The Gleaner:

AND NORTHUMBERLAND SCHEDIASMA.

VOLUME V.] *Nec aranearum sane texus ideo melior, quia ex se fila gignunt, nec noster vilior quia ex alienis libamus ut apes.* [No. 26.

MIRAMICHI, TUESDAY MORNING, MARCH 4, 1834.

THE GLEANER.

PROVINCIAL LEGISLATURE.

NEW-BRUNSWICK.

February 10.

SHERIFF'S SALES OF REAL ESTATE.

The Bill to alter and amend the Act, "subjecting Real Estates to the payment of debts, and directing the Sheriff in his proceedings thereon," was committed.—Mr. Gilbert in the Chair.

Mr. STREET stated the object of the bill, which chiefly was, to throw the *onus* of proving deficiencies in the formalities previous to sale by execution, of real estates by the Sheriff, on the party disputing the sale, or defending the consequent action of ejectment for recovering possession of the estate, instead of on the purchaser, or plaintiff in such actions.—The hon. member stated that at present, purchasers of estates sold and conveyed by Sheriffs frequently laboured under extreme inconvenience, from the Rule of the Supreme Court requiring the plaintiff in such actions of ejectment to produce a copy of the judgment against the debtor, to prove that the Sheriff had in every respect advertised the property according to law, that there was a want of goods and chattels whereon to levy, and, in short, to produce such a great deal of minute proof, which it was often next to impossible for a plaintive or purchaser to produce. He thought it much better, therefore, that the party questioning these facts should be compelled to prove that they had *not* been regularly performed, than that the plaintiff should be required to prove that they had; because it frequently happened that estates sold by the Sheriff were purchased by strangers, persons ignorant of the previous occurrences and wholly unable to have a knowledge of them, but who would purchase such estates solely on the conviction that the title was good, and would be conveyed to them legally by the Sheriff.—The present mode was also attended by another inconvenience: the question might not arise till some years after the sale, when the parties entitled to the possession of the property sold might be unable to collect all the necessary documents and proofs, and when it would be much easier for the party questioning the right, to prove that the formalities had not been properly complied with, than for the opposite party to prove that they had. The present practice also tended greatly to depreciate the value of the property so sold, because persons would not purchase property liable to such litigious interference or disturbance, unless they could get it at a very great bargain; and therefore, in every point of view, it was desirable that the *onus* of proving default in the necessary preliminaries by the Sheriff, should lie on the questioning party. The conveyance of the property by the Sheriff should be *prima facie* evidence of the correctness of the sale, and the party dispating that point should prove the contrary. This bill, therefore, being intended to effect that object, the hon. member believed would be found very useful, as the rule of the Supreme Court under the present law had been generally complained of.

M. KINNEAR, after stating that in a former session he had intended to bring in a bill of this kind, but had postponed it, under the expectation of a general revision of the law, after the Report of the Law Commissioners, expressed his approbation of the Bill, and trusted that it would remedy all the defects complained of. He heartily concurred in what had been said by the hon. mover, respecting the difficulty of making sale under a Sheriff's proceedings. He had known cases, where the property was obliged to be given up by the purchasers, because the Sheriff had ignorantly and unintentionally made some mistake in the preliminary formalities.—The law required a great many minute particulars to be attended to, and if the purchaser could not prove that every title had been exactly performed, he must lose his title. The rule of Court also required the purchaser to look well to his title before making the purchase, or else, in case of deficient title, he must lose not only his land, but also all right of action on the case. Now, to throw such an aggravated case wholly on the purchaser was, surely, a most serious evil; a serious evil to the purchaser, to the person whose land had been taken and sold, and to the creditors of such person; because the value of the land would be greatly depreciated, by its title and possession being exposed to so many risks on the part of the purchaser. It would therefore be decidedly for the benefit of all parties, the purchaser, the debtor, and the creditor, that relief in this case should be afforded; and he (Mr K.) therefore hoped the present bill would pass.

Mr. CHANDLER said, that it would be observed by the Committee, that none of the requisitions of the present law would be taken away by this bill; its only object was, to determine who should prove the performance of all these preliminary matters. The law would remain *in statu quo*, with respect to all its guards and requirements, but the purchaser would not be bound to prove all those things, as at present, but the defendant, if he questioned their performance, would be required to prove the deficiencies he might allege. A great deal of labour and expense was now thrown on purchasers, in consequence of the rule of court, from which this bill would relieve them. The law presumed, that every officer performed his duty, until the contrary was proved. This bill only corroborated that presumption of the law, and would therefore prevent much litigation, inconvenience and expense. He (Mr C.) fully concurred in opinion, that the bill was highly a necessary one.

Mr. SIMONDS thought the bill in general very good, but suggested, whether it would not be well to include in it some provision, making it incumbent on the Sheriff to ascertain positively that the debtor had a good title to the land seized, before making sale of it.

Mr. CHANDLER informed the hon. member that such a provision could not possibly be made; because such a fact would be a question of law, which the Sheriff could have no power or ability to determine.

Mr. SIMONDS, in reply, regretted the difficulties now attending purchases under Sheriff's sales, and approved of the proposal for a remedy. He also suggested the insertion of some clause, to prevent lands sold by administrators being claimed by the heirs, as he had heard had lately been done in one instance in this Province.

Mr. CHANDLER assured the hon. member that lands lawfully sold by administrators, for want of assets, could not be claimed by the heirs; and then detailed the circumstances of the particular case alluded to, which he considered to have been particularly hard, although from the curious train of circumstances attending it, he was perfectly satisfied that the decision of the Supreme Court was correct.

Mr. KINNEAR also replied to Mr. Simonds' observations, and in doing so, particularly stated, that, with respect to the title of lands, the purchaser could ascertain that point quite as satisfactorily, when lands were sold by the Sheriff, as if he had purchased them of the owner himself; because he could have recourse to the public records, and examine the deeds.—The hon. member corroborated Mr. Chandler's remarks relative to lands sold by administrators, and also observed, that with respect to that point also, there ought to be some relief to the purchaser. When administrators found a deficiency of assets, and obtained a licence to sell lands, the purchaser ought not to be bound to prove the licence; but the whole facts relative to the transaction, such as the want of assets, the licence to sell, &c., should be inserted in the deed of conveyance by the administrators; the whole should be on affidavit of the administrators or executors, or of the auctioneer appointed to sell the estate, and enrolled on the country records, and the production of such affidavit in court should be *prima facie* evidence of a good title to the lands so purchased.

Mr. STREET observed, that the Sheriff could sell only "*all right and title*" to the lands, and could not give possession of them, or determine what the right or title was. It would therefore be both the duty and interest of the purchaser, to ascertain the goodness of the title before purchasing, because he must know that he could purchase only the "*right and title.*" The object of the bill simply was, that it should be presumed that the Sheriff had done his duty, in all the previous particulars, and to throw the *onus* of proving the contrary on the defendant in the action of ejectment.—With respect to administrators' sales, he thought the whole law of administration decidedly required revision, and he hoped and believed the subject would, ere long, be taken up by the law commissioners; and whenever a bill for that purpose should be brought in, the whole of such matters could be remedied together. It was a subject requiring great consideration and care, and had therefore better not be introduced into the present bill.

Mr. S. HUMBERT made some remarks on the propriety of making as much amendment as possible in one bill, so as to prevent frequent legislation. He approved of this bill as far as it went, but wished to see it effect all the amendments suggested.

Mr. CHANDLER replied to Mr. S. Humbert; and Mr. Simonds expressed his perfect satisfaction with what had fallen from Mr. C., and his decided approval of the bill.

Mr. END was altogether against the principle of the bill. It had been said, that it was a fundamental principle of law, that every public officer did his duty, until proof of the contrary; and that therefore the Sheriff must be presumed to have done his duty, till convicted of having neglected it. He (Mr. E.) thought that was carrying the principle too far. If the people of this Province had any share in choosing their Sheriffs, he would be inclined to go in favour of this bill; but when he found, as he did, that the Sheriffs were the very unfittest persons for such offices that could possibly be appointed, and that the mode of appointing them was an innovation of the people's rights in choosing them, he would certainly not extend that general principle to Sheriffs. A Sheriff was the very last officer to whom he would extend it.—But there was another principle of law which ought to be attended to; which was, that no person should be called upon to prove a negative. Now it would often be very hard for Defendants in these actions of ejectment, to prove that the Sheriff had *not* duly advertised the property in every particular; that he had not given due notice of sale; that he had not taken every legal precaution, and performed every legal acquirement. A Sheriff might omit some of these duties; he might make an improper seizure; he might not give due public notice of sale, and he might at last sell the property to a person with whom he had colluded, for the very purpose of maliciously injuring the original owner; and if, then the mere proof of sales were admitted in an action of ejectment, as conclusive against the defendant, because he could not prove that the Sheriff had not done all that the law required, his property might be most improperly wrested from him, at a price far below its value. He (Mr E.) would compel the Sheriff to do with the property, in every respect, exactly what the owner would himself do if he wanted to sell, so as to obtain the best possible price for it; and he would never compel a party to prove a negative. A main theory of the British Constitution was, that every man entrusted with power would abuse it if he could; and therefore, in every enactment, power was always coupled with responsibility. Should not, then, that principle be allowed to affect Sheriffs; seeing that they were appointed as they were, without any responsibility to the people?—He (Mr E.) was against the bill *in toto*; and in every action of ejectment of this kind, he would make the Plaintiff prove, step by step, that the sheriff had in every respect taken a legal course.

Mr. KINNEAR thought the remarks of Mr. End very good; and they had fully confirmed him (Mr K.) in the idea, that the Bill should go a little further with regard to the sheriffs. He thought the Sheriff should be compelled, at the time of acknowledging the sale, to swear before a Magistrate, that he had executed his duty previous to the sale, in every particular, according to the requirements of the law. There would then be two safeguards in the Bill; firstly, against any abuse of power by the public officer; for it might reasonably be supposed, that no Sheriff would venture or attempt to commit a wilful and deliberate perjury, and his affidavit, therefore, would be a safeguard against the abuse of his power; and secondly, the party purchasing the title would be far more sure of the correctness of the sale than he otherwise would have been, and would have powerful evidence to satisfy him that he would hold his title safely, as far as the sheriff was concerned, and would therefore be inclined to give a better price for the land. The reason why he (Mr K.) felt so strongly in favour of this Bill was, that he had him-