimen:

"As an example of the latter species of evidence, I would adduce a witness in a horse cause, to prove that the horse was not injured, who frisked into the box, and before there was time to administer the oath to him, repelled the dignity of being called a veterinary surgeon, by rapping out—'I'm not one of your ranting, flaunting, flaring, harum scarum tearum fellows: I'm one of the old school, taught by nature and experience. The horse is not a glass of gin the worse.' The noble and learned judge here rebuked him for talking of glasses of gin. The witness changed his expression—'I tell you he is not a drop the worse.' Sir William Garrow then examined him—'You are one of the old school?' *Witness*—'Yes; I've known you a long time.'

"Of this damning kind are witnesses who prove *too much*; for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort: he leads the witness on from one extravagant assertion in his friend's behalf to another; and, instead of designing him to mitigate, presses him to aggravate, his partiality, till at last he leaves him in the mire of some monstrous contradiction to the common sense and experience of the court and jury; and this the advocate knows will deprive his whole testimony of credit in their minds. Such is all that witnesses gain by partiality, by favour and affection, and by combating with truth. He who is not *for* truth is *against* it, and against him will the belief of the jury be shut."

Witnesses of this sort often do an infinity of mischief to the cause, by speculating on the drift of the question or the effect of the answer, which they will then modify in such a manner as, in their opinion, the circumstances may require.

Mr. Field says that the reason most witnesses give their evidence in so slovenly a manner is, that they will not apply their minds to the matter in question, and he seems to think that a good deal of their listlessness and indifference might be cured by making it worth their while to attend. They receive little or no remuneration, and the consciousness of having

done their duty is hardly strong enough to compensate for the sacrifice of time and comfort.

"This is a very unpatriotic feeling; and the evil to which it gives birth should be remedied (wherever it can) by a previous examination of his witnesses, on the part of the attorney in the cause. Here is the reason why women and children are so much better witnesses than men: they are seldom called upon to act as such, and business is a rarer thing to them: they, therefore, (particularly children) have a vaster idea of its, and consequently of their importance; and they shall have recalled to mind all the circumstances of their testimony, and shall have ruminated upon what they shall depose, long before they come into court. This is no more than what every witness ought to do; and such a preparation would greatly conduce to the better administration and dispatch of justice."

The truth is, most of the particulars to which witnesses are called to speak made no impression at the time, and the wonder generally is, not that they recollect so little, but that they recollect so much. Moreover, clearness of perception is a very rare quality; and both dates and facts have a strange tendency to mingle and get confounded in the minds of most of us.

Children are good witnesses, because they speak *without* premeditation. Women are not good witnesses, except on topics coming peculiarly within their own sphere of observation; for they do not live and act under the same habitual responsibility for the truth of their statements as men, who are liable at all times to be called to a severe account for an inaccuracy. The author of "The Adventures of an Attorney" agrees with us in both these points: "Of all witnesses in an honest cause, an intelligent child is the best; of all witnesses in any cause, a woman is the worst, unless she happens to be very pretty and engaging, for then she will answer the purpose, whatever it be, most successfully."

Mr. Field repeats the often repeated caution to witnesses,

"Don't tell us, Sir, what he told you." (*a*)

But as none are more apt to transgress the rule than professional witnesses, it is clear that the transgression is not the result of ignorance, but the perhaps inevitable consequence

(*a*) The Pleader's Guide.

of men carrying their ordinary modes of expression into the witness box.

The constant war which both judge and counsel are compelled to wage against this habit, not unfrequently presents itself in a ludicrous point of view, to the lay spectator, and few of the jokes in Pickwick have told better than his caricature of Mr. Justice Starleigh correcting Sam Weller.

"Now, Mr. Weller," said Serjeant Buzfuz.

"Now, Sir," replied Sam.

"I believe you are in the service of Mr. Pickwick, the defendant of this case. Speak up, if you please, Mr. Weller."

"I mean to speak up, Sir," replied Sam; "I am in the service o' that 'ere gen'l'man, and a wery good service it is."

"Little to do, and plenty to get, I suppose?" said Serjeant Buzfuz, with jocularity.

"O quite enough to get, Sir, as the soldier said ven they ordered him three hundred and fifty lashes," replied Sam.

"You must not tell us what the soldier or any other man said, Sir," interposed the judge, "it's not evidence."

"Wery good, my Lord," replied Sam!

(To be continued.)

POINTS IN PLEADING AND PRACTICE.

NO. V.—AIDER AND AMENDMENT OF DEFECTIVE PLEADINGS.

The case of Beasley qui tam v. Cahill, in which judgment was arrested by the Court of Queen's Bench last term, in an action on the statute of Henry the Eighth, against buying disputed titles, and in which it was strenuously argued, that the defects which were alleged against the declaration, were not of a nature to prevail after verdict, has called our attention to the subject of aider of defective proceedings, a subject which is of considerable importance to every pleader and practitioner, as any step in a cause, from the declaration to the writ of error, may be more or less affected by it. Aider must not be confounded with *amendment:* the latter is a permission given by the court out of favour, to alter and amend in a pleading something

that is admitted to be defective or erroneous. Aider on the contrary is not *ex gratiâ*, but is an assistance, by custom and inference, granted *ex debito justitiæ* to pleadings, which, if rigidly construed, would be held imperfect.

There are two kinds of aider, by common law, and by statute. Aider at common law, was, first by the original writ; secondly, by pleading over; and thirdly, by verdict.

First, Aider by the original writ, was where a declaration contained an imperfect statement of the nature of the action, which, however, appeared correctly described in the original writ, which was recited in the beginning of the declaration, and regarded as part of it. Thus, in an action of trespass, where the declaration omitted to state the offence to have been committed "*vi et armis*," the presence of these words in the recital of the original writ was held to supply the deficiency (*a*). But, as it is no longer usual or necessary thus formally to recite the original writ in the declaration, this mode of aider is virtually abolished.

Secondly, Aider by pleading over. It is a well known principle of pleading, that each party is required to put his case on the record with clearness and precision. *Verba fortius accipiuntur contra proferentem*; and, generally speaking, omissions and imperfections are not to be supplied by inference or intendment in favour of the party pleading. But as the only object in establishing this rule was, to elicit the precise point in dispute from the conflicting statements of the parties, so as to be able to refer it to the proper mode of trial, and as of course it is a matter of indifference to the tribunal how that point is ascertained, so as it is ascertained, the rule in question has received a qualification, and many pleadings or statements which would be held imperfect if objected to on demurrer, are cured or aided, if the opposite party, instead of demurring, replies in such a manner as to render the meaning of the former pleading clear and intelligible; the imperfection or omission in which is thus ratified, as it were, by the self acting power of the pleadings alone. (*b*) In furtherance of this

(*a*) Com. Dig. Pleader, c. 12, 86.
(*b*) Com. Dig. Pleader, c. 85, E. 37; Co. Lit. 303, b; Stephen. Pl. 159; 1 Chit. Pl. 671, 6 Ed.

principle, it has been established as a rule, that all defects of mere form, and such as could not be taken advantage of on general demurrer, are cured by pleading over.(*a*) But it is not easy to say how far this principle extends when the fault in the pleading is of a substantial kind. In Banham's case,(*b*) Lord Coke expressly lays it down, that "when a declaration wants time or place, or other circumstance, it may be made good by the bar; so of the bar, replication, &c.; but that when the declaration wants substance, no bar can make it good; so of the bar, replication, &c.; e. g., the defendant pleads agreement, but does not shew satisfaction: the replication denies the agreement, this does not aid the bar;" and he cites several cases from the year books in support of his position. So in Badcock v. Atkins, (*c*) which was an action of slander for saying, "Thy father (innuendo the plaintiff) hath stolen six sheep;" but the declaration neither stated that they were spoken to the plaintiff's son, nor that the plaintiff's son was present at the speaking: it was held not to be aided by a plea in justification put in by the defendant, and this on the ground that a declaration deficient in substance cannot be aided by the plea, and there are several other cases in the books to the like effect. (*d*)

These authorities, however, only shew, that when the first pleading is essentially faulty, and the second only *impliedly*, and by inference admits the case sought to be established by it, but that even taken both together, they do not shew on the face of the record a complete cause of action or ground of defence (as the case may be) in the party pleading, the doctrine of aider cannot apply. Thus in Bonham's case, where the fault in the plea was the shewing award without satisfaction, which is no defence at all, the traverse of the award does not shew (otherwise than by a rather violent inference) that there ever was any satisfaction; and consequently there is no defence developed on the record. But it is a very different matter where the second pleading expressly puts on the record the fact omitted by the opposite party. Thus for instance, in an action for taking a hook, where the plaintiff

(*a*) 3 Wils. 297; 2 Salk. 519; 8 Co. 120, b; 6 Mod. 136; Bac. Ab. Pleas, &c.
(*b*) 8 Coke, 120, b. (*c*) Cro. El. 416. (*d*) Butt's case, 7 Coke, 25.

omitted to state in the declaration that it was *his hook*, or even that it was in his possession at the time, and the defendant on plea justified the taking the hook *out of the plaintiff's hand*, the declaration was held to be aided by the plea.(*a*) And if a deed be incorrectly set forth in the declaration, the fault is cured by the defendant's setting out the deed on oyer, and pleading *non est factum*.(*b*) From these and similar cases, the best modern authorities consider the true rule to be, that a defect in substance cannot be cured by pleading over, when the subsequent pleading only aids the defect by implication; but that when it expressly states the fact, which ought to have been alleged by the adversary, it is otherwise.

Thirdly, Aider by verdict is another mode of aider known to the common law. This seems properly a branch of the doctrine of legal presumption, and belongs to that class called by Mr. Starkie "presumptiones juris et de jure", or presumptions of mere law. (*c*) Its meaning is strictly this, that after a verdict has been given by a jury, the law in order to support their finding, will presume many statements of matters, which are imperfect on the face of the record, to have been duly corrected and rendered complete by proof at the trial. The principle on which this description of aider is founded, cannot be better expressed than in the clear and forcible language of Serjeant Williams, (*d*) which has been quoted with approbation by Stephen, in his work on pleading. (*e*) "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required proof on the trial, of the facts so defectively or informally stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." The extent of this rule is also well described in the case of Jackson v. Pesked;(*f*) "when a matter is so essentially necessary to be proved, that had it not been given in evidence the

(*a*) 1 Sid. 184; Steph. Pl. 159.
(*b*) 1 Chit. Pl. 433. 673.
(*c*) 3 Stark. Ev. 1241.
(*d*) 1 Wm. Saund. 228, a n 1.
(*e*) Page 161.
(*f*) 1 M. & S. 234.

jury could not have given such a verdict, then the want of stating that matter in express terms in a declaration, providing it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must in fair construction so far require to be restricted, that no judge and no jury could properly have treated it in an unrestricted sense, it may reasonably be presumed after verdict, that it was so restrained at the trial." And in Hitchins v. Stevens, (*a*) it is said, "Whensoever it may be presumed that anything must of necessity be given in evidence, the want of mentioning it on the record will not vitiate it after verdict."

These descriptions contain within them all the rules and all the exceptions on the subject. The defective matter must be such, that its correction by proof may be implied by *fair and reasonable intendment* (*b*), from the allegations on the record, coupled with the verdict. The issue and the verdict together are to be regarded, and from their *united* effect the intendment arises. The *issue* must be looked at, because it is not necessary that anything should be proved, unless it be expressly stated on the record, or be necessarily implied from the facts which are stated (*c*); the *verdict* must be taken into consideration, because it must have been given for the party in whose favour the presumption is raised; for it is in consequence of such verdict, and in order to support it, that the court puts so liberal a construction on the allegations contained on the record. The cases in illustration of these principles range themselves under the following heads: (*d*)

1. *Omission* of that which was necessary to be proved, or the party could not have recovered, is aided by verdict (*e*); or, in other words, if the substance of the action be alleged, the omission of the necessary incidents to that substance will not vitiate. A few instances will illustrate this. In an action of debt for rent by the grantee of a reversion, no attornment was alleged, but it was resolved good after verdict; *for, if the*

(*a*) T. Raym. 487.
(*b*) 1 M. & S. 237; 1 T. R. 145; 1 Chit. Pl. 673. (*c*) *Ibid.*
(*d*) See the cases collected in Com. Dig. Pleader, C. 87, E. 38; 1 Saund. 228, a., n. 1; 1 Chit. Pl. 673; Sheph. 160, n. f.
(*e*) 4 Burr. 2018; 2 Shaw, 233; 1 Salk. 365.

plaintiff had not given attornment in evidence, he would have been nonsuited (*a*). So, if the grant of a reversion or other hereditament, which lies *in grant*, be pleaded, without alleging that such grant was made *by deed*, the imperfection is cured by the verdict finding that the grant was made (*b*). So where a feoffment is pleaded, but no mention is made of livery, it would be implied after verdict, "*because it makes a necessary part of a feoffment.*" If the plea to a declaration on a bill of exchange state that there was no consideration given, but without shewing the circumstances with particularity, the defect is aided after verdict (*c*).

2. Surplusage and repugnancy are thus cured (*d*); as if the plaintiff declare in trover that, on the 4th of March, he was possessed of goods, and that *after, viz., on the 1st of March*, they came to the defendant's hands, the latter date will be rejected.

3. Ambiguous and informal expressions are also aided, and must afterwards be taken to have been used in that sense which will sustain the verdict. Thus, where in trover a declaration was for goods, chattels and *fixtures* (enumerating merely moveable articles), general damages having been assessed on the whole declaration, it was held that the word "fixtures" would not necessarily be taken to mean things affixed to the freehold; for, by Parke, B., "the verdict having been found generally, we must intend them to have been fixtures attached to other things, which were in themselves moveable"—Sheen v. Rickie (*e*). And the same point, in an action of trespass, has been lately adjudged in the court of Queen's Bench here, in the case of Meyers v. Marsh—not yet reported. So in libel, where one of the paragraphs complained of ran thus:—"We again assert the cases formerly put by us on record; we assert them against A. S. and A. H. (the plaintiff), and they are such as no gentlemen or no honest man could resort to;" it was held, after verdict for the plaintiff, that these words imputed a charge of misconduct against the plaintiff, and not merely an assertion in contradiction of him—Hughes

(*a*) T. Raym. 487.
(*b*) 1 Saund. 228, a., n. 1.
(*c*) 4 Tyr. 472.
(*d*) Bull N. P. 321; Cro. Jac. 96; 4 B. & Ad. 739.
(*e*) 5 M. & W. 175.

v. Rees (*a*). The limits and qualifications of the general rule of which we have been treating next demand our attention. Where there is no room for a fair and reasonable intendment from the verdict and issue, the defect of course will not be cured; and this is the case in the following instances:—

1. Where the *gist of the action* is omitted, or is defective in itself. A *defective statement* of title may be aided; but a statement of a *defective title*, or the *omission* of title, is always fatal (*b*). Where a party states the cause of action inaccurately, it is a fair presumption, after verdict, that it was duly proved; because, to entitle him to recover, all circumstances necessary in form or substance to complete it must be proved at the trial; but where he totally omits it, there is no ground for presumption, as he need not prove it at the trial (*c*) Thus, in an action on the case, brought by one entitled to the reversion of a yard and well, to which the declaration stated an injury to have been committed, but omitted to allege that the *reversion* was in fact prejudiced, or to shew any grievance which in its nature, would necessarily prejudice the reversion, the court arrested the judgment after a verdict had been given for the plaintiff (*d*). So in an action for keeping a mischievous bull, where there was no *scienter* alleged in the declaration, judgment was arrested, the court observing, they could not intend its proof at the trial, for the plaintiff need not prove more than was in his declaration—Buxendin v. Sharp (*e*). And in our Court of Queen's Bench, where an action was brought for a malicious arrest, made under the old law, but after the union of the Upper and Lower Provinces; and the plaintiff averred that the defendant not having any reasonable or probable cause to be apprehensive that the plaintiff would leave the province of *Canada* without satisfying his debt, made the affidavit and arrest, the judgment was arrested after verdict for the plaintiff, because it was a sufficient justification for the defendant, if he was apprehensive that the plaintiff would

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(*a*) 4 M. & W. 204.

(*b*) 1 Saund. 228, n. 1; Sheph. Pl. 161; 1 Chit. Pl. 681; 3 T. R. 25; 1 M. & S. 236; 4 B. & Al. 655; 2 T. R. 470; 4 B. & C. 555; 1 T. R. 141-146; 4 T. R. 472; 2 N. & P. 114; 5 M. & W. 283; Cowp. 826; Salk. 360; 2 Doug. 683; 2 Burr. 1159; 3 Wils. 275.

(*c*) 2 Doug. 683. (*d*) 1 M. & S. 234. (*e*) Salk. 662.

leave *Upper Canada*, and under his declaration the plaintiff was not bound to prove more than he had alleged (*a*). So, in the same court, in a qui tam action, under the 32nd Hen. VIII., ch. 32, against the purchaser of an alleged pretended title, the declaration was held bad in arrest of judgment, because there was no scienter alleged on the part of the defendant of the want of possession for a year next before the bargain made, of the seller or any of them, under whom she claimed, according to the exception in the statute, although it was alleged that the right was a pretended right, and that the defendant knew it (*b*). If, in an action on a bill of exchange, demand on and refusal by drawee, or notice of non-payment (when such averment is necessary), be omitted, it is fatal after verdict (*c*). So in an action against an heir, on the bond of his ancestor, if the declaration omit to state that the ancestor in his bond bound himself and *his heirs*, the omission is not cured by verdict (*d*). Also, in assumpsit, if the promise alleged does not appear to be made on good consideration, it shall not be aided (*e*).

2. The court, in order to support a verdict, will never make an intendment which is *inconsistent* with the allegations in the record(*f*); or, in other words, if the verdict falsify the pleading, no presumption will be raised in its favour. Thus, in *conspiracy*, if it find all but *one* not guilty (*g*); or, if a declaration expressly shew that a condition precedent was *not* performed by plaintiff, and state matter which is no excuse for the non-performance, it will be bad after verdict (*h*).

3. When the imperfection or omission, though in form only, is in some *collateral* part of the pleading, that was not in issue between the parties, so that there is no room to presume that the defect was supplied by proof, a verdict does not aid it at common law, but it would almost in every instance be aided now by the statutes of jeofails.

Such was the extent of the doctrine of aider at common law, but it was soon found very insufficient to prevent justice

(*a*) Thompson v. Garrison, Easter, 5 Vic.
(*b*) Beasley qui tam v. Cahill, not yet reported.
(*c*) Doug. 679; 7 B. & C. 468.
(*d*) 2 Saund. 136, 137, a.
(*e*) 1 Salk. 364.
(*f*) 3 T. R. 17, 25. 26; 6 T. R. 710.
(*g*) 1 Saund. 230.
(*h*) 6 T. R. 710.

being defeated by objections of form. Its defects were principally these: 1st, Although all errors of mere form were held to be aided by pleading over, still objections which now would be deemed matters of form, were by the pleaders and courts in those days considered matters of substance, and consequently not aided. 2nd, Errors in a pleading were not aided when the adversary demurred: that is, objections of form might, on demurrer, be taken to previous pleadings on the record, and the justice of the case perhaps utterly defeated. 3rd, The doctrines of aider by pleading over, or by verdict, were manifestly inapplicable where judgment had been allowed to go by default. 4th, Assuming the pleading and record to have been originally drawn up correctly, the whole was liable to be defeated by errors or misprisions of the clerk or officer in transcribing the pleadings. In order to remedy these evils, numerous statutes have been passed from time to time, and which are known by the name of the Statutes of Amendments or Jeofails, the latter word being derived from the French *J'ay faillé*, and was an expression used by the pleader of former days, when he perceived a slip in his proceedings. These statutes have all been expressly introduced into Upper Canada, by the 24th section of the 2d Geo. IV. ch. 1, commonly called the King's Bench Act, and are as follows: 14 Ed. III. ch. 6; 9 Hen. V. ch. 4; 4 Hen. VI. ch. 3; 8 Hen. VI. ch. 12, 15; 32 Hen. VIII. ch. 30; 18 Eliz. ch. 14; 27 Eliz. ch. 5; 21 Jac. I. ch. 13; 16 & 17 Car. II. ch. 8; 4 & 5 Anne, ch. 16; 9 Anne, ch. 20; 5 Geo. I. ch. 13. The effect of these statutes is to be considered after general demurrer, and after verdict. 1st, After general demurrer: By stat. 37 Eliz. ch. 5, after demurrer joined and entered in any action or suit in any court of record, the judges shall give judgment as the very right of the cause and matter in law shall appear unto them, without regard to *any imperfection, defect or want of form, in any writ, return, plaint, declaration or other pleading*, process or cause of proceeding whatsoever, except those only which the party demurring shall *specially* and *particularly* set down. The chief difficulty that arose on this statute was, the distinguishing between matters of form and substance; and many defects which are *now* deemed to

be mere form, were then held not to be aided by the statute, such as the omission of "*vi et armis*," &c. To remedy this, the statute 4 & 5 Anne, ch. 16, directs, that after demurrer joined in any court of record, the judges shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission or defect in any writ, return, plaint, declaration and other pleading, process or cause of proceeding whatever, except those only which the party demurring shall specially and particularly set down as causes of the same; notwithstanding such imperfection, &c. might heretofore be taken as matter of substance, and not aided by 27 Eliz., so as sufficient matter appear on the pleadings, on which the court may give judgment according to the very right of the cause; also, no exception shall be taken for an immaterial traverse, default of pledges, &c., or default of alleging the bringing into court any deed, &c. mentioned in the pleadings, or any letters testamentary, &c. for omission of *vi et armis*, and *contra pacem*, for want of *hoc paratus est verificare*, or *per recordum*, or of *prout patet per recordum*, but the court shall give judgment without regarding such imperfections, &c., except the same shall be *specially* set down and shewn for cause of demurrer. The provisions of this statute are extended to proceedings on *penal statutes*, by 4 Geo. II. ch. 26, sec. 4.

2nd, After verdict: The statutory provisions on this head are well stated in Chitty's Pleading, (*a*) "Judgment shall not be stayed or reversed by reason of any *mispleading*, lack of colour, *insufficient pleading*, or *jeofail*, or other default or negligence of the parties, their counsellors or attornies, *want of form* in any writ, declaration, plaint, bill, suit or demand, lack of averment of any life, so as the person be proved to be alive, want of any *profert* or omission of *vi et armis*, or *contra pacem*, mistaking the christian or surname of either party, sums, day, month or year, in any pleading, being right in any writ, plaint, roll or record preceding, or in the same roll or record wherein the same is committed to which the *plaintiff* (or more properly the *defendant*) might have demurred, and

(*a*) 1 Vol. 682.

have shewn the same for cause; want of averment of *hoc est paratus verificare* or (*idem*) *per recordum*, or for not alleging *prout patet per recordum*, or want of a right venue, so as the cause were tried by a jury of the proper county where the action is laid, or *any other matters of a like nature, not being against the right of the matter of the suit, nor whereby the issue or trial is altered.*"

These statutes are by 4 & 5 Anne, ch. 16, sec. 2, extended to judgments entered upon confession, *nil dicit*, or *non sum informatus*. On the statutes of amendments and jeofails generally, it is right to remark, 1st, that no defect in substance whatever is cured by any of the latter, (*a*) although, if it arose from the misprision of the clerk, it might come under the provisions of some of the former. 2nd, That although an *informal* issue will be aided by the statutes, yet an *immaterial* issue is still fatal; (*b*) for if the issue is immaterial, so must be the verdict. In such cases the proper course is, to move for a repleader. (*c*)

The whole of the law on this important subject may be thus summed up:—

1. All merely *formal* defects are aided at common law, either by pleading over, or by verdict; and under the statutes of jeofails, either by verdict, general demurrer, or suffering judgment to go by default, &c.; so that now no merely formal defect can be made a ground of objection after verdict.

2. Defects of *substance* are in general fatal, subject to the following exceptions: first, an error of substance may be aided by pleading over, when the subsequent pleading *expressly*, and not by inference, puts on the record the fact necessary to render the defective pleading good; secondly, by verdict, when the defective part does not form the very gist of the action, and is not in a matter collateral to the issue, and when the making the intendment is not inconsistent with the record, or the finding of the jury; thirdly, when the error has arisen from the mistake or misprision of the clerk.

(*a*) Doug. 63; Cro. Car. 13. (*b*) 2 Saund. 319, e. n. 6; 2 Chit. Pl. 654.
(*c*) Steph. Pl. 108.

MARRIAGE DE JURE AND DE FACTO.

1. DALRYMPLE v. DALRYMPLE, 2 Hag. C. R. 54.
2. THE QUEEN v. MILLIS, 10 Cla. & Fin. 534.
3. CATHERWOOD v. CASLON, 13 M. & W. 261.

The three cases which we have placed at the head of the present article, exhibit as singular an instance of fluctuation in legal opinions, as our juridical history has ever witnessed. In the first, we see a doctrine asserted by a judge, whom the Lord Chancellor has proclaimed "the most learned ecclesiastical lawyer of his age." The doctrine is accepted and maintained, for thirty years, by a succession of the brightest ornaments of the bench and bar, temporal as well as spiritual; when, lo! in the second case, we find it dividing the legal oracles of the House of Lords: and in the third the Court of Exchequer feels bound to repudiate it altogether!

The point, on which these very eminent and learned persons have differed, is whether or not, by the common law of England, the presence of an *episcopally* ordained minister be essential to the validity of a marriage. It is not now essential in England by statute; but the statutes of this class (with some special exceptions) do not extend to *marriages contracted on or beyond the seas.* Such marriages, it has been held, if valid by the law of the place of contract, are valid by the law of England. But there are thousands of her Majesty's subjects, of all ranks and degrees, now living, whose marriages, or those of their parents, were contracted where there was either no ascertainable law in force, or none but the common law of England, and where the ministration of an episcopally ordained minister could not be had, or if attainable would have been refused by the parties being members of the Church of Scotland, or other Protestant dissenters. Weighty, indeed, must be the judgments, which would brand as concubines the pure-minded women, who have for years trusted to the sanctity of unions so formed; and would stamp bastardy, with all its legal incapacities, on their innocent and unsuspecting offspring! If such be indeed the existing law of England, it is a disgrace to the age, and should be altered without a

moment's delay. If it be not the law, as little time should be lost in clearing up doubts, which must cause grievous pain to susceptible minds.

It is admitted, on all hands, that the solution of the problem in question is only to be found in the history of the law, and accordingly most praiseworthy industry has been exercised, in exploring the receptacles of legal relics, and dragging forth from the dust of ages the long-forgotten monuments of barbarous legislation,—"Juvabit," says Bacon, "etiam *antiquitates* legum invisere; non abs re fuerit *legum præteritarum mutationes et series* consulere et inspicere." Far be it from us to reprobate the philosophy of this 86th aphorism! But, alas! the *history of the law* forms amongst us, at the present day, no part of legal education! It is otherwise on the continent. In the universities of Paris, Berlin, Gottingen, Heidelberg, Jena, Tubingen, Leipsic, Erlangen, Bonn, Friburg, &c. &c. special courses of lectures are given on the history of law in general, on the history of law universal and comparative, on the history of the Roman law, on the history of the French law, on the history of the German law, on the history of the European constitutional law, on the history of judicial laws, and, in short, on almost every branch of juridical history. Deprived of such aids, we must find our way, as well as we can, through the "mutations and series" of our by-gone laws; ever remembering, that all great changes in the constitution of society, or in the frame and tendencies of the public mind, infallibly draw after them corresponding modifications of the national jurisprudence.

Before we attempt, however, to investigate any problem, we must clearly understand its terms. If we would decide on the validity of a marriage, we must first know what the word "marriage" means. A familiar household word, no doubt it is: and yet it is used in many different significations. In ancient Rome, there were no less than three different kinds of marriage—*Confarreatio*, *Coëmptio* and *Usus*, with reference respectively to the religious, the civil, and the natural bond of union. So among the Jews, there were the *Pactionis libellus*, the *Nummuli actio* and the *Coitus*. Again, marriage in Turkey admits of polygamy. The law of Scotland considers

marriage to be a contract purely *civil*: the Church of England deems it a *spiritual* act: and the Church of Rome entitles it a *sacrament*. If in argument the major proposition relate to one of these significations, and the minor to another, the conclusion must needs be illogical.

Now, there is a most important distinction in our own law-books, namely, that between marriage *de jure*, and marriage *de facto*. This we shall here endeavour to elucidate; because we think it will serve to reconcile authorities, which have been deemed contradictory; and because the distinction seems, at times, to have been lost sight of, in arguments of great consideration and solemnity. Marriage *de jure* is, in our understanding of the term, strictly and properly an act which, according to the law and practice of courts competent to decide on its legal validity, is held *conclusively* to bind a man and woman to each other as husband and wife. Marriage *de facto*, as distinguished from marriage *de jure*, is, in our apprehension, an act which, according to the law and practice of courts competent to decide on it, as a matter of fact, is held *primâ facie* to bind the parties together as married persons, until otherwise determined by lawful authority. Judgments on marriage, considered in this latter aspect, are, it is manifest, of an interlocutory character, in their origin; though circumstances, which will be explained in the sequel, may give them (as the civilians say) "the force and effect of a definitive sentence in writing."

The great and frequent changes of opinion, which, in the lapse of ages, the public mind of England has undergone, in regard to the sanctity and civil importance of the matrimonial union, account, in some degree, for that confusion and uncertainty, in which the laws concerning marriage have of late appeared to be enveloped. The only way, to find a clue to this labyrinth, is to begin with the earliest *distinct* traces of the matrimonial jurisdiction, and follow with caution the changes which it underwent. We say emphatically the *distinct* traces; for we mean at once to discard two vague clauses in ordinances ascribed to Edmund, a Saxon king, and Lanfranc, a Norman archbishop, which are alleged to have rendered the blessing of a priest essential to the validity of a marriage, in

the 10th or 11th century. The authenticity of these obscure fragments of legislation is altogether doubtful: and in a pamphlet, which appeared pending the discussions in Millis's case, (*a*) it was shown, that if genuine, they prove nothing as to the essential validity of the marriage bond, at any time; that whatever they prove, they are not known to have been ever received as law, in any court; and that if so received before the 13th century, the effect now ascribed to them was, from that time, directly contrary to the law and practice of the only courts competent to entertain the question.

The pamphlet just mentioned, proves that the foundations of the matrimonial law of England, as it has existed for seven or eight centuries, were laid in the establishment of the Ecclesiastical Courts by William the Conqueror; and it reviews the history of those courts, so far as regards the jurisdiction of marriage. Of this survey we shall give a brief sketch; but shall divide it, with a view to our present inquiry, into *five* periods, beginning respectively with the establishment of the courts,—the formation of a body of laws for their guidance,—the Reformation,—the Toleration Act,—and the Marriage Act of 1753.

I. By a mandate of the year 1085, William removed the Bishops from the civil courts, and gave them in England, as they had long before enjoyed on the continent, an exclusive jurisdiction in *spiritual* concerns, among which marriage then held an undisputed eminence. During the whole of this first period, therefore, marriage *de jure* was exclusively under the ecclesiastical jurisdiction. In what way marriage *de facto* was then considered, does not distinctly appear; but we may reasonably conclude, that the limits between the two jurisdictions were much the same as we find them in the age immediately succeeding.

II. The second period began about the middle of the twelfth century, when the canon law received a systematic form in the *decretum* of the monk Gratian, as the common law to a certain extent did, in the treatise of Glanvil. In the fol-

(*a*) A letter to Lord Brougham, on the opinions of the judges in the Irish marriage cases, by Sir J. Stoddart, LL.D. &c. 1844.

lowing century appeared the authoritative *Decretals* of Pope Gregory IX., and the valuable productions of Bracton and Fleta, and from these sources we have a clear view of the matrimonial jurisdiction in both its branches, *de jure* and *de facto*.

First, as to marriage *de jure*. The key to all difficulty, on this subject, is to be found in the religious opinions of an age eminently, and (as we now think) blindly religious. The Ecclesiastical Court was not a court of the king, or of the civil state: it was "*Curia Christianitatis*," the court of the Christian community, governed by the bishop as spiritual pastor, with an ultimate appeal to the bishop of bishops, the pope. The law of the court was not "the King's Ecclesiastical Law" (a phrase invented by the servile parliament of Henry VIII.) —it was "the Law of Holy Church," set forth, not in statutes of kings or parliaments, but in decrees of popes, and canons of councils, and these again resting on the doctrines of theologians. Now, the great leading doctrine of the theologians of that day was, that *marriage was a sacrament*, which it is still held to be by all Roman Catholics. In the 13th century, this doctrine was received, as a matter of *faith*, by the whole community; the necessary consequence of which was, that the existence and validity of a marriage could only be determined by the law of the church: and accordingly we find Archbishop Arundel, in 1408, expressly denouncing it as *heresy* to hold any doctrine concerning marriage contrary to the law of the church, "*as set forth in the decretum and decretals*;" the punishment of heresy, on relapse, being, at that time, to be *burnt alive*. (*a*)

The law of the Church, "as set forth in the decretum and decretals," was, that "marriage is contracted by consent alone"—"that solemnities ought to be observed, but are not of the substance of marriage"—and that "though they be not observed, still the marriage holds good."(*b*) The church, indeed, from the earliest times reprobated unsolemn marriages in the strongest terms: it represented them as, morally speaking, no better than fornication or adultery; but it

(*a*) Stat. 2 Hen. IV. ch. 15. (*b*) Decretal, 4. 1. 1. &c. &c.

thought that those, whom God had joined together, man could not put asunder; and therefore, far from even pronouncing them null and void, when once contracted by competent persons, it held them valid, to the full extent of voiding a subsequent marriage with another person, though the first had been quite secret, and the second public, solemn, blest, and consummated. This is authoritatively laid down in a decretal of Pope Gregory IX. (A.D. 1230), which was cited *verbatim* by Lord Brougham in Millis's case. Well might Lord Denman ask, how any ordinance of the 10th or 11th century, supposing it had declared a marriage void for want of a priest's benediction, could continue to be received as law by an English Ecclesiastical Court, in the face of this decretal.

Unsolemn marriages, then, were *de jure* valid, but irregular. They were more or less irregular (and consequently more or less discountenanced by all courts), in proportion as they omitted more or fewer solemnities. The cases doubtless were rare, in which all solemnity was omitted; because few persons would, in those days, wantonly brave, to that extent, the censures of the church, the disfavour of the law, and the odium attached to such conduct by public opinion. Of these few cases, too, the records, which have come down to us, are of course much fewer. Still it does so happen that we have notices of two cases, on the very point of this decretal cited by Lord Brougham. One, of the 13th century, is to be found in Coke upon Littleton. (*a*) "A. contracts *per verba de præsenti* with B., and has issue by her, and afterwards marries C. *in facie ecclesiæ.* B. *recovers* A. *for her husband, by sentence of the ordinary.*" The other, of the 14th century, was quoted from the rolls of the province of York. "John de Steinbergh made a contract *cum copulâ* with Cecilia de Portynton, and afterwards married Alicia de Crystyndome *in facie ecclesiæ:* and on suit brought by Celicia, the Ecclesiastical Court pronounced the marriage with Alicia *fuisse et esse* invalidum, and adjudged John *in virum legitimum Ceciliæ.*" Here, observes the Lord Chancellor, in The Queen v. Millis, "the marriage

(*a*) 33 a. n. 10.

with Alicia is pronounced not only to be, but *to have been* void, agreeable to the rule of the Ecclesiastical Court, that when a marriage, voidable by reason of precontract, is annulled, it is annulled *ab initio*."

The Ecclesiastical Courts not only had jurisdiction on the validity of marriage *de jure*, but that jurisdiction was *exclusive*. This again is strongly, ably, and clearly put by the Lord Chancellor,—"It must always be remembered (says his lordship) that the Spiritual Courts were the *sole* judges of the lawfulness of marriage, where that question was *directly* in issue." "The discussion whether there be marriage or not (say both Bracton and Fleta) belongs not to the secular, but to the ecclesiastical judge." (*a*) When, therefore, a question, directly putting in issue the *right* of marriage, arose in the King's Courts, they referred it to the bishop, to certify whether the marriage was lawful or not. In all such cases, the rule of the King's Courts was, "that judgment must be given according to the ordinary's certificate;" and when so given it was conclusive against all the world. For instance, in a case of alleged bastardy, where the bishop had certified the marriage of the parents to be lawful, "the effect of this proof of legitimacy (says Bracton) is, that when once it is proved, and a judgment given accordingly in the King's Court, the individual shall be held legitimate always against all persons." (*b*) And so it was ruled A.D. 1309. (*c*) So much for marriage *de jure*, as determined by the Spiritual Courts, and recognised and carried into full effect by the King's Courts.

How, and to what extent, marriage *de facto* came to fall under the jurisdiction of the common law, is now to be explained. The lay judges, though they trembled to invade the spiritual sanctuary, were active and astute enough, in maintaining and extending their own jurisdiction over temporal concerns, in the name, and by the authority and power of the temporal sovereign. In the first place, therefore, they prohibited the Ecclesiastical Courts from holding plea *de laico feodo*. (*d*) Secondly, they would not allow the bishop to certify marriage without a reference to him for that purpose

(*a*) Br. 5, 19, 1; l. 6, 39.
(*b*) Br. 5, 19, 7.
(*c*) Y. B. 3 E. 2 M. T. 53.
(*d*) Glanvil. 12, 21.

from the King's Courts. (*a*) And, thirdly, they would not make such reference, when the right of marriage was not directly in issue, or when the certificate might affect a person deceased, or otherwise incompetent to make defence. It must be remembered, that though marriage itself was deemed spiritual, the incidents to marriage, such as legitimacy, dower, tenancy by the courtesy, &c., were creatures of civil institution, and on this domain the churchmen strove in vain to encroach. (*b*)

There were two classes of cases, in which the *right* of marriage not being directly in issue, the King's Courts allowed a presumptive proof of marriage, founded on acts *in pais*, to entitle the parties to certain temporal privileges. Where the presumption arose from cohabitation and reputation, it was called marriage *in possession;* where it arose from an act of public betrothment, it was called marriage *in fact.* It would seem that the common law had laid down no positive rule, as to the kind or degree of publicity or solemnity necessary to the proof of a marriage in fact; or else that the rule had varied at different times. A certain degree of publicity, and a certain degree of solemnity would naturally be required. Some persons perhaps may have thought, that the ceremony should be performed in a church or chapel, or at a church door; others, that a mass should be sung, or a benediction uttered, or a ring used; whilst others again may have been willing to dispense with all these, provided only that the party were not on his death-bed. One thing, however, is certain, that the rule recently suggested, which renders the presence of an *episcopally* ordained minister essential to the validity of a marriage, is to be found nowhere in the law—absolutely *nowhere!*—in no reported judgment, in no text-book or commentary, in no *dictum* of any judge, scarcely in any argument of counsel! If deemed necessary, it was plainly not sufficient, in the cases of *Foxcroft* (*c*) and *Del Heith*, (*d*)

(*a*)2 Rol. 589, l. 50.

(*b*) About 60 years before the Statute of Merton, Pope Alexander III. claimed to decide on the *legitimacy* of an English lady, but was compelled to give up this point, as temporal, retaining, nevertheless, his spiritual jurisdiction on *marriage.* See *Observations on Lord Cottenham's Opinion*, pp. 19, 20.

(*c*) Roll. Ab. 359. (*d*) 34 Ed. 1.

for the former was married by a bishop, and the latter by a priest, and yet the sons, in both cases, were held illegitimate; though, for aught that appears, both marriages might have been certified to be good by the ordinary, if reference had been made to him for that purpose. These were cases of bastardy. Now it is plainly laid down both by Bracton and Fleta, that if the party asserting his adversary's bastardy put it on the ground, that the father of the latter *never* married the mother, or that their marriage was *unlawful*, this was a question of marriage *de jure*, and was sent to the bishop; but if he put it on the ground, that he was born *before* his father's marriage, or begotten by *another man*, the right of marriage was not in issue, and the trial must be by a jury (*a*). Hence the distinction afterwards found in the books, between general and special bastardy, to the latter of which classes these cases evidently belong.

The circumstance, which has rendered the cases of *Foxcroft* and *Del Heith* (with some similar ones) such stumbling-blocks, in the investigation of the Matrimonial Law, is simply this—the decisions have been supposed to be given on marriage *de jure*, when they were really given on marriage *de facto*. In Del Heith's case it was clearly so; for the suit was on a writ of ejectment: and it is said "it was asked, *at the trial*, whether any espousals were celebrated between his parents in the face of the church, and because *it was not proved* that John Del Heith was ever married to Katherine in the face of the Church, the *jury* found, that the plaintiff had no right to the lands." The question whether the private marriage, which was admitted to have taken place, was *valid* or *void*, was one to which the jury were totally incompetent, and on which they did not pretend to offer an opinion.

The King's Courts allowed different issues to be sent to trial, according to the nature of the suit. When the suit touched the right of marriage directly, they allowed the issue "ne unques accouple en loial matrimonie," to go to the bishop: when it concerned only a marriage in *fact*, or in possession, an issue "Feme ou nient sa feme" (or the like) was sent to a jury. (*b*) The rules of evideuce and procedure in the two

(*a*) Br. 5, 19, 1; Fle. 6, 39. (*b*) Y. B. 18 Ed. 3, A.D. 1344; and 39 Ed. 3, A.D. 1365.

courts being so totally different, it is obvious that the decision of a jury, on the one issue, could in no degree affect that of a bishop on the other; far less could a verdict on a marriage *de facto* serve as a "*test*" of the validity of a marriage *de jure*: not to mention that the tests themselves might produce the most opposite results. "A marriage might be lawful as to the succession, and unlawful as to the action of dower." (*a*) On the other hand, a marriage *de jure*, valid, but irregular, might, in consequence of that irregularity, be disallowed, in the King's Courts, as insufficient *de facto* to entitle the parties to the particular civil right in question; for (says Lord Stowell) "the common law had scruples in applying the *civil* rights of dower, and community of goods, and legitimacy, in the cases of these looser species of marriage."(*b*) But this could not affect a decision of the Ecclesiastical Court on the validity of such a marriage. "Rights of property, (as he elsewhere says) have nothing to do with marriage considered as to the *vinculum*."(*c*)

Marriages *de facto*, then, might, according to circumstances, have been valid or void *de jure*. But we find a further distinction made by common law writers between marriages *void* and *voidable*, which, according to Blackstone, turns on the nature of the disability to contract marriage; and he divides those disabilities into *canonical* and *civil*: the first comprising precontract, consanguinity, affinity, and personal infirmity; the second including a prior marriage, want of age, want of reason, and want of consent of parents. These distinctions are not very philosophical; since the last was neither canonical nor civil till 1753, and the preceding three, which he calls civil, are equally canonical. We shall therefore attempt another explanation of the matter. The term *voidable* is equivocal: in common parlance it would seem to signify something essentially valid, but capable of being *made* void *for the future*: here, on the contrary, it is applied to something apparently valid, but capable of being *declared* void *from the beginning*. Take, for instance, a case of consanguinity. Rolle says, "If a man marry his mother, they are husband and wife till the the marriage *is dissolved*:" and for this, he quotes a judgment

(*a*) Fleta, 5, 28. (*b*) 2 Hag, 67. (*c*) 1 Hag. 236

in the year book of 1430. Now, what court ruled this? A lay court, incompetent to decide on the validity of any marriage *de jure*, and which intended merely to decide, that the parties in this particular case were entitled to certain rights, on the *presumption, ex facto*, that they had contracted a valid marriage. Moreover, the presumption itself was pronounced defeasible, which at that time was inconsistent with marriage *de jure*, because *that* was deemed absolutely indissoluble. Now, suppose these same parties had gone before a competent court; what would have been the language there held? The court would have said, "You are not husband and wife, and *never were* so; your pretended marriage is no marriage at all: it was a nullity *ab initio*." So, in one of the cases of pre-contract before mentioned, the court said, in substance, "You, John de Steinbergh, never were really married to Alicia: a mere 'show or effigy of marriage' passed between you; but it could not be a marriage *de jure;* for you were, at that time, the husband of Cecilia; and a christian man cannot be at the same time the husband of two wives." Moreover, the common law itself treated such a marriage, when dissolved, as having been void *ab initio;* for it deprived the second wife of dower, and bastardised her issue;(*a*) which it could never have done if the right of the one had been vested, and the *status* of the other fixed, by solemnization.

The real and only distinction, at the time of which we are speaking, between the classes since called *void* and *voidable*, was a distinction in the practice of the common-law courts. Both classes were essentially void by the canon law, to which they were both subject; but the circumstances of some marriages afforded a presnmption in their favour, which was held sufficient at common law, until rebutted by the sentence of a competent court. These marriages were called voidable, and until avoided were necessarily treated as valid. But others could offer, on the face of them, no such presumption. Marriage, being a contract, could not be even presumably good, if made between parties incompetent, by defect of age or mental sanity, to contract at all. Whether or not

(*a*) 2 Co. Inst. 93.

they were so defective, was not a spiritual question, but a physical fact *in pais*, of which the country could judge quite as well or better than the pope: and when the verdict of a jury had determined it in the negative, there was an end of the matter, in a court which professed only to deal with marriage *de facto*. The judgment on such a verdict, though (as we have said) in strictness merely interlocutory, with reference to the right of marriage, came to have the force and effect of a definitive sentence; because the verdict itself could not well be gainsaid in any court. The same reasoning would apply to a marriage under duress, though on that point some seem to have doubted. (*a*) The question of disability by a prior (solemnised) marriage was still more disputed. In a suit for dower in 1365, one of the judges appears to have thought that prior marriage was a question only fit for the Court Christian; (*b*) and in a case of bastardy in 1440, the same point being mooted, the report ends "*quære legem.*" (*c*) But finally it was left to be tried by a jury, (*d*) probably because the presumptions from each solemnity being equal, the former, in point of time, must necessarily prevail, in a contract for life. It is obvious, however, that the second marriage is not absolutely void; for if the former be declared null by a competent court, the latter, if properly contracted, must be valid.(*e*)

(To be continued.)

(*a*) 1 Rol. 340, l. 20. (*b*) Y. B. 39. E. 3, 15.
(*c*) Y. B. 19, H. 6. 32. (*d*) 1 Rol. 340. l. 13.
(*e*) Cooke v. Browning, Arches, A.D. 1812.

THE

UPPER CANADA JURIST.

HINTS ON THE EXAMINATION OF WITNESSES.

(Continued from page 106 of last Number.)

The rest of Mr Field's pamphlet is occupied with matters of a technical kind, regarding the rights of witnesses to their expenses, the modes of compelling their attendance, &c. &c., which are beside our present purpose, though not unworthy of consideration, when this branch of law comes to be brought under the consideration of the legislature, or of a board authorized to give it the complete revision it is pretty generally admitted to require. At the same time, we should find it no easy task to suggest a remedy for the principal defects—the insufficient remuneration for loss of time, and the difficulty of inflicting an adequate penalty for wilful or even fraudulent non-attendance.

In strictness, none but attorneys and medical men can claim a compensation for their time, though a practice has grown up of making other witnesses an allowance on this score. For example, at the last Guildhall sittings, a witness claimed something for loss of time, and Lord Denman so far entertained the claim as to enter into the question of its reasonableness. But such allowances must be jealously watched, or they will rapidly degenerate into bribes. Every body knows that surveyors, and (we regret to add) scientific witnesses, may be had in any quantity, and on either side of any given question of value or opinion, by whoever chooses to bid up to their price.

On the first blush of the question it would seem that the party ought to enjoy the privilege of summoning what witnesses he stands in need of, and that he himself must be the sole judge of the necessity. If he were obliged in each indi-

vidual instance to prove the materiality of the expected evidence, it is obvious that he might be put to great inconvenience or suffer serious damage; for a prudent litigant will come prepared to meet every combination of circumstances that might reasonably be expected to present itself. On the other hand, it is hardly politic to place the time and comfort of any (the most occupied or most distinguished) members of the community at the mercy of any wrongheaded, quarrelsome, or turbulent person who happens to be afflicted with a diseased love of notoriety. We remember one case, a prosecution for blasphemy, in which the defendant, by way of shewing the divided state of opinion on theological subjects, actually subpœnaed the heads of all the religious persuasions he could hear of, and when the day of trial arrived, these found themselves all shuffled up together in the waiting room—the Archbishop of Canterbury and the High Priest of the Jews being of the party. Lord Brougham knew better, and when Mr. Dicas subpœnaed him, stayed away. There was an application for an attachment, but, as it could not be made to appear that he was able to speak to any material point, the court declined to interfere.

Mr. Best was induced to translate Quintilian's chapter concerning witnesses, with the view of supplying a chasm left by law-writers; who, he says, have paid little or no attention to the art of examining witnesses, from an opinion that it can be acquired by practice and experience only. This opinion is better founded than most of those advanced by what are called practical men—a title absurdly enough appropriated by common consent to those who are incapable of generalising; but still something may be done to facilitate the acquirement by laying down rules or suggesting topics; and it is a fact, well worthy of grave reflection, that almost all that can be done in this way has been done by a Roman writer who flourished in the first century of the Christian era. Aristotle's Rhetoric includes nearly every useful precept in oratory; and nearly every useful precept regarding witnesses, which can be laid down beforehand, will be found in this one chapter of Quintilian.

His advice as to the best mode of impeaching their credit

is commonplace enough, but throws considerable light on manners.

"But a severer battle is to be fought when the witnesses appear in person. Speeches addressed to the judges, and questions put to themselves, are alike made use of both to impeach their testimony and to support it. First, in speeches, it is usual to declaim both in commendation of proof by means of witnesses, and in derogation of it. The following are the common places on this subject. It is contended, on the one hand, that no proof can be more satisfactory than the assertions of individuals who depose to facts within their own knowledge; while, on the other, all those temptations and motives, which so often induce men to give false testimony, are enumerated, in order to cause the witnesses, who have been produced, to be disbelieved. We next proceed to impeach the testimony of the witnesses more particularly,—still, however, in such a way, as to include many under one head of objection; for it is well known that orators have at times treated with contempt the evidence of whole nations, and at others condemned entire classes of testimony—such, for example, as hearsays—on the ground that the individuals deposing are not themselves witnesses of the transactions in dispute, but merely repeat the words of others who have not been sworn; again, in prosecutions for extortion, individuals, who swear that they paid the accused the money in question, should be looked on as parties to the cause, and not as witnesses. Sometimes each witness is attacked separately; in most orations where this course is adopted, it is made part of the main defence, but is sometimes the subject of a distinct speech, as it was in the case of the witness Vatinius."

He proceeds to press an injunction of his master, Domitius Afer, whose books are unfortunately lost.

"He most wisely taught his pupils, that every orator should, in this part of his profession, (a maxim which doubtless applies generally,) make it his first care to become familiarly acquainted with all the facts of the case. How this knowledge is to be acquired shall in its proper place be explained. It will supply him with materials for questioning, and, as it were, furnish his hands with weapons. It will also enable him, in his opening speech, to prepare the minds of the judges for the testimony to be produced. For every advocate should in his address comment on the evidence about to be given by his own and his adversary's witnesses, since any statement of facts has weight or not with the person to whom it is given, according as he is predisposed to believe or disbelieve it."

It is astonishing how very few of our best advocates do master their facts, although there is a splendid living example of the extraordinary power that may be acquired by doing so. He, however, ordinarily reserves the knowledge, thus painfully acquired, for his reply, when he brings circumstance after circumstance to bear in a style which cannot fail to inspire the highest admiration in all capable of appreciating this kind of intellectual excellence. But, in his openings, he certainly errs constantly and we believe wilfully, against the precept of Quintilian,—to prepare the minds of the jury for the coming testimony by commenting on it. Our own impression is, that every material point in the case should be so far touched upon in the opening as to give the desired bias and prepare the jury for the meditated gloss or colouring, but slightly and, if possible, even parenthetically, so as not to suggest topics of defence.

In the Roman tribunal, witnesses were of two classes: such as appeared voluntarily, and such as were summoned by the judges.

"In the case of a voluntary witness, the advocate who introduces him can always know beforehand the testimony he comes to give, and seems, for that reason, to have the easiest task to perform when called on to examine. But even here tact and caution are requisite; and measures must be taken to counteract the effects of timidity, unsteadiness, or indiscretion on the part of the witness, should he display such. For the opposing advocate often succeeds in confounding the witness, and leading him, as it were, into a trap, where, if caught, he does more harm to your cause, than his evidence, given steadily and unshaken, would have served it. Your witnesses should, therefore, be well exercised out of court in the evidence which they are to give, and you should try them with the various questions which are likely to be put to them by the other side; by which means they will either be rendered capable of standing firm when examined in court, or, should they be at all shaken in their testimony, the advocate by whom they were produced can, by a judicious re-examination, regain for them their former credit."

The attorney who understands his business will take good care to put his own witnesses through a trying cross-examination, and would do well to insert in his brief not merely their answers to his questions, but the remarks suggested by their

mode of answering. Still it by no means follows that they will tell the same story upon oath; and, as a general rule, we should say that the evidence of the lower order of witnesses turns out weaker, and that of the higher order stronger than was anticipated. The reason is obvious; the lower order, regarding attendance as a holiday, wish to be subpœnaed, and the higher order do not.

The next passage is curious:

"But even though the story our witnesses tell us be consistent in itself, we must still be on our guard against treachery on their part; for we frequently discover that they have been suborned by the opposite party, and, after having promised that their testimony shall be altogether in our favour, tell things on the trial which make the other way, and which they seem to the judges rather to confess than depose to. We should therefore inquire into their reasons for wishing to injure the opposite party; nor should it content us to learn that enmity has existed between him and them; we should ask if that still continues; besides, they might wish to make their conduct on this very trial a means of reconciliation with him; we should also consider if it is likely that they have been bribed, or if, after all, they may not repent of their intention of giving evidence in our favour. But if it is necessary to be on our guard even when our witnesses are only going to depose to facts which really occurred, and which they know, much more is it so when people promise to give false testimony in our favour: for not only are such more likely to repent of their original intention, but there is less reliance to be placed on their promise, and should they even persevere in their purpose, are more easily overthrown."

This has been frequently adduced to show Quintilian's want of principle and the low state of morality existing amongst the advocates of Rome, who, it is inferred, thought themselves fully at liberty to use the testimony of witnesses who were confessedly hired to swear falsely. Mr. Best can find no better apology for him than one strongly resembling that suggested by a French writer on cookery for M. Corcellet, who was wont to use artificial means to give his geese a liver complaint:

De son estomac il faut distinguer son cœur.

Just so Mr. Best says that we must distinguish between the intellect and the moral sense of Quintilian, and urges that

we may benefit by the critic's advice without copying his malpractices.

Great caution is recommended when the witness shows an undue degree of eagerness. The best course then is to avoid putting questions which would bring him directly to the point, and if possible lead him to mix up the required statement with indifferent matters. When once made, no opportunity should be afforded him for repeating it. Quintilian's notions of cross-examination differ very little from those of a modern practitioner:

"But when the witness you have to deal with is one of those who will not disclose the truth until he cannot help it, the advocate's greatest art is required in order to wring it from him. There is only one way of accomplishing this, which is, by questioning him about matters which lie at a distance. For he will give you such answers as he thinks cannot make against the cause he wishes to favour; then, from the various matters he has thus been got to admit, you may place him in such a situation as to be unable to deny those facts which he is unwilling otherwise to make known. For as in our opening address we frequently bring together scattered arguments,—each of which seems in itself to make nothing against the accused, but, by putting them all together, we prove the fact charged,—so, in like manner, we should ask a witness of this description a great many questions about the circumstances which preceded and followed the main transaction, as also about the time and place of the occurrence, the character of parties, and such like, in order to try to make him light on some answer which will either compel him to confess what we want him to tell us, or contradict what he has said already. Should this not occur, it will then be manifest that he is unwilling to speak about the matter in dispute; and we must then proceed to examine him about others which are extraneous to it, in order to try if we can catch him even in that way. Besides, we should prolong his examination on the material facts of the case, for this reason, that as a witness of this kind will seize every opportunity of colouring his evidence in favour of the accused, even more than is requisite for his exculpation, the judges observing this, will be induced to suspect him, which will have the effect of rendering his examination quite as injurious to the accused as if he had disclosed the whole truth against him."

The present chief justice of the Queen's Bench is reported to have once spoken of "the vulgar practice of cross-examining every witness;" and it must be owned that no practice is

more absurd. The majority even of our leading advocates, when they have no materials for cross-examination, no new facts to elicit, and no ground for disbelieving the statement, will notwithstanding persevere in compelling the witness to repeat himself, in the vain hope of pushing him into an inconsistency; though their own observation must have taught most of them, that trifling discrepancies are uniformly disregarded by jurymen, and that the experiment almost always ends in bringing out the adverse facts more strongly against their clients. The mystic power attached by the public to cross-examination exists only in very rare and exceptional cases.

There is wisdom in the following maxim:

"To pass on to the second case we put; suppose the advocate does not know how the witness is biassed towards the accused; he should endeavour to find this out by a cautious and step-by-step examination, as it is called, and lead him on gradually to the answer he is desirous of eliciting. But inasmuch as artful witnesses are to be met with, who answer at first to your entire satisfaction, in order to be able afterwards to tell what makes against you with the greater appearance of truth, the wary advocate should always dismiss a suspected witness while his testimony is favourable."

The art of stopping at the proper moment is one of the highest moment,—in the speech, the evidence, or the general conduct of the case; for every fresh witness, new question, or additional statement, is a source of peril, and ought not to be lightly hazarded. No first-rate advocate, who has courage and independence enough to act upon his own judgment, will overlay his case; but too many, we fear, act upon the principle frankly avowed by the late Mr. M., who stated that he always made a point to call all the witnesses in his brief. "Did you never lose your cause by so doing!" "Often; but never my client." There is no doubt that clients (both attorneys and parties) are dissatisfied unless their whole array of witnesses are regularly polled out; but, on the other hand, it should be remembered that (taking the narrowest and most interested view of the question) general reputation attracts business, and that general reputation is influenced both by a man's ordinary system of tactics and his success.

"We next proceed" (continues Quintilian) "to consider the course which the defendant's advocate should pursue in his

examination. And here the great thing is to know the kind of witness you have to deal with. For if you observe him to be of a timid disposition, work upon his fears; if you see that he is a weak man, try to entrap him; should he be of a passionate temper, get him into a rage; is he vain-glorious? then puff him up; or, if he appear verbose, entice him on to make him say something inconsistent with his direct testimony; but when you see that the witness is a prudent and steady man, either dismiss him instantly with the insinuation that he is surly and hostile to your cause, or in preference to trying to shake him by examination, throw out some short observation to the court against his testimony; or if the opportunity present itself, turn him into ridicule by some pleasantry; or if any thing can be said against his character, attack his credit with the tribunal by commenting strongly on his misconduct. We sometimes meet with witnesses who to much uprightness of character join great diffidence, and we should not handle them roughly, for such persons may be frequently softened by gentle treatment, when any petulant attack would only exasperate them against us.

"Now the advocate's line of examination may either relate to the matters in dispute, or be directed to extraneous subjects. When of the former class, let him follow the course we have already laid down for the prosecutor, and begin by asking questions about matters which lie at a distance, and can excite no suspicion in the witness as to his object in asking them, and then frame his subsequent questions by the answers given; by which means he will frequently succeed in bringing unwilling witnesses into such a situation as to be able to wring from them what may be of service to his cause. Our schools, it is true, neither give their scholars any instructions, nor require any exercises from them, in this art; and the talent in question is rather the result of natural acuteness, or is acquired by practice. But if it be required to give an example of its exercise, I must refer you to the Dialogues of the Socratic Philosophers, and especially those of Plato, where you see such an ingenious course of examination adopted, that although the answers given are for the most part happy enough, still the matter is brought to the conclusion which the interrogating party wished. It sometimes fortunately happens that the account which the witness gives is inconsistent with itself; at other times (and this latter is of more frequent occurrence), different witnesses give irreconcilable statements; but these, which are in general the result of chance, can also be brought about by an ingenious course of examination."

"But above all things the advocate should be circumspect in the way he puts his questions, for witnesses often retort

with much repartee, and the feeling of the auditory is in general greatly in their favour. He should also, as much as he possibly can, employ words in common use, in order that the individual under examination (who is generally an illiterate person) may understand the question, or at least be deprived of the power of saying that he does not, a thing which makes the advocate appear not a little ridiculous."—

We have already said that witnesses who come prepared to show off their wit, generally cut a bad figure; but if they attempt nothing of the sort, and the repartee obviously flows naturally and is suggested by the occasion, it is fatal to the examining counsel; as when Bearcroft, addressing a Mr. Vanzellan—"With your leave, Sir, I will call you for the sake of shortness, Mr. Van." "And with your leave, Sir, I will call you for the same reason, Mr. Bear." Still better, if the retort be unintentional or the result of simplicity, as when Lord Brougham, examining a gentleman as to facts within the knowledge of his wife, asked "Pray, Sir, is Mrs. Thompson here?" "No." "No! I hope Mrs. Thompson is well?" "Quite well, I thank you, I hope Mrs. Brougham is the same." The bystanders assert that the witness spoke with the most perfect *bonhomme;* but if he had studied all his life under Horne Tooke (the only professed puzzler of judges and counsel who succeeded,) he could not have given a more effectual damper to the flippancy of his assailant.

We have reprinted these passages, and connected them with a few random observations of our own, merely in the hope of inducing reflection on the topics; for much more may be suggested than said regarding them. With the general rules or (as the ancient rhetoricians called them) the common places in his mind, the young practitioner will proceed with much greater confidence and effect, than if he had nothing better than his own limited experience for a guide; but nothing short of long observation, and some actual practice in courts of justice, will enable him to acquire the conventional tact and readiness necessary to bring even the most brilliant natural talents into play. Even the strict technical rules can only be learnt in this manner. Thus a leading question, according to the books, is one which suggests the answer; but such a question is invariably permitted unless it suggests an answer

regarding the precise matter in dispute. "I wish that objections to questions as leading might be a little better considered before they are made. In general no objections are more frivolous." So said Lord Ellenborough, and much time is certainly wasted by not putting leading questions, but the evil cannot be corrected unless a higher degree of mutual confidence can be established amongst the members of the bar. We regret to say, that it would not invariably be safe to suffer a departure from the strict rules of evidence, under the confidence that no unfair advantage would be taken. In fact the eagerness of competition, and the absence of any one acknowledged superior, have introduced an extent of conventional trickery extremely detrimental to the time of the public and the character of the profession. "Win your cause, honestly if you can, but at all events win it," is the word.

A correct knowledge of this rule of evidence, by the way, might be of considerable use to the attorneys (many of them clever accomplished men) who attend the revising barristers' courts. They constantly begin by asking whether the voter has *occupied*. When the objection does not turn on occupation, the question is allowed; but then they almost always insist on beginning in the same manner when the sole point for decision is, whether the individual has occupied or not. It is quite useless to explain that the question is not simply a leading one, but requires the witness to swear to a legal conclusion. They reply that they have always been in the habit of putting it; and if you persevere in stopping them, they assume a look of injured innocence during the remainder of the day, and probably show you up in the county newspaper for an unconstitutional attempt to limit the franchise.

We have one more caution to add. Both bench and bar ought really to bear in mind that they have no well-founded authority over witnesses, and that they might be made to look exceedingly foolish by a man of clear perceptions and strong nerves, resolved on following his own mode of statement. "Don't tell us *this*, Sir," and "We don't want to hear *that*, Sir," may be all very fine so long as the present vague undefined apprehension can be kept up, but suppose the witness were to turn round and say: "I have sworn to speak the

whole truth, and I am ready to do so; but I will not state it in a garbled fashion to please any body; nor give what you call a direct answer, when I know that a false impression might be conveyed by it; nor say that a thing is either black or white, when in my opinion it is grey." Is there a judge upon the bench who would dare to commit? We rather think not. The prescriptive threat would be found about as formidable as the Speaker's, to *name* the member who should prove contumacious. "And what would happen if you should name me, Mr. Speaker," said an orator who had been somewhat unceremoniously put down during Sir Fletcher Norton's dynasty. "The Lord in Heaven only knows," was the muttered yet distinctly audible reply. *H.*
—*Law Magazine.*

MARRIAGE DE JURE AND DE FACTO.

(Continued from page 128 of last Number.)

III. The third period of our historical survey begins with the Reformation. What change did that great event make in our matrimonial law? Did the legislature take from the Ecclesiastical Courts the jurisdiction of marriage *de jure?* On the contrary, it declared that all causes of matrimony appertained to the spiritual jurisdiction. (*a*) Did it abrogate the canon law previously received in those courts, respecting marriage? On the contrary, it declared that such canons as were not contrary to the laws of the land, should *continue* in force. (*b*) An attempt indeed was made to abrogate, in part, the decretal of Gregory IX. above mentioned, as "an unjust law of the Bishop of Rome." (*c*) "This statute," says the Lord Chancellor, "was pointed against the injustice of dissolving by reason of precontract a marriage solemnized *in facie ecclesiæ*, and after consummation between the parties; but *it left the law, where there had been no consummation, as it stood before;*"

(*a*) Stat. 24 Hen. VIII. c. 12. (*b*) Stat. 25 Hen. VIII. c. 19.
(*c*) 32 Hen. VIII. c. 38.

and very early in the reign of Edward VI., the statute was repealed, and the law *restored to its former state.*

Accordingly, the Ecclesiastical Courts continued to hold contracts *per verba de præsenti* valid marriages, and public solemnizations with a third person, after such a contract, mere nullities; and the common law courts continued to recognise such judgments as lawful, and sufficient to convey titles to lands and goods. All this is clear from Bunting's case,(*a*) which was merely the converse of the case in the thirteenth century, above cited from Coke upon Littleton. Here, A., the man, contracted with B., the woman. She afterwards publicly married C., and cohabited with him; but on suit in the Ecclesiastical Court she was *restored to A.*, and the marriage with C. was declared void *ab initio:* and on the ground of this sentence the common law court held a son, whom she subsequently had by A., legitimate. In the very next year (1587), occurred the case of Edward Hampden's daughter, whose marriage was dissolved *causâ præcontractûs.* (*b*) Shortly after these cases, Swinburne wrote his Treatise on Spousals—"a work (says the Lord Chancellor) of great learning." He lays it down, in the most precise terms, that a consent *de præsenti* is in truth very matrimony; that the parties to it are husband and wife, in respect of the substance and indissoluble bond of marriage; and that though one of them should afterwards marry a third person, in the face of the Church, and consummation should follow, yet the first contract is good, and shall prevail against the second marriage;" and he cites to this effect various passages of the decretals, as being part of the canon law binding in England. This same canon law, as to marriage *de jure*, continued unaltered, except by the Commonwealth ordinance of 1653 and the statute relative thereto, for the remainder of this period. Attempts were made in vain to correct it by the *Reformatio Legum Ecclesiasticarum* in 1550, and by bills to restrain clandestine marriages, in 1666, 1667, 1677, and 1685; but none of these measures ultimately affected the general jurisprudence of the country.

IV. We come then to the Revolution of 1688.—The law

(*a*) 4 Co. 29, a.

(*b*) 2 Co. Inst. 93.

of marriage *de jure* remained the same, from this epoch till 1753. Attempts indeed were made to restrain clandestine marriages by bills brought into parliament, in 1689, 1690, 1691, 1696, 1697, 1718, and 1735; but they all failed. The books of strict authority in ecclesiastical law, published during this period, were those of Ayliffe and Oughton, who both follow the doctrines of Swinburne. As to the practice of the ecclesiastical courts, it is frequently alluded to, as matter of notoriety, in the common law discussions of the time. Lord Holt, in Jesson's case (A. D. 1703,) and in Wigmore's case (A. D. 1705,) distinctly states it to be such as we have described,; (*a*) and the same was so asserted, without dispute, in Holt v. Ward (A. D. 1732). (*b*) It has been erroneously supposed to have been ruled differently in Haydon v. Gould, (A. D. 1710), (*c*) but there the *regularity* of the marriage only was in issue, not its *validity;* and it was held (though the Ecclesiastical Courts seem afterwards to have relaxed that strictness), that an irregular marriage (ex. gr. in a Sabbatarian congregation) would not entitle a party claiming under it to an administration, which was expressly demanded as a "right due by the ecclesiastical law," and properly so described; for though regulated by various statutes, it was derived from the ancient jurisdiction of the ordinary. The judgment no doubt was grounded on the rule, "frustrà Ecclesiæ auxilium implorat, qui ejus *contempserit* authoritatem." (*d*) This rule, however, did not prevent a party who had contracted a valid but irregular marriage, and was therefore in contempt, from offering to purge the contempt by a regular solemnization. Accordingly, we find a Quaker woman alleging a contract *de præsenti*, and citing the man to solemnize. (*e*) So, on a marriage contract *per verba de præsenti*, between Jews, and a suit to compel solemnization, the libel was admitted, but the proof failed; (*f*) so, where the parties had read the words of the English ritual, but not in the presence of a clergyman, it was established as a marriage, and solemnization decreed. (*g*)

(*a*) 2 Salk. 437.
(*b*) 2 Stra. 937.
(*c*) 1 Salk. 119.
(*d*) Sanchez, iii. 42, 2.
(*e*) Haswell v. Dodgshon, Deleg. 1730; Letter to Lord Brougham, 59.
(*f*) Da Costa v. Villareal, 1733, 1 Hag. C. R. 242.
(*g*) Leeson v. Fitzmaurice, Deleg. 1732; Letter to Lord Brougham, 59; Observations on Lord Cottenham's opinion, 56.

Sir E. Simpson, at the conclusion of this period, thus briefly sums up the law as then practised: "The canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnities according to English rites;" (*a*) and Lord Hardwicke shows its recognition by the common law,—"Where a marriage is in fact, or in a contract *in præsenti*, or in a suit for restitution of conjugal rights, a sentence in the Ecclesiastical Court will be conclusive, and bind all; but not if given in a collateral suit." (*b*)

How far a marriage of Dissenters may have been allowed as a marriage *de facto*, previously to this time, is somewhat doubtful. But the Revolution, which now occurred, caused one of those mighty changes in the frame of English society, which could not fail to leave deep traces on the national jurisprudence. Among its first and most distinguished fruits was the Toleration Act, stat. 1 W. & M. sess. 1 c. 18. Protestant Dissenters were for the first time, constitutionally recognized, as entitled to full protection in the peaceful exercise of their religion, and could not be prosecuted in an Ecclesiastical Court for not conforming to the Church of England. Two years after this, the bill of 1690 to restrain clandestine marriages was brought in, which, for the first time in Parliamentary legislation, proposed to make all such marriages *void*. It was thereupon moved, "that the act should not *extend* to the marriages of Quakers," clearly implying that, but for the proposed law, their marriages would be good either *de jure* or *de facto*. The bill indeed dropt; but soon afterwards occurred the case of Hutchinson v. Brookbank (A. D. 1694). (*c*) Hutchinson and his wife had been married in the face of a dissenting congregation, and were afterwards libelled in an Ecclesiastical Court, for fornication. They thereupon applied for a prohibition, suggesting that their marriage was protected by the Toleration Act, and leave was given them to declare in prohibition, which clearly showed, that the court inclined in favour of their suggestion. The King's Court, therefore must at least have regarded it as a marriage *de facto*; and though the matter

(*a*) Scrimshire v. Scrimshire, 1752, 2 Hag. C. R. 400.
(*b*) Roach v. Garvan, 1748, 1 Vez. 157. (*c*) 3 Lev. 376.

appears to have dropt, yet its impression was very effectual; for we never afterwards hear of any attempt by the Ecclesiastical Courts to disturb married dissenters, on such a pretext, either before or after stat. 27 Geo. III. c. 44., which only protects persons *lawfully* married.

An act of 1695, (*a*) adverts to "marriages or pretended marriages" of Quakers and Jews; and declares, that they shall be of the same force and effect, as if the act had not been made. Here again we have an evident implication, that some of them at least may have been good, either *de jure* or *de facto*.

In Wigmore's case (A. D. 1705), there was an Anabaptist marriage, on which the wife sued in the Spiritual Court for alimony, and the King's Court refused to prohibit. My Lord Holt gave a strong opinion, that this was a valid marriage *de jure*, and he certainly did not intimate, that he would not have held it good *de facto*.

Fielding's case, which occurred in the same year, (*b*) was one of bigamy, for which offence (according to Coke) an unavoided marriage *de facto* supports the indictment. In the disputed marriage, there was no regular solemnization. A sort of ceremony indeed was performed by a *Romish priest*; but the judge did not rest the legality of the marriage on that fact alone. He merely mentioned it as *one of the circumstances*, from which the jury might infer a marriage *de facto*, as he probably would have done, had a minister of any other communion intervened. Indeed, after the indulgence given by the Toleration Act to protestant dissenters, it would have been strange to refuse to their ministers a privilege conceded to Romish priests, few of whom could at that time be in the kingdom without incurring the guilt of treason. Yet strange to say, this very case of Fielding seems to be the sole authority (except the obscure fragments of Edmund and Lanfranc) for holding *episcopal* ordination to be the test of a lawful marriage! In 1710 occurred the above-mentioned case of a Sabbatarian marriage, in which, though the Ecclesiastical Court refused the husband administration, yet it

(*a*) Stat. 6 & 7 Will. III. c. 6, s. 63. (*b*) 14 St. Tr. 1327.

was said, "the wife, who is the weaker sex, and the children, who were in no fault, may entitle themselves to a temporal right by such a marriage." If so, it was clearly, by law, a marriage *de facto*. (*a*)

In 1718 another bill was brought into the House of Commons, to prevent clandestine marriages; and on this occasion a clause was agreed to *by the whole House*, "that the act should not extend to *prejudice* the marriages of Quakers, *solemnized* by Quakers, between Quakers." One branch of the Legislature, then, at least, recognized those marriages as including a public solemn betrothment, and conveying some legal rights, which would seem, on principle, to be all that is essential to a marriage *de facto*. And indeed we find it laid down about this time in a work of repute, that a marriage *de facto*, or in reputation, *as among the Quakers*, hath been allowed by the temporal courts to be sufficient to give title to a personal estate." (*b*)

V. We now reach the fifth period of the Matrimonial Law. Lord Hardwicke's bill was enacted in 1753. We shall not here dwell on the inconsistencies and iniquities of that act. They have been fully set forth in one of the pamphlets before referred to. (*c*) Happily, it has ceased to disgrace our statute-book; and we shall only observe, that by rendering all marriages in England null, which were not solemnized according to its enactments, it gave to the common law courts a concurrent jurisdiction on marriage *de jure*. Our present concern, however, is not with the cases under the act, but with those exempt from its mischievous operation; viz. those of Scotch marriages, marriages between Quakers and between Jews, and marriages solemnized beyond the seas, including those on the sea, and in Ireland.

The Scotch marriages were treated on the same principles as those beyond the seas, which we shall presently consider.

Jewish marriages, both before and after the act, were probably considered as governed by a foreign law (namely, that of the Hebrew people); of which law the courts received evidence, as of a matter of fact.

(*a*) Haydon v. Gould, ut sup. (*b*) Wood's Inst. b. 1, c. 6.
(*c*) Letter to Lord Brougham, p. 67.

The marriages of Quakers require more particular examination. "The case of the Quakers," says the present Lord Chief Justice of the Common Pleas, "is certainly one which it is *difficult* altogether to dispose of." The Lord Chancellor says, "It is of *difficult* solution." And Lord Cottenham says, "I have felt the fact, that such marriages have been recognized in several cases, very *difficult* to be explained." Now, this difficulty does not seem to strike Lord Brougham, Lord Denman or Campbell. They all think it clear that the act contemplates the marriages of Quakers as good. Let us look then at the provisions of the act. Sir Nicholas Tindal suggests, that the exception of the marriages of Quakers and Jews, "amounted to a tacit acknowledgment by the legislature, that a marriage solemnized with the religious ceremonies which they were respectively known to adopt, *ought* to be considered sufficient." But other sects were known to adopt religious ceremonies fully as much entitled, as those of Quakers and Jews, to the favour of the legislature; for instance, the Sabbatarians, who used the form in the Common Prayer-book, excepting the ring: it could not, therefore, be from any consideration of the ceremonies, that these two classes of marriages alone were deemed valid. Besides, the statute does not say they shall be valid: it only applies to them a well-known formula—"this act *shall not* extend" to such and such marriages. It would be a perfectly novel mode of construing that formula, to read it, "this act *shall* extend to certain marriages heretofore void, and *shall* render them henceforward valid." The section immediately preceding says, "this act shall not extend to any marriages of the Royal Family." Did any body ever dream, that marriages of the Royal Family were void before the act, and were made valid by the act? The only intelligible exposition of the clause in question is, that it leaves the marriages of Quakers exactly as they were. If, therefore, we find this class of marriages uniformly recognised as valid after the act, we must conclude that they were held so (either *de facto* or *de jure*) before the act; but before the act they were not legally distinguishable from other marriages of protestant dissenters; therefore before the act all marriages of protestant

dissenters must have been held valid, either *de facto* or *de jure*. If, again, we are asked, why Quakers were more favoured by the act than other dissenters, we fear no better reason can be given than their unbending firmness. A Presbyterian, or an Anabaptist (it may have been thought) would submit to be married in a church,—a Jew, or a Quaker, never.

That Quaker marriages have been recognised in several cases since the act, is notorious; and, as Lord Cottenham candidly admits, "it is impossible not to feel the importance of that fact." In the very year 1753, an Anabaptist marriage, which, being before the 25th of March, 1754, could not be affected by the act, was allowed as the ground of a suit for criminal conversation, in Woolston v. Scott, coram Denison, J., at Thetford, and a verdict obtained for £500. On this case Buller, J., observes, "It has been doubted whether the ceremony must not be performed according to the rites of the Church; but as this is an action against a wrong-doer, and not a claim of *right*, it seems sufficient to prove the marriage *according to any form of religion;* as in the case of Anabaptists, Quakers, or Jews."(*a*) Now, this is only saying, in other words, "As against a wrong-doer, in an action of tort, *a marriage* DE FACTO, *without the presence of an episcopally-ordained minister*, was held, before Lord Hardwicke's act, and should still be held, sufficient. Accordingly, a Quaker marriage was held sufficient, in a like action, as cited in 1776 by Willes J., in Harford v. Morris. (*b*) And again in 1829, in Deane v. Thomas."(*c*) So, as to personal property, "Widowers and widows," says Lord Campbell, "being Quakers, and the children of Quakers, have received *administration* in the Ecclesiastical Courts; and in cases of intestacy, have succeeded to personal property according to the Statute of *Distributions*." So, "in tracing a title to real property," adds his lordship, "no objection has ever been made, on the ground that it had been in a Quaker family; and no doubt has existed that the eldest son of a Quaker marriage would take, by descent, lands of which his father died seised in fee simple." So in a devise of lands in Ire-

(*a*) Buller, N. P. 28. (*b*) 1 Hag. C. R. Ap. 9. (*c*) 1 Moo. & Mal. N. P. 361.

land, (*a*) Lord Chancellor Manners held, in 1824, that Quaker marriages were meant to be included in the Irish Statute 21 & 22 Geo. III. c. 25, which was a declaratory act for the removal of any doubts which *might have arisen* concerning marriages between protestant dissenters, and applied to all such marriages theretofore entered into, or that should thereafter be entered into, and declared and enacted that they should be, and be held good and valid, to all intents and purposes whatever. Nor must we omit to notice an expression of the great Lord Mansfield, who, having laid it down in Morris v. Millar (A. D. 1767), that a marriage in fact was necessary to support a suit for criminal conversation, says afterwards, in Birt v. Barlow (A. D. 1779), "There are marriages among *particular sorts of dissenters*, where the proof by a register is impossible:" evidently treating those marriages, as marriages in fact. (*b*)

It has been urged as an objection to Quaker marriages, that the Ecclesiastical Court will not grant restitution of conjugal rights on them. (*c*) But if this be now the practice (which may be doubted), it must rest on no objection to the validity of the marriage, but to the mode of its celebration, which the ecclesiastical law may designate clandestine, and may therefore apply to it the rule "Petens restitutionem uxoris non auditur de jure, ubi matrimonium est contractum clandestinè."(*d*)

The last exception in Lord Hardwicke's Act is that of marriages solemnized *beyond the seas*. These, with which Irish and Scotch marriages may be classed, remain, both *de jure* and *de facto*, as they were before the act. The first general rule is, that if they are valid by the *lex loci contractûs*, they are valid here. This rule, though now familiar to all our courts, does not seem to have been received till some time after the Marriage Act. It was strongly argued for by Sir E. Simpson in Scrimshire's case, above cited, and is supposed to have been adopted as to Scotch marriages, by the delegates in Compton v. Bearcroft (1769); though this is

(*a*) Haughton v. Haughton, 1 Molloy, 611. (*b*) Dougl. 171.
(*c*) Green v. Green, 1 Hag. C. R. Ap. 9. (*d*) Atho. ad Const. innotuit.

doubtful. It seems to have been recognized in Chancery in a case in 1781, (*a*) and was adopted, on full plea and proof of the law of Scotland, in Beamish v. Beamish. (1793) In that year, too, it was held, that if proved as a marriage *de facto*, it would carry dower. (*b*) To many cases, however, the general rule will be found inapplicable; as where no local law is ascertainable, or where, if ascertained, it may be found to shock our notions of rectitude, or where extraneous circumstances render strict compliance with its dispositions impossible. In all such cases a marriage *de jure* or *de facto*, which would have been good, as such, if contracted in England before 1753, must be good at present, to the same extent, if contracted abroad.

Now we have seen, that in England, before the act, marriages *per verba de præsenti*, without the presence of an episcopally-ordained minister, were allowed as marriages *de jure*; and marriages of Quakers, Anabaptists, and Jews (where, of course, no episcopally-ordained minister was present), were allowed as marriages *de facto*; there can, therefore, be no ground for holding the presence of an episcopally-ordained minister indispensable to a marriage beyond the seas, *de jure* or *de facto*. Accordingly, in Harford v. Morris (1776), Sir G. Hay held, that the parties being *in itinere*, their marriage at Ypres was not subject to the local jurisdiction, and that though celebrated by a Calvinistic chaplain, yet it was a good marriage *de jure* by the law of England. In Rex v. Brampton, where the marriage was in St. Domingo, Lord Ellenborough did not hold, that it was necessary, by the common law of England, that the person officiating should be episcopally ordained. On the contrary, he said, "A contract of marriage *per verba de præsenti* would certainly have bound the parties before the act."(*c*) In Lautour v. Teesdale (1816), where the marriage was at Madras, Lord Chief Justice Gibbs did not hold the presence of an episcopal clergyman necessary; on the contrary, he said, that "before the Marriage Act, a contract *per verba de præsenti* was considered to be an actual marriage."(*d*)

(*a*) Lib. Reg. A. 1780, f. 552.
(*b*) Ilderton v. Ilderton, 2 H. Bl. 145.
(*c*) 10 East, 288.
(*d*) 8 Taunt. 387.

It seems generally admitted, that the marriage law of Ireland, where not varied by statute, is the same now, as that of England was before the Marriage Act; and that in Ireland as well as in England, a marriage *de facto* will support an indictment for bigamy. Now, we find indictments for bigamy sustained on Irish marriages at common law, without an episcopal minister, in the following cases, prior to that of Millis, viz.: Murray's coram Sylvester R. (1815); Marshal's, coram M'Lellan B. (1828); Wilson's, coram Torrens J. (1828); M'Laughlin's, coram Moore J. (1831); Robinson's, coram Foster B. (1838); Halliday's, coram Pennefather B. (1838); and Ancruey's, coram Crampton J. (1841). The first of these was tried in London before the Recorder, who consulted on it with the then Attorney and Solicitor-General and some of the judges; and the case was taken up in parliament by Sir S. Romilly, as one of hardship on the facts; but nobody disputed the law. The other trials were in Ireland. Here is, then, a *series rerum judicatarum*, proceeding uniformly for twenty-six years on the principle, that the presence of an episcopally-ordained minister is *not necessary* to a marriage *de facto* at the common law of this country.

Numberless have been the opinions both of civilians and common lawyers, of the first eminence, to the same effect. We need only mention two. In 1804, that learned and careful investigator of legal doctrines, the late Mr. Justice Holroyd, gave a most elaborate opinion in favour of a marriage had at Gibraltar, where the ceremony was performed by a person *not in orders;* and he held, that by the law of England, exclusive of the Marriage Act, such a marriage would be deemed valid. (*a*) In 1818, Sir C. Robinson, afterwards Judge of the Admiralty, Sir S. Shepherd, afterwards Chief Baron of Exchequer in Scotland, Sir R. Gifford, afterwards a Peer and Master of the Rolls, Mr. Sergeant Lens, Mr. Cooke, Mr. Bosanquet, afterwards a Knight and Justice of the Common Pleas, Dr. Swabey, and Dr. Lushington, now Judge of the Admiralty, all joined in an opinion, that the marriages of British subjects in India by ministers of the

(*a*) Observations on Lord Cottenham's Opinion, Appendix.

Church of Scotland (of course not episcopally ordained), were then governed by the law of England, exclusive of the Marriage Act, *and would be considered in Courts of Common Law as marriages de facto.* (*a*) And we happen to know that Sir Samuel Romilly and Sir Arthur Pigott coincided in the same opinion.

We have but little space for the application of the principles deducible from our historical survey to the three cases placed at the head of the present article.

1. *Dalrymple* v. *Dalrymple* (A. D. 1811). Mr. Dalrymple made a contract *per verba de præsenti* in Scotland, with Miss Gordon, no other persons being present. He afterwards came to England, and here married Miss Manners *in facie Ecclesiæ.* Miss Gordon brought a suit for restitution, in the Consistory of London, where the contract with her was pronounced to be a valid marriage, by the law of Scotland, and the marriage with Miss Manners to be null and void; and this judgment was unanimously affirmed by a full bench of delegates, including judges of the common law and civilians. In the course of Lord Stowell's judgment (one of the most splendid pieces of judicial eloquence ever delivered from any bench), that great lawyer, speaking of the time before Lord Hardwicke's act, laid it down:—

"1. That the *Ecclesiastical* Courts of this country, which had the cognizance of matrimonial causes, enforced that rule of the canon law, which held an irregular marriage constituted *per verba de presenti*, not followed by any consummation shown, *valid* to the full extent of voiding a subsequent regular marriage contracted with another person."(*b*)

"2. That the same doctrine was recognised by the *temporal* courts, as the existing rule of the matrimonial law of this country."

These doctrines relate to marriage *de jure:* and it would be superfluous to observe how fully they are borne out by the authorities above cited. For the first, we need only refer to the decretal of 1230, and the extracts from Swinburne; for the second, to Bunting v. Lepingwell, and Roach v. Garvan.

(*a*) Letter to Lord Brougham, Appendix, No. 11. (*b*) 2 Hag. C. R. 67.

2. Regina v. Millis (A. D. 1844). Of this very voluminous case, an extremely compressed account was given in our last number. It was there considered as involving a decision of the House of Lords unfavourable to the doctrines of Lord Stowell: and such, no doubt, will be the *primâ facie* impression derived from these proceedings by the legal public in general. But with reference to the principles above stated, the case will present itself in a new and very important aspect.

George Millis, a member of the Established Church of Ireland, married in that country Esther Graham, a Presbyterian, in presence of a Presbyterian minister. He afterwards, in her life-time, married another woman by the rites of the Established Church. He was thereupon indicted in Ireland for bigamy, and on a special verdict, a majority of the Irish judges held, notwithstanding the long series of judgments to the contrary, that the first marriage would not support such an indictment, and that he must, therefore, be acquitted. This judgment was brought by writ of error before the House of Lords, who took the opinion of the judges on two questions. Nine judges assembled, and "after considerable fluctuation and doubt," agreed in opinion "that by the law of England, as it existed at the time of passing the Marriage Act, a contract of marriage *per verba de præsenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the celebration of an actual marriage: but that such contract never constituted a full and complete marriage in itself, unless made in the presence, and with the intervention, of a minister in holy orders." They said also, that "admitting, for the sake of argument, that the law had held a contract *per verba de præsenti* to be a marriage, yet looking to the statute on which the indictment (in Millis's case) was framed, the offence of bigamy could not be made out by evidence of such a marriage as this." And they further observed, that "the statute of 58 Geo. III. c. 81. had enacted, that no suit should be had in any Ecclesiastical Court in Ireland to compel the celebration of such a contract." These opinions were delivered by Lord

Chief Justice Tindal (7th July, 1843), together with various reasons of his own in their support; for which he declared that his learned brethren were not to be held responsible. The lords debated on the case at distant intervals, and at length, on the 29th of March, 1844, the judgment of the House was given, affirming the judgment of the court below. This is all that appears on the *journals:* and so far the House of Lords may be thought to have given a *decision* on the law of the case. But if we examine the *minutes*, we shall find these additional circumstances. The *House* divided—"*the votes were equal*—whereupon, according to the ancient rule in the law, *semper præsumitur pro negante.* it was determined in the negative. *Therefore* the judgment of the court below was affirmed."

To understand how these proceedings bear on Lord Stowell's doctrines, we must look to the *speeches* of the law lords. Lord Abinger spoke very shortly; he said he had not had an opportunity of making any investigation in private on the subject; and though he agreed in the opinion of the judges, he made no allusion whatever to the case of Dalrymple. Lords Brougham, Campbell, and Denman, on the contrary, spoke of the judgment, in that case, in terms of the highest admiration, and fully subscribed to all its doctrines. The Lord Chancellor quoted it at great length; he showed its accordance with Swinburne, Ayliffe, Sir E. Simpson, Lord Holt, and Blackstone, in proving that a contract "*per verba de præsenti* was (prior to 1753) considered to be *marriage*—that it was in respect of its constituting the substance and forming the indissoluble knot of matrimony, regarded as *verum matrimonium.*" In coming to this conclusion, his lordship wholly disregarded Sir N. Tindal's main authorities: he did not even mention the fragments of Edmund and Lanfranc, and he thought it plain, that Lord Holt spoke of the canon law *received in England.*

His lordship however observed, that such marriages were irregular—that they were destitute of many legal effects which belonged to marriages duly solemnized—and that this was fully admitted by Swinburne, Sir E. Simpson, and Lord Stowell himself. He then went into an able review of the

many particulars, in which such a want of civil efficacy was clear; and after urging reasons to show generally, that an unsolemnised marriage would not support an indictment for bigamy, he added, that the effect of the statute 58 Geo. III. c. 81, had been to change entirely the character of a contract *de præsenti* in Ireland, as the act of 1753 had done in England; and, upon the whole, his lordship held that Millis was not guilty of bigamy. Our readers will observe, that the statute of 58 Geo. III. c. 81, was passed seven years after Lord Stowell's judgment in Dalrymple: and that from that judgment the Lord Chancellor did not, in the slightest degree, dissent. In fact, the only law lord, who did so, was Lord Cottenham, who on this point, as on every other, adopted implicitly the reasoning of the Lord Chief Justice of the Common Pleas. Thus it will be seen, that the House of Lords was so far from repudiating Lord Stowell's doctrines on marriage *de jure*, that of the peers who took part in the discussion of them, four to one were in their favour. The only point decided was on marriage *de facto*, in Ireland.

3. *Catherwood* v. *Caslon* (A. D. 1844). The marriage was between two British subjects, in Syria, in the house of the British consul. The English ritual was read by an American missionary, who is assumed not to have been episcopally ordained. Every circumstance of publicity attended both the ceremony and subsequent cohabitation, and there was issue. The husband brought an action for crim. con., and obtained a verdict, with £200 damages; and on a motion in the Exchequer for a new trial, a special case was made for the judgment of the court. After argument, it stood over, to await the decision of the lords in Regina v. Millis; and on the 6th of July, 1844, judgment was given. We take the report from the best sources, to which we have access; and should it be found in any degree incorrect, we trust it will not be imputed to a want, on our part, of that unfeigned respect, which we entertain for the learned barons. It is stated to have been said; "It has been decided by the House of Lords in Regina v. Millis, that unless in the presence of a minister in episcopal orders, a contract *per verba de præsenti* does not constitute a

valid marriage, at the common law of this country; and by the authority of that case we are bound."

We are but too sensible, that to doubt the judgment of so highly respectable a tribunal (*a*) may expose us to the imputation of an overweening confidence in our own very humble attainments; but when we reflect, in the words of Lord Brougham, that "marriages innumerable have been contracted, both by sectarians in this country, and by persons of all descriptions in our vast possessions beyond the seas—possessions on which the sun never sets—all of which are now alleged to be void, all these parties fornicators and concubines, all their issue bastards," we feel, that we should be abandoning our duty to our readers, if we did not fairly and honestly state two objections, to which, after the most diligent and impartial examination, we think this judgment (as hitherto reported) is liable.

1. We submit with great deference, that the point for decision by the House of Lords in Regina v. Millis was not whether the presence of a minister in episcopal orders was, or was not essential to the constitution of a valid marriage, at the common law. The Lord Chancellor, in that case, expressly said, "the immediate point for decision is, whether the defendant George Millis is, under the circumstances stated in the special verdict, guilty of the crime of *bigamy*." One of the reasons, which his Lordship stated (and in our opinion by far the most weighty) was deduced, not from the *common law*, but from the *statute* of the 58th of Geo. III. c. 81., "the effect of which statute (he states) has been to change entirely the character of a contract *per verba de præsenti*, at least as to its temporal effects:" and among the circumstances stated in the verdict, was the date of the first marriage, which was subsequent to that statute. Now, as the house divided two and two, if one vote, out of four, was given chiefly (or but partly) on the effect of the statute, how can it be said, that the house determined a point of common law; more especially a point touching the effect at common law of a contract entirely changed by that very statute? It seems to

(*a*) Parke, Alderson, and Rolfe, Barons.

us that, on the issue stated by the Lord Chancellor, the prisoner had as much right to avail himself of a statute passed before both his marriages, as of the common law; and he did avail himself of a statute in argument: and that argument is acknowledged to have had great weight with at least one of the only two judges, who voted in his favour. Again, the Lord Chancellor held, that "the Spiritual Courts were the *sole* judges of the *lawfulness* of marriage, where that question was directly in issue"—that those courts considered a contract *per verba de præsenti* (without the presence of any minister) to be "a marriage"—and that their opinions were "confirmed by *common-law* authorities, of the most respected and highest character." How can it possibly be said then, that his lordship's vote established, or helped to establish the doctrine, that such a contract was not a valid marriage, at the common law? A marriage pronounced by the sole judges of its lawfulness, to be lawful, has always been received at common law as valid and effectual. "The bishop's certificate" (says the Lord Chancellor) "was conclusive." "The law of those courts" (says Lord Cottenham) "must have been at all times the law of the country." "All titles whatever under a marriage" (says Lord Keeper Guildford) "must even at *common* law, stand or fall by the sentence in the Ecclesiastical Court." "A sentence in the Ecclesiastical Court" (says Lord Hardwicke) "will be conclusive, and bind all." A marriage *per verba de præsenti*, therefore, if duly certified by the bishop to be *verum matrimonium*, was necessarily held valid at the common law.

Now, how does this reasoning apply to Mr. Catherwood's case? "In crim. con. and bigamy" (says the learned Baron) "the plaintiff must show a marriage *in fact;* which, we think, is an actual marriage, valid, or voidable and not yet avoided;" and for this he refers to 3 Co. Inst. 88., where my Lord Coke says of the then only statute against bigamy (1 Jac. 1. c. 11.), "This extendeth to a marriage *de facto*, or avoidable by reason of a precontract, or of consanguinity, affinity, or the like; for it is a marriage, in judgment of law, until it be avoided: and therefore, though neither marriage be *de jure*, yet they are within this statute." Here then Coke plainly distinguishes

marriage *de facto* from marriage *de jure*. He does not say, the prosecutor *must* show the former; he merely says the statute *extends* to it, implying that the prosecutor *may* show the latter. Again, he excludes from the term a marriage *de facto*, an "actual marriage valid;" for that is a marriage *de jure*. He means, as we humbly conceive, to say this—in support of an indictment for bigamy, it is not sufficient to show a marriage clearly void, both *de jure* and *de facto* (as for instance with a raving madman); you must show a marriage, which may either be duly proved to the King's Court to be valid *de jure* (by a recorded certificate of the ordinary, or otherwise), or else may appear, on the face of it, to be a marriage *de facto;* for though the latter may be in truth void *ab initio*, in the judgment of the spiritual law (which can alone determine its essential validity), yet in the judgment of the common law, it is a marriage, until it be avoided. Moreover, Coke does not say, that the only marriages *de facto*, which will support the indictment, are those voidable (that is, capable of being *declared* void by the Spiritual Court) by reason of any of the disabilities which Blackstone terms "canonical;" for, consistently with Coke's words, an indictment might be supported by a marriage, which, on the face of it, would appear to a jury to be a marriage *de facto*, and yet, on examination in a Spiritual Court, would be found not to contain such a consent as forms "the substance and indissoluble knot of matrimony;" nor is this unlikely to happen, if "marriages among particular sorts of dissenters" (as Lord Mansfield expresses himself), or "marriages according to any form of religion" (in the words of Buller), may, as against a wrong-doer, be sufficient marriages in fact. We admit that, as a trial for bigamy, and an action for criminal conversation, are both against wrong-doers, it is reasonable to hold, that a marriage, which would not support an indictment, in the one case, would, *à fortiori*, not support an action in the other; but if the House of Lords had authoritatively ruled, in the Queen v. Millis, that a marriage contracted in Ireland subsequently to the statute 58 Geo. III. c. 81, by a member of the Established Church, without the presence of an episcopally-ordained minister, was incompetent for either purpose, it does not

necessarily follow, that a marriage so contracted in Syria would be equally incompetent, by the common law; and we trust, that we have offered some not inconclusive reasons for holding, that it might be competent.

2. But another point arises from the judgment in the Exchequer, which, we humbly conceive, is entitled to most grave and serious consideration. Were the proceedings in the House of Lords, in Millis's case, of such a nature, as to bind the house itself, or any subordinate court, to the observance of any general rule or doctrine in the law whatever? We ask in no captious spirit, but with most deferential feelings to the high authorities concerned; and with an earnest desire to ascertain the safest and best rules of practice, in the administration of the law.

"It is not in the nature of the minds of men, (says Lord Kenyon,) always to see every part of an intricate argument in the same light." (*a*) Therefore, in the opinions of collective tribunals, differences will sometimes arise: and the votes on a given point may be equally divided. In such a case, different systems of procedure have resorted to very different measures. In the civil law, the decision was for the defendant, or for the minor sum, or for the more favourable object.(*b*) In some tribunals, the president has a casting vote.(*c*) In some, the number of members is augmented; as in the old afforcement of the assize;(*d*) or in a commission of adjuncts to the suppressed court of delegates, of which a remarkable instance occurred within our recollection. The court, at the first hearing, being divided 3 and 3, adjuncts were added; it was then divided 4 and 4; afterwards 7 and 7; and at last, a majority of 10 to 5 being obtained, judgment was given.(*e*) In the Queen's Bench, when the votes are equally divided, the judges think it right to state publicly the grounds of their respective opinions, but give no judgment.(*f*) On writs of error in the Exchequer Chamber or the House of Lords, the course is to affirm the judgment below, on the ground stated in the minutes of the Queen v. Millis. Let us

(*a*) 7 T. R. 580.
(*b*) Paulus, D. 42, 1, 38.
(*c*) Voet. Pand. 42, 1, 18.
(*d*) Bracton, 4, 19.
(*e*) Henshaw v. Atkinson, 1 Lee, 240.
(*f*) 7 T. R. ut sup.

consider, how this ought, in sound reason, to operate on future cases.

The august assembly of the peerage sits judicially, as a court of ultimate appeal, the oracle of all subordinate jurisdictions, to ascertain the law, by which they must be governed. But when the house is equally divided, the oracle is dumb. In the particular case, it declines to interfere, and the cause reverts to the inferior jurisdiction, to be there dealt with according to the wisdom of the lower court. In this there is nothing remarkable; but it would be strange indeed, if, because the house was equally divided, such division should *settle* the law, according to the wisdom of the court appealed from. In Millis's case the majority of the court below held the conviction wrong; it might have happened that they had held the conviction right, and then the very same division of the House of Lords, which actually took place, would have settled the law directly contrary to what it is now taken to have done. We ask with great respect, would such a settlement of the law have bound the house itself? If so, the legal oracle is removed across the Irish Channel: and the Four Courts in Dublin are paramount to the judicial supremacy of the Peerage of the Empire.

The judgment of the lords (if judgment it must be called) was professedly a mere presumption—"*Præsumitur pro negante.*" Suppose the same point of law raised between other parties to-morrow in the Queen's Bench at Westminster, and there decided by a majority the other way. Upon a new writ of error, there would be presumption against presumption. Must the House of Lords be for ever equally divided? And if so, must it stand like Garrick between tragedy and comedy, casting an eye alternately at the two rival benches, and sighing "How happy could I be with either?" Or must it alternately discard the Irish Lucy and the English Polly, according as successive writs of error afforded contrary presumptions, in favour of opposite denials? The subject is too grave for levity. If the affirmance in Millis's case is to have the binding effect ascribed to it, the same rule must be applied to every other equal division of the House, in its judicial capacity; and eventually the casting vote of a single Irish

judge (possibly the least learned of a very learned body,) may give law to the empire, even though it should be contrary to the clear and unanimous opinion of the whole English bench and bar.

We are not aware, whether the House itself has ever laid down any rule for its guidance, in a case like that we are contemplating. We know not, that it is precluded, by any positive ordinance, or recognised custom, from examining to-morrow a doubt, which it has been unable to solve to-day; or from disturbing a doctrine, which Irish judges may establish, in opposition to the settled law of their predecessors and contemporaries. But if any such regulation or usage exist, we trust, that some noble and learned peer will bring it under their lordship's revision; so that it may, at all events, be distinctly known, whether an exact equilibrium of the scales of justice, within the house, amounts to a permanent and irrevocable preponderance beyond its walls.

If it shall eventually appear, that the Court of Exchequer was not bound by the proceedings in the lords; or that the lords did not mean to lay down the rule, which the learned barons understood them to have laid down, the remedy of the party aggrieved is simple. On the other hand, if the judgment in Mr. Catherwood's case be wholly unimpeachable, still as it professedly related to his marriage, only in the character of a marriage *de facto*, the question of its validity as a *marriage de jure* remains still open, and the legal remedy is to be sought in the Ecclesiastical Court, which always had, and still has, exclusive jurisdiction of the lawfulness of marriage, when not under a statute, and when the question of its lawfulness is directly in issue. In that court, there are various kinds of procedure, to which the injured gentleman might resort. If, for instance, he should institute a suit for nullity of marriage, it would be to be seen, whether Dr. Lushington or Sir Herbert Jenner Fust would pronounce for the nullity, independently of the law of Syria, which may be laid out of the present argument. To hold it null *de jure*, by the law of England, would we humbly apprehend, be in direct opposition, not only to Lord Stowell, but to every eminent judge of that [illegible]ech, to every author of repute in their courts, and probably

to every opinion, which the learned Dean of the Arches and Judge of the Consistory themselves ever gave on the point, as counsel at the bar.

Finally, if upon the fullest investigation, it shall be found (contrary to the numerous authorities we have cited) that marriages contracted on or beyond the seas, in places where no local law is known, and where an episcopally-ordained minister is not present, are void, both *de jure* and *de facto*, we can only call, with the greater earnestness, on members of the legislature to rescue British jurisprudence from so gross an inconsistency; and to give her Majesty's subjects in such situations, the same freedom, which the statute law of their country secures to them at home.—*The Law Review.*

THE

UPPER CANADA JURIST.

IN CHANCERY.

(REPORTED BY ALEX. GRANT, ESQUIRE, REPORTER TO THE COURT.)

TUESDAY, 12TH AUGUST, 1845.

GAMBLE v. HOWLAND.

INJUNCTION—APPURTENANCES—C. being seised in fee of certain lands on both sides of the river Humber, erected grist and saw mills on the east bank of the river, and on the west bank a woollen mill or factory, situate some distance farther down the stream, and having leased the latter, *together with*, &c., subsequently thereto leased the grist and saw mills to certain parties who have since assigned to the defendant. At the time the lease of the woollen mill was made, a dam had been erected across the river by C., about a quarter of a mile up the stream, for the purpose of carrying the waters thereof to the grist mill and saw mill, but which, it was said, still permitted sufficient water to escape for driving the machinery of the woollen mill, and which had been built by C., for the purpose of consuming the waste water flowing from the said dam; after the defendant entered into possession of the grist and saw mills, he erected a new grist mill, and threw a new dam across the river, lower down the stream than the old one, and of more perfect construction; in consequence of which in the dry season, the bed of the river had become almost dry, and the plaintiff was unable to work his woollen mill, whereupon he filed a bill and obtained a special injunction restraining the defendant from making or continuing, &c., any dam, &c., whereby the natural flow of the river might be prevented, &c., so as to injure, &c., the water power of the woollen mill, and at any time heretofore used, &c.; and which the defendant moved upon affidavit to have dissolved. Held, that the court would not dissolve the injunction, but retain the same until the hearing or a trial had been had at law.

The bill filed, stated, that in 1834, Thomas Cooper was seised in fee of certain lands in the townships of York and Etobicoke, occupying the east and west banks of the river Humber; and that there were erected on the said lands certain mills, &c., namely, on the lands in York a grist and saw mill, and on those in Etobicoke a woollen mill or factory; that in July, 1838, Cooper leased the factory, *together with the water power, privileges, &c.*, to W. Irish, and W. Harris, for 21 years, and after passing through several intermediate assignees was assigned to the plaintiff, who entered, and is still in possession; that in 1838, or 1839, Cooper demised to the defendant the grist mill and saw mill, who entered

into possession, and afterwards erected a higher dam than had been formerly used for the said mills, above the dam constituting the water power of the said factory; however, as the defendant did not then use more water than formerly, *sufficient was still left* to work the factory, but the defendant having a short time ago erected a new mill in place of the grist mill, on an enlarged scale, with two additional run of stones, and other machinery, which required a greater power or supply of water, he at the same time excavated a new head race, and enlarged the tail race on the premises occupied by him, which the plaintiff had remonstrated against, fearing the injury to the water power of the factory; and that since the dry season had commenced, the water in the river had been so lessened in quantity thereby, as to render the said woollen mill or factory idle and useless; and that the plaintiff had applied to the defendant to discontinue the use of the said dam and head race, and to leave the matters in dispute to arbitration; charged damage to the plaintiff, and his intention of commencing proceedings in the Queen's Bench in respect thereof, and prayed injunction to restrain the defendants from making, &c., or suffering to continue any dam, &c., "*whereby the natural flow of the said river may be prevented, diminished or affected so as to prejudice, injure or impair the water power necessary for the use of the said woollen mills, and at any time heretofore enjoyed by the plaintiff or those under whom he claims.*" The affidavit of the plaintiff was to the same effect, and upon it a special injunction had been obtained, according to the prayer of the bill. Whereupon the defendant filed an affidavit, stating that in 1803 or 1804, the lands mentioned in the bill were owned by one William Cooper, who built the grist mill and saw mill in that year, and wrought them, until 1821, when he leased them to one Murchison, who enjoyed them for five months; that during all this time, the mills were supplied with water by means of an old log dam, remains of which still exist [a plan of the river, mills, &c., accompanying affidavits, exhibited the several dams mentioned in the pleadings]; That no other mills were erected on Cooper's lands, and Murchison therefore used all the water of the river during dry seasons; W. Cooper subsequently resumed possession of the mills; that in 1824, Thomas Cooper, son of W. Cooper, acquired a right to work the mills, and erected a new dam above the old one, and at the commencement of the head race, about a quarter of a mile above the old dam, and cleared and repaired the tail race; on 19th March, 1827, W. Cooper conveyed all his estate in lands, waters, &c., to Thomas Cooper, who used as much water for the mills as he chose, and afterwards rented the said mills to Hodgson and Harris, who entered, &c.; that in 1832 or 1833, during the said lease to

Hodgson, &c., Thomas Cooper erected the woollen mill, on the opposite bank of the river, *and that the object Thomas Cooper had in view in erecting the said woollen mill, was to use the water which was allowed to escape by leakage from the dam, and the waste water when not required;* that on the erection thereof, Thomas Cooper leased the woollen mill to W. Harris and W. R. Irish, *with such water privileges as were then attached to the said woollen mill,* and they entered into possession; and the plaintiff became assignee of the lease, on 27th March, 1845; that on 21st July, 1840, Thomas Cooper made a lease of the grist and saw mills to defendant, for 21 years, renewable; the defendant thereupon entered into possession, and remained in possession ever since; that when the defendant made the agreement with Thomas Cooper, it was agreed that the defendant should use the lands as fully and freely as Thomas Cooper could have used them; *and that no privilege had been or could be thereafter given to the lessee of the said woollen mill, by which he could* interfere with the defendant's absolute right to the use of the water; that at the same time Cooper spoke to Henry and Scott, who were the lessees of the woollen mill, and advised them to purchase from the defendant a right to the use of a sufficient quantity of water for the factory, and that they offered £25 per annum therefor, which offer the defendant declined, and sometime afterwards Henry and Scott offered to bear a portion of the expense of erecting, &c., the new dam, upon the same condition, which the defendant also declined; that Cooper reduced the rent of Henry £25, in consequence of Henry having given Cooper notice that he would relinquish; that he had been informed by the plaintiff that he occupied the woollen mill at such reduced rent; that the agreement for reduction had been reduced into writing, and was in the possession of the plaintiff; when the defendant took possession of the mills, they were out of repair, &c.; the defendant in 1842, constructed a new dam, and in 1844 erected a new grist mill; that the new dam is not higher than the old log dam, and the head of the water is not higher than at the upper dam; that the orifices of the new grist mill and of the saw mill as improved, are less than they formerly were; that the lessees, and particularly the plaintiff, have enlarged the woollen mill on a scale that in dry seasons it would require *all* the water in the river; that the new head race erected by the defendant receives its water from the old one, and the defendant has not enlarged the tail race, only cleared and repaired the embankment; and the present season is unusually dry, and the defendant has not had water enough to work both mills; and that since the injunction was served, the defendant had been occasionally obliged to stop his mills to prevent a breach thereof, having had very little water for the use of the

said mills. There were also filed affidavits of Robert Blythe, John Murchison, and other parties, corroborating more or less the statements contained in Howland's affidavit, and stating also, that in former years the grist and saw mills required more water than was in the river, so that at times only one could be used; and the defendant having given notice of motion to dissolve the injunction, the plaintiff filed additional affidavits, shewing that since the new dam was erected the bed of the river was drier than it was in former years, and that the right of the woollen mill to a supply of water not disputed as witnesses ever heard, and that the defendant's mill required more water than was formerly used for the old grist mill. Upon the motion coming on for argument this day,

Sullivan, with whom was *Crooks*, for the defendant,—considered the present case one of great interest, as well on account of the amount of property involved, as of the general principles of the law with respect to mills and the rights of owners to the waters flowing past and used by them; and also on account of the motion itself now under consideration. And in the latter view of the case, the first question that presented itself was, the propriety or expediency of the court granting this writ in a case where no irreparable damage could possibly ensue, by the defendant being allowed to continue his business; for if any damage did ensue to the plaintiff from the defendant using more water than was wont to be used, it was a matter for the consideration of a jury, and who, in an action on the case, could give a verdict sufficient to cover any loss the plaintiff might sustain; while on the other hand, the defendant, who by having his business—which was a most extensive mercantile one—put a stop to by the injunction of this court, might, and unavoidably would, sustain great loss and damage, and would be without remedy against the plaintiff, the latter acting under the authority of the court. The law in England regarding the right to water as an easement, has not been as well and distinctly settled as the nature of the subject would lead one to expect. It might be as well to mention the principal decided cases, whether they bear directly upon the questions now in discussion or not, and when the cases have been followed throughout, and the principles which now prevail have been ascertained, these can be brought to bear upon the present matter in litigation, so far as they are applicable here. The counsel quoted and commented upon the following cases: Saunders v. Newman,(*a*) Mason v. Hill,(*b*) Wright v. Howard,(*c*) Smith v. Cage,(*d*) Doe Freeland v.

(*a*) 1 B. & A. 258. (*b*) 3 B. & Ad. 304. (*c*) 1 S. & S. 190.
(*d*) Cro. Jas. 526; Chas. 17, 57.

Burt,(a) Bell v. Harwood,(b) Longchamp v. Fawcett,(c) Webber v. Richards,(d) Acton v. Blundel,(e) Hall v. Swift,(f) Wynstanley v. Lee,(g) Frankhum v. Lord Falmouth.(h) Upon a review of these cases, he thought the court would be of opinion, that a mere appropriation of water will not give the party using it a right to continue its use against any person who may be injured by the appropriation. An adverse or undisputed use of water in a particular manner for twenty years, will raise a presumption, and indeed be conclusive evidence, of a grant; had the land through which the river Humber flows, through and past the premises of the plaintiff and the defendant, been for 20 years in possession of adverse parties, their respective rights or want of right might be easily ascertained so far as the law is concerned; but in the present case, the whole lands originally belonged to William Cooper, and afterwards to his son Thomas Cooper, who is the lessor of the plaintiff as well as of the defendant. It would appear by the affidavits, as if the parties thought the fact of user for 20 years was important to be established or denied, but manifestly it is not; Thomas Cooper had the undisputed right of using the whole water within his land, as he pleased, and the only question is, when he divided the land into separate tenements, what right of water was made appurtenant to these tenements respectively? Thomas Cooper in the first place had a saw mill and a grist mill, which required and used the water to a certain extent, to this extent the water became appurtenant to these mills, but what remained and no more was appurtenant to the cloth factory erected lower down the stream. It will be observed, that the lease under which the plaintiff claims does not convey the bed of the river, nor the water of the river, it merely demises the land by abuttals and boundaries, bounded by the river; no common law right to half the water of the stream attached to this demise, the whole river and its bed were in Cooper; and it is only under the demise of *privileges* and *appurtenances* that the plaintiff can set up any claim to the water. What is or is not an *appurtenance* must be ascertained by evidence, it is not to be found by any rule of construction or general principle.—Acton v. Blundell,(i) Canham v. Fish.(j) The question here is, therefore, in what manner and to what extent was the water used in the factory occupied by the plaintiff when the lease was granted to his predecessor; this again is to be ascertained by the use of the water at the grist and saw mills previously built and in

(a) 1 T. R. 701. (b) 3 Durn. & E. 308. (c) Peake, N. P. 71.
(d) 12 Ad. & E. 442. (e) 12 M. & W. 348. (f) 4 Bing. N. C. 381.
(g) 2 Swans. 339. (h) 6 C, & P. 529. (i) 12 M. & W. 348.
(j) 2 Cr. & Jar. 126.

operation. If the factory had only at the time of the lease what remained of the water after the mill was supplied, there was nothing in the lease to give it any more now; it is therefore of the utmost importance to inquire as to the manner and extent to which the water was used as appurtenant to the mills. Many years ago William Cooper erected a dam near to the place at which the defendant's dam now stands, this dam was destroyed, and in 1824, Thomas Cooper erected a dam a quarter of a mile farther up the river, and led the water by a race-way to the same mills; lately the defendant erected the present dam, near to the site of the ancient one, near the bridge; it is in evidence, that these dams are nearly on the same level, and at all events that the new dam does not back the water to a higher level than either of the older dams. Again it is proved, that the sluice or aperture through which the water flows to the new grist mill erected by the defendant, is smaller than the apertures of the old grist and saw mills, the water being at the same or no higher level, it is manifest that no more water can pass now to the new mill than anciently passed to the old ones; the height of the several dams is of no importance except in this respect. It is also in evidence, that before the lease of the factory, in dry seasons, there was not enough of water in the river for the old mills, and that consequently only one of them could work at the same time in such seasons; the present season is admitted on all hands to be the driest within the memory of the witnesses, and thus we clearly show the use of the whole water of the river by the old mills. It is further proved, that the whole water of the river was in fact used in dry seasons, and in such seasons the factory of necessity would remain idle. It is very clear, that the erection of a new wheel, or a new saw mill will not destroy the right to use water, and that where a grant is presumed to use water in one mode, it will enure to enable the owner to use it in any other mode, and with any other machinery; the only question being, as to the extent to which the privilege is used, as affecting the water. It may be objected in this case that the new dam of the defendant is a better one than either of the old ones, that with a bad or leaky dam a portion of the water in the driest season would escape to the factory; the dam appears by the evidence to be better than the old ones, and would in dry seasons more constantly dam back the water; but it is clearly established in evidence that the occupiers of the grist and saw mills constantly endeavoured to turn the whole water to the mills, and that the whole was not sufficient in dry seasons. The use of water cannot be measured by the goodness or badness of a dam: the height of the dam, and the size of the aperture is the only guide; in other words, the capability of the dam and

aperture to use or turn the water, is the only safe rule by which the use of the water can be measured. In Alder v. Saville,(a) this principle is clearly established; in that case the defendant, Saville, claimed the right to flow back water to a certain level, and it was proved that by the ancient dam the water was flowed back so as to irrigate meadows of the plaintiff, but that the dam was a bad one, that the mill used so much water as suddenly when in operation to leave the meadows dry, consequently they were not injured but rather served by the water; the repaired dam on the contrary, was staunch, and the machinery was so improved as to use the water slowly and economically. The consequence was, that the plaintiff's meadows were drowned and destroyed, but the court upheld the defendant's right, provided the dam was not of a greater height, so as to overflow the meadows to a greater extent than was formerly done; his making the dam secure, and using the water more slowly, to the plaintiff's injury, was held not to be illegal. If, then, the owner of the land, Thomas Cooper, divided it into separate tenements, and by a dam and aperture sufficient when in repair to turn the whole water of the river in dry seasons to that tenement, made the whole water at such seasons appurtenant thereto, and afterwards erected another mill, on the other tenement, only what was not appurtenant to the first tenement could be an appurtenance to the latter, and the plaintiff having only that appurtenance by his lease could not complain, if in fact a greater quantity of water were used by means of a better though not higher dam. The plaintiff contends, that sufficient water at all times for the use of his factory was his right; this we deny, but even if it were so, it is in evidence that he has increased his machinery, and at present requires a much larger quantity of water than the first lessee used. This may be doubtful upon the evidence, but the court will only sustain an injunction where the facts are clear and almost undisputed. Again, it is in evidence that the plaintiff has raised his dam since the lease under which he claims was granted, and so much as to overflow the defendant's land. Thus his privilege of using the water upon which this injunction is granted, is used without legal right, and by wrong done to the defendant; if his dam were lowered to the height at which it was when his lease was made, his machinery could not work at all. Consequently, he has no right to the interference of this court to enable him to enjoy what he can only use illegally, and to the defendant's injury. The counsel here read and commented on the affidavits at length, and mentioned the

(a) 5 Taunton, 454.

cases as applicable to the several facts disclosed, he contended that the law and facts of the case were manifestly with the defendant, and even if they were doubtful, the extraordinary power of this court should not be used to maintain an uncertain claim, where no irreparable injury was sustained, when damages if any were sustained could be given by a jury, and when if the injunction should be wrongly granted, the defendant would have his mills stopped during the summer without any chance of redress. He contended also, that the injunction was uncertain; in one reading of it, it wholly postponed the defendant's right to the plaintiff's claim, it reversed the order in which the water could be claimed, leaving the defendant a mere remainder after the plaintiff should be satisfied. If the latter part of the injunction is to prevail, it means nothing but an enjoining the defendant not to do something illegal, what is legal or illegal in the view of the court not being in the least ascertained, consequently, the only safe course for the defendant was to stop his mills, and submit to manifest wrong; for he could not tell when by any use of the water he might be subjecting himself to process of contempt.

Blake, for plaintiff.—It would be unnecessary for him to follow the counsel who supported the motion, in much of their argument. With the law as laid down by Mr. Sullivan, he in the main concurred, and taking it to be clearly so settled as the learned counsel had stated, he had not noted a single case to cite to the court. But with a view of demonstrating in a few words the complete revolution which the law had undergone in relation to the mode of acquiring title to the elements, he would ask leave to read Sir W. Blackstone's statement of the law on the subject. "Thus, too, the benefit of the elements, the light, the air and the water, can only be appropriated by occupancy. If I have an ancient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me.

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If a stream be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbour's prior mill, or his meadow, for he hath by his first occupancy a property in the current."(a) And singularly enough, Mr. Christian, in a rather recent edition of the Commentaries, has said, that the entire law on the subject was contained in the text. Whereas in truth not a single proposition laid down by the learned commentator, can now be sustained. Property in the elements cannot in truth be acquired by mere occupancy, no matter

(a) 2 Black. Com. 402-3.

how long continued. The elements, from their very nature, are incapable of actual occupation; and title to them can only be acquired by actual grant, or such a continuous user as would warrant a jury to presume one. But the rights which the proprietor of land, as such, acquired as to the elements of light and air, he argued, were different from the rights which the proprietor of land through which a stream flows, relative to the water. In the former case, the property which we have in the elements, gives no easement in the adjoining lands, no right to interfere with the use which the proprietors of those lands may choose to make of their own soil, no matter how materially such use may impede the ingress of the light or air to our close. But not so in the latter case; there the proprietor of the land through which a stream flows, has, he contended, a right to interfere with the use which his neighbour may wish to make of his own soil, if that use should change the level of the stream. He has indeed no right to prevent his neighbour from erecting any edifice, no matter how fantastic or unsightly, across the channel, provided he does not thereby injuriously alter the level of the stream, or its course through the adjoining lands; but the moment that the edifice, of whatever kind, does injuriously alter the level of the stream, either above or below, from that moment the proprietor who suffers by the alteration has a right of action, on account of the disturbance of the easement spoken of. Now assuming the law to be so settled, and it was not disputed by the other side, the court could have no difficulty in coming to the right conclusion in this case, had the grist mill occupied by Mr. Howland, and the fulling mill occupied by the plaintiff, Mr. Gamble, been always in the occupation of distinct proprietors; for it would be then obvious that Mr. Gamble could have no right of action against Mr. Howland, simply because he erected an edifice across the bed of the Humber, a thing which he called a dam, provided that edifice did not disturb the level of the stream: and it can make no difference that the grist and woollen mills were at the time of Mr. Gamble's lease in the occupation of a single proprietor; for although Mr. Cooper might have turned the whole stream to the grist mill, and so made the water appurtenant to that, so far as his own property was concerned, still, not having in fact done so, having built a dam which in fact only turned half the water to the grist mill, and left the other half to flow by the woollen mill *at the time* it was leased, it was quite obvious, he argued, that the lessee of the woollen mill, from the moment his lease was executed, would have a right of action against Mr. Cooper, if he by any act of his should divert more than half the water of the stream. In other words, the quantity of water accustomed to flow to the woollen mill

when the lease was executed, was appurtenant to that mill, and passed under the word *appurtenances*. And as it would be absurd to argue that Mr. Howland could use all the water of the Humber as against Mr. Gamble, simply because he had kept for twenty years an erection which he called a dam, to a certain height, but which in fact only diverted a small portion of the water, inasmuch as that would be absurd, supposing these properties to have been always in the hands of different proprietors; so it would be equally absurd to argue, that Mr. Cooper had made *all the water* appurtenant to the grist mill, simply because he had erected a weir to a certain height, which in fact only diverted half the water of the stream. In this view of the law, nine-tenths of the evidence he read was wholly immaterial. The evidence of the defendant himself was ample to sustain the injunction; it not only did not displace the plaintiff's equity, but it established it: for it stood, he said, confirmed, that the dam erected by Mr. Cooper never diverted more than half the water of the Humber; and the only ground by which Mr. Howland's counsel had sought to dissolve the injunction was, that the present dam was not *higher* than the old one. But he did not care about the height, provided the new dam diverted water which the old one did not; that was the ground of the injunction, and stood in his estimation admitted. As to the arguments derived from the impolicy of stopping a trading concern, he would not trouble the court with any reply to them; they were directed against the jurisdiction altogether, which he considered well settled. He could not however forbear to observe, that unless the court would stop Mr. Howland's mill by injunction, in accordance with right, it was obvious that the defendant would stop a trading concern—Mr. Gamble's mill—in violation of right.

Esten also for the plaintiff,—considered that the general principle upon which the plaintiff's case stood was, that a man cannot derogate from his own act. Mr. Cooper made a lease of something, and as stated by the counsel on the other side, we had only to ascertain what that was; for whatever was then conveyed, neither Mr. Cooper, nor the defendant who claims under him, could ever afterwards detract from such grant. On looking at the affidavits filed by the defendant, we find that in 1838, a lease was made to Harris and Irish, (under whom the plaintiff claims), of the woollen mill with the *appurtenances*; and one portion of those appurtenances, according to the case in 2 C. & J., cited by the other side, was the flow of the water as it *was then running*, and therefore the lessor certainly had not a right to construct a new dam of such material and in such a manner as to deprive the plaintiff of the use of the water in as beneficial a manner as it was

conveyed to him at the time of the lease. If Mr. Cooper, or those claiming under him, could erect such a dam as has been done in the present instance, he could with equal propriety have built a break-water, thereby throwing back the waters of the river at nearly all seasons, and so render the mill of the plaintiff entirely useless. The injunction does not stop the operations of the defendant's mill, it only forbids his turning the waters of the river so that the plaintiff shall be prevented from enjoying the same privileges as heretofore; whereas, were the injunction to be dissolved, the manufactory of the plaintiff would be completely stopped, and his damages could never be properly estimated by a jury. The present case is different from that of infringement of rights under patents; there, accounts are sometimes directed to be kept, so that the injunction can be withheld in the meantime, without any damage to the plaintiff. [Here *Esten* was stopped by the VICE CHANCELLOR, who intimated his opinion to be strongly with the plaintiff.

Sullivan, in reply,—Did not contend that occupation gave a right to the water, but maintained, first, that Mr. Cooper, as owner of all the property, had a right to use all the water, and appropriate it in such way as he thought best. Secondly, that he had appropriated it to the mills up the river, those owned by the defendant; and having so appropriated it, made it thereby appurtenant to those mills, and became a matter that could only be ascertained by evidence whether it was appurtenant or not; Mr. Gamble having no right to the water other than as appurtenant to the land conveyed to him, that is no right other than that acquired by user. There is no case in any of the books, where the *quantity* of water is considered to be the rule that governs, it is too uncertain; but in all the cases on the subject, the apertures through which the water escapes, and the height of the dam, is the true principle that governs. If this be not law, then on what ground had Saville, (in 5 Taunt.) a right to do what he never had done before, that is, to dam back the water in such a manner as to destroy the meadows he had only benefitted before?

Tuesday, 19th August, 1845.

The VICE CHANCELLOR gave judgment this day, refusing to dissolve the injunction, with costs.

IN CHANCERY.

8TH & 11TH JULY, 1845.

BROWN *v.* KINGSMILL. KINGSMILL *v.* BROWN.

PRINCIPAL AND AGENT—PAYMENT—SPECIFIC PERFORMANCE.

On the 7th June, 1839, John Brown filed his bill in this court against David Smart and William Kingsmill, for the redemption of a mortgage, bearing date the 30th September, 1825, made by Brown to one Jonathan Walton, and by him assigned to Smart and Kingsmill. Kingsmill and Smart, by their answer (filed in February, 1840,) stated that the mortgage had been purchased by them with and out of the assets of one Robert Innes, deceased, whose executors they were, and claimed a balance. As matter of defence to the bill, and the plaintiff's right to redeem, the answer alleged, that through one James G. Bethune, as his agent, the plaintiff had contracted with Robert Innes, the testator, to sell to him the mortgaged premises and also a certain messuage with an acre of ground adjoining thereto, the whole being known as the Wilder Farm, for the sum of 500*l.* and that with the assent of plaintiff the testator had paid to J. G. B. for plaintiff, the said sum of 500*l.*, by delivering to him bills of exchange on Scotland for 500*l.* sterling, which Bethune immediately negociated, and from the proceeds thereof appropriated the sum of 500*l.* currency, to the use of plaintiff; that Innes had been put into possession of the premises, in pursuance and part performance of the contract, by Bethune, as the agent and with the assent and authority of the plaintiff, and that therefore Innes had become entitled to the equity of redemption, &c. Upon this answer coming in, Brown amended his bill. At this stage of the proceedings, Brown died, having made his will, and devised to his wife, Margaret Brown, who survived him, all his real and personal estate, and appointed her executrix of his will. On the 2nd of May, 1843, Margaret Brown, as devisee and executrix of John Brown, filed a bill in the nature of a bill of revivor, to have the benefit of the suit so instituted by John Brown, and the relief prayed for by him; to which the defendants filed their answer, and admitted the statements therein, and submitted that the suit should be revived, &c. On the 14th December, 1841, Kingsmill and Smart—as executors of Robert Innes deceased, Eliza Innes, the widow, and John Innes, William Innes, Robert Innes, and Janet Innes, the children of R. Innes, by Kingsmill and Smart, their next friends—filed a bill, in the nature of a cross bill, against John Brown, who died without having answered. On the 14th of April, 1842, the plaintiffs in the

cross bill, filed their bill against Margaret Brown, as devisee, &c., of John Brown, and on the 14th November, 1844, the bill was amended and filed, stating the mortgage from John Brown to Walton, and the assignment thereof to the plaintiffs, Kingsmill and Smart, upon a purchase made by them, with and out of the assets of the testator, R. Innes; also that Brown, being seised of a certain messuage, and the land thereto adjoining, containing about an acre, forming part of lot No. 33, in the Township of Hamilton, being on the north side of and abutting the road leading from Toronto to Kingston, and formerly in the occupation of one C. Wilder, under a lease, for one year, commencing from the 1st May, 1832, made by the said John Brown; that Robert Innes, deceased, contracted with Brown, through the medium of James G. Bethune, his agent in that behalf, for the purchase of the same, and of the land comprised in the indenture of mortgage, for 500*l.*; and that shortly thereafter, and in pursuance and part performance of the contract, Innes entered into possession, and the 500*l.* were duly paid to Bethune for Brown; that Innes afterwards died, having first made his will, whereby he devised all his estate real, &c., to his wife (the said) Eliza Innes, in trust for her sole use, towards the education of his children, and appointed Kingsmill and Smart his executors; that the executors had purchased the mortgage from Walton, and prayed that the plaintiffs might have a decree for specific performance of the contract against Margaret Brown, and that she might be decreed to pay the sum due on the mortgage to Walton, or that she might, out of the assets of the said John Brown, be decreed to pay the said sum of 500*l.* and interest, and give in an account of the estate of John Brown. Margaret Brown, by her answer, admitted the seisin of J. Brown in the premises, the mortgage and assignment, also the death of Innes and Brown, and that she was devisee and executrix of Brown as stated in bill; and that Bethune was, by some verbal understanding between him and Brown, the agent of Brown for the disposal of his lands, but denied that Bethune had any authority (as Brown's agent), to make the contract with Innes, stated in the bill, inasmuch as he was acting under precise instructions with regard to the land in question; or that he was authorised to receive the money from Innes, or to put him in possession; or that Innes did enter in pursuance of the contract alleged, but that on the contrary, the entered as tenant to Brown by assignment from Wilder of the lease from Brown to him; or that Brown ever acquiesced in the contract; and she also relied on the Statute of Frauds. By mutual admissions entered into between the parties, it was agreed that the causes should be heard together, and that any facts, circumstances, or evidence in issue in either of the

causes, should be considered in issue in the other for all purposes. It was also agreed that the following correspondence which was set out in the pleadings should be considered as proved, and might be used by either party on the hearing. The correspondence alluded to consisted of an extract from a letter written by Bethune to Brown, on the 16th September, 1833, in which he stated, "I shall probably sell your Wilder lot; shall I take 500*l.* cash? Let me know per bearer." Brown in answer wrote: "The Wilder Farm cost me more than 500*l.*, with the interest and expenses since I bought it. As times are turning out, take that sum, if you can do no better. I ought to get 650*l.* for it."—And the letters following:

"John Brown, Esq., Dear Sir,—I received from Mr. Bethune the enclosed (of which retaining a copy); may I request you to send a written answer? As it is of some importance to have it in good time, the messenger is desired to remain for your leisure. Mr. Boulton wishes we would, as Mr. B. has returned home, so as to meet and explain this matter, to me a very unpleasant one. I have not yet done about my bills being on Jamaica dishonoured.

Yours very truly,
(Signed) Robt. Innes.

3rd April, 1834,
Cottage, Hamilton."

"Cobourg, 3rd April, 1834.

John Brown, Esq., My dear Sir,—Dr. Innes, who purchased the Wilder Farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid, I shall account to you for the amount, 500*l.* This transaction is entirely out of our other business. I sent the bills to Scotland through W. Bradbury & Co., and the moment they advise payment, I can draw for the amount.

Yours truly,
(Signed) J. G. Bethune.

If you will make a title to the land, and leave it with Mr. Moffatt, to be given up on your order."

"Port Hope, 4th April, 1834.

Dear Sir,—I have your favour, and enclosure from Mr. Bethune. In reply beg to say, that I cannot make a title to the lot you purchased until I get the pay, there being a mortgage due to Jonathan Walton, Esq., of Schenectady, with interest, nearly 200*l.*, which must be first discharged. At the time I consented to take 500*l.* for the lot, it was to be cash down; and were it not that I was in great want of the needful, I would not have offered it for any such sum:

however, as the matter now stands, although much disappointed as I have been in not getting the pay at the time I expected it, I will take no advantage of you by demanding a further sum than the 500*l.*, with interest from the time you took possession from Wilder, although the rent I was getting much exceeded the interest. I hope it may not be long before the money comes to hand.

(Signed) JOHN BROWN."

"Dear Sir,—On reference to Mr. Bethune's letter to R. Henry, Esq., and the acceptance of the letter endorsed upon it, I am of opinion that Mr. Henry is liable as agent of the Commercial Bank, if the letter of credit mentioned in Mr. Bethune's note was accepted at the time the note was presented to Mr. Henry, and that Mr. Henry is bound to retain the sum of 500*l.*, mentioned in the acceptance, subject to your order.

(Signed) G. M. BOSWELL."

"New Lodge, 4th April, 1834.

Dear Robert, — Mr. Brown, being very urgent for the money for the farm purchased of him for Dr. Innes, I have to request, that if the order on you is accepted, you may pay Mr. Brown 500*l.*, and I will give you a bill for the same. I forwarded Dr. Innes's bills to Scotland, and did not negociate them; they have been accepted, but I have as yet no account of the money.

Yours truly,

(Signed) J. G. BETHUNE."

"R. Henry, Esq."

"21st April, 1834.

Dear Sir,—At the request of Dr. Innes to call on you for 500*l.*, I enclose you copies of a correspondence between Mr. Bethune and yourself, and the opinion of Mr. Boswell on the subject, which documents Mr. Innes insists on me to take as payment for a lot of land I sold him, and for which he says he gave drafts to Mr. Bethune for payment. I expected the money long before this time, but never wanted it more than I do at present. Will you have the goodness to inform me if I may draw on you for the amount.

(Signed) J. BROWN."

"To R. Henry, Esq."

"Port Hope, 21st August, 1834.

Dr. Innes, Dear Sir,—I beg to inform you that I have, as I before told you, a payment to make on the 23rd instant.

Mr. Bethune, when I last saw you at his house, promised to let you have, about the time stated, at least 200*l.* I wrote to remind him, a few days ago. You will do well to call on him to-day or to-morrow, and see what you can do. If the sum of 200*l.* at least is not paid me on Saturday morning or before, I will give a deed to a person who has got the money, and is waiting the opportunity; and I think after waiting so long as I have done, and me so much drove for money, you cannot blame me. Should you fail in getting the money, the back rent must be paid to me next week.

(Signed) JOHN BROWN."

Evidence was taken in the cause, the purport of which appears in the argument of counsel, and the judgment of the court. [Amongst the evidence produced at the hearing, was the testimony of James G. Bethune, taken under a commission from the Court of Queen's Bench, in an action at law between Smart and Kingsmill, plaintiffs, and the late J. Brown, defendant. This evidence was objected to by the counsel of Margaret Brown, on the ground that the interrogatories were leading. On the other side it was contended that it was admissable, having already been used in the suit at common law, where no objection had been taken—citing Williams v. Williams, 4 M. & S., 497; Wright v. Doe dem. Tatham, 1 Ad. & E. 3, 19. The Vice-Chancellor over-ruled the objection.] Upon the cases coming on for argument—

Sullivan and *Vankoughnet*, for Margaret Brown.—In all cases for specific performance, the terms of the contract must not only be precisely proved, but must be proved as laid in the bill.—Daniels v. Davison, 16 Vesey, 249; Savage v. Carroll, 1 B. & B., 551. Here the contract laid in the bill is a sale for 500*l.*; the one proved is a sale for 500*l.*, to be paid by bills of exchange, at three and four months after sight, upon payment of which the purchaser was to receive a deed. The contract Bethune was empowered to make was for 500*l.* *cash.* Now a contract to sell for bills of exchange is not one to sell for cash. An agent is not authorised in making a contract such as the one shown here to have been made, when empowered to sell generally, more especially when told to sell for *cash.*—Ward v. Evans, 2nd Lord Raymond, 928; Sikes v. Giles, 5 M. & W. 645. Sikes v. Giles is very similar to the present case, in its nature and circumstances. An agent is held to a strict performance of the power entrusted to him, and the court will not recognize any deviation however slight.—Daniels v. Adams, Ambl. 495; Coles v. Trecothick, 9 Ves. 249. The claim for specific performance must fail *in limine.* First, the contract made is not that stated in the bill; secondly, if it be, it is not the contract

Brown authorised his agent to make; thirdly, the contract between Bethune and Innes never was reduced to writing. At most Innes entered in pursuance of that contract, and not in pursuance of the one authorised by Brown, therefore there is no part performance of a contract binding on Brown. The taking possession must be with the knowledge and assent of the vendor, and must not be referrible to any other arrangement; if it can be so referred, it will not be considered part performance (*a*). The evidence shews that Innes did not take possession in pursuance and part performance of any contract, because the contract was not to be complete or considered binding till the notes were paid, four months afterwards. If the bills had been dishonoured, the contract could not have been enforced. Innes therefore entered in anticipation of the contract, and unless Brown subsequently distinctly by writing recognized the contract between Innes and Bethune, the case is clearly within the Statute of Frauds. But the entry of Innes into possession is referrible to something else than even that contract. The evidence shews that Innes bought out Brown's tenant that he might have a house into which to remove his family, and that he took possession with this object, and therefore not by way of carrying the contract into execution. It will be urged that negociable bills are cash: if they are, Brown was not to receive any benefit from those given to Bethune till months afterwards. The payment by Innes, if intended for Brown, was under the terms of the contract, premature, and Bethune was thereby made the agent of Innes (*b*). The correspondence contains no evidence of Brown's assent to Innes's act. It is contended that on the 3rd of April following the time of making the contract, Brown was first made aware of it by Bethune's letter, seven months after the sale took place; and Brown's letter of August shews distinctly that he would not ratify the contract. He was at that time, and his devisee is now, willing to make a conveyance, upon being paid the amount of the purchase money. The evidence establishes gross carelessness on the part of Innes, and that he afterwards acknowledged his error in having trusted entirely to Bethune. It was further contended, that the question brought forward by the cross bill had been already adjudicated upon and decided against the claimants, as it is shewn by the record of nisi prius (in evidence), that the executors of Innes had sued Brown to recover back the 500*l.* said to have been paid to him, and for damages

(*a*) Gunter v. Halsey, Amb. 586; Fonb. on Eq., B. 1, c. 3, s. 8 & 9, and note in Am. Ed; Frame v. Dewson, 14 Ves. 386; Kern v. Balf, 2 B. & B., 348; Charlwood v. Bedford, 1 Atk., 497; Lacon v. Mertius, 3 Atk., 1; Wells v. Stradling, 3 Ves., 379.

(*b*) Parnther v. Gaitskill, 13 East. 432.

for non-performance of the identical contract sought now to be enforced. A verdict was rendered for the defendant, thereby negativing both the receipt of the money and the making of the contract, and the Court of Queen's Bench refused to disturb that verdict. A court of law was quite competent to decide the question, and the party having made his election, is bound by it (*a*). If the court should entertain any doubt of Bethune's authority, it will direct an issue (*b*).

Blake and *Esten*, for Kingsmill, &c. The contract, as set up by the plaintiffs in the cross bill, is recognized by the letters so as to satisfy the statute of frauds, and leaves the only question remaining, whether the purchase money has been paid? The contract is shewn to have been made by J. G. Bethune, who was authorised to receive the purchase money and to apply it to the use of Brown. Bethune did receive the money as agent of Brown, for having negociated the bills, and their amount having been placed to his credit, a corresponding sum was thus placed at his disposal, and the amount of the purchase money he applied to the use of Brown, and paid the surplus to Innes. Independently of these facts, Brown assented to the arrangement made by Bethune, whereby the conveyance was to be given when the bills were honoured, thus agreeing that the acts already done amounted to payment, provided they were not undone by the bills being returned. Brown having once assented to this arrangement, cannot withdraw his assent when he finds himself disappointed in receiving the money from the person to whom he trusted, and the bills having been honoured, the plaintiffs are entitled to a conveyance. Suppose Innes had negociated the bills, either with Bethune (who was then agent for the bank), or any other person, and out of their proceeds had paid Bethune the amount of the purchase money, and he had immediately remitted it to Bradbury & Co., and had the amount placed to his credit, Brown would then undoubtedly have been bound. The withholding the deed until the bills were honoured did not prevent the present payment. The debiting Innes with the amount of the purchase money until the bills were paid, created only an apparent credit; the non-crediting Brown until that period was only matter of arrangement by Bethune, to guard himself from inconvenience in case the bills were dishonoured, and did not affect the result worked by the present application of the money. The fact of Bethune being indebted to Brown, upon a final

(*a*) Mitf. Eq. Pl. by Jer. 253; Behreus v. Pauli, 1 Keen, 456; Beames Orders, 11, 117; Cockerell v. Chomeley, 1 R. & M. 418.

(*b*) Story Eq. Juris. 2 Vol. S. 1478; Kern v. Balf, 2 B. & B. 348; Hollis v. Whiting, 1 Ver. 159.

settlement, in a large sum for which he had to give a confession, does not prove that at the time of the sale the balance was not in favour of Bethune; for by the accounts rendered by Brown's own clerk and agent, it appears that sums, amounting to between £3,000 and £4,000, on account of land and other dealings, are charged against Bethune, between the date of the sale and the time when business transactions between Bethune and Brown are said to have ceased. The record of nisi prius cannot be taken as evidence that the jury found that Brown had not received the £500, for it is clear the plaintiffs in that action could not recover for money had and received, while they continued in possession of the premises; and it does not appear, nor can this court know, but that the verdict may have been rendered in favour of the defendant on the ground that in the opinion of the jury there was not any contract in writing within the Statute of Frauds that could be enforced at common law; besides, some of the letters now in evidence were not known to exist at the time of the trial at law. Citing Paley on Princ. and Agent, 171; and Kirnitz v. Surrey cited in note, 172, 3 and 4; and cases cited, 278, 280; Stiles v. Cooper, 3 Atk. 692; Shannon v. Bradshut, 1 Schol. & Lef. 73; Favenec v. Bennett, 11 East. 38.

THE VICE CHANCELLOR.—I take it as proved that, during the period of the proceedings out of which this suit arises, Bethune was the general agent of Brown for the disposal of lands, &c., and receiving payments; that he had for a considerable time been very extensively employed as such by Brown; and, up to a period subsequently to the commencement of these transactions, had possessed his implicit confidence. As such agent, some agreement had been made by him for the sale of some land to the testator Innes, known as the Wilder Lot, belonging to Brown; together with a small portion of land adjacent, with a house, &c. The nature and consequences of this agreement are now to be enquired into.

The questions are—was Bethune authorised in this particular case to contract for the sale to Innes; and, if so, did he perform his agency according to his authority; and, if not according to his authority, either in the letter or the spirit, or contrary to both, was there such an acquiescence and adoption of his acts as to bind his principal; or, was the assumed deviation from the right line of his agency so entirely his own, or his own together with the pretended purchaser (especially in the act of receiving the purchase money or consideration), as to leave Brown unfettered by their proceedings; and whether there ever existed at all a contract binding, within the Statute of Frauds and the decisions of courts of equity?

I infer that the lands in question were among those which Bethune considered himself authorised to dispose of under

his general power to sell; for his enquiry of Brown, in his note of September, 1833, relates only to price: "I shall probably sell your Wilder Lot; shall I take 500*l.* cash? Let me know by bearer."

The authority assumed by Bethune is certainly admitted by Brown, who, with reference to that enquiry, directs him to "take that sum, if you can do no better." There appears no mention of "cash" in this answer; but he adopts the proposition from the note of his agent, and it must be construed as though the direction had emanated from himself.

This confirmation of the agent's proposal to sell the property for 500*l.* cash, and the subsequent conduct of the parties as to the mode in which the purchase money was paid, or alleged to have been paid, forms the principal difficulty in dealing with this case; there is no question however which, in point of time, arises before the date when that difficulty became apparent. It may be as well to dispose of it at once, and then return to the one involving greater perplexity.

The question is, the validity of the contract itself. (*a*) It is contended that the agreement was a nullity in its inception, having been verbally made with Bethune, not at the time invested with proper authority: and that this invalidity was not aided by *any* such part performance as is here set up, because Bethune had no more right to deliver possession than an auctioneer selling an estate would have; that there could be no part performance of a non-existent contract. That, in fact, possession was taken by Innes not as a purchaser under any existing or even inchoate contract, but as assignee of the lessee of Brown then in possession, with a view to a future contract for the purchase. It is in proof that the lessee, Wilder, who had a short period of his lease unexpired, had been bought out by Innes, and that Bethune had himself advanced the sum of 7*l.* 10*s.*, being the back rent then due to Brown; that, as there was no agreement, therefore the possession could only be the continued possession of the tenant; and it is rightly argued, and irrefragable cases cited in support, that any act of part performance, whether possession or otherwise, to take a case out of the Statute of Frauds, must have manifest and unmistakeable reference to, and connexion with, the *agreement to purchase*, of which they profess to be a consequence; (*b*) that the possession here had obvious and sole reference to the right of the tenant which the plaintiff had purchased, but could have no reference to a contract which, with Innes's knowledge, was not made according to Bethune's

(*a*) Ward v. Evans, 2 Ld. Ray. 928; Parnther v. Gaitskill, 13 E. 432; Sykes v. Gibbs, 5 M. & W. 645.

(*b*) Wells v. Stradling, 3 Ves. 379; Charlwood v. Bedford, 1 Atk. 497; Fonb. Eq. B. 1, c. 3, s. 8; Hollis v. Whiting, 1 Ver. 159.

limited authority, viz., for cash; that, though he had long retained possession, he had not entered under a contract. I do not agree in either of these views. It is true that, when Bethune enquired of his principal, shall I sell the Wilder Farm for 500*l.* cash? and he was directed so to do, it never could be imagined that it was for the contract alone that Bethune was to demand 500*l.* cash in hand, as if the estate could be sold and handed over like a portable chattel. The sale, it is true, was to be for cash; but the sale of an estate is a sort of equitable and legal compound, begun by the contract and perfected by conveyance; and it is only on the legal consummation that the party contracting to sell for cash could expect his cash payment confirmed: however, as Bethune's proposal to sell for cash was approved by Brown, I am by no means certain that this possession was at all necessary as an act of part performance, to take the case out of the statute; but, supposing it to be so, as it was taken after the contract and by the intervention of the vendor's agent, I cannot attach any importance to the fact that, to obtain possession of the land contracted for, it was necessary to buy out a tenant having a short unexpired term. Strong inferences were drawn from the fact that Bethune, the agent of Brown, paid the tenant the amount of rent which Brown himself was to receive: to have remitted or given a receipt for the rent due, might have been a simple course, but the tenant might have doubted Bethune's authority; and it is clear that Bethune was anxious that the unwillingness of the tenant to give up possession, should throw no obstacle in the way of the fulfilment of his contract with Innes, who was desirous to obtain possession.

I think therefore that there was a contract which even if not complete by Brown's affirmation, was certainly so by part performance, possession given by Brown's agent, and with his knowledge, followed by extensive improvements carried on within his frequent observation. It remains to see whether the conduct of the agent in conjunction with the purchaser in regard to the payment, was such as to deprive the purchaser of any right to specific performance on other terms, than of paying again to the vendor the purchase money, which it is admitted on all hands, was received by the agent.

It is contended that through the instrumentality of the purchaser, and against the known terms of the agreement, it was received by the agent in such a manner, as to enable him to apply it to his own use in fraud of his principal. On the other hand, that if after the contract, there were any deviation from the particular form of payment, it was one known and assented to by the vendor, and that he did in effect receive the purchase money.

It seems that not many days after the completion of the contract for sale, Innes, who seems to have dealt exclusively with the agent of Brown, with whom it would appear he had no personal acquaintance, drew two bills of exchange for £250 sterling, each, upon a person in Scotland, at three and four months, in favour of Bethune, who, instead of endorsing them to Brown, transmits them to Bradbury, his agent in Montreal, to be sent to Scotland for payment. In the mean time they are placed to Bethune's credit by Bradbury, and when at maturity, are duly paid. The excess between 500*l.* sterling, and 500*l.* currency, is repaid by Bethune to Innes.

Had the case rested simply thus, and the proceeds of these bills come to the hands of Brown, or his authorised agent for him, before or at the time when Brown was prepared to give a deed for the land, it would beyond doubt, have been a sale for cash, within the literal meaning of the contract; but it is insisted that the intention was that Brown was to have the cash down upon the contract itself, and that Innes, by giving these bills to Bethune, enabled him to obtain the benefit of them, and therefore there was no payment to Brown.

As evidence that Brown was ignorant of the whole transaction up to the April of the following year—1834—a letter on the third of that month is produced, written by Innes to Brown,—(here his honor read Innes's letter, of 3rd April, 1834, Bethune's of the same date, and Brown's answer of the 4th, addressed to Dr. Innes.)

That these bills had at this time been actually paid, was a fact concealed by Bethune from both Innes and Brown; but if Brown had been altogether ignorant all this period of upwards of six months, that Bethune had taken payment in bills, which could only be cash payment when paid, his anxiety shewn at the time of the contract to receive his money for the land which he knew was in the hands of Innes (whom he clearly acknowledged as purchaser) must have been suspended for some reason or other. If he were ignorant of any such payment by bills, a payment defeasible indeed by return of the bills, it is singular that no demand should, during this long interval, have been made upon Innes, for any payment other than what he had made. It is suggested in argument, that it is in the highest degree improbable that Brown, relying on a ready money payment, should consent to wait till March for the payment of the bills, yet we find him making no remonstrance at the non-appearance of the money, until the beginning of April, when this correspondence commenced, which I think must have originated in some application on the part of Innes to Bethune, surprised probably at not hearing from him that his bills had been honoured, and was then indeed directly misinformed and deceived as to the fact. Brown's

ignorance of the taking of these bills is further inferred from the peculiar commencement of Bethune's letter, which might appear to have given the first intimation of the fact. Setting aside for the present moment the letters of Bethune, who then becoming immersed in difficulties, was playing a disingenuous part probably to both parties, there is nothing in Brown's letter to show that he was not fully aware that some mode of payment had been resorted to, which must for a time postpone the receipt of the "Cash down," and that he had hitherto been in hopes, as he states that he still is, that "before long the money will come to hand," for the first time appears one strong reason why he wished to get the purchase money before giving the title, which he says he cannot make until a mortgage of nearly 200*l.* shall have been paid off.

[Referring again to the repudiation of the contract, on the part of Brown, for whom it is contended that he never treated Innes as any thing but a tenant standing in the place of Wilder, not only does this letter state that the land was purchased, but he draws the distinction between the rent which he had received from his tenant, and the interest on 500*l.*, which he was to receive from the purchaser, and complains that he is a loser as the interest is less than what the rent amounted to.]

On the 21st April, 1834, Brown writes to Mr. Henry, (a person against whom Mr. Bethune had, or fancied he had, some pecuniary claim, out of which it seems he had offered to accommodate Mr. Innes, and enable him to satisfy Brown),—*(see Brown's letter of that date.)*

[Here again, so far from up to this period repudiating the contract because the cash was not paid for it, he is willing on the supposition that Mr. Henry had not yet paid the bills to draw on him.]

Pursuant to the accommodation which Mr. Bethune had promised to Innes, another letter from Mr. Bethune, written on the 4th of April to Mr. Henry, illustrates the plan he was carrying on to conceal from Brown (as well as Innes), the actual payment of Innes' bills, whether he (Brown) had known of their having been received or not, he writes—*(see Bethune's letter to R. Henry, Esq.)*

This letter, while it proves concealment and misrepresentation on the part of Bethune, proves also that he had no design ultimately to defraud his principal, for he here tries to obtain for him the money upon his own responsibility. He seems merely to have contemplated a temporary accommodation at the expense of much inconvenience on the part of Brown, and suspense and solicitude on that of Innes.

Brown, now weary with waiting to obtain the money, the receipt of which his agent had concealed, meditated rescind-

ing the contract, and writes to Innes—(see letter from Brown to Dr. Innes, of 21st August, 1834).

The last expression seems to import that if 200*l.* be not paid by the day appointed, he will no longer treat him as owing 500*l.*, and interest from the day he took possession, but will charge him rent for the use and occupation, probably alluding to the amount of rent paid by Wilder. This is the only evidence associating Innes with the character of a tenant in the mind of Brown, yet this is only a threat of what he would do, even had he the power of so transferring his purchaser. There is a good deal of evidence about Brown's revoking a contract no longer revokable, and exercising acts of ownership by cutting down timber, all which proves nothing, except that Brown committed a trespass, for which, while the contract subsisted, and Innes was in possession, he might have been punished in damages; the only question is, the contract having been complete, and the purchase money paid to the agent, was the payment made in such a manner as to bind the principal? If the agent were authorised to receive payment, whether he received it in bills or cash, does not appear to me to make any difference. If he received it in cash, it was equally in his power to misapply it, and if in bills drawn in his favour, which would become cash when paid, (and as this was to be a cash sale, Brown was not bound to make a perfect sale until they were paid), the result is the same. Is there any evidence to show that Innes, though he might contract with Brown's agent, had notice that he could not legally pay him? As between the purchaser and the vendor and his agent, I can see no irregularity or departure from the terms of the sale, for as already remarked, before the transaction could have matured into a sale, there was an actual cash payment, in the hands of the vendor, through his agent; I say an actual cash payment, though through the misconduct of that agent, not actually in the hands of the vendor; but that cannot be visited upon the honest purchaser. As to the vendor's expressly consenting to his agent's taking bills in payment as before said, a defeasible payment, there is, except from testimony which has been impugned, no direct evidence; it is equally certain that there is no direct evidence against it, and I think the probabilities arising from the conduct of the parties, are in its favour.

Had the evidence of Bethune himself, taken in the suit at law, and used in the present suit, been entirely free from suspicion, the case would have been perfectly clear; for he swears that Brown was privy to the whole transaction, and that the amount, though at first placed to his (Bethune's) credit, was afterwards fully credited by him to Brown, not indeed *eo nomine*, as proceeds of those bills given in payment

for land, but after explaining why he did not debit himself at Cobourg to the amount to which he had been credited at Montreal, until he should have ascertained that the bills had been actually paid,—reasons the goodness of which, or the badness, is unimportant, if the result be true: he says that he made use of such credit in meeting Brown's liabilities, and that at this particular time Brown was in his debt.

Bethune has, unfortunately, himself furnished the opposing parties the strongest ground for questioning this evidence, by the several letters already referred to. It has been objected at the bar, that these letters not having been presented to the witness, when examined on oath, for his exposition (and certainly that equivocal note to Brown of the 3rd of April, 1833, might not impossibly have had a subtle object as regards Brown and Innes, as well as between himself and Brown) cannot now be used to discredit his testimony on oath. I admit that, had they been now for the first time produced for that purpose, the witness being no longer capable of examination, they could not have been received. But they have been received by agreement, and read in the cause, and their discrepancies must be allowed their full force; it must not, however, be forgotten that at the time these letters were written, he was entering into those inextricable difficulties which ended in his ruin and expatriation: a creditor, it might possibly be, of Brown, but a bankrupt to the rest of the world—actuated by a passion stronger than the love of truth, therefore departing from the truth—trying to keep up his falling credit by concealment and misrepresentation; yet, with regard to this 500*l.* not, I really believe, meditating any ultimate fraud against Brown, as shewn by his letter to Mr. Henry; for, as to Innes, when he reflected on the character in which he received his money as the agent of Brown, he might naturally have felt that he could not ultimately be the loser by his concealing for a time the payment of his bills.

On the other hand, when he made his depositions deliberately under the sanction of an oath, his personal liberty secure, he was to a certain degree beyond such influences; for he had passed the worst. He had a direct passing interest in *saying* what was untrue, but he had no apparent interest in *swearing* what was untrue. I should, therefore, believe him upon his oath, unless the probabilities were in favour of his previous statements.

Balances of accounts, as stated by him, have been referred to, in order to discredit him on that point; and, from the testimony of witnesses, it does not appear that they are sustainable, or that his mode of keeping his accounts was particularly satisfactory: but these are by no means conclusive. It is not improbable that the payments made for or on behalf of Brown, may have absorbed the credit raised by the deposit and ultimate payment of these bills. The transactions between these

parties were evidently pretty extensive up to the last, though it has been represented at that time to have almost entirely ceased, in order to render the application of so large a sum as 500*l.* to Brown's concerns a matter of improbability, in the absence of any specific appropriation of such a sum appearing in the accounts. Between the date of Innes's bill, however, and the close of that year—1833—I find by the statement of the accounts between Brown and Bethune, drawn up by Wallace (a relative and clerk of Brown), that Bethune is credited with eleven several money payments on account of Brown, amounting together to the sum of 2117*l.* The balance on the whole account is in Brown's favour about 1673*l.*; but it is not certain that it might not have been greater by 500*l.*, had it not been for the credits afforded by this same purchase money. Upon the whole, Bethune's statement is not improble; it is on oath, and it has not been disproved. A nisi prius record has been put in to shew that the matter in issue has been determined by a court of law, and that this court will not entertain a case which has been settled by a competent tribunal. If it were apparent that a single fact (out of which the whole equity arose), as, whether there was or was not a contract, had been so determined, of course the court would not entertain it; nor, although issues of fact are so frequent in cases like the present, would it send such an issue, if it were clear that it had already been tried. But it is not apparent, nor do I see how the whole equity of this case could have been compressed within any issue at law. Neither do I understand how a plaintiff could succeed in an action for the recovery of money paid under a contract while holding possession by force of that contract. If he founds his right to possession on the agreement, it is, of course, only in a court of equity that he can enforce the performance of it. Looking at the whole case, the following facts seem sufficiently clear:—An agreement to purchase made with an agent authorised to sell and to receive the purchase money, that agreement ratified by the principal in writing, and the purchaser put into possession. Payment to the agent, who was certainly authorized to receive it, as between the vendor and purchaser, and who probably, as between principal and agent, received it in the manner and form in which he was, by his principal, authorised to do, with the further probability that though this purchase money was at first placed to the private credit of the agent, yet that it ultimately went to benefit the estate of the principal; at all events, I see nothing to deprive the purchaser having honestly paid his money, of his right to specific performance, and the repayment of the money paid to relieve the property from the mortgage.

[GAMBLE v. HOWLAND.—NOTE.—Since the report of this case has been in the press, a trial of the action at law has been had—His Honor the Chief Justice presiding—in which a verdict has been rendered for the plaintiff.]

NOTES OF LEADING CASES.

WHEN THE COMMUNICATION OF SLANDEROUS WORDS IN ANSWER TO AN INQUIRY IS PRIVILEGED, AND THE LIABILITY ARISING THEREFROM.

GRIFFITHS v. LEWIS, EASTER TERM, 1845, 9 JURIST,370.

As a general rule the liability of a party who uses and publishes of another expressions which amount in law to slander, does not at all depend upon the actual consideration of the particular motives prevailing at the time. It is enough that the words are found to be *per se* actionable, in order to warrant therefrom a legal implication of existing malice. To this general rule however there are some exceptions classed under the distinctive denomination of "privileged communications;" and when it is remembered that in an action on the case founded on statements of the latter description, the question of malice becomes an ingredient so essential to success, that it cannot, as in ordinary cases, be left to mere inference, but must expressly and in fact be proved, the importance of a decision tending to settle and define what is to be considered a "privileged communication," must unhesitatingly be admitted. Of this character is the decision in the case of Griffiths v. Lewis above referred to; and in now briefly adverting thereto, every observation will be limited to that particular kind of privileged communication, the nature and extent of which the case in question very accurately defines, namely, how far the communication of slanderous words in answer to an inquiry by a person who is interested in knowing whether they have been previously used or not, can be so considered. The first case to which it is necessary to refer, is that of Twogood v. Spyring (1 C. M. & R. 181). There the defendant, who was tenant of certain premises, for whom, in the capacity of a journeyman carpenter, the plaintiff in the action had been sent by the landlord's agent to do certain work, charged the plaintiff, in the presence of a person named Taylor, with being drunk, and having broken open his (the defendant's) cellar door. Upon the then denial of this charge, the defendant went and complained in similar terms to the londlord's agent by whom the plaintiff had been employed, and subsequently repeated in reply to an inquiry by Taylor, and in the absence of the plaintiff, that he was confident the plaintiff had broken open the cellar door. On this state of facts it was contended, in support of a motion for a nonsuit or new trial, that these were priviliged communications, and that therefore the question of malice should have been left to the jury. After taking time to consider, the judgment of the court was delivered by Parke, B., in the course of which it is laid down, that the communication to the landlord's agent, and that made in the presence of Taylor, were to be

considered as privileged, but that the subsequent one made in the absence of the plaintiff to Taylor, could not be so considered. The ground on which the decision with respect to the first charge in the presence of Taylor rests, is that of its being made by one who was to be considered as standing in the relation of master to the plaintiff, and it may be well to quote a portion of the judgment relative to this point, as it will be found of some assistance in determining the practical application of the law. In Griffiths v. Lewis, Mr. Baron Parke observes, " I am not aware that it was ever deemed essential to the protection of such communication, that it should be made to some person interested in the inquiry *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed, Child v. Affleck (4 Man. & Ry. 590; 9 B. & C. 403),) the simple fact that there has been some casual bystander cannot alter the nature of the transaction." And again, "the mere fact of a third person being present does not render the communication absolutely unauthorized, although it may be a circumstance to be left, with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant had acted *bona fide* in making the charge, or been influenced by malicious motives." The rule thus laid down has received direct confirmation in a decision of the Court of Queen's Bench in the case of Padmore v. Lawrence (11 Ad. & E. 380). As an authority on the question about which we are more immediately concerned at present, the case of Twogood v. Spyring goes no further than to establish what could hardly be matter of serious doubt, that the circumstance of a party's repeating a charge (privileged on the first occasion) of another, to an uninterested third person, in answer to an enquiry by the latter, does not protect him from the ordinary liabilities of an action on the case for slander. Another case bearing on the subject now under consideration is that of Warr v. Jolly (6 C. & P. 497), and was tried before Mr. Baron Alderson at the sittings in London, after Trinity Term, 1834. The alleged slanderous words in this case had been elicited by questions put by the plaintiff and his friend to the defendant, and they communicated the fact of defendant's wife having been cautioned by a third party against the plaintiff as a man of intemperate habits. On behalf of the defendant it was submitted that the words were privileged, having been used in answer to questions by the plaintiff, and the learned judge being of that opinion directed the jury that it lay on the plaintiff to show the existence of malicious motives on the part of the defendant, who thereupon found a verdict for the defendant. In this case it will be observed that the statement made (not

repeated, as in the previous case) related to something which had been said by another person to the party of whom the enquiry was made, and in this respect differs from that to which reference is about to be made: of this decision it will be seen the case of Griffiths v. Lewis is an extended confirmation. Smith v. Matthews (1 Moo. & Rob. 151), tried before Lord Lyndhurst, then Lord Chief Baron, at the sittings in London after Michaelmas Term, 1831, was a case in which, in consequence of certain statements made by the defendant, prejudicial to the plaintiff as a tradesman, he, the defendant, was called upon by the employers of the plaintiff to examine into the subject-matter of such statements, and thereupon repeated in a report what he had before said. The learned judge told the jury that, "if they believed the report originated with the defendant, and that what he had said produced the enquiry, the communication was not privileged. If they believed that it originated elsewhere, and that the defendant, being called upon to report, had *bonâ fide* made the statement, they should find for the defendant." Whereupon the jury found a verdict for the plaintiff.

Griffiths v. Lewis, above quoted, by which the foregoing principle is fully recognised, makes it further appear that the circumstance of a prejudicial statement being *repeated* in answer to an enquiry by the injured party himself, does not alter the application of that principle. The defendant there, it appeared, was applied to by the plaintiff, in company with another, to state whether he had been saying that the plaintiff, who was a butcher, used false weights, and that the defendant replied yes, and that he had been doing so for years. A verdict having been found for the plaintiff, it was contended, in support of a motion for a new trial on the ground of misdirection, that being a privileged communication, the question of express malice in the defendant ought to have been left to the jury, and in the course of the argument the previous cases were particularly referred to. The court of Queen's Bench, however, expressed an unanimous opinion to the contrary. Mr. Justice Patteson says, "Where a person did not originate the words, and being applied to by the person whose character is affected by them, makes a communication in answer thereto, such communication is privileged. Where a party originates a slander, and afterwards repeats it, even in the shape of a report in answer to a question by the person slandered, then, though made by him *bonâ fide*, and believing it to be true, he is liable, because he was the inventor of it." Again, Lord Denman, C. J., says, "The question really is, whether the utterance of slander once, gives to the party who uttered it a privilege of uttering it again when he is asked for an explanation. It is the constant practice for persons who have been slandered, and wish to set themselves right, to take with them

some friend, and ask the person who has uttered the slander, whether he used the words, and whether he will abide by them. Indeed, an action for establishing a person's character does not stand well without such a previous enquiry." His lordship then goes through the several cases, and concludes by stating that in Smith v. Matthews the correct rule was laid down.

The conclusion derivable from these cases would seem to set at rest all ordinary doubts as to how far a communication interrogatively obtained can be considered legally privileged. From the cases of Twogood v. Spyring and Padmore v. Lawrence, as well as that of Griffiths v. Lewis, it is quite clear that the mere circumstance of a third party being present when a communication is made will not take away from it any claim to be considered as privileged which may otherwise exist. It seems, however, that there must be an interest in the subject-matter of the inquiry in the person making it; and the cases afford no *direct* authority for saying that any interest short of that possessed by the party slandered will suffice. All the cases clearly decide that the main point to be ascertained is, whether the party who, when interrogated, communicates the prejudicial statement, be himself the person from whom it originated, or whether, having heard it from another, he merely, to gratify the interested inquirer, discloses its purport. In the former case the liability of the party will result from the proof of the statement alone, whilst in the latter the success of the plaintiff in the action will depend on his ability to establish in addition the existence of malicious motives on the part of the defendant.

The case of Griffiths v. Lewis may be noted in 2 Selw. N. P. 11 ed. 1255, 1266; Roscoe on Ev. 5 ed. 395.—*Law Magazine.*

CONTRACTS OF INFANTS.

Chappel v. Anne Cooper, 13 M. & W. 252.

That an infant is liable upon his contract, where the supply of necessaries is the object of the agreement, is a proposition so well established that it would be mere pedantry to cite authorities in its support. It is obvious too that such things as relate immediately to the person of the infant, as his meat, drink, apparel, lodgings and medicine, are necessaries for which he may be liable. And likewise authorities are not wanting to show, that, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral or religious information, may also be a necessary. So, again, attendance may be a necessary; and upon this principle, in Hand v. Slaney (8 T. R. 578), necessaries for the livery servant of an officer in the army were held to be necessaries for him. In all these instances, it is to be observed, there is a manifest direct per-

sonal advantage from the contract derived to the infant himself. But the cases have gone further. In Turner v. Trisley (1 Str. 168), it was ruled by Pratt, C. J., that "necessaries for an infant's wife are necessaries for him." The grounds of this decision are not given in the report of the case. In Bacon's Law Maxims, 67, (edit. 1639), the author in illustrating the maxim "Persona conjuncta æquiparatur interesse proprio," says, "so if a man under the years of twenty-one contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy no more than if he had contracted for his own aliments or erudition."

This brief statement of the different classes of necessaries will suffice to introduce the case of Chapple v. Cooper, in which an entirely new question with reference to the liability of an infant came before the Court of Exchequer. The declaration was in the ordinary form, for work, labour and materials. To this the defendant pleaded infancy, and the replication stated that the goods were necessaries. It appeared that the plaintiff, being an undertaker, had by the defendant's order conducted the funeral of her husband, and that the husband had left no property to be administered. Upon this arose the question, was the infant widow bound by her contract for the funeral expenses of her husband? After time taken to consider, the judgment of the court was delivered by Alderson, B., and the process of reasoning by which the court came to the conclusion, that by analogy with and inferentially from the authorities already stated, the defendant was liable on her contract, can only be understood by an extract from the judgment itself. "This is the case of an infant widow, and the burial that of her husband, who has left no property to be administered. Now the law permits an infant to make a valid contract of marriage, and all necessaries furnished to those with whom he becomes one person, by or through the contract of marriage, are, in point of law, necessaries to the infant himself. Thus a contract for necessaries to an infant's wife and lawful children is used by Lord Bacon as one of the illustrations of the maxim, persona conjuncta æquiparatur interesse proprio." The learned baron, after citing the passage from Bacon's Law Maxims already given, and laying down the rule that decent Christian burial may be classed as a personal advantage, and reasonably necessary to a man, thus continues: "If then this be so, the decent Christian burial of his wife and lawful children, who are the persona conjuncta with him, is also a personal advantage, and reasonably necessary to him; and then the rule of law applies, that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence, from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for

the burial of his wife or lawful children; and then the question arises, whether an infant widow is in a similar situation. It may be said that she is not, because during the coverture she is incapable of contracting, and after the death of the husband the relation of marriage has ceased. But we think this is not so. In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end for some purposes. But if the husband can contract for this, it it because a contract for the burial of those who are persona conjuncta with him by reason of the marriage, is as a contract for his own personal benefit, and if that be so, we do not see why the contract for the burial should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract, and her infancy for the above reasons is no defence, if her contract be for her own personal benefit. It may be observed, that, as the ground of our decision arises out of the infant's previous contract of marriage, it will not follow from it that an infant child or more distant relation would be responsible upon a contract for the burial of his parent or relative." (*a*)

Out of this decision are evolved two points for the first time decided, for it is obvious that two steps must be taken by the court to come to the conclusion at which it arrived. 1stly. Every man's right to be decently interred will hardly be denied; but does the consequence follow that a man's funeral expenses are necessaries for him for which an infant may be made liable? By a slight extension of the rule, *as to what are necessaries*, an infant's funeral expenses are for the first time construed to be comprised within it. 2ndly. This case affords a new illustration of the maxim cited from Lord Bacon's work. It shows the operation of that maxim may for some purposes continue even after the relation which gave it efficacy has ceased to exist. The court proceeded upon the principal that there grows out of the contract of marriage a continuing identity, which survives the death of one of the parties; and concluded that as the husband's funeral expenses were necessaries for him, so *his* funeral expenses were necessaries for the wife, and consequently, she having contracted for them, her infancy afforded no defence. From this case it appears the funeral expenses of a lawful child are personal necessaries for which an infant parent may be sued. Note this case in Chitty on Contracts, p. 144.—*Law Magazine.*

(*a*) The common law imposes upon the individual under whose roof a person dies, leaving no effects, as in this case, the obligation of defraying the expenses of decent burial. Reg. v. Stewart, 12 Ad. & Ell. 773.

THE

UPPER CANADA JURIST.

LIABILITY OF INFANTS IN RESPECT OF CONTRACTS, AND THEIR LIABILITY FOR TORTS.

At first sight there appears such a clear distinction between contracts entered into by a person on his own behalf, and contracts on the behalf of another, that it might be thought that it was needless to do more than to state that such a distinction exists, but the case of Zouch v. Parsons (Burrows, 1808) shows that it is necessary to keep this difference in mind, whilst considering the effect of contracts and deeds entered into by infants.

As regarding then his power to contract as agent on behalf of another, it is clearly established (Co. Litt. 52 a) that an infant may act as agent for another person, and can carry out the authority entrusted to him in the same manner as an adult, and there is no difference whether the act entrusted to him to do is a judicial or a ministerial act.

The case of Zouch v. Parsons (Burrows, 1794) is an important illustration of this principle. It was there held that a re-conveyance of mortgaged premises, by an infant mortgagee, on whom the land had devolved as heir, was binding on him on the ground that he was a mere trustee to re-convey the mortgaged premises, on the mortgage money being paid off, and therefore that the conveyance was an act not touching the interests of the infant; and although Mr. Preston, in his edition of Sheppard's Touchstone, p. 56, states that this decision could not safely be relied on, the doubt there expressed is as to whether the interest of the infant was, or was not affected by the conveyance, and not as to his power

to convey, supposing he had no personal interest in the premises.

The statute 1 Will. IV. c. 60, s. 6, has been subsequently passed, under which infant mortgagees may re-convey under the direction of the Court of Chancery.

On the same principle it follows that an infant may execute a power *simply* collateral, that is to say, a power to dispose of or charge an estate in favour of some other person, the infant not having any interest, or taking any estate, in the land. (Sugden on Powers, 45, 6th ed.)

A devise of lands to an infant to sell where the will passed only a naked authority would be a power of this instance, and one which the infant might execute. (Dyer, quoted in Sugden on Powers, 46.)

The question, however, whether an infant could execute any powers which are appendant or in gross, and not simply collateral, has been discussed in Sir Edward Sugden's Treatise on Powers, p. 215, 6th ed., and it will be seen that it is considered as clearly settled by that learned writer, that such powers cannot be executed. This opinion is in accordance with the views that have been already expressed (ante, vol. xxxi., p. 126), when treating of those contracts which affect the infant's own interest.

It follows, from what has been already said, that an infant can at any age act as agent for a third party, unless prevented directly or indirectly by some statute law. Many statutes have however prevented him from acting till he arrives at age; thus he cannot act as administrator during his minority, because he is incapacitated (for the reasons already stated, ante, vol. xxxi., p. 136) from entering into the bond as required by the statute 22 and 23 Car. II. c. 10, s. 1, for the due administration of the intestate's effects, and consequently, by the practice of the ecclesiastical courts (Williams' Executors, 333, 2d ed.), administration is granted to another, durante minore ætate. So also by the statute 38 Geo. III. c. 87, an executor cannot act till of age, although he may be appointed executor at any age. Previously to that statute, the law had considered him incapable of acting as executor until the age of seventeen (Pigott's case, 5 Co. 29 a), a limi-

tation peculiarly necessary, for as the appointment by the testator is never intended to take effect immediately, but only on his death, it must be presumed that he did not expect that the infant would be called upon to act till he had arrived at an age capable of undertaking the duty which the common law had fixed at seventeen years of age, but the statute law now at twenty-one.

So he cannot act as a public attorney to prosecute suits, as by the laws regulating attornies, which have existed from the earliest times, he is prevented from acting till of age. Co. Litt. 52 a, note 2.)

Having treated of the effect of contracts entered into by infants, as well on their own account as also as agents for others, it remains to state, that their *contracts* must be distinguished from their *acts*, for an infant has capacity not only to do many things, and which, when performed, he cannot undo, but there are also many things the court will compel him to do. It is proposed then to consider—

THE CAPACITY OF AN INFANT TO ACT GENERALLY, INDEPENDENTLY OF HIS POWER TO CONTRACT.

Lord Coke (Co. Litt. 172 a) lays down the rule that, whatsoever an infant is bound to do by the law, the same shall bind him, albeit he doth it without suit at law.

In Fortescue (18 Hen. VI. fol. 2 a) the same rule is expressed thus, that if an infant doeth that which he ought to do, the act is good; therefore the attornment of an infant to a grant by deed is good, because it is a lawful act, albeit he be not, upon that grant by deed, compellable to attorn. (Co. Litt. 315 a.)

It has been already said that an infant is never liable to be sued in a court of law on his contract, laying aside his contracts, for necessaries, but there are many cases in which a court of law would compel an infant to do certain acts, as to admit a copyholder (Coney's case, 7 Rep. 35 b), and make a partition; and therefore if an infant does these acts, they will be good and bind him. So in the case of Zouch v. Parsons, (3 Burrows, 1808), it is said, that if under an act of parliament an infant could be compelled to make a conveyance of a trust estate, such a conveyance would be binding on him, although not made under the authority of the statute.

The rule laid down in Fortescue is rather wider in terms, and includes certain cases which would not fall within the rule laid down by Coke, as the case of an attornment above quoted (Coney's case, 9 Coke), which is an act that he is not absolutely bound by law to do, but which he ought to do.

Payment of rent by an infant is quoted as an instance of an act which is valid, because it is one which he is bound by law to do, and no doubt the payment is good, and could not be recovered back after the enjoyment of the land; but the reason of this is rather because the infant cannot remit the other party to the same state as he was before the occupation of the land by the infant, and it would be an injustice if the law assisted him to undo what he had done.

The infant, it has been shown (ante, vol. xxxi., pp. 119 and 140), is not compellable by law to pay the rent even after use of the land; therefore the act is not valid on the ground that the act was one which the lord could compel him to do. An infant is bound to perform a condition annexed to his estate; therefore the performance of the condition is necessarily good (Whittingham's case, 8 Rep. 88; Co. Litt. 233 b); for if an estate is given to an infant on a condition to be performed by him, and the condition is broken during the infancy, the land is lost for ever (Vernon v. Vernon, cited in 1 Vesey, jun. 453). So he may present or nominate to a benefice, as the law requires the benefice to be filled up.

Marriages by infants are also instances of the validity of their acts, for at common law, a male infant could marry at fourteen, and a female at twelve; and, at the present day, unless the marriage acts are violated, a marriage at those ages is valid, although a *contract* to marry by an infant would have no effect, and no action for the breach of the contract would lie until a ratification after age. (Ante, vol. xxxi., p. 121.)

As a male infant may lawfully marry at fourteen years, it may become important to consider whether by such an act he becomes liable to all the debts of his wife, contracted by her previously to marriage, to the same extent as if he had been of age. It is believed that there has been no judicial decision on the point, although there is a dictum of Pratt, C. J., in Turner v. Frisby (1 Stra. 168) (which would probably be

upheld at the present day), that the infant would not be liable to the debts of his wife, contracted by her previously to his marriage. It is quite inconsistent with the privilege of infancy, as already explained, to hold that an action could be sustained against him upon a contract entered into by his wife before marriage, while for his own contract no such action could be brought. (See ante, vol. xxxi. p. 119.)

It is clear that the wife could not be sued alone, for her debts contracted before marriage, and if the action was brought against the husband and wife jointly, the better argument seems to be, that the husband could plead his infancy at the time of the marriage in bar of such action.

If the wife was sued alone and failed to plead her coverture in abatement, *she* would not be allowed to take advantage of it at any subsequent stage of the cause, and might, therefore, eventually be taken in execution for her own debts (see Tidd's Practice, 1026, 9th edit.); yet, nevertheless, if she pleaded her coverture in abatement, which would unquestionably be a valid plea, it would follow that neither herself nor her husband would be liable for such debts as long as the coverture lasted, and after six years the statute of limitations would be a complete bar to these demands had it commenced to run before the marriage.

It seems, that in case of a recovery against a wife as a feme sole, the husband may, if he chooses, bring a writ of error at any time, since he is prejudiced in the loss of the society and comfort of his wife, and is thereby a party injured by the judgment. (Bacon's Abridgment, Error, 67; Baron and Feme, L.; Rolle's Rep. 63; 3 T. R. 631.) The court, however, will not discharge the wife, if taken in execution, on her application, but will put the husband to his writ of error. (Cooper v. Hunchin, 4 East, 521.)

As a further consequence of the *act* of marriage all the personal estate of an infant female will vest in the husband precisely in the same manner as if she was of age, and it is on this account that the settlement (2 R. & My. 376) by an adult male on the marriage with an infant female is valid, and will operate over all the personal estate of the wife, including not only the property which would have actually vested in the

husband on the marriage, but also over those choses in action which the husband by the marriage becomes entitled to reduce into possession (Ashton v. M'Dougal, 5 Bevan, 56); and including also her chattels real (Trollope v. Linton, 1 S. & S. 477), over which the husband by the marriage has a jus disponendi.

It seems, however, that the settlement would have no effect over such choses in action which the husband did not become entitled to reduce into possession *during* the overture. (Ashton v. M'Dougal, 5 Bevan, 56; Horrey v. Ashley, 3 Atk. 616.)

As to the effect of marriage upon the real estate of the infant female, any settlement by herself would, for the reasons suggested in the former part of this article (ante, vol. xxxi., p. 126, et seq.), be inoperative; and the settlement (Clough v. Clough, 3 Wood, 453) by the adult husband would only take effect upon the limited interest which he acquires by the marriage, and, therefore, quite ineffectual towards making any settlement of the property.

A settlement by a male infant of his real or personal estate, although in consideration of marriage, can have no further effect than any other of his contracts affecting his own interest, and which has already been explained. (Ante, vol. xxxi., p. 127, et seq.)

Settlements, it must be observed, on marriage, are usually and almost necessarily effected by deed, and, therefore, a settlement by a male infant of his real or personal estate, or by a female infant of her real estate, would come within the first class of contracts and operate accordingly; and as it appears that deeds may still be ratified (ante, p., 137), either by parol or acts confirming the deed, after age, settlements though made by infants may frequently be supported both at law and equity when so *ratified and confirmed.*

The case of Ashton v. M'Dougal, reported since the foregoing part of this article was written, in 5 Bevan's Reports, page 56, supports the opinion already expressed of the power of an infant to ratify a deed after age. The judgment of the Master of the Rolls in this case assumed that a settlement made by a female infant on her marriage of her reversionary interest in choses in action which had not been reduced into

possession by the husband during the marriage, was not binding on her, in the event of her surviving him, yet it was held that the wife might adopt and ratify the settlement after the death of her husband by not calling for a transfer of the funds; thus expressly deciding that acquiescence after age will support a deed which originally passed no interest, as being the deed of an infant.

Mr. Jacobs, in his edition of Roper on Husband and Wife (vol. ii. p. 26), has so clearly expounded the law of settlements by a minor on his or her marriage, and the passage is so confirmatory of the doctrine which has been ventured to be put forth in this and the preceding article, as to the effect of contracts of infants, and of their power to ratify deeds when of age, and also of the effect of the act of marriage upon the property of the female infant, that we may be excused in inserting it somewhat at length:

"A settlement on the marriage of a female infant will," says Mr. Jacobs, "also bind her personal estate, whether "consisting of property, which would upon the marriage vest "absolutely in the husband, or of choses in action or leasehold "estates, which would survive to her, if not reduced into "possession or assigned by the husband. (Harvey v. Ashley, "3 Atk. 607; Trollope v. Linton, 1 Sim. & Stu. 477.) On "the other hand, it is now held (Durnford v. Lane, 1 Bro. "C. C. 106; Milner v. Lord Harewood, 18 Ves. 259; Trol-"lope v. Linton, 1 Sim. & Stu. 477), after considerable fluc-"tuation of opinion (see Cannell v. Buckle, 2 P. W. 243; "Harvey v. Ashley, 3 Atk. 607; Lucy v. Moore, 4 Bro. P. "C. 343, ed. Toml.; May v. Hook, Co. Litt. 246 a, note; "Peirson v. Peirson, cited 1 Bro. C. C. 115: Clough v. "Clough, 3 Woodeson, 453; 3 Ves. 710), that a settlement "on the marriage of a female infant will not bind her real "estates. Although a settlement of a female infant's real "estate is not binding upon her, it will be binding on the hus-"band, and will therefore prevent him from joining in any "other disposition of the estate during the coverture. (Durn-"ford v. Lane, 1 Bro. C. C. 106; see 18 Ves. 276.)

"If the husband be an infant at the time of the marriage, "it may be presumed, for the same reasons which apply to "the case of a female infant, that a settlement of his real "estate would not now be held to bind him. There are two "cases in which a different view of the question appears to "have been taken (Strickland v. Coker, 2 Ch. Cas. 211, cited "3 Atk. 614; Warburton v. Lytton. 1764, cited in Lytton v.

"Lytton, 4 Bro. C. C. 440; see Slocombe v. Glubb, 2 Bro. "C. C. 545); but it is possible that they may have turned "upon acts confirming the contract done by the husband "when of age.

"The principle on which the validity of marriage settle- "ments of the personal property of female infants appears to "rest, does not apply to similar settlements of the personal "property of male infants."

The reason why an infant female is bound by a legal or equitable jointure before marriage is quite independent of her *capacity to contract*, because the law, on this subject, has arisen upon the construction of the statute of Hen. VIII.; and the question as to the validity of the contract turns upon the fairness of the transaction. (1 Roper on Husband and Wife, by Jacob, 475.)

Since the preceding pages of this article were written, the case of Chapple v. Cooper has been decided in the Exchequer (13 Mees. & Wels. 252), where it was held that the burial of a deceased husband, who has left no executor and no property, is a *necessary*, so as to render his infant widow liable for the expenses of it. This decision appears to be quite consistent with the definition of *necessaries* attempted to be given (ante, vol. xxxi. page 123). It would not, therefore, have been requisite to have noticed this case here, except for an observation of the court in the judgment delivered by Alderson, Baron, by which it might be inferred, that it was considered by the court that the contract for the funeral of the husband was similar in principal to a contract of marriage. The court said, "that a decent Christian burial of an infant's wife is a "personal advantage, and reasonably necessary to him, and "then the rule of law applies that he may make a binding "contract for it. This seems to us to be a proper and legiti- "mate consequence from the proposition, that the law allows "an infant to make a valid contract of marriage. If this be "correct, then an infant husband or parent may contract for "the burial of his wife or lawful children." And again in a former part of the judgment the court says, "the law permits "an infant to make a valid contract of marriage." (13 Mees. & Wels. 259.)

It can hardly be said that marriage is a necessary thing for

an infant, and it has been endeavoured to be shewn in the former pages that contracts for necessaries are the only contracts which bind the infant.

That the marriage of an infant is a valid act cannot be contradicted, but it has been already seen (ante vol. xxxi. p. 121), that a promise of marriage by an infant is not binding. It is therefore submitted that it would be more correct to say, that a *contract* of marriage is invalid, and is precisely the same as all the other contracts of an infant which are not *apparently* beneficial to him (see the 2d class, ante, vol. xxxi. p. 132), but that after the performance of the marriage ceremony, the act of marriage is distinguishable from the contract, and is an act which he cannot undo.

Another instance of the capacity of infants to act is exemplified in the power which they formerly possessed of making a will of personalty at the age of fourteen years, and which still exists as to all wills made prior to the 1st of January, 1838. Now, however, by the statute 1 Vict. c. 26, no person under the age of twenty-one years can make any testamentary disposition whatsoever, even to appoint a testamentary guardian.

Whether an infant can take the benefit of the Insolvent Act has been more than once raised, without being decided.

In the case Ex parte Deacon (5 B. & Ald. 759), it was said in argument that minors were daily discharged, and the court seemed to acquiesce in the proposition that they might legally be so, although it had no reference to the case under discussion.

The 87 sect. of the 1 & 2 Vict. c. 110, enacts, "that before any adjudication shall be made with respect to any prisoner, the said court, or commissioner or justices, shall require such prisoner to execute a warrant of attorney to authorise the entering up a judgment against such prisoner." It will be seen, then, that the statute makes a warrant of attorney essential to the validity of the discharge. The enactment itself cannot be construed as enabling a party to execute a warrant of attorney, who is incompetent by law to do so; and the decision in Ex parte Deacon (5 B. & A. 759) established this, when it

decided that a married woman could not be discharged because of her incapacity to execute the warrant of attorney.

The court there, in drawing a distinction between the contracts of a minor and a feme covert, is reported to have stated, "that the acts of a minor are not necessarily void, but voidable only, and that a minor may execute a deed for his own benefit. But a married woman cannot comply with the conditions of the act, and therefore the commissioners have it not in their power to discharge her."

This dictum of the court as to the validity of an infant's deeds was extra-judicial, and if the reasoning is correct which has been urged in a former page, (see ante, vol. xxxi., p. 128,) that the deed or other contract in pais of an infant has no validity in any case beyond his minority, this distinction between deeds of married women and infants could scarcely be supported. In addition however to the above reason, it has been distinctly held (Sanderson v. Mar, 1 H. B. 75; Wotteux v. St. Obin, W. Black. 1133), that a warrant of attorney given by an infant is absolutely void. If, then, the infant cannot comply with the condition, it would follow that no certificate of discharge would be valid, whether it was obtained on his own petition or on the petition of a creditor.

As to the bankruptcy of an infant, it has been held (Belton v. Hodges, 9 Bing. 365), that a commission issuing during his minority is absolutely void, because at any rate he was incapable of contracting a debt during his minority. (See ante, vol. xxxi., p. 133.) The Lord Chief Justice Tindal expressly guards himself from expressing any opinion as to whether a fiat could be taken out against him after age, on a subsequent ratification of the debt. Supposing the effect of the ratification is to set up the debt ab initio, as has been formerly suggested (see ante, vol. xxxi., p. 137,) then there would appear no reason why, on a subsequent trading and act of bankruptcy (see Rex v. Cole, 1 Ld. Raym. 443), the fiat should not be supported.

Another rule is, *that an infant can do no act which delegates a mere power, and conveys no interest* (see Perkins, 12; Lord Mansfield, Burrows, 1808), as a letter of attorney, which is therefore void.

So he cannot appoint an attorney, except only to receive seisin of lands, an exception made purely for his benefit. By stat. 1 Will. IV. c. 65, it is enacted, that an infant copyholder may be admitted in person or by attorney.

It has been already seen (ante, p. 122), that an infant may always bring an action for any injury to his property or person, but that he cannot appoint an attorney to prosecute the suit, nor can he by the practice of the courts appear in person. The court, therefore, by analogy to the provisions of the statute of Westminster 1, (3 Edw. I. c. 48), appoints a person as prochein amy to conduct the action for him (Arch. Prac. by Chitty, p. 889). The application for such appointment may be after or before the suing out of process; and it seems that to grant or refuse it, is in the discretion of the court. (7 M. & W. 405, per Alderson.) How in practice the appointment is made, see Arch. Prac. by Chit. 7 edit. 889, where it will be seen that the usual practice is for the infant either to be brought into court, or to get a petition signed by him. His knowledge or consent, however, is not essential to the appointment (Morgan v. Thorne, 7 M. & W. 400), and the court would vary the practice according to circumstances.

Before the statute of Westminster, the court used to admit a guardian ad litem to sue for him, who is also by the modern practice of the court (whatever formerly might have been the case) (see Fitz. N. B. 27 J.), always appointed by the court; and ever since the practice has been established that the appointment of guardian or prochein amy must be by the court, the distinction between the two offices has in fact been taken away, and leaves merely a difference in name.

The power of an infant (Fitz. N. B. 27 J.) to appoint a guardian ad litem, without the authority of the court, is questionable (2 Inst. 261; Simpson v. Jackson, Cro. Jac. 640; Morgan v. Thorne, 7 M. & W. 400 and 403); at any rate, if such an appointment was to be made without the authority of the court, the extent of the power of such guardian would be uncertain and unknown, and should therefore never be resorted to in practice. The appointment of the prochein amy or of the guardian to sue being then in all cases the act of the court, no appointment or subsequent confirmation by the party

is requisite, whether he be an infant of the tenderest age or of years of discretion; nor does it signify at all whether he is cognizant of the proceedings or not, or whether he is in the country or absent, and he cannot disavow the action. (Morgan v. Thorpe, 7 M. & W. 400.)

The judgment in the action is binding on the infant, and he cannot, on attaining his majority, commence fresh proceedings on the same cause of action.

It was formerly error if an infant plaintiff appeared by attorney; now, however, by statute 21 Jac. I., c. 13, s. 2, and 4 Anne, c. 16, s. 2, it seems that the appearance of an infant plaintiff by attorney is only a plea in abatement. (Saund. Rep. 212.)

The only exception to an infant appearing by attorney, is when he sues in *autre droit*, and this frequently occurs to infant executors when appointed with adults; for although he cannot act till of age, yet the grant of probate is valid, and the infant is a necessary co-plaintiff to the suit. Whether the correct reason of the exception is upon the ground that the adult executor and infant executor being co-plaintiffs, the former can appoint an attorney for both, as was stated in the case of Foxwist v. Tremaine (2 Saund. 211), or that the exception applies whenever an infant sues in *autre droit*, as appears by Wade v. Starkey (Cro. Eliz. 542), and Cotton v. Wescott (Cro. Jac. 441), is perhaps quite immaterial, because a sole infant executor cannot now act or bring any action as executor during his minority. The better argument, however, appears to be, that the exception applies to all suits in *autre droit*, because when acting as executor he is merely acting as agent for another, and carrying out an authority entrusted to him to execute.

An infant cannot sue as an informer on a penal statute, for an informer must exhibit his suit in person, and prosecute it either in person or by attorney. (Ch. Archbold's Prac. 889, 7th ed.)

When a minor is made *defendant* in a court of law, and an action may be frequently brought against him, (see ante, vol. xxxi. p. 123, his contracts for necessaries, and post, p. 60, as to his liabilities for torts), he is equally incompetent to appoint

an attorney; and in such action it particularly behoves the plaintiff to take care that the appearance is by his guardian, for should the judgment be against the defendant, he might assign his appearance by attorney for error, and reverse the judgment. Bird v. Pegg, 5 B. & A. 418.)

When the infant defendant appears by attorney, the plaintiff should apply to the court to compel an amendment, by entering the appearance by a guardian. (Hindmarsh v. Chandler, 7 Taunt. 488.)

Though an infant executor may sue by attorney, yet he cannot defend an action by attorney when sued quà executor with others, and his appearance by attorney would be error. (Frescobaldi v. Kinaston, 2 Stra. 783; Bird v. Orms, Cro. Jac. 289; 2 Sands. Rep. 212, notes.)

This incapacity of a co-defendant executor to appoint an attorney for him confirms the opinion that his power to appoint an attorney as plaintiff, when suing quà executor, is upon the ground that he is then acting as agent, and not that the validity of the appointment depends upon his co-executor.

As the statute of Westminster (7 Edw. I. c. 48,) applied only to plaintiffs, the infant cannot defend an action by prochein amy, but only by his guardian. Co. Litt. 135 b.)

It remains to state that matters of record, as statutes merchant and of the staple, and recognizances acknowledged by him bind the infant, if not reversed during the minority, because being judicial acts, they cannot be tried by the country, but only by inspection of his person, a trial therefore which must necessarily take place during his minority.

It does not appear, then, to be correct to say that recognizances on fines and recoveries entered into by infants are valid; on the contrary, they appear altogether invalid, but *will become* valid if not set aside during minority, because non-age at the time of executing them cannot be shewn after full age. (2 Inst. 673.)

"Matters of record," says Lord Coke (Co. Litt. 380 b.) "as statutes merchant and of the staple, recognizances acknowledged by him, or a fine levied by him, recovery against him by default in a real action (saving in dower), must be avoided by him, viz. statutes, &c., by audita quærela, and the fine and

recovery by writ of error during his minority, and the like. And the reason thereof is because they are judicial acts, and taken by a court or a judge; therefore, the non-age of the party, to avoid the same, shall be tried by inspection of judges, and not by the country. And for that his nonage must be tried by inspection, this cannot be done after his full age; and so is the law clearly holden at this day, though there be some difference in our books. But if the age be inspected by the judges, and recorded that he is within age, albeit he come of full age before the reversal, yet may it be reversed after his full age."

From this passage it would seem that a judge or magistrate would act incorrectly in taking a recognizance from an infant, and that the infant during infancy could avoid it by audita quærela.

Probably, however, if there was no other reason for setting the recognizance aside except infancy, the court would not discharge him from it, but put him to his suit. (See Ex parte Williams, M'Clel. 493.)

Having then shown the effect of the infant's contracts, and his power to act, it remains to explain—

HIS LIABILITY FOR TORTS.

The privilege of infancy does not protect them from the consequences of wrongs, and consequently they are liable to civil actions for all torts and injuries of a private nature. (Per Lord Kenyon, 8 T. R. 336.)

Thus an action may be maintained against an infant for slander and libel (Defries v. Davies, 1 Bing. N. C. 692; S. C. 1 Scott, 594), and it is presumed that his liability for these offences would be similar to his responsibility for criminal acts; and that although under the age of fourteen years, express malice must be proved, yet above that age malice in law would be sufficient, and his responsibility would after then be the same as an adult. (See Bacon, Infants, H.) In all civil actions for torts, wherein malice is the gist of the action, it would appear that the rule would be the same as in criminal cases, and that consequently under the age of seven years no responsibility would attach to his acts, and that after the age of seven years, and between that and fourteen years, the ma-

licious intention of the child must be clearly shown, in order to obtain judgment against him; but in other civil actions for torts, wherein malice either in law or in fact was not necessary to sustain the action, these distinctions would not arise. Thus detinue or trover will lie to recover any specific chattel which he had no right to retain, and which had not been delivered to him upon any contract, without reference to his age at the time the detention was committed. (Mills v. Graham, 1 N. R. 140.) So trover or trespass would lie for an unlawful taking by the infant, as for property embezzled by him, although his age might be such as not to render him criminally responsible; and since the form of the action in no way alters his liability, assumpsit for money had and received would lie, if he had subsequently to such wrongful conversion sold the goods for his own use, and obtained money for them. Bristow v. Eastman, 1 Esp. 172.)

Trover or detinue would also lie against an infant for not returning goods sent to him for a particular purpose which has been fulfilled, or for a limited time which has expired. His liability arises in such case independently of the original contract of bailment; thus if goods are lent to an infant for a specific time, trover would lie if he failed to return them (Mills v. Graham); or if goods are sent to an infant to be manufactured, and he refuses to return them after they are completed, detinue or trover would be the proper remedy. (Co. Litt. 180 b, note 4.) An infant is also liable in trespass quare clausum fregit, or vi et armis, and the only difference between him and an adult is, that the infant is not liable as a trespasser by a prior or subsequent assent.

If the infant has committed a wrong, it has been already shown that it is immaterial whether the action be brought in form ex contractu or in tort; for his liability for the wrong does not depend on the form of the action. (Bristow v. Eastman, Peake, 223).

So by charging an infant in an action of tort, where the foundation of the action is upon a contract, he will not thereby be rendered liable for a breach of a contract. (Jennings v. Randall, 8 T. R. 335.) Thus where an infant hires a horse he will not be liable in an action on the case for an immoderate

use of it, the offence arising clearly out of the mere breach of the agreement; but had he refused to return it, or had wilfully killed the horse, for such wrongs it would seem that his nonage would not protect him. (Howlett v. Howlett, 4 Camp. 118.)

On the same principle it was held (Green v. Greenbank, 2 Marsh. 485), that infancy is a bar to an action for a breach of a warranty of a horse, though framed in an action on the case for deceit, the foundation of the action being a breach of the undertaking, whether the action is framed in assumpsit, or case for the deceit.

It has already been said (ante, vol xxxi., p. 135; Johnson v. Pie, 1 Lev. 169; 1 Keb. 905, S. C.), that an infant who has goods delivered to him on a contract of sale is not liable either in trover or detinue, inasmuch as the delivery was in pursuance of a contract, by which the return of the goods was not contemplated, a circumstance which distinguishes these cases from the case of Mills v. Graham (1 N. R. 140), above quoted.

The writer of this article has known instances in which an action of debt and detinue has been brought against an infant upon his refusal to pay for or return goods sold to him, and a plea of infancy to the count in detinue was not pleaded, on the authority of Mr. Chitty, who in his work on pleading, vol i. p. 124, 6th ed. says, "that if an infant buys goods and refuses to pay for them, detinue lies for the goods." The resolution of the Court of B. R. in the time of Charles II., as reported in vol. i. of Siderfin, p. 129, contradicts this opinion, and is in these words: "que si un deliver biens al infant pur contract, se "sachant luy destre infant, le infant ne serra chargé in trover "et conversion pur ceux, car par cel noy toutes les infants in "Engleterre serront runi;" and therefore it seems properly said in Bacon's Abridgment, (Infants I.), that the effect of the delivery of the goods to the infant is a *gift*.

Immediately below the above quotation from Siderfin there is a query, whether the infant would not be liable in trover, if the party delivering the goods to him did not know him to be an infant; and at the present day it would probably be held that if the infant was guilty of any deceit in concealing his age, the action of trover would be sustainable, or an action on the case for the deceit. (See 1 Levinz, 169.)—*Law Magazine.*

ON THE PROOF OF HANDWRITING.

Few rules in the law of evidence are more interesting in theory or more useful in practice, than those which relate to the proof of handwriting; yet it is an undoubted fact, that on no subject are the opinions expressed even by sound lawyers less satisfactory or consistent. It will be our endeavour, therefore, in the present article, to discuss this branch of the law, in the hope that our observations may prove of some service to those who are actively engaged in the conduct of causes at Nisi Prius.

When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the writer himself, if he be a competent witness, or some person who actually saw the paper or signature written. When such evidence cannot be procured, as must often be the case, recourse may be had to the testimony of witnesses who are acquainted with the handwriting. Such evidence, indeed, may in all cases be given in the first instance, as the law recognizes no distinction between these several modes of proof; but, as it is clearly less satisfactory than direct testimony, any unnecessary reliance on it will raise a suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

The knowledge of a person's handwriting may have been acquired in both or either of two ways(*a*). The first is, from having seen him write; and though the weight of the evidence which depends upon knowldge so obtained, must, of course, vary in degree, according to the number of times that the party has been seen to write, the circumstances, whether of hurry or deliberation, under which he wrote, the interval that has elapsed since the last time, and the opportunities and motives which the witness had for observing the handwriting with attention(*b*); yet the evidence will be admissible, though

(*a*) See 3 Benth. Jud. Ev. 598, 599.
(*b*) Doe v. Suckermore, 5 A. & E. 730; per Patteson J.

the witness has not seen the party write for twenty years(*a*) or has seen him write but once, and then only his surname(*b*).

Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents.(*c*) The proof, in such cases, may be very slight, but the jury will be allowed to weigh it. The witness need not state, in the first instance, how he knows the handwriting, since it is the duty of the opposite party to explore, on cross-examination, the sources of his knowledge, if he is dissatisfied with the testimony as it stands.(*d*) Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded; though, if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be rejected.(*e*) Where a witness, called to establish a forgery, had become acquainted with the signature of the party from having seen him sign his name, after the commencement of the suit, for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon justly observing that the party might, through design, have written differently from his common mode of signature.(*f*)

The second way in which the knowledge of a person's handwriting may be acquired, is by the witness having seen, in the ordinary course of business, documents, which by some evidence, direct or circumstantial, are proved to have been written by such person. Thus, if the witness has received letters purporting to be in the handwriting of the party, and

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(*a*) R. v. Horne Tooke, 25 How. St. Tr. 71, 72, ; Eagleton v. Kingston, 8 Ves. 473, 474., per Lord Eldon.

(*b*) 5 A. & E. 730., per Patteson, J.; Garrells v. Alexander, 4 Esp. 37, per Lord Kenyon; Willman v. Worrell, 8 C. & P. 380; Burr v. Harper, Holt's N. P. R. 420; Lewis v. Sapio, M. & M. 39, per Lord Tenterden, who refused to recognize the authority of Powell v. Ford, 2 Stark. R. 164, where Lord Ellenborough rejected the testimony of a witness, who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See also Warren v. Anderson, 8 Scott, 384.

(*c*) George v. Surrey, M. & M. 519, per Tindal, C. J., after some hesitation.

(*d*) Moody v. Rowell, 17 Pick. 419, over-ruling Slaymaker v. Wilson, 1 Pennsylv. R 216.

(*e*) R. v. Murphy, 8 C. & P. 306, 307, per Coleridge, J.; Da Costa v. Pym, Pea. Add. R. 144, per Lord Kenyon.

(*f*) Stanger v. Searle, 1 Esp. 15. See Page v. Homans, 2 Sheph. 478.

and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the party as to induce a reasonable presumption in favor of their genuineness, his evidence will be admissible.(*a*) So, if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is, that the answer was written by the person addressed in the letter; and consequently, the witness who received such answer, may be examined as to the genuineness of any other paper, which it is necessary to show was or was not written by the same person.(*b*) Again, the clerk who constantly read the letters, or the broker who was consulted upon them, is as competent as the merchant to whom they were addressed to judge whether another signature is that of the writer of the letters: and a servant who has habitually carried his master's letters to the post, has an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him.(*c*) In one case, an attorney was permitted to speak to the signature of an attesting witness, though his knowledge of the handwriting was solely derived from having seen the same signature attached to an affidavit, which had been filed by the opposite party in a previous stage of the cause.(*d*) Here the opposite party having used the affidavit as a genuine document, was in a manner estopped from disputing the fact that it was signed by the person whose signature it bore. But perhaps, after all, some doubt may be entertained respecting the correctness of this decision; since, in another case, the plaintiff's attorney was not allowed to prove the defendant's handwriting, though he had frequently seen and acted upon

(*a*) Doe v. Suckermore, 5 A. & E. 731., per Patteson J. ; 2 Nev. & P. 46., S. C. ; Lord Ferrers v. Shirley, Fitz. 195., B. N. P. 236. ; Carey v. Pitt, Pea. Add. R. 120. ; Tharpe v. Gisburne, 2 C. & P. 21. ; Harrington v. Fry, Ry. & M. 90. ; Burr v. Harper, Holt's N. P. R. 420. ; Comm. v. Carey, 2 Pick. 47. ; Johnson v. Daverne, 19 Johns, 134. ; Pope v. Askew, 1 Tredell, R. 16.

(*b*) Carey v. Pitt. Pea. Add. R. 130, per Lord Kenyon.

(*c*) Doe v. Suckermore, 5 A. & E. 740, per Lord Denman.

(*d*) Smith v. Sainsbury, 5 C. & P. 196, per Park J., cited by Lord Denman in Doe v. Suckermore, 5 A. & E. 740.

other papers in the master's office, which the opposite attorney admitted had been written by the defendant.(*a*) Where in an action on a joint and several promissory note against three persons, the signature of one of them was attempted to be proved by calling the attorney for the defendants, whose knowledge of his handwriting was founded on the circumstance, that he had required a retainer signed by his three clients, and had in fact received one purporting to be so signed, and had acted upon it in defending the action, the Court of Common Pleas held that his testimony was inadmissible, inasmuch as there was no proof that the party had ever acknowledged the signature to the attorney, and either of the other two defendants might have signed the retainer for him with his assent.(*b*) So the testimony of an inspector of franks, called to prove the handwriting of a member of parliament, has more than once been rejected, where the knowledge of the witness has been simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he has never communicated with the member on the subject of the franks; for, in this case, there is no evidence to prove that the superscriptions of the letters he had seen were not forgeries.(*c*) These last decisions certainly carry the law to the very verge of impropriety, since they are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sensible rule, that a crime is not to be presumed, or so much as suspected, without special ground, in any single instance; much less in a number of unconnected instances.(*d*)

In whichever of these two ways the witness has acquired his knowledge of handwriting, it is obvious that evidence, identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either *aliunde*, or by the testimony of the witness himself, if he is personally acquainted with the writer(*e*). If this were

(*a*) Greaves v. Hunter, 2 C. & P. 477, per Abbott, C. J.
(*b*) Drew v. Prior, 5 M. & Gr. 264.
(*c*) Carey v. Pitt, Pea. Add. R. 130, per Lord Kenyon; Bachelor v. Honeywood, 2 Esp. 714, per id.
(*d*) 3 Benth. Jud. Ev. 604.
(*e*) See Doe v. Suckermore, 5 A. & E. 731, per Patteson, J.

not so, the witness might be proving the handwriting of one man, while the party calling him might be seeking to establish the signature of another.

When witnesses are called to speak to handwriting, they should declare their *belief* on the subject, though, in one case, it has been held by Lord Kenyon, that the evidence of a witness who admitted his inability to form a belief, but who stated that the paper produced was *like* the handwriting of the individual by whom it purported to have been written, was admissible.(*a*) This case, though recognized by Lord Wynford (*b*), has been questioned by Lord Eldon(*c*), and apparently with reason. It may be very true, as Lord Eldon admits, that witnesses are occasionally pressed too much to form a belief(*d*); and some allowance should certainly be made for the over caution of a scrupulous witness; but though it may be very proper to admit the testimony of a person, who, declining to express a decided belief, will yet declare that he is of *opinion* or that he *thinks* the paper is genuine, yet it is going a step further when the witness will only state that the handwriting is like;—a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison,—it being the belief which a witness entertains, when comparing the writing in question with an exemplar in his mind, derived from some previous knowledge (*e*),—yet the law will not allow the witness, or even the jury, except under circumstances that will be presently mentioned, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. Several reasons have been assigned for this rule. One is, that the jury may be too illiterate to form an opinion upon this sort of evidence. "Suppose," said Mr. Justice Yates,

(*a*) Garrells v. Alexander, 4 Esp. 37.
(*b*) 2 Ph. Ev. 249, n. 2.
(*c*) Eagleton v. Kingston, 8 Ves. 476. See also Cruise v. Clancey, 6 Ir. Eq. R. 552.
(*d*) Eagleton v. Kingston, 8 Ves. 476.
(*e*) Doe v. Suckermore, 5 A. & E. 730, per Patteson, J.

"some of the jury cannot read: how can they judge of the "similitude?"(a) Surely this argument requires no answer at the present day, and never could have applied to the case of a witness being called upon to make the comparison; since a party would scarcely select for this duty a person, whose ignorance, instead of throwing light, would heap ridicule on his cause.(b) The second reason is, that specimens may be craftily selected, being such as are calculated rather to serve the purpose of the party using them, than to exhibit a fair example of the general character of the handwriting;(c) but to this it may be answered, first, that, if the specimens were authentic autographs, they would at least furnish *some*, though not the most satisfactory data, by which a comparison might be formed with the writing in dispute, since a certain similarity may be ever traced between the most dissimilar writings of the same person;(d) and secondly, that the unfairness of the selection would be open to inquiry, and if exposed, as it might easily be on cross-examination, would draw down on the party making the attempt the usual consequences of detected fraud.(e) If, indeed, the *genuineness* of the specimens be disputed, another and more serious objection to the mode of proof by comparison arises; for, in such an event, collateral issues might be raised upon every paper used as a standard; and it is further urged, that, as these papers might be also proved by mere comparison, the inquiry might lead to an endless series of issues, each more unsatisfactory than the preceding(f). The last branch of this argument is evidently founded on fallacy; since it is obvious that one specimen at least *must* be proved in some other way than by comparison; and such being the case, no man in his senses would run the risk of complicating, if not of defeating his proof, by tendering papers to be compared with this autograph, in order that

(a) Brookbard v. Woodley, Pea. R. 21. n. (a); Macferson v. Thoytes, id. 20. per Lord Kenyon; Eagleton v. Kingston, 8 Ves. 475, per Lord Eldon; Burr v. Harper, Holt. N. P. R. 421, per Dallas J.; Doe v. Suckermore, 5 A. & E. 723, per Williams, J., and 749, per Lord Denman.
(b) See per Lord Denman, in Doe v. Suckermore, 5 A. & E. 749.
(c) Burr v. Harper, Holt's N. P. R. 421. per Dallas, J.
(d) See per Williams, J.. in Doe v. Suckermore, 5 A. & E. 726.
(e) See per Lord Denman, in Doe v. Suckermore, 5 A. & E. 751.
(f) Doe v. Suckermore, 5 A. & E. 706, 707, per Coleridge, J.; 2 St. Ev. 516.

such papers might in their turn form a standard, wherewith to compare the disputed document. Prudence, to say nothing of justice, would surely suggest the wisdom of producing the autograph alone. Indeed, the whole argument is much more specious than sound, as it would be never necessary, and seldom expedient, to prove more than one disputed specimen, and there could be no more danger or difficulty in allowing the judge to decide whether this proof had been satisfactorily established, than is now felt in those cases where the court has to pronounce an opinion on the admissibility of confessions or dying declarations, or has to determine whether a deed has been duly executed or stamped, or whether sufficient search has been made for it, or whether it comes out of the proper custody. In all these and the like cases, the judge, as is well known, is called upon to decide questions of fact.

It may here be worth while to cite the remarks of Sir W. D. Evans, who is certainly no mean authority on this, or on any other legal question. "Where, in point of reason," says that profound writer, "is the objection to proof by comparison of "hands, as founded upon an inspection at the trial?" "What "is the common evidence of knowledge but an act of compar- "ison; a comparison of the object presented to the sight, "with the object imprinted by memory in the mind,—with "the image and copy of the supposed reality? And when "the comparison is made, not with this imperfect and falla- "cious copy, but with an undisputed original, applied with "the skill and experience of persons habitually devoted to "similar inquiries, it is deemed not only a matter of technical "caution, but an essential point of constitutional liberty, to "reject the assistance which it may be naturally expected to "afford."(*a*) Even Mr. Starkie, who appears, on the whole, to be in favour of the rule as it exists, is forced to admit, "that abstractedly a witness is more likely to form a correct "judgment as to the identity of handwriting, by comparing "it critically and minutely with a fair and genuine specimen "of the party's handwriting, than he would be able to make "by comparing what he sees with the faint impression made

(*a*) 2 Evan's Poth. Law of Obl. 185, App. No. 16, s. 6.

"by having seen the party write but once, and then, perhaps, "under circumstances which did not awaken his attention."(a) It has been urged that this is an unfair mode of stating the argument, since the weakest possible degree of knowledge which can arise from seeing a person write, is contrasted with the strongest possible degree which can arise from a direct comparison;(b) but, admitting this to be the case, we are prepared to go much farther than Mr. Starkie, and to contend that in almost every case a jury would be more likely to come to a correct conclusion, were they allowed to compare, in their own way, the paper in dispute with a proved or acknowledged autograph(c), than they now are, when called upon to pronounce a verdict on the evidence of a witness, who of course comes prepared to give favorable testimony on behalf of the party who calls him, who runs little risk of incurring the penalties of perjury, since he is only required to state his *belief*, and who, moreover, has seldom had an opportunity of acquiring any great familiarity with the character of the handwriting on which he undertakes to pass an opinion. To illustrate the argument by referring to "twins, who may present no observable diversity to a *stranger*, and yet be distinguished at a glance by their *parents*(d)," is to advance a position at least as unfair as that stated by Mr. Starkie; for it assumes that all witnesses have acquired a most intimate knowledge of the handwriting which they are called upon to prove. Yet does the law demand the production of such witnesses, or are they in fact produced? Most assuredly not. Besides, the argument at best amounts to this, that persons well acquainted with the character of handwriting, are more competent than utter strangers to judge whether a document bears that character; a proposition which, however true, does not touch the question, whether it be more expedient to have recourse to indirect, than to direct, comparison. The fact, if it be one, that

(a) 2 St. Ev. 516.
(b) Doe v. Suckermore, 5 A. & E. 734, 735, per Patteson, J.
(c) In order to prevent the opposite party from being taken by surprise, a provision might be made, that papers should not be laid before the jury for the purpose of comparison, unless such papers had, previously to the trial, been submitted to the inspection of the adversary, and notice had been given of the course about to be pursued.
(d) Doe v. Suckermore, 5 A. & E. 745, per Lord Denman.

persons are apt to form fanciful conclusions from comparison of handwriting, some dwelling on the general character, some on the peculiar turn of a particular letter, and others on more minute circumstances of similitude or discrepancy, which may be wholly accidental, has been strangely twisted by one learned judge into an argument in favor of the present rule(*a*); but no fallacy can be more apparent than this; for, admitting that the fact is so, the only deductions derivable from it are, first that the power of proving handwriting by comparison cannot be safely entrusted to a *witness*, or even to a single judge; secondly, that a jury should not be enabled to institute such a comparison for the purpose of *disproving* handwriting; and lastly, that it may be impolitic for a party to rely on this mode of proof, in consequence of the difficulty of securing the suffrages of twelve men on a subject respecting which opinions confessedly differ so largely.

The principal of direct comparison, which we here advocate, has been long recognized and acted upon by the common law courts with respect to other matters. Thus, if a prisoner be charged with stealing wheat, and the question turn on the identity of that found in his possession with the corn belonging to the prosecutor, it is every day's practice to produce parcels from each lot, and to call upon the jury to compare them together, with or without the aid of witnesses; and no one dreams of contending that such a comparison is not more satisfactory, than if the farmer, who grew the wheat, and is therefore well acquainted with its character, were asked to speak to the identity of the lot found on the prisoner, by vaguely comparing it with the exemplar of his own corn which memory had formed in his mind. Then, if this be the case, —and that it is so with respect to numerous questions of identity, is a proposition which admits of no doubt,—why is not the same principle to prevail, when the issue turns on the genuineness of handwriting? The same collateral issues may arise in all these cases, but while danger is *apprehended* from this cause in matters of handwriting, none whatever is *experienced* in all other inquiries of a kindred nature. The

(*a*) Doe v. Suckermore, 5 A. & E. 735, per Patteson, J.

analogy, on principle, is complete; and no satisfactory reason can be given, why the practice should be different.

In the ecclesiastical courts, witnesses skilled in the examination of handwriting and detection of forgeries have been permitted for centuries to depose to their opinion, upon direct comparison of the writing in question with other documents admitted to be in the handwriting of the party, or proved to be so persons who saw them written; and that, too, though the specimens on which the comparison is founded may be wholly irrelevant to the cause(*a*). In France the same doctrine prevails, at least to a limited extent(*b*) · and in America, though some of the states have adopted the English rule, others have altogether rejected it; while a few have received it subject to considerable modifications(*c*). It will be seen, by referring to the last note, that the American decisions do not add much weight to either side of the argument; and they are here noticed, rather as furnishing to the curious reader ample sources for further investigation, than as affording a safe, or indeed an intelligible, guide on which to rely. If it were possible to extract from these conflicting judgments a rule which would find support from the majority of them, perhaps it would amount to this: that such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them; that is, where the papers are

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(*a*) 1 Will. on Ex. and Ad. 260; 1 Oughton, Ord. Jud. tit. 225. ss. 1—4; Doe v. Suckermore, 5 A. & E. 708—710, per Coleridge J.; Beaumont v. Perkins, 1 Phillim. 78; Saph v. Atkinson, 1 Add. 215, 216; Machin v. Grindon, 2 Cas. temp. Lee, 335; 2 Add. 91. n. (*a*) S. C.

(*b*) Code de Proc. Civ. part. i. li. 2. tit. 10. s. 193—213; Pothier, 3 Œuvr. Posth. 46; Doe v. Suckermore, 5 A. & E. 710, 711, per Coleridge J.

(*c*) In New-York, Virginia and North Carolina, the English rule is adopted, and such testimony is rejected. Jackson v. Philips, 9 Cowen, 94. 112; Titford v. Knott, 2 Johns. Cas. 210; Rowt v. Kile, 1 Leigh, R. 216; The State v. Allen, 1 Hawks, 6; Pope v. Askew, 1 Tredell, R. 16. In Massachusetts, Maine and Connecticut, it seems to have become the settled practice to admit any papers to the Jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting. Homer v. Wallis, 11 Mass. 309; Moody v. Rowell, 17 Pick. 490; Richardson v. Newcomb, 21 Pick. 315; Hammond's case, 2 Greenl. 33; Lyon v. Lyman, 9 Conn. 55. In New Hampshire and South Carolina, the admissibility of such papers has been limited to cases where other proof of handwriting is already in the cause, and for the purpose of turning the scale in doubtful cases. Myers v. Toscan, 3 N. Hamp. 47; The State v. Carr. 5 N. Hamp. 367; Bowman v. Plunkett, 3 M'C. 518; Duncan v. Beard, 2 Nott. & M'C. 401. In Pennsylvania, the admission has been limited to papers conceded to be genuine. M'Corkle v. Binns, 5 Binn. 340; Lancaster v. Whitehill, 10 S. & R. 110; or concerning which there is no doubt. Baker v. Haines, 6 Whart. 284.

either conceded to be genuine, or are such as the other party is precluded from denying; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony(*a*).—*(To be continued.)*

NOTES OF LEADING CASES.

PLEADING.

INTEREST—WHEN RECOVERABLE AS PART OF DEBT, AND WHEN AS DAMAGES ONLY.

HUDSON v. FAWCETT, 8 Scott, N. R. 32.

The question as to when interest is recoverable as a part of the debt itself, and when as damages only, is one of great practical importance in a pleading point of view, as upon this the pleader is entirely guided with reference to the amount of damages he lays in the declaration. For when the interest is regarded as a part of the debt, and is recoverable as such, the damages laid need only be nominal; whereas, when the interest cannot be properly included *as a part of the debt* demanded, but must be recovered as damages for the detention of the debt, then a sum sufficiently large to cover the full amount of interest which has accrued upon such debt, should be laid as damages at the end of the declaration.

The importance of this rule was well instanced in the case of Watkins v. Morgan, 6 Car. & P. 661; 1 Ch. Pl. 128. A. covenanted to pay B. 270*l.* on the 15th of December, *with interest up to that time.* A. omitted to do so, and B. brought an action of debt, laying his damages at 10*l.*: and it was held that B. could not recover any more than the principal sum of 270*l.*, *the interest up to the 15th of December*, and 10*l.* more for the interest which had accrued subsequently to that date; although the interest up to the time of the commencement of the action amounted in fact to a much larger sum than 10*l.* In this case, the interest which A. covenanted to pay B. on the 15th of December was regarded as a part of the debt, and

(*a*) Smith v. Fenner, 1 Gall. 170, 175. See also Goldsmith v. Bane, 2 Halst. 87; Bank of Pennsylvania v. Haldemand, 1 Pennsylv. R. 161; Sharp v. Sharp, 2 Leigh, 249.

was recoverable as such; while that which accrued subsequently to that period, and before the commencement of the action, not being made the subject of an express covenant, and therefore incapable of being reduced by means of calculation to a sum certain, was simply regarded as damages for the detention of the principal beyond the time mentioned in the deed, and could be recovered only as such.

The doctrine laid down in the nisi prius case just referred to, has recently received the sanction of the judges of the Court of Common Pleas in the case of Hudson v. Fawcett above selected for consideration. It was an action of debt by the payee against the maker of a promissory note for 40*l.*, dated the 29th of March, 1840, and payable on demand, "with lawful interest for the same." The declaration, in addition to the count upon the note, contained also a count in 50*l.* for money lent, and the same sum upon an account stated. The defendant pleaded—first, *as to the said debts* in the declaration mentioned, except so far as the same relate to the sum of 5*l.*, parcel of the said sum of money in the first count of the declaration mentioned, that on divers days after the accruing of the said debts, and before the commencement of this suit, he the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, divers sums of money, amounting, to wit, to the sum of 150*l.*, *in full satisfaction and discharge of the said debts*, except as aforesaid, and *of all damages* by the plaintiff sustained by reason of the detention of the said debts, except as aforesaid, concluding with a verification. Secondly, a set-off of 150*l.* for money lent, money paid, and money due upon an account stated. Thirdly, payment of 5*l.* into court.

The plaintiff traversed the first two pleas and took the 5*l.* out of court. Upon the trial a verdict was found for the defendant, with liberty to the plaintiff to move to enter a verdict for him for 2*s.* 6*d.*, if the court should be of opinion that upon these pleadings the *interest* was recoverable. A rule nisi was obtained accordingly, and *Byles*, Serjeant, in showing cause, contended, that as the first plea was pleaded, not to the whole cause of action, except as to 5*l.*, but to the *debts* only, and as the interest sought to be recovered in the first count was not included in the word "*debts*," and as the plea can be

an answer to so much only as it professes in the commencement to answer, that therefore that part of the cause of action which consisted of the interest was left altogether unanswered, and that the plaintiff's course, instead of going to trial upon the issue so raised, should have been to demur, or to have signed judgment by nil dicet for the part unanswered, but that the discontinuance was cured after verdict. The court, however, was of opinion that the before cited case of Watkins v. Morgan was a conclusive authority in favour of the plaintiff, and that as the interest formed part of the debt, it was therefore recoverable upon the issue raised by the pleadings, and that the plaintiff was entitled to his rule.

The result of this case, in connection with that of Watkins v. Morgan, may be stated as follows:—That when, in an action of debt, the instrument declared upon, expressly provides for the payment of interest in such a way as to render it capable of being reduced by means of calculation to a sum certain, then such interest is regarded as a portion of the debt itself, and may be recovered as such; but that where interest is sought to be recovered on a principal sum, not by virtue of any express terms or provision contained in the instrument by which that sum is secured, then such interest is regarded simply in the light of *damages* for the detention of the principal sum, and is recoverable as such. Hence, even in the action of debt, where a part of the cause of action consists of interest not expressly reserved or made payable, it is essential to lay such damages at the end of the declaration as will be sufficient to cover the interest sought to be recovered.

The case of Hudson v. Fawcett may be conveniently noted in 1 Chit. Pl. 389; 2 ib. 313, 314, last ed.—*Law Magazine.*

BANKRUPTCY.

FRAUDULENT PREFERENCE.

Marshall v. Lamb, 5 Q. B. 115.

The doctrine of fraudulent preference which was engrafted upon the bankrupt laws by judicial decisions, and more especially by those of Lord Mansfield, has been the subject of so much diversity of opinion that no one will dispute what was

said by Lord Denman in delivering the judgment of the court in Aldred v. Constable (4 Q. B. 674), that the cases reported with reference to it cannot be reconciled. It has long been settled that the creditor need not in any way be a participator in the intended fraud upon the bankrupt laws, but that the question is to be determined by the conduct and circumstances of the bankrupt. It seems now also to be settled, that while on the one hand, insolvency is not absolute proof of the contemplation of bankruptcy, yet, on the other hand, no specific act of bankruptcy need be contemplated at the time of the preference. It suffices if the debtor "considered that he was "likely, from the condition in which he stood, to become a "bankrupt;" and as there is no infallible proof of what passes in a man's mind, we may say that "if his circumstances are "such that any prudent man, taking a reasonable view of his "situation, and the surrounding circumstances at the time, "might fairly expect bankruptcy would follow," a jury would be right in declaring bankruptcy to have been contemplated and the preference fraudulent. (Abbott v. Burbage, 2 B. N. C. 444; Gibson v. Muskett, 3 M. & G. 158; 4 M. & G. 160; Aldred v. Constable, 4 Q. B. 674.) Other questions, however, have arisen as to the purport of the word "preference." Is it used relatively to the creditor, so that he must benefit by the act? or is it used only in relation to the estate of the bankrupt? And will an act which interferes with the equal distribution of the bankrupt's estate be fraudulent, notwithstanding that the debtor should not intend to prefer that particular creditor, or that he shall not in fact benefit from the preference shown? The cases of Abbot v. Pomfret (1 B. N. C. 462), and Belcher v. Jones (2 M. & W. 258), decided that the intention to benefit the person who in fact gained a preference was essential. In the last case, where, in consequence of an intimation *intended* by the bankrupt only to cause a private creditor to obtain payment of his debt, that creditor drew out of the bank not only the amount of his own balance, but the balance of a company of which he was a director, the Court of Exchequer held that there was no fraudulent preference of the company. The inference from these cases seemed to follow, that the effect of the act upon the estate of

the bankrupt was not so much contemplated as his intention, and the fulfilment of it by a benefit being gained by the creditor. In Marshall v. Lamb (5 Q. B. 115) it was for the first time necessary to decide whether a person, who in fact received no benefit from the act of the bankrupt, should be considered as a creditor fraudulently preferred, because the bankrupt had for his own advantage caused a sum to be withdrawn from his general assets. The facts were peculiar, but the principle involved is of great importance. It appeared that the defendant had advanced money to the bankrupt on a mortgage (dated June 12, 1840,) of the interest and dividends (and the capital in a particular event) of 2000*l.* of 3 per cent. reduced bank annuities, which by settlement, at the time of the bankrupt's marriage, had been conveyed to trustees to pay the dividends for the separate use of his wife during their joint lives, and after her decease, to permit the bankrupt, if surviving, to receive them during his life, and on further trusts which it is unnecessary to state. The wife, in execution of a power reserved to her by the settlement, joined in the mortgage. It included also a policy of insurance on the bankrupt's life, and some leasehold property of his sister, who was a party to the mortgage. There was a covenant for reassignment, if the principal, with 5 per cent. interest, should be repaid on the 12th December then next: also a covenant by the bankrupt to repay the said principal and interest on that day: and further, if the said principal and interest should not be then paid, the bankrupt would pay half-yearly interest on the said principal sum of 700*l.*, or so much thereof as should remain due. A power of sale was given to the defendant, if default should be made in principal and interest contrary to the provision in that respect, and also for two calendar months after notice to pay; and there was a covenant that the mortgagor should possess and enjoy, &c., until default made in principal or interest.

It was proved that the bankrupt had, unasked and in contemplation of bankruptcy, and after an act of bankruptcy, paid off this mortgage with four months' additional interest, because no notice had been given. The assignees sued the defendant for the amount. It was admitted that the only

party benefitted was the bankrupt and his family, and that the creditor gained no advantage whatever from the transaction; but the payment having been made out of the estate, it was contended that there was a fraudulent preference, that is, that the word "preference" is to be taken relatively to the estate and other creditors, and *not* to the particular party receiving the money.

It was distinguished from the case of a mortgage or lien upon the bankrupt's own property, because then the property given up would have been received by the assignees, but here they gained nothing, and the estate lost 700*l.* The court admitted that the case was one of great difficulty, but held it to be a fraudulent preference, supporting the direction of Mr. Justice Maule at the trial. "The defendant," said Lord Denman, in delivering the judgment of the court, "was a creditor "of the bankrupt, because the money was lent to him and he "covenanted to repay it: the payment was therefore emphati- "cally a payment of the bankrupt's debt, in order to release "the property of his friends, which they had mortgaged for his "benefit; the defendant did therefore receive twenty shillings "in the pound out of the bankrupt's estate to the prejudice "of other creditors, although it was no benefit to him, for he "would have been as well off if he had kept the mortgage "deed."

This establishes, therefore, that neither the intention to confer a benefit, nor the actual benefit of the creditor, are essential requisites to constitute a fraudulent preference; the "preference" is shown by the loss to the estate, not the advantage of any other party.

It should be remarked further, that in Ex parte Simpson (14 L. J. 1, Bank.), the question whether payment of money by way of fraudulent preference was an act of bankruptcy within the third section of 6 Geo. IV. c. 16, was elaborately argued in the Court of Review. Sir J. L. Knight Bruce held that he could not agree with the expressed opinion of Lord Chief Justice Tindal in Bevan v. Nunn (9 Bing. 112, to which he still adhered); and that it was an act of bankruptcy within that section. If this be the correct view, it would of course render it unnecessary to determine whether a payment of money is "a dealing or transaction" within 2 & 3 Vict. c. 29, for that statute does not protect any transactions which are *per se* acts of bankruptcy. (Hall v. Wallace, 7 M. & W. 353; Turquand v. Vanderplank, 10 M. & W. 180.)

Marshall v. Lamb may be noted in Montagu & Ayrton's Bankruptcy, vol. i. p. 805.—*Law Magazine.*

THE

UPPER CANADA JURIST.

IN CHANCERY.

(IN REVIEW.)

SATURDAY, 6TH SEPTEMBER, 1845.

IN RE DAVID KISSOCK, A BANKRUPT.

K. having become a bankrupt, and passed the several examinations required by the statute 7 Vic. ch. 10, before E. C. Campbell, Esquire, Judge of the Niagara District Court, and obtained from the Commissioner his certificate, a petition was presented to the Vice Chancellor by several of his creditors, praying a stay of the certificate, on grounds of fraud, &c.: Held, that the Commissioner of Bankrupts is the only person who can exercise any discretion in granting or refusing the certificate to the bankrupt, under the provision of the statute.

This was a motion to stay the certificate from issuing for David Kissock, of St. Catherine's, on the grounds of fraud in having obtained credit, and that the statement made before the commissioner was not satisfactory. The petition was to the following effect:

"In the matter of David Kissock, a Bankrupt.

"To the Hon. Robert S. Jameson, Vice Chancellor of Upper "Canada.

"The humble Petition of," &c.

Stated: That a commission had been issued against David Kissock, by Edward Clarke Campbell, Esquire, and proceedings had thereon; and that a certificate of the said bankrupt's conformity had been signed by the said E. C. Campbell, and was then lying in this honourable court for confirmance and allowance.

That the petitioners were creditors of the said bankrupt, and had come in under the commission, and proved their debts.

That the said bankrupt had made divers fraudulent misrepresentations to his creditors as to the state of his affairs, and concealed some part of his property, and therefore the said certificate should be declared void. And prayed the certificate might be stayed, and such other order made, &c.

Signed by the petitioners.

"Witness, J. F. MADDOCK, Solicitor for the Petitioners."

From the affidavits filed, it appeared that a few months before going into the Bankrupt Court, Kissock had exhibited a statement of his assets, shewing a balance in his favour of 2000*l.*, and of which no satisfactory account had been given, and also that the bankrupt had not kept any books whereby his affairs could be investigated; on both grounds the counsel for the petitioners relied for an order of this court to stay the certificate as prayed.

[A preliminary objection was taken by the counsel for the bankrupt, that the petition and affidavits were not entitled in the Court of Review, also that the attestation to the petition by the solicitor was not sufficient, which should have been, "J. F. M., solicitor to the petitioners in the matter of the petition,"(*a*) but was over-ruled; it appearing that a solicitor of the court had attested the petition, who would be answerable for costs if improperly presented, and the court considering the entitling of the petition, &c. sufficient.]

Sullivan for petitioners.—The fact of no books having been kept by the bankrupt was sufficient to create in the mind of any one a strong suspicion of fraud; and from the small extent and nature of the business in which the bankrupt had been engaged, it was impossible that in the course of a few months so large a sum as 2000*l.* could have been lost without the bankrupt having been able to give some satisfactory account thereof; either that sum or a great portion of it had been concealed by the bankrupt, or else the representations made by him to his creditors at the time of contracting the debts with them were untrue; in either case it was such an act of fraud as would justify this court in withholding the certificate.

(*a*) 3 Deacon, 310.

Mowat for the bankrupt.—The proper time for the petitioners to have taken these objections was before the commissioner, but although they had there appeared by counsel during the examination of the bankrupt, none such were urged, they having declined examining the bankrupt, relying on a subsequent appeal to this court; having omitted at that time to take these objections, the petitioners are now too late, and the certificate cannot be withheld.

THE VICE CHANCELLOR.—To impeach a certificate, the certificate itself must have been obtained by fraud; and it is not sufficient to state mere suspicion of fraud, which may be incapable of proof. Nor can this court interfere in any way by withholding the certificate, merely because the statement made by the bankrupt is not as full and satisfactory as it ought to be. The commissioner is the only party to whom is given any discretion in the matter, and he having granted the certificate required by the act to be given by him, I cannot set up my opinion against his as to the propriety of having done so.

Had the commissioner refused to receive evidence of the charges of fraud, this court might interfere on that ground, but no such fact is alleged, and I believe the case is free from that objection. And although the statement of the bankrupt is certainly one with which I would not, as a creditor, have felt at all satisfied, still the commissioner, with all the facts before him, appears to have considered it sufficient, and has accordingly granted the certificate.

I may also add, that the charges of fraud in affidavits to stay a certificate, should be a positive allegation of facts from which the fraud is to be inferred, and not *to the best of knowledge*, &c., that the party has committed a fraud, as in the affidavits filed by the petitioners.

The bankrupt must therefore obtain the usual certificate, and the motion to stay it, I refuse with costs.

IN CHANCERY.

FRIDAY, 14TH NOVEMBER, 1845.

WINSTANLEY v. KING'S COLLEGE.

The defendants having filed a demurrer to part of the bill and the time for setting the same down for argument by the plaintiff having been allowed to expire, the defendant gave notice of motion for an order to declare the said demurrer allowed, and for the costs thereof. Held that an order for that purpose is necessary, inasmuch as the master could not tax the costs of the demurrer without an order declaring it allowed, but might be obtained on a side bar motion.

Upon the motion coming on, *Crooks*, for the plaintiff, considered the motion quite unnecessary, as the plaintiff had chosen to submit to the demurrer rather than have it argued, and such submission had been sent in writing to the solicitor for the defendants.

Grant for defendants.—The practice of the profession in respect to this point is not at all settled; none of the practitioners seem to agree; and with a view of settling the practice of the court in this respect, as well as for enabling the defendants to tax the costs of the demurrer, the solicitor for the defendants deemed it advisable to obtain the order he had given notice of. That an order must be obtained declaring the demurrer allowed was quite clear, for otherwise a plaintiff, by submitting to a demurrer to part of his bill, might tie the cause up for ever, as, until the demurrer is allowed, the defendant in such a case cannot move to dismiss for want of prosecution; and besides, the plaintiff could have prevented any necessity for this motion by obtaining an order to amend, and expunging the interrogatory demurred to, as is the usual practice in England.(*a*)

The plaintiff having given a submission in writing did not place the defendants in any better position than they were in before, for, by the orders of the court, a demurrer to part of the bill is to "be held sufficient, and the plaintiff to have

(*a*) 1 Smith, 213 & 215.

"submitted thereto, unless the plaintiff shall within three "weeks from the expiration of the time allowed for filing such "demurrer cause the same to be set down for argument."—(28th order of 1st January, 1842.)

An order, therefore, being necessary, the only question was, how it is to be obtained, and the solicitor considered it to be the better course to do so upon notice of motion.

THE VICE CHANCELLOR.—I consider an order necessary so as to place the defendants in a position to proceed in the cause, the only question being how it was to be obtained. I do not consider a notice of motion necessary; the order was clearly intended to obviate the necessity of so doing. However, as the point has now come up for the first time, and the defendants cannot proceed to tax the costs of such demurrer without an order declaring it allowed, I shall grant the order with costs, as on a motion of course.

FRIDAY, 28TH NOVEMBER, 1845.

BROWN V. KINGSMILL.

The court cannot order the decrees of two original suits to be consolidated.

This was a motion to consolidate the decrees pronounced by the court in Brown v. Kingsmill and Kingsmill v. Brown, the former dismissing the plaintiff's bill to redeem, and the latter directing the specific performance of a contract entered into by the late Robert Innes with the late John Brown.(*a*)

Vankoughnet, for plaintiff, considered the bill filed by Kingsmill against Mrs. Brown might be considered a cross bill, for the answer of Kingsmill to the bill filed by Mrs. Brown to redeem, although a complete defence to that suit, still the court could not, in that cause, grant the relief to which the defendants were entitled. If Brown and Innes had both survived, and the same defence made by Innes that had been made by his executors, as there is no doubt would have

(*a*) For the facts of the case see ante, p. 172.

been, a cross bill for the relief to which, under the agreement, Innes would have been entitled, would have been necessary, it was equally necessary for those claiming under him to file a bill for the specific performance of the contract; and if not strictly and technically a cross bill, the parties to the two suits not being exactly the same, although they are the same in interest, being the executors and devisees, still, the agreement entered into by the solicitors of the parties to both suits to use the evidence, &c., taken in one suit in the other, and have the two causes heard together, rendered the suits so essentially a bill and cross bill that the court would exercise its discretion and treat them as such. When the interest in each suit is the same, the court will treat them as bill and cross bill.(*a*)

Blake & Esten, contra, considered it impossible that the order could be granted. No one, on looking at the objects for which the several suits were instituted, and perusing the pleadings, can for a moment look upon them as bill and cross bill; every essential to constitute them such is wanting. It is quite true, the defence to the bill to redeem shewed that Brown's devisee had not a right to redeem; but there was not any thing elicited in that suit to shew who was entitled to the specific performance of the contract set up; it was necessary to institute a fresh suit for that purpose; and it was merely accidental that Innes's executors were introduced as plaintiffs in the latter suit, they should have been made defendants. The fact that the parties had consented to have the causes come on to be heard together, shews that it was not a cross bill; if it had been so no such consent would have been necessary. The parties to the two suits being in the same interest, is not a ground for consolidating the decrees.—The Warden and Fellows of Manchester College v. Isherwood, 2 Sim. 476.

In a cross bill strictly so called, the defendant is estopped from saying that the court has not jurisdiction in the subject matter in dispute. In the bill to redeem, Mrs. Brown had not stated any thing that could have prevented her from dis-

(*a*) Jones v. Jones, 3 Atk. 110.

puting the jurisdiction in the second suit, had it been open to such objection.—Citing also Wentworth v. Turner, 3 Ves. Junr. 3; Calverly v. Williams, 1 Ves. Junr. 210.

Vankoughnet in reply.

THE VICE CHANCELLOR.—I cannot see any ground upon which I can possibly make the order asked; although the executors of Dr. Innes are concerned in both suits, still, it was not necessary that they should be so. It might have happened that a stranger had purchased the mortgage: in such a case it would not for a moment be contended that he could be compelled to litigate a question in which he had not a scintilla of interest, namely, the right of Innes's devisees to have the agreement specifically performed. Motion refused, with costs.

PHILLIPS V. CONGER.

SALES BEFORE THE MASTER.—Parties to the suit will not be allowed to bid at the auction, but will be permitted to have a reserved bidding.

In this case a sale had been ordered of certain premises, and a motion was now made by *Esten:* that all parties interested might be allowed to bid at the auction. It appeared that both plaintiff and defendant desired to buy the property; all parties were consenting, and no doubt it would have the effect of causing the property to realize more than could otherwise be obtained for it.

THE VICE CHANCELLOR.—In England the practice is to allow the plaintiff one reserved bidding at sales before the master, and even the propriety of allowing that privilege has been questioned by some judges; the present motion however, is of a very different nature, and such as, if granted, would tend greatly to destroy the confidence of the public, as to the bona fides of sales by this court. At the same time, as all parties to the suit are consenting, I have no objection to allow the plaintiff and defendant to have a reserved bidding each, which will prevent, in a great measure, the property being sacrificed, of which some fears appear to be entertained.

TUESDAY, 25TH NOVEMBER, 1845.

CONNELL v. CONNELL.

PRACTICE.—An answer improperly filed, will be ordered to be taken off the files, upon motion of the plaintiff.

This was a motion to take the answer of the defendant to the amended bill of the plaintiff, off the files of the court, it having been filed after replication to the defendant's answer to the original bill.

Esten, for the plaintiff.—By the registrar's certificate of the state of the cause, it appears that on the 30th day of November, 1844, the plaintiff filed his bill in this court; on the 3rd of July following, the defendant put in his answer thereto; after which, the plaintiff obtained an order to amend, and on the 31st of August last filed an amended bill without requiring a further answer, and on the 20th October last filed a replication; and further, that on the 14th November, instant, the defendant had filed an answer to the amended bill. The present motion is to take such answer off the files of the court, it having been improperly filed after the plaintiff had put the cause at issue; if the plaintiff were to proceed with the cause with the present answer on the files, the defendant might consider herself entitled to go into evidence upon the facts stated therein. Upon the whole the plaintiff deemed it the more prudent course to make the present motion, as it would probably have the effect of saving much additional expense and trouble to the defendant. There cannot be any question but that the answer has been improperly filed, and the court upon having the subject brought under its notice, will take the necessary steps to place the pleadings in a proper state.

Ramsay for defendant.—By the 3rd order of 3rd of March, 1843, "no answer, plea or demurrer, shall be deemed or con-"sidered as duly filed until a copy thereof, authenticated, "&c., shall have been served on the solicitor or agent of the "plaintiff in the cause.

The question is, when is a pleading *duly* filed? The proper test is, can the party filing it avail himself of it? If not, it is clear it cannot be *duly* filed. The order evidently

means that the plaintiff shall not be bound to notice any pleadings filed by the defendant until a copy shall have been served; here that has not been done—the answer, therefore, according to the words of the order, has not been duly filed, and the plaintiff is not supposed to be aware that it has been; nor is he entitled to make this motion, for the court will not presume that the defendant would attempt to give evidence of the facts contained in that answer, knowing as she must, that she has no right to do so: and, if she did, it would certainly be at her own peril, as she would thereby be subjecting herself to extra costs—that however, is not for the plaintiff to consider.

As to the proper construction to be put upon the expression "duly filed," he referred to Beame's Orders of 1646, and Exchequer Orders, 13th November, 1731.

THE VICE CHANCELLOR—considered it the duty of the court to preserve the pleadings in a proper state; and, although a party might choose to run the risk of incurring costs improperly, it was equally the duty of the court, when such proceedings were brought under its notice, to prevent him doing so.

The practice of the court must be kept uniform; and, as the defendant should have at once submitted to the motion, or moved herself to take the replication off the files, and for leave to file her answer to the amended bill, I shall make the order for taking the present answer off the files, with costs.

IN REVIEW.

TUESDAY, NOVEMBER 18, 1845.

IN RE SAMUEL WALLACE.

Where a party, being a creditor of a trader, served the notice of demand required to be served on the debtor, and obtained a summons of the commissioner, calling upon the debtor to appear and either admit or deny the claim of the creditor, according to the provisions of the Bankrupt Act of this province; and, upon being served with such summons, the debtor appeared and asked for further time, which was granted; after which, and before the time

allowed for the party again appearing, the creditor settled with the trader, taking certain securities for his debt; the costs of the proceedings the trader promised to pay, but afterwards refused: the creditor thereupon applied to the commissioner (under the 71st section of the act) for an order upon the debtor to pay the costs, which the commissioner refused: upon a petition, filed by the creditor by way of appeal against the decision of the commissioner, praying this court to make an order for payment of such costs, the application was refused, with costs.

A. Wilson, for petitioner, considered the party who had taken the steps to compel payment of his debt, clearly entitled to the payment of such costs as had been incurred by such proceedings; at common law, under like circumstances, a plaintiff would be entitled to proceed in the cause, and obtain a verdict for nominal damages, upon which he could tax his costs; and the legislature had introduced the 71st section into the statute to meet a case like the present, in which, but for this section, the creditor would clearly have been without remedy.

That the practice in bankruptcy, being administered by so many different and independent judges, it behoved the Court of Review to watch their proceedings narrowly, to keep the practice uniform and, if possible, well defined; that, although the amount here was small, yet it was the full charge for conducting the proceedings so far as they had been carried; and the real point to be considered was not whether an appeal ought to have been brought for the sum in question, but whether an appeal lay from the decision of the judge on the ground complained of; that the proceedings taken before the commissioner were of an adverse character, and the debtor here was the only one benefitted by the arrangement made, and ought to be chargeable with the expense of the necessary steps taken against him; and that, unless relief were afforded in this case, creditors would be induced to press the matter to extremity rather than make a compromise which cast upon them the costs of the proceedings, and which costs in some cases might be of large amount, if the necessary proof had to be obtained from abroad.

Esten, contra, was stopped by the court.

THE VICE CHANCELLOR.—The compounding of bankruptcy is looked on by the law of England with great jealousy, as giving undue preference and advantage to a party taking

steps apparently for the benefit of creditors generally, but in effect solely for his own. This, however, cannot apply to a case like the present, as the law gives to any creditor the right of compelling his debtor to commit an act of bankruptcy, of which any creditor properly qualified may avail himself, unless such debtor appear to the summons and satisfy the summoning creditor, or, &c. In the present case he does appear, and the creditor receives satisfaction for his debt; and by abandoning his proceeding not in, but with a view to, bankruptcy, withdraws the case from the hands of the commissioner, who might well consider that he had, in regard to bankruptcy, been exercising only an inchoate jurisdiction, having merely issued the summons, which was not productive of an act of bankruptcy. The fees of these preliminary proceedings are of course, in the first instance, disbursed by the party applying; and, if the bankruptcy proceed, they fall upon the estate. Now, it was entirely within the power of the applicant to have exacted the repayment of these fees when he settled with his debtor; and I do not think it expedient, under the circumstances, to sanction a subsequent suit for their recovery. The commissioner, I think, was right in not entertaining the question. There is little fear of this rule leading to the evil suggested in argument; for the summoning creditor will seldom object to get, by payment or composition, a larger share of his debtor's assets than he could have obtained in consequence of an equal distribution under a commission of bankruptcy; and it is at all times within the power of a debtor so summoned to give the right to such equal distribution to his creditors generally, by refusing to settle or compound with the one.

Wilson hoped the application would be refused, however, without costs, the point being new and of great importance to the profession generally, and had been raised more with a view to obtaining a decision upon the question, than for any interest the petitioner had in the amount demanded.

THE VICE CHANCELLOR.—All I can do is to refuse the prayer of the petition; and the order will be drawn up in the usual manner when a motion is refused.

Petition dismissed with costs.

ON THE PROOF OF HANDWRITING.

(Continued from page 209.*)*

In thus discussing at length the general rule of law, which rejects all proof of handwriting by direct comparison, and in venturing to question the validity of the principles on which this rule is founded, it is not intended for a moment to deny the existence of the rule, but simply to advocate, however feebly, the adoption of another system; and, acknowledging the rule to be the law of the land to the fullest extent, it now becomes necessary to advert to *two exceptions*, which have been recognised in courts of justice with more or less distinctness. First, where *other documents, admitted to be genuine, have already been produced as evidence in the cause, the jury may compare them with the writing in dispute.* The reason assigned for this exception is, that, as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the court, to examine the documents for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause.(*a*) In fact, it is impossible to prevent the comparison, and therefore the exception may be said to rest on necessity.(*b*) Moreover, this course is supposed to be the less inconvenient, inasmuch as documents which are put in for other purposes would be free from all suspicion of having been unfairly selected.(*c*) It seems, however, that this last reason would not be universally applicable, since, if a paper happens to be admissible, in its own nature, as bearing in however slight a degree on the cause, it cannot be rejected, though it is avowedly put in for the sole purpose of enabling the jury to compare it with another document in dispute.(*d*) When the holder of a bill, which has been endorsed to him by the drawer, brings an

(*a*) 20 Law Mag. 323, 324; Griffith v. Williams. 1 C. & Jer. 47; Solita v Yarrow, 1 M. & Rob. 133, per Lord Tenterden; Bromage v. Rice, 7 C. & P. 548, per Littledale and Patteson Js.; Hammond's case, 2 Greenl. 33.

(*b*) Doe v. Newton. 5 A & E. 514; 1 N. & P. 1 S. C.; Eaton v. Jervis, 8 C. & P. 273, per Gurney B. For another application of the same principle see the judgment of Coleridge J. in Wright v. Doe d. Tatham, 4 Bing. N. C. 500.

(*c*) R. v. Morgan, 1 M. & Rob. 135 n., per Bolland B.

(*d*) Waddington v. Cousins, 7 C. & P. 595, per Lord Denman.

action against the acceptor, who by his plea denies the endorsement alone, the jury cannot compare the endorsement with the drawing, and thus find a verdict for the plaintiff without the intervention of a witness, though the acceptance admits the drawing to be correct, and this is further confirmed by a subsequent acknowledgment by the defendant.(*a*)

Secondly, where documents are of such antiquity that witnesses who have held a correspondence with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases.(*b*) It is well known that, as a general rule, such documents, when thirty years old, prove themselves; but, nevertheless, there are occasions when, in order to establish identity, it becomes necessary to prove the handwriting. For instance, if, in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, or if it be required to show the identity of the writer of two ancient documents, only one of which is admissible in the cause, the handwriting must be proved in some legal mode, however ancient the paper may be.(*c*) The question, then, remains, how is this to be done? Till within a recent date, it has been thought that the proof might be established in one or both of two ways, either by producing other documents admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and then permitting witnesses, whether experts or others, and perhaps even the jury, to compare such documents directly with the paper in dispute;(*d*) or by calling witnesses, who, from a prior examination of these documents, could, without an actual comparison, pronounce their belief as to whether or not the instrument in question were written

(*a*) Alport v. Meek, 4 C. & P. 267, per Tindal C. J.

(*b*) Doe v. Suckermore, 5 A. & E. 717, 718, per Coleridge J.; 724, 725, per Williams J.; 726, per Patteson J.; 747, 748, per Lord Denman.

(*c*) Tracy Peerage, 10 Cl. & Fin. 154; Fitzwalter Peerage id. 193; Morewood v. Wood, 14 East, 328; Taylor v. Cook, 8 Price, 652.

(*d*) Davies v. Lowndes, 7 Scott, N. S. 168, 169, 209; Doe v. Tarver, Ry. & M. 143, per Abbott C. J.; Anon. cited id. per Lawrence J.; Roe v. Rawlings, 7 East, 282, n., per Le Blanc J. on two occasions; Morewood v. Wood, 14; East, 328; per Hotham B.; Taylor v. Cook, 8 Price, 652, 653, per Richards C. B.

by the same hand.(*a*) But, though, in the case of Doe v. Suckermore, the judges of the Court of Queen's Bench, differing as they did with respect to the immediate question before them, appear to have recognised the legality, if not of both modes of proof, at least of the latter;(*b*) yet the House of Lords, by a very recent decision, have thrown much doubt on the subject, if they have not expressly overruled the practice that had hitherto prevailed.

The question arose on the claim of Sir B. W. Bridges to the Barony of Fitzwalter,(*c*) when it became necessary to shew that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years ago by the ancestor of the claimant, was in fact written by him. To establish this fact, an inspector of official correspondence was called, who stated that he had examined the signatures attached to two or three documents which were admitted to have been executed by the ancestor;—that they were written in a remarkable character; and that his mind was so impressed with that character, as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. The Attorney-General having objected to the testimony of this witness, on the ground that he had gained his knowledge of the handwriting, *not* from a *course of business*, like a party's solicitor or steward, but from *studying* the signatures for the express purpose of speaking to the identity of the writer, the Lord Chancellor and Lord Brougham were clearly of opinion that the testimony was inadmissible; the latter noble lord observing, that the cases of Doe v. Tarver and Sparrow v. Farrant,(*d*) if correctly reported, had gone farther than the rule was ever carried;—that the Lord Chief Justice entertained the same views on this last subject; and that if, as was doubtless the case, such kind of evidence had been often received, it was only because no objection had been raised. The family solicitor of the claimant was then called; and having stated that he had

(*a*) Sparrow v. Farrant, 2 St. Ev. n. (*e*) per Holroyd J.; Doe v. Lyne, 1 Ph. Ev. n. 1. per id.; Beer v. Ward, cited id. per Dallas C. J.; Anon. per Lord Hardwicke, cited B. N. P. 236, (*b*).

(*b*) Law Rev. p. 296, note 5. (*c*) Fitzwalter Peerage, 10 Cl. & Fin. 193.

(*d*) Law Rev. p. 297, notes 2 & 3.

acquired a knowledge of the ancestor's handwriting from having had occasion, at different times, to examine, in *the course of his business*, many deeds and other instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. The distinction drawn between these two witnesses is obvious. The former had studied the signatures admitted to be genuine with the avowed purpose of discovering a similitude between them and the writing in dispute, and might well be supposed to bring to the investigation that bias in favor of the party calling him, which is proverbially displayed by scientific witnesses;(*a*) the latter had acquired his knowledge incidentally and unintentionally, under no circumstances of prejudice or suspicion; and what is especially worthy of remark, without reference to any particular object, person or document.(*b*) Coupling this decision with the case of Brookbard v. Woodley,(*c*) in which Mr. Justice Yates refused to permit the proof of an old paper by comparison, it may, perhaps, be stated as the better opinion, that, in strict law, the handwriting of *ancient* documents must be proved by some witness who has become acquainted with it in the ordinary course of his business, and that it will not be allowable either to call a scientific witness, who has obtained his knowledge by studying other documents in the same handwriting, or to produce such documents to the jury, provided they be not admissible for some other purpose, in order to enable them to form a comparison.

But, be this as it may, the case of the Fitzwalter peerage furnishes a strong *à fortiori* argument in favour of the rejection of a skilled witness, who is called to prove or disprove the signature of a *modern* instrument, and whose sole knowledge of the handwriting has been derived from the study of other papers, which are proved or admitted to have been written by the party whose signature forms the matter in dispute. It may therefore be safely affirmed, that the arguments of Mr. Justice Coleridge and Mr. Justice Patteson,

(*a*) Tracy Peerage, 10 Cl. & Fin. 191, per Lord Campbell.
(*b*) Doe v. Suckermore, 5 A. & E. 731, 735, per Patteson J.
(*c*) Pea. R. 21.

who, in Doe v. Suckermore, would have rejected such testimony, are consistent with sound law as at present understood.(*a*) Whether a witness, who has in his possession a paper which he has seen the party write, or which he has received from the party in the course of correspondence, can recur to it at the trial for the purpose of refreshing his memory, is a question which admits of much doubt. Such a course was permitted on one occasion by Mr. Justice Dallas;(*b*) but the correctness of this ruling, though apparently recognised by one learned judge, has been expressly questioned by another;(*c*) and as the leaning of the courts, for some years past, has been rather to limit, than to enlarge, the rule respecting proof of handwriting, it is presumed that this practice would not now be allowed. It is true that, in such a case, there is little danger of an unfair selection of specimens, and therefore, so far as that danger constitutes the ground for rejecting comparison, it does not apply; but the practice is still open to the objection that it enables the witness to speak to his belief, not from the *revived* impression on his mind, but from a *new* impression made during the progress of the cause, in a manner that the law does not sanction.

Though scientific witnesses cannot, as before mentioned,(*d*) prove ancient or modern documents, either by actual comparison, or by studying other papers for the purpose of qualifying themselves to give evidence respecting the document in dispute, it seems that their testimony will be admissible in *two cases*. First, if the writing be *ancient*, they may state their belief as to the probable *period* at which it was written,

(*a*) 5 A. & E. 703; 2 Nev. & P. 16, S. C. In this case a defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, eighteen other signatures were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, who had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard in court. Per Ld. Denman, C. J., and Williams, J., such evidence was receivable; per Patteson and Coleridge Js., it was not.

(*b*) Burr. v. Harper, Holt, N. P. R. 420.

(*c*) In Doe v. Suckermore, 5 A. & E. 724, Williams J. cited Burr v. Harper as sound law, but Patteson J. denied that the decision was right, p. 737.

(*d*) Law Rev. p. 297-299.

because, as the character of handwriting varies according to the progress of civilization, antiquarian knowledge may afford much assistance in arriving at a right conclusion;(*a*) and, secondly, if the question be whether a paper is written in a *feigned* or *natural* hand, witnesses whose duty it has been to detect forgeries will, perhaps, be admissible in this country, as they certainly are in America,(*b*) on the ground that such persons are supposed to be more capable than ordinary men to pronounce a safe opinion on a subject of this nature.(*c*) Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little, if any, weight will be attached to their evidence,(*d*) and the courts will jealously take care that their answers are confined within the strict bounds of the exception. Thus, on the trial of an information for a libel, a post-office clerk, though permitted to state his belief that the libel was in a feigned hand, was not allowed to examine a letter written by the defendant, and then to give his opinion as to whether the same hand wrote both papers.(*e*) This was clearly an act of comparison, and the fact, if it was one, that the handwriting of the libel was in a disguised character, was not considered a sufficient reason for varying the general rule.

There is one remaining point connected with this subject, on which doubts are still entertained; we allude to the question, how far the knowledge of a witness, who is called to

(*a*) Doe v. Suckermore, 5 A. & E. 718, per Coleridge, J.; Tracy Peerage, 10 Cl. & Fin. 154.

(*b*) Hammond's case, 2 Greenl. 33; Moody v. Rowell, 17 Pick. 490; Comth. v. Carey, 2 Pick. 47; Lyon v. Lyman, 9 Conn. 55; Hubly v. Vanhorne, 7 S. & R. 185; Lodge v. Phipper, 11 S. & R. 333. In America, the skilled witness may compare the writing in a feigned hand with other writings already in evidence in the cause. See cases above.

(*c*) R. v. Cator, 4 Esp. 117, 145, per Hotham B.; Goodtitle v. Braham, 4 T. R. 497; Doe v. Suckermore, 2 Nev. & P. 18; Fitzwalter Peerage, 10 Cl. & Fin. 198, per Ld. Brougham. See Gurney v. Langlands, 5 B. & A. 330, where Wood B. having rejected such evidence, the court refused a new trial, and Carey v. Pitt, Pea. Add. R. 130, where Ld. Kenyon acted in the same manner as Wood B. See also the observations of Ld. Denman in Doe v. Suckermore, 5 A. & E. 751.

(*d*) Tracy Peerage, 10 Cl. &. Fin. 191, per Ld. Campbell; Gurney v. Langlands, 5 B. & A. 330.

(*e*) R. v. Cator, 4 Esp. 117, 145, 146, per Hotham B. Persons who feel an interest in tracing a similarity between feigned and natural handwriting, are referred to the 4th vol. of Lord Chatham's Correspondence, where at p. 37 of the fac-similes of autographs, they will find a curious comparison of the upright writing of Junius with the running hand of Sir Philip Francis.

prove handwriting, may be tested by showing him other documents, not admissible as evidence in the cause, and then asking him whether they are written by the same hand as the paper in dispute? Mr. Baron Parke, some years back, not only permitted this course to be adopted, but allowed all the papers to be shown to the jury, in order that they might see the degree of credit to which the witness was entitled;(*a*) but in Griffiths v. Ivory,(*b*) where, several witnesses being called to establish a signature, the opposite party proposed to ask each of them whether another irrelevant paper was written by the same person, purposing to test their knowledge by the agreement or disagreement of their testimony on this point, the Court of Queen's Bench decided that the question could not be put; and Lord Denman added, that it was immaterial whether it could or could not be proved that the paper, used as a test, was written by the party whose signature was disputed. This decision has been since acted upon by Mr. Baron Parke in one case at Nisi Prius,(*c*) but the Court of Exchequer has very recently questioned the soundness of the rule as laid down in the Court of Queen's Bench.(*d*) The question thus arose: A witness, being called to disprove an acceptance, which was signed "Robert Honner," gave as a reasou for denying the genuineness of the signature, that the acceptor always signed his name "R. W. Honner." The opposite counsel, in cross-examination, put into his hand another irrelevant document, which was signed in the same manner as the acceptance, and the witness having admitted that this was written by the acceptor, he was asked whether the document was not signed "Robert Honner," and whether he would persevere in saying that the acceptor always signed his name "R. W. Honner?" An objection being taken to this course of cross-examination, Mr. Baron Alderson, after consulting the full court, stated, that all the barons were of

(*a*) Per Parke B., in Hughes v. Rogers, 8 M. & W. 125. His lordship's ruling was not afterwards questioned, though a bill of exceptions was tendered. Id.

(*b*) 11 A. & E. 322., 3 P. & Dav. 179.

(*c*) Per Parke B., in Hughes v. Rogers, 8 M. & W. 125.

(*d*) Young v. Honner, 2 M. & Rob. 537; 1 C. & Kir. 51. S. C. Nom. Younge v. Honner.

opinion that the question might be put,(*a*) observing, that if in the document, which the witness admitted to be an autograph, the peculiarity existed on which he relied, as disproving the genuineness of the signature in dispute, that must be a circumstance by which to test the value of his belief on the subject. His lordship added, that if the witness had denied the genuineness of the document produced as a test, he should not have allowed any issue to be raised on that point.(*b*) The last part of this ruling is entirely in accordance with the case of Hughes v. Rogers,(*c*) where a witness having denied that the signature of an attesting witness to a bond was genuine, and having further denied that another paper, not in evidence in the cause, was written by that person, the court decided that he could not be contradicted by calling persons to prove that this last paper was actually written by the attesting witness.

The rules deducible from these cases would seem to be these: first, that if a witness is called to prove or disprove a writing, any documents, though inadmissible in the cause, may be put into his hand on cross-examination, and he may be asked whether such documents are or are not written by the person who is supposed to have written the paper in dispute; secondly, if he denies that these documents are so written, witnesses cannot be called to contradict him, nor can the documents be shewn to the jury; and lastly, if he admits that they were written by such person, he may be further cross-examined as to the reasons for the belief he has expressed respecting the disputed paper. Thus, if he considers it genuine on the ground of some peculiarity in the signature, he may be asked whether such peculiarity is observable in the paper he has admitted to be an autograph; if for the same reason he rejects the disputed writing as

(*a*) In R. v. Murphy, 1 Arm. Mac. & Ogle, 204, Pennefather C. J. would not allow this course of cross-examination, as his lordship considered that it must end in comparison of handwriting; but in R. v. Caldwell, id. 324, Perrin J. and Richards B. held that a witness, who had denied the handwriting of the paper in dispute, but had admitted the genuineness of other irrelevant documents, might be questioned as to any similarity between them, provided the passages in each supposed to be alike were pointed out to the witness by the hand, and were not read aloud, so as to go to the jury.

(*b*) Young v. Honner, 2 M. & Rob. 536.

(*c*) 8 M. & W. 123.

spurious, he may be asked whether in the paper offered as a test the same peculiarity does not prevail; and, in either case, the court would probably permit the irrelevant documents to be laid before the jury, not that they might judge of the genuineness of the paper in dispute by comparing it with these, but that they might be enabled to appreciate the testimony given by the witness.(*a*) Whether the course proposed to be pursued in Griffiths v. Ivory was correct or not, is another question, and one which, until some further decision is pronounced upon the subject, it would be mere speculation to attempt to resolve.

It remains only to be observed, that the rules of evidence which govern the proof of handwriting, are precisely the same in criminal as in civil proceedings; though in favour of life and liberty, judges will naturally feel more disposed than they would be in ordinary disputes between man and man, to resist any endeavour to infringe these rules, or to introduce evidence of a doubtful description.(*b*)—*Law Review.*

NOTES OF LEADING CASES.

SUFFICIENCY OF THE CONSIDERATION OF A SIMPLE CONTRACT.

KAYE v. DUTTON, 8 SCOTT, N. R. 495.

The principle, that some consideration is requisite, in order to support a parol promise, must of course be sufficiently familiar to our legal readers. This principle obtained in the Roman law, and is thus concisely stated in the second book of the Digests, tit. xiv. s. 7, § 4, *nuda pactio obligationem non paret;* and in the second book of the Code, tit. iii. s. 10, we find the rule adverted to that *ex pacto actionem non nasci,* and stated to apply where there is merely a *nudum pactum.* The case which is usually cited in our own courts as estab-

(*a*) Younge v. Honner, 1 C. & Kir. 53., per Alderson B.
(*b*) R. v. Cator, 4 Esp. 117, 144, per Hotham B.; R. v. De la Motte, 21 How. St. Tr. 810, per Butler J., and see 779 S. C.

lishing the same rule, is that of Lampleigh v. Brathwait (Hobart, R. 105), where it was resolved that "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party, that gives the assumpsit, it will bind; for the promise though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference." With respect to the nature of the consideration on which an assumpsit may be founded, it is laid down in Com. Dig. tit. Action upon the Case upon Assumpsit, that the consideration must be "for the benefit of the defendant, or to the trouble or prejudice of the plaintiff." "Consideration," observes Mr. Justice Patteson, in Thomas v. Thomas (2 Q. B. 859), "means something which is of *some* value in the eye of the law moving from the plaintiff." And in Selwyn's Nisi Prius, 41, 10th ed., consideration is defined to be, "any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, if such act is performed or such inconvenience suffered by the plaintiff, with the consent either expressed or implied of the defendant."

In Bourne v. Mason (1 Vent. 6) the facts were, that A. was indebted to the plaintiff in a certain amount, and that B. was indebted to A. in a certain other amount, whereupon the defendant, in consideration of being permitted by A. to sue B. in his name, promised to pay A.'s debt to the plaintiff; A. having given such permission, and the defendant having recovered from B., the plaintiff brought his action for the amount of the debt originally due to him from A., and after verdict the judgment was arrested, on the ground that plaintiff was a mere stranger to the consideration for the promise made by the defendant, having done nothing of trouble to himself or of benefit to the defendant. In this case, therefore, the action was held not to be maintainable, because there was no legal consideration at all for the defendant's promise. The case of Haigh v. Brooks (10 A. & E. 309) is an authority to show that a consideration possessing some value will be sufficient

to support a promise. (See per Cresswell, J., Allnutt v. Ashendan, 6 Scott, N. R. 131.) In that case the consideration alleged in the declaration was the giving up a certain guarantee, and the defence was, that this guarantee was void under the statute of frauds, as not disclosing any consideration on the face of it, and that consequently the agreement made with the plaintiff was in fact a nudum pactum; on looking at the guarantee, however, the Court of Queen's Bench were of opinion that the question as to its validity was open to discussion, and that there was, at all events, sufficient doubt to make it worth the defendant's while to possess himself of the guarantee, and Lord Denman in delivering judgment made the following remark, which is apposite to our present subject; "we are by no means prepared to say that any circumstances short of the imputation of fraud, in fact, could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable."

In Kaye v. Dutton, *supra*, the plaintiff declared in assumpsit upon an agreement, reciting that a certain estate had been mortgaged by one Whitnall, since deceased, and that the plaintiff had joined in a bond as a collateral security for the mortgage money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of Whitnall's affairs, had repaid to the plaintiff part of the money which he had paid, and had agreed to pay him the residue, amounting to 83*l.*, out of the proceeds of the mortgage property when sold, and in the mean time to appropriate the rents of the premises to the payment of such residue, inasmuch as the plaintiff had a lien upon the premises for the same. The agreement further recited that the defendant had requested the plaintiff to release and convey his interest in the mortgaged property to certain parties, and that he had done so, *reserving to himself a lien on the property* as aforesaid; and it then proceeded to state that the defendant in consideration of the plaintiff having paid the money and having released all his estate and interest as above-mentioned, *reserving to himself the said lien*, undertook and agreed to pay him the said sum of 82*l.*, with interest thereon. Now in Copis v. Middleton (Turn. & Russ. 224) it was held, that if

at the time a bond is given a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee, that is to say, he has a lien upon the mortgaged property for the satisfaction of his claim against his principal; and inasmuch as the mortgagor cannot get back his estate again without a conveyance, the security remains a valid and effectual security for the ultimate repayment to the surety of the money advanced by him. Consequently, in the case of Kaye v. Dutton, to which we wish particularly to direct attention, the reservation of the plaintiff's lien in his release and conveyance was, in fact, a reservation of the only interest which, according to the rule of equity above noticed, he had in the premises so conveyed, and the release and conveyance, by which the plaintiff really parted with nothing, was therefore held to form no legal consideration for the defendant's alleged promise. In delivering judgment, Tindal, C. J. remarked, that the case resembled that of Edwards v. Baugh (11 M. & W. 641), where the declaration stated that certain disputes and controversies were pending between the plaintiff and defendant as to whether the defendant was indebted to the plaintiff in a certain sum of money, and thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the said sum in dispute, but would accept a smaller sum in full satisfaction, the defendant promised to pay such smaller sum. This declaration was held bad on general demurrer, because it contained no allegation that a debt was actually due from the defendant to the plaintiff, and because it did not show either expressly or by implication that a *reasonable doubt* existed between the parties as to the fact of such debt being due. "I think," observed Mr. Baron Rolfe, "the plaintiff is bound to show a consideration, in the shape of something either beneficial to the opposite party or detrimental to himself."

Another objection, which was taken to the declaration in Kaye v. Dutton, was this: that an executed consideration will only sustain such a promise as the law will imply; that here the consideration, if any, was executed, and that the promise alleged was *not* such as would have been implied by law from

the given circumstances. In Hopkins v. Logan (5 M. & W. 241) it was held, that where the consideration is executed, and where the implied promise would be to pay on request, as in the case of an account stated, such consideration is not sufficient to support a promise to pay at a future day, and several other cases will be found cited in the judgment (8 Scott, N. R. 502), which support the following proposition: that where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, *differing from that which by law would be implied*, can be enforced. We may further observe generally, that in order to sustain an action of assumpsit there must be—1. A request either expressed or implied. 2. A consideration of some value in the eye of the law; and 3. A promise, either express or such as the law will from certain facts and circumstances imply. The case of Lampleigh v. Brathwait, supra, is an instance of the necessity of an *express* request. The very recent decision in Victors v. Davies (12 M. & W. 758), (*a*) proceeded on the ground that a request must necessarily be inferred from particular facts: that was an action of assumpsit for money lent, and it was observed by Pollock, C. B., that the statement that the money was lent implies that it was advanced at the request of the defendant; so where A. makes a payment on account of B., but without his knowledge or request, and B. subsequently assents to this payment, an antecedent request by him will be implied. (See also Nordenstrom v. Pitt, 13 M. & W. 723.) In cases where the law would raise an implied promise, it certainly seems, on the authority of the cases above referred to, that no express promise differing therefrom can be enforced; and as observed by Tindal C. J., these cases may have proceeded on the principle, that the consideration was exhausted by the promise implied by law from the very execution of it, and that consequently any promise afterwards made must be *nudum pactum*, there remaining no consideration to support it. Another class of cases may however occur, in which there is a consideration, from which the law would not imply a promise,

(*a*) See Law Magazine, N. S., No. 3, p. 406.

as where the party suing has sustained a detriment to himself or conferred a benefit on the defendant *at his request*, under circumstances which would not raise any implied promise. In such case it appears to have been held in some instances that the act done at the request of the party charged is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. (Judgment, 8 Scott, N. R. 502, 503.) And this view of the subject seems quite in accordance with the resolution in Lampleigh v. Brathwait, that a courtesy, if moved by a request of the promiser, will bind; because in this case the subsequent promise is not naked but couples itself with the previous request.

The decision of the court in Kaye v. Dutton shows that although it may in ordinary cases be very easy to determine whether there be a sufficient consideration for the alleged promise, yet circumstances may and do occur in which that which at first sight appears to constitute a good consideration will, on further investigation, prove insufficient, as causing no detriment to the plaintiff or benefit to the defendant; and this case likewise shows how necessary it is before drawing the declaration on an assumpsit, when the consideration is executed, to determine—1st, Whether from the facts submitted there be *any* promise implied by law; and 2dly, If there be such an implied promise, what is its precise nature? Having determined these points, the pleader will be careful to allege no promise different from that which would be by law implied.

We shall conclude these remarks by considering very shortly another question, which was raised in the argument in Kaye v. Dutton, but which it was unnecessary for the court to decide; viz. whether a mere *moral* consideration, to which the law will give no effect, is sufficient to support a subsequent promise. It certainly seems singular that a question so interesting and important as this should not have been formally decided, especially when we consider how frequently the attention of courts of law is directed to the nature and sufficiency of the consideration for a promise. The cases of Lee v. Muggeridge (5 Taunt. 36), Watson v. Turner (Bull. N. P. 147), and some others, which will be found collected and commented upon in the note to Wennall v. Adney (3 B. & P. 247), are usually cited

as favouring an affirmative answer to the above question; but we apprehend that the authorities in support of the negative will, on investigation, be found greatly to prevail. In Littlefield v. Shee (2 B. & Ad. 811) Lord Tenterden, although he does not go to the extent of overruling Lee v. Muggeridge, observes, that "the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation," and this observation of the above very learned judge is cited and approved of by the Court of Queen's Bench in Monkman v. Shepherdson (11 A. & E. 415), and in Eastwood v. Kenyon (11 A. & E. 447), where the same court expressly adopted the conclusion deduced from the authorities considered in the note to Wennall v. Adney, already alluded to. This conclusion is, that an express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule at law, but can give no original cause of action, if the obligation on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." In the course of the judgment, in Eastwood v. Kenyon, delivered by Lord Denman, his Lordship observed, that the doctrine of the sufficiency of a moral consideration would, if carried out, annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it, and likewise that "the enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts; suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult." In addition to these authorities, we may call in aid a remark of Park, B. in Jennings v. Brown (9 M. & W. 501) to the effect that a mere moral consideration "is nothing," and of Tindal, C. J., in the prin-

cipal case (8 Scott, N. R. 499) that "no doubt a subsequent express promise will not convert into a debt that which of itself was not a *legal* debt;" and we think we may in conclusion venture to affirm, as a proposition consistent with the principles of law and of common sense, that a mere promise to do that which never could have been enforced before a legal tribunal, however binding it be *in foro conscientiæ*, will not suffice at law to sustain an action of assumpsit.

The case of Kaye v. Dutton may be conveniently noted in Chitty on Contracts, third edition, 48.—*Law Magazine.*

POINTS OF PRACTICE.

WHEN A NEW TRIAL WILL BE GRANTED, THE VERDICT BEING AGAINST EVIDENCE.

HALL v. POYSER, 13 M. & W. 600.

The most ancient proceeding recognised by the common law in case of a wrong verdict being returned by the jury summoned to try an issue joined between the parties to an action, was by the writ of attaint, so called, according to Sir E. Coke (1st Inst. 294 b), from the Latin word *tinctus* or *attinctus*, "for that if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever;" the punishment inflicted for this offence, in case of conviction, being moreover extremely severe, as will be seen by a reference to the passage in Coke's Commentaries immediately following that above cited. The rigour of the law was, however, mitigated in this respect by the stat. 23 Hen. VIII. c. 3, and the writ of attaint was altogether abolished by the stat. 6 Geo. IV. c. 50, s. 60, which enacted, that from and after the passing of that act it should not be lawful, either for the king or any one on his behalf, or for any party or parties in any case whatsoever, to commence or prosecute any such writ against any jury or jurors for the verdict by them given, or against the party or parties who should have judgment upon such verdict. With reference to the latter part of this

passage, we may observe, that the object of the writ of attaint was twofold, 1st, to punish the jury for their false verdict, as already stated, and 2ndly, according to Sir H. Finch, in his Discourse of Law, p. 484, to reverse the judgment following upon such verdict, and to restore the party to all that he had lost thereby. At the present day, we apprehend, that practically there is no mode of punishing a jury for returning a wrongful verdict; but in this case the party aggrieved may obtain redress by applying to the court in banco, who will, if sufficient cause be shown, set aside the verdict, and grant a new trial. One of the grounds for granting such new trial is, misconduct of the jury, provided it be such as to satisfy the court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, which is essential for the proper exercise of those highly important duties which jurymen are called upon to discharge. In like manner, if the verdict be a *perverse* verdict, or clearly contrary to evidence, it will be set aside by the full court, and a venire de novo will be awarded. Mellin v. Taylor (3 B. N. C. 109) is a striking instance of that particular branch of the discretionary jurisdiction of the courts to which we now refer. This was an action to recover damages for criminal conversation with the plaintiff's wife; the evidence was extremely conflicting, although certainly the weight of evidence was in favour of the plaintiff; the jury, however, found for the defendant; a new trial was subsequently moved for on the ground that the verdict thus given was against evidence; and although it was contended on behalf of the defendant, that where there is evidence on both sides it is not the practice to set aside the verdict merely because the court may form an opinion as to the weight of the evidence different from the opinion of the jury; yet the rule was made absolute, Tindal, C. J., after a *cur. adv. vult.* thus delivering judgment: "We agree that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict except that it is formed in the opinion of the court against the weight of the evidence, the court ought to exercise not merely a cautious, but a strict

and sure judgment before they send the case to a second jury. The general rule under such circumstances is, that the verdict once found shall stand, the setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence. The argument before us has gone the length of contending that if we send this case to a second trial we invade the province of the jury, and in the particular instance before us almost insure a verdict against the defendant. I cannot conceive how the benefit of trial by jury can be in any way impaired by a cautious and prudent application of the corrective which is now applied for; on the contrary, I think that without some power of this nature residing in the breast of the court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public." So in the language of Lord Kenyon, Wilkinson v. Payne (1 T. R. 469.) "In the case of new trials it is a general rule that in a *hard* action, where there is something on which the jury have raised a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial where the objection does not lie in point of law." These remarks of the two very learned judges above named will serve as a sufficient introduction to the case of Hall v. Poyser (13 M. and W. 600.) This was an action by the drawers against the acceptor of a bill of exchange for 50*l.*, plea that "after the said acceptance by the defendant of the said bill of exchange, and before the cause of action accrued to the plaintiffs, the defendant delivered to the plaintiffs, who then accepted and received from the defendant, divers goods of the defendant in satisfaction and discharge of the said bill of exchange and of the said promise of the defendant." Replication, traversing the acceptance of the goods in satisfaction and discharge modo et formâ, and issue thereon. At the trial there was conflicting evidence respecting the fact thus at issue between the parties; it likewise appeared that the defendant, having become embarrassed, had, prior to the transactions with the plaintiffs out of which the action on the bill arose, paid his other creditors a composition of ten shillings in the pound. The jury found a verdict for the plaintiffs, damages

25*l.*, and this verdict the defendant obtained a rule nisi to set aside, on the ground that it was against evidence, and did not decide the issue raised between the parties; the question for their consideration being, as it was contended, whether the bill sued on was satisfied by the delivery of the goods. It was argued, that if the bill was not satisfied, the plaintiffs were entitled to recover the whole amount of it; if it was, the defendant was entitled to the verdict. The court, however, after argument, discharged the rule nisi; and Alderson, B., thus expressed his opinion on the point which had been raised: "The jury," observed the learned baron, "have decided the issue in favour of the plaintiffs, and have given them a verdict for 25*l.*, which they find to be the amount of the damages. If that could be accounted for only on the supposition, that having disagreed as to whether the verdict should be for the plaintiffs or defendant, they had split the difference, the defendant would certainly be entitled to a new trial. But they may have found their unanimous verdict for the plaintiffs, and given them as *an equitable amount of damages.* Of this the plaintiffs do not complain; and I think, therefore, that we ought not to disturb the verdict." The case affords a good illustration of the rule, which will be found laid down in the books of practice, viz., that if the verdict be such as justice and equity require, the court will not disturb it, although there be conflicting evidence, and although the weight of such evidence may appear to preponderate against it. A note of Hall v. Poyser may be made in 1 Chitt. Arch. Pr. 7th edit. 1089.—*Law Magazine.*

A PEREMPTORY UNDERTAKING TO TRY AT A PARTICULAR SITTING IS AN ABSOLUTE CONDITION, THE BREACH OF WHICH ADMITS OF NO EXCUSE.

PETRIE v. CULLEN, 8 Scott, N. R. 705.

The above decision is of importance with reference to the stat. 14 Geo. 2, c. 17, from which the Courts of Westminster derive the power of giving judgment as in case of a nonsuit, where the plaintiff in an action neglects to go to trial according to the regular course and practice of said courts, in which

case the first section of the above statute enacts, that "it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court (due notice having been given thereof) to give the like judgment for the defendant or defendants in every such action or suit as in cases of nonsuit, unless the said judge or judges shall upon just cause and reasonable terms allow any further time or times for the trial of such issue, and if the plaintiff or plaintiffs shall neglect to try such issue within the time or times so allowed them, in every such case the said judge or judges shall proceed to give such judgments as aforesaid." In Petrie and another v. Cullen, supra, a rule nisi for judgment as in case of a nonsuit was obtained, the plaintiffs having neglected to proceed to trial at the proper time, and this rule was subsequently discharged upon a peremptory undertaking by them to try at the sittings after term therein specified. The cause, however, was not entered for trial until the last day for entering causes for the sitting, and in consequence of its being so low on the list it was necessarily made a remanet; the defendant under these circumstances obtained a rule absolute for judgment as in case of a nonsuit, and on motion to set aside the above rule and the judgment signed in pursuance thereof, the question was simply this, whether or not the plaintiffs had sufficiently complied with the undertaking entered into by them as above mentioned. On their behalf it was argued that their undertaking was to proceed to trial according to the course and practice of the court, and that they had literally complied with such undertaking so far at least as was practicable, the cause having been entered for trial *within the time allowed by the practice of the court*, and the trial having been postponed without any default on their part. In answer to this argument, however, it was observed by Maule, J. "The question is, whether the undertaking is an absolute one to try the cause at all events, or whether it is satisfied by the plaintiffs' doing what they reasonably could do to get the cause tried. It seems to me that it is as absolute as an undertaking to pay a given sum on a day named. From the course they pursued, I think the plaintiffs clearly meant that the cause should not be tried at

the last sittings." With respect to the correctness of the first position thus laid down by the learned judge, we must observe that Tindal, C. J. expressed some doubt, the Lord Chief Justice relying upon the peculiar circumstances of the case, which in his opinion clearly indicated a *wilful default* on the part of the plaintiffs; the judgment of Erle, J. moreover entirely proceeded on this latter ground. "It appears to me," he remarks, "that the plaintiffs in the case have done all they could to prevent the cause from being tried at the last sittings." The rest of the court, however, consisting of Coltman, J., and Maule, J., certainly adopted, we think with good reason, the general rule as laid down by Coleridge, J., in Ward v. Turner, (5 Dowl. 22,) according to which rule the meaning of a peremptory undertaking is, that the party undertakes at all events and without any reservation or exception, that the trial shall take place within the time limited, so that he will be responsible even if there be no moral fault and no neglect on his part, and although he had no controul over the circumstances which prevented the trial. This rule of practice may, it is true, like any other inflexible rule, occasionally be productive of hardship to the party undertaking to go to trial, but on the whole it appears the most convenient as well as the most just and reasonable that can be devised.

Note the above case in 2 Chit. Arch. Pr. 7th ed. 1079.—*Law Magazine.*

THE

UPPER CANADA JURIST.

IN CHANCERY.

22ND NOVEMBER, AND 12TH DECEMBER, 1845.

MERRITT v. TOBIN.*

INJUNCTION—PAYMENT OF MONEY INTO COURT.

A suit having been brought for the specific performance of an agreement of compromise, and after amendment of the bill and a special injunction granted, on the merits confessed in answer to the original bill, restraining proceedings at law, judgment was obtained in an action brought by the defendants for the recovery of the whole amount originally claimed, but which the plaintiff had always denied his liability to pay, a motion was made,—amongst other things—for the payment into court of the amount of the judgment, or for security for the performance, by plaintiff, of the decree of the court. Payment into court refused, but security ordered to be given for the performance of the articles of compromise, in the event of the same being decreed.

The pleadings in this cause, shewed that Merritt and one George Adams (now deceased), were possessed of certain mills, &c., in St. Catherine's, called "The Welland Canal Mills," as tenants in common; Merritt having the fee simple in three-fourths, and Adams in the one-fourth part thereof; and being so possessed, had, by articles of agreement, dated 30th July, 1835, contracted and agreed with one Thomas Scott, for the sale unto him of one-tenth part of said premises; that he was thereupon admitted into possession, and had paid 504*l.* 12*s.* 4*d.*, on account of purchase-money, but no conveyance executed.

That Merritt, Adams & Scott, having become indebted to Samuel Street, Esquire, in the sum of 1,500*l.*, a mortgage to

* The facts of this case are reported at greater length than may be considered necessary on the present motion, in order to avoid a repetition thereof, in any report that it may be necessary to make of the cause at any subsequent stage of the proceedings.

secure the payment of that amount was executed by Merritt and Adams, with the consent, &c., of Scott; and that default had been made in payment of said debt.

That by a certain deed, of the 28th of August, 1839, and made with like consent of Scott, between Merritt and Adams, of the one part, and John Mittleberger and Beacher Benham, of the other part; and reciting that Merritt and Adams had let the said premises to Mittleberger for 3 years, and that Mittleberger had determined to carry on business with Benham, during the said term, as Mittleberger & Co.; and that Mittleberger and George Rykert had carried on business at St. Catherine's, under the name, &c. of George Rykert & Co.; and that Mittleberger and Benham had also carried on business with Rykert, under the style, &c., of Rykert, Mittleberger & Co.; and that by agreement, the said firms had been dissolved on the 15th day of July, then last; and that Rykert had let to Mittleberger all his interest in the firms for three years, under certain covenants, &c. Merritt and Adams demised said premises to Mittleberger and Benham for three years, from 15th July, then last, at certain rents, &c. And Merritt and Adams covenanted and agreed with Mittleberger, that they would from time to time, &c., during the period therein limited, and during the solvency of the firm of John Mittleberger & Co., upon the request of John Mittleberger, and exhibition of the books of the said firm, if required, endorse such notes, accept such bills, &c., as he might require or desire, together with the said George Rykert, to the extent of 12,500*l.*; and beyond that sum without him in such sums as Mittleberger should require for use of said firm. And it was agreed by said deed that should Mittleberger, in the firm of Mittleberger & Co., sustain losses by the business, exceeding the profits thereof, the said demised premises of Merritt and Adams should be liable thereto in the proportions therein mentioned.

That Merritt and Adams had executed a bond to Mittleberger, with like consent of Scott, in the penal sum of 16,000*l.*, which recited that Merritt and Adams had carried on the business of a grist mill at St. Catherine's, and had discontinued the same; and that the mill, &c., had been assigned to

Mittleberger, &c. &c. (to the same effect as in deed); and the condition thereof was to pay their proportion of the losses, or assign the said mill and premises, or such parts or proportions thereof, as would be sufficient to pay their proportions of such losses.

That Mittleberger, Benham, Merritt, Adams and Rykert executed to defendants (Tobin and Murison), a joint and several bond, dated 6th December, 1839, in the penal sum of 12,500*l.*, with a condition reciting that for the purpose of enabling Mittleberger and Benham to carry on and extend their business as merchants, Tobin and Murison had agreed to become surety by letters of credit or other collateral security, for the payment of all such drafts, &c. as Mittleberger and Benham might desire, or which might be negociated on their account, not exceeding 25,000*l.*; and making said bond void, if Mittleberger and Benham from time to time, &c. well and truly paid, &c. all debts, &c. incurred upon or by virtue of the credit or guarantee of defendants, and also to save harmless, &c.

That an agreement was made between Merritt and Charles Mittleberger, acting on behalf of the defendants, and Mittleberger, Benham and Adams, as follows:

"Memorandum of agreement made at Toronto, between "W.H. Merritt, C. Mittleberger, and John Mittleberger & Co., "witnesseth, that in consideration of Messrs. Murison & Co. "extending to the proprietors of the Welland Canal Mills the "sum of 4,000*l.*, at 6 per cent. interest, for the term they "rent the mills, and the relinquishment of their names as "indorsers, except on a case of emergency, and in considera- "tion of their also furnishing John Mittleberger & Co. a "sufficient capital to continue their business and stock their "mills, they also assign a mortgage for the same, the said "W. H. Merritt agrees to give an additional security for "2,000*l.* on the premises on which he resides, on a similar "security being furnished by Mr. Adams on his property, or "in proportion to his interest.—Toronto, 25th January, 1840.

"Signed, W. H. MERRITT, C. MITTLEBERGER,
"JOHN MITTLEBERGER & Co., GEO. ADAMS."

"The property mentioned in the letter of Jno. Mittle-

"berger & Co., dated 23rd December, addressed to Mr. "Charles Mittleberger, is also to be mortgaged to Messrs. "Tobin and Murison, as collateral security, the same as the "mills.

"Signed, JOHN MITTLEBERGER."

That in pursuance of this agreement, a mortgage dated 3rd March, 1840, (made with consent, &c. of Scott) was executed by Merritt and Adams, to the defendants, whereby, after reciting in part the deed of 28th August, 1839, to the effect that Merritt and Adams had thereby demised the mills to Mittleberger and Benham, and had agreed to endorse the business paper of Mittleberger & Co. upon the conditions, &c. therein mentioned, and that Tobin and Murison, for the purpose of facilitating the business of Mittleberger & Co., had agreed to endorse for them to the amount of 25,000*l.*; and in order to secure Tobin and Murison for any advances they might make or liabilities they might incur on account of Mittleberger & Co., it was agreed that said premises should be conveyed to Tobin and Murison by way of mortgage; it was witnessed that Merritt did grant, &c. his three-fourth parts of said premises, and Adams did also grant his one-fourth part of said premises, with a proviso for making the same void, if Mittleberger and Benham, their executors, &c., or some or one of them, should from time to time well and truly pay or cause to be paid unto Tobin and Murison, their executors, &c., all such sum or sums of money as upon a statement of cash or other accounts between them arising or accruing under and in pursuance of such agreement should appear to be due to Tobin and Murison, and save them harmless from all damages, &c.

That in further pursuance of said agreement, Merritt (by consent of all parties concerned) by an indenture of 4th March, 1840, for 2,000*l.*, conveyed to Tobin and Murison a lot in St. Catherine's, which lot was substituted for the premises mentioned in the agreement, and had been previously sold to one Stephenson by Merritt, for 2,051*l.* 10*s.*, payable, 1239*l.* with interest on 1st January, 1840, and 812*l.* 10*s.* in five annual instalments, the interest to be paid half-yearly; and Merritt, on the occasion of such sale to Stephenson, executed

a bond to him dated 17th October, 1839, with a condition for making the same void in case Merritt, upon payment of the purchase money and interest, executed a conveyance to Stephenson, whereupon Stephenson was admitted into possession; and at the executing the said indenture, had not paid any part of the purchase money. All which the bill stated was well known to Tobin and Murison at the time of such execution, and that in fact it was the intention of the parties thereto, that the mortgage thereby created should be subject to such sale to Stephenson; with a proviso for making the same void, on payment of 2,000*l.* with interest on or before the 15th July, 1842.

That in further pursuance of the agreement, Adams, by an indenture of bargain and sale, dated 24th April, 1840, in consideration of 2,000*l.*, conveyed to the defendants certain premises in St. Catherine's, with a like proviso, on payment of 2,000*l.* on the same day.

That the consideration money mentioned in such deeds was not paid, (nor any part thereof), but the conveyances were intended to secure to Tobin and Murison two specific sums of 2,000*l.* advanced by them to Mittleberger and Benham in 1839, and applied to the liquidation of certain demands due from Merritt, Adams and Scott, in relation to the said demised premises, being incurred for the purpose of building the said mills.

That John Mittleberger endorsed on the counterpart of the said deed of August, 1839, the following memorandum:—
"Whereas W. H. Merritt has mortgaged to Tobin and Murison
"a certain individual property to the amount of 2,000*l.*, and
"George Adams a similar mortgage on individual property
"to a like amount of 2,000*l.*, John Mittleberger & Co. are to
"meet the interest thereon out of their concern, and carry to
"account all balances due by the proprietors of the Welland
"Canal Mills. And whereas W. H. Merritt and George
"Adams have mortgaged the mills to the said Tobin and
"Murison, to indemnify them for the repayment of certain
"advances to be made to John Mittleberger & Co., not exceed-
"ing 25,000*l.*, to stock the mills for John Mittleberger & Co.,
"who are to repay the same; W. H. Merritt and G. Adams

"are to be relieved from further indorsation except in carry-
"ing over the balances due by the mill company, as within
"named, to John Mittleberger & Co. in account, until the
"same is paid: otherwise than as above written, this agree-
"ment is not varied."

That by a certain deed, dated 23rd March, 1840, reciting that Merritt and Adams, were proprietors of "The Welland Canal Mills," as tenants in common (in the proportions already set forth); and that Thomas Scott was equitably entitled to one-tenth part of the same, and of the rents, &c., and was also liable to sustain a like proportion of all losses that had accrued, or might accrue in the management thereof; and that Merritt and Adams, as such legal owners and proprietors thereof, had, with Scott's consent, demised the same to Mittleberger and Benham for three years, and also, with like consent, had mortgaged the same to Tobin and Murison: they, the said Merritt and Adams, agreed that they would when thereto required make and execute a conveyance to Scott, of one-tenth part of the said premises, in the same proportions that Merritt and Adams held the same; such conveyance to be subject to the said lease and mortgage, and to all leases, charges and incumbrances, theretofore made or existing, or which should thereafter at any time before the execution of the said conveyance be made upon the said premises: and further, that Merritt, Adams and Scott were, and were thereby declared to be, severally interested and entitled to the rents, business, &c., of the said mills in proportion to the estates held or to be held by them respectively; and were also respectively bound and liable, and did thereby undertake and agree in the like proportions to sustain and bear all losses, damages and expenses whatsoever, that should or might in any manner arise, happen or accrue in or to the said mills, or the business or management thereof; and lastly, that the said agreement should be understood to apply to, and include all contracts, liabilities, claims, demands and transactions whatsoever then outstanding or existing, either in favour of or against the said mills or the parties thereto, arising out of the business of said mills, or on account of the said proprietors and owners thereof.

That Mittleberger and Benham carried on business under said deed till 15th July, 1842, when the three years limited for the same expired; and during that time sundry advances were made by the defendants to Mittleberger and Benham; the whole whereof was not applied, or intended to be applied, to the purposes of the deed of 28th August, 1839: that large remittances and payments of money and consignments of goods were made by Mittleberger and Benham to Tobin and Murison, which were carried to the general credit of Mittleberger and Benham; and at the expiration of the three years, Mittleberger & Co. were indebted to defendants on account of such advances, in the sum of 80,000*l.*; which, however, was reduced by Mittleberger and Benham to 28,000*l.*

That Tobin and Murison commenced (27th June, 1843) an action of assumpsit against Merritt, Adams and Mittleberger, for 28,000*l*, on the alleged ground that Merritt and Adams were the general partners of Mittleberger & Co., under the circumstances set forth; and at the same time commenced several actions of covenant against Adams and Merritt, upon their respective covenants in the mortgages of the 4th March and 24th April, 1840: also, actions of ejectment against the tenants in possession of the premises mentioned in said mortgages, and a suit of foreclosure against Merritt.

That by certain articles of agreement, of 8th July, 1843, and made between plaintiff and defendants by R. E. Burns, Esquire, their attorney, and assented to by J. Mittleberger, after reciting that plaintiff and defendants had agreed to an *arrangement, settlement and compromise* of the sum of 11,500*l.*, which plaintiff acknowledged to owe defendants as being the amount of his own liabilities to them, on the following terms and conditions,—1st. Plaintiff agreed and bound himself to release his equity of redemption in the St. Catherine's mill property, and then mortgaged to the defendants by plaintiff and Adams; and that plaintiff should procure a release of his wife's dower in said property; and all the machinery, &c., to be assigned to defendants, *so far as plaintiff could legally or lawfully do the same:* also, plaintiff should assign, &c., the lease then held by him from the St. Catherine's Water Power Company, under which the water was obtained to supply the

said mill—the consideration for said release, as agreed between the parties, to be 5,000*l.* 2nd. Plaintiff agreed to convey, &c., to defendants, the fee simple of "The White Factory," known as "The Farnsworth Property;" the consideration therefor to be 1,000*l.*,—the release of Mrs. Merritt's dower in this property also to be procured. 3rd. The plaintiff agreed to release his equity of redemption in the property then in the occupation of E. W. Stephenson, in St. Catherine's, and procure a release of dower,—consideration therefor to be 2,000*l.* 4th. After reciting that Street held the mortgage before-mentioned for 1,500*l.*, executed anterior to the mortgage to defendants, it was agreed that plaintiff should procure and deliver to defendants an undertaking from Street not to enforce the payment thereof for three years, from 1st July, 1843; and that upon payment by defendants, or their assigns, to Street, of the principal and interest, to assign over said mortgage to defendants or their assigns,—to discharge plaintiff, so far as covenants in said mortgage would render him liable;—And to provide for a further discharge of the said 11,500*l.*, it was agreed that plaintiff should assign bonds for the payment of 2,650*l.*, to defendants, which bonds were all to be good, and secured by lands being sold for the payment of the same or otherwise; and to bear interest from date and to fall due within the period of three years, from that date. The lands for which said bonds were payments should be conveyed by plaintiff to defendants, or to such person as they might appoint as trustee thereof, to convey to purchasers, on payment of their respective purchase monies and interest, the dower of Mrs. Merritt in these lands to be released; and the lands should be ample to secure the amounts due respectively thereon: the consideration for this branch of the agreement was agreed to be 2,650*l.* 5th. Plaintiff agreed and bound himself to make good the sum of 600*l.*, which had been formerly offered by Adams in an attempted compromise of his individual liability to defendants, in the following manner, viz., for 300*l.*; plaintiff was to assign and transfer to defendants the former mill books, and debts, and assets thereon represented as due to the proprietors of the mill, as made out by a schedule; and giving defendants full power to use name

of mill proprietors to collect the same; and in case Adams or Scott should interfere in any way, and release or discharge any action brought for the recovery of any of said debts, &c., then plaintiff to be answerable for, and make good the amounts so released; for the remaining 300*l.* plaintiff agreed to assign bonds secured upon lands, and transfer lands, in the same manner, with the release of dower, as agreed upon with respect to the foregoing lands and bonds,—the consideration for this branch of the agreement to be 600*l.* 6th. Plaintiff agreed and bound himself to transfer the one-half of the schooner, *Wm. H. Merritt*,—consideration for this, 250*l.* It was agreed that plaintiff should assign, &c., to defendants, all and every matter, &c., connected with or belonging to said property, or necessary or required to give Tobin and Murison the full and absolute controul and ownership of the same, *so far as his rights and interests therein extended.* It was agreed that all the deeds, &c., to carry this arrangement into effect, should be completed, executed, and delivered, on or before the 1st day of August, then next.

In consideration of plaintiff's acknowledgment so to be due to Tobin and Murison the said sum of 11,500*l.*, and in consideration of satisfying the same in the manner aforesaid, and which arrangement Tobin and Murison bound themselves, and thereby agreed to accept in satisfaction and discharge of the said sum of 11,500*l.*: they did thereby acquit and discharge plaintiff of and from the said action so commenced in the Queen's Bench against plaintiff, Adams and J. Mittleberger, and of and from the suit commenced against plaintiff in this court; and from that time the same should be discontinued and cease. It was further agreed, that upon the completion of the deeds, &c., and delivery thereof, to fulfil the foregoing arrangement, defendants should execute a general release to plaintiff of all claims whatsoever upon him, except such as should arise out of the covenants, &c., contained in such deeds, &c. And it was further agreed, that the actions commenced in Q. B. against plaintiff, Adams and Scott, and against plaintiff respectively, by Mittleberger and Benham, should be discontinued, &c.; and that Mittleberger should release the same; and that Mittleberger and plaintiff, at the same time

that defendants released plaintiff, should execute mutual releases; and for the due performance of this clause on the part of Mittleberger, defendants thereby bound themselves. It was further understood and agreed, that such settlement should not extend, nor be construed to extend, to release any claim defendants might have upon Adams for any liability he was under upon his mortgage, executed to defendants to secure 2000*l.* and interest; nor was it to extend to release Adams from any covenant contained in the mortgage to S. Street, or the mortgage to defendants upon the mill property, but should include all claims for which Adams might be liable to defendants or to Mittleberger & Co. It was agreed that plaintiff should assign the lease of the said mills, then held by Woodward and Scott; and that possession of the said mills and other property, should be delivered by plaintiff, *so far as he could do the same*, on completion of the deeds, &c. Lastly, it was agreed, that each party should pay and bear his and their own costs and charges theretofore incurred; and that the expense of preparing and executing the papers, &c., on the part of plaintiff, should be borne by plaintiff, to which said articles of agreement were annexed by defendants or their agent, or with their or his consent, two lists or schedules, one being a list of the debts due to the Welland Canal Mill Company, on the 31st December, 1842, and bearing the following endorsement, namely, "The within debts to be transferred to Tobin and "Murison, per agreement, dated July, 1843. W. H. Merritt "to be accountable for Messrs. Adams and Scott not cancel-"ling the same, but subject to no further costs or liability." And the other being a list of sureties to be furnished by plaintiff in satisfaction of the sums of 2650*l.* and 300*l.*, mentioned in the agreement and headed to that effect, and containing the following memorandum subjoined, namely, "In "surety for 2950*l.*, if this sum is made out of the above within "three years, the residue will be restored to Mr. Merritt; "meanwhile, bonds and titles are to be made over by Mr. "Merritt, according to the annexed agreement, or Mr. Merritt "may reduce these sureties to the required sum of 2950*l.*, by "changes of the sureties, such as will be satisfactory to Mr. "Burns, according to the agreement. A letter is to be pro-

"duced, stating that properties on which the sums opposite "the names of Blackmoor, T. Merritt and Ingersoll, are to "be secured, are good securities for the sums named. In the "above amounts, the interest is included to 1st January, "1843, on such as were due." Which said lists, headings, endorsements and memorandum, were in the handwriting of defendants or one of them, or of their agent duly authorised.

That in pursuance and performance of the said agreement on his part, the plaintiff caused to be prepared the several indentures, &c., contained in a certain schedule, and his wife had released her dower; and had offered to deliver them to the defendants through Mr. Burns, their agent, and had also procured from Street the undertaking before mentioned, and delivered the same to the said agent, and had also offered to deliver in the same manner the bonds duly assigned mentioned in the indenture before set forth, and that the bonds were good and secured by lands being sold, and that the lands were ample to secure the amounts due; that he had also offered to deliver the mill books, and offered, so far as he was able, to deliver to the defendants possession of the property mentioned in the said articles, and had directed the tenants thereof thenceforth to pay their rents so far as the plaintiff was interested therein to the defendants; and further, that the plaintiff performed or offered to perform his part of the said articles in all other respects.

The bill charged that the defendants, through their agent (Burns) had accepted all the said indentures, &c. with the exception of the one purporting to convey the plaintiff's equity of redemption in the premises comprised in Street's mortgage, and which they refused to accept on the ground that it conveyed only three-fourth parts of the premises, less three-fourths of one-tenth, that being Scott's property; charged further, that the defendants, or their agents, had full notice of Scott's interest in the premises at the time of the execution of the articles; also, that on the 22nd of August, 1843, Burns, as the agent of the defendants, wrote to the plaintiff, requiring him to procure Mr. Street to add to a certain letter, written by Street, an undertaking to assign to such person as defendants should appoint upon payment, &c., which was done and sent

by plaintiff to Burns on the 6th of September,—that upon examining the bonds, &c., Burns, as such agent objected to three of them; but that upon plaintiff remarking that the whole amount of such bonds, by the agreement, was to be only 2,600*l.*; and the amount of those assigned was 3,300*l.*, the excess would compensate for any defects in the bonds so objected to by Burns (all the rest of said bonds having been accepted by him as such agent); he was satisfied with such suggestion of plaintiff, and waived his objections thereto and accepted the same, and all the other bonds, and thereupon handed to plaintiff a release—(said to have been afterwards signed by defendants)—and at that time it was agreed between plaintiff and Burns, that plaintiff should cause to be prepared a proper indenture for the assignment of said mill debts, which was done and forwarded to Toronto, and perused by Mr. Draper, one of plaintiff's counsel, and Burns, and accepted by Burns in the manner before mentioned. It was afterwards discovered that the lands mentioned in Reynold's bond had been conveyed to another person. Bill charged that although such was the fact, plaintiff had so conveyed by mistake, and had subsequently obtained a re-conveyance, &c.; also that Burns had transmitted a copy of the articles of 8th July, 1843, to defendants before execution, for their approval thereof; and that upon perusal and consideration thereof, defendants executed a general release from them to plaintiff, pursuant to said articles, and transmitted the same to Burns, to be delivered to plaintiff in fulfilment of said agreement; and that therefore the articles were ratified. Bill further charged, that negociations had been entered into previously to the execution of said articles between plaintiff, Adams and Scott, on the one side, and defendants, on the other, for the settlement of the matters in dispute: and that plaintiff and Murison had had several interviews in relation to such negociations, and that it was perfectly understood, that to any settlement that might be made, Adams and Scott were to be parties as well as plaintiff, and *thereby* defendants were to acquire the entire interest in the said mill premises; and that it was well known to defendants that Scott was interested in said premises, and that plaintiff had, in fact, communicated to

Murison that Scott was a part owner. That such negociations failed, and it was afterwards suggested to plaintiff by Burns, that he should make a settlement with defendants on his own individual account, apart from Adams and Scott, after which the said articles of 8th July were entered into; and that plaintiff caused to be introduced into the articles, after they had been drawn, the words, "*So far as the said W. H. Merritt can legally or lawfully do the same;*" the better to shew the individual nature of such setttlement, and the intention of plaintiff to deal only with what belonged to himself. That Burns led plaintiff and his legal advisers to believe that he had full authority to settle the matters in dispute between plaintiff and defendants in any manner he thought fit,—that Scott was in possession of mill premises jointly with plaintiff and Adams, and thereby Murison had notice that Scott was interested therein. That the deed of 23rd March, 1840, from plaintiff and Adams to Scott, was left with J. Mittleberger, and communicated by him to defendants; and that before execution of articles, the same was in possession of Burns. That during the negociations, the actions brought by defendants against plaintiff were suspended, and were not further prosecuted until after the disagreement occurred respecting the form of the indenture, releasing the equity of redemption, when they were renewed; also, that Burns, as such agent, had, on the 31st of August, 1845, written a letter to Mr. Boomer, of Niagara, directing in what manner the debts of the mill company should be assigned, what covenants to introduce, &c.

The prayer of the bill was, that it might be declared that plaintiff, by said articles, contracted only for the sale of his own interest in the premises; and that Burns had authority to contract therefor on behalf of defendants, in manner appearing by said articles, or that defendants recognised and confirmed the said articles, &c. If no such authority or recognition by defendants, so as to bind defendants to the full extent, then that said articles may be established, so far as Burns had authority, that articles might be specifically performed, and for injunction to stay actions, &c. &c.

Upon the facts disclosed in the amended bill, and the

answer to the original bill, the plaintiff moved for a special injunction to stay trial; the court, however, granted the injunction to stay execution only. The defendant Murison, by his answer to the amended bill, denied all knowledge of Scott's interest in the mill premises before the execution of the indenture of mortgage of 3rd March, 1843; and was only informed thereof during the pendency of the negociations for a settlement: he also denied that Burns had any authority to make the arrangement mentioned, except upon the terms of obtaining full and complete title to the mill property, and stated that plaintiff had agreed to arrange with Scott for the transfer of his one-tenth part of mill property, and therefore Burns refused to accept the release of Merritt's equity of redemption, with the clause reserving Scott's right: the same having been introduced into the conveyance after the execution thereof by plaintiff and his wife. The other material facts of the case were admitted.

Since the granting of the injunction, a verdict had been rendered in favour of defendants in the suit against Merritt and Mittleberger for 26,014*l.* 15*s.* 7*d.*, upon which judgment had been entered.

After Murison had filed his answer, and the judgment against Merritt and Mittleberger had been so entered, the defendants moved, that the injunction might be dissolved, or that the plaintiff should be directed to pay into court, the sum of 24,397*l.* 2*s.*, sworn by the defendants in their answer to be due, with interest thereon, or the sum of 26,014*l.* 15*s.* 7*d.*, being the amount of the judgment at law recovered by the defendants against Merritt and Mittleberger, with interest thereon; or that Merritt should, within fourteen days, give security for payment of said monies; or security for performance, by him, of the decree or order of the court.

The motion coming on for argument, *Blake* and *Vankoughnet* for the defendants, contended that the deed was clearly a deed of composition, and not one of compromise; and further, that according to the general doctrine laid down by courts of equity in England, the rights of a party in an action at law would never be interfered with, by injunction, without ordering

the amount of the demand when ascertained—either by a verdict or by the answer—into court, so that the plaintiff (at law) may be secured in his claim.

Amongst the cases cited for the defendants were :—Wynne v. Griffiths, 1 S. and S., 147 ; McKenzie v. McKenzie, 16 Ves. 372; Exparte Vere 19, Ves. 93; Stapylton v. Scott, 13 Ves. 425 ; Dally v. Catchlowe, 4 Price, 147 ; Goddard v. Sloper, 9 Price, 182; Playfair v. Birmingham, &c., Railway Comp. 9 Law Jour. 255; Meux v. Smith, 7 Jurist, 825 ; Potts v. Butler, 1 Cox. 330 ; Culley v. Hickling, 2 B. C. C., 182 ; Thornberry v. Bevill, 1 Y. and C., N. S., 556.

Sullivan, *Cameron* and *Esten*, for the plaintiff, cited Attwood v. ———— 1 Russel, 352 ; Leonard v. Leonard, 2 B. and B., 171 ; Hill v. Buckley, 17 Ves. 394 ; Graham v. Oliver, 3 Beav. 124 ; Allan v. Inman, 7 Jurist, 433 ; Clewes v. Higginson, 1 V. and B. 524, 15 Ves. 516 ; Binks v. Lord Rokeby, 2 Swans., 222 ; Hayward v. Greenwood, 7 Price, 537 ; Boehm v. Wood, 1 J. and W., 420 ; Lord Ormond v. Anderson 2 B. and B., 370 ; Hudson v. Bartram, 3 Madd., 440 ; Hearne v. Tenant, 13 Ves. 287 ; Halsey v. Grant, 13 Ves., 73 ; Seton v. Slade, 7 Ves. 264, 2 Story's Eq. Jur. sec. 776-7-8-9 and 80, and notes; Ramsbottam v. Gosden, 1 V. and B. 165; Flood v. Finlay, 2 B and B. 9.

THE VICE CHANCELLOR.—The general rule is sufficiently clear, that wherever there is a legal demand subject to an equitable defeasance, the court will not restrain the defendant, and try the equity without ordering into court the fund,—about which, at law at least, there can be no dispute ; as where there has been a verdict at law, or an award for a sum of money, or where the defendant has sworn by his answer that a sum of money is due to him. The cases on this subject appear to have arisen chiefly on applications to continue injunctions already obtained. On this subject, Eden observes : "The usual mode at present is, to order the money to be paid "into court, for which a reasonable time will be given, accord- "ing to the greatness of the sum or the distance of the party ; "this, however, will not be done where there is matter con- "fessed in the answer sufficient for a total relief."

That there is sufficient confessed in the answer to make it

clear that total relief upon that can be given, is not pretended. The question is, whether it comes within that rule by which clear legal demands are dealt with.

In the cases relied on in support of this application, the *legality* of the demand was admitted, and the very ground of the application to equity, as the only means of relief. The present case differs in this respect, that the legality of the demand has from the beginning been denied, except for a certain sum indirectly, as due from Merritt to Mittleberger & Co., the debtors of Tobin & Co., of which they could only become possessed through the circuity of an action by Mittleberger & Co.

The debt now claimed against Merritt, as a partner with Mittleberger, has been denied, and the character of a partner repudiated. That he had in fact made himself liable within the laws relating to partnership, I am informed, has lately been proved by a trial at law; with regard to the present question we can only look at the equitable relation in which the two parties had placed themselves in respect to each other, long previous to that trial.

However clear it may be, and I doubt not it is, that Merritt had, whether knowingly or not, made himself legally a partner with Mittleberger and Benham, I do not see, had this controversy been confined to a court of equity, how Tobin and Murison could have turned upon Merritt as *a partner* with Mittleberger and Benham, after dealing with him as *security* for that firm only, under an instrument which, to me, would have appeared imcompatible with the existence of a partnership, and limited the effect of Merritt's liability to the bond and mortgage. During the time of making the advances to Mittleberger and Benham, Tobin & Co. seem only to have looked to Merritt as security; and Merritt's taking upon himself such a character (had nothing further appeared in the case), would have been sufficiently explained by his desire to advance the prosperity of the tenants of his mills, raising no presumption of partnership.

Mittleberger and Benham fail; and Tobin & Co., probably on further information as to Merritt's liability as a partner, institute an action against him (it is unnecessary for present

purposes to introduce the name of Adams), for the whole amount due to them from Mittleberger and Benham. An action is also commenced against Merritt, by Mittleberger and Benham; a proceeding totally incompatible with their belief in the actual existence of any partnership between them, but which, however, proves nothing against an inference of a court of law upon premises laid before them. Merritt still denies his liability beyond the bond and mortgage given by him and received by Tobin and Murison, not as a partner with, but as surety for Mittleberger and Benham; and in this state of things—in this, then at least, doubtful state of each other's rights, an agreement is entered into "for a *settlement and compromise*,"—predicated on Merritt's liability to the extent of 11,500*l.*, acknowledged only "*on the following terms and conditions*," &c.

Here is anything but an unconditional admission of a legal debt; or proof on the other hand of being certain to establish one. This agreement to compromise a claim then questionable, and primâ facie *very* questionable, was in progress of being carried into effect by Merritt performing his portion of the contract: his being to convey, and theirs to receive.

For reasons which only apply to the decision of the merits of this case, the arrangement is not carried into perfect fulfilment,—each party to the contract attributing to the other the fault of the non-fulfilment. The one resumes his action at law; one part of the agreement respecting which was, that it was to be abandoned: the other applies to the Court of Chancery to restrain proceedings against the equity of the agreement. An injunction was granted not according to the application, which was to stay trial (and many cogent cases were cited to justify such a proceeding), but to stay execution. It is alleged that there is no equity confessed in the answer,—the strongest primâ facie equity appears in the fact of the agreement to compromise; whether or not Mr. Merritt has by his neglect forfeited the right to enforce that agreement is matter for evidence; it is sufficient for the purpose of supporting his case for the present, that it is not certain that he has.

It is contended that, by Merritt's own shewing he allowed such a time to elapse as deprives him of the benefit of an

agreement for a composition, on failure of any of the conditions of which, the creditor's full rights revert to him; but it is clearly not a composition, which is the acceptance of a part in lieu of the whole of an ascertained debt, but a compromise—to avoid litigation on a doubtful claim—a proceeding which has always been favourably viewed by the courts. The compromise of a doubtful claim is held a good consideration for foregoing a possible right. See Atwood v. ——, 1 Russell 353: a very strong case, in which the subsequent discovery of one of the parties' legal rights was not allowed to affect the validity of the compromise. The Master of the Rolls observes, in answer to the argument on the alleged want of consideration: "The compromise of such a claim entered into with due "deliberation, even if it were doubtful whether the claim was "such as could have been made effectual, is a sufficient con-"sideration, both at law and in equity, for such an agree-"ment." "The objection for want of consideration for the "agreement, has no more foundation than the objection which "proceeded upon the defendant's alleged mistake as to his "legal liability." That Tobin and Murison's claim to the full extent, as founded on an alleged partnership between Merritt, Mittleberger, and Benham, was then at least, a matter of doubt on their part, is I think, clear from the agreement, which is with a party recognized not to be a partner; for while they retain their rights against Mittleberger, they compromise with Merritt, and agree to give him a release in full. Now, a release of one joint debtor being a release to all, it is clear that their agreement was an undertaking not to proceed against him not as a partner; and if there were none of the suggested obstacles in the way, it would be difficult to say that this was not a case where the enforcement of specific performance would be decreed.

The injunction was, I think, rightly granted. The agreement to compromise appeared—no legal liability was admitted as the ground of relief on account of an equitable defeasance of such legal liability, and no specific debt was sworn to. To have ordered to be paid into court a large sum stated to be due from the alleged partnership of Merritt, Mittleberger and Benham, would have been to prejudge the question that there

was a partnership, for upon that ground only was any claim beyond the liability as surety ever set up. This question as to partnership, or no partnership, was purely a matter for a court of law; the *agreement*, which was in fact a waiver, *quoad hoc*, of the claim against Merritt in the character of a partner, presenting only this subject for inquiry to the Court of Chancery: the agreement being fair on the face of it, and entered into with due deliberation under the advice of experienced counsel—was there or not, in the conduct of Merritt, in obstructing the carrying out of such agreement, that which would induce the court to refuse a decree of specific performance. The mere fact of a subsequent action having proved the existence of a partnership, is no reason for now ordering the money to be paid into court; for the result of the cause may, by possibility, shew that the action was one which the parties had deprived themselves of the right to bring. It does not prove within the decision of Wynne v. Griffith, 1 Sim. and St. 147, that this ought to have been a condition on the compliance with which alone the plaintiff could have obtained his injunction.

With regard to the alleged impossibility of enforcing this agreement, from the fact that Merritt has it not in his power to comply with certain conditions contained in it, it is unnecessary, if not improper at this stage of the case, to enter minutely into the question, further than to remark that the difficulties are not so glaringly clear as to render Merritt's case hopeless. Had they been so, of course even the qualified injunction which he obtained would not have been granted.

It is *the intent* of the parties which, in all agreements, is to be carried out, if not literally yet effectually. Agreements to compromise are treated by courts with the same respect as agreements between vendor and vendee; and the rule is, that small deviations from the terms shall not vitiate a contract, where relief can be given in compensation.—Stapylton v. Scott, 13 Ves. 428. A party failing in doing that part of a contract which had been the *strong inducement* for the purchaser entering into it, specific performance will *not* be decreed; but when the question is simply of more or less, and the purchase-money can be reduced in proportion to the ascertained

diminution of the property, it has never been held a sufficient reason for rescinding a contract that the terms cannot be complied with to the letter.—Binks v. Lord Rokeby, 2 Swans. 222; the case of the purchaser of an estate, described as *tithe free*. Had the estate been found subject to tithes generally, the purchaser would not have been compellable to take it, for its being tithe free, might have been his inducement to purchase; but a portion only being found so subject (in this case it was 32 acres out of 140), compensation was decreed by an abatement of the price. He had in fact a *tithe-free* estate, only it amounted to 108, instead of 140 acres.

Two or three particulars are strongly relied on in the present case of deviation from the terms of the agreement when the same was to be carried into effect; as that an interest of one-tenth in certain mills, to be conveyed by Merritt to Tobin and Murison, was in fact the property of Scott; and that Merritt refused to execute the conveyance, unless Scott's share were excepted from its operation; and it is stated that Merritt undertook to have this matter settled with Scott—and why this was not promptly done does not appear. But it does not necessarily follow that this was a breach of the agreement on the part of Merritt, or that he could have any object in forcing Scott as a joint tenant on Tobin and Murison. This would have been plainly inconsistent with the agreement by lessening the amount represented by those mills in the compromise, different portions of property being taken, as forming an aggregate of 11,500*l.*; all of which were to be conveyed, of course, with all convenient promptitude. May it not be probable that Merritt might desire, on seeing the literal terms of the conveyance, which was not likely to have been drawn by his own hand, that Scott's subordinate interest in the equity of redemption of those mills, should be conveyed in a more regular manner; though it is not clear, looking at the contract between Merritt and Scott, that Merritt had not retained a right to encumber and deal with that portion of the mill property to meet the emergencies of the partnership then subsisting between Merritt and Adams, subject to consequent settlement between themselves.

Other objections were also urged, that certain bonds for

land purchases which were to be assigned, were not the identical bonds specified; and that the interest in another portion of the real property to be conveyed was not the particular estate described, but one of a different nature.

Now, what was the intent of this agreement? In terms that Tobin and Murison should have certain specified portions of Merritt's property assigned to them, each portion representing a certain sum, in the whole 11,500*l.*, to compromise a disputed liability. Did the having carried into literal operation these particular items of the arrangement, form "*the strong inducement,*" which led Tobin and Murison to enter into this agreement—or was it simply that various portions of the property should with all convenient speed be conveyed to them, of the full and admitted value of 11,500*l.*?

These questions may be of sufficient difficulty in Merritt's way to produce the dismissal of his bill; but they do not on the face of them bear such manifest importance; and for the purpose of this expression of opinion alone, I now refer to them, as they belong to the inquiry into the merits of the case, and not to the decision of this interlocutory motion.

Motion for payment of money into court refused, and security ordered to be given for the due performance of the articles of compromise by plaintiff, in the event of a decree to that effect being made. Costs to be costs in the cause.

[NOTE.—This suit was originally commenced by Merritt and Adams; but Adams—as above stated—having died, and the suit since that time having been carried on by Merritt alone, who had always been the principal plaintiff, it was not considered necessary to introduce the name of Adams otherwise than has been done.]

FRIDAY, DECEMBER 19, 1845.

Ex parte Detlor.—Re Detlor, a Bankrupt.

Where a trader had requested one of his creditors to sue out a commission of bankruptcy against such trader, and upon the promise of being afterwards paid his debt in full, the creditor sued out the commission, and the judge below had refused to grant the bankrupt his certificate: upon a petition being presented to the Court of Review, on behalf of the bankrupt, against the order refusing such certificate, the court refused to interfere.

This was an application by petition of the bankrupt, against an order of the judge of the Midland District Court (acting in bankruptcy), expressed in the following terms:

"*I do order that the bankrupt's certificate be not granted, as the "commission issued at the instance of the bankrupt, and with collu-"sion between him and the petitioning creditor.*"

The evidence of collusion was, the bankrupt's examination and the petitioning creditor's admission before the court below. The bankrupt, in his examination had stated, that not being able to make any arrangement with his creditors, he applied to one of them, who afterwards became the petitioning creditor, to take out a commission against him; and he promised to pay the latter in full, notwithstanding his certificate; but the petitioning creditor received no further security. The latter admitted the accuracy of this statement, and that he had not sued out the commission for his own benefit. The certificate was opposed before the commissioner by some of the creditors, on several grounds, all of which, except the one set forth in the order, were over-ruled. A copy of all the proceedings before the court below, had been returned to this court, and from these, amongst other things, it appeared that the petitioning creditor's debt had been proved and allowed; and that the bankrupt had given up to the assignees certain assets, as being all he had.

Mowat, in support of the petition.—Such a circumstance as that on which the judge below has founded his refusal in this

matter, could at no period, even in England, be taken advantage of to deprive a bankrupt of his certificate, though it constituted at one time a sufficient reason for superseding a commission. That was always the settled practice in England, and not a single case or dictum can be cited to the contrary. It is only for fraud, or grossly improper conduct, that a certificate is ever refused; and there is certainly no fraud or grossly improper conduct in an insolvent trader desiring, or even actively endeavouring to have all his effects divided among his creditors fairly and equally; and then to be relieved from further liability for claims which he cannot fully discharge, and the existence of which puts it in most cases out of his power ever fully to discharge them, even when he desires to do so. Our bankrupt act, (S. 60) points out specifically the grounds which disentitle a bankrupt to his certificate, or make it void if granted; and among these are not to be found either the reason now urged, or many other reasons, which however would be abundantly sufficient for superseding a commission. The good sense of a distinction in this respect is obvious. When a commission is superseded, the bankrupt and his creditors are merely restored to the position they occupied before the commission issued. When, on the other hand, a certificate is refused, but the commission acquiesced in by all parties, the creditors retain all the bankrupt's present assets, and are entitled to all he may acquire up to the day of his death; and the bankrupt is thus forever prevented from resuming business—so harsh a punishment can never be justified but by the grossest misconduct:—now, however, the objection stated by the judge is not good, either in England or Canada, even against a commission. By the English statute 1 & 2 Will. IV, c. 56, s. 42, it is enacted, "that no commission of bankruptcy shall be superseded, &c., "by reason only that the commission, &c., has been concerted "by and between the petitioning creditor, &c., and the bank-"rupt, &c." And this clause must be taken to be in force here, under the 75th section of our statute, which introduces the English law, "in all cases not otherwise provided for." The cases cited in the judgment below, were all before 1 & 2 Will. IV., and are therefore wholly inapplicable now. Again, in

Lower Canada, it is understood that the objection would not be deemed good; and how, without inconsistency and injustice, can there, on so important a point, be one law for Lower Canada, and another law for Upper Canada, and that under the same statute? By the insolvent debtor's act, 8 Vic. ch. 48, insolvent traders who failed before the passing of the bankrupt act, can obtain this relief from their debts, on their own direct and personal application, and though every creditor should oppose their obtaining it. And it is obvious that the provisions alluded to were introduced into that statute with the view of placing traders, who failed before the passing of the bankrupt act, in the same favourable position as that act had placed those failing afterwards; and not of placing them in a wholly different, and far more favourable position. Since the passing of this statute, the policy of the law cannot be deemed to require the slightest weight to be given to the present objection, even when urged against a commission, and not, as here, against a certificate. That cannot be taken to be a crime in those whose misfortunes did not reach their crisis till after the 9th December, 1843, which, and much more than which, is expressly sanctioned and authorised in those whose insolvency took place before that time. The principal English authorities in favour of an application of this kind to the Court of Review, are Ex parte Williamson, 1 Atk. 82; 2 Ves. Sen. 249; Ex parte King, 11 Ves. 417.

Robinson, J. L., contra, on behalf of certain creditors.—It is admitted that the law is correct as stated by the other side, so far as regards the changes that have been introduced, both in England and this Province, on the subject of concerted acts of bankruptcy, and concerted commissions. Under the old cases, and down to the year 1831, there is no doubt that mere concert between the petitioning creditor and the bankrupt, would be sufficient to supersede the commission. At that period the law was so far altered, that without fraud, or the proof of some act tending to the suspicion of fraud, on the part of the bankrupt, the commission would not be invalidated. The following cases under the amended laws of bankruptcy, viz., Ex parte Taylor, 4 D. & C. 125; 2 M. & Ay. 36. Exp. Edwards, 1 M. D. & D. 8; Exp. Caldicott, 4 D. 264; M. & C.

600 Exp. Lewis, 1 M. D. & D. 365; Exp. Clare, 4 D. 156, clearly recognize this distinction, and state, in so many words, that one must *now* look to the concert in connexion with the other circumstances of the case. In Exp. Taylor, 4 D. & C. p. 127, a case under the existing law, we find a commission superseded, upon the ground that the bankrupt had no property or assets to distribute among his creditors, and that his only object in getting his certificate was, to be discharged from his debts. And there can be no question, that where a promise is made by a bankrupt to a petitioning creditor to pay his debt in full, as a consideration for his taking him through the court and procuring his certificate, (unless it were clearly shewn that no money was to be paid by the bankrupt, out of the present assets, and even this fact would hardly remove the suspicion of fraud), the certificate would be refused; now, we have no proof here upon the affidavit filed by the petitioning creditor, that Detlor, the bankrupt, had any assets; and we have an admission throughout, that Detlor had made a promise to pay the debt of the petitioning creditor, and nothing to shew that the debt has not been so paid out of the bankrupt's present property, and of course to that extent the fund diminished out of which the other creditors were to be paid. And such being the case, it is apprehended that this court will not interfere with the order made by the commissioner. The fact of there being no assets shewn, coupled with the admission of a promise to pay the petitioning creditor in full, leaves such room for suspicion of unfair dealing on the part of Mr. Detlor, that this court can hardly be expected to say that the commissioner has not exercised a wise discretion in refusing the certificate; at all events, whatever may be the opinion of the court in this respect, it seems clear that it cannot comply with the prayer of the petition, in issuing an order to the commissioner to grant the certificate. All that this court can do, it is submitted, in the exercise of its jurisdiction as a Court of Review, upon this petition, is to state its opinion upon the petition, and refer the matter back with its suggestion to the commissioner, leaving it still discretionary with him to refuse the certificate if he thinks fit.—Chitty's Bankrupt Law, page 341. Then as to the objection that the grounds stated by the com-

missioner apply to the issuing of a commission, and not to the refusal of a certificate, it is apprehended that this court will see no good reason why the certificate should not be refused on these grounds, just as well as the commission. True it is, that in the books they are generally stated as grounds for defeating a commission, but it is nowhere laid down that they are grounds which can only affect the issuing of the commission, and must necessarily be excluded from affecting the cerficate; and without an express authority of this kind, there is nothing, in common sense or reason, to allow such an objection to prevail.

Under all these circumstances, he submitted, the petition ought to be dismissed.

Mowatt, in reply.—The two grounds on which the argument against this petition rests, are, it is submitted, inaccurate in point of fact; and, if true, would be unimportant. It is said there is no proof that the bankrupt had any assets at all, and no proof that he had not performed his promise to the petitioning creditor, by paying him in full out of his present assets to which his creditors were entitled under the commission. Now it was not necessary for the bankrupt to give any such proof to this court; neither objection was taken in the court below, and to avoid the necessity of going into the whole matter, the judge has, by his order, stated the sole ground on which he did refuse the certificate. The proceedings there, however, of which a copy is in evidence here, do shew that there were assets. That the petitioning creditor's debt was not paid out of the assets to which the creditors were entitled is clear, from the fact proved by these proceedings, that it has not been paid at all. It has been sworn to by the creditor, and allowed by the judge, and in this allowance all the creditors have acquiesced. The argument founded on a different state of facts, is therefore inapplicable; and the cases which have been cited, it is submitted, are equally so. In all of them there was positive proof of circumstances either establishing actual fraud, or giving ground for strong suspicion of fraud. All that is even urged here is, that fraud is not disproved. In all of the cited cases, there were no assets at all to divide among the creditors; in

some there were not sufficient even to pay the costs of working the commission. The bankrupts alone could by possibility receive any benefit from the commissions. And it is upon this circumstance that the judgments in them all rested. Mr. Detlor's promise to pay the petitioning creditor in full, out of subsequently acquired property, was not binding on him, and is not objectionable, such as payment would be, on account of giving undue advantage to the petitioning creditor, and could work no injury to the rest.

THE VICE-CHANCELLOR.—The petition of the bankrupt states, among other things, that he has made a full disclosure and delivery under the commission, of all his estate and effects, and in all things conformed himself to the provisions of the statute, and has so done to the satisfaction of the judge; that divers objections were made before the judge at the meetings for the allowance of his certificate, all of which, save the objection afterwards mentioned, the judge overruled; but he refused to grant the certificate; and by an order, bearing date the 24th November last, ordered that a certificate should "not be granted as the commission issued at the instance of "the bankrupt, and with collusion between him and the peti- "tioning creditor, on whose application the commission had "been issued." The petition prays that this "order may be "reversed; or that it may be declared that the reason for "refusing the said certificate was not, and is not, under the "circumstances, a good or sufficient reason for refusing the "same; and was not, and is not, sufficiently substantiated for "that purpose; and that the said judge may be directed to "grant such certificate, or to review his judgment in refusing "the same;" and for general relief.

When this petition was first brought to my notice, though I saw no power given to this court by the bankruptcy act to interfere with regard to the certificate, except to confirm it, or to cancel it, if shewn to have been obtained by fraud; yet, as it was intimated, that the certificate had been withheld by the commissioner upon the single argument that the bankrupt had himself been instrumental to the issuing of the commission, I did entertain the petition so far as this—that the commissioner should be requested to state the ground of his

refusing the certificate; not with a view of interfering with his discretion in the matter, but that if it should appear that such objections on his part were founded purely on the force of old decisions, and I should happen to differ with him as to their applicability to the present state of the statute law, I might direct that the bankrupt should have the opportunity of laying my reasons for so differing in opinion before the commissioner in order that he might reconsider his decision. This request was instantly complied with, the only desire on the part of the commissioner and the Court of Review being to settle a uniform understanding of the law.

The reasons assigned by the commissioner, are as follows:—

" Three objections have been raised to the certificate being " granted in this cause; the two last are not, in my opinion, " good, but the first is.

" This is clearly a case where, by agreement between the " petitioning creditor and Detlor, the latter endeavours to " procure his certificate with a view to get rid of old debts, " some of them judgment debts; any certificate granted, would " be void.

" The clause in the statute about concerted acts of bank- " ruptcy, does not apply here; the object of it being merely " to protect commissions issued when a trader has signed a " declaration of insolvency, with the knowledge of the person " who afterwards becomes petitioning creditor. The prin- " ciple of bankruptcy is not that merely the bankrupt should " be discharged from his liabilities, but that a corresponding, " or at least a certain benefit should accrue to the creditors.

" There is a clause in the English statute, the same as in " the Provincial, about concerted acts of bankruptcy, but still " it is held that a certificate granted under circumstances " similar to the present would be void(*a*).

" All commissions issued at the instance of the bankrupt " are void; and it is in evidence both from the petitioning " creditor and the bankrupt, that the commission was issued " at the request of Mr. Detlor. The fact of his promising

(*a*) Ex p. Grant, 1 G. & J. 17; Ex p. Brookes, Buck., 257; Ex p. Prosser, Buck. 77.; 14 Ves., 602, (ex parte Maule).

" to pay the debt of the petitioning creditor, although in " itself of no importance, corroborates this fact."

Now, had the commissioner merely returned, that he had refused the certificate because all commissions emanating from the bankrupt, in concert with the petitioning creditor, were void, and therefore, inasmuch as the commission in this case might be superseded, if any creditor took measures for that purpose, the certificate founded upon such commission ought to be withheld, I should have had no hesitation in saying that I differed with the commissioner, unless something more than that fact had appeared. The abstract law, as laid down in some of the old decisions—decisions expressly in accordance with the letter and spirit of the then existing acts of parliament—does not apply either to the letter or the spirit of the present law. In Ex parte Grant, 1 Gl. & J. 17, the rule is most rigidly pronounced, that a commission issued at the instance of the bankrupt, although conducted hostilely, and operating beneficially to the creditors, and although its supersedeas was in fact injurious, must nevertheless fall to the ground on account of its original taint; the law intending that every commission must be in its inception adverse to, and not for the convenience of the debtor; yet even under that state of the law, the Vice-Chancellor evidently yielded to the authority of decisions, rather than to his own conviction of what the expediency and good sense of the case required.

I say that if the objection of the commissioner had avowedly rested on this ground alone, I should have gone so far as to express an opinion that the rigid rule in Ex parte Grant, is now in a great measure obsolete; and that it is not under the present law a sufficient objection to the carrying out of a commission, and granting a certificate thereupon, that it shall have been proved that the bankrupt not only co-operated in, but was the instigator of the issuing of the commission, providing it is not for his ends alone that the proceeding be taken. On looking into the present case, no mere arbitrary acting upon any abstract opinion in accordance with the old law appears on the part of the commissioner, but a decision within the recent cases decided on the improved state of the statute law of England, which in all its essentials has been adopted here.

It appears from the proceedings, that not only was the commission obtained at the instance of the bankrupt, and under a promise to pay the debt of the petitioning creditor (which in itself, unless viewed as a sort of bribe to the petitioning creditor, is not much, as he has a right to pay any creditor out of property acquired after a certificate fairly obtained), but there are facts apparent which may easily be supposed to have convinced the commissioner, who had opportunities of seeing into the heart of this case, which I have not, and thus coming to a conclusion on better grounds than I can pretend to, that this was a commission concocted for the benefit of the bankrupt, in relieving him from his debts, and not for such relief *combined with the equal and beneficial distribution of his assets among his creditors.* Had this latter ingredient appeared prominent, there is no reason to believe the commissioner would have looked exclusively at the former. The disallowance of the certificate is not the mere arbitrary act of the commissioner. It is opposed by those whose claims to a large amount are not impeached as bona fide creditors; while there is something equivocal in the fact, that among the debts proved by apparently friendly creditors, are claims of such ancient standing, that in some the interest now exceeds the principal in amount. I think it more than probable, therefore, even from what appears before me, that the commissioner was justified in the present exercise of his discretion, even supposing the Court of Review had clearly on such a matter the right to control his judgment.

The decisions I allude to, are cases in the Court of Review, which merely by substituting "commissioner," (and consequently *certificate*) for "fiat," are precisely in point in principle; and whether they apply in fact to the present case, it is for the commissioner to decide.—Ex parte Clare, Re Glover.

Sir George Rose, after remarking that under the existing law a fiat could not be annulled for concert alone, adds, "But "then we may look to the concert, in connection with other "circumstances of the case. Neither am I disposed to dispute "the proposition, that any creditor may properly take out "a fiat to defeat an execution; *but then it must not be the bankrupt's fiat.*"

In Ex parte Taylor, 4 Deacon & Chitty, 127, Sir George Rose observes, "where a bankrupt has *no* property, and the "petitioning creditor, well knowing the fact, issues a fiat "against him, not for the purpose, of course, of any distribu- "tion of property, but for the purpose of enabling the bank- "rupt to obtain his certificate, and get discharged from his "debts without paying one farthing in the pound; in that "case, it is impossible to deny that the fiat is void on the "ground of fraudulent concert; for in order to render a fiat "good which has issued against a trader who has no property, "it ought, at least, to appear in evidence that there was some "prospect of property to be got from issuing the fiat. *The "question here is, whether besides the concert there is fraud.*"

MONDAY, 15TH DECEMBER, 1845.

BOWN V. WEST.

INDIAN RIGHTS—RESCISSION OF CONTRACT—COMPENSATION.

A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand River, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands: Held, that as the whole estate, both legal and equitable, was in the crown, it was not a case in which the court would interfere, even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to be dismissed with costs.

The bill filed in this cause stated, that in the early part of the month of September, 1843, the defendant, "*pretending to "have, and representing himself as having a leasehold or some "valuable and transferable estate or interest of and in the parcel "or tract of land and premises hereinafter particularly described, "and as being entitled to the possession, and as being in fact in "possession thereof, agreed with the plaintiff to sell him, and the "plaintiff agreed to purchase for the sum of* 265*l.*, *all the said "estate, right, title, interest and possession of him, the said defend- "ant, of and in the said parcel or tract of land and premises; "which said parcel or tract of land and premises consists of about* 134 *acres, whereof about* 70 *acres are cleared and improved, in "the vicinity of the town of Brantford,*" being, &c., and described, &c.

That the treaty for the sale was carried on by plaintiff's agent. That plaintiff had paid 112*l.* 10*s.*, and given a note of hand for the balance of the purchase money agreed upon.

That after execution of assignment, and the delivery of the title deeds, &c., to plaintiff, and a notice to the tenant of defendant to pay rents to plaintiff, plaintiff's agent had gone to the premises with the defendant, and found them to agree in quantity and extent of improvements with the representations made by defendant, and was put in possession of a tavern on the premises, and believed such partial possession was given as and for possession of the whole parcel of 134 acres; and it was not till some days afterwards that plaintiff, for the first time, learned from the person in possession of the tavern, that the defendant had not been entitled to the possession of the whole tract of 134, *but had a valuable and assignable interest* in 30 acres only, or thereabouts, and had in fact been in possession of that quantity only,—which information he found upon enquiry to be correct, and thereupon saw defendant, and proposed to rescind the contract, &c., which defendant refused to accede to; but it was afterwards verbally agreed between plaintiff and defendant, that plaintiff should retain possession of the tavern and 30 acres of land, of which he was in possession, with liberty for defendant at any time within two years to repay the sum of 112*l.* 10*s.*, and re-possess himself of lands, &c.; and that defendant should forthwith deliver up the note given by the plaintiff for the balance of the purchase money; but if the defendant should fail to repay the said sum of 112*l.* 10*s.* within the period of two years, that then the plaintiff should retain possession of the said premises without further consideration beyond that sum.

That defendant had refused to give up the note without a bond from plaintiff for the due performance of his part of the agreement; which plaintiff went and had prepared accordingly; but on his return with the bond, he found the defendant had gone away, and from that time further negociation ceased. That the sum of 112*l.* 10*s.* paid by plaintiff, on account of purchase money, was more than the portion of the premises which plaintiff had been put in possession of was worth.—*To be continued.*

THE

UPPER CANADA JURIST.

IN CHANCERY.

IN REVIEW.

MONDAY, 15TH DECEMBER, 1845.

BOWN V. WEST.

(Continued from page 288.)

The bill charged that the defendant had commenced an action against plaintiff for recovery of the amount of note—that defendant, at the time of entering into the agreement, knew that he had not any valuable or assignable interest in the whole tract of 134 acres, and that he had not in fact, nor was he entitled to have the possession of a greater portion thereof than 30 acres, or thereabouts; and that the defendant had induced plaintiff to enter into the agreement by misrepresentation or suppression of the truth and matters within his knowledge.

And plaintiff submitted that he was entitled at his election to have the contract wholly rescinded, or carried into effect, so far as defendant could do so, with abatement of purchase-money, &c.; and prayed that the contract might be rescinded, and defendant ordered to deliver up the promissory note of plaintiff, and pay all costs, &c., incurred by plaintiff in respect of the contract and the action at law. Or, if plaintiff should elect to have the contract carried into effect, so far as defendant could execute it, then a reference to the master to enquire what compensation plaintiff is entitled to, in respect of the

difference in quantity between the parcel of land comprised in the agreement and the portion thereof in which plaintiff had actually acquired an interest from defendant; and if it should appear upon such enquiry that the defendant had received more than the value of the interest and possession so acquired by the plaintiff, then that defendant might be ordered to repay such excess, the plaintiff offering to pay such further sum, in addition to the sum of 112*l.* 10*s.*, as might appear just. That the defendant might be ordered to deliver up the note of hand given by plaintiff, and for injunction, &c.

The defendant by his answer set forth, that about the year 1843, one W. Parker was in possession of 15 or 20 acres cleared and improved land near Brantford, (part of Indian tract), with a house thereon. And about that time, defendant entered into treaty with Parker for the purchase of his right to the said dwelling-house and parcel of land, who produced to defendant in course of such treaty, as evidence of his title, certain instruments in writing, signed by one Isaac Duncombe, one of the Six Nations Indians, resident on the Grand River tract, whereby Duncombe conveyed, or assumed to convey to Parker, for a valuable consideration, all his (Duncombe's) *right*, *interest* and *possession* to the said dwelling-house and the land thereto adjoining, containing 134 acres, more or less, as surveyed by Lewis Burwell, Esquire, D. P. S., including the improved land adjoining the house, and was the same as mentioned in the bill.

That defendant then understood and believed, that by taking an assignment from Parker, to himself, of the said instruments of conveyance, and entering into actual possession of the said dwelling-house and the cleared land adjoining, he (the defendant) would acquire a right to keep possession not only of the dwelling-house and cleared land, but also a right to enter on the remainder of the said tract of 134 acres, and take actual possession thereof, by clearing and fencing it. And under such impression, and being satisfied with Parker's title, defendant purchased his interest in the premises for 125*l.*, and took an assignment in writing of the said instruments of conveyance, and was put into possession of the dwelling-house and cleared land adjoining thereto, and so remained in pos-

session until the sale to the agent of plaintiff; and while so in possession, defendant cleared and improved about 15 or 20 acres more of the said surveyed tract of 134 acres, and fenced the whole clearing of about 35 acres, and built thereon a tavern and out-houses.

That in September, plaintiff and Robert R. Bown (the agent of plaintiff), waited on defendant, and offered him $1000 for the premises aforesaid; which offer was declined by defendant; but afterwards on the same day he left word at residence of said R. R. Bown, that he would take $1100. Next day, R. R. Bown stated to defendant that he would give $1060 in cash, if defendant would give possession on the morrow. That defendant had taken the writings, including the conveyance from Duncombe to Parker and the assignment thereof to defendant, and exhibited them to R. R. Bown, who examined them and expressed himself satisfied therewith. That during the treaty for sale, and before the completion thereof, defendant had observed to R. R. Bown, that he supposed he (Bown) was aware of the nature of Indian lands; and that Bown had replied he knew all about it as well as he (defendant) did, and that defendant had stated that he would put him in possession of that part of the premises that was under fence, and the buildings; but for the woods, meaning all the rest of the said tract, Bown must look out for himself, who expressed himself fully content on that behalf to rely on the said papers of defendant. That thereupon an assignment was drawn up and executed, and part of purchase-money paid, and note of hand given for the balance.

That next day, defendant had gone to the premises with R. R. Bown, and took him over the tavern, out-houses and cleared land thereto adjoining, and gave him possession thereof, being under fence, and containing about 35 acres, and then told the said R. R. Bown that what was under defendant's fence, meaning the said 35 acres, he gave him possession of, but as to the rest of the said tract of 134 acres, he (Bown) must look out for himself, and that defendant knew nothing of it: and that Bown replied, that he knew that.

That before leaving the premises defendant had stated to plaintiff that he had sold the place, meaning the premises,

too cheap; and offered Bown to return the note of hand, if he would give defendant four years to repay the amount of cash (112*l.* 10*s.*) paid to defendant, and defendant would allow him (Bown) to hold the premises in security; to which Bown replied that he never made "children's bargains." Defendant denied having agreed to rescind the contract as in the bill stated.

That about two months after the completion of the sale, R. R. Bown had stated to defendant that he (Bown) could not hold as much land as the lease specified; to which defendant replied, that he could not help it, that he had sold it for better or worse, as it was, and that he had not sold any land, but only the right defendant had under the papers; that R. R. Bown then expressed his readiness to accept the offer formerly made by defendant to rescind the bargain, &c., but defendant declined to accede thereto, as Bown had not accepted such offer at the time, &c. That the premises in the actual possession of plaintiff, were worth the full amount agreed upon (265*l.*) The answer also denied all knowledge by defendant of the badness of his title, and all misrepresentation, &c.

R. R. Bown, and some of the members of his family who had been examined as witnesses on the part of the plaintiff, stated in their depositions, that at the time of making the bargain respecting the sale of the premises in question, defendant represented that he had about 130 acres, about 70 of which were cleared, and had produced a map of the premises in question.

R. R. Bown also stated, in his evidence, that before the note became due, he had accompanied defendant to the land to take possession in the name of plaintiff, and walked round the boundaries with defendant; that he then thought part of the land on which defendant took him, was not his, and for the first time found he had been deceived by defendant; that part of the land on which he had been taken, was improved land, and ascertained afterwards that it was not the property of defendant; that defendant, in offering to sell, did not pretend to sell the fee-simple, but merely the right he had under his deeds to Indian lands; *that he never had any conversation*

with Mr. Burwell respecting the purchase from defendant; that when defendant put him in possession of the premises, *he did not give him possession of* 30 *acres alone, informing him that he must look out for himself for the rest, nor did the witness reply that he knew it*; that defendant, at the time, professed to give possession of land which was found to belong to another person; that defendant never made the proposition for rescinding the bargain and repaying the purchase-money in four years, the only proposition to that effect was made by witness, and that he never had made use of the expression, "*that he never made children's bargains*;" and that after a document (in evidence) for the purpose of rescinding the contract had been prepared by Mr. Lewis Burwell, according to the mutual agreement of all parties, defendant refused to sign it.

Other witnesses proved that defendant had stated that he had sold his right or interest in 134 acres to plaintiff; that defendant had never lived on the premises; that upon being told that plaintiff had said that defendant had only 30 acres, defendant answered that he had only sold his right to the land in question; that defendant had said that there was not the quantity of land he had proposed to sell.

On the part of the defendant, Mr. Lewis Burwell stated he had surveyed the premises in question, and the value of them, if held in fee-simple, would be above 500*l.*; that defendant, so far as he knew, had never been in possession of the whole tract, but only of 33 or 34 acres—the remainder, for the last 20 or 30 years, had been in possession of one Tuttle and his representatives. Tuttle's possession was held under a lease from a number of the chiefs and others of the Six Nations Indians. That about the time of the execution of the assignment to plaintiff, R. R. Bown had gone to witness's office, and employed him to draw up a paper between the parties to this suit—could not recollect whether such paper was prepared at the time—but R. R. Bown told witness that he was about to purchase in the name of his son (the plaintiff), the possession of the defendant of the said premises; and that witness then told him that defendant could not sell more than 33 or 34 acres, and that the remainder was in the posession of Mrs. Patterson, formerly Mrs.

Tuttle, and one Johnson; that witness told him that defendant had had a trial before the magistrates with Mrs. Patterson and her husband, for an alleged trespass in respect of the premises, in which defendant had failed, the former having established their possession; and stated to him that Wm. Parker had been deceived in purchasing originally from the Indian, Duncan, and advised Bown to take an assignment of what defendant had in his possession; to which Bown answered, that the defendant had made him acquainted with the circumstances, as stated to him by witness, and that he was only purchasing the quantity that he was in the actual possession of, but would take an assignment of his interest in all that Parker's lease covered, and perhaps he might be able to get it; and that he considered the part he was purchasing and getting possession of, was worth the money he was paying for it, as it lay so near the town of Brantford. That on a subsequent occasion, about the 18th or 19th September, 1843, R. R. Bown stated to witness that he wished an alteration in the contract with defendant, and employed witness to draw up an instrument for that purpose; and that he had subsequently, at the request of the plaintiff, made a survey of the lands in question, the object of the plaintiff being to ascertain the precise quantity of land the defendant had put him in possession of, and desired the plan also to embrace the lines contained in lease from Davids or Duncan (the Indian), to Parker.

Abram Bradley.—Owns the farm adjoining the premises in question. In selling Indian lands, a quitclaim deed of the right of the seller is usually given—such seller being in possession of the land, and entitled, or supposed to be entitled, to a right of pre-emption,—leases were often made to embrace more land than was under improvement, *but not more than the seller claimed.* Defendant was in actual possession of about 34 acres, with buildings, &c. Witness had conveyed to defendant, and informed him at the time of doing so, that the person who had conveyed to witness, he (witness) had been told, had conveyed only 34 acres. Witness knew nothing of the possession or claim of any one to any other part of the 134 acres. R. R. Bown had been engaged in purchasing Indian

properties—had bought three. Witness, when he held the deeds of the premises in question, had told R. R. Bown that he owned them and the farm adjoining, and that witness had 80 acres in the farm, and 34 in the premises in question—had pointed out to R. R. Bown the line fence between the premises in question, and those of one Paterson. Annual value of the 34 acres and buildings, about 36*l*.

At the hearing of the cause, the counsel for the plaintiff submitted, there could be no doubt that the bill asserts that the defendant professed to sell the right of posession of one hundred and thirty four acres, or thereabouts, and there is no principal clearer than that the plaintiff had a right to that possession; no matter if it were only a possession at will, still for that possession he had bargained with the defendant, and was entitled to obtain it. Had the contract been concerning the sale of a fee simple, the authorities are clear to the point, that if the vendor is aware of any material defect in his title, and conceals such defect from the vendee, the latter will not be held to the sale; and a party purchasing only the possession, would also be entitled to come to this court to rescind a contract concerning the sale of such possession on the ground of such fraudulent concealment; in the present case there can be no doubt of such concealment, for the defendant himself has not even denied, but shows clearly, that he concealed the defective nature of his title. The only question for enquiry being, whether or not the defendant was aware of such defect in his title at the time of entering into the contract, on this point the evidence given by Mr. Burwell is clear to show, not only that defendant never had had possession of what he professed to sell the plaintiff, but also, that in certain proceedings which had been had against West, the right of Patterson to certain portions of the premises had been established.—Citing Besant v. Richards, Tam. 509; Winch v. Winchester, 1 V. & B. 375; Partridge v. Usborn. 5 Russel, 195; Edwards v. McClay, Cooper, 308; Dobell v. Stevens, 3 B. & C. 625; Hill v. Bulkley, 17 Ves. 394; Balmanno v. Lumley, 1 V. & B. 224; Milligan v. Cooke 16 Ves. 1.

For the defendant, it was contended that the bill did not

state, nor did the evidence shew with any precision, in what respect the title of the defendant was defective.

The statement in the bill was too vague and general, it should have set forth the custom of the Indians to sell certain portions of the lands set apart for their use, which the crown, of its mere grace and favour, had been in the habit of recognising, and granting a patent of the lands so sold to parties holding the conveyances from the Indians.

There is nothing shown, either in the bill, answer, or depositions, upon which the court can found any decree.

The bill also calls upon the court to make abatement, on the ground, that the plaintiff has not possession of the whole of the premises in question; but it does not appear that the plaintiff here has not a right to apply to the government for a grant of the whole tract originally conveyed by Duncombe, and the court will not presume that such right would not be recognized by the crown. The instrument *(a)* which the defendant had executed, itself shows that the possession was not what was agreed to be sold, but it was intended merely to assign the leases under which the defendant claimed, and all interest that he held in the lands under such leases.

The statements made by the bill are not supported by the evidence; there is no absence of the land mentioned and described in the several assignments, the title is admitted by the bill to be good for thirty-four acres, and there is nothing stated in the bill to show that any other person had a better right than the defendant to the remainder, nor is any person shown to be in possession. The plaintiff and his agent both resided near the premises, and must have been aware if any person had been in possession of the rest of the tract, and he also knew that defendant had a claim to the whole; that claim he had purchased, and such as it was, it had been assigned to him. There could not, therefore, have been any misrepresentation made by the defendant, and if any had been made, it was clear that the plaintiff could not have been prejudiced thereby, for the evidence shows that it had been previously mentioned to the agent of plaintiff.—Citing E. India Compy.

(a) Set out in the judgment of the court.

v. Henchman, 1 Ves. Jr. 287; Cressett v. Mytton, 1 Ves. Jr. 449; Serjeant Maynard's case, 1 Sug. 555, 8, 9, 62 & 3 (9th Ed.); Early v. Garrett, 4 M. & R. 687; Thomas v. Powell, 2. Cox., 394; Cann v. Cann, 3 Sim. 447; Bree v. Holbeck, Doug. 654, Free. 2; But. note 1, Co. Litt. 34. a.; Cator v. Lord Bolingbroke, 1 B. C. C. 301, 2 ib. 282.

Blake and *Brough*, for plaintiff.

Sullivan and *Eston*, for defendant.

Tuesday, 13th January, 1846.

THE VICE-CHANCELLOR.—This is a bill to rescind a contract for sale; or to decree compensation by an abatement of price proportioned to the difference in the quantity of land comprised in the agreement, and the portion in which the plaintiff considers that he has actually acquired an interest.

Among some conflicting evidence which, according to my view of the law, it is not important to sift or decide upon, the main facts of the case I take to be as follows:

On the 10th of March, 1834, a sale is made from Isaac Davids alias Isaac Duncan, an Indian of the Mohawk tribe, in consideration of 50*l.* to one William Parker, of "all and "singular certain improvements and buildings lying and "being situate on a certain parcel or tract of land which is "composed of part of the Indian territory on the Grand River, "bounded as follows, &c., containing one hundred and thirty-"four acres;" with the form of a covenant, "that he the said "Davids is the true, lawful and rightful owner of all and "singular the said improvements and buildings, according to "the custom of the said Six Nations Indians in apportioning "and settling the lands amongst each other."

After various assignments of the right, whatever it may be, to these improvements, it vests in the defendant Alder Baker West. What improvements existed at the time of the sale from the Indian, does not appear: but at the commencement of the suit, somewhere about 34 acres had been cleared and fenced, partly by the defendant, and a tavern built upon the land on the road between Brantford and Hamilton.

The next important document, dated 11th September, 1843, is as follows: "Know all men by these presents, that I, Alder

"Baker West of the town of Brantford, &c., blacksmith, for "and in consideration of the sum of £265 of &c., to me in "hand paid by John Young Bown of the same place gentle- "man, the receipt &c., hath granted, sold, assigned and set "over to him the [said] John Young Bown, his heirs and "assigns, all and singular my right, title, claim, possession "and demand whatsoever, in and to the annexed assignment "or quit claim from John McDonald to [*the said*] Abram "Bradley, and from the said Abram Bradley to the said Alder "Baker West, and to have and to hold the same unto the said "John Young Bown, his heirs and assigns, &c."

Together with this, all the previous transfers, each assigning the rights supposed to attach to its predecessor, were handed over to the plaintiff. Part of the purchase money was paid, and a note given for the remainder.

After somewhat hastily, as it might seem, concluding this transaction, the plaintiff examined the land described in the instrument from the Indian, and had reason to believe that the amount which he states that the defendant represented himself to be in possession of, was not near so much as he had stated. Indeed it is not pretended that the portion fenced and cultivated in the visible possession of the defendant or his tenant, much exceeded thirty-four acres; the rest was in a great measure forest land undivided by enclosures. He discovered, it appears, that there was some conflicting claim to a portion at least of the enclosed lands, originating in a similar source from which sprung that of the defendant. As to what these claims are, or to what extent, or how indicated on the land, we have no evidence whatever, except from one of the defendant's witnesses, Mr. Lewis Burwell, who states that the portion not cleared and possessed by the defendant, had long been in the possession of Stephen Tuttle and his representatives. He says, "Tuttle's possession was, "I believe, under a lease from a number of the chiefs and "others of the Six Nations Indians." What Mr. Burwell meant by possession, does not appear. On the small plan drawn by him, and referred to in the evidence for the plaintiff, the name "Tuttle" is inscribed on land adjoining, but forming no portion of this irregular block of 134 acres.

On this the plaintiff, after some unsuccessful negotiation with the defendant, files his bill for relief in this court.

If the bill itself were alone to be viewed as the statement of an alleged case of equity, it would present this state of facts only: That one party sells, and the other purchases the right to the possession of Indian, that is of Crown Lands, such right of possession never having been out of the Crown, but specially appropriated to the use of the Six Nations Indians, under the proclamation of Governor Haldimand. The nature of this tenure by the Indians, and their incapacity either collectively or individually to alienate or confer title to any portions of such lands, might have been sufficiently plain, even though the point had not been raised in Doe Jackson v. Wilkes, (*a*) and the whole matter maturely and lucidly considered and decided on by the Court of King's Bench.

There is one fact however, which if it had been stated in the bill, and the present averment in the bill proved, would have shewn that the plaintiff might have had a sort of possible contingent title to the land in question, supposing the defendant's rights had been such as he contracted to sell; which is, that in settling the lands of the Indians, surrendered by them to the Crown for sale and settlement for their express benefit—using the word surrender merely as meaning that their express concurrence is in such case given, and that the alienations by the Crown are not against the faith of Governor Haldimand's proclamation—where in many cases, (putting the Brant Leases out of the question), individual Indians had assumed separate apportionments of these lands, and made improvements, and then sold them, the purchasers have, where the transactions bore evidence of bona fides, been generally preferred in some cases I believe even to the extent of having free grants: the Indians themselves in these cases having by their custom sanctioned such alienations, being compelled to do equity. This practice however is the exception; the general rule having been to consider sales of lands or exclusive local rights by individual Indians, as a fraud upon the whole body, for whose use it was set apart.

(*a*) Easter Term, 5 Wm 4.

This custom or equitable practice in the Crown Land Department, however, has not been alluded to in the bill; neither is it attempted to be shewn what is "the custom of the "Six Nations Indians, in apportioning and settling their lands "among each other," as referred to in the instrument which forms the ground-work of this claim; and it is only on knowledge dehors the pleadings, that we can understand any thing like an approach to a right to the land in question. But for the benefit of the plaintiff, I choose to allude to the fact as within my own knowledge instead of binding him down to the uncertainty of his bill. On the face of it, there appears simply a case of parties calling upon the court to deal with a contract affecting property, on both hands confessedly belonging to a third party, and assumed by them without that party's consent or concurrence—merely self-constituted rights—the real owner a stranger to the transaction. Had it been competent to a party joining in such an agreement, to say that his own act was not a contract, and that the bargain in which he was concerned was one which could not be supported in equity, the bill would have been demurrable: but as he cannot demur, it is for the court to do it, if it sees clearly that it ought not to entertain jurisdiction in the matter. If this be a contract such as a court of equity can deal with at all, it must be reciprocal,—one which it can enforce as well as rescind. But how could the court enforce such a contract as this, and (supposing the alleged counter claims or rights of other lessees out of the question,) decree that the defendant shall put the plaintiff in *possession* of the excess of 134 acres of Crown lands beyond the 34 of which he is, as was the defendant before him, in the visible possession and occupation? I cannot comprehend how any possession of the unsurveyed lands of the Crown can be had even by implication, except by the actual clearing, fencing or cultivation of a particular spot, which to strangers would afford a presumption of the right of possession. But the court can never decree possession to be given of property which each party has admitted and shewn belonged to neither.

It does not appear clear that, beyond the 34 acres in the visible possession of the defendant, any part of the 134 acres (the *improvements* upon which, not the *land*, were assigned by

the Indian Davids or Duncan,) has ever been enclosed or cultivated; or that there is any tangible or manifest possession in the person or persons alleged but not proved to have claims thereto, inconsistent with those assigned by the defendant to the plaintiff, nor is the nature of these suggested claims set forth: nor, assuming that they were such as the Crown would entertain, whether they were anterior, or in any respect paramount to those of the defendant at the time of the assignment. The objection is taken chiefly from Mr. Burwell's evidence that the defendant was not in possession of the whole, but that one Tuttle or his representatives had certain anomalous claims or rights such as those relied on by the defendant: but as already remarked, no evidence is produced that there was any visible possession known to the defendant, and such as might have put the purchaser even of such a claim as this upon his guard, had he taken common precaution.

Giving then the benefit to the plaintiff of having stated in his bill the custom of the Indians and practice of the Crown in its land-granting department, by which peculiar favour has been in certain cases shown to purchasers of Indian rights by free grants or privilege of pre-emption, it does not appear that the plaintiff ever tested the goodness of the claim he had purchased, by applying for a recognition of it by the Crown, and for a grant of the land upon any conditions;—for however weak his title is, there is no proof that any but the Crown has a better. He knew that he was purchasing that which could only be valuable on the contingency of the Crown confirming it, and yet he himself obstructs the happening of that contingency. It may turn out to be that the assignment from Davids or Duncan of his improvements, however small they may have been compared with the tract of land they profess to carry with them, may be favourably viewed by the Crown, and the claims stated to be in conflict with it not so; in which case it will probably be a very beneficial purchase, for its value if confirmed by grant, is stated to be very much beyond what was to be paid for the right such as it exists.

In the absence of direct decisions, and referring to first principles and a supposed analogy to English decisions on

questions of Tenant-right, I did entertain jurisdiction in the case of Jeffrey v. Boulton, in dealing with equities arising between parties in relation to claims to property, the absolute right to which was still in the Crown. But that was a very different case from the present. There the possession had for a long period been by its own act out of the Crown, first under a lease, and then under a contract for sale and payment accepted; a contract it is true not enforceable, for it is a legal impossibility that the Crown can violate its contract. It appeared to me that under such a partial or inchoate alienation of Crown lands, there might arise tangible rights between parties interested in such lands that would be recognized by the Court of Chancery, and enforced *inter se*, though the patent had not yet issued from the Crown. The Court of Appeal however thought otherwise: and probably by their decision have prevented the court from straying beyond the legal landmarks to grasp at moral subtleties. In the present case there is no recognized possession out of the Crown, except the occupation of the Indians, who cannot alienate; and as no equitable title can be discussed, except as between the equitable and at least *apparent* legal owner; and as in this case the legal owner is the Queen, I cannot settle claims affecting her lands between parties who are in a manner co-trespassers, or make any decree upon this bill.

The second alternative of the prayer of course falls to the ground. If the contract cannot be enforced or rescinded in the whole, it cannot be enforced or rescinded in part.

Notwithstanding my unwillingness to assume jurisdiction in this case, in relation to the subject matter of the suit, I should have no hesitation in so doing as regards costs, had those charges been well substantiated which impute fraud and misrepresentation to the defendant; as to the nature of the property, or rather the chance of acquiring property, sold, I do not see clear evidence of such fraud. He is charged with selling "a transferable interest," whereas he had not in fact any such interest. Such interest as he had, was apparent upon the face of the papers, and was clearly understood by the plaintiff; even setting aside that part of Mr. Burwell's testimony which shews that he cautioned him with regard to

the defendant's questionable claim to any part of the 134 acres, except the portion which he had in his manifest possession and occupation. That this claim had been treated as a transferable interest is clear, for it had not only passed through several hands, but had actually been sold at sheriff's sale under an execution. The instrument of sale itself already quoted, drawn by the plaintiff, only professes to convey the defendant's right, not to the land, but to *the several quit-claims*, on the evidence of which there rested the hope of acquiring the land. He must be intended therefore, were there not direct evidence of the fact, thoroughly to have understood the nature of the right he was purchasing. The defendant is a man in a humble sphere of life, and there appears no reason to doubt, believed in the efficacy of the evidences of title he was assigning: the plaintiff, a man in a superior grade, from his intelligence perfectly aware of the nature of the right he was purchasing properly called, "an Indian title," —his agent and relative residing near the spot, with abundant facilities before entering into the bargain of ascertaining facts of which complaint is now made of concealment and misrepresentation,—buying too at a low price compared to the value of the land itself, from which may be inferred, that the purchase was not unencumbered with difficulties. There is no reason to doubt that the defendant thought he was selling him all he professed to do, and if it be found that obstacles exist to the plaintiff's urging his claim upon the Crown, I do not see that they arose or were concealed by the fraud of the defendant. This question has relation only to costs. If fraud were to be inferred, I could only have dismissed the cause generally—but as it is, I think the defendant has been erroneously brought before the court, and must be released with his costs.

Bill dismissed with costs.

SATURDAY, 15TH DECEMBER, 1845.

WRIGHT v. HENDERSON.

EVIDENCE—PLEADING:—Where a party filed a bill to set aside a deed on the ground of fraud: Held that evidence of particular acts of fraud, although not charged in the bill, was admissible.

And where a part of the consideration for the deed sought to be set aside, was a promise on the part of the grantee to make a lease for life of certain lands to the grantor, the bill prayed a specific performance thereof, and the defendant without making discovery of the circumstances, pleaded to so much of the bill generally, that there was not any contract: Held that a plea in that form, intended as a plea of the statute of frauds, was insufficient.

The bill filed in this case was for the rescission of a deed obtained, as alleged by the bill, under circumstances of fraud and misrepresentation. [The nature of which is set forth in the judgment of the court.]

The defendant, by his answer, admitted the execution of the conveyance by the plaintiff, in the manner set forth in the bill, but denied any fraud &c., in obtaining it. And as to so much of the said bill as seeks to have any discovery of all and any or either of the deeds, &c., touching the premises in the township of York, or seeks a discovery of defendant's interest, &c. therein, "He doth plead "thereto; and for plea saith he did not at any time promise "the said complainant that he would give complainant a lease "for life, or any other term, of fifty acres of land, or of any "land in the said township of York, with the improvements "thereon &c., all which matters and things this defendant "doth aver to be true, and pleads the same to so much of the "said bill as is hereinbefore pleaded to, and humbly prays the "judgment of the court, whether he ought to make any fur- "ther answer to so much of the said bill as is hereinbefore "pleaded to."

One of the witnesses called on the part of the plaintiff,—Thomas Burnett — in his depositions stated that, "*In July, a "year ago,* [1843] *the defendant asked me to take over to the United "States a deed of* 400 *acres of land in the township of York, and "to get it executed by some one, any person whomsoever I could "get to sign it as a lawful heir. He took me upon the land, and "shewed it to me. I do not remember the number of the lots.* "Defendant promised me £20 if I should go; he told me the

"name of the heir or heiress, it was ——— McDonald; he "wished me, after getting some one to execute the deed, to "testify to the execution, in order that he might sell the "land;" the witness refused to go, did not know of defendant having ever been in possession; he had told witness he wished to get possession, and witness knew two persons were in possession of part of the land. Defendant told him the real heir lived in a foreign country, he did not know where, expected he was dead. Heard the defendant promise to give Wright a life lease of 50 acres of the land in York, in consideration of his giving defendant a deed of two hundred acres in Smith.

[On the part of the defendant this evidence was objected to, as being inadmissible, on the ground that the facts stated therein should have been set forth by the bill. The counsel for the plaintiff considered he was entitled to read the evidence; the suit being brought on the ground of fraud, any evidence tending to show it ought to be received.

The Vice Chancellor directed the evidence to be read, subject to the objection.]

Blake for the plaintiff, after shortly stating the facts of the case, considered them, as stated in the bill, admitted by the answer and proved by the depositions, of the witnesses in the cause, so strong that it would not be necessary for him to cite any cases to show that the deed executed by the plaintiff would not be permitted to stand. It might be said that the evidence of an agreement to make the lease was not such as would entitle the plaintiff to a specific performance of the contract in that respect, but it was clearly sufficient to show that the plaintiff had been taken by surprise, and induced to sign a deed under circumstances that could leave no doubt on the mind of any one, that highly improper means had been made use of by the defendant to attain the object he had in view—the execution of the conveyance by the plaintiff.

The attorney who drew the conveyance should not have acted in the matter as he had done; having been employed by the grantee to prepare this voluntary conveyance, it was his duty to have directed the grantor to have taken other advice as to the propriety of the step he was about to take in executing such an instrument, the nature and effect of which

the grantor evidently was not aware of. Citing Story Eq. Jur. ss. 221, 237, 251; Huguenin v. Basely, 14 Ves. 290; Steed v. Calley, 1 Keen, 620.

Ramsay, with whom was *Eccles* for defendant.—The evidence of any agreement or promise of a lease is only parol, such evidence cannot be received to prove a contract of this nature; the deed as executed, speaks for itself, and shows what the agreement was, and no evidence can now be received to alter or vary such agreement; even written evidence, for such a purpose, would not be sufficient.

There is no evidence here sufficient to take the case out of the statute, part performance will not apply here, the execution of the quit-claim by the plaintiff is not a part performance of any contract for a lease, if any lease ever had been promised, for according to the plaintiff's own showing, it was merely the consideration for such a lease. Now, payment of the consideration is not in any case considered a part performance of a contract, sufficient to take it out of the statute.

The question here is, what was the concurrent intention of the parties at the time of executing the deed? It is clear the intention was merely to convey the land to which the plaintiff had good reason to believe himself entitled; a good consideration therefor, having been already paid to the son of the plaintiff, the benefit of which had been participated in by the plaintiff and his family.

The plea denies the agreement for the lease, that is, any agreement that would be binding under the statute of frauds, and this court, as well as a court of law, will give effect to such an objection, when taken by plea.

Citing amongst other cases, Saunders v. King, 6 Mad. 65; Morris v. Ansel, 3 Wil. 275; 1 Sug. 333, (9th Ed.); Powell v. Edmunds, 12 East. 6; Townsend v. Stangroom, 6 Ves. 328; Woollam v. Hern. 6 Ves. 212; Rich v. Jackson, 4 Bro. C. C. 518; Harwood v. Wallis, 2 Ves. 196; Anon. Skin, 159; Peacock v. Monk, 1 Ves. 128; Langley v. Brown, 2 Atk. 202; Green v. Wood, 2 Vern, 632.

Blake, in reply, assented to all that had been stated on the other side, except the applicability of it to a case like the present. It appears that the intention of the party who drew

the answer of the defendant, was to plead the statute of frauds. In this view of the matter, the plea is clearly bad, the great difference is between the pleading in the two courts; in the courts of common law, a mere denial of the contract is all that is required to give the defendant the benefit of the statute; but here the plaintiff is entitled to a full discovery of all the circumstances attending the transaction, and it is then for the court to decide whether or not there has been such a part performance as will take the case out of the statute, part performance being in this court sufficient for that purpose. He admitted the correctness of the argument as to parol evidence being inadmissible to vary or alter an agreement by a party seeking to enforce it, also that such evidence may be made use of as a defence, to show that the agreement is not what it was intended to be, and that therefore it should not be enforced; but it is equally sound law, that a party can come to this court, and upon parol evidence, set aside a conveyance on the ground of fraud, misrepresentation, &c.; and a decree for the purpose of setting aside the deed executed by plaintiff to defendant, was what was most desired in the present instance; a decree for which, it was submitted, the court, upon the facts elicited in this case, would readily grant; it would be the most beneficial for the plaintiff, and as the evidence proved that the defendant had no title to the land for which he had agreed to give a lease, it was the only decree the court, under the circumstances, could properly make.

Friday, 30th January, 1846.

THE VICE-CHANCELLOR—The facts of this case appear to be as follows: James Wright, residing in the township of York, as heir at law of his sister Pamelia Wright deceased, is the owner of a certain lot in the fourteenth concession of Smith, in the Newcastle District. About seven years before the institution of the present suit, it seems that the plaintiff's son, under the impression that he was the heir of his aunt Pamelia Wright, made a conveyance of the land to one Coonat, who, in August 1844, gives a sort of release of his right to Patrick Henderson, as follows:

"I release for value my right to the within land to P.

"Henderson, and believe there is a mistake in the lot, and "authorize him to get a correct deed.

A. COONAT."

At this time Coonat and Henderson, aware of the badness of their respective titles, called on the plaintiff and requested him to go to the office of an attorney in Toronto, and make an affidavit that he, the plaintiff, had never given a deed for the lot so inherited by him; in consideration for his doing which, Henderson undertook to make to him and his wife, and the survivor, free of rent, a lease of fifty acres of improved land, with a house, &c., in the Township of York: being part of four hundred acres to which he pretended that he had a good title. How he could imagine that such an affidavit would confirm his claim to the land in Smith, it is difficult to understand: it is probable, from the result, that the proposal was only an invention to decoy the old man into Toronto.

After repeated solicitations, the plaintiff, who appears to be an infirm man, many years afflicted with the palsy, attended by his wife, accompanies Coonat and Henderson to the office of a legal practitioner, with the ostensible view of making this affidavit. There is found, prepared from the previous instructions of Henderson, not an affidavit, but a deed of conveyance of the lot of land in Smith, with covenants for title, &c., this the plaintiff refuses to execute; whereupon, a quit-claim deed, in consideration of one hundred pounds, with bar of dower, &c., is prepared for the signatures of Wright and his wife. This instrument, however unexpected, they are prevailed on to sign, in consideration of the promised life-lease of the fifty acres of improved land, &c., in the Township of York. No money consideration whatever passed between the parties.

It is very soon discovered that Henderson had no title whatever to the land from which the promised fifty acres were to be taken; and a scene of fraud is disclosed, (the evidence of which, I think, is admissible under the charges of fraud in the whole res gestæ) by which Henderson attempted to induce a person, for a sum of money, to go into the United States and procure a conveyance for him, by some

person professing to be the heiress to the land; the real owner being supposed to be one Elizabeth McDonell, residing in some foreign country, and whose tenant is now in possession, and paying rent either to her or her agent.

Finding himself entrapped in this manner, Wright files his bill, praying either that Henderson may be decreed specifically to perform his part of the contract, and execute a good and effectual lease, such as was to have been the consideration of the two hundred acres of land in Smith; or that the deed executed by the plaintiff and his wife may be declared void, having been obtained by surprise and fraudulent representations, &c.

It is objected by answer and plea, that this is not a contract which can be enforced within the statute of frauds, &c. Now, whether the giving of the consideration by the one party, and the acceptance by the other, be in the present case such a part performance as would take it out of the letter of the statute, it is hardly necessary to consider, since, however good in form the contract might have been, there is this objection, that the court cannot decree specific performance of an agreement to convey another person's property. The plea is novel, and I think perfectly untenable; but the evidence is so strong, that the plaintiff's advisers seem not to have thought it necessary to except to the defendant's answer for insufficiency, couched as part of it is in the form of an unsustainable plea. But it is not necessary to dwell upon that part of the case: the fraud and premeditated bad faith, and the knowledge on the part of the defendant that he had it not in his power to give the pretended consideration, is sufficiently clear to authorize the court to make a decree upon the other alternative of the prayer. A deed so obtained cannot avail the defendant. If he really believed that he had acquired, through Coonat, any equity against Wright through the act of his son, who had no title, (an equity founded on the suggestion, that as the son lived with his father, the father must have participated in the purchase money assumed to have been paid by Coonat,) it was not to be enforced by such means as those to which he resorted.

VEXED QUESTIONS—FRAUDS.

We commence a series of articles on vexed Questions of Commercial Law, which we deem not only the most popular branch of jurisprudence, but one so intermixed with the daily concerns of life, that it is especially requisite that its principles be ascertained, that its provisions be precise, and its laws definite; nevertheless we find none in which doubts are rifer, and discrepancies more prolific of litigation.

We regard questions of mercantile law of fourfold the importance of any other province or division of law.

The subject we have selected for discussion in this article is this:—Is a misrepresentation of a fact, on the faith of which another acts and is damnified, a fraud on the part of him who makes it without knowledge of its falsehood? In other words, is moral fraud essential to fraud in law, and the scienter to the right of action? The same point is involved in the question, whether he who undertakes to make a statement on which another acts, impliedly warrants its truth, and is liable for its falsehood, though he believed the statement to be true? In two very recent Exchequer Chamber cases, Collins v. Evans and Ormerod v. Huth, to which we shall revert presently, we find the point taken as settled, and admitting of little or no question; and in the latter case, Tindal, C. J., is reported to have said that the rule there laid down appeared to be supported by the early as well as the most recent decisions. We humbly venture to think otherwise: and we proceed to trace the various discrepancies of judicial opinion from black letter law to the present day.

The doctrine that there may be fraud in law, without fraudulent intent, is of comparatively modern growth. The old law knew no such cause of action. The parent of all actions for fraud is to be found in the old writ of disceit, which embraced all civil remedies for this class of wrongs. The name itself bespeaks the gist of the action; and in the old form of writ we find the words "fraudulente et maliciose," thus marking the malus animus, which formed the essence of the injury;

and Fitzherbert (in his Natura Brevium, p. 95, edit. 1635) thus identifies the character with the words of the writ;— "Briefe de disceit gist come appiert *per nat. brev.* Et gist "propermt ou auc home fait auc chose en nosm dun autr. per "que lautr. person est endammage et disceive, donc cestui "que est issint endammage aurera cest briefe."

We need scarcely remind the reader that in those times actions on the case, not being split on the one hand into the classes ex delicto and ex contractu, and assumpsit being a refinement of after growth (*a*), so on the other, actions for disceit were distinguished from actions on the case, though they now belong to them; thus in Brooke's Abridgment, p. 238 (we cite from the edition of 1573), is this passage: "videtur que ou home pmise per un consideracion de fair act, "et ne fait, que action sur le cas gyst, mes ou home fayte son "promise faussement que donque actyon de dysceyt gyst." Nevertheless, in Harvey v. Young, Yelverton, 20, temp. 44 Eliz. (1602), the action was "sur le cas en nature dun "disceit." It is not material to our purpose at what time all actions for deceit fell within the pale of torts, and formed part of the ramified family of actions upon the case; from which, at a more recent period, breaches of contract were dismembered. It suffices to show, that through a long current of cases this action was held to be maintainable only where there was a warranty, or where there being no warranty a falsehood was knowingly told, for a fraudulent purpose, on some point of fact peculiarly within the knowledge of the person making the statement, and not equally within the knowledge of him to whom it was made. Writs of deceit chiefly lay in such cases of fraud as the purchase of a quare impedit in the name of another, the fraudulent acknowledgment of fines and recoveries by covin. Where the ground of the action was merely confined to a false affirmation, the writ was upon the case, in the nature of a writ of deceit, but based on similar principles.

One of the old cases of such an action was that cited in King

(*a*) See Steuart v. Wilkins, Doug. 18, whence assumpsits on warranties derive their practical origin. See also Williamson v. Allison, 2 East. 446; see p. 91 post.

v. Robinson, Croke, Eliz. 79 (temp. 28 & 29 Eliz.), where the action was held maintainable by a swain deluded by the *blanda verba, matrimonio æqui pollentia*, whereby a lady induced him to spend money and time in her service, and then proved faithless, and married another in fraud and deceit of the plaintiff: the action was "upon the case for the disceit in not marrying" the plaintiff.

Most, though certainly not all, the old cases of frauds (as asserted by Grose, J. in Pasley v. Freeman, 3 T. R. 51) were cases of contract, where the misstatement was made by the vendor to the vendee relating to the thing sold. Furnis v. Leycester, Cro. Jac. 474, (temp. 16 James I.), was an instance of this sort. It was on the case for "falsely and deceptively" affirming that 200 sheep were the property of the defendant, *he knowing them to be a stranger's*. Here the scienter is made an essential feature in the right of action. Also in Springwell v. Alleyn, 91 (temp. 24 Car. I.), of which a full note will be found in 2 East, 447, n., by Burnet, J. the defendant sold a horse without warranty as his own, whereas it was the horse of A. B.; "yet as the plaintiff could not prove that the defendant knew it to be the horse of A. B., the plaintiff was nonsuited." So in Chandler v. Lopus, Cro. Jac. 4, where a jeweller sold a false stone as a bezoar stone, no action lay, because it was not averred that "he *knew* it was not a bezoar stone;" Anderson, J. dissentiente.

It was afterwards held that the *averment* of knowledge was not essential, where, from the nature of the case, the defendant was better aware of the facts than the plaintiff. See Cross v. Gardner, Carth. 90 (temp. 1 W. & M.), where it was held sufficient to aver that the vendor sold oxen as his own, they being the oxen of another, without a scienter, the action lying on the bare affirmation, where plaintiff has no means of knowing to whom the property belonged. But here also the defendant must have known the fact.

A similar principle governed the law with respect to the statement itself. In Risney v. Selby, 1 Salk. 211 (temp. 3 Ann.), which was an action on the case, the plaintiff being in treaty with the defendant for the purchase of a house, the defendant, says the report, did fraudulently affirm the rent to

be 30*l.*, whereas it was but 20*l.*, whereby he was induced to give so much more than the house was worth. It was contended that the "plaintiff was over credulous in taking the defen-"dant's word for it, but the plaintiff had his judgment; for "the value of the rent is matter that lies *in the private knowledge* "of the landlord and his tenant, and if they affirm the rent to "be more than it is, the purchaser is cheated, and ought to "have a remedy for it." But in Harvey v. Young, Yelver. 20 (44 & 45 Eliz.), the defendant affirmed that a term of years, which he sold to the plaintiff, was worth £150, whereas the plaintiff gave that sum, the term being worth only £100. But the court held that no action lay, for this was but a naked assertion of a fact, which the plaintiff's folly alone induced him to give credit to; but that if the defendant had warranted the term, it would have been otherwise.

In Leakins v. Chissell, Sider. 146 (temp. 15 Car. II.), we find the distinction also drawn between the statement that houses are worth so much, and that they let for so much, the one being matter of opinion, the other of fact. See also 1 Rolle's Abr. 91.

One of the most important cases on the capacity of the plaintiff to discover the fraud is that of Baily v. Merrell, 3 Buls. 94 (temp. 13 James I.), where the defendant gave the plaintiff (a carrier) a "cade of wood" to be carried, telling him it was 800 cwt., and that he should have 2*s.* per cwt. for the carriage. The carrier fidem adhibens carried without weighing, and killed two of his horses from the fatigue, the weight proving to be 2000 cwt.; but the court held that this was not a warranty, and that there was a "plain default by "the carrier that he did not weigh this." In this case Croke, J. said "If one lends his cart to another, to carry a load of wood, "and that he will have for it 10*s.* a load; if he overload the "cart, an [*Qu.* no?] action lieth for this fraud without damage, "for damage without fraud gives no cause of action; but where "these two do concur and meet together, there an action "lieth;" a dictum, by the way, misquoted by the judges in Pasley v. Freeman. This principle of care in the plaintiff formed a marked feature in the requirements of fraud to sustain an action according to the earlier cases; and we find the

same doctrine upon the same authority laid down in Rolle's Abridgment, vol. i. p. 101, which brings the law down to the end of Charles I. Buller's Nisi Prius, written in 1771, brings down the cases to that date; and he thus describes the nature of the action and its elements. It will "lie wherever a per-"son has by false affirmation or otherwise imposed upon "another to his damage, who has placed a reasonable confi-"dence in him; as, if a man in possession of a horse or a "lottery ticket, sell it to another for his own, for possession of "a personal chattel is a colour of title, and therefore it was but "a reasonable confidence which the buyer placed in him, "when he affirmed it to be his own; but it is incumbent on "the plaintiff in such a case to prove the defendant knew it "not to be his own at the time of the sale (for the declaration "must be that he did it fraudulently, or knowing it not to be "his own). For if the defendant had a reasonable ground to "believe it to be his property (as if he bought it bonâ fide), "no action will lie against him; but the defendant cannot "plead such matter, but must give it in evidence. So if the "vendor affirm that the goods are the goods of a stranger, his "friend, and that he had an authority from him to sell them, "whereas in truth they are the goods of another, and he had "no such authority, an action will lie against him; and in "such case it will be sufficient for the buyer to prove them "to be the goods of another, without proving that the defen-"dant knew them to be so (for it need not be averred in the "declaration); for the deceit is in his falsely affirming he had "an authority to sell them. *The plaintiff must therefore prove* "*that he had no such authority*, and doubtless proving them to "be the goods of another would be evidence prima facie that "he had no authority, and sufficient to put him upon proving "that he had."—p. 31, 1st edition.

Here also we find the fact of *wilful* misrepresentation retained as material to actionable fraud.

Although actions for deceit embraced a large variety of frauds, from the misstatements of salesmen to the bland words of faithless ladies, like the case cited in Cro. Eliz., yet in all of them it was held essential to the action up to this time—

1. That the defendant should *know* the statement to be false, and make it with intent to deceive.

2. That it should relate to a fact peculiarly within the knowledge of the defendant, and not merely be a naked assertion of a matter of opinion, the truth or falsehood of which the plaintiff had the means of knowing, for the principle of caveat emptor was held to apply to such cases.

3. The plaintiff must have been damnified.

These form the essential requirements to the right of action for a fraud up to 1771. Up to that time no report had appeared containing any semblance of a judicial recognition of the doctrine of legal fraud without moral fraud.

In 1778 we find the earliest approach to that doctrine by Lord Mansfield, who was, we believe, the first judge who discarded the knowledge of the falsehood uttered as an essential feature of the action. In the case of Pawson v. Watson (Cowp. 785), which was an action against the underwriters on a policy of assurance alleged to have been made on a false verbal representation, that great judge said, "If in a life "policy a man warrants another to be in good health, when he "knows at the same time he is ill of a fever, that will not avoid "the policy; because by the warranty he takes the risk upon "himself. But if there is no warranty, and he says 'the man "is in good health,' when in fact he knows him to be ill, it is "*false.* So it is if he does not know whether he is well or ill; "for *it is equally false to undertake to say that which he knows "nothing at all of, as to say that is true which he knows is not "true.* But if he only says 'he *believes* the man to be in good "health,' knowing nothing about it, nor having any reason to "believe the contrary, then, though the person is not in good "health, it will not avoid the policy, because by the warranty "the underwriter then takes the risk upon himself. So that "there cannot be a clearer distinction than that which exists "between a warranty which makes part of the written policy, "and a collateral representation, which, if false in a point of "*materiality,* makes the policy void; but if not material, it can "hardly ever be fraudulent."

This forms, we believe, the first extension of the doctrine of fraud. The words in italics clearly go that length, and

give a scope to the range of actionable misstatements which the prior cases had invariably avoided, and in some instances expressly repudiated. It is however to be observed, that Lord Mansfield refers to such misstatements as affect the interest of the party making them; and he likewise restricts it to cases where the person making the statement does *not know it to be true.* Lord Mansfield's opinion does not, therefore, go the length to which we shall presently see other judges have gone, of holding that where the party making the statement *believes it to be true,* he is nevertheless liable. In 1789 occurred Pasley v. Freeman (3 T. R. 51), which is to this hour a leading case.

Pasley v. Freeman, whatever may have been the impression on the minds of the judges who respectively pronounced and dissented from the judgment, decided nothing more than this: that it is not necessary to an action on the case for a deceit, that the person making the false statement should derive benefit from it, or that he should collude with the person who is benefited. This was not new law; it was nothing more than had been held before, and we concur with the view taken by Mr. Justice Buller, that authorities were not wanting on that point. He cited a case in 1 Roll. Abr. 91, pl. 7, where a vendor affirmed that the goods were the goods of a stranger, his friend, and that he (the friend) authorized him to sell them, upon which B. buys them, whilst, in truth, they are the goods of another party; yet if he sell them fraudulently and falsely on this pretended authority, though he did not warrant them, and although it is not averred that he sold them knowing they were the goods of a stranger, still B. has his action on the case for this deceit. And Mr. Justice Buller adds, "The gist of "the action is fraud and deceit; and if that fraud and deceit "can be fixed by evidence on one who had no interest in his "iniquity, it proves his malice to be the greater." * * "*The "fraud is that the defendant procured the plaintiffs to sell goods "on credit to one whom they would* not otherwise have trusted, "by asserting that which *he knew to be false.*" So that in Pasley v. Freeman the point was not involved whether there could be legal without moral fraud, for moral fraud existed in full force; nevertheless Mr. Justice Buller goes on to state

that "the assertion alone would not maintain the action; but "the plaintiff must go on to prove that it was false, and that "the *defendant knew* it to be so." Mr. Justice Ashurst took the same view, and said, "It is expressly charged that the "defendant *knew* the falsity of the allegation, &c."—"the gist "of the action is the injury done to the plaintiff, and not "whether the defendant meant to be a gainer by it. * * The "malice is the more diabolical if he had not the temptation "of gain." There could not be a more unsafe rule than to make the interest of the party giving the statement a test of his liability for its untruth; for how can that interest be always known? Might it not be concealed for the express purpose even of escaping from liability, were such a doctrine to prevail? All this, we repeat, was merely the expression of what had long been the law. Mr. Justice Grose, however, dissented from the rest of the court, because he could find no cases, except of contract between the parties, where the defendant had an interest in the fraud. This, as Mr. Justice Buller showed, was a mistake. Another ground taken by Mr. Justice Grose was, that the knowledge of the credit of a third party was a nude assertion of opinion, and fell within the rule in the case of Harvey v. Young in Yelverton, above cited: but this is not so; for it is clear that the knowledge of the credit of an individual must depend upon the degree of intimate acquaintance which a party possesses with him; and if he holds himself out as having this, he does possess means, which the plaintiff being a stranger has not, of ascertaining the fact. The decision of the rest of the court also went on broad grounds of social interest, which requires that parties should not be injured by false statements of the credit of others. The only new feature in this case was, that it was the first one where the subject-matter of the false statement was the credit of a third party; but this was properly held to be merely the application of an old principle to a new case. Lord Kenyon bases his judgment on the facts thus tersely put in its concluding words:—"It is admitted that the "defendant's conduct was highly immoral and detrimental to "society; and I am of opinion that the action is maintainable "on the grounds of deceit in the defendant and injury and

"loss to the plaintiffs." The animus, the falsehood, and the injury were certainly sufficient to counterbalance the want of apparent interest and the novelty of the subject-matter of the fraud; and this is all that Pasley v. Freeman decides. Lord Mansfield's dictum in the last case was not alluded to, nor was there occasion that it should have been; for here moral fraud and the intent to deceive fully existed; but this case is well worthy of note for the distinct adherence of two of the judges, Buller and Ashurst, to the doctrine that knowledge of the falsehood by the defendant is essential to the action. The latter judge says, the *quo animo* is a great part of the gist of the action; and so it was also ruled by a majority of the court in the case to which we must next refer. (*a*)

Haycraft v. Creasy, 2 East. 92 (A. D. 1801), was the first case in which the question arose whether the knowledge of the fraud by the defendant was essential to the action.

The defendant vouched for the credit of Miss R., "as he "the defendant *knew* that she was then in possession of con- "siderable property, &c." He is then asked if he knows this only by hearsay; he replies, "I can positively assure you "of my own knowledge that you may credit Miss R. to any "amount with perfect safety." The defendant had himself trusted her, and fully believed in the truth of his statement, for which he had reasonable ground. Miss R. however proved to be an impostor, and the plaintiff, who had given her credit on the faith of the defendant's statement, sued him for the loss in an action on the case for false, fraudulent and deceitful representations. The majority of the court held that the action would not lie, on the ground that fraud and deceit was the foundation of the action; and that this was not fraud, because the defendant believed his statement to be true. Grose, J., thought it only the expression of his firm belief and conviction. Lawrence, J., thought that, "in order to "support the action, the representation must be made *malo*

(*a*) Eyre v. Dunsford, 1 East. 318, is merely an echo of Pasley v. Freeman. On a representation of credit false to the knowledge of the defendant, though he had no apparent interest in making it, and made it without prejudice, the action was held to lie.

"*animo*, and that there must be something more than mis-"apprehension" or mistake; but this he stated with doubt and distrust of his own opinion, in deference to that from which he differed (Lord Kenyon's). Leblanc, J., said, "By fraud "I understand an intention to deceive," without which the action is not maintainable. But what says Lord Kenyon? Referring to the case of Pasley v. Freeman, in which he had expressed no opinion on this point, he says—

"I indeed was not then so well versed in the critical form "of actions, but I had endeavoured to store my mind with "established principles, and I have learned that laws were "never so well directed as when they were made to enforce "religious, moral and social duties between man and man; "and I knew that it was repugnant to such duties for one man "to make false representations to another to induce him to "take measures which were injurious to him. * * * It is "said that I imputed no fraud to this defendant at the trial. "It is true that I used no hard words, because the case did not "call for them; it was enough to state that the case rested on "this,—that the defendant affirmed that to be true within his "own knowledge that he did not know to be true. *This is* "*fraudulent;* not perhaps in that sense which affixes the stain "of *moral turpitude on the mind of the party, but falling within the* "*notion of* LEGAL FRAUD, *such as is presumed in all the cases* "*within the Statute of Frauds.* The fraud consists, not in the "defendant's saying that he believed the matter to be true, "or that he had reason so to believe it, but in asserting "positively his knowledge of that which he did not know. "There are, it is true, some duties of imperfect obligation, "as they were called, the breach or neglect of which will not "subject a party to an action. If I know that one in whose "welfare I am interested is about to marry a person of infamous "character, or to enter into commercial dealings with an insol-"vent, it is my duty to warn him, but no action lies if I omit "it; but if any one become an actor in deceiving another—*if* "*he lead him by any misrepresentations to do acts which are* "*injurious to him, I learn from all religious, moral and social* "*duties, that such an action will lie against him to answer in damages* "*for his acts.* And when I am called to point out legal

"authorities for this opinion, I say that this case stands on "the same grounds of law and justice as the others which "have been decided in this court on the same subject."

Let us at once back this bold and righteous doctrine with the opinions of the great judges and lawyers who have maintained it, returning hereafter to the current of decisions which form the tail, and follow in the wake of Js. Grose, Lawrence and Leblanc.

First and foremost stands Sir James Mansfield. The doctrine which we found Lord Mansfield first broaching in Pawson v. Watson, in 1778, we find Sir James Mansfield holding and making the basis of his judgment in the case of Schneider v. Heath (3 Camp. 506), (A. D. 1813), which was an action for money had and received on the ground of fraud and misrepresentation, which consisted in a bill of particulars falsely describing a ship as seaworthy, which the person giving it had not examined, and did not know to be unseaworthy. In his judgment Mansfield, C. J. says, "The agent tells us he "framed the particulars without knowing anything of the "matter. *But it signifies nothing whether a man represents a thing "to be different from what he knows it to be, or whether he makes a "representation which he does not know at the time to be true or false,* "if, in point of fact, it turns out to be false."

There is also a dictum of Best, C. J., exactly to the same effect, in Adamson v. Jarvis (4 Bing. 66); "He who affirms "either *what he does not know to be true,* or knows to be false, "to another's prejudice and his own gain, is, both in morality "and law, guilty of falsehood, and must answer in damages." That was a case, however, in which the defendant had a direct interest in the fraud, but Pasley v. Freeman decided that interest was not necessary to the action.—*To be continued.*

THE

UPPER CANADA JURIST.

IN CHANCERY.

SATURDAY, 13TH DECEMBER, 1845.

BARNHART v. PATTERSON AND GREENSHIELDS.

PRACTICE.

Where one of several defendants has become bankrupt, his assignees are necessary parties, and the court will not proceed to make a decree in their absence.

In this case a bill had been filed to redeem a mortgage given by the plaintiff to the defendant Patterson, which had subsequently been assigned by him to Greenshields, to secure certain debts due by Patterson to Greenshields.

After the answers of the defendants had been put in, Patterson became bankrupt. The plaintiff having replied, and served the usual subpœna to rejoin, took no further proceedings in the cause, in consequence of which the defendant Greenshields served rules to produce witnesses and pass publication, in the name of both defendants; but the plaintiff had not examined any witnesses, or taken any steps, and Greenshields set the cause down for hearing: and on this day

Esten, for the plaintiff, moved to have the cause struck out of the paper for irregularity, on the ground that by the bankruptcy of the defendant, Patterson, his assignees had become necessary parties, and until they should be made parties, the suit was so defective, that the court could not make a decree; that Greenshields having taken out rules to produce, &c., in the name of both defendants, was clearly irregular; the course that should have been adopted by him, if he desired to force the suit on, was to have moved, that unless the assignees of

his co-defendant were brought before the court, within a time to be limited, the bill should thenceforth stand dismissed; this is clearly the practice when the bankrupt is a sole defendant; and the fact of there being other defendants, who are not bankrupts, cannot alter the practice in this respect.—1 Smith, 514.

If the bankrupt were not a necessary party to the suit, the cause might be proceeded with in the absence of his assignees, but here he had been an interested and necessary party, and his assignees are the legal holders of the lands, and will be entitled to receive any overplus that may be coming after discharging the claim of Greenshields. If, therefore, the court were to make a decree, it must necessarily be incomplete, and the court will not, in any case, make an incomplete decree, when the facts are brought under its notice. And as both defendants appear by the same solicitor, Greenshields cannot say he did not know of the bankruptcy of his co-defendant.

The suit, as originally instituted, was perfect, and only became defective during its progress, and therefore, the ordinary rule of dismissing for want of parties will not apply to a case like the present.

Brough and Crooks, for the defendants. The plaintiff here wishes to take advantage of his own wrong, in having allowed the cause to remain in its present imperfect state. The plaintiff must either ask for the cause to stand over, in order that he may make the assignees parties, or else dismiss his bill; the court, it is submitted, will adopt the latter course.

The defect in the suit is the fault of the plaintiff, and by allowing it to remain in its present state he might tie up the cause for ever, unless the defendant Greenshields were allowed to proceed in the manner he had, and set the cause down for hearing; the plaintiff having filed a replication and served a subpœna to rejoin, it is clear an ordinary defendant could not move to dismiss for want of prosecution; the only course left for him to take would be that taken in the present case.—Tozer v. Tozer, 1 Cox 288.

The assignees of the bankrupt defendant cannot be benefitted by being made defendants, nor do they desire to become parties to the suit in any way. And as the plaintiff was the party who should have taken the necessary steps to make them

parties, and has chosen not to do so, the court, it is submitted, will now dismiss the bill with costs.—Monteith v. Taylor, 9 Ves. 615; 5 Sim. 497; 11 Law Jour. N. S. pt. 1, p. 280, were also cited.

THE VICE CHANCELLOR.—There can be no doubt that the assignees of the defendant Patterson are necessary parties to be brought before the court, and in their absence the court cannot properly make any decree; the cause must therefore be struck out of the paper; but as the steps necessary for making them parties should have been taken by the plaintiff, I do not allow him his costs of this motion.

FRIDAY, 23RD JANUARY, 1846.

GEDDES V. MORLEY ET AL.

PRACTICE.

This court will not grant an injunction at the suit of a mortgagee of chattels, against a judgment creditor of the mortgagor, to prevent a sale of the chattels; the rule being of universal application that the court will protect the specific possession of chattels only in case they are of peculiar value.

In this case a bill had been filed, stating to the effect that the plaintiff had advanced certain monies to W. A. Geddes, in consideration of W. A. Geddes undertaking to execute and who had accordingly executed a bill of sale by way of mortgage of certain chattels, consisting of household furniture, &c., to secure the repayment of the amount advanced by the plaintiff, and that afterwards the defendants had issued an execution against the goods, &c., of W. A. Geddes, and seized the property assigned to the plaintiff; W. A. Geddes having continued in possession thereof.—The bill prayed an injunction to stay the sale, &c. Upon an affidavit verifying these statements of the bill, a special injunction as prayed had been obtained; the defendants had filed a demurrer to the bill for want of equity, and now

Blake, for the defendant, moved to dissolve the injunction with costs. The general rule of this court is, that an injunction will not be granted to interfere with the enjoyment of chattels, unless some peculiar value attaches to them, as in the

case of heir-looms; Lloyd v. Loaring, 6 Ves. 773. The plaintiff will no doubt rely upon the case of Lady Arundel v. Phipps, as a ground for retaining the injunction in the present case; that case however, is not applicable to the present; there, the property sought to be preserved was such as brought the case within the class of those excepted from the general rule of the court, against interfering with chattel property; here no such ground exists, the articles are not only of no peculiar value, but the value of them in the opinion of the plaintiff is affixed to each article in the schedule accompanying the bill of sale; and where the value can be given in damages either in an action of trover or trespass, this court will not interpose to prevent a party at law proceeding in the usual way to recover his demand. Citing also 1 Mad. C. P. 222; Eden on Inj. 313; Jeremy's Eq. Juris. 467; 1 Madd. R. 150.

Esten, contra, cited the case of Truscott v. Dunn in this court, as showing that the rule, that the court would not interfere when the subject in dispute was chattel property, was not inflexible, and in the present case the plaintiff had advanced the money, not on the personal security of any one, but on the specific security of the goods contained in the schedule; those goods ought therefore to be preserved in specie, and in such a case the jurisdiction of this court arises. In an action of trover or trespass, all that the plaintiff would recover would be damages; that however, was not what he had contracted for as security, when making his advances, nor was it reasonable that he should be now driven to the circuity of an action after having obtained what he considered security on certain specified property, sufficient to answer his demand.—Citing Lady Arundel v. Phipps, 10 Ves. 139; Lord Cooper v. Baker, 17 Ves. 128.

Blake, in reply. Lord Cooper v. Baker is not in point, the trespass in that case was in the nature of a trespass to the realty.

What was the intention of the party when he obtained the injunction? It was to protect him in his mortgage. But if such an equity exist in favour of a mortgagee of chattels, *a fortiori* it would exist in favour of the owner of such goods; but it is clear there is no such right in favour of the owner,

nor can there be any in favour of a mortgagee, simply upon the general principle that the court will in no case interfere with the possession of chattel property, unless a peculiar value be attached to it by the party claiming it.

Injunction dissolved—costs to be costs in the cause.

[NOTE.—The demurrer which had been filed, was subsequently submitted to by the plaintiff.]

TUESDAY 3RD MARCH, 1846.

KINGSMILL V. GARDNER.

PLEADING.

A demurrer will not lie to a bill of foreclosure on the ground that the bill does not shew that the plaintiff had actually paid a money consideration for the mortgage, or because it does not offer to do equity.

It appeared by the bill, that the defendant Gardner had been a prisoner within the limits of the gaol of the Niagara District, and that Lockhart had become his security to the sheriff by bond, under a penalty to secure the sum of 163*l.* 16*s.* 8*d.* To save Lockhart "*harmless for or on account of any action, &c., which "might at any time be brought against him, his heirs, &c., by reason "of the said James Lockhart's having become security &c,*" a mortgage was given of certain hereditaments in the county of Lincoln; that Gardner had departed from the limits of such gaol, and an action on the case for an escape had been brought, and judgment recovered against the plaintiff, as sheriff, who thereupon brought his action on the bond against the defendant and his surety Lockhart for the sum of £293 11*s.* 11*d.*, for which amount judgment had been recovered. That by indenture of 6th May, 1845, Lockhart, in consideration of being discharged and released from the said judgment, assigned the said mortgage to the plaintiff; that no money had been paid on such judgment; and it prayed the usual account, and in default of payment of the amount due, that the defendant might be barred and foreclosed of and from all equity of redemption, &c.

A demurrer was filed on the grounds, first, that it did not appear that any good consideration had been given to entitle

the plaintiff to institute a suit for foreclosure. The sheriff had shewn only a liability, but not a payment; secondly, that the suit was for the whole of the mortgaged property, without any offer to pay over the difference if any should be found due: it contained no offer on the part of the plaintiff to do equity.

Mr. Ramsay, in support of the demurrer.

Mr. Brough, contra.

THE VICE CHANCELLOR.—Under the new orders simplifying and abridging the pleadings in suits for foreclosure and redemption, all that is necessary to state, is such a case as will warrant the court to send it to the master to enquire as to the amount actually due in respect of the transaction. On the first ground I think there is sufficient on the bill to show that the action and liability against which the surety was to be protected on account of his joining in the bond to the sheriff did occur; and that the mortgage so far had become absolute. Whether Lockhart satisfied the sheriff by a money payment and proceeded himself in equity on the mortgage, or satisfied the sheriff by assigning the mortgage, leaving him to take such ulterior proceedings, could make no difference to the defendant. The sheriff's absolute liability to the defendant's judgment creditor, is I think a sufficient primâ facie case. With regard to the other objection, it is well answered by the prayer of the bill, which is for an account between the parties. The very idea of *an account* involves the doing as well as receiving equity under the administration of the court. It is usual in bills to be relieved against a fraudulent or usurious contract, to insert such a submission; but it is upon the *facts* of the case stated, the primâ facie right to the aid of the court must be judged of.

Demurrer overruled.

TUESDAY, 27TH JANUARY, AND FRIDAY, 27TH FEBRUARY, 1846.

SCHRAM V. ARMSTRONG.

PLEADING—EVIDENCE—PARTIES.

Where a party had given a mortgage to secure a debt for which he had made himself liable as surety, and had received from his principal a mortgage on his own estate for the same debt, &c., afterwards filed a bill to foreclose the latter and redeem the first mortgage, and the principal at the hearing objected to the bill on the ground that it was multifarious: Held, that the objection, if tenable, should have been taken by demurrer, and was too late at the hearing; and, *quære*, if such objection would have been sustainable under the circumstances of the case.

Held also, that evidence taken by the plaintiff to contradict statements made in the answer was admissable, though not put in issue by the bill.

Evidence not read in the cause cannot be made use of by the defendant, to shew that the suit is defective for want of parties; such defect must be apparent from the pleadings and evidence.

The facts of the case appear in the judgment of the court.

Mowat and *Vankoughnet*, for plaintiff.

Esten, for defendant.

Davis v. Quarterman, 5 Jurist, 93; and Story Eq. Pl. ss. 271, 272, were cited by plaintiff.

THE VICE-CHANCELLOR.—It appears from the bill, &c., that in the month of April, 1842, the plaintiff endorsed a promissory note for £200, payable six months after date, for the accommodation of Armstrong and Black, then indebted in that amount to Leonard Thompson. To secure the plaintiff against any loss by payment or costs in respect of this note, they executed to him a mortgage, dated 25th August, 1842, of a town lot in London. The promissory note was not paid by the drawers when at maturity, and an action was brought against the plaintiff by the defendant Thompson. To prevent an execution being issued against his effects, and to secure to Thompson the amount of his debt and interest, and the costs incurred in the action, the plaintiff executes to him a mortgage upon certain property of his own.

Black having assigned his interest in the mortgaged property first named to Armstrong, a further mortgage dated 7th September, 1842, and purporting to be for the consideration of £200, was made by Armstrong to Falconer, another defendant, who afterwards by indenture dated 4th January, 1843, executed a conveyance of his interest therein to Gunn & Brown to secure the sum of 140*l.* 4*s.* 6*d.* The bill charges

that these subsequent incumbrances were taken by the sub-mortgagees with full knowledge of the plaintiff's previous title; and that the prior registration of the defendant Falconer's mortgage was fraudulent, and of no effect, there having, at the date of the plaintiff's title, been no registration of any mesne conveyance since the grant from the crown. It avers that the plaintiff had been put to considerable costs and charges in respect to the note so endorsed by him for Armstrong and Black and the action brought thereupon; that the mortgaged estate had become absolute at law: and the complainant prays that an account may be taken under the direction of this court of what had been secured to the said defendant Thompson for principal, interest and costs secured by the said mortgage given by Armstrong and Black to the complainant, and of the damages, costs and expenses incurred by him by reason of such indorsation; and that the [other] defendants or some of them may be decreed to pay the same, together with the plaintiff's (and the defendant Thompson's) costs of this suit, or be foreclosed of all equity of redemption, &c.; and that the mortgaged premises may be sold, &c.; and that, on satisfaction to the said Leonard Thompson of the monies so secured to him as aforesaid, he the said Thompson may be decreed to reconvey the premises so mortgaged to him by the complainant.

To this bill there are several objections raised. First, that it is multifarious, being for a foreclosure in one aspect of the suit, as regards the defendant Armstrong and those claiming under him by a title subsequent to that of the plaintiff; and for a redemption as against Thompson: the plaintiff appearing in the same cause in the double character of mortgagor and mortgagee; praying for the sale of property as against one set of defendants, for the purpose of furnishing funds wherewith to redeem as against another. That, to entitle a party to foreclose, there must be an actual debt; whereas in the present case there is a mere liability—the debt due to Thompson not being paid but merely secured by another mortgage. To dispose of the last point first, I am of opinion that there is sufficient evidence of payments and loss sustained by the complainant in consequence of his having

made himself liable for Armstrong and Black's debt, to protect him against all loss in respect to which transaction the mortgage was given; to entitle him to adopt this proceeding as regards Armstrong (*a*).

Upon the other point, it is clear that the court will not permit a plaintiff to demand by one bill several matters *of different natures* against several defendants (*b*); for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connection (*c*). To such a bill a demurrer will lie. But where one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold (*d*). The court is equally averse to allowing a bill for the settlement of one portion of a matter, where the nature of the transactions and the relation of the parties to each other will permit of the several issues being embraced in one suit.

The present bill is certainly somewhat novel in its nature; but it can hardly be said that (putting the sub-mortgagees Falconer, &c., out of the question) the rights of the plaintiff against Thompson, and against Armstrong and Black, are so different in their nature and inception as to render it impossible to combine the settlement of them in one suit. It was to pay the debt due from Armstrong and Black to Thompson that the plaintiff's liability on the note arose; and to protect him against loss upon which, the mortgage was given. It was in satisfaction of such debt with interest, and the costs of the action at law, that the charge was made upon the plaintiff's own property and accepted by Thompson. The whole suit arises out of one transaction, though it includes two mortgages. Thompson does not object to the present course; for the manifest object of the suit is, that he in effect may have the benefit of the security originally given in order to facilitate the payment of his debt, and at the same time relieve the property of the plaintiff from the incumbrance rendered necessary by the defendants' neglect or inability to meet their own engagement; the complainant thus avoiding

(*a*) See also Kingsmill v. Gardner, ante p. 325. (*b*) 5 Mad. 146.
(*c*) Mitf. 181. (*d*) Mitf. 182, and cases there cited.

the circuity of resorting to one suit to obtain the money, and to another to be permitted to apply it in redeeming his own estate. I do not see any difficulty in taking this twofold account in one suit; while the additional extent of the pleadings arising from this consolidation is trifling compared to what must have followed, and the expenses incurred by some of the parties, if the plaintiff had instituted two distinct suits; so that whatever doubts I might have entertained, in the absence of any case precisely parallel, I should not have been inclined to favour the objection, even if it had come in time, which it has not. It is one which cannot be made at the hearing. In Ward v. Cooke (*a*) the same objection was made and overruled. The Vice-Chancellor Sir Thomas Plumer held that, if a bill be multifarious (even admitted to be so), it should have been objected to by demurrer, and that it was too late to make that objection on the hearing of the cause.

Another objection is for want of parties. That it appears from the evidence of one O'Neill, a witness in the cause, but whose depositions are not made evidence by being read, that he (O'Neill) had some interest, which was intended to be secured by the mortgage from Armstrong and Black to the complainant, in respect to a debt due, at the time of making it, from the mortgagors to the witness; and that, although testimony not made evidence by the plaintiff who takes it cannot be used by the other side for the purpose of substantiating any part of their case, yet that it may be brought to the attention of the court with a view to its interposing to stay a suit defective from the absence of a party interested. I admit the court is bound of its own will to notice any such defect as must necessarily render the suit imperfect, and the decree thereon inconclusive; but to render this the duty of the court, the defects must be apparent upon the *pleadings and evidence.*

The next matter of defence set up on the part of Falconer is the plea contained in the answer, that at the time of taking such mortgage the defendant Armstrong was in possession, and claimed to be seised in fee, &c.: and that he (the defendant) was a purchaser for valuable consideration, without

(*a*) 1820, 5 Mad. 122.

notice of the prior incumbrance. And it is contended that this fact being stated in the answer, and there being evidence of notice by one witness only, the rule of attaching, in such case, the principal weight to the answer, must prevail. But this rule only applies to cases where there simply appears to be oath against oath, and where neither is weakened by inconsistencies or aided by circumstances. Wherever probabilities or improbabilities exist, for or against such statements, founded on or contradicted by a single oath, the court has the same power that a jury has, in judging of the respect to be paid to either. First, let us examine the caution with which other facts are sworn to in the answer. After having shewn the descent of the title to the mortgaged premises from the crown, he states that he did not require the several title deeds to be delivered to him; but that "*the same were in the posses-* "*sion of the said Armstrong at the time that he so made such* "*mortgage to this defendant; which fact contributed to produce in* "*the mind of this defendant the belief that the said Armstrong* "*was seised in fee simple in possession of the said premises free* "*from all incumbrances.*" Here is a fact sworn to, not lightly as an unimportant matter which might be stated carelessly and erroneously, but one, the knowledge of which influenced his action in taking this mortgage. Yet the statement is not true; for each of these deeds, including the patent from the crown, are proved *not to have been* in the hands of Armstrong since the execution of the previous mortgage by himself and Black to the plaintiff, but were then in the custody of one of the witnesses to the deed and memorial, who held them for the plaintiff. If the defendant could be mistaken on such a point as this he may be mistaken as to the notice, or perhaps as to what he might deem the sufficiency of the notice. At all events, here is sufficient to let in and give full effect to the evidence of Mr. Horton, which is exceedingly special, unimpeached, and strongly corroborated by that of Mr. Murray.

Mr. Horton in his testimony states, that about the time the mortgage was made from the defendants Black and Armstrong to the plaintiff, he heard them say that the plaintiff had endorsed a note for them for £200, and that the mortgage was given to secure plaintiff: that he was the subscribing

witness to the deed from George Mitchell [the grantee of the crown] to Armstrong and Black; and that witness and one Stuart were the subscribing witnesses to the mortgage from Armstrong and Black to the plaintiff: that the deed from Mitchell and the mortgage were given to witness, for the purpose of taking them to the register office to prove them, as he (Horton) was a subscribing witness to both instruments. The patent from the crown to Mitchell had been previously in the custody of witness, and so remained in his possession till the time that Hugh Falconer's mortgage was drawn—a few days after the execution of the mortgage to plaintiff,—when one Cleverly (since deceased) borrowed it of witness, as he was about to prepare the mortgage to Falconer as attorney for Falconer. And, in answer to a subsequent interrogatory, Mr. Horton says:—"Some days after the deeds were placed "in my hands, as already mentioned, the defendant Falconer, "either alone or in company with Mr. Cleverly his attorney, "met me, and asked me whether the plaintiff had any mort- "gage on the lot mentioned in the pleadings. I then informed "him that the defendants Black and Armstrong had given "plaintiff the mortgage then in my possession on said lot, "and I told Falconer the full particulars of it; Falconer then "said Armstrong and Black owed him, and that he wanted "to get a subsequent mortgage to secure such debt. I told "him that the security would not be much as the lot was not "worth much, if anything, more than the amount of plaintiff's "mortgage. Falconer replied, he must take it or get nothing. "Next day Mr. Cleverly called at my office and borrowed "the patent, when I told him (Cleverly), half in joke, that "there must be no trick about it; he must not attempt to cut "the plaintiff's mortgage out, or get Falconer's when drawn "registered first; to which Cleverly replied 'certainly not;' "and it was agreed between us that we should go to the "register office together, I with the said deed and mortgage "for the plaintiff, and the said Cleverly with the subsequent "mortgage to Falconer, when prepared, to get registered, "and that the said deed and mortgage in my possession "should be registered first. On the day the said mortgages "were registered, Mr. Cleverly came to me and told me to

"hurry and go to the registrar and get the deed in my cus-
"tody registered, as Falconer had been to him (Cleverly)
"and had requested him, as a witness to the mortgage to him-
"self, to go and get it registered at once before the plaintiff.
"Cleverly told me he had refused to comply with such request,
"and Falconer thereupon obtained from him the mortgage,
"and was going for the other witness to it (Mr. Murray), to
"get it registered. I immediately hurried to the registrar
"and found that Falconer and Murray had arrived there
"before me, and had succeeded in getting said mortgage
"proved for registry before the plaintiff's. I expostulated
"with Falconer and told him it was most unfair to the plain-
"tiff, and remonstrated with him about it. Falconer replied,
"'every one should look out for himself.'"

Mr. Murray in his evidence states that, "in September,
"1842, Falconer met me and requested me to go with him
"to the registrar and prove the execution of a mortgage from
"the defendants Armstrong and Black to him; which mort-
"gage I had previously witnessed. I accompanied Falconer
"to the registrar, and proved the mortgage. On my way
"Falconer walked very fast, and appeared to be in a hurry.
"I asked him why he was in such a hurry; to which he re-
"plied, that he was 'afraid Mr. Schram [the plaintiff] would
"get his mortgage on the same premises registered first.'"

An objection has been made to that part of this testimony relating to the grant from the crown to Mitchell, and the deed from Mitchell to Armstrong and Black, they not being alluded to in the bill. Falconer, however, having himself referred to them in his answer, and in support of his plea stated them to have been in the hands of Armstrong, &c., has made a reference to them part of his case; I therefore think the whole is admissable.

It is stated in the bill that at the respective times of the execution of the mortgage to the plaintiff, and of the subsequent mortgage to the defendant Falconer, and each of the said times, no memorial of any conveyance or mortgage relating to the mortgaged premises had been registered according to the statute in that behalf: and it appears, from the registrar's certificates, that, the deed from Mitchell the

grantee from the crown to Armstrong and Black, the mortgage from Armstrong and Black to the plaintiff, and (from Horton and Murray's evidence, for the deed itself is not among the exhibits) the mortgage from Armstrong to Falconer, were all registered on the same day—19th September, 1842—Falconer in his answer says the 17th, but this may be another mistake. Now, under these circumstances, the precipitate registration of the mortgage taken with the knowledge of the plaintiff's previous title, could not avail him; and the registration made by the plaintiff a few minutes afterwards, being a work of mere supererogation in itself, cannot now prejudice him, but must stand as the first enregistration, the other having been a mere fraud.

It is contended however that, though Falconer's plea as purchaser for a valuable consideration without notice should not be sustained, yet that there is no evidence of such notice as against Gunn & Brown. In the absence of direct testimony, we must examine their answer. They state that, shortly before the execution of the assignment of the mortgage from Falconer, they caused the proper registry office to be searched, and found that the indenture of mortgage from Armstrong to Falconer was the first mortgage of the premises on record, &c. But what was the ground-work of the whole transaction? It appears from the answer itself that Armstrong, having become indebted to them in the sum of 140*l.* 4*s.* 6*d.*, had given to them a promissory note for that amount dated 26th July, 1842, which note was endorsed by Falconer, but was not paid when at maturity either by the maker or endorser. In satisfaction of this debt the mortgage already made by Armstrong on the 7th September to Falconer, was by him assigned to Gunn & Brown, and the note delivered up to him. It is not pretended that Armstrong was indebted to Falconer in any way but in respect to his then approaching liability on the note. The nominal consideration in the deed to Falconer is £200; but the consideration of the assignment to the defendants is the precise sum of 140*l.* 4*s.* 6*d.* The deed in fact recites that they were interested as to this amount in the mortgage to Falconer, in which case they were bound by the knowledge of Mr. Cleverly, the solicitor, who in that transaction must,

it appears, have been acting on their behalf through Falconer. Why the mortgage was not given by Armstrong direct to Gunn & Brown does not appear; but I cannot help coming to the conclusion, from the equivocal account of the matter given by the parties interested, that this circuity was adopted with a view to deprive the plaintiff of his priority, by a colourable removal of the defendants one step farther from the original mortgagor.

With regard to costs, it has been urged on behalf of Armstrong, that they ought not to be allowed to the plaintiff in respect to the redemption of his property; inasmuch as he having been surety, it was his duty, on default of his principal, to have paid the debt; and that, although compelled to this by an action at law, the costs arising therefrom would not have been so much as must necessarily have accrued from his having satisfied the debt by means of the mortgage, &c. It is true that the plaintiff, as surety, was morally and legally bound to fulfil his undertaking; but the argument does not come with much force from the principal, whose legal and moral liability were at least as great as that of his surety, and whose omission in respect of his primary duty had been the origin of the evil.

Judgment for the usual decree of foreclosure and redemption.

VEXED QUESTIONS.—FRAUDS.

(Continued from page 320.)

The case of Cornfoot v. Fowke (6 M. & W. 358), is fresh in the memory of our professional readers. The question arose on a plea of fraud and covin to an action for the rent of a house, which the agent of the plaintiff had assured the defendant that there was no objection to. The plaintiff, the landlord, however, well knew that there was a grave objection to the house, of which he made no mention to his agent, and the agent was wholly ignorant of such objection when he made the false statement alleged in the plea. In this case

the majority of the Court of Exchequer held that the defence was bad upon the grounds thus stated by Mr. Baron Parke.

"The alleged fraud consists in an untrue representation made "by a house agent employed by the plaintiff, in an answer "to a question by the defendant. The question was, whether "there was any objection to the house; the answer, that there "was none; and it appeared that the next door was a brothel, "and that the plaintiff knew it before, but the agent did not. "My Lord Chief Baron thought the plaintiff was bound by "the agent's representation, and left the question to the jury, "whether that representation was intended to relate to in- "trinsic objections only or applied to extrinsic objections "also. The jury found that it was meant and understood to "refer to both; and to the mode in which that question was "left to the jury, or their finding upon it, no objection is "made. But it is said, and I think justly said, *that it is not "enough to support the plea that the representation is untrue; it "must be proved to have been fraudulently made.* As this repre- "sentation is not embodied in the contract itself, the contract "cannot be affected unless it be a fraudulent representation, "and that is the principle on which the plea is founded. Now "the simple facts that the plaintiff knew of the existence of "the nuisance, and that the agent, who did not know of it, "represented that it did not exist, are not enough to consti- "tute fraud; each person is innocent because the plaintiff "makes no false representation; and the agent, though he "makes one, does not know it to be false; and it seems to "me to be an untenable proposition, that if each be innocent, "the act of either or both can be a fraud. No case could be "found in which such a principle is laid down as was admitted "in the course of the argument. It must be conceded, that "if one employ an agent to make a contract, and that agent, "though the principal be perfectly guiltless, knowingly com- "mit a fraud in making it, not only is the contract void, but "the principal is liable to an action. Lord Holt held that in "an action of deceit for selling one sort of silk for another, "upon evidence that there was no actual deceit in the defen- "dant, but that it was in his factor beyond sea, the merchant "was liable; Hern v. Nichols (1 Salk. 289). But in the "present case the agent acted without any fraudulent intent; "and, therefore, his act alone neither renders the plaintiff "liable to an action nor vitiates the contract. It must also "be admitted, that if the plaintiff not merely knew of the "nuisance, but purposely employed an ignorant agent, sus- "pecting that a question would be asked from him, and at the "same time believing or suspecting that it would, by reason "of such ignorance, be answered in the negative, the plaintiff

"would unquestionably be guilty of a fraud, and the contract "would be avoided; for then the representation of the agent, "which he intended to be made, would be the same as his "own, and his own representation, coupled with his knowledge "of its falsehood, would doubtless be a fraud. But whether "the facts in the case would warrant an inference that such a "fraud was committed, it is unnecessary to inquire, as, if they "would, this question should have been submitted to the "jury."

Nothing can carry the doctrine further than this; it almost outstrips the subsequent judgment in Taylor v. Ashton, which we shall presently cite. The injury here was unquestionably great; and a fact which on any principle of common honesty ought to have been disclosed to the defendant is kept from his knowledge. The non-communication to the agent was the means whereby the defendant was misled and damnified, and yet that very ignorance is made the ground of denying redress to the defendant; the defence of the plaintiff is his own wrongful act, and this the court upholds as law; for if the agent had been made acquainted with the objection, it is admitted that the plaintiff could not have maintained his action: but because the plaintiff improperly keeps him in ignorance, the defendant is left without redress. Mr. Baron Parke thinks, if the plaintiff had purposely withheld the knowledge of the fact from his agent in order that he might deceive the defendant, the case would have been otherwise; that is to say, the liability of the party benefitting by a fraud is to depend on the secret motives in his mind, which from their very nature it is impossible to know. Is it possible to conceive a rule of law more disastrously fraught with uncertainty of application, and more injurious to commercial security? But we hasten to add the masterly judgment of the Lord Chief Justice (who dissented from the court) to the opinions we have already recorded.

"I have bestowed some consideration on this subject, and "am sorry to find myself obliged to differ from my brethren "on a matter that appears to me, but for their opinion, too "plain to admit of a doubt. In the first place, it is not correct "to suppose that the legal definition of fraud and covin "necessarily includes any degree of moral turpitude. Every "action for the breach of a promise, for deceit, for not

"complying with a warranty, or for false representation, is "founded upon a legal fraud, which is charged as such in the "declaration, although there be *no moral guilt* in the defen- "dant. The warranty of a fact which does not exist, or the "representation of a material fact contrary to the truth, are "both said, in the language of the law, to be fraudulent, "although the party making them *suppose them to be correct.* "This point, if it could be doubted, is fully established by "the case of Williamson v. Allison (2 East. 446). That "was a declaration in tort for breach of a warranty, that "twenty-four dozen bottles of claret were in a fit and proper "state to be exported to India, whereas they were at the time, "and the defendant well knew they were, in a very unfit and "improper state. At the trial no evidence was given of "defendant's knowledge, and the verdict being for the plain- "tiff, a motion was made afterwards for a new trial, on the "ground that the scienter having been alleged ought to have "been proved. But the court, after full discussion, and a "reference to cases cited in the argument, were unanimously "of opinion that the allegation of the scienter was wholly "unnecessary and immaterial, and therefore need not be "proved. Now, if the action had been for a false represen- "tation, made by the seller, of a material fact, by reason of "which the plaintiff was induced to buy, although the seller "might have supposed the fact to be true, the same reasoning "or the same rule would apply; the difference between a "warranty and a representation is nothing more than this, "that where there is a written contract the warranty forms "a part of the contract, but the representation is collateral to "the contract, and may be made verbally, though the con- "tract may be in writing; but if it be of a fact, without which "the other party would not have entered into the contract "at all, or at least on the same terms, it is equally effectual, "if untrue, to avoid the contract, or to give an action for "damages on the ground of fraud. This is often illustrated "by actions, which have been very common of late, by the "purchasers of public houses, who have been induced to buy "or to give a great price for the goodwill of the house by a "representation of the extent of its business, and if that "representation of the extent of its business turns out to be "false, even though the party making it supposed it to be "true, and whether that party were the principal or the agent, "it has never been doubted that the contract is void, and that "the buyer may recover back his money in an action for "money had and received to his use. In the case of Hodson "v. Williamson (1 Wm. Bl. 463), Mr. Justice Yates lays it "down as a general proposition, that the concealment of "material circumstances vitiates all contracts, upon the prin-

"ciples of natural law. If this be true, can it be doubted "that the false representation of a material circumstance also "vitiates a contract? These principles are familiar to every "person conversant with the law of insurance. But a policy "of insurance is a contract, and is to be governed by the same "principles as govern other contracts. When it is said to be "a contract aberrimæ fidei, this only means that the good "faith which is the basis of all contracts is more especially "required in that species of contract in which one of the "parties is necessarily less acquainted with the details of the "subject of the contract than the other. Now nothing is "more certain than that the concealment or misrepresenta- "tion, whether by principal or agent, by design or by mistake, "of a material fact, however innocently made, avoids the "contract on the ground of a legal fraud. But though I con- "sider this case as coming fully within the meaning of a legal "fraud, even if the agent is presumed to be ignorant of the "falsehood of his misrepresentation, I am very far from con- "ceding that it is a case void of all moral turpitude."

Of this just judgment we should weaken the force by any comment of our own. The Court of Exchequer upheld the views of Mr. Baron Parke, and there was judgment for the plaintiff. It now becomes our duty to cite the next authority in favour of the view taken by Lord Abinger; it is, *mirabile dictu*, from the same court, composed of the same judges who overruled him, and who took the opposite opinion in the case we have just cited. They have also since resumed their former opinion, and have in fact overuled themselves twice over in two considered judgments, laying down this same point in the 10th and 11th volumes of Meeson and Welsby with equal positiveness both ways, and overruling themselves moreover in the latter case without the slightest allusion to their former judgment! We have a high respect for the learned Barons of the Court of Exchequer, nor can more lucid or profounder judgments be cited than those which enrich the reports of their court; but we confess our entire inability to reconcile that astute precision and zealous activity of acumen, at all times so keenly awake to the smallest flaws in arguments by counsel, with the conflict of the following judgments, which we extract from the authorized reports. We have only to premise, that the case of Smout v. Ilbery (10 M. & W. 1), though it was decided upon the point that a

party could not be held liable for a representation believed to be true, and which he *had not the means* of knowing to be false (see p. 11), it clearly decides that the liability exists where the truth might have been ascertained, though the statement were *believed to be true.* In that case a widow had ordered goods on the assumption that her husband, who had sailed for China, was alive, at a time when she could not have heard of his death. The question arose whether, by the order she gave for meat in her husband's name, she did not impliedly undertake that he was alive. We repeat, that had it been possible for her to have known that he was alive, she would, according to the judgment, have been held liable for the misrepresentation. In the case of Taylor v. Ashton (11 M. & W. 401), the misrepresentation was direct and express: it consisted in the report of a Joint Stock Banking Company, which represented itself in a prosperous condition, whereas it was not, and an action upon the case was brought, charging fraudulent misrepresentation and statements known by them to be untrue, against the defendants, by the plaintiff, who had been induced to take shares on the faith of the report. The jury found the defendants not guilty of the charge laid in the declaration, but guilty of gross negligence. Upon this the exact question arose which forms the subject of this article, and also of the judgment in Smout v. Ilbery, and which may be briefly put thus,—whether a falsehood in a statement, without fraud, is actionable? Here are the judgments, which we print side by side for facility of contrast:

SMOUT v. ILBERY.

"*We took time to consider this question, and to examine the authorities on this subject, which is one of some difficulty.* The point, how far an agent is personally liable, who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority with an intention to deceive, the agent would be personally responsible. But indepen-

TAYLOR v. ASHTON.

"It was contended by Mr. Knowles, that it was not necessary moral fraud should be committed, in order to render those persons liable; for that if they made statements for their own benefit, which were calculated to induce another to take a particular step, and if he did take that step to his prejudice in consequence of such statements, and if such statements were false, the defendants were responsible, *though they had not been guilty of any moral*

dently of this, which is perfectly free from doubt, there seem to be still two other classes of cases in which an agent who, without actual authority, makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable; for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge, and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, *in which the courts have held that where a party making the contract as agent bonâ fide believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent* IS NOT ACTUATED BY ANY FRAUDULENT MOTIVES, *nor has he made any statement which he knows to be untrue.* BUT STILL HIS LIABILITY DEPENDS ON THE SAME PRINCIPLES AS BEFORE. *It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertions, it is equally just that he who makes fraud.* Indeed, he said the finding of the jury on this issue would warrant the position he took, because the jury found the defendants not guilty, but at the same time said they begged to express their opinion that the defendants had been guilty of *gross negligence;* and it is insisted that even that, accompanied with a damage to the plaintiff, in consequence of that gross negligence, would be sufficient to give him a right of action. FROM THIS PROPOSITION WE ENTIRELY DISSENT, *because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made.* That is the doctrine laid down in Pasley v. Freeman, where, for the first time, the cases on this subject were considered. In that case Mr. Justice Grose differed from the rest of the court, and thought the law gave no remedy for fraud, unless there was a contract between the parties. The court, however, held that if a person told that which was untrue, and told it for a fraudulent purpose, and with the intention to induce another to do an act, and that act was done to the prejudice of the plaintiff, then an action for fraud would lie. That case was followed by Haycraft v. Creasy, and a great variety of other cases, *and it must now be considered as established law.* But then it was said, that in order to constitute that fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue; that it was enough that the fact *was* untrue, *if* they communicated that fact for a *deceitful purpose*; and to that proposition the court is prepared to assent. It is not necessary to shew that the defendants knew the fact to be untrue; *if* they stated a fact which was true *for a*

such assertion should be personally liable for its consequences."

fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud."

Parke, B., in the course of the argument—"I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud."

In Smout v. Ilbery the court thinks that the liability exists where there is no moral fraud at all. In Taylor v. Ashton they think that moral fraud is the sine qua non of liability. In the one case negligence alone in making statements *is* actionable, even where impliedly made; in the other, negligence alone in making statements is not actionable, though directly made! Where the subject-matter of the misrepresentation is that of an agent undertaking for his principal without authority, as in Smart v. Ilbery and other cases, which we have cited, it is clear that the misrepresentation is less direct, more likely to be unintentional, and less liable to the suspicion of moral fraud than where, as in Taylor v. Ashton, the misrepresentation was express, and not implied, and was moreover made by parties directly interested in its subject-matter (the value of commodity for sale, ex gr.), and where ignorance of the falsehood of the statement would be less probable, and fraud more likely to lurk. We name this to shew that no sort of distinction, explanatory of the discrepancy of judgment on this point, can be based on the difference between representations by agents and by principals; for as far as such distinction goes, the Court of Exchequer upholds liability where the representation is least likely to be fraudulent, and denies it where it is most probable; but in point of fact there is no real distinction. The representation that a person is vested with an authority, which he has not got, is merely a misrepresentation on a parity with any other mis-statement; and the principle of the law of fraud applies indifferently to either.(*a*)

(*a*) In Polhill v. Walter, 3 B. & Ad. 114 (1832), where the defendant had accepted a bill *per proc.* knowing that he had no authority to do so, but believing that the acceptance would be ratified, the court held that *corrupt motive* was *not* essential to an action for the fraud; but that the defendant's *representation*

Lord Denman and the judges of the Court of Queen's Bench are now distinctly of opinion that fraudulent intent is *not* essential to the right of action, and have so ruled it in the recent case of Collins v. Evans, cited in a note to Wilson v. Fuller (3 Q. B. 78), although that decision was overruled in the Exchequer Chamber on writ of error (13 Law J. Q. B. 180).

In Evans v. Collins (decided in Q. B. Trin. Vac. June 24th, 1843), Lord Denman, C. J., said, in delivering judgment, "One of two persons has suffered by the conduct of another. "The sufferer is wholly free from blame; but the party who "caused his loss, though charged neither with fraud nor with "negligence, must have been guilty of some fault when he "made a false representation. He was not bound to make "any statement, nor justified in making any which he did not "know to be true; and it is just that he, not the party whom "he misled, should abide the consequence of his misconduct. "The allegation that the defendant knew his representation "to be false is therefore immaterial; without it, the declara- "tion discloses enough to maintain the action, and nothing "that goes beyond that necessity need be proved."

True it is that this decision has been overruled by the Exchequer Chamber; but if we err not, the principle of the judgment has been subsequently re-established by a still higher jurisdiction—the House of Lords.

Railton v. Matthews, 10 Cl. & Fin. 934, is a decision directly analogous, and based on the self-same principle with the doctrines we have just cited. It was an appeal to the House of Lords. The respondents had not communicated certain facts affecting an agent's credit to the plaintiff, who became his co-surety in a bond to the respondents, without any communication with them, and it proving that they the

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being "untrue to his knowledge," he was liable; though if he "had had good reason to believe his representation to be true, he would have incurred no liability." This judgment establishes a sort of *tertium quid*, and exhibits the wavering course of the decisions on the subject. It is a refinement upon Taylor v. Ashton, and equally distinguishable from the bolder doctrine of Smout v. Ilbery, affording no authority for either. It asserts that where there is no knowledge of the falsehood there is no liability; but it does not go the length of saying that there must be absolute moral fraud to constitute it, for in Polhill v. Walker there was none.

respondents knew facts materially affecting the credit of the agent. The agent having proved a defaulter, an action was raised in Scotland against all the obligors in the bond, and the appellant, one of them, raised another action against the respondents for reduction of the bond, on the ground that it was obtained fraudulently by the respondents, by means of a fraudulent concealment of material circumstances, known to them, and deeply affecting the credit of the agent, which they suppressed and concealed, and thereby that the bond was obtained by fraud and deceit. The two issues were afterwards joined in these actions; the Lord Chief Justice Clerk held at the trial that the "concealment must be first of things "known to the defenders, or which they had good ground to "suspect; 2dly. That the concealment therefore, being undue, "must be wilful and intentional, with a view to the advantage "they were to receive." The jury found accordingly. There was a bill of exceptions to this ruling, argued before the lords of the second division, who by an interlocutor disallowed it, and refused a new trial. The appeal in the House of Lords was against this interlocutor, and the House of Lords reversed the interlocutor, and in the course of the judgment Lord Cottenham said, "In my opinion there may be a case of "improper concealment, or non-communication of facts, which "ought to be communicated, which would affect the situation "of the parties, *even if it was not wilful and intentional, and with* "*a view to the advantage the parties were to receive.*" Lord Campbell thus laid down the rule:

"What is the meaning of *undue concealment* on the part of "the defenders? I apprehend the meaning of those words "is, whether Railton was induced to subscribe the bond by "the defenders having omitted to divulge facts within their "knowledge, which they were bound *in point of law* to divulge; "and whether they concealed those facts *from one motive or* "*another*, I apprehend, is *wholly immaterial. It certainly is* "*wholly immaterial to the interest of the surety, because to say that* "*his obligations shall depend on that which is passing in the mind* "*of the party requiring the bond, appears to me preposterous; for* "*that would make the obligation of the surety depend on whether* "*the other party had a good memory, or whether he was a person* "*of good sense, or whether he had the motive in his mind, or* "*whether he was aware that these facts ought to be disclosed.* The

"liability of a surety must depend on the situation in which "he is placed, *or the knowledge communicated to him* of the "facts of the case, and not upon what was passing in the "mind of the other party, *or the motive of the other party.* "*If the facts are such as ought to have been communicated, if it was* "*material to the surety that they should be communicated, the motive* "*for withholding them, I apprehend, is wholly immaterial.*"

It may be objected to this case that the decision went on the rule that the concealment of facts from an obligor of a bond, such as affect the credit of a person for whom such obligor is bound, invalidates the bond. Equally does the existence of fraud invalidate a contract: in both cases the question is virtually the same. Is it essential that the concealment in the one, and the fraud in the other, should be wilfully and knowingly perpetrated? The decision is therefore in point.

The plain principle of the authorities we have now cited for the liability of persons who make representations whereby others are defrauded, though without guilty knowledge of the fraud or intention to deceive, is this,—that men are responsible for the probable results of their acts; and wherever a man, without sufficient knowledge, takes upon himself to make an assertion which proves to be false, and it results in fraud, he is by every principle of justice liable for the fraud he occasions, and the injury of which he is the immediate cause. If the absence of malus animus were a defence for such misconduct, it would *à fortiori* excuse acts of negligence, which are daily the subject of actions where no shadow of malus animus is imputed. On what conceivable principle are wrongdoers held liable in one case, and exempted from all liability in the other? To borrow the admirable language of the Court of Exchequer, when overruling itself in Smout v. Ilbery, if their liability depends on the same principles as where the falsehood is known, "if that wrong (in the case of "the misrepresentation) produces injury to a third person, "who is wholly ignorant of the grounds on which such belief "of the supposed agent is founded, and who has relied on the "correctness of his assertion, *it is equally just that he should be* "*personally liable for its consequences* * * * *he holds himself out*

"*as guaranteeing the consequences of his act.*" This is the true reason of the liability. The person who makes the assertion undertakes for its truth. Lord Abinger expressly puts this on a parity with a warranty in Cornfoot v. Fowke; and though this is expressly denied by Tindal, C. J., in Budd v. Fairmanners (8 Bing. 48), in principle there is really no other difference than that between an express and an implied promise. Morally there is no distinction; and Story, in his excellent Commentaries on Agency, p. 227, n. (to which the Court of Exchequer refers in its Smout v. Ilbery judgment), says, "The damage is the same to the party who confided in "such representation, whether the party making it acted "with a knowledge of its falsity or not. *In short, he undertakes "for the truth of his representation.*" And in the second edition of his Treatise on Equity Jurisprudence, vol. i. p. 166, after considering the subject of misrepresentation generally, he observes: "Whether the party thus misrepresenting a fact "knew it to be false, or made the assertion without knowing "whether it were true or false, is wholly immaterial, for the "affirmation of what one does not know or believe to be true "is equally, in morals and law, as unjustifiable as the affirma-"tion of what is known to be positively false; and even if "the party innocently misrepresents a fact by mistake, it is "equally conclusive, for it operates as a surprise and impo-"sition upon the other party."

Whilst the benefit of holding men responsible for mis-statements, whereby others are defrauded, is thus palpable, where is the hardship to the persons thus rendered liable? In the first place their liability according to all the cases arises only where their mis-statement was the cause of injury to the sufferer. There are two classes of cases where persons ought to be held liable for these mis-statements, whether they knew them to be false or not. First, where the party making them is interested in the fraud; and, secondly, where he is not. In the first case, can there be a doubt that, according to morality and justice, he ought to be responsible, unless indeed the doctrine of caveat emptor is to be carried (as it was in a judgment we shall presently cite) to the length of making the ven-

dor profit by his own wrong, and rendering that very negligence which, in other cases would be itself actionable, in this a defence to an action? Where, however, in the other case, the person making the mis-statement has no interest in it, there, unless the fact he affirmed were peculiarly within his knowledge, and not merely a naked assertion, he would not be liable; but where he knows that the other party will be guided by the statement, and he chuses to make it, not as a mere matter of opinion or belief, but as a fact within his actual knowledge, we ask, on what principle of justice, by what analogy of law, is he to be divested of legal liability for a voluntary statement of which he impliedly warrants the truth, and for which he is clearly morally responsible?

One very sound reason why the affirmant is held bound by the result of his statement is the impossibility of testing his motive. How can the real mind or the degree of belief be in all cases ascertained? If it cannot, motive is not a safe or a sound criterion of liability. On this ground, in actions for libel, the law looks at the results and tendency of the act. Chalmers v. Payne (2 C. M. R. 156); Fisher v. Clement (10 B. & Cr. 472). In Burrowes v. Lock (10 Vesey, 476), the Master of the Rolls said, "the plaintiff cannot dive into the "secret recesses of the heart, so as to know whether the party "did or did not *recollect* the fact, and it is no excuse to say he "did not recollect it; at least it was *gross* negligence to *take* "*upon him to aver distinctly and positively*, without giving him-"self the trouble to recollect whether the fact was so or not." As Lord Campbell remarked, in Matthews v. Railton, the requirement that intent shall be proved is "preposterous;" it is worse than preposterous; it is a narrow and anti-social view of the requirements of justice in a great commercial country, where the mightiest enterprises and the largest interests are hourly staked on the integrity of individual credit. If men are to be held irresponsible for the results of false statements, whereby vast damage ensues, upon the plea of their own ignorance of the truth or falsehood of such statement, a blow is struck at good faith and the security of all commercial credit. We regard the last decision of the Exchequer Cham-

ber in this light. We refer to the case of Ormerod v. Huth and others, at the time we write reported only in the Law Times of June 28, 1845. It was an action on the case against the defendants, who were dealers in cotton, for fraud in representing certain samples of cotton as fair samples of 142 bales, which the plaintiff was thereby induced to buy at the price of 1646*l.* 15*s.*, whereas they were not fair samples, but of a very inferior description. The judge, who tried the cause at nisi prius, declared to the jury that *unless the jury could see grounds for inferring that the defendants or their brokers were acquainted with the fraud* that had been practised, or had acted against good faith or with some fradulent purpose, the defendants were entitled to a verdict. The record then alleged that the jury gave a verdict for the defendants. The ground assigned for error thus stated the facts: "that when a vendor, during "the course of negociating a sale, makes a representation to "the purchaser which is likely to act as an inducement to the "latter who subsequently completes the bargain, the vendor "not having made any communication as to the extent or "means of his knowledge or ignorance, nor given any caution "or explanation, and the representation turns out to be false, "and an action on the case is brought upon it, the jury is "not precluded from finding in favour of the plaintiff by "reason of knowledge of the falsehood, or of acting against "good faith or with fraudulent intent, not being brought home "to the defendant."

The court of error, after a long argument, came to an immediate conclusion *without taking time to consider*, and confirmed the judgment of the court below; Tindal, C. J. is reputed to have said in giving judgment of the court of error:

"The rule which is to be derived from all the cases appears "to us to be that where, upon the sale of goods, the purchaser "is satisfied without requiring a warranty, which is a matter "for his own consideration, he cannot recover upon a mere "representation of the quality by the seller, unless he can "show that the representation was bottomed in fraud. If, "indeed, the representation was false to the knowledge of the "party making it, this would, in general, be conclusive evi- "dence of fraud; but if the representation was honestly made "and believed at the time to be true by the party making it,

"although not true in point of fact, we think this does not "amount to fraud in law; but that the rule of *caveat emptor* "applies, and the representation itself does not furnish a "ground of action; and although the cases may in appearance "raise some difficulty as to the effect of a false assertion or "representation of title in the seller, yet it will be found on "examination that in each of those cases there was either an "assertion of title embodied in the contract, or a representa- "tion of title, which was false, to the knowledge of the seller. "The rule we have drawn from the cases appears to us to be "supported so clearly by the early as well as the most recent "decisions, that we think it unnecessary to bring them forward "in recital, satisfying ourselves by saying that the exception "must be disallowed, and the judgment of the Court of "Exchequer affirmed."

(Present Tindal, C. J., Williams, Coltman, Coleridge, Maule and Creswell, Js.)

This case affords matter of very grave consideration and no small apprehension on the part of mercantile men. If the law is to step in and extend its protection to those who knowingly or not are the instruments of frauds such as these, the security of commercial dealing is seriously shaken. We look upon this decision as a direct premium and inducement to the recklessness of the statements upon which a large proportion of the commercial transactions of this country are and must be necessarily based; it upholds an irresponsibility for falsehood which cannot but beget indifference to truth. If men are known to be irresponsible for the carelessness of their statements in matters vital to the interest of those they mislead, where is the security of the merchant and the tradesman in relying on those parol statements which form the basis of so vast a part of the dealings and business of life? No matter how basely defrauded—no matter how grievously injured,—unless the plaintiff can dive into the mind of the person who misled him, and exhibit his secret intent to a jury, the sufferer is remediless for the wrong done to him. That ignorance, which in no other action of a man's life is admissible as a plea for the most venial conduct, if illegal, is to be a lawful defence where the wrong done is a flagrant fraud, and its results a heavy and perhaps a ruinous injury. The doctrine

is monstrous in principle in its best aspect, but here, applied as it was to a case where the statement was the basis of a contract, and the parties benefitted by the mis-statement were the parties who made it, we humbly submit it is irreconcilable with the very authorities on which it was alleged to be based. How is the doctrine of caveat emptor to apply? Are the purchasers of cotton henceforth to unpack every single bale and examine them seriatim? If so, there will be but little cotton bought and sold, we trow. Dobell v. Stevens (3 B. & Cr. 623) is a direct authority for holding a person liable for a mis-statement, though not laid as being known to be false in the declaration, and not embodied in a contract, but where like this it was the basis of it. Decisions there certainly are, and many of them, which uphold the general rule laid down in Ormerod v. Huth; but what are they? inane echos, and mere repetitions of the views of Grose, Lawrence and Leblanc, Js. in Haycraft v. Creasy, and like the judgment in Ormerod v. Huth, barren dicta divested of any attempt at a reason for their obvious divergence from the rules of responsibility in all other cases. The chief among them are Budd v. Fairmaner (8 Bing. 48); Polhill v. Walter (3 B. & Ad. 114); Foster v. Charles (7 Bing. 105); Freeman v. Baker (5 B. & Ad. 797); Wilson v. Butler (4 B. N. C. 748); Ames v. Milward (8 Taunt. 367); Cornfoot v. Fowke (6 M. & W. 358); Fuller v. Wilson (3 Q. B. 58 (*a*)); Collins v. Evans (13 Law Journ. Q. B. 180); Pickering v. Dawson (4 Taunt. 779), &c. &c.

Where is the principle by which these decisions uphold the non-liability of him who defrauds another by a mis-statement, simply because his intent to defraud is not shown? Where is the reasoning whereby they can withstand the phalanx of authority and the breadth and strength of principle by which we have shown that the contrary doctrine is fortified and vindicated? Mansfield—Kenyon—Best—Denman—Abinger—Sir James Mansfield—Cottenham—Campbell—Story—are these names and authorities against which the dicta of Mr. Justice Grose are to countervail? Are the great require-

(*a*) This case really decides nothing but the facts on which it turned.

ments of commerce—the consistency of legal remedy—and above all, the imperishable interests of justice, to be sacrificed to a servile, mindless allegiance to precedents; regardless of those great principles and those high moral and social duties which the wisest and greatest of our judges have taught us to regard as the test and basis of law? *S.*
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