1854, except in so far as it might affect "any rate or taxes of the present year," 1853, "or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by this act." The plaintiff purchased, under 13 & 14 Vic., in 1852; so that he was not entitled to a conveyance until the act had been repealed.

Held, that as the exemption in the repealing clause gave no power to complete inchoate proceedings, the sheriff could not convey, although such a result was clearly not intended.--*McDonald* v. *McDonell et al.*, 24 U. C. Q. B. 424.

RECOGNIZANCE—RELIEF UNDER C. S. U. C. CAP. 117, SEC. 11.—Defendant having entered into a recognizance to appear at a certain assizes, attended until the last day, when he left, assuming, as no indictment had been found, that the charge against him, of a breach of the Foreign Enlistment Act, was not intended to be prosecuted. He was, however, called, and his recognizance estreated.

The court, under the circumstances, relieved him and his sureties, under C. S. U. C. cap. 117, sec. 11, on payment of costs, and on his entering into a new recognizance to appear at the following assizes.—*Reg.* v. *McLeod*, 24 U. C. Q. B. 485.

UPPER CANADA REPORTS.

QUEEN'S BENCH

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

MASON v. MORGAN.

Injury by domestic animals—Trespass maintainble—Evidence of scienter—Right of bailee or owner to recover—General verdict on two counts—Plaintiff not bound to elect.

(Continued from p. 134.)

1. That trespass *quære clausum fregit* is not maintainable on the facts adduced in support of the first count, and the remedy of the plaintiff, if any, is case, not trespass.

2. That were the law otherwise, the mare killed not being shewn to be the property of the plaintiff, but of his father, and no injury to the soil being shewn, the plaintiff is not on the first count entitled to substantial damages.

3. That there was no sufficient evidence to support the averment of *scienter* in the second count, and, on the contrary thereof, the evidence wholly disproved that averment.

4. That there was no sufficient evidence to sustain the issue of property in the mare killed as being the property of the plaintiff, but, on the contrary thereof, the evidence wholly disproved the issue joined as to property on the second count.

5. That the plaintiff proved only one wrong, and having proved no more is not entitled to hold a general verdict on two independent counts charging two distinct wrongs; and the jury, though polled, were wholly unable to decide in respect of which counts the plaintiff was entitled to recover.

6. That the plaintiff failed on the evidence to sustain the first and second counts, or one or other of them, and the verdict being general on both counts, there ought to be a new trial.

Robert A. Harrison, for the appellant, cited *Mason* v. *Morgan*, 10 U. C. L. J. 189; *Blacklock* v. *Millikan*, 8 C. P. 34; *Beckwith* v. *Shoredike*, 4 Burr. 2092; *Millen* v. *Fawtrey*, Sir W. Jones, 131. Popham, 161; *Brown* v. *Giles*, 1, C. & P. 118; Anon. Ventr. 295; Chy. Plg. Vol. I., p. 93; *Thomas* v. *Morgan*, 2 Cr. M. & R. 496; *Holford* v. *Dunnett*, 7 M. & W. 848; *Haacke* v. *Adamson*, 14 C. P. 201; *Midland R. W. Co.* v. *Bromley*, 17 C. B. 372, 382; *Trew* v. *R. W. Passengers Assurance Co.*, 6 Jur. N. S. 759.

John Bell, Q. C., contra.

HAGARTY, J., delivered the judgment of the court.

That portion of the appeal which insists that the second count fails in proof of the "scienter" may be disposed of by referring to the view of the law expressed in *Thomas* v. *Morgan*, referred to by the learned judge of the court below. The expressions of the defendant were proper to be submitted to the jury, accompanied by the caution as to their weight. It is contrary to the practice of this court in appeals to weigh the evidence legally entitled to be submitted to them; and the learned judge below is not dissatisfied with the finding.

As to the right of property in the animal killed, it seems immaterial, as the plaintiff in any event could recover its value against a wrong-doer, although a mere bailee. This point was discussed in the case of *Irving* v. *Hagerman*, in this court (22 U. C. Q. B. 545).

On the first count, the law is not in a very clear state. Defendant's bull breaks and enters the plaintiff's close, and there kills his mare, defendant not being present or aware of the act: can trespass be maintained? The late Sir J. Macaulay, in the case cited in 3 C. P. 34, says, "I have always been of opinion, that or trespasses by domestic animals, such as horses, cattle, pigs, &c., the owner of the close might maintain trespass against the owner of the animals, unless he can excuse the act for defect of fences," &c.

One of the cases which he cites in support of that view, *Mason* v. *Keeling*, is reported in 1 Ld. Raym. 606, but more fully in 12 Mod. 332. Holt, C. J., says: "The difference is between things in which the party has valuable property, for he shall answer for all damages done by them," &c., and explains how as to dogs, &c., "notice of all their ill quality" is necessary: "If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but if my dog go into another man's soil, no action will lie."

The report in Ld. Raym. 606, is not very clear as to Holt, C. J.'s view. He says: "If the owner puts a horse or an ox to grass in his field, which is adjoining the highway, and the horse or the ox breaks the hedge, and runs into the highway, and kills or gores some passenger, an action will not lie against the owner; otherwise if he had notice that they had done such a thing before.