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DIARY FOR MARCH.

1. Thursday...... { Sittings of Error and Appeal begin. Last day for return of Collector's Rolls where time extended by Municip. Council
4. SUNDAY...... 2nd Sunday in Lent. {day for not. of Trial Co. Ct.
5. Monday......... Last day for notice of Ex Ch. Brantford and Kingston. Last
6. Tuesday......... Chan. Ex. Term. London and Belleville, commences.
11. SUNDAY...... *3rd Sunday in Lent.*
12. Monday......... Last day for notice Ch. Ex. Term. Hamilton and Brockville.
13. Tuesday......... Last day for serv. of writ for Toronto Spring Assizes. Quarter
18. SUNDAY....... *4th Sunday in Lent.* {Ses. and Co. Court Sittings in each Co.
19. Monday......... Last day for not. of Ex Ch for Barrie and Ottawa.
20. Tuesday......... Chan. Ex. Term. Brantford and Kingston, commences.
23. Friday......... Last day for declar for Toronto Spring Assizes.
25. SUNDAY....... *5th Sunday in Lent.*
26. Monday......... Last day for not of Ex Chan. Goderich and Cornwall.
27. Tuesday......... Chan. Ex. Term. Hamilton and Brockville, commences,
31. Saturday......... Last day for notice of Trial for Toronto Spring Assizes.

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

MARCH, 1860.

ERRATUM.

In our report of *Potter* v. *Carroll*, in the last number of the *Law Journal*, it is stated that Richards, J., dissented from the judgment of the Court. We are informed that this is an error, as the judgment pronounced was unanimous. Our readers therefore will please make the necessary correction.

RETURNS OF CONVICTIONS TO QUARTER SESSIONS.

The office of Justice of the Peace is not free from responsibility, and yet there is one duty which, of all others, appears to be very generally neglected. It is the duty which the law imposes upon every Justice of the Peace to make returns of convictions had before him, in the manner prescribed by statute.

To the nature of this duty and the penalty for neglect of it we propose in this number to direct attention.

Extensive powers are entrusted to Justices of the Peace, including the power in given cases to fine and imprison. This power is one which, if not placed under check, may be abused in many ways. If abused to the detriment of the liberty of the subject, the subject has his remedy for damages. But as the fines to be imposed do not belong to the convicting justice, if not called upon to give an account of them there may be an abuse of much magnitude, though no particular individual suffer wrong thereby. The sufferer would be the Crown—the guardian of the public—which would be defrauded if fines were improperly withheld.

The office of Justice of the Peace is not to be deemed one of profit. Nothing would be more revolting to every principle of British justice than that magistrates should make a livelihood out of fines imposed in the discharge of official duty. Were this allowed, the frailty of human nature might lead the justice to impose a fine not so much in proportion to the wrong committed as in proportion to his own actual wants or sordid craving for gain. Thus the liberty of the subject would be at the mercy of avarice, and the administration of justice would become a subject of scorn.

The Legislature has deemed it prudent to provide certain checks as preventives of these abuses.

On 27th August, 1841, an act was passed, reciting that for the more effectual recovery and application of penalties, fines and damages, imposed by Justices of the Peace according to law, it is necessary and expedient that such justices shall, *together* with the convictions, make a due return thereof to the General Quarter Sessions of the Peace of the district in which such penalties, fines and damages, have accrued. (4 & 5 Vic. cap. 12.)

In the case of a conviction, it is very doubtful whether a return of the conviction itself, without the formal return of the particulars rendered necessary by the statute, is sufficient. In *Kelly q. t.* v. *Cowan*, 18 U. C. Q. B. 104, hereafter noticed, which was the case of a conviction by a single justice, the Chief Justice of Upper Canada made some observations that appear to favor the affirmative of this proposition; while in *Murphy q. t.* v. *Harvey*, decided during last term in the Court of Common Pleas, but not yet reported, the Chief Justice of the Common Pleas expressed an adverse opinion—at all events as regards the case of a conviction by two or more justices, which was the case then before the court.

The only safe course for a justice to adopt is in the words of the preamble of 4 & 5 Vic. cap. 12, "together with the conviction, to make a due return thereof, &c."

The act now regulating the returns is chapter 124 of the Consolidated Statutes of Upper Canada.

By section 1, it is provided "That *every* Justice of the Peace, before whom any trial or hearing is had under any law giving jurisdiction in the premises, and who convicts or imposes any fine, forfeiture, penalty, or damages, upon the defendant, shall make a return thereof in writing under his hand to the *next* ensuing General Quarter Sessions of

the Peace for the county in which such conviction takes place, and of the *receipt* and *application* of the moneys received from the defendant."

By the same section it is provided, "That if the conviction takes place before two or more justices, such *justices* being present and joining in such conviction shall make an *immediate* return thereof."

The following is the form of the return given by the statute:

Name of the prosecutor.	Name of the defendant.	Nature of the charge.	Date of conviction.	Name of convicting justice.	Amount of penalty, fine or damage.	Time when paid or to be paid to said justice.	To whom paid over by said justice.	If not paid, why not, and general observations, if any.

All experience proves that it is not enough for the Legislature to enjoin that given things of a public nature shall be done, but must go further, and state that if not done, there shall be a given penalty. So the Legislature has done here.

It is provided by section 2 of the same statute, "that in case the justice or justices before whom any such conviction takes place, or who receives any such moneys, *neglect* or *refuse* to make such return thereof, or in case any such justice or justices *wilfully* make a false, partial or incorrect return, or *wilfully* receive a larger amount of fees than by law authorized to be received, in every such case such justice and justices, and each and every of them, so neglecting or refusing, or wilfully making such false, partial or incorrect return, or wilfully receiving a larger amount of fees as aforesaid, shall forfeit and pay the sum of eighty dollars, together with full costs of suit, to be recovered by *any* person who sues for the same by action of debt or information, in any court of record in Upper Canada; one moiety whereof shall be paid to the party suing, and the other moiety into the hands of her Majesty's Receiver-General, to and for the public uses of the Province."

Every prosecution for any such penalty must be commenced within six months next after the cause of action accrues, and the same is to be tried in the county wherein the penalty was incurred (sec. 3).

The object of the Legislature in passing these enactments is, to compel justices to make a return of whatever fines they impose, in order that their diligence in collecting the fines may be quickened, and in order that it may be known what money they admit themselves to have received, or that they may be made to account for it (*O'Reilly q. t.* v. *Allan*, 11 U.C Q.B. 415).

It seems to be no excuse for neglect to make the return required, that the conviction made was an illegal one. The Court of Queen's Bench expressed the opinion, that if a justice of the peace makes a conviction in fact—not an imperfect one, but one upon the face of it good—there must be a return of it. If he, after conviction, discover that the conviction was illegal, and for that reason forbear to enforce the fine, his obvious course would be to make the return as the law directs. and at the same time explain in the return that the fine is not collected, because the justice doubts the legality of his conviction. (*Ib.*) It is proper, however, to observe, that the late Chief Justice Macaulay, in one case, expressed much doubt as to the correctness of this ruling, and inclined to the opinion that an illegal conviction is no conviction, and therefore not necessary to be noticed in a return (*Spillane* v. *Wilton*, 4 U. C. C. P. 242).

Some doubt has existed as to whether an appeal from the conviction to General Quarter Sessions is a sufficient excuse for not making the return. The point has recently received a judicial exposition (*Kelly q. t.* v. *Cowan*, 8 U.C. Q.B. 110). The better opinion now appears to be, that notwithstanding an appeal, a return of some kind must be made. If the justice return the conviction alone, and in any way make it appear on the face of the proceedings transmitted that the conviction has been appealed from, it seems he cannot properly be convicted of having either *refused* or *neglected* to make the return required by the statute. The appeal should suspend all proceedings as regards the collection of the fine, but, singular to say, the act regulating the appeals from convictions by justices makes no provision for giving notice of the appeal to the convicting justice, or to stay his proceedings to collect any fine imposed by him (*Murphy q. t.* v. *Harvey*, *ubi supra*). If the appeal after the conviction is so returned be abandoned, then it clearly rests with the justice to proceed and collect the fine; and after having collected it, he would be bound to make a return, showing the payment, to the Court of General Quarter Sessions. If the contrary course were adopted, there would be much confusion. One object of the return is, to inform the Court of General Quarter Sessions what has been done by the convicting justice. If the convicting justice make no return of any kind, he leaves the Court without information

of the fact that there has been a conviction. If the appeal be abandoned, the Court of Sessions would not be in possession of the information that a conviction had taken place, and so would not have the means of calling the justice to account, in case he afterwards levied the fine and made no return of it.

Where a justice of the peace committed and fined the plaintiff for carrying away some cordwood, and, after notice of appeal, the prosecutor, finding that the conviction was improper, went to the justice, who drew out for him a notice of discontinuance, which was served on the person acting as attorney for the plaintiff, before the then next Court of Sessions, and the justice made a general return to that Court, including this and another conviction, but ran his pen through the entry of this conviction, leaving, however, the entry quite legible; and made a memorandum at the end of it as follows, "this case withdrawn by plaintiff," the return was held sufficient (*Ball q. t.* v. *Fraser*, 18 U.C. Q.B. 100). The facts of this case, it will be observed, so far from disclosing neglect or refusal, show that the justice did, under the circumstances, all that he could do to comply with the statute; and it would be well for every justice, when in a state of perplexity, to follow his example. The courts will not allow a public officer, such as a justice of the peace, to be vexatiously sued or needlessly harassed. When it appears that everything was done that, under the circumstances of the particular case, could be done, to comply with the provisions of the statute, the justice may rely upon receiving all necessary protection as against vexation or oppression.

In each return, a justice may include as many convictions as have, up to the time of the making of the return, been had before him; but for every conviction omitted from the return, he is liable to be sued for the penalty.

Where a justice at the same time convicted three persons severally, and neglected to make a return of the convictions, he was held liable to a fine of eighty dollars for each one of the three convictions (*Donagh q. t.* v. *Longworth*, 8 U. C. C.P. 437). So in the event of habitual neglect, it may become a matter of most serious consequence. Some magistrates, in the course of three months, make as many as twelve convictions, and, in the event of neglect to make the requisite return to the next Court of General Quarter Sessions, such a magistrate would be liable to a penalty of $960! It is to be hoped that these remarks will not be without due effect upon the many magistrates who, by their inexcusable neglect of plain and known duty, daily lay themselves open to be mulcted almost to ruin.

Another remark, and we have done. It is this: In the case of a conviction by two or more justices of the peace, it is the duty of each and all to make the return. By this we mean that though only one return is required, each justice is liable to a penalty of eighty dollars if that return be neglected. Thus: if three justices convict of an offence, and no return be made, the penalty, instead of being only $80, would be $240, or $80 from each (*Metcalf q. t.* v. *Reeve & Gardner*, 9 U. C. Q. B. 263). The moiety of the penalty is given to any person, that is, to the first person who shall sue for the same. The justice is not liable to be sued by two or more persons for one and the same penalty. If, however, the person who first sues do so without any intention of proceeding to judgment, so as to collect the penalty, but in fact to protect the magistrate from being sued by other parties for the same cause, such device will not be allowed to succeed (*Kelly q. t.* v. *Cowan*, 18 U.C. Q.B. 104).

SPRING ASSIZES, 1860.

Date.	Midland.	Eastern.	Oxford.	Home.	Western.	Toronto.
Wednesday, March 14	C. J. Robinson	C. J. Draper	J. McLean	J. Burns	J. Richards	J. Hagarty
Thursday " 15	Whitby				Sarnia	
Monday " 19				Hamilton		
Tuesday " 20	Peterboro'				Goderich	
Monday " 26	Cobourg		Guelph		London	
Monday April 2			Berlin			
Monday " 9				Niagara		Toronto
Tuesday " 10	Belleville		Stratford		St. Thomas	
Wednesday " 11		Perth				
Monday " 16			Woodstock		Chatham	
Tuesday " 17		Brockville				
Monday " 23		Cornwall	Brantford	Welland	Sandwich	
Wednesday " 25	Picton					
Monday " 30				Milton		
Tuesday May 1		Ottawa	Simcoe			
Wednesday " 2	Kingston					
Monday " 7				Barrie		
Tuesday " 8		L'Orignal	Cayuga			
Tuesday " 15				Owen Sound		

Easter Term, from Monday, 21st May, to Saturday, 2nd June.

CHANCERY TERMS, 1860.

EXAMINATION TERMS.

Toronto	7th February, and 4th September.
Sandwich and Whitby	21st February, and 18th September.
Chatham and Cobourg	28th February, and 25th September.
London and Belleville	6th March, and 2nd October.
Brantford and Kingston	20th March, and 9th October.
Hamilton and Brockville	27th March, and 16th October.
Barrie and Ottawa	3rd April, and 23rd October.
Goderich and Cornwall	20th April, and 6th November.

HEARING TERMS.

From 23rd April, to 5th May. From 19th Nov., to 1st December.

LECTURES

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

BY JOHN MORRIS, ESQ.

(Continued from our last.)

4.—WAGES.

Concurrently with the courts of common law, this Court entertains jurisdiction in suits for mariners' wages. Recent statutes have also given summary remedies for the recovery of seamen's wages before justices of the peace, where the amount due does not exceed £50; and in such case no suit can be now brought, either in this court or in a court of law, "unless the owner be bankrupt or insolvent, or the ship be under arrest, or be sold by the authority of the Court of Admiralty, or unless a magistrate, acting under the authority of this Act, shall refer the case to be adjudged by this Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman is discharged or put on shore."*

The right of the Admiralty to maintain jurisdiction in suits for mariners' wages has often been questioned in common law courts. Ultimately it was settled that mariners might sue in the Admiralty for their wages on the ground chiefly of usage and convenience, although it was admitted to be expressly against the "restraining statutes," where, as is usually the case, the contract is made *on land*. This right of the mariner was said to be at first a mere indulgence, and to be at length justifiable only on the maxim "*quod communis error facit jus;*"† but as was observed by a learned reporter, in a note to one of the cases at common law in which this doctrine was propounded, "surely, it is not consonant to legal principle to hold that usage or common error can abrogate a statute to any purpose, or give legality to what an Act of Parliament expressly prohibits." The right of the mariner to proceed in this court for his wages is now clearly established, although the reasons on which it is founded are open to criticism.

The advantages of proceeding in this court are:—

(1.) That all the crew, however numerous, can join in one suit.

(2.) That the ship, or its proceeds if in the registry, may be arrested, and the wages will, in general,* be preferred to all other charges, if the value is insufficient to discharge all the claims upon the ship. In the words of Lord Stowell, "It is the sailor's right to cling to the last plank of the ship in which he has served."

(3.) The Court is open all the year round, and, as has been said, the mariner can enforce, or rather initiate, his remedy by seizure of the ship "between tide and tide."

It appears that a female mariner may earn wages and sue for them in the Admiralty Court. Such a claim was pronounced for in a case† decided by Lord Stowell, where seaman's work was proved to have been done, and well done, by a woman.

It is a peculiar principle of the Court of Admiralty, that a claim for wages is not absolutely forfeited by negligence or incapacity, but the proper deduction would be made to meet the loss. In the words of Dr. Lushington,‡ "in this court where losses have occurred from the negligence or misconduct of the seamen, the amount of the loss only is deducted from the wages; whereas in other jurisdictions, the contract not being fulfilled, the party suing would fail in recovering anything."

The Court of Admiralty has always set its face against agreements entered into by seamen for the forfeiture of their wages, or their remedies therefor. Lord Stowell, in the case of *The Juliana* (2 Dodson, 510), said:—This Court certainly does not claim the character of a Court of general equity, but it is bound by its commission and constitution to determine the cases submitted to its cognisance upon equitable principles, and according to the rules of natural justice. How far a Court of law would limit its views of the question to the letter of the contract, and leave these improvident men to find their way, in a Court of equity, out of bargain which that Court has deemed unreasonable, when it appeared in another form substantially the same, I am not able to pronounce. There are those who might, perhaps, lament if this humble class of suitors were compelled to a pilgrimage through a second court. This court is not disposed to put that burthen upon them; it will, as far as it can, protect these illiterate and inexperienced persons against their own ignorance and imprudence." The principles upon which this judgment proceeded have been repeatedly avowed and acted upon in the courts of the United States; it is cited by Judge Story and Chancellor Kent with approbation, as deciding, "that where a voyage is divided by various ports of delivery, a proportional claim for wages attaches at each of such ports, and that all attempts to evade or invade that title, by renunciations obtained from the mariners without any consideration, by collateral bonds or by contracts inserted in the body of the shipping articles, are ineffectual and void."§

And now, by statute 17 & 18 Vict. c. 104, it is enacted, "That no seaman, by reason of any agreement, shall forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled and that every stipulation inconsistent with this Act, whereby any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be inoperative." The same statute further enacts, in abrogation of the principle of the marine law, "Freight is the mother of wages," that no right to wages shall be dependent on the earning of freight; and that every seaman or apprentice, who would be entitled to demand and recover any wages if the ship in which he had served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to recover the same, notwithstanding that freight has

* Merchant Shipping Act, 17 & 18 Vic., c. 103, s. 189.

† A friend, well versed in foreign law, has favoured me with the following note on this maxim —"Is it so certain that this is an unsound maxim? It is put in the least prepossessing form, by describing the new law, which prevails over the old, as an *error*. Call it common or consuetudinary law, or case-law, and is there any reason why it should have less power to repeal or vary statutes then we know it has to repeal previous cases, and make new law where statutes and cases are silent? On the Continent, statutes are not considered to be exempt from the overruling power of subsequent consuetudinary law, nor, practically, are they so here, though our constitutional jealousy of a discretionary power in the judges inclines us to say that they are interpreted when we see that they are repealed. The word *issue* in a deed will not create an estate tail, though it is one of the words in the statute *de donis* as much as *heirs of the body* is a phrase of that statute; so st. *de donis* is, in fact, not altogether law now."

* One exception is where there is a bottomry bond, and the wages are *antecedent* to it, so in cases of collision, if the mariners of the damaging vessel are held in fault; in both these cases wages have to be postponed.

† *Jane & Matilda*, 1 Hagg. 187. ‡ *The Thomas Worthington*, 12 Jur. 1057.

§ Abbot on Shipping, p. 458.

not been earned: but that, in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim.* Previously to this statute, where no freight was earned, the mariner, as a general rule, got nothing.

The Court of Admiralty will not enforce contracts for seamen's wages which are of a *special nature*. In a case in which the mariner relied on an agreement, to the effect that he should be paid wages at the rate of so much per month, and 1*s.* 6*d.* for every ton of oil which should be obtained in the voyage, which was a whaling voyage to the Greenland fishery, Dr. Lushington, in giving judgment, thus expressed himself:—"Supposing I was to pronounce for the wages as claimed, and to compel the owners to bring in the £800 which it is alleged they have received, in what way am I to apportion the shares of the seamen? I must enter into a difficult investigation, and decide upon hand money in advance, and what is termed striking or fish money, and the shares which the mariners are to take for oil money per imperial ton.

"What must I do besides? Why, when the parties become partners under these circumstances, I should further have to decide between the interests of the mariners and the owners; for could I possibly determine that the persons on board this ship are to take all that has been saved, in total exclusion of the owners? Are they not partners in one and the same adventure.

"Would not the equitable course of proceeding be, that all the parties should come in to share and receive a division of the property which has been saved, in proportion to the amounts to which they may be respectively entitled? This Court is utterly incompetent to enter into any such apportionment. I therefore feel bound to reject this summary petition, and I do so upon three grounds—

"First, because the contract is a special contract, such as is described by Lord Tenterden as ousting the jurisdiction of this Court.

"Secondly, because I conceive that I am confirmed by the authority of Lord Stowell in so doing.

"And lastly, because the contract being in the nature of a partnership, I should have, in entertaining the question, to encounter such difficulties as would render it impossible for the Court to arrive at a just and equitable result."

Foreign seamen can sue in the Admiralty Court, with the consent of their consul, for wages earned on a foreign ship. It appears to have been the notion at one time that the Court had no jurisdiction, save by the consent of the foreign minister or consul.† In a case‡ which came before the present learned judge of the court, he examined the ground upon which this point was supposed to rest, and thus expressed himself with reference to it:—"Now, upon general principle, I apprehend that this court, administering as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description. Can it then be consistent with the principles of justice that the exercise of this right should depend entirely upon the consent of a foreign minister or consul who should be authorised to prohibit the court altogether, or to induce it from exercising its jurisdiction? How would the question stand in other courts? In other courts of this country I have no doubt that the mariners might have instituted and action, *in personam*, against the master, without reference to any consent at all. Why, then, should not proceedings be competent on their part, in this court, against the ship? For, by the general maritime law, the ship is the primary security for their wages. Is it just or proper that the consent of the foreign representative should be necessary to put this court in motion, and should not be necessary in a court of common law? How is it possible there can be any such difference between them?

"Upon general principle, then, I am inclined to hold that this court does possess a competent jurisdiction to adjudicate in these cases; at the same time, the exercise of this jurisdiction is discretionary with the court; and if the consent of the representative of the Government to which the vessel belongs is withheld, upon reasonrble grounds being shown, the court might decline to exercise its authority. Indeed, circumstances might occur, upon the face of the case itself, in which this difficulty might arise, that the matter in dispute was so connected with the municipal law of a foreign country, that this court would be incompetent to render impartial justice: in such cases, undoubtedly, the court would decline to adjudicate."

Now, the practice appears to be, to require notice to be given to the consul of the foreign country, on the commencement of proceedings; and if no interference takes place, the cause proceeds without requiring any consent.

Formerly a master could not sue the ship under any circumstances, his contract being held to be a personal one with the owner. See Pritchard's Dig. p. 475.

But by stat. 7 & 8 Vict. c. 112, s. 16, the same liens and remedies as a seaman had for the recovery of his wages were given to masters, where the owner became bankrupt or insolvent. Ibid. p. 474.

And now, by the Merchant Shipping Act, s. 191, the condition of bankruptcy or insolvency of owner is withdrawn, and the master has the same remedies as seamen. He can only sue for his wages in the first instance; but if the owners set up any claim of set-off, the Court may then go into all his accounts with the ship, and award him what may be due to him. (*The Caledonia*, and s. 191 of Merchant Shipping Act.)

Where, however, the master has hypothecated the ship, and the proceeds are insufficient to pay both his wages and the bond, his claimed is postponed to that of the bondholder. (*The Jonathan Goodhue*, Dec. 22, 1858: *Shipping Gazette*.)

2.—POSSESSION AND RESTRAINT.

The Court has always exercised a most useful and important jurisdiction as between part owners. The rule it enforces is of a twofold character: (1.) To give possession to the majority as against a minority: (2.) To require the majority who are in possession to give security for the safe return of the vessel, to any part owner who dissents from an intended voyage. To give effect to either branch of this rule, the ship can be *at once arrested* on the application of the majority who want possession, or any one of the minority who require security. The latter cause is termed a cause of restraint—it does not seek possession, but to restrain the majority from sending the ship to sea without first giving security. In a cause of restraint after a ship has been arrested, security must be given for the value of the applicant's share before the ship is released. The security is satisfied by the safe return of the ship to some port in England, even although that may not be the port to which the vessel belongs. "The Court," in the language of Lord Stowell, "in this operation is not merely ministerial, for it compels the party authoritively to find such security; it likewise compels the party to pay the sum stipulated in the bond given for the security. The bail bond contemplates no other object than the safe return of the vessel, or, in default thereof, the payment of the stipulated sum."

* Sss. 182, 183.

† The same gentleman who favoured me with the note at page 10, has also given me the following —"I presume that the ambassador's consent was required because the Roman law, which the Court of Admiralty follows, did not in general admit the mere situation of property as a sufficient foundation for jurisdiction. The plaintiff could bring even real actions only in the defendants domicile, until the year 385 A.D., when he was allowed the choice of bringing his action in the place where the thing was situate *Code*. 1 3, t. 19, 1. 3 But the words of the imperial constitution here referred to are very general, and have been carried out in practice by rules more or less liberal in different countries. If a foreign seaman contracted for wages abroad, and the ship properly belonged to a foreign port, it would have been far from being generally admitted that the casual presence of the ship here would found the jurisdiction; and, I presume, the ambassador's consent was required as a security, that by exercising the jurisdiction we should not offend the country to which the ship belonged For personal actions of course the Roman law gave the choice between the *forum domicilii of* the defendant, and the *forum contractus*."

‡ *Golubchick*, 1 W, Rob. 145.

A part owner who thus dissents, and obtains security, renounces all profit in the intended voyage. He does not participate in its risks, and he cannot, therefore, share its profits. If the owners in possession are entitled to an equal number of shares with those out of possession, the Court cannot interfere to give possession to the latter, who are considered in the same position as a minority, and entitled to the same rights as to requiring security, &c., but are not entitled to possession.

Thus, without interfering with the right of property, or attempting to settle disputes which the parties would be more likely, and better able, to settle if left to themselves, the Court, by the simple but just rule which I have stated, prevents the injury which would result if any one part owner could obstinately interfere with the enjoyment of the common property and enforces the maxim that ships are built to plough the sea, and not to lie by the wall."

The Court cannot go beyond this protective power; it cannot, for instance, as between the part owners, compel the sale of the ship, or of any part owner's share therein.

Having thus the power to take possession of a vessel from the minority, and give it to the majority in interest, à fortiori, it had the power to put the rightful owner in possession, as against a mere wrong-doer or a person having no title. If, however, there was a bonâ fide dispute as to title, the Court could not, prior to the recent statute, have interposed. It had no power to adjudicate on any question of title, as distinguished from a question of mere possession.

These suits, for giving possession of a vessel either to the majority as against a minority, or to the rightful owner as against a mere wrong-doer, or person having no title, are what have usually been termed in this court "causes of possession." They formed a part of the ancient jurisdiction, which the common law courts, after a good deal of conflict, allowed the Admiralty to retain, not because they could not have twisted the restraining statutes to embrace them, but because the common law courts had not themselves any machinery to apply the remedy which the Admiralty enforces by means of its power of arresting the vessel.

Where the shares of the respective part owners are not ascertained, the Court of Admiralty had not formerly jurisdiction. (Whether it has now or not depends upon the construction of the statute of Victoria, which we shall presently notice.) In the case of *Haly* v. *Goodson* (2 Mer. 77), the Lord Chancellor said, "Where the shares are unascertained, and their respective amount, which is a matter of covenant and contract between the parties, is the subject of dispute, then if the Court of Admiralty were to proceed, I apprehend that it would render itself liable to a prohibition. Upon that ground it is therefore, that this Court ought to interfere on the present occasion. It was in that case referred to the master to ascertain the shares of the plaintiff, who was seeking security, and to approve of the amount for which the defendant should give security.

At page 137 of the same volume of Merivale, another case *Christie* v. *Craig*, is reported, the marginal note of which is as follows:—"Injunction to restrain the sailing of a ship upon the application of a part owner refused, where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for the plaintiff's delay in applying."

There are few cases reported of applications to the Court of Chancery for injunctions to enforce security as between part owners. No practitioner would think of resorting to that court, if the simple, expeditious and inexpensive remedy of the Admiralty Court were available to him. This Court is open all the year round to applications by part owners. In all ordinary cases this is proper, and the only proper, jurisdiction, and it may be question whether the difficulties which formerly stood in the way of the Admiralty Court interfering in such cases as those just referred to, are not lessened, if not removed by the statute of Victoria.

Hitherto we have considered the position of this branch of the jurisdiction of the Admiralty Court, prior to the passing of the statute of the 3 & 4 Vict. c. 65. By the 4th sect. of that Act, it is enacted, that the Court shall have jurisdiction to decide all questions as to the title to, or ownership of, any ship or vessel, or the proceeds thereof remaining in the Registry, in any *cause of possession*, salvage, damage, wages, or bottomry; thus restoring, to a great extent, one of the most important branches of jurisdiction formerly exercised by this Court. It was not until after the Restoration that the Court appears to have been restrained by the common law courts from instituting questions of disputed title to ships.

The effect of the statute I have referred to is, I take it, to enable the court to decide all questions of title (*i. e.* the *legal* title carrying with it the right to *possession*), not merely where they arise incidentally in the suit, but also where the suit is brought with the sole object of having the question of title decided.*

In the case of foreign owners the Court would not formerly exercise jurisdiction as between part owners without the consent of the consul of the country to which the ship belongs, now I apprehend notice to, and non-interference by, the consul is sufficient; and even under the old practice a sentence of the proper tribunal of the foreign country was deemed equivalent to the consent of the minister or consul;† thus where the Court of Admiralty of Rostock, to which place the ship belonged, had ordered the master to deliver up the possession of the ship, it was decreed by our Admiralty Court to be given up to the majority of owners, in their suit against the foreign master and part owner. Such is the comity existing between this Court and a properly constituted foreign tribunal. It is even part of the ordinary jurisdiction of this Court to enforce, when necessary, the sentence of a foreign Admiralty Court; thus differing essentially from our municipal courts. The Court, however, has no power at the suit of a British part owner of a foreign vessel to arrest her, until bail is given for her safe return to her own port abroad. In the case of the *Arthur Bernstorff* (2 Eccl. & Adm. Reports, 30), in which this point was decided, the present learned judge of the Admiralty Court said, in giving judgment, "there is no doubt as to the jurisdiction of the Court, at the suit of a part of the owners, to arrest a vessel which is going on a voyage of which they disapprove, until security is given for her safe return to port; but, to the best of my recollection, this is the first time where a British owner of a part of a foreign vessel has sought to apply the remedy, and I am of opinion that I have no power to grant it. If a British Merchant thinks proper to embark his property in a foreign vessel, he is at perfect liberty to do so; but this consequence must necessarily follow—he becomes subject to the law of the foreign state to which she belongs, for her government and management. I cannot say what that law may be with respect to the present case; for aught I know the remedy which exists in this country with respect to British ships may exist in the country to which she belongs. But to arrest a foreign ship about to proceed on a voyage, until bail is given for her return, appears to me to be not only without precedent, but contrary to all principle. If, indeed, I was assured by competent information that such was the law of the country to which this vessel belongs, then upon that ground the Court might perhaps be induced to take it consideration. As the matter stands, however, I must reject the motion."

The British owner clearly has a remedy in the Admiralty Court against a foreign ship, in order to obtain possession of it

* See *The Eliza Cornish*, 17 Jurist 738.

† The same rule applies to other cases in which foreigners seek the Court in reference to a foreign ship, as we have already seen in the case of "wages."

from parties having no title,*—and in such cases the Court did not, even before the statute of Vic., feel itself so circumscribed to inquire into questions of title, as it did in an ordinary case as between British subjects; for, as Lord Stowell remarked in one of those cases, "If the British subject cannot have justice done him here, he cannot procure it elsewhere."

(To be continued.)

THE LAW OF BLASPHEMOUS LIBEL.

(From the Solicitors' Journal.)

The discussions which have recently taken place on the law of blasphemous libel have attracted considerable attention among lawyers, and also among philosophical students of English institutions and English history. Until Mr. Lewis wrote the paper which he read before the Judicial Society, and which was the groundwork of the debate reported in a former number of this Journal, as well as of its continuation, which will be found elsewhere in our columns, there was no serious attempt, that we are aware of, to give any thing like a rational account of the law of England on the subject. Here and there, in the reported cases, there were, no doubt, dicta of eminent judges, which afford some notion of the direction in which they were disposed to seek for principles in favour of a conclusion which, at all hazards, they seem predetermined to maintain. Unlike the severe reasoning which characterises most of the authorities in which great principles are enunciated for the first time, most of the leading cases on the law of blasphemy have been characterised rather more by appeals to sentimental considerations than one likes to see where the liberty of the subject is at stake. Mr. Lewis, however, has boldly undertaken to treat the question from a purely juristical point of view, and has produced a defence of the existing rule of law, such as has not hitherto appeared. Whatever learning or ingenuity could say in its favour, has been said by him. That he has nevertheless failed to convince the majority of those who heard his paper read, only proves that he urges in favour of a position not quite tenable. Accepting the definitions of blasphemy given by Lord Erskine and others, Mr. Lewis proceeds, in his paper, to show that according not only to the law of England, but to the law of society itself, the principle common to all those definitions is sound, and must be enforced in every well-regulated state. He sees in all the reported cases the purely practical aim of protecting the essential interests of society at large, or at least of certain classes of society, which according to his theory require the protection of the State, namely, the young, the ignorant, and the poor. His arguments generally may be stated as follows:—The whole existing fabric of our constitution and government in this country is identified with the christian religion, and "has no other foundation than the oath" which is taken by "the whole judicial fabric, from the king's sovereign authority to the lowest office of magistracy," "the whole is built," he says, "both in form and substance, on the oath of every one of its ministers, to do justice as God shall help them hereafter. What God? and what hereafter?" His next argument proceeds upon the ground that the standard of morality in this country is the Christian standard, and that it is criminal by scoffing and derision, or as lawyers say, maliciously, to bring Christianity into disrepute, because, by so doing, public morals are thereby undermined. Next, he says, that the great majority of the people being professors of Christianity, they have a right to be protected from insults offered to a creed which, at least, has numerous positive sanctions such as its opponents do not affect to rival.

* Would he have an equal right to possession as a part owner against a minority in interest, being foreigners and in possession? Having regard to the above case would not the Court, first enquire, what is the law of the country, to which the ship belongs, on this point?

It is obvious that, however ingenious may be the arguments and illustrations brought forward in support of these propositions, a good deal must necessarily be left to the other side to say. The first thing to be done in such a controversy, as Mr. Collier pointed out on Monday night is, to come to a clear understanding of the terms employed on either side. For instance, granting all that Mr. Lewis asserts in his first proposition to be true, and even admitting that, according to Christian doctrine there is peculiar obligation in an oath, nevertheless, according to the law of England, the oath of a person not professing Christianity, and even of one who might be generally characterised as an infidel, has equal force and validity with that of a Christian. All that the law requires is a belief in a state of future rewards and punishments, which is common to other systems of religion.

As to the argument deduced from the fact that the standard of morality in this country is Christian, it may be said that morals are independent of all religious dogmas; and have a foundation other than a spiritual one, so that there is no necessary connection between morality and any form of religious belief. The question raised as to the right of the great majority of any state to have their religious opinions and sentiments protected from insult, if not so speculative as the last one, is still too diffuse to be treated within our narrow limits. Every legal consideration, perhaps, might be raised equally well upon a narrow issue, by asking whether there is any reason in point of law why persons professing the faith of the majority should be protected from attacks upon their faith of a character such as would not give them a right to protection if directed against opinions or sentiments not affecting religion, entertained by them. There is no difficulty of course, if it be assumed that the attacks are of such a nature as to provoke a breach of the peace, or in any way to come within the category of public nuisance. The question is, whether if a man uses language of such a character, or in such a manner as to be innocent, when applied to any other subject, is to be guilty of a crime if he applies it to Christianity. In other words, is the rule of law to be dependent upon the subject-matter of what is written, or upon the animus and intention of its author and the object at which he aims? Mr. Buckle and Mr. Stuart Mill contend that any rule of law which can justify a prosecution for blasphemy, so far as it is fair and reasonable, must necessarily be applicable to any analogous attack upon the opinions of persons who are not Christians. Mr. Baron Bramwell appears to entertain the same view, and to hold that the only reasonable foundation of any such rule is the preservation of the public peace. According to this doctrine, if honestly applied, there is no doubt that, every week, there issues from the press scores of publications directed against the views of particular bodies of Christians, and containing matter which would be as liable to subject their authors to prosecution as many of those who have been tried for the crime of blasphemy. It is difficult to understand how any prosecution could be attempted according to this doctrine, except where the publication in question endangered the public peace; and therefore the author of any attack upon Christianity, however violent or scurrilous it might be, would be free from all risk, except it could be shown that he had thereby broken the public peace—a conclusion which, if just, may perhaps have the effect of making some converts to the views advocated by Mr. Lewis. He altogether rejects the assumption of equality of rights between the advocates and the opponents of Christianity in this country, or perhaps, we might say, of the adherents of any form of religion, and those who deride religion altogether. "The man which rejects religion," he says, "has nothing to offer which can entitle him to put the Christian under terms. There is no subject-matter for an exchange. The offence is all on one side. How can any one defame infidelity, which, in its very nature, abjures all claims to veneration, and which says, 'Let us eat and drink, for to-morrow we die.'" The

difficulty which he would have in applying the doctrine here laid down, would be to substantiate against a person accused of blasphemy, that his opinions were of the character and tendency described; because it appears to be the necessary corollary of Mr. Lewis's proposition, that, if the accused held other opinions, and was very far from being such an atheist as is assumed, he *would* have a right to put his accusers *under terms*, and to require that no degree of passion or invective should be allowed to be used against his creed, which he was prevented from using against Christianity.

Practically, the cardinal difficulty of the whole subject rests in the distinction between heresy and blasphemy. According to existing law, there is no essential distinction between the two. Heresy plus invective, passion, or intemperance of expression, *is* blasphemy. But law does not affect to touch insidious attempts upon Christianity, however injurious or wanton they may be, though it will prosecute a man who uses the same weapons with far less effect, if he has not the same regard for conventional forms.

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

OFFICERS AND SUITORS.

PROCEEDINGS OF A MEETING, held by the several Division Court Clerks for the County of Waterloo, at Berlin, on Mondays, the 20th and 27th days of February, 1860; convened for the purpose of mutual information and improvement, by a free discussion on the various matters connected with the operation of the Division Courts.

Present: Messrs. Wm. Davidson, Otto Klotz, H. McCrune, Geo. Colcleugh, John Allchin, Michael P. Empey and William Hendry.

John Allchin, Esq., was appointed Chairman, and
Otto Klotz, Esq., Secretary.

Among the several topics brought under consideration were:

1. The result of the operation of the 91st clause of the Act of 1850; each Clerk having prepared a statement of the proceedings had and taken under said clause during a period of eighteen months,—from the 31st December 1857, to the 30th June 1859,—of which one general statement was compiled, showing that the average per cent. of money realized under the operation of said clause in the county of Waterloo is 51, as will more fully appear from the statement below.

2. The propriety of establishing a uniform mode of procedure of Clerks in the discharge of their various duties, and the necessity of establishing a uniform practice in the taxation of costs.

The discussion on these topics, including the charges for postages, resulted in the adoption of one uniform system.

3. The necessity of further protection to execution debtors.

The meeting expressed the unanimous opinion that a larger amount than that at present exempt from seizure, might with propriety be allowed, under process, as a further protection to a debtor.

4. The necessity of having a garnishee clause embodied with the Division Court Act, which clause was deemed very essential for the benefit of Division Court creditors.

5. The propriety of increasing the amount of claim for which *personal service* of a summons is necessary.

The meeting being of the opinion that it would be proper to increase the same.

6. The subject of furnishing each Division Court office with a Safe, sufficient to contain the court books and valuable papers connected with the office; and the general opinion was expressed that such a safe is required.

7. The appointment of a Delegate, in the event of a convention of representatives of Division Court Clerks from the several counties in Upper Canada being held.

The meeting appointed Otto Klotz, Esq., Clerk of the Second Division Court, Preston, as the Delegate for the Division Court Clerks in the County of Waterloo.

After having made provisions for the incidental expenses, the meeting adjourned.

JOHN ALLCHIN, *Chairman.*
OTTO KLOTZ, *Secretary.*

STATEMENT,

Showing the actual working of all the Judgment Summonses issued in the County of Waterloo, from the 31st day of December, A. D. 1857, to the 30th day of June, A. D. 1859; being for a period of eighteen months.

Number of Division Court.	Name of the Clerks of the Division Courts.	Total Number of suits entered during said eighteen months.	Total amount of claim involved in those suits.	Number of Ju'nt Sum. issued during said period.	Amount of claim involved in such Judgment Summonses.	No. of Judgment Sum. withdr.	Amount of claim involved in such withdrawn Judgment Summonses.	No. of Ju'nt Sum. dismissed.	Amount of claim involved in such dismissed Judgment Summonses.	Number of Ju'nt Sum. remaining for adjudication.	Amount of claim involved therein.	Amount of money realized thereon.	No. of orders of commitment under Judg't Sum. process.	Number of actual commitments thereunder.	Number of days committed.	Average per cent. realized on such Judgment Sum. suits.
			$ c.		$ c.		$ c.		$ c.		$ c.	$ c.				
1	William Davidson.	2,765	57,522 21	167	3,614 69	32	1,091 84	29	733 01	108	1,749 84	1,240 65	7	2	30	70
2	Otto Klotz	1,083	25,368 58	41	1,644 92	10	502 17	5	313 70	26	829 05	247 57	2	2	20	30
3	Henry McCrune ...	1,666	43,347 33	19	823 40	2	139 42	1	29 83	16	654 21	433 17	2	...	...	66
4	George Colcleugh.	332	7,865 68	20	507 23	2	64 93	5	117 82	13	324 48	128 83	5	...	...	39
5	John Allchin........	1,820	48,387 88	47	1,934 11	6	348 40	5	304 93	36	1,280 78	391 29	8	4	40	31
6	Michael P. Empey.	1,472	37,006 51	25	513 89	3	35 90	3	44 99	19	433 00	256 33	2	...	...	59
7	William Hendry...	1,234	29,390 00	47	1,316 77	12	297 88	8	172 15	27	846 74	437 11	5	1	30	52
	Totals........	10,372	248,918 14	366	10,355 07	67	2,480 54	56	1,756 43	245	6,134 45	3,134 45	31	9	120	51

[At present we have not time to do more than to notice the above, and to state how pleased we are that in the county of Waterloo so much has been done towards carrying into effect the suggestions from time to time made in this journal. We hope that what has been done in Waterloo is only an earnest of what may yet be done in that county, and that the example there set by Division Court Clerks will not be without some practical result as regards the other counties of Upper Canada.

The Clerks of Division Courts have a great deal in their own hands. By united exertion much can be accomplished in the way of bringing about necessary reforms.

The success of the meeting to which we now refer was, we fancy, in no small degree owing to the active exertions of some energetic and clear-headed officer such as we take Mr. Otto Klotz to be. A Division Court Clerk of his ability, industry and energy, in each county of Upper Canada, would without trouble bring about meetings such as that in his county in every county of Upper Canada.

In all proceedings of the kind, a leader is required. The great majority are more inclined to follow than to lead; and we congratulate the Division Court Clerks of the County of Waterloo on having a leader in whom so much confidence can be placed as Mr. Otto Klotz.

Now that the Legislature is in session is the time for exertion.—Eds. L. J.]

U. C. REPORTS.

CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Booth v. the Preston and Berlin Railway Company.

Interpleader for proceeds of goods sold—Action—Staying same upon payment of proceeds—Costs.

Where a Sheriff sold certain goods and chattels under an execution, against the property of defendants, and after sale, but before the Sheriff had paid over the proceeds to the execution creditor, a claim was made on the Sheriff and an action commenced for damages in respect of the goods and chattels sold; but it was not proved that the goods and chattels were sold under value, and the execution creditor abandoned the proceeds, an order was made staying the action upon payment of the proceeds without deduction, and—as it appeared that the Sheriff might have applied for relief before action—upon payment of the costs of the action.

Februrry, 1859.

This was an interpleader summons, granted on 31st December, 1859, at the instance of the Sheriff of the County of Waterloo, calling on the plaintiff and Samuel C. Ridley to appear and state the nature of their claims to the goods seized.

The parties appeared, and on their different applications the summons was enlarged from day to day till the present month.

The facts, as they appear in affidavits filed and on which there was no dispute, were substantially as follows.

The Sheriff, on the 1st October last, seized a quantity of frame timber, boards, door and window frames, ties, rails, truck wheels, timber, 25 dirt cars, &c. &c., and he sold a quantity of them on 17th and 26th of October, the remainder being still in his hands.

On the 4th November, notice of Ridley's claim was given to the Sheriff.

Several communications passed between Ridley's attorney and the Sheriff, and the former would seem to have formally laid claim to a larger quantity of property than he ultimately asserted to be his.

The goods seized were in different places along the line of road, and many communications seem to have passed between the parties, which, as is alleged, induced the Sheriff to delay applying for relief before the 31st December.

On the 23rd December, he was served with process at Ridley's suit.

At the hearing, all parties agreed as to the ownership of the property, and it was conceded that Ridley was entitled to all that he finally pointed out as his in the affidavit of his agent, Carpenter, part of which were sold, and the proceeds were still held by the Sheriff and the others still in his hands.

Several affidavits were filed as to what passed between the Sheriff and Mr. Martin, the plaintiff's solicitor, the latter contending that he had not instructed the Sheriff to seize any property in particular.

It seemed conceded that the matter must be settled between Ridley and the Sheriff, as it was not clear that substantial justice could be attained by compelling Ridley and the plaintiff to interplead either to the goods or the proceeds, the plaintiff not claiming the goods claimed by Ridley, and it not being clear whether it was at his special instance the latter were taken by the Sheriff.

Harrison appeared for the Sheriff, and cited Consol. Stat. U. C., cap. 30, s. 8, p. 333; *Anderson* v. *Calloway*, 1 Dowl. P. C. 636; *Scott* v. *Lewis*, 4 Dowl. P. C. 259; *Bishop* v. *Heneman*, 2 Dowl. P. C. 166; *Washington* v. *Webb*, 16 U. C. Q. B. 232

Read, for Ridley, cited *Washington* v. *Webb*, 3 U.C. L.J. 75.

Jackson, for execution plaintiff, cited 1 *Archd.* 1323.

Read suggested that Ridley would not be fully indemnified by awarding to him the proceeds of his goods at sheriff's sale, and that the action should be allowed to proceed.

Hagarty, J.—The affidavits filed on behalf of Ridley contain no assertions that the goods have been sold at an undervalue, or any especial damage sustained at their loss.

In a case in which the claim is not made until after the sale, I do not feel called on to assume that the proceeds in the Sheriff's hands do not represent their full value.

It was also objected that the interpleader relief could not be given as the money was made.

The Stat. Consol. Acts, cap. 30, s. 8, expressly speaks of claims to goods and chattels taken in execution, *or to the proceeds or value thereof*, and enables the court or judge to deal with the case either before or after return of the process, or before or after any action has been brought against the Sheriff, "and to make such rules and orders as appear just according to the circumstances of the case."

I consider the law to be settled, that an interpleader can be directed for the money in the Sheriff's hands.—*Hall* v. *Kissock*, 11 U. C. Q. B. 9; *Scott* v. *Lewis*, 2 C. M. & R. 289, and other cases.

Assuming the jurisdiction to be clear, it remains to be seen how the case should be disposed of on the merits.

In *Abbott* v. *Richards*, 15 M. & W. 195, Pollock, C. B., says, "I find no suggestion in the affidavits of any special damage, and the supposed hardships of the party of having his goods seized and sold, perhaps for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the judges."

There may perhaps be some doubt as to the judge's authority under the act My impression is that he has a right to do all that is just, proper and equitable, under the circumstances.

Winter v. *Bartholomew*, 11 Ex. 705, is an exceedingly strong case. The Sheriff entered the house of one Mester, and there seized goods in an execution against defendant. Mester claimed some of the goods, and commenced an action against the Sheriff for breaking and entering his house and seizing his goods. The Sheriff obtained an interpleader summons, and Martin, B., ordered the goods claimed by Mester to be given up to him, and the execution creditor be barred as to them. The Sheriff to sell the other goods seized in the house belonging to the defendant, and the action against the Sheriff was ordered to be stayed. The court, after argument, refused to rescind the order so made. *Alderson, B.*—"The object of the interpleader act is the adjusting of adverse claims, but there is incidentally a power to protect the Sheriff when he is subject to an action, and it is unjust that he should be sued. If the Sheriff has been guilty of misconduct, the court will not protect him; but when he has done no wrong, the legislature intended that the court or judge who makes the interpleader order should protect him against vexatious actions. It is much more just that the matter should be left to the discretion of the court or judge, than that the Sheriff should be subject to vexatious actions."

I am of opinion that an order be made that the action brought by Ridley against the Sheriff be stayed upon the Sheriff delivering to him all the goods mentioned in Carpenter's affidavit remaining

unsold in his hands, and paying to him the proceeds without deduction of the sale of his (Ridley's) goods as have been sold, and that on such delivery and payment that Ridley be barred as against the Sheriff and the execution plaintiff of all claims in respect of such seizure or sale. That the execution plaintiff be barred as to the said goods of Ridley and the proceeds.

As the Sheriff might I think have applied before Ridley's action was brought, he must pay the costs of action. But under the circumstances I think the parties must pay their own costs of this application.

Purcell v. McKeown.

Insolvent debtor—Weekly allowance—Seduction—Consol. Stat. 22 Vic. cap. 26, s. 11

A prisoner in execution in an action for seduction, is not entitled to weekly allowance, and if granted, upon the defendant being recommitted to close custody will be suspended.

Chambers, January, 1860.

Richards, J.—The learned Chief Justice of the Court of Common Pleas, having decided, in the case of *Upthegrove* v. *Winters*, in Chambers, that where a defendant is in prison in execution, under a judgment recovered for seduction, he is not entitled to the weekly allowance, or at all events is not entitled to be discharged from custody for non-payment of such allowance in the first instance, I am not prepared to differ with him on the question.

It may be open to discussion whether, under the 11th section of chapter 26 of the Consolidated Statutes, a judge has not power to recommit where the debtor, as in this case, is confined under a judgment in an action for seduction, though he may apply for his discharge for non-payment of the weekly allowance.

Looking at the facts disclosed in the affidavits filed on behalf of the mother, that the girl seduced was not more than fourteen years of age at the time of the seduction, I do not feel that the imprisonment should be merely nominal. It is true that the defendant denies the seduction, but the verdict of the jury must be considered conclusive on this point.

On the whole, on the application to recommit, I must order the defendant to be recommitted to close custody for six calendar months, to be computed from the first day of January, 1860, and then to be discharged.

The point raised in this case is precisely the same as in the one decided before the Chief Justice of the Common Pleas, to which I have referred.

The order for the payment of the weekly allowance to be suspended during the period of the six months' imprisonment ordered by me.

McKinnon v. Campbell.

Pleading—Endorsements on Promissory Note—Practice.

An endorsement on a Promissory Note before the same is signed, is considered as part of such note. If made after the signing of the note it will not be so considered, but merely as a memorandum to identify the note.

When there is a reasonable doubt as to certain pleas being good or bad, a Judge will not, on that account, disallow them, but will permit the defendant to plead them, leaving the plaintiff to meet them as he may be advised.

Chambers, September 25, 1859.

This was the usual application to plead several pleas under the C. L. P. Act, and the particulars of the case sufficiently appear in the judgment.

Richards, J.—The first plea is, that the note at the time it was made, and at the time of the delivery thereof to Alonzo Hinds by defendant, was drawn and made subject to a condition written thereon to the effect, that the time for the payment thereof should be extended until the said Alonzo Hinds performed or procure the performance of the condition of a certain Bond theretofore made, and executed by him to the defendant, for the conveyance to the defendant by the said Alonzo Hinds, and other parties therein mentioned, of a certain Lot of land therein described; but that the said Alonzo Hinds did not perform the condition of the said bond, or procure the performance thereof; and the defendant further saith, that after the making and delivery of the said note, and before the commencement of this suit, the said note was by the said Alonzo Hinds, without the consent of the defendant, altered and changed in this, that the said condition was obliterated and erased from the said note in order to obtain for the said note currency, and to render the same unconditional, and the said alteration was not made in correction of any mistake originally made in the framing of the said note, or to further the first intention of the parties thereto or either of them.

2nd. That at the time of the delivery of the said note to Alonzo Hinds, there was written or endorsed thereon, a condition in writing to the effect that the time for the payment thereof should be extended, and the defendant should not be required to pay the same until the said Alonzo Hinds performed and procured the performance of the condition of a certain Bond theretofore made and executed by him to the defendant, for the conveyance to the defendant by the said Alonzo Hinds, and the other parties therein mentioned, of a certain Lot of land therein described, but the said Alonzo Hinds did not perform the condition of the said Bond, or procure the performance thereof—that after the making and delivery of the note to the said Alonzo Hinds, and whilst he was the holder thereof, Alonzo Hinds fraudently and without the consent of the defendant, and not in furtherance of the intention of the parties thereto, or any of them, obliterated and erased the said condition so endorsed on the said note, by pasting on the back of the said note, and over the back of the said condition, a piece of paper, in order to conceal the same, and thereby to render the said note negotiable; and the plaintiff's afterward accepted and received the said note with notice of the premises hereinbefore mentioned.

Leeds v. *Lancashire*, 2, Campbell, 205. Declaration on a joint and several promissory notes payable to order, made by defendant and others. It was proven that before defendant signed there was written on the back of the paper as follows: "The within is taken for security of all such balances as we may happen to owe Leeds & Co., (the plaintiffs,) not extending further than the within named sum of £200; but this note to be in force for six months *and no money liable to be called for sooner in any case.*" Lord Ellenborough held this to be an agreement between the parties, and not a promissory note. He added, in the hands of a *bona fide* holder, who received it as a promissory note, it might possibly be considered as such, but the present plai[illegible]s can only treat it as a guarantee to the amount of £200, as to them the endorsement must be incorporated with the body of the note.

Hartley v. *Wilkinson*, 4 Campbell, 127, sustains the doctrine in *Leeds* v. *Lancashire*, and decides that an endorsement written before the note was signed, must be taken to be part of it, and that as the note was to be void on any dispute arising between Lady Wray and the plaintiff, the payment was a conditional one, and the instrument a promissory note under the Statute of Anne—this rule was upheld by the full court. *Stone* v. *Metcalfe*, 4, Campbell, 218.—An endorsement made after the note is signed, does not qualify the contract.

In *Brill* v. *Crick*, 1 M. & W. 232, the endorsement was written upon the note after it was signed, but the endorsement was not signed. It purported that the note was given upon the conditions mentioned in a memorandum of agreement annexed to the note. In argument *Stone* v. *Metcalfe*, *Hartley* v. *Wilkinson*, and *Leeds* v. *Lancashire*, were referred to, and it was admitted if it had been delivered absolutely as a promissory note, it was not competent to the parties afterwards to limit its negotiability by any endorsement upon it. It was held that it was not a note payable on a contingency, as the agreement was collateral to the note. Parke Baron said, the endorsement was never intended to alter the legal effect of the note; it was intended for the purpose of marking the note only, and to shew it was the note referred to in the agreement, and concluded thus:—"The averment of the endorsement brings it within the principle acted upon in *Stone* v *Metcalfe*, as he has averred that the note was signed and delivered, and *then* the momorandum was endorsed upon the back of the note.

In *Bowerbank* v. *Monteiro*, 4 Taunton, 845, Gibbs J says: In *Hoan* v. *Graham*, (3 Campbell, 57,) the evidence of the undertaking to provide for the Bill was rejected, merely because it was parol and could not be received to control written instruments against an *innocent indorser;* but a party may, by one writing, change or contradict another, and there is no innocent endorser here."

I have not met with any case that decides expressly that an indorsement like the present would prejudice the holder's remedy on the instrument after it had passed into the hands of a third party, and although Lord Ellenborough, in *Leeds* v. *Lancashire*, seems to intimate that, possibly in the hands of a *bona fide* holder, it might be considered a promissory note, yet in deciding on this application, I do not feel warranted in disallowing the plea, and thus shutting out the defendant from raising the point in this case, if he desires to do so. If the instrument was not a promissory note in its inception, it does not seem clear that passing it away to a third party could make it a note afterwards.

Both the pleas would be more clearly brought within the rule, that defendant wishes to apply, by averring that the endorsement was made thereon before the note was signed by defendant.

Webb v. *Spicer*—13 Q. B. 886, and in error at page 852 of the same volume; and *Salmon* v. *Webb*, 3 H. of L., Cases 510, all in fact being on the same point, go to shew that many of the agreements not to enforce the payments of notes, &c., on certain contingencies, can only be enforced as covenants not to sue, and cannot be set up in answer to an action on the notes.

On the whole, I do not feel at liberty to refuse permission to defendant to file these pleas.

It may be that it would be sufficient to plead *non fecit* to bring up the point, but if the facts stated in the plea amount only to a denial of the making of the note, pleading them in the form proposed can do no injury to the plaintiff.

Without deciding whether the pleas are good or not, I do not feel at liberty to disallow them.

Order granted.

IN RE ECCLES ET AL.

Attorney's bill—Delivery and taxation thereof—Conveyancing charges.

An attorney's bill for conveyancing, is taxable under our Provincial Statute.
The Master in taxing a bill for conveyancing, must decide as best he can, according to the contract expressed or implied between the parties.
An attorney's bill must have been delivered before it will be referred to the Master for taxation, and if not delivered, the first application should be for the delivery thereof.
Affidavits filed in support of an application for the delivery or taxation of an attorney's bill, must be intitled in some court, (the court in which it is intended to use them,) and under the Statute "In the matter of A. B."

On the 23rd July, 1859, an order was obtained by one Peachy, against H. Eccles, Q. C., and his partners, referring certain bills of costs between attorney and client in this matter, to the Master to tax.

The order was made, on the consent of the parties, to have all matters contained in an account delivered by the said Eccles to his client, (excepting one item, viz., a charge for conveying, amounting to £37 10s.) referred to the Master for taxation.

This application was made on behalf of Peachy, to have the order amended so as to include the charge for conveyancing with the other bills thereby referred.

Eccles, Q. C., objected.

1st. That the papers on which this summons was obtained, had not been filed, and that none of the papers were intitled in any Court.

2nd. That no Common Law Court has power to refer an attorney's bill for conveyancing, or which is composed in part of charges for conveyancing, to the Master for taxation.

3rd. That in this matter no bills of costs had been rendered, but merely an account containing the charges in gross in the different causes.

RICHARDS, J.—I think the variations in our Provincial Statutes, 16 Vic., cap. 175, sec. 20, from the Imperial Statutes 6 & 7 Vic., cap. 73, sec. 57, have the effect of giving to any of the Courts or Judges therein mentioned, the power of directing a reference to taxation of an Attorney's Bill, whilst in England that power is confined to the Judges of some of the Courts, when the business done is of a peculiar character.

The Provincial Statute is equally broad with the Imperial one as to the necessity of an attorney delivering his bill "for any business done by him," before he can maintain any action for the recovery thereof.

The Statute seems to apply to "All business done by any attorney in respect of an employment in his professional character as such." I have no doubt it would extend to the items referred to in the account viz.: drawing an assignment and ordinary conveyancing, such as is usually done by professional gentlemen, when employed as attorneys.

As to the mode in which the master is to ascertain the amount to be allowed for conveyancing, the observations of Pollock, C. B., in *Smith* v. *Dimes*, 4 Ex. 32, will apply, as reported at page 41: "When the Bill is for conveyancing and business not done in Court, the master, or taxing officer, must ascertain the remuneration as well as he can, according to the contract between the parties express or implied."

When an attorney's bill is solely for conveyancing, there may be some question as to whom it is to be referred, but if any of the business charged for is done in any Court, then the Judge may refer it "to the proper officer of any of the Courts in which any of the business charged for in the bill may have been done."

The affidavit and papers in this matter are not intitled in any Court, and I think the objection on this head is fatal to the application.

The parties, however, have, I suppose, sufficiently obtained the object they have in view, by bringing the matter forward.

The application should be first made, that the attorneys deliver their bill. The affidavits to support the application should, according to the general rules of practice, be intitled in the Court in which they are intended to be used, and under the Statute they should be intitled, "in the matter of the attorney." It is recommended that the party applying should shew that he comes within the Statute, and has a right to demand a bill. After the bill is obtained, he should then make another application to tax it.

It is probable on applying to the attorneys, they will deliver their bill and consent to the taxation. If not, the party who seeks to have the bill taxed must take the steps required by law to obtain the bill and have it taxed.

I have no doubt, as I have already intimated, that under the Statute and decided cases, that charges for conveyancing, when done by an attorney, as such are taxable, and when these charges and others for business done in Court are included in an attorney's bill, they may be referred to the master to be taxed with the other charges in the bill rendered.

This Summons will be discharged, but Mr. Peachy may apply again if he find it necessary to do so.

Summons discharged.

Reported by T. C. WALLBRIDGE, Esq., *Barrister-at-Law.*

CANNIFF V. BOGART.

Replevin—Verdict for part—Costs.

In an action of replevin for 900,000 feet of sawn lumber, alleged to have been wrongfully taken by the defendants, there were the following pleas: 1st. *Non cepit.* 2nd. Goods not plaintiff's. 3rd. Goods defendant's. The jury found a verdict in favor of the plaintiff, for 350,000 feet of lumber, and for defendant as to the remaining 550,000.

Held, 1st. That plaintiff having obtained a verdict which entitled him to damages, was entitled to the general costs of the cause. 2nd. That defendant having succeeded with respect to a portion of the property in dispute, was entitled to the proportion of costs occasioned by that part of the case, and to deduct them from the plaintiff's bill

(Chambers, 7th December, 1859.)

This was an action of replevin for 900,000 feet of sawn pine boards, alleged to have been wrongfully taken by the defendant.

Pleas: 1st. *Non cepit.* 2nd. Goods not plaintiff's. 3rd. Goods were defendant's.

At the trial before Draper, C. J., the plaintiff proved the same title to the whole of the property. The jury, however, divided the property in their verdict, finding 350,000 feet for the plaintiff, and 550,000 feet for the defendant. The plaintiff moved for a new trial, and his rule was discharged; and the question then arose as to who should pay the costs.

The costs were taxed by the deputy officer at Belleville, who allowed the plaintiff the general costs of the cause, and allowed the defendant so much of his bill, as was occasioned by his defence to the quantity for which the verdict was for him.

The defendant gave notice of revision of taxation, at the principal office in Toronto, under the Common Law Procedure Act, and the Master then allowed the defendant also, the general costs of

the defence, and deducted the amount from the demand of plaintiff. Against this taxation application was made in chambers.

BURNS, J.—The principle upon which the Master has proceeded, of allowing to each party, plaintiff and defendant a full bill, cannot be supported, therefore there must be a revision.

The plaintiff having obtained a verdict which entitles him to damages, is therefore entitled to the general costs of the cause.

The defendant has succeeded, not on any plea which entitles him to the judgment, for I conceive that judgment must be entered for the plaintiff, but he has succeeded with respect to a portion of the property in dispute.

In such a case, I think it would be proper for the Master to tax to the defendant the proportion of costs occasioned by that part of the case, and deduct them from the plaintiff's bill.

Had there been several pleas, and a verdict on some one way, and some another, that would be the rule in replevin. Vide 2 T. R. 235, and 5 Taunt 594. I think a similar rule should prevail on a plea being found devisably in respect of property.

THE QUEEN ON THE RELATION OF GEORGE CROZIER V. EMERSON TAYLOR.

Municipal election—Innkeeper—Disqualification—Costs.

The defendant being an Innkeeper on the eve of a municipal election, leased the Inn to a person who was formerly his bar keeper, and notwithstanding the lease, himself and family continued to live in the Inn, occasionally attending bar as before the lease.

Held, 1st. That if the transfer of the business was in good faith, it was no valid objection, that the object of it was to enable the defendant to be legally elected to the office of Township Councillor. 2nd. That the parties to the transaction, having expressly negatived collusion or want of good faith, the boarders in the house, and those who had dealings with the defendant before the transfer, and those who were in the habit of visiting the house frequently, and had opportunities of knowing if there had been any change in the business, having expressed their belief under oath, that the defendant had nothing to do with business of the Inn, that the transaction must be taken to have been *bona fide*, and defendant, therefore, entitled to his seat. 3rd. That the relator having acted in good faith in bringing forward, the matter should not be amerced in costs.

(Chambers, February 20, 1860.)

The defendant was elected on the 18th day of January last, a Councillor for Ward No. 1 of the Township of Toronto, in the county of Peel.

The objections urged to his sitting were, that before and at the time of his election, he was an Inn-keeper in the village of Springfield, in the said Township and Ward, and that he was a saloon-keeper there.

There were about 20 affidavits filed, ten on each side. Those on behalf of the relator stated, in effect, that defendant had kept a hotel for many years past, at Springfield; that one Shook had resided with him for a number of years, and for several years past had attended the bar; that defendant and his wife were also in the habit of attending at the bar at times; that Shook worked at some mechanical business in a small shop near the hotel, that the sign in front of the hotel, was "Springfield Exchange," with the name E. Taylor (the defendant), under it. That at time of the application, the sign remained unchanged. That defendant and his wife and family, still continued to reside in the building, and that defendant and his wife, both were in the habit of attending at the bar, and that to all appearance the business was conducted as it was before.

Most of the affidavits filed by the relator stated, that the deponents believe defendant still kept the tavern as before, and was equally interested in it.

In one or two of the affidavits this was not stated, and in one of them, that part of the affidavit referring to the belief of the deponent that defendant kept the house as before, was struck out.

The defendant filed his own affidavit and that of Shook, stating that defendant leased the hotel to Shook for one year from the 1st of January last, and that Shook went into possession on 31st December last. That he assigned the license to Shook on the 31st of December, having first procured the written consent to the transfer of the license, of Andrew Davidson, the only Inspector of Houses of Entertainment in the Township, pursuant to the Township By-law to that effect. That Shook was to give him $200 a year for the house, besides boarding defendant and family, and furnishing them with necessary rooms, &c.

A lease also was put in, executed by the parties, and witnessed by one Hammond, who made an affidavit as to his belief that the defendant had nothing to do with the hotel this year.

Defendant and Shook both swore to the *bona fides* of the transfer and transaction generally, and denied in the strongest terms, that defendant had any thing to do with hotel business.

There were other statements in the affidavits, showing that defendant, at the time of the application, devoted most of his time to the carrying on of the business of building fanning Mills, whereas he formerly attended mostly to the business of the hotel, and that the hotel business was attended to by Shook, that he bought the necessaries for the house and stables, and paid the servants, and, in fact, that the business was under his entire control.

One of the deponents was a miller, who supplies the house with flour. Defendant paid for the supplies to the end of the year, and then notified him that he would not be responsible for what might be delivered after, and that Shook paid for the subsequent supplies.

Other affidavits were by boarders in the house, who spoke of the change of occupancy, and paying their board to Shook instead of the defendant as formerly, all expressing their belief that defendant had nothing to do with the hotel business.

As to the defendant and his wife attending the bar since the 31st December last, it was sworn that this occurred only on one or two occasions when Shook was absent, and was a mere matter of personal convenience to him, without their having any interest in the hotel business.

Harrison, for the relator, cited section 70 of the Consolidated Statutes for Upper Canada, p. 54. declaring that no Judge of any Court of Civil Jurisdiction, &c., no Inn-keeper or Saloon keeper, &c., shall be qualified to be a member of the Council of the Corporation. He contended, 1st. That the object of the Legislature, was to prevent the influence which inn-keepers exercise over municipal elections, from having any operation in the composition of Municipal Councils. 2nd. That the evil contemplated being evident, and the words used general, they ought to be construed to extend to all cases which come within the mischief intended to be guarded against, and which can fairly be brought within the words. 3rd. That it is not the making of a lease or transfer of a license, which makes an inn-keeper, but the actual following of that occupation. 4th. That the making of the lease by the defendant in this cause, to his own bar-keeper, a man without means, was a colorable transaction. 5th. That the fact of his sign remaining after the transfer, himself attending the bar, and his family still residing in the house, were strong facts in proof of this position. 6th. That whether the transaction were *bona fide* or not, defendant came within the meaning of the act, and ought to be excluded. On these points, Mr. Harrison referred to *McKoy* v. *Brown*, 5 U. C. L. J. 91. He also asked leave to have the parties orally examined, or to have an issue directed to be tried by a jury.

A. F. Scott for the defendant, submitted, 1st. That the transfer of the license, &c., though on the eve of the election if *bona fide*, removed the disqualification. 2nd. That the transfer was *bona fide*, as proved by the affidavits of boarders, and others who had dealings at the inn. 3rd. That it was not necessary that after the transfer there should be an actual and continued change of the possession of demised premises. 4th That if necessary, there was, in fact, an actual and continued change of possession. 5. That defendant attended the bar only on one or two occasions, and then for the personal convenience of his lessee. 6th. That defendant remaining at the inn was only as a boarder, and his being there consistent with the terms of the lease. 7th. That on the day of the election, he was not an inn-keeper within the meaning of the act, and so not disqualified to be elected a member of the Township Council.

RICHARDS J.—Looking at the affidavits on both sides, there is little doubt that defendant leased his house to Shook for the year, for the purpose of enabling himself to come forward as a candidate for municipal honors.

If the transfer of the business to Shook was in good faith, and really intended to lease the same to him, then I apprehend that it is no valid objection, that the object of the transfer was to enable the defendant to be legally elected to the office he sought.

The whole case, then, turns on the *bona fides* of the transaction.

The parties to it expressly negative any collusion or want of good faith. The boarders in the house, and those who had dealings with defendant before the transfer, and those who were in the habit of visiting the house frequently, and had opportunities of knowing if there had been a change in the business express their opinion under oath, that they believe that the defendant has not now anything to do with the business of the hotel. These persons who appear to have the best opportunities of knowing the real facts of the case, do not seem to doubt that the transaction was a real one It has not been suggested to me, that the parties who make the affidavits are not entitled to credit; such being the case, I do not feel at liberty to decide that the defendant is an innkeeper now, because he was one last year, though he may now be a boarder in the hotel he formerly was keeper of, and may not have removed his sign. There are facts shown, which unexplained, would raise the presumption that defendant is still the keeper of the tavern. I think the affidavits filed on behalf of the defendant, sufficiently rebut the presumption. I must therefore decide in favour of the defendant.

If the Legislature think the facility with which inn-keepers may assign their licenses and transfer their business to other parties, is likely to encourage colorable transactions for the purpose of evading the law, they can so far amend the act as to say, that no person shall be elected a Councillor, who has carried on the business of an Inn-keeper, at any time within a certain number of months before the holding of an election.

As to the question of costs, I cannot say that the relator has not acted in good faith in bringing forward this matter. What took place might, in the absence of the explanations given in the statements filed on behalf of the defendant, induce persons to suppose that the lease, if any had been given, was colorable, and that the whole transaction was a fraud upon the Statue. I am not, therefore, prepared to amerce the relator in costs. I think I shall best exercise the discretion I have as to costs, by withholding them from either party.

My judgment is in favor of the defendant, and without costs to either party.

McKay v. Mitchell, and Trust and Loan Company Garnishees

Mortgagor and Mortgagee—Sale of mortgaged premises—Surplus to mortgagor—Order to attach—Judgments.

The surplus money arising out of the sale of mortgaged premises in the hands of the mortgagee, is a debt such as may be attached on a judgment against the mortgagor.

And although the plaintiff's judgment be subsequent to that of several others registered as against the land sold, still if plaintiff first attach the surplus of proceeds of sale, he is entitled to be paid the amount of his judgment, to the exclusion of the prior judgment creditors.

There is no priority in respect to debts due to a judgment debtor, in favor of any judgment creditor.

This was a garnishee Summons. The amount due from the garnishee was admitted. They were mortgagees of the judgment debtor, with a power of sale, and having sold under the power, a sum remained in their hands after their claim was satisfied. The mortgage deed contained a covenant on their part, to pay over any such sum to the mortgagor, his heirs, executors or assigns, but subsequent to the mortgage, there were several registered judgments against the judgment debtor.

Draper, C. J.—In my opinion, this is a debt within the meaning of the Common Law Procedure Act.

It appears, however, there were other judgments against the defendant in this cause, registered before that of the plaintiff, and therefore apparently entitled to satisfaction out of his land in priority to the plaintiff, or more properly speaking, which formed a prior lien or charge on his lands.

The garnishees' mortgage must, on the facts stated, be assumed to be the first lien [illegible] rge. The purchaser from them, is not, I presume, bound in any way to see to the application of the purchase money, and holds the land free from the subsequently registered judgments. The garnishees have notice of the judgments, and of their priority to the plaintiff. Can that affect them or prevent an order in plaintiff's favor, to pay the plaintiff?

I do not see that the garnishees paying the money in obedience to a judge's order, can, on the fact appearing, be compellable to pay it over again. The order will discharge them.

Then as to the propriety of making the order, I do not see any sufficient ground for holding that the money in the hands of the garnishees, can be treated as affected or bound by the judgment of any of the prior creditors.

The registry of the judgments, would bind nothing, at least at law, but the interest of the judgment debtor in the land. The mortgage and the power of sale were paramount to the judgments, and the surplus money is only a debt due by the garnishees, arising, it is true, out of the land, but not of the land as affected by the judgments registered.

There is no priority in respect to debts due to a judgment debtor, in favor of any judgment creditor, nor is there any machinery provided for bringing other judgment creditors before the Court, when any one of them appear for or obtains the usual attaching order.

As far as I can see, the judgment creditor who gets the first attaching order, will gain in priority over other judgment creditors to be satisfied out of the debts attached, due to the judgment debtor. Such was the effect of an absconding debtor law as at first passed, and such is the consequence of getting the first execution against goods, into the sheriff's hands.

Griggs v. Firley.

Equitable Plea—Setting aside.

If, on the state of facts presented by an equitable plea, it appears that the restraining of the action would not do complete justice between the parties but that something more might be necessary to ascertain which, enquiries taking of accounts, &c., would be requisite, the plea will be set aside.

In an action on a covenant for the payment of money, the plea for defence on equitable grounds, was as follows:—The defendant, by A. B., his attorney, says, that shortly before the making of the covenant in the declaration mentioned, the plaintiff had agreed to sell to the defendant, and to assign and transfer to the defendant, a certain term, estate and interest of the plaintiff in a certain furniture store, and the goods, chattels and stock in trade therein, and the said covenant was so made to secure to the plaintiff $2,000 as part of the consideration money for the purchase by the defendant of the plaintiff, of the said term and stock in trade, but the plaintiff, after the making of the said covenant, and after having delivered to the defendant possession of the said furniture store, goods, chattels and stock in trade refused to complete the said sale and purchase, and to assign, or procure to be assigned to the defendant, the said term, estate and interest, and afterwards entered into possession of the said store, and dispossessed the defendant of the same, and of the said furniture, goods, chattels, and stock in trade, and hath since remained in possession thereof, and kept the defendant so dispossessed, and the consideration for the making of the said covenant hath wholly failed.

Plaintiff obtained a summons calling upon the defendant to shew cause why this plea should not be set aside, and the plaintiff allowed to sign judgment, or why the plaintiff should not have leave to reply, and demur to the plea on the grounds that the plea is inapplicable as an equitable defence to a declaration in a Court of Law, because the plea and the decree of the Court upon it would not complete all the equities arising out of the matters referred to in the plea, as it would [illegible] necessary to do complete justice between the parties, that plaintiff should be ordered to complete the purchase, by making him assign the term, and accounts would have to be taken, which the process of a Court of Common Law cannot direct or enforce.

H. B. Morphy for the plaintiff, and *A. Prince* for defendant.

The following authorities were cited in the argument: Har. C. C. P. A., 468, *Wood* v. *The Copper Miner's Company*, 17, C. B., 561; *Drew* v. *Harvey*, 17, C. B., 257; *Burgoyne* v. *Cotterel*, 24, L. J. Q. B. 28; *Miner's Royal Society* v. *Magnay*, 10 Ex., 489; *Steele* v. *Haddock*, 10 Ex., 643, *Woodhouse* v. *Farebrother*, 5, E. & B. 277.

Draper, C. J.—I do not wish to be understood as denying that this may not be a good plea in equity against the plaintiff's claim to enforce this covenant. But I think that I should not allow it to stand, because even if true, it does not shew that both parties are restored to the same position as if there had never been any agreement.

There has been a change of possession, both of the realty and of the personalty; there may have been sales, payments of rents, in short such a dealing with the subject matter of the contract as to require something more to be done than to restrain the action on the covenant, which alone might not do perfect justice between the parties, and to ascertain how this is, an enquiry, or taking of accounts, is necessary. For any such purpose, a Court of Law has not the fitting machinary, and I think, therefore, the plea should be disallowed, and the defendant left to his remedy in the Court of Chancery. The only judgment a Court of Law could give for the defendant, would be that he should go without day, &c., and that might do very incomplete justice.

MEARNS v. GRAND TRUNK RAILWAY COMPANY.
MEARNS AND SPENCE v. GRAND TRUNK RAILWAY COMPANY.
SPENCE v. GRAND TRUNK RAILWAY COMPANY.

A claim for interest on a demand for specific goods and chattels sold, indorsed on a writ of summons is good, and cannot be disputed after judgment signed in default of appearance, but if a claim for interest is endorsed, in order to gain an improper advantage and judgment be signed for a larger amount than a plaintiff is really entitled to, such judgment will be set aside.

A judge in Chambers has power to set aside a final judgment on the merits under the C. L. P. Act.

In these cases applications were made on 22nd December, 1859, by *Jackson*, on behalf of the defendants, and summonses granted by Mr Justice Hagarty, calling on the plaintiffs to shew cause why the final judgment signed in default of appearance, and the *fi fas.* issued thereon, and all proceedings subsequent thereto, should not be set aside on the following grounds:

1st. That said judgments were signed on specially indorsed writs and the indorsements were not such as would warrant the signing of *final* judgment.

2nd. That the judgments were improperly signed for interest.

3rd. That nothing was due from the defendants (in the joint suit) to the plaintiffs jointly.

4th On grounds of merits, or why the *fieri facias* should not be set aside on grounds aforesaid, and that the judgments on which they issued had been paid or satisfied prior to issuing said *fi. fa.* Or why the amounts indorsed on said *fi. fas.* should not be reduced with costs, on the grounds that said *fi. fas.* are indorsed for more than is due and include 25s. for certificate of judgment and on grounds disclosed in affidavits filed.

The special indorsement on the writs was as follows: "amount due for wood sold and delivered," stating the sum claimed which was different in each case. The affidavits and papers filed by the defendants covered some 200 folios but the material facts of the cases appear in the judgment delivered below.

S. J. Vankoughnet shewed cause, contending in the first place that the applications were too late, the judgments having been signed in March, 1858, and 21 months having elapsed before any steps was taken to set them aside. He referred to new rules of Court No. 106, *Farher* v. *French*, 5 L. & M. 658, *Brooks* v. *Hodgson*, 7 M. & G. 520, *Bate* v. *Lawrence*, *Ib.* 405. He contended that such an application could not be made after execution executed unless the applicant had no notice until then of the judgment which was not pretended in the present cases. Archbold's Practice 10th Ed. p. 943. Then again the irregularity if any had been waived by the action of the defendants, the attempt to enter an appearance, and the payments made after judgment signed. *Fox* v *Money*, 1 B. & P. 250, *Steele* v. *Morgan*, 8 D & R. 450.

As to the first ground taken in the summonses he contended that under the 41st section C L. P. A, 1856, looking at the different clauses of that section and especially the latter part authorising the indorsement of particulars of claim in the form contained in Schedule A. No. 5, in which examples were given quite as unliquidated as in the cases under consideration, that in these cases the indorsement on the writs was quite sufficient to warrant the signing of final judgment and that the judgments ought not to be disturbed on that ground. As to the 2nd ground, he contended that the Court would not after judgment signed persume the claim for interest improperly made. The defendants should have appeared to the writs, by their non-appearance they had admitted the propriety of the claim. *Rodway* v. *Lucas*. 10 Ex. 667.

As to the 3rd ground, that only applied to one of the actions, and even if maintainable in that which was not clear, could not affect the other cases. The last ground was on the merits. Was there jurisdiction in a case of this kind? There seemed an absence of authority on the point, but it appeared doubtful whether the 60th section C. L. P. A., 1856, applied in such a case.

As to the setting aside the executions, that would depend on the fate of the judgments; if the judgments were successfully assailed, then the executions must fall with them; if not, then they must stand.

Jackson supported the applications, referring to the affidavits generally and contending that they ought to be made absolute in the terms moved.

DRAPER, C. J. C. P.—After carefully reading over the case of *Rodway* v. *Lucas* 10 Ex. 667, cited by Mr. Vankoughnet, it appears to me as the result that a plaintiff may claim interest on a demand for specific goods and chattels sold and that if the defendant means to dispute the claim he must appear to the writ.

If the endorsement is made on the writ for interest in order to gain an improper advantage, and judgment be signed for a larger amount than the plaintiff is really entitled to, such judgment will be set aside.

In the case of *Mearns* v. *The Grand Trunk Company* and *Spence* v. *The Grand Trunk Company*, I do not find in the affidavits filed for the defendant sufficient reason for concluding that the interest was claimed in order to gain an "improper advantage" except in one respect. It was very fairly admitted by Mr. Jackson, that on a writ specially indorsed for goods sold and delivered it is the general practice to indorse a claim for interest also, but he says that interest was claimed from August, 1857, and that the affidavits shewed clearly the claim could not have existed *then*, and that the accounts the correctness of which Mr. Armour, at least *prima facie* admits by signing the receipts at the foot of them, shew that the Plaintiffs demands accrued as follows: Mearns' first claim for £318 2s. 6d. on 30th September, 1859, and his second claim for £15 15s. on the 31st October, 1857, and Spence's claim for £108 10s. on 31st August, 1857, while the writs were endorsed for interest from 1st August, 1857.

But though the writs were served on 16th March, 1858, no appearances were ever entered, and this arose, it is suggested rather than sworn by their being sent too late to be filed. This fact ought to have been known to defendant's attorney, if he took proper care, for it is to be presumed he employed an agent to file them. Mr. Bell's letter 20th March, 1858, refers to the receipt of the writs, at least I can put no other interpretation on it, and therefore, Mr. Bell knew the actions were commenced—meant to appear—but by some accident not set forth, omitted to do so, and paid the bare principal of the debt on the 6th or 7th of April—a week at least after judgment had been signed.

Under these circumstances plaintiff in strictness is entitled to his costs unless the arrangement stated in Mr. Shanley's affidavit, affords an answer.

As to this, I do not entertain the slightest doubt but that Mr. Shanley, both intended and believed the free pass given by him should be and was accepted as a compensation for all claims which Mr. Armour, was then setting up. But Mr. Armour's affidavit unequivocally denies that such was his understanding or intent, and I am in one particular inclined to agree with him. For interest and for costs in suits, he had a legal means of asserting the claim as a right appertaining to the plaintiffs in the action. If the suits had been unsuccessfully defended, he would certainly have recovered one if not both. But his individual claims as the assignee of the debts for journeys, in trying to get a settlement and the loss or inconvenience resulting from delay he had no legal remedy and he may have had these only in his name when Mr. Shanley would draw no such distinction, and would materially conclude *all* Mr. Armour's claims were compensated by the free pass. At all events, Mr. Armour's affidavit denies Mr. Shanley's conclusion and this denial prevents any action on the latter as an established fact.

In these two cases therefore, I think the judgments and writs cannot be set aside. But the defendants claim to have the amount of interest endorsed upon the executions reduced as the interest is calculated for too long a period.

I should not have felt inclined to interfere at all for so trifling an amount but for a consideration to which I shall presently advert.

There is a third action, of *Mearns & Spence* v. *The Grand Trunk Railway Company*. In this the summons was endorsed for £147 17s. 6d., and interest from the 1st August, 1857. The summons in Mearns's suit was endorsed for £333 17s. 6d., and that in Spence's suit for £147,—together, £480 17s. 6d. Mr. Armour received, as the full amount of principal on Mearns's suit, £333 17s. 6d., and in Spence's $108 10c., the latter being £38 10s. more than the special endorsement claimed. The aggregate of debt which Mearns & Spence had a right to was £441 7s. 6d. It was sworn on the part of the defendants that there was no debt due to them jointly, and Mr. Armour does not deny this, but receives in full of both the debts due, a sum less than that claimed in the two separate suits.

There seems therefore to have been no foundation whatever for the third suit. These facts exclude all idea of it, and Mr. Armour offers no explanation. In this case judgment has been signed for £153 15s., and costs £5 15s. 2d., and the writ is endorsed for 9s. 11d. balance of damages as well as costs.

The joint plaintiffs had no claim, and this Mr. Armour must have known when he received payment if not before. In the absence of any explanation from him, and when the affidavits on the defendant's side so pointedly call his attention to the matter, I cannot avoid the conclusion that he knew he had no evidence to sustain this action, and that his issuing a *fi. fa.*, founded on a judgment which he knew was not founded on any just claim, shows that he made the special endorsement in order to obtain an improper advantage, and that he signed judgment for a sum to which he had no title.

I think, therefore, the judgment should be set aside with costs. The only hesitation I feel is as to the authority of a judge at chambers to set aside a final judgment on the merits; but the 60th section of the Common Law Procedure Act of 1856, favors the view that there is such authority, and certainly there could be no fitter case for its exercise.

As to the other suits, I think the charge on each of £1 5s. for certificate of judgment should not be allowed. Mr. Armour has not attempted to show that such a certificate was taken out or filed. I cannot make out that the sums endorsed on the executions for balance of damages—in other words, interest—go back in computation as far as 1st August, 1857. The amounts fall far short of the interest at the rate of six per cent., computed from the time that the defendants' accounts show the debt became due.

I have felt some doubts as to the question of the costs of the *fi. fas*, and indeed of the suits. It certainly seems that the actions might have been successfully defended, and but for Mr. Shanley's interference the plaintiffs would not have recovered anything. Such, I say, is the apparent conclusion from what is shewn.

But when Mr. Bell paid the debt, he knew the actions were pending, and that the plaintiffs claimed interest as well as principal, and he ought to have known that his appearances were not entered—and that judgment was signed; for that was the only ground on which the appearance could be too late. But he pays the money unconditionally, and as I cannot for reasons already given, act upon Mr. Shanley's statement, though I have no doubt as to the truth of his representation, Mr. Bell should not have left the question open.

It is certainly a very ungracious return for the active interference of the defendant's officers to whose exertions Mr. Armour apparently owes the recovery of a large amount of money, that he should take advantage of the legal right to enforce costs when if their suits had been defended the defendants might probably have recovered them. But I cannot say his proceedings are made out to be irregular or in bad faith. The only objection is to the amount endorsed on the *fi fa*. This should be reduced by the sums charged for certificate. I do not see my way clear to any further reduction and in these two cases I shall give no costs.

Swift v. Jones.

Seduction—Arrest—Setting aside—Affidavits.

There must always be great reluctance to set aside the order of a county judge directing the issue of bailable process, when there are reasonable grounds from which he might draw the conclusion that the defendant was about to leave the Province of Canada.

Semble:

1. It is not necessary for the copy of the writ of capias served to show the debt on which the order authorizing the issue of the capias issued.
2. It is not necessary that the writ should show the *name* of the county judge who made the order.
3. An affidavit showing facts and circumstances sufficient to satisfy the judge that the defendant, unless apprehended, is forthwith about to leave, will be sufficient, though it is only sworn that defendant is about to leave Upper Canada.
4. If any of the foregoing were held to be irregularities, amendments might be allowed.

Held, that where the order for bailable process was made upon two affidavits, one of which was intitled in the Queen's Bench, and the other not intitled in any court, and the process afterwards issued from the Common Pleas, that the affidavits were irregular, and the arrest was set aside, with costs.

March 5, 1860.

This was a summons to show cause why the order of the judge of the County Court of the county of Brant, the writ of capias issued in this cause, the copy and service thereof, and the arrest of the defendant Jones on the said writ, should not be set aside, with costs, on the following grounds: 1. That the two affidavits on which the order was made, do not show any ground for arresting the defendant, it not being therein sworn or stated that the defendant was about to leave Canada. 2. That the writ was issued out of the Court of Common Pleas, and one of the affidavits on which it was issued was intitled in the Court of Queen's Bench, and the other not intitled in any court. 3 That the order of the learned Judge of the County Court does not show at whose suit the defendant should be arrested; or, 4. Why the arrest of the defendant on the writ of capias should not be set aside, and the bail bond given to the sheriff of Brant be given up to be cancelled, on the grounds already stated; also on the ground that there is no endorsement on the copy of the writ of capias served, of the amount for which bail was to be taken. 5. Because there was no date in the said copy of writ, as to when the order issued. 6. Because the writ does not state the name of the judge of the county court making the said order. 7. Because there was no sufficient cause stated in the affidavit, to warrant the belief that the defendant was about to leave Canada. 8. Because the affidavit only stated that the defendant was going to leave *Upper* Canada.

Harrison showed cause, and contended, 1. That the granting of the order to hold the bail, was a matter in the discretion of the county judge; and as he in the exercise of that discretion, granted the order on the affidavits produced to him, the exercise of his discretion cannot be reviewed either as to the grounds of making the order, or the form and title of affidavits (Eng. Stat. 1 & 2 Vic. cap. 110, sec. 3; Consol. Stat. U.C. cap. 24, sec. 5, p. 277; *Hargreaves* v. *Hayes*, 5 El. & B. 272; *Terry* v. *Comstock*, M.S. Chambers, Draper, C. J.). 2. That although the deponent stated his belief that the defendant was immediately about to leave Upper Canada, yet he stated facts to show that he (defendant) "has no ties which particularly bind him to the Province of Canada, and is so situate that he can leave without inconvenience at any moment;" and also that the defendant had failed to meet him in relation to the matter, as he had promised; and that the judge might well infer from this his intention to leave Canada as well as Upper Canada (*McInnis* v. *Macklin*, 6 U. C. Law J. 14). 3. That the affidavits on which a capias issues need not be intitled in any court, as the statute is only directory, not imperative (Consol. Stat. U.C. sec. 6, p. 278; *Ib* p. 7). 4. That affidavits might be read without being intitled in any court, if sworn before an officer of the court in which read. (*Perse* v. *Browning*, 1 M. & W. 361; *White* v. *Irving*, 5 Dowl. P.C. 261; *In re Fraser*, 10 U.C. Q B. 285; Consol. Stat. U.C. cap. 89, ss. 3, 8, 9, p. 434.) 5. That an affidavit intitled in the wrong court is not a nullity (*Saunderson* v. *Cummings*, R. & H. Dig. Arrest, I. 24). 6. That although there was no endorsement on the back of the writ of the amount for which bail was to be taken, yet such endorsement was on the face of the writ, and thereupon substantially complies with the form given in the statutes (Consol. Stat. U.C. cap. 22, sec. 3, p. 186, and Forms on pp. 260, 261, 262; *Chamberlain et al.* v. *Woodell*, 1 U. C. Prac. Rep. 195; 1 Chit. Archd. 713). 7. That it is not necessary to show the date of the

order on which the writ was issued on the copy of the writ served; that the original order was dated, and that was sufficient. 8. That there is nothing which requires the name of the county judge who made the order to be stated in or on the writ; that it was stated on and in the margin of the writ, "Bail for £50, by order of the judge of the County Court of Brant." 9. That the 7th and 8th objections had been already referred to by him. 10. That this being an action for seduction, and the defendant having admitted his guilt, is not entitled to much consideration from the court.

Benson, contra, argued: 1. That the discretion of the county judge was a legal one, to be exercised in a rational manner, and subject to review. 2. That he might well assume, on these affidavits, that the defendant was only going to *Lower* Canada; and if so, the plaintiff could not properly cause him to be arrested. 3. That the irregularity as to the affidavit could not be got over; that although by the Consolidated Statutes of Upper Canada, chapter 24, section 6, it is not necessary that an affidavit to hold to bail should at the time of the making be intitled of or in any court, but the style and title of the court out of which the process issues may be added at the time of issuing out the process, and such style and title, when so added, shall be for all the purposes and in all proceedings whether civil or criminal, taken and adjudged to have been part of the affidavit *ab initio*, that this enactment clearly contemplates the title of the court is to be added when the writ is sued out, and omitting to add it is an irregularity for which the arrest should at all events be set aside. 4. That even admitting an affidavit not intitled in any court might be read, yet in this cause the affidavit that was intitled, was intitled in the *wrong* court, and the other not intitled in any court. The affidavit was intitled in the Court of Queen's Bench, whilst the writ was issued out of the Court of Common Pleas. That the case of *Sanderson* v. *Cummings*, referred to, merely decided that an affidavit intitled in one court and used in another was not a nullity, but the note of the case states that it is an irregularity. 5. That to the form of the writ in appendix to the Common Law Procedure Act, under the head of "Indorsement on the writ before the service thereof," among other things was the following: "Bail for $——, by order of —— (naming the judge who makes the order)." And by Consolidated Statutes, chapter 22, section 28, that every writ of capias, with every memorandum or notice subscribed thereto, *and all indorsements thereon*, shall be delivered with the original writ to the sheriff, who is to serve it on the defendant. That this implies that the name of the judge who made the order, and not his name of office, is to be endorsed *on* the writ. That the proper notice was endorsed on the writ in this cause, except that the name of the judge is not given; but no copy of the notice was on the copy of the writ served on the defendant, and thus it was irregular on both grounds. He considered, however, that the objection to the title to the affidavits was the strong ground of his application.

Richards, J.—The case cited from 5 E. & B. seems to me to be a strong one in favor of the plaintiff, and there would always be great reluctance to set aside the order of a judge directing the arrest when there are strong grounds from which he might draw the conclusion that the defendant was about to leave the Province of Canada. At all events I am not prepared, even if I had the authority so to do, to set aside the arrest on the ground that the learned judge of the county court ought not to have ordered it, from the insufficiency of the affidavits placed before him. I think the other formal grounds of objection, from the fifth to the eighth inclusive, ought not to prevail; at all events I should not hesitate to amend the irregularities complained of. The third objection is without foundation; the fourth seems to me to be the most formidable.

I have looked at the cases cited, and many others. They doubtless go to show that the courts have permitted affidavits to be read when sworn before the proper officer of the court, though not intitled in the court. The modern cases do not go to the length of deciding that when intitled in a wrong court, they are not irregular. The case referred to in 16 M. & W. merely decides that when the affidavit is sworn before an officer of both courts, it might afterwards be used in either court Baron Park says that "the affidavit might be taken before him (a commissioner of common pleas and exchequer), to be intitled and used in either the common pleas or the exchequer, as the case might require."

In the case from 5 E. & B., Lord Campbell says: "If, indeed, there had been a cause in court, and the affidavit had omitted to name it, that would be bad, because no perjury could then be assigned on the affidavit; but where there is no cause, the names are mere surplusage, *and you have the name of the court.*"

One of the affidavits here is intitled in the Court of Queen's Bench, and the other is not intitled at all. It may be argued that the affidavit might now be intitled, which has a blank for that purpose; but that would not get over the difficulty as to the other, and *both* affidavits are necessary to justify the arrest.

I have seen no case which goes so far as to decide that a plaintiff is not guilty of an irregularity when he intitles his affidavit in one court and uses it in another. The general doctrine with regard to affidavits is this, and laid down in Lush's Practice, at page 762: "The formal parts of an affidavit which require notice are, first, the title, &c. The title consists of two parts, viz., the style of the court and the names of the parties to the action or proceeding. If either be improperly omitted, the affidavit will not be heard, though the opposite party consent to waive the objection."

It is true, as I have already stated, that affidavits of debt have been permitted to be used, when sworn to before the proper officer, in England, though not intitled in the court; but I think, independently of the question of irregularity in using the affidavit intitled in one court for the purpose of issuing a bailable process out of another, that our statute was intended to provide expressly for the mode in which affidavits to hold to bail were to be sworn and intitled, when used in either of the courts. The plaintiff not having followed that course is, I think, clearly irregular in his proceeding. He can gain no support from the argument that the affidavits, when produced before the judge, were in their present state or not intitled at all, for the statute contemplates that they are to be intitled when used, and the judge undoubtedly supposed the plaintiff would have them properly intitled when issuing his capias. On the whole I feel bound to give effect to the objection to the affidavits, so far as to order the arrest to be set aside, and the bail bond to be given up to be cancelled, on the defendant's entering an appearance to the action.

The order will go, with costs.

CHANCERY.

(Reported by Thomas Hodgins, Esq., LL.B., Barrister-at-Law.)

Allan v. McDougall.

Costs—Mortgagor and Mortgagee—Redemption.

A mortgagee is always entitled to his costs, and therefore when a subsequent mortgagee who has filed a bill to foreclose, offers to consolidate his suit in that of the prior mortgagee who has filed a bill after him, he will be allowed his prior costs in such suit.

In this case, three mortgagees had filed separate bills in the following order—the second mortgagee filed his bill first; then the third mortgagee, and then the first mortgagee. Decrees had been made in favor of the second and third, and now the bill of the first mortgage came on by way of motion for a decree.

Freeland for the plaintiff, asked for the usual decree for enquiries and for foreclosure.

Hodgins for the second mortgagee, had no objection, and consented to consolidate his suit with that of the plaintiff, provided his client would be allowed the costs already incurred; and cited *Loftus* v. *Swift*, (2 S & L 642) *White* v. *Bishop of Peterborough*, (Jac. 402) *Brace* v. *Duchess of Marlborough*, (Mos. 50) *Detillen* v. *Gale*, (7 Ves. 583) *Lee* v. *Lockhart*, (10 Beav. 323) *Barlow* v. *Gains*, (23 Beav. 244).

Freeland, in reply, contended that the second mortgagee could not obtain such a relief in the present decree.

Esten, V. C.—This is a case in which three mortgagees have filed bills of foreclosure or sale, the plaintiff being first mortgagee. The second mortgagee has obtained a decree against the mortgagor and the third mortgagee. The third mortgagee has also filed his bill against the mortgagor and second mortgagee, praying a sale, subject to the first mortgage The second mortgagee, being a party to the present suit, undertakes to discontinue his, and asks

to be allowed in this decree, the costs already incurred. We think he should have them, on a redemption in this suit, by either the third mortgagee or the mortgagor; and the third mortgagee cannot redeem the estate in either suit, without paying the second mortgagee his costs in both suits, nor, of course, could the mortgagor. It would be advisable that the third mortgagee should be a party to this arrangement, as he is, of course, entitled to the same benefit.

WORTHINGTON v. ELIOT.
ELIOT v. WORTHINGTON.

Mortgage—Trust and Trustee—Evidence—Cross suit.

A party procured a release of a mortgage from a mortgagee in order that a mortgage might be made to another party by way of trust to raise money. The trust was never carried out, the party for whose benefit it was intended having died. His executors then filed a bill to foreclose, and thereupon the mortgagor filed a bill on the ground that the trust having failed, the mortgage should be delivered up to be cancelled.

Held, that he was entitled to the relief.

The bill on the first suit was filed for the foreclosure of a mortgage made by the defendant Eliot, to one Davidson, deceased, for $10,000. The defence to that bill and the foundation of the bill in the second suit, was that this mortgage was made to Davidson, at the request of the defendant Eliot, in order that the former might negociate it and hand over the proceeds of it to the latter, for the purpose of distribution among the accommodation endorsers of one Berryman. To this it was answered that although the arrangement might be so between the parties yet,—*first*, it was made in pursuance of a prior engagement between Berryman and Davidson, that the property should be mortgaged to secure an endorsement to Davidson; and *secondly* that at any rate Davidson being one of the *cestui que trusts* interested in the trust funds was entitled to retain the moneys after negotiations in respect of his own liability.

The evidence failed to show any knowledge on the part of Eliot of the alleged agreement between Berryman and Davidson.

ESTEN, V. C., delivered the judgment of the Court.

I think the bill of foreclosure should be dismissed with costs, and the mortgage delivered up to be cancelled. I think that the cross relief could have been obtained in the foreclosure suit, and therefore, if the foreclosure bill was filed first, I think the decree in the cross suit should be without costs, as it was unnecessary; but if Eliot's bill was filed first, he is entitled to his costs in that suit also. Miller's evidence may be finally excluded from consideration, because, among other reasons, he does not pretend to be personally cognizant of the facts. Dunn's evidence is, I think, inadmissible. The agreement he proves, would, if valid, entitle him to a large part of the £2,500, sought to be recovered in this suit. Holden's evidence, however, is equally free from objection and suspicion, and I think it is clearly proved by his evidence, that an agreement such as he mentions, was made between Berryman, Davidson, and Dunn. It does not appear, however, that so much of it as concerned the intended mortgage to Davidson, was ever made known to either Eliot or Jones. It seems that Berryman was to procure the mortgage from Jones to Davidson and Dunn, and Davidson relied upon him for that purpose, and acting in good faith, he should have communicated the understanding to Jones. I conclude that he did not, but having procured the release from Dunn, that he afterwards procured the creation of the trust from Jones. To execute a mortgage to Davidson for the purpose of sale, and to pay Dunn, would not have been according to the trust, and to indemnify Davidson against Dunn's claim, although not perhaps at variance with the trust, is not a probable fact; for Jones and Eliot were both endorsers for Berryman, and Eliot would naturally protect himself and Jones, in the first instance. I conclude, therefore, that the mortgage was not to Davidson, in pursuance of the agreement between Dunn, Berryman, and Davidson. It is agreed on all hands, however, that it was made for the purpose of sale, and the only question is, what disposition was to be made of the money to be thus produced? It necessarily follows, that it was to be paid to Eliot for distribution according to the trust, and that Davidson held the mortgage as a mere agent; that Eliot could have recalled it at any time; and that Davidson not having succeeded in executing his trust, the mortgage must be delivered up, and the foreclosure suit is utterly inadmissible. With this view, all the conduct, and expressions, and letters of Davidson agree. I do not think either Dunn's or Jones' evidence is admissible, but Water's I think is, and at all events Claney's. When Davidson found that the agreement with Dunn had not been carried into effect, he seems to have received the mortgage from Eliot, on the full understanding that he was merely to negotiate it, and pay the proceeds to Eliot, he was, in fact, a mere agent, and I think so understood himself to be. My view is, that Dunn having incautiously released his mortgage before the new one was made, and Berryman having procured the creation of the trust, without communicating the whole of his engagement with Dunn, and the trust having been created, and the mortgage executed *bona fide*, by Jones and Eliot, and Davidson having received the mortgage on the understanding that has been mentioned, of course foreclosure is out of the question, and, the purpose having failed, the mortgage must be delivered up, and all parties will stand in the same position as if the mortgage had never been made. The trust will remain in the same plight, as if the abortive attempt that has been made to carry it into execution, had not been made. Whether if Dunn released his mortgage, and Davidson assumed his debt, on the condition that it was to be collaterally secured by another mortgage; that agreement not having been carried into execution, Dunn or Davidson's representatives have any right to impeach the trust, is another question, upon which I express no opinion, and which must be settled, if at all, in another suit; but this mortgage having been made under this trust, and for the purpose that has been mentioned, must, in the event that has happened, be delivered up.

Subsequently the question of costs was spoken to, when ESTEN, V. C., decided that although Eliot's bill had not been filed until after the other, in which the full relief could have been obtained, yet since the plaintiffs in the first suit might at any time have disappointed Eliot by dismissing their bill, he was justified in filing his own, and should receive the costs of the suit.

SUPREME COURT OF ILLINOIS.

Railroads—Common Carriers.

THE CHICAGO AND AURORA RAILROAD COMPANY, Appellant, v. JAMES THOMPSON, Appellee.

Railroad Companies are common carriers, although their charters do not, in so many words provide that they shall be.

Bank bills are not, in common parlance, included in the phrase, "goods and chattels," when used in connection with insurance companies and transportation by land or water.

Alleging and proving that a railroad company is a common carrier of "goods freight, etc.," does not establish it to be a common carrier of bank bills.

Authority to receive goods and freight does not imply power to receive bank bills at the ordinary tariff for the risk.

If common carriers are to be held as insurers, they must be treated with good faith and concealment, artifice, or suppression of truth, would equally relieve the insurer and common carrier from liability

Common carriers are not liable for the loss of money packed among other goods in a box in such a way as to deceive and mislead them. If to be held liable, they should be told of the contents.

Where a party examines a witness as to a conversation, the opposing party can only examine the witness upon the conversation about the same suject matter; but not about a conversation upon a different subject, not related to the primary conversation.

BREESE, J.—This was an action on the case, brought to the November term, 1854, of the Kane Circuit Court. The declaration contains two counts essentially alike. The first count alleges, that on the 19th of January, 1854, the defendant was, and now is, a common carrier of goods and chattels for hire, from Aurora in the county of Kane, to Earlville, in the county of La Salle; that on that day, at Aurora, the plaintiff delivered to the defendant, and the defendant received a certain box containing goods and chattels, to wit: one new suit of broadcloth clothes, one small trunk, three fine shirts, three pairs of woolen stockings, seven hundred and fifty dollars in bank bills, fifty dollars in silver money, and one rifle, at the value of one thousand dollars, the property of the plaintiff, to be carried from Aurora to Earlville, and at Earlville to be delivered for the said James Thompson, for certain reasonable reward in that behalf; that the defendant disregarded his promise, and did not carry the box from Aurora to Earlville, nor there safely and securely deliver it for the plaintiff, and that

through the carelessness of the defendant the box was broken open and its contents lost to the plaintiff.

The second count alleges that they agreed to deliver it in a reasonable time.

The general issue was pleaded and tried by the court by consent and verdict and judgment for the plaintiff, and appeal prayed and allowed to the defendant. The evidence is all preserved in the record, and it is assigned here for error: permitting Lester Harding, a witness for the defendant, to answer this question, put to him by the plaintiff: "What did he (plaintiff) tell you when he paid you the three hundred dollars?" in deciding that the plaintiff was entitled to recover for the money contained in the box mentioned in the declaration; in deciding that the plaintiff was entitled to judgment therein, without alleging or proving that the defendant was a common carrier of bank bills: and in giving judgment for the plaintiff without such proof.

The appellee contends that the first error is not well assigned, for the reason that the appellant had called out a part of the conversation with Harding, and therefore the whole must come out. As a general principle this is true, but it must be confined to conversation as to the subject matter about which his conversation had been called out, not a different subject, having no connection with it, or relation to it. But the record does not show that appellant had called out any conversation of appellee with Harding. Harding stated simply that he lived at Paw Paw Grove; knew the plaintiff since 1853; he bought land of me; paid me $200 Dec. 31, 1853, and $300 March 13, 1854, also at the same time, $105, for a yoke of cattle. These were all acts done. The question then, "What did he, the plaintiff, tell you when he paid you the three hundred dollars?" was inadmissible. It put it in his power to strengthen his case very much by the reply he might make to it. Whether he did so or not, is not material—on principle the question was improper.

But this is a very small matter in this case, involving, as it does, one of the most important questions we have been called on to consider.

The declaration alleges that the defendant, when the box was delivered to him, was "a common carrier of goods and chattels for hire," and plaintiff's counsel contends that being such, he is liable for the value of the box and its contents.

The appellant denies that he is a common carrier, that the charter of the company does not make him so for any purpose, much less of bank bills, and there being no express contract, and the charter of the company not making the company a common carrier of bank bills, whether it was such or not, was a fact to be alleged and proved.

We suppose it is not necessary the charter should provide, in so many words, that the railroad companies created by them shall be common carriers.

The authorities are numerous to the point that such companies, using cars for the purpose of carrying goods for all persons indifferently, for hire, and whose custom and uniform practice is to do so, are common carriers and liable as such. There can be no doubt on this point. There needs no Legislative declaration to make them such; they are so in virtue of their uniform business. As was well said by the Court in *Thomas* v. *Boston and Providence Railroad Company*, 10 Metcalf R. 475, they advertise for freight, they make known the terms of carriage, they provide suitable vehicles, and select convenient places for receiving and delivering goods, and as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law, which are applicable to carriers.

Their character or vocation as common carriers of goods and freight, and passengers is sufficiently shown by the testimony of Mr. Allen, who shipped the box from Aurora for Earlville. He says, in January, 1854, he was in the warehouse business at Aurora; knows that defendant has a railroad for carrying freight and passengers between Earlville and Aurora, and was then a common carrier of "goods, freight etc., for hire."

Now, the question is, are these terms equivalent to the term "goods" and chattels," as used in the declaration, and do they reasonably include bank bills?

The term "goods and chattels" includes choses in action. 1 Atkins, 182. The term "chattels" is more comprehensive than the term "goods," and will include animate as well as inanimate property, slaves, horses, cattle, etc., being chattels, but "goods," will, not be included, as that term is understood.

Every moveable thing which can be weighed, measured or counted, is included under the general term "chattels," which, Lord Coke says, is a French word, signifying goods.

Blackstone says the term is, in truth, derived from the technical Latin word *catalla*, which primarily signified only beasts of the husbandry, or as we still call them, *cattle*; but, in its secondary sense was applied to all moveables in general. 2 Com. 385.

We may remark here, that in the English statute of limitations (21 James I, chap. 5) this phraseology is used, as regards the action of replevin. "goods and *cattle*," and not as in our modern statutes, "goods and *chattels*."

Chattels personal are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. 2 Blackstone's Com. 387.

Money is a chattel, and as a chattel, according to Lord Coke. signifies goods; money is goods, and not only that, but goods and chattels. Choses in action are goods and chattels: bank bills are goods and chattels, and must be comprehended under the word "goods," as used in the phrase of the witness, "goods," "freight," etc.

This being true as a general proposition, that the term "goods and chattels" would include bank bills under certain circumstances, does it follow that, at all times, for all purposes, and under all conditions bank bills must be regarded as goods and chattels merely?—In practical life, among business men, in many commercial transactions, bank bills, though having no intrinsic value, are used as money, and perform the functions of money for home purposes. The supposed representatives of real value—gold and silver—and convertible readily into gold and silver they have thereby a value imparted to them by the consent of the community in which they circulate, which entitles them to more special regard and care than the ordinary goods and chattels which they can buy, and when bought, are boxed up and sent off, by the most ready conveyance, wheresoever and to whomsoever ordered.

Bank bills are not therefore, in common parlance, supposed to be included in the phrase "goods and chattels," and though they are such, to be taken on execution, to pass to executors or administrators, to assignees in bankruptcy, and in some cases, to devisees in a will, under the term goods; yet, in connection with insurance policies, and transportation by land or water, they are not so regarded.

In 1 Arnold on Ins. 214, it is said, that it is not necessary, in most cases, for the merchant who wishes to insure his merchandise against sea risks, to do more than give a general description of it, as "goods" or "merchandise."—Though doubt was entertained whether money, bullion or jewellery were covered by the general denomination of "goods, wares and merchandise," it is now settled that they may be so insured, though in actual practice, they are generally insured under a specific description. *Ib.* 216.

Under the term "goods and merchandise," specie, dollars, the proceeds of the sale of the goods covered by the policy were held to be included. *Am. Ins. Co.* v. *Griswold*, 14 Wend. R. 389.

In a time policy, effected by the owner of the vessel, who was also the captain or master, it was held, that the term "property" include current bank bills owned by the captain, and on board the vessel for the purpose of the coasting business, and that the underwriters were bound to pay for the loss of such bills by fire on board the vessel. *Whiton* v. *The Old Colony Ins. Co.*, 2 Metcalf R. 1. The court say that the term "property" is a term of the largest import, more extensive than "goods, wares and merchandise." The case shows distinctly the bank bills were not on freight, or received as freight for transportation; the inference is, that had the terms "goods, wares and merchandise" been used, bank bills would not have been embraced, clearly not then, if the word "goods" was alone used in a policy on "goods," meaning only, such goods as are merchantable, that is to say, the cargo put on board for the purposes of trade—tenchnically, *merces*. *Brown* v. *Stappleton*, 4 Bingham R. 121; *Hill* v. *Patten*, 8 East R. 373.

In Manning's Index, 165, Justice Dampier is reported to have

said, that the term "goods, wares and merchandise," will cover dollars, if entered at the custom house, but not bank notes or bills of exchange; they must be specially described. This is the principle in insurance policies.

Now, as the term "goods" will not, as generally understood, include bank bills, neither will the word "freight," for, though carried, they are never received and taken as freight, in the popular sense of the term as part of a cargo or carload.

Technically, it is the reward the common carrier receives for the use of the means he provides for transportation and for his own care over them, and should be in some proportion to the risk run.

What the "&c" may be supposed to mean, will not be considered, it is too indefinite. Alleging then, and proving that the appellants were common carriers of "goods, freight, &c.," does not establish that they were common carriers of bank bills.

It is true, they may make themselves such carriers, but there is no proof that they have done so. No portion of the proof goes to the point that they at any time, carried bank bills, or money of any kind, or held themselves out to the public as carriers of such property. No express contract to carry these bank bills, has been proved, and none can be implied from the nature of their business, as carriers of "goods, freight, &c, and passengers."

It not being then, the business of the company to take bank bills as freight, it should be proved that in this particular case, they authorized their agent to receive them, before the company can be liable. Authority to receive goods and freight, does not imply this power to receive bank bills at the ordinary tariff for the risk.

It is no answer to say the agent was authorised in the course of the business to receive the box as freight, and consequently the company is responsible for all the box contained. This would be so, if the box contained nothing more than such articles, known in common parlance, as goods and chattels, which the company was accustomed to carry for hire, their charges being proportioned to the value of the articles and the risk incurred.

If the bank bills, when out of the box, were not "goods" in the ordinary acceptation of that term concealing them in a box would not make them so, nor would they thereby lose the distinctive character the whole community accords to them.

A case bearing on this has been cited on both sides. *Allen* v. *Small*, (2 Wend. R. 327,) in which it appears, by act of the General Assembly of New York, the members of a certain steamboat company were made individually liable in the same manner as carriers at common law, for the transportation of all goods, wares and merchandise delivered to the agents of that corporation, and for all contracts made by such agents relating to the business of the corporation.

Allen put on board the steamboat "Sun," belonging to the company, a packet containing $14,347 50 in bank bills, and $1,800 in a draft on a bank at Albany, to be transported to Albany and delivered to a cashier of a bank there. The packet was delivered to the captain of the boat, and informed that it was very valuable, and who engaged to take charge of it and deliver it according to its direction.

The packet was not delivered to the person to whom it was directed.

It was a general practice to send money in steamboats. For carrying specie a fixed price was paid, which went to the company; the carriage of packets of bank bills was a perquisite of the captain.

The "Sun" was employed as a passenger boat, though she carried light freight. For the carriage of boxes a charge was made, but none for small bundles; and when freight was carried, an extra price was charged. Nothing was charged for the ordinary baggage of passengers. The company did not receive pay for packets carried by the captain, who was instructed not to carry money, though such instructions were never published.

It was argued, as in this case, that bank bills were goods within the meaning of the act incorporating the company, that they were treated as money, and might be levied on as goods and chattels of a defendant on an execution; that they represent our circulating medium; that the packet was delivered to the captain as the agent of the defendant; that it was a proper article for freight or transportation in a steamboat; no mode of conveyance could be more safe and expeditious; that a person may be a common carrier of money as well as other property.

The defendant's counsel contended that bills, notes, drafts, etc., were not goods, wares and merchandise within the meaning of the statute.

The Court said, in giving judgment for the plaintiff against Sewall, a member of the company, that the term "goods" is synonymous with personal chattels; that money has been accounted goods and chattels, though things in action are not generally so accounted. This court had considered bank bills money, and held that as such they might be levied on; persons can be common carriers of money, and they are responsible for its safe delivery; no ground for the imputation of fraud, in concealing the fact that money was sent, to exonerate the carrier, for that was disclosed.

This case was taken up to the Court of Errors, and is reported in 6 Wend. R. 345, as *Sewall* v. *Allen*, and the judgment reversed, that court deciding that a company, incorporated for the transportation of goods, wares and merchandize, and liable as common carriers for such, are not common carriers of packages of bank bills, unless it be shown they have made the carriages of such packages a part of their ordinary business.

Walworth, Ch., was for affirming the decision, but he says, if the contents and value of a package is improperly or fraudulently concealed from a carrier, for the purpose of depriving him of a part of the compensation he would otherwise have claimed for the transportation and risk, he would not be liable if he uses the ordinary vigilance which a prudent man would exercise of his own property of the same *apparent* value.

Senators McLean, Oliver and Talmadge held, that the terms "goods, wares and merchandise" as used in the act of incorporation, did not include bank bills; that though they are, under certain purposes, considered and treated as goods, under other circumstances they are not; they could not be given in evidence under a declaration for goods, wares and merchandise, or of demanding them on a promissory note made payable in goods, etc.; and if they do mean bank bills, yet the company were not obliged to carry them, for it does not follow they become common carriers of all things of which they might by their act of incorporation, or otherwise, have become common carriers. A common carrier may limit his business as he pleases, and their character as carriers of bank bills must be made out by proof, that they have become such carriers, etc. So there were six senators with the Chancellor for affirming the judgment, and fifteen senators for reversal.

Justice Story, in his comments on this case, *Citizens' Bank* v. *Nantucket S. Boat Co.*, 2 Story C. R. 49, says: "If I were compelled to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the court of Errors the best founded in the principles of the law."

In 2 Kent's Com. 609, there is in note *b*, a reference to this case, and the author finds no fault with the decision.

But admitting that it is fully established that the appellants were common carriers of bank bills for hire, they became, on receiving them, insurers against everything but inevitable accident, and the principle appertaining to the relation of insurer or underwriter, and insured, must apply. The company is the insurer, the owner or party freighting, the insured, and the premium is the price paid for transportation, or freight charges, bearing some proportion to the risk, their insurance being in respect of the reward they are to receive.

Now, to make a contract of insurance valid and binding, there must be good faith on the part of the insured.

As said by Lord Mansfield, in *Carter* v. *Boehm*, 3 Burrow, 1905, insurance is a contract upon speculation; the special facts upon which the contingent chance is to be computed, lie, most commonly, in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is *deceived*, and the policy is void; because the risk

run is really different from the risk understood and intended to be run, at the time of the agreement.

The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately *knows*, and the other is ignorant of and *has no reason to suspect*.

So it seems that concealment, or the suppression of any fact or circumstance material to the risk, is fatal to the contract; without any special agreement it is a species of fraud, a *suppressio veri* rendering the contract void *ab initio*. But it is not solely on the ground of fraud that concealment avoids the contract; the omission to state material circumstances, though the omission be the result of accident or negligence, will avoid it.

Representation, as here used, is a material fact stated by either party to the other before completing the contract, and a misrepresentation is the statement of such a fact, which turns out not to be true. By a material fact is meant one that shows the nature and extent of the risk, and may induce the other party to enter into the contract. A concealment, on the other hand, is the suppression of a material fact within the knowledge of either party, which the other has not the means of knowing or is not presumed to know, (1 Philips on Ins. 214,) and it is equivalent to a false statement, and amounts to fraud. *Lockridge* v. *Foster et al.*, 4 Scam. R. 673.

Testing this case by these principles, these carriers can not be held liable for the loss of the bank bills, for although there were no verbal representations of any kind made by the appellee, there was that which was equivalent to it, in the structure and appearance of the box in which it is said these bills were placed. That, according to the description given of it by the witnesses, told only the plain and simple tale, that tables, bed-clothes and bedding, and some other cheap articles were in it, such as were usually carried in such boxes, for the usual freight charges. The fact most important for the insurers to know, that among this paltry stuff was a valise, with seven hundred and fifty dollars in bank bills in it, was not disclosed. The owner, treating the box of no particular value—shipping it as common freight, concealing its true value, deludes and deceives the carrier, an imposition is practiced upon him to deprive him of the compensation he is entitled to, in proportion to the value of the article entrusted to his care, and the consequent risk he incurs, and it tends to lessen the vigilance he would otherwise bestow. 2. Kent's Com. 603; 3 W. & S., *Relf* v. *Rapp*, 25.

A case very similar to this is to be found in Burrow's R. 2298, the case of *Gibbon* v. *Paynton and another*. It was an action against the Birmingham stage coachman for one hundred pounds in money, sent from Birmingham to London by his coach, and lost. It was hid in hay in an old mail bag. The bag and hay arrived safe, but the money was gone. Notice was brought home to the plaintiff that the company had advertised in a public newspaper that the coachman would not be answerable for money or jewels, or other valuable goods, unless he had notice that it was money, etc., that was delivered to him to be carried.

It was proved that money was not carried from Birmingham to London at the common and ordinary prices of the carriage of other goods, and it likewise appeared, from a letter of the plaintiff, that he knew this, and that he was conscious he could not recover by reason of the concealment. Verdict for defendant. It was argued —as it is in this case, by the appellee—on the motion for a new trial, that the coachman was answerable, though he did not know it was money; that a carrier is always answerable, unless he accepts the goods specially; that he made no enquiry or objection, and is therefore answerable. It is incumbent upon him to see that he is not cheated. He is bound to receive the goods, and must run the risk, citing, among other cases, that of *Fitchburn* v. *White*, 1 Strange R. 145, in which, Lord Chief Justice King held, "that if a box is delivered, generally, to a carrier, and he accepts it he is answerable, though the party did not tell him there is money in it."

Lord Mansfield held, that a common carrier, in respect of the premium he is to receive, runs the risk of the goods, and must make good the loss, though it happen without any fault in him the reward making him answerable for their safe delivery, and the reward ought to be proportional to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards, or other methods of security; and therefore he ought in reason and justice, to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. And here, the owner was guilty of a fraud upon him; the proof of it is over-abundant. And if he has been guilty of a fraud, how can he recover? *Ex dolo malo non oritur actio.*

Justice Yates said. By the general custom of the realm, a common carrier insures the goods at all events, and it is right and reasonable that he should do so; but he may make a special contract, etc. And certainly, the party undertaking, ought to be apprised what it is that he undertakes, and then he will, or at least may, take proper care. But he ought not to be answerable when he is deceived. Here he was deceived. The money was hid in an old mail bag, and it was hid from him that it was money.

Mr. Justice Aston, who tried the cause, said, "he never had any doubt about the justice of it. It manifestly appeared that this money was sent under a concealment of its being money. The true principle of a carrier's being answerable, is the reward. And a higher price ought, in conscience, to be paid him for the insurance of money, jewels, and valuable things than for insuring common goods of small value, Mr. Justice Willis concurred.

The court here did not, as distinctly as we have attempted to do judge this case upon the principles of insurance, but all their arguments lead to it. It is a very clear case, and very like the one before us, and not much stress is laid upon the fact of notice. The whole bearing of the case is on the fraud and deceit.

We have looked into the case of *Fitchburn* v. *White*, 1 Strange R. 145 and find it as cited. A reference, in that case is made to this case of *Gibson* v. *Paynton*, and to *Sir Joseph Tyley et al* v. *Morrice*, Cartnew R. 485, where it is held that the carrier was liable only for what "he was fairly told of." See, also: *Great Northern Railway Company* v. *Shepherd*, 14 Eng. L. and Eq. 370; *Boston et al.* v. *Donovan et al.* 6 ib. 373.

In this case as in Paynton's case, the owner of the money was guilty of a fraud upon the carrier, in concealing, in a rough box, stuffed with feather beds, bedding, tin ware, dishes, guns, etc., a very large sum of money. This artifice, giving the box a mean or common appearance, and thereby inducing the carrier to think it of no particular value, and so prevent him from making inquiries, ought to be regarded as pregnant proof of fraud. It is no answer to say, that the carrier made no inquiry about the box, the artifice resorted to prevented it; it was complete; there was nothing about it to excite special attention to it. The owner gave out that the box was not more valuable than it appeared to be, by treating it with so little care as he did, provoking a corresponding care only, on the part of the carrier. It seems to have been a plan laid to get his money—if he really had any, which we must doubt—safely carried, and cheaply, without paying any premium for the risk.

We say, it is doubtful if the money, or bank bills, was really in the box, after it left Sacranton, or even while there. The witness, Charles Labor, who speaks to that point is not at all positive. He says the goods were repacked at Sacranton, on the suggestion of the railroad agent there, and a box made at the Company's shop, the dimensions of which he gives. He saw the goods put into this box, and "one valise was put into the box, by himself between the beds, and the box fastened up. James Thompson was written on the box, and directed to him at Paw Paw, Illinois, and box placed in the care of railroad agent at Sacranton. Saw valise opened and saw plaintiff take out a comforter for the neck, and a small roll of money, which plaintiff *said* was one hundred dollars, and put it in his pocket. Plaintiff showed him, a large pile of bank bills, in the valise, a large pile of bank bills, containing, *he should say*, from six to eight hundred dollars, which remained in the valise. It was fastened up in the valise in the box by plaintiff and himself. To the best *of his knowledge* plaintiff had, when he left Pennsylvania, from $950 to $1,100, principally in bills. Plaintiff received $600, besides some interest from his father's estate; received funds before he left: one hundred dollars from Zeba Bennett; over two hundred from E. S. Thompson & Brother, and over two

hundred dollars from goods sold at auction, and also several other small sums."

This witness does not state how he knows these facts. It is manifestly all hearsay, derived from the plaintiff himself. The plaintiff told him how much money he had, graduating the amount to the appearance of the pile in the valise. As to that, to what does his testimony really amount? What is more deceptive than a pile of bank bills? and how could any one speak of the amount, unless he knew the denomination of each bill? He could not possibly tell whether there was one hundred dollars or one thousand dollars in the pile, for the smallest sum will make the largest pile if in small bills, the other pile being composed of bills of a large denomination.

But, besides all, there is no proof whatever that these bills, if they were in the valise, were genuine bills, and of value. It is not an uncommon circumstance for spurious bills to be concealed in a valise, and for aught that appears, all these bills may have been spurious—counterfeits. Nor does this witness state, that he remained with the plaintiff and the box until he started on the cars, and saw him and the box on board.

It was in the plainliff's control at the station house at Sacranton He had free access to it there, and an opportunity to commit a fraud, if he designed one.

The plaintiff, however, does show, by competent evidence, that in December, 1853, he did receive, in Pennsylvania, seven hundred and ninety dollars, viz, one hundred dollars from Zeba Bennett; from A. T. McCormick, five hundred dollars, in a draft, which was paid at the Wyoming bank, at which time Jones, a clerk in that bank, testified plaintiff drew out of that bank "a large amount in gold," the amount not stated. In August preceding, McCormick had given him another draft for one hundred and ninety dollars, which, it is quite likely, "was the large amount in gold" he drew out. All these sums make seven hundred and ninety dollars.

L. Harding testifies that on the 31st December, 1853, plaintiff paid him two hundred dollars on a land purchase, and on the 13th March following, three hundred dollars, and, at the same time, one hundred and five dollars for a yoke of oxen; in all, six hundred and five dollars; to which is to be added the one hundred dollars in bills Labor says he took out of the valise, at the station, and put in his pocket, Here is seven hundred and five dollars, of the seven hundred and ninety, plausibly accounted for.

The six hundred dollars received from his father's estate, if received, which is not proved, was long before the receipt of these moneys in December, and the two hundred dollars for goods sold at auction is not proved, so that the whole amount of money he is proved to have had; when he left Pennsylvania, was seven hundred and ninety dollars, for nearly all of which the testimony of Harding fully accounts.

But be all this as it may, we have attempted to show that bank bills do not, in common business affairs, come under the denomination of goods and chattels, or goods and freight, and therefore, the company is not chargeable for them, not having been received by them as such.

That if they were common carriers of bank bills they were entitled to be informed that this box contained bank bills, so that they might have a corresponding premium for the risk incurred and care to be bestowed upon it. Suppressing or concealing this fact, in the manner and by the means resorted to by the plaintiff, was a fraud upon the defendant, and makes the contract void, for there can be no action where the plaintiff has practiced deceit and fraud.

Had this issue been tried by a jury, the court should have put the fraud in the concealment of the contents of the box, home to them, and should have told them it was such an artifice to deceive, as to render the contract to carry void, and released the company from liability.

The judgment is reversed, the cause remanded, and a *venire facias de novo* awarded for further proceedings in conformity with this opinion

Judgment reversed.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Municipal Law—County Rate—Lands of Non-residents.

Southampton, 7th March, 1860.

Gentlemen,—Many difficulties have arisen in several Corporations, as well as various opinions been expressed by several Reeves of the County Council of the United Counties of Huron and Bruce, respecting the right of residents paying the taxes for the lands of non-residents, every year, for county purposes.

I have always contended in the County Council, and argued that they had no right to have done so. For it is in my opinion the duty of the County Council, in conformity with the 31st sec. of 16 Vic. cap. 182, to make every due allowance for the taxes of the lands of non-residents, at the time when the estimates are made up for county purposes.

Suppose, for example, that the County Council takes no notice of the non-resident rolls of the several corporations of the United Counties of Huron and Bruce; and that a by-law is passed to raise a certain sum of money, at the rate of four cents on the dollar, for general county purposes, on the basis of the total aggregate amount of the assessed value of the whole of the real and personal property of the said United Counties; and that a certain corporation, whose assessed value is $30,000, one half of which property belongs to non-residents; and the clerk of said corporation gets instructions, by order of the County Council, to raise 30,000 times 4 cents, equal to $1,200. Now the important question arises, how can the $1,200 be raised? There is no money in the treasury. It is evident that in consequence of one-half of the property belonging to non-residents the corporation will have to pass a by-law to raise the requisite sum of $1,200 from the residents, at the rate of eight cents on the dollar (double the amount of the county rate). If they do not pass a by-law, they must carry the County Council by-law into effect, and by so doing it is evident that the sum of only $600 will be raised,—half of the sum required for county purposes. Therefore by reasoning from such premises, I think no local corporation can legally pass a by-law to raise money for county purposes. For councils of municipalities, less than counties, have not the power to assess themselves in aid of any county requirements. Their aid is limited.

If the above reasoning be correct, it is evident that the County Council has a right to take into consideration the non-resident lands when they make up their estimates for the year. They are then in possession of the non-resident rolls, and every other information necessary for their guidance, so that if any deficiency should thus be likely to arise, either from the non-resident rolls or other causes named in the 31st sec. of 16 Vic. cap. 182, the County Council has the power to issue debentures for such deficiency, so that they can meet the demands before the money is wanted.

If the County Council neglects to make due allowance for the non-resident lands, the fault undoubtedly rests with that corporation. All that the corporation, which is assessed for

$30,000, has to do is to collect four cents on the dollar from the residents, in conformity with the County Council by-law, as above referred to, and claim credit for $600, the amount of tax of non-resident lands.

By giving your opinion on the above, in your next issue, you will much oblige

Your humble and obedient servant,
JAMES TELFER CONAWAY,
Reeve.

[We greatly doubt the power of a Township Council to pass a by-law such as that mentioned by our correspondent, in aid of a county rate.

1. It is the duty of the County Council, when making an estimate of the sum required for county purposes, to make due allowance in such estimate for the cost of collection and the abatements and losses which may occur in the collection of the tax, *and for taxes on non-resident lands which may not be collected.* (Consol. Stat. U. C. cap. 55, sec. 11, p. 652.)

2. It is then the duty of the County Council, in every case in which any sum is to be levied for county purposes, to *ascertain* and by by-law direct what portion of such sum shall be levied in each township, &c., in the county. (*Ib.* sec.75, p. 666.)

3. In apportioning any county rate among the different townships, &c., in order that the same may be assessed equally on the *whole ratable* property of the county, the County Council is to make the amount of property returned on the assessment rolls as finally revised and equalized of such townships for the preceding financial year, the basis upon which the apportionment is to be made. (*Ib.* sec. 72, p. 666.)

4. When the sum for each township is ascertained, it is the duty of the county clerk to certify the amount for such township to the clerk of that township, so that the clerk shall calculate and insert the same in the collector's roll of the year. (*Ib.* sec. 76, p. 666.)

5. Moneys at any time received on account of taxes on non-resident lands are made to constitute a fund, to be called "the non-resident land fund." (*Ib.* sec. 154, p. 679.) Upon which fund, in anticipation of moneys to be collected, the County Council can issue debentures. (*Ib.* sec. 160, p. 180). The surplus of which is to be apportioned among the municipalities ratably according to the moneys received and arrears due on account of the non-resident lands in each municipality. (*Ib.* sec. 163, p. 681.)

6. Therefore we coincide with our correspondent in his conclusion that it is the duty of the County Council to take into consideration non-resident lands when they make their estimate for the year, for that they are in possession of the roll and every information necessary for their guidance; so that if any deficiency be likely to arise, either from the non-resident rolls or other causes specified, the County Council has the power to issue debentures to meet the deficiency.

Money required for county purposes, it appears to us, is to be raised upon the whole ratable property of the county. Now the lands of non-residents are as much ratable as the lands of residents. If the latter only are compelled to bear the rate, the rate is not one raised upon the *whole* ratable property of the county, but, on the contrary, one unlawfully and unjustly raised upon a portion only, viz., the lands of residents. Such we believe the Legislature never intended.

Fletcher v. *the Municipality of the Township of Euphrasia*, 13 U. C. Q. B., 129, is in point.—EDS. L. J.]

To the Editors of the Law Journal.

Township Clerk's Office, Onondago,
March 1, 1860.

GENTLEMEN,—I take the liberty to address you respecting the duties of Inspectors of Weights and Measures, and your opinion as to their fees.

They are required to inspect yearly. Would they be entitled to an annual fee for all pieces inspected, and how must they be sworn into office? I may say that I am an Inspector of the County of Brant.

I have the honor to be your obedient servant,
WM. D. SOULES, *T. C.*

[Our correspondent puts two questions, both of which we shall endeavour to answer.

1. As to fees. An inspector of weights and measures is a public officer, and entitled only to such fees as the law of the land expressly authorizes him to collect for services performed. It is provided by Con. Stat. U. C. p. 696, cap. 58, sec. 13, that "every inspector may demand and receive ten cents, and *no more*, for *every* weight or measure he marks or stamps." We know of no other fee than this, which an Inspector of Weights and Measures is authorized to collect. Certainly there is nothing of which we have any knowledge, to authorize the collection of an annual fee.

2. As to the oath of office. An Inspector of Weights and Measures is a municipal officer—that is to say, owes his appointment to the council of the county or city for which he is authorized to act. The form of the oath of office is given in sec. 9 of the above mentioned statute, to which, for more full information, we refer our correspondent. Though the statute does not state before whom it is to be taken, we presume that it may be taken "before some court, judge, recorder, police magistrate, *or other justice of the peace*, having jurisdiction within the municipality." (Con. Stat. U. C. p. 563, cap. 54, sec. 179.)—EDS. L. J.]

MONTHLY REPERTORY.

CHANCERY.

V. C. W. RE CLULON'S TRUSTS. *June* 15.

Will, accumulation—Thelluson Act.

Testator devised lands upon trust for his son A during the joint lives of A and B, and after the death of either of them (A and B) which should first happen, upon trust to receive and invest the rents in stock and to accumulate the dividends, &c., by way of compound interest, until the trustees should have laid out £3,000 in the purchase of stock and subject to such investment upon trust for A with remainder to A's first and other sons in tail, with remainders over to testator's other sons, &c. As to the accumulations the trustees were to stand possessed thereof upon trust for the benefit of the child or children of A, and in default of such issue upon trust, as A should by will appoint, and in default of appoint-

ment for the next of kin of A living at his death according to the statute of distributions.

The testator died in August, 1822. A died without issue in 1839, in the lifetime of B, having bequeathed to C the £3,000 directed to be accumulated.

Held, that the trust for accumulation was not a provision for a portion within section 2 of the Thellusson Act, and that the accumulation was void except for the period of 21 years from the testators death.

Held also, that C was entitled to the accumulations made between A's death and the expiration of 21 years from testator's death, and that subject to such right of C, the remaining accumulations belonged from time to time to the persons entitled to the rents and profits under the limitations contained in the will.

V. C. S. RE HORER'S ESTATE. *June* 25.

Will—Construction—General gift controlled by subsequent words.

M H. being entitled under a will to land at L, for life with certain limitations over (which afterwards failed) and with remainder to her own right heirs, a portion of the said land was taken by a poor law union, under the compulsory powers given them, and £800 the purchase money was paid into court and afterwards invested. M. H. by her will devised her freehold land at L, to W. H. for his life with remainder to her own right heirs, W. H. being such right heir. She afterwards gave the interest of the sum of £800 stock (the fund in court) to W. H. for life; and after giving certain legacies, and referring to the surplus of her effects and monies, she, subject to the payment of her debts, and of the life estates aforesaid, gave devised and bequeathed the same to the children of W. H. as tenants in common, to be paid to them on attaining twenty-one.

Held, that W. H. had only a life interest in the fund in court; and that on his death his children were entitled to it.

V. C. K. THOMPSON v. WEBSTER. *June* 28.

Voluntary settlement—Creditor.

A voluntary settlement made without valuable consideration, the settlor being at the time in embarrassed circumstances, is not void, under 13 Eliz. cap. 5, unless it is the spontaneous act of the settlor, and there is proved to be an intent on his part to delay, hinder or defraud creditors; the onus of proving such intent lying on the party alleging it.

To render a deed void as against creditors, it is not sufficient that it is merely voluntary, but it must be proved that the party making it intended to delay, hinder or defraud his creditors.

On the question of a voluntary deed being void under the statute of Elizabeth, all the surrounding circumstances must be looked at, and each particular case must depend upon these circumstances.

L. J. NELSON v. STOCKER. *June* 1.

Infancy—Misrepresentation as to age—Marriage settlement.

By a marriage settlement the husband covenanted to settle £1,000 on his wife and children. At the time of the marriage the husband was an infant of eighteen years of age, but he represented to his wife, or to her solicitor that he was of age. The wife carried on the business of a pawnbroker before marriage, and the husband upon his marriage took possession of the stock, in trade, which was worth several hundred pounds, and carried on the business, but did not settle the £1,000 according to his covenant. After the death of the wife, the trustee filed a bill to enforce the covenant.

The court being of opinion that the result of the evidence was that the wife was not deceived as to the age of her husband, but knew herself that he was an infant, dismissed the bill.

The protection which the law throws around an infant, is a legal previlege, and ought not to be broken in upon on slight ground.

If a person pleads that he was led into a contract with an infant by misrepresentations on the part of the infant as to his age, he must show that he was actually deceived by such misrepresentations.

V. C. W. JOHNSTONE v. LORD HARROWBY. *July* 1.

Will—Construction—Cumulative legacy.

Testator by his will gave a legacy of £500, to be paid out of his pure personalty to a charity. By a codicil he "gave and bequeathed to the said charity the sum of £1,000."

Held, that the two legacies were cumulative, but that in the absence of the indication of any intention by the testator to blend the two legacies together, and subject them to the same conditions as to payment, &c., the second legacy was not payable out of the pure personalty, like the first.

L. C. & L. J. J. KING v. CLEAVELAND. *July* 2.

Will—Construction—Legacy—Substitution—Personal representatives.

Gift by will to nieces then living, or their legal representatives, share and share alike. One of the neices died before the time without issue.

Held, that her next of kin and not her administrator was entitled.

M. R. MELLISH v. KEEN. *July* 12.

Partnership—Lunatic—Dissolution by notice.

When parties enter into a partnership at will, notice to one by the others, that they wish to dissolve the partnership, must be considered as an overture for an effectual dissolution. For this purpose, a notice to a person of unsound mind, not found lunatic by inquisition, held good, and dissolution decreed from the date of the notice.

COMMON LAW.

C. C. R. HENDERSON v. MEARS. *June* 4.

Landlord and tenant—Eviction—Direction to jury.

When unfinished apartments were let by the occupier of a house to the defendant, who put a man in the possession to show the appartments in order to underlet them and where the man was turned out by the occupier as being personally disagreeably to him, it is acorrect direction to the jury to ask them whether the man was turned out for the purpose of expelling him or for the purpose of evicting the defendant.

Q. B. TAUVACO AND OTHERS v. LUCAS AND OTHERS.

Cargo of ship—Sale of goods—Varience between quantity of goods contracted for and delivered.

By a contract the plaintiffs sold a cargo of wheat of about 2000 quarters, say from 1800 to 2200 quarters at the price of 52s. per delivered quarter of 492lbs free on board at Taganrog to any safe port in the United Kingdom, the wheat to be shipped between certain dates, the measure for the sake of invoice to be calculated at the rate of 100 chetwerts equal to 72 quarters, sellers guarantee the delivery of invoice weight, sea accidents excepted, buyers to pay for any excess of weight, unless it be the result of damage or heating. Payment, cash in London on exchange for usual shipping documents. The shipping documents showed a quantity between 1,800 and 2,200 quarters, but the quantity actually shipped was less than 1,800 quarters.

Held, that this fact released the buyers from their contract.

Q. B. *June* 16.

THE AND W. LOAN AND DISCOUNT CO., v. DRAKE.

Mortgage of fixtures—Surrender.

A having mortgaged to the plaintiffs, the fixtures in a house of which he was tenant before the fixtures were severed, surrendered his lease to his landlord who demised to the defendant. The defendant then entered and took possession of the house, together with the fixtures.

Held, that the mortgagor could not defeat his own act by the surrender, and that the plaintiffs had a right to enter and sever the fixtures notwithstanding; and that they were entitled in an action of trover for the fixtures, to recover their value.

EX. Solomon v. The Vintners' Company. *May* 6.

Easement—Right to support—Intervening house—Houses falling out of perpendicular—Prescription.

The plaintiff and defendants were respectively the owners of houses separated by a house the property of a third person, and which three houses immediately adjoined each other.

The houses were built on a declivity, the defendants house being lower down than the plaintiffs'; and for a period exceeding twenty years they had fallen out of the perpendicular in such a way that the plaintiffs' house projected over the ground of the next house and that again over defendants' land. The defendants took down their house for the purpose of building a new house on the site; and the consequence was that the plaintiff's house was damaged.

Held, that the plaintiff had not acquired a right to the support of the defendants house; and that he could not maintain any action against them for the damage so sustained.

EX. C. Brown et al v. Hare et al. *May* 18, *June* 23.

Mercantile contract for purchase of unascertained goods—Property lost at sea passing to vendee upon shipment—Bill of lading making goods deliverable to shipper's order—Indorsement.

The defendants, merchants at Bristol, through a broker, contracted to levy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board," at Rotterdam, in September 1857, at £48 15s. per ton, to be paid for, on delivery to the defendants of the bills of lading by bill of exchange, so be accepted by the defendants, payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship trading between Rotterdam and Bristol, five tons of the oil. The master signed a bill of lading by which the oil was deliverable "unto shippers' order," and the plaintiffs endorsed the bill of lading specially to the defendants. On the same day the plaintiffs enclosed in a letter to the broker the bill of lading, invoice, and a bill of exchange drawn on the defendants, in accordance with the contract. On the night of the 9th, the ship, with the oil on board, was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol, on the afternoon of the 10th, in due course of post, but after business hours. On the morning of the 11th, the broker left with the defendants the bill of lading, invoice, and bill of exchange, for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards, the defendants returned to the brokers the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil.

In an action for not accepting the bill of exchange, and for goods sold and delivered,

Held (affirming the judgment of the Exchequer), that the property in the oil vested in the defendants on its delivery free on board the ship in performance of the contract, and consequently the plaintiffs were entitled to recover on both counts, and that the form in which the bill of lading was taken, making the oil deliverable "unto shippers' order," did not prevent the property from passing.

EX. C. Marquis of Camden v. Botterbury. *June* 27.

Landlord and tenant—Action for use and occupation of building land—Building articles—Agreement not amounting to an actual demise—Rent—Tenancy from year to year when to be implied—Liability of assignee—Evidence.

In an action for money payable for the defendants use of lands, messuages and premises, by the plaintiffs permission, the particulars of demand claimed £241 as a years rent due Lady day, 1858.

It appeared that by Indenture made Feb. 4th, 1853, between plaintiff and E, the plaintiff agreed to grant leases of the whole or part of certain ground, whereon houses then proposed to be built should be erected, so soon as one or more houses should be erected. To hold the same and the other premises agreed to be demised to E and his assignees, from 29th September, 1852, for ninety-eight years, paying for the first, second, third, fourth and fifth years, from £30 to £285. E. covenanted, for himself and his assigns, to pay the several yearly rents reserved, and there was a proviso for re-entry if the said yearly rents should be behind. During 1853, E. built on the land five houses, which were duly demised to him at rents amounting to £35; and until January 31st 1854, paid the several yearly sums covenanted to be paid.

On the 31st January, 1854, E. assigned the indenture and all his interest under it, to the defendants, who, till Lady-day, 1857, paid to the plaintiff's agent the several yearly sums, and took receipts which in general, purported, on the face of them that the payments were made by the defendant as rent due to the plaintiff under the deed of February 4th.

In 1854, and 1856, the defendant built on the land a house and stables, and obtained two leases according to the said indenture of agreement, reserving rents amounting to £9. The two last mentioned rents, added to the £35 reserved on the demises to E when deducted from £285, the highest rent, leave £241 the sum claimed in the action; and except these sums of £9 and £35, no payment was made to the plaintiff after Lady-day 1857. On the 25th May, 1857, the defendant assigned to one W, the indenture of the 4th February, and all interest thereon.

Evidences were also given for the plaintiff of the defendant having employed an auctioneer to let the property, and that some of it was a mere ballast hole.

Upon the facts above, the Common Pleas held, that the defendant was not liable; that the indenture of February 4th, 1853, did not amount to an actual demise; that the several annual sums reserved as rent were collateral sums paid for the right to occupy for the purpose of building, under the agreement; that the tenancy of E if any, was not a tenancy from year to year is implied from payment of rent, it is becauee there are no other circumstances to *account for the payment, except that it is paid for the occupation* but that in this case the facts showed that the payments were made by the defendant, not as rent, but in discharge of the obligation upon E to pay them.

Held (affirming the judgment of the Common Pleas,) that the plaintiff was not entitled to recover; that the facts afforded no ground for implying a new tenancy from year to year between the plaintiff and the defendant; and that the form of the receipts showed that the payments by the defendant were made, not as rent for the occupation of the premises but in discharge of his engagements with E.

APPOINTMENTS TO OFFICE, &c.

SOLICITOR GENERAL FOR UPPER CANADA.

The Honorable JOSEPH C. MORRISON, to be Solicitor General in and for that part of the Province of Canada called Upper Canada.—(Gazetted 25th February, 1860.)

JUDGE.

JOHN MAJORIBANKS LANDER, Esquire. Barrister-at-law, to be Judge of the County Court of the County of Lincoln —(Gazetted 4th February, 1860.)

COUNTY ATTORNEY.

RONALD McDONALD, of St. Catherines, Esquire, Queen's Counsel, to be County Attorney for the County of Lincoln.—(Gazetted 4th February, 1860.)

CLERK OF THE PEACE.

RONALD McDONALD of St. Catherines, Esquire. Queen's Counsel. to be Clerk of the Peace for the County of Lincoln.—(Gazetted 4th February, 1860.)

CORONERS.

JAMES SILL and JAMES GORDON, Esquires, to be Associate Coroners, County Haldimand.—(Gazetted 4th February, 1860.)

WILLIAM PIPE, Esquire, M.D., Associate Coroner, County of Waterloo.—(Gazetted 18th February, 1860.)

JOHN ROY PHILIP, Esquire, M B., Associate Coroner for the County of Waterloo —(Gazetted 18th February, 1860.)

GEORGE METHERELL, Esquire, M.D., Associate Coroner, County of Wentworth. (Gazetted 18th February, 1860)

ALFRED LANDER, Esquire, M D., Associate Coroner, United Counties of Huron and Bruce.—(Gazetted 18th February, 1860)

TO CORRESPONDENTS.

Otto Klotz—Under "Division Courts."

James Telfer Conway—Wm. D. Soules—Under "General Correspondence."

Edward R. Kent—Rowley Kilborn—Paul Dunn—Too late for this number. See our next.

A Johnsonian—No notice taken of anonymous communications.