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DIARY FOR DECEMBER.

1	Saturday	Michaelmas Term and Chancery Hearing Term ends
2	SUNDAY	*1st Sunday in Advent*
3	Monday	Last day for notice of Trial in County Courts
9	SUNDAY	*2nd Sunday in Advent*
11	Tuesday	Quarter Sessions and County Court Sittings in each County. Sittings of Error & Appeal begins
13	Thursday	Last day for service of Writ for Toronto Winter Assizes
14	Friday	Last day for collection of money for School Teachers Salaries
16	SUNDAY	*3rd Sunday in Advent*
23	SUNDAY	*4th Sunday in Advent*
24	Monday	Last day for declaration for Toronto Winter Assizes.
25	Tuesday	CHRISTMAS DAY. Alterations in School Sections take effect
30	SUNDAY	*1st Sunday after Christmas*
31	Monday	End of Municipal year. Last day on which remaining half of Grammar School Fund payable

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.

DECEMBER, 1860.

NOTICE TO SUBSCRIBERS.

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

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

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

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

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

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

THE LAW JOURNAL

With this number we close Volume VI. of the *Upper Canada Law Journal*

The conclusion of the volume suggests to us the consideration of the following questions as to the past, the present, and the future:—What have we done? What are we doing? What shall we do?

As to the first question. We have instituted and conducted, with a fair measure of success, the only legal periodical in Upper Canada. We have secured the patronage of a wide class of readers in the legal profession and out of it. We have taken a position that entitles us to the support of all who are in any manner concerned in the administration of justice in Upper Canada. We have widened the circle of our influence till we find ourselves the organ of all interested in the administration of the law or its amendment and improvement. We have done much to give to local courts an abiding place in the land. We have done much to procure the enactment of several beneficial laws. In a word, we have done, to the best of our ability, all that we have undertaken to do.

As to the second question. We are doing our best to make the laws known and respected. We take every opportunity of disseminating information of service to our readers. We lose no opportunity of tendering advice to all officers concerned in the administration of justice, to whatever Courts belonging; and to those engaged in the working of the municipal institutions of the country. We seek to produce among local tribunals, uniformity as well as soundness of decision. We herald suggested improvements of the law. We seize every opportunity of serving our readers within the scope of our undertaking.

As to the third question. We shall continue to do what we have done. We shall, however, be happy to improve, and feel that there is room for improvement. We shall be glad to receive sound advice and not slow to act upon it. Our aim is to serve our patrons, and in return we shall ask only a fair support.

This brings us to a subject upon which we desire to touch. What is the support of a periodical? The good-will of its readers and their aspirations for its success are not to be despised; but something more is needed to ensure its success—a material support is requisite. The man who wishes us all success, but withholds his subscription, fails to give us proper support. A law periodical cannot be edited and published free of cost. It is an article of bargain and sale. If it is of value and is purchased, purchasers should pay for it. It relies for support upon the number of purchasers and the payment of the purchase money. The man who subscribes for our journal, receives it, and yet from year to year neglects to pay for it, robs us of the reward of our industry. We look only to subscription money for our support. Unlike daily newspapers, we make little of advertisements; unlike daily newspapers, we have no political or other ulterior motive to serve. We ask our readers to take our journal if it is of advantage to them to do so, and if they take it we ask them to pay for it. Nothing can be more reasonable. And yet we are sorry to say that a large proportion of our readers, while they do the one, omit to do the other—they take the journal but omit to pay for it.

The amount standing on our books is very great—

thousands of dollars. To us it is in the aggregate an object of great concern; to each of our readers it is of little moment. The inconvenience to each defaulting reader of paying his subscription money would be much less than the inconvenience which we suffer from being unable to collect our dues. How long is this state of things to last? Not long. We are about to examine our subscription list, and to instruct our solicitors to deal with those upon whom our entreaty has no effect.

Subscribers in default are without excuse. They cannot urge in extenuation that they are ignorant of the amount of their liability to us. Each subscriber, by reference to the cover of each number of the *Journal* as he receives it, can easily discern the precise amount due and payable to us. Our new system of keeping accounts and of addressing the *Journal* affords every facility for prompt payment. It is no object to us, to increase the circulation of the periodical among men who do not pay for it—but the contrary. Neither false pride nor the hope of securing advertizing patronage prompts us to trumpet the extent of our circulation. We want a paying—not a wide and losing circulation—a circulation that causes loss in proportion as it widens. We have no ambition to swell our list with illustrious nothings—in common parlance, dead heads. We prefer therefore, before the commencement of a new volume, to examine our list and if necessary to prune it. We shall take means the most mild of bringing those endowed with self respect to a proper sense of duty as regards the payment of their subscription money. We shall hand the names of the incorrigible to the executioners of the law, at the same time being quite as unmindful of their fate as of their patronage.

COUNTY COURTS—JURISDICTION IN EJECTMENT.

(Continued from page 241.)

We have observed that there is no *general* jurisdiction in ejectment given to the County Courts by the act of last session, that it is only in certain cases, and subject to certain circumstances that the action lies; and having noticed the first ground lying at the foundation of jurisdiction—the limit as to amount—we proceed to notice the *cases* in which ejectment may be brought.

The first enquiry of the practitioner is, Does the yearly value of the premises fall within two hundred dollars? Or if a value has been placed on the premises by the parties themselves—that is if the place has been rented—does such value, *i.e.* the rent payable, come within that amount?

The next consideration that presents itself is, as to the parties; for to bring the act into operation, the relation of landlord and tenant, as contemplated by the act, must exist between them.

The right to bring the action is also dependent on the fact whether the term has expired or been determined, or the rent has been sixty days in arrear; and in this order we purpose noticing each ground.

The relation of landlord and tenant.

The precise relation which the words "landlord and tenant" are intended to express is not always easy to determine, though they are terms in constant use. According to the meaning in general attributed to these words, the terms are correlative; the word landlord importing a party who grants a lease, the other the party to whom granted. "I think," says Smith in his lectures on "Landlord and Tenant," "that I am not far wrong in saying that, when we speak of landlord and tenant, we have the notion in our minds of a tenancy limited, in point of duration, within some bounds, not so extensive as to render the landlord's interest *practically* worthless, and accompanied by some remunerating incidents to the reversion, such as a rent or, at all events, a fine in lieu of rent, and also by certain obligations, such as covenants, or, when the tenancy is evidenced by some instrument not under seal, agreements for the performance of the duties usually required from persons taking the description of property demised." But this is the narrow sense of the words, though the usual one, for, "in point of strict law, whenever we find a subject in possession of land, *there* the relation of tenancy is in existence between him and somebody or other" * * * "Some one or other *must* be his superior lord." * * * "No person, except the Sovereign, can hold landed property without a superior lord, and, consequently, in contemplation of strict law, the relation of landlord and tenant is as extensive as the ownership of landed property by subjects." (Smith's Landlord and Tenant, 34.)

The term *tenant* may be applicable whatever the nature of the estate, whether an estate for years, for life, in fee simple, or an estate tail; but the word is then used independently and not correlatively, as when we employ the words landlord and tenant speaking in the ordinary sense of lessor and lessee.

And, as has been noticed, the term *landlord* does not necessarily import one who grants a lease, but the owner of the land. In the statute before us the words "landlord and tenant" are used independently—at least they do not contemplate the sort of tenancy meant when the words are employed in their ordinary sense.

Section six enacts that "The term 'landlord and tenant' as used in this act shall be understood to mean the person entitled to the *immediate* reversion of the lands, or if the property be holden in joint tenancy, co-parcenary, or tenancy in common, shall be understood to mean any one of the persons entitled to *such* reversion."

The *immediate reversion* meant in the section is obviously the reversion expectant upon the tenancy in litigation And the person entitled to it may or may not be the party granting the lease to the defendant. For example, if a party, after having demised premises, sell the property, in case the lessee refuse to pay the rent or give up the property, we think the owner, under the purchase, could bring ejectment in the County Court, as being the landlord under the act (or person entitled to the immediate reversion); for by his purchase he became owner of the property, subject to the tenancy Or if tenant for life demise premises for a term of years, upon the death of tenant for life, the party entitled to the remainder in fee could bring his action as the person entitled to the premises But it has been held under an analagous English enactment by Patteson, J, that a mere constructive tenancy arising out of a mortgage transaction is not sufficient. (*Jones* v. *Owen*, 18 L. J, Q B 8). This was a rule for prohibition to restrain the county judge from proceeding in the case, on the ground that there was no tenancy proved to exist between the parties, beyond what was to be implied from the relationship between mortgagor and mortgagee. The plaintiff was mortgagee of the premises; the defendant claimed under the mortgagor. It was objected at the hearing that there was no privity of contract between the plaintiff and defendant, but the judge overruled the objection, and gave judgment for the plaintiff. Patteson, J., in giving judgment said: "I do not think anything is clearer than that the act contemplates the ordinary position of landlord and tenant, *and not* that existing between mortgagor and mortgagee; and I do not find anything in the affidavits to show that any such relation existed in the present case between the parties I therefore think that the county judge had no jurisdiction to try this case; and that as far as right is concerned, the defendant is entitled to a prohibition. * * There was a total want of jurisdiction."

Another case has been decided in England upon this point (*Banks* v *Kebbee*, 20 L J, Q B. 476). It appeared that an agreement in writing had been entered into between the parties, for the purchase of the premises in question for the sum of £150, to be paid by weekly instalments of £8 each, until the whole purchase money was paid. Upon a rule for a prohibition it was held that the relation of landlord and tenant did not exist, and that the county court had no jurisdiction

If our view be right, the question which a practitioner should determine as to whether the plaintiff is entitled to bring the action is, simply—is he the party or not (subject to tenancy) entitled to the premises in dispute? If he is, then, subject to other restrictions in the statute, the action lies.

(To be continued.)

ATTORNEYS' BRANCH OFFICES.

It has been intimated to us by the Benchers of the Law Society, that in Upper Canada there is a vicious system springing up whereby attorneys living in leading cities and towns establish in smaller places branch offices, under the superintendence of articled or other clerks, who receive a certain proportion of fees for work done in compensation for their services.

We need not say to our more experienced brethren in the profession, that in point of law such a system is illegal, and on grounds of public policy most objectionable.

It is the duty of an attorney to instruct his clerks and advise personally with his clients, in order that the former may profit by the instruction so as to qualify themselves to pursue the duties and avocations of the profession to which they are brought up, and that the latter may reap the benefit of the advice and judgment of their principal (per Richardson in 7 Moore, 243).

The attorney who, while actually carrying on his profession in one place, establishes branch offices in other places under the management of his clerks, is unmindful of both these duties. On the one hand he neglects his clerks whom he is bound personally to instruct, and on the other he neglects those clients who are entitled to his personal attention, and the fruits of his experienced judgment.

In our opinion the case is not at all improved by the fact that the attorney occasionally makes the circuit of his branch offices.

Attorneys, after having been duly examined and found qualified to act, are admitted to practice under the sanction of and with the approbation of the Courts When admitted they are entitled to the privilege and protection of the Courts, and are subject to punishment by the Courts in cases of misbehaviour. The Courts, however, could exercise no control whatever over attorneys if they were allowed to have different clerks in different parts of the Province, where clients could seldom if ever have personal communications with them (see per Burrough, J., 7 Moore, 241).

Besides, the system of remuneration established in these offices, is quite opposed to every principle of public policy regulating the conduct of the profession in their relations to the public. The payment of a proportion of profits to inexperienced clerks, could only be an incentive to stir up litigation held out to men (or rather boys) whose motives would not be governed either by learning, experience, or common prudence

It is unnecessary to do more than refer to *Hopkinson* v. *Smith*, 7 Moore, 237, to shew in what light these partnerships are viewed in England It there appeared that plaintiff, an attorney, lived at Dewsbury, in Yorkshire, and had a branch office at Wakefield, five miles from Dewsbury,

where he went once a week, and where a person by the name of Berry, who had lately been his articled clerk, but who had not been admitted an attorney, superintended his business and practised in his name. The defendant resided at Huddersfield, fourteen miles from Wakefield, and applied to Berry there, in the first instance, to commence an action against one Naylor. The suit was carried on by Berry. Between him and the plaintiff there was a private understanding that for all business done by the former at Wakefield, he was to receive one-third of the profits, and the plaintiff the remaining two-thirds. It was not shown that the defendant had ever seen or communicated with the plaintiff as to the conducting of the cause. It appeared also, we may add, that Berry was indebted to the defendant for spirituous liquors, furnished to him by the latter, before the bill of costs was delivered. The plaintiff brought an action against defendant for the amount of his bill of costs.

The learned judge at the trial, upon this state of facts, was of opinion that the plaintiff was not entitled to recover, on the ground that no proof had been given that he had been retained by the defendant; that before a client can be called on to pay an attorney's bill of charges for business done by him, in the character of an attorney, he should have had the benefit of his experience and judgment as the principal; that the plaintiff by allowing his clerk to transact his business at Wakefield and giving him one third of the profits, constituted a *partnership*; that if so, the action should have been brought in their joint names; and that as such partnership would have been illegal in itself, they could not have been enabled to recover, and so the plaintiff was nonsuited.

The judges, *in banc*, refused to set aside the nonsuit, and gave utterance to expressions of disapprobation much stronger than any we have used.

It only remains for us to add that the Benchers of the Law Society of Upper Canada have determined to discountenance every such transaction, and will not allow the time served by an articled clerk at a distance from his master's chief place of business. This determination will, at least, have the effect of deterring young men, anxious to become admitted at an early date, from becoming parties to bargains which every professional man of a correct mode of thinking must condemn in his conscience.

We are also informed that the Law Society have discovered a practice equally liable to censure, and that is, the practice of articled clerks, in the last year of their service, coming to Toronto, bringing with them the agency business of country principals, and pocketing the agency fees, or some portion thereof, as their own. This is a practice which, if discovered in the case of any particular student, will subject him not only to censure, but probably to pains of a more severe description.

It is our duty to the profession, as well as to the public, to make these remarks; and we hope that they will not be without some effect upon those to whom they are especially addressed.

SUMMARY CONVICTIONS, AND APPEALS THEREFROM.

BY A BARRISTER.

A conviction may be defined to be "A record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced."

Being a record therefore of a proceeding taken under the authority of a statute, and in restraint of the common law, which requires that a man shall be tried by his equals, nothing will be presumed in favor of a conviction, but the intendment will be against it.—*Burn* 586.

Every thing therefore necessary to show the jurisdiction of the magistrate, the commission of an offence, the hearing and adjudication, must be stated fully and with certainty.

In 1 Lord Raym. 510, Lord Holt said, "Convictions ought to be certain, and not taken upon collection;" and in *Rex* v. *Harris*, 7 T. R. 238, Lord Kenyon said, "A conviction is in the nature of a verdict and judgment, and therefore must be precise and certain."

Except in cases where a form of conviction was given by a particular statute, it was necessary at common law to set forth in a conviction—

1st. An information or charge against the defendant, shewing by whom the complaint was made, the nature of the offence, and the time when and place where it was committed.

2nd. The jurisdiction of the magistrate.

3rd. A summons to the defendant, in order that he might have an opportunity to make his defence.

4th. His appearance or non-appearance.

5th. His confession or defence.

6th The evidence against him, in case he did not confess.

7th. The judgment or adjudication.

8th. That it be under the hand and seal of the convicting magistrate.

The difficulty of drawing up convictions in due form no doubt induced the Legislature, in the act relating to summary convictions, to give general forms, in which many things necessary to have been stated in a conviction at common law have been omitted.

In a conviction in the form given by the statute 16 Vic c. 178, Consol Stat. Can c 103, it is only necessary to set forth—

1st. The jurisdiction or authority of the convicting magistrate.

2nd. The offence of which the defendant is convicted, including statements of the time and place when and where committed.

3rd. The judgment or adjudication.

4th. The hand and seal of the magistrate.

First as to the jurisdiction of the magistrate. He should style himself one of her Majesty's justices of the peace *in and for* the county of ———. It is not sufficient to call himself a justice, &c., *within* the county, for *non constat* that he is a justice *for* the county, and therefore having jurisdiction.—*Rex* v. *Dobbyn*, 2 Salk. 474 When a statute gives cognizance of an offence to the *next* Justice, it should be so stated in the conviction. It is not sufficient in that case to call himself merely a justice *in and for the county*, because none but the next accessible justice can have jurisdiction under *these words* —*Sanders*, case 1; Wms. Saund. 263, c.

Second, as to the offence. The offence of which the defendant is convicted must also be stated with certainty, otherwise the conviction will be quashed.

In *Wilson* v. *Graybiel*, 5 U. C. Q. B. 227, a conviction for selling liquor without license, contrary to the form of the statute in such cases made and provided, was held bad because it was not alleged under what statute and for what offence the conviction was made.

A conviction "*for wilfully damaging, spoiling and taking and carrying away, six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels*," was held not to contain a statement of an offence for which a conviction could take place —*Eastman* v. *Reid*, 6 U. C. Q B. 611.

A conviction alleging that the defendant did "*evade payment of toll at the toll gate situated, &c.*," was held insufficient in not showing that any toll was claimed, or what toll, or how imposed, or that any *could* be claimed —*Regina* v. *Haystead*, 7 U. C. Q. B. 9.

And so a conviction which stated that the defendant did "*take and receive toll from the informant, at, &c., unlawfully and improperly, the said gate not being in a situation or locality authorized by law*," was held bad in not stating how much toll was taken, and in not shewing in what respect the taking of toll was unlawful —*Regina* v *Brown*, 4 U. C. Q B. 147.

A conviction stating an offence to have been committed in the alternative is bad —*Rex* v. *Sadler*, 2 Chitty, 519; *Rex* v. *Pain*, 5 B & C 251. See also *Fletcher* v *Calthorp*, 6 A & E, N.S., 880; *Rex* v. *Roberts*, 1 Stra 608; *Rex* v. *Sparling*, 1 Stra. 497; *Rex* v. *Popplewell*, 1 Stra. 686; *Rex* v *Chaveney*, 2 Lord Raym. 1368; *Rex* v. *Ferguson*, Trin Term, 4 Wm IV, U. C.; R & H. Dig. 121.

Where the offence is created by statute, it is in general sufficient in describing it to pursue the words of the statute. —*Rex* v. *Chandler*, 1 Lord Raym. 581; *Stamp* v. *Sureland*, 14 L. J., N. S., 184; 9 Jur. 939.

If a statute creating an offence or penalty contain a proviso or exception, the conviction should negative the exception —*Rex* v *Jukes*, 8 T. R. 542; *Hespeler* v *Shaw*, 16 U. C. Q. B. 104.

However, if the exception is contained in a subsequent statute to that creating the offence, the exception need not be negatived in the conviction. It is incumbent on the defendant to show that he comes within such exception — *Rex* v. *Hall*, 1 T. R. 322. And so it would appear where a statute in one clause creates an offence generally, and in a subsequent clause excepts certain cases.—1 Stra. 555; 2 Stra 1101.

A conviction under a by-law must shew the by-law, that the court may judge of its sufficiency.—*Regina* v. *Ross*, Mich. 3 Vic. U. C.; R. & H. Dig. 127.

The time of committing the offence must also be stated in the conviction, that it may appear that the prosecution is commenced in due time, and also to enable the party to defend himself against a second charge.—Salk. 360; 2 Stra. 900. But the offence need not be proved precisely on the day it is alleged to have been committed; though it must be proved to have been committed within the time limited for the prosecution.—*Rex* v. *Chandler*, Salk 378; 5 Mod. 446; 1 Lord Raym. 582; *Regina* v. *Simpson*, 10 Mod. 248.

The place where the offence was committed should also be set forth in the conviction, in order that it may appear to be within the jurisdiction of the magistrate (*Rex* v. *Hazel*, 13 East. 139); and also that the party may be able to defend himself against a second charge.

Third, as to the judgment or adjudication Every conviction must contain an adjudication of the defendant's having been convicted, and there must be a penalty imposed; for it is said that "An appeal is not from the judgment of the Justice as to the fact, but because he has ordered a penalty to be paid, or has committed the defendant, who wants to stay execution or be released."—Dickenson, Q S. 809 Even in cases where the punishment is fixed by statute there must be an adjudication, for the want of which the conviction in *Rex* v. *Harris*, 7 T. R 238, was quashed. In *Rex* v. *Hawkes*, 2 Stra. 858, and *Rex* v *Vipont et al*, 2 Burr. 1163, convictions were quashed

because there was no judgment of forfeiture, and see *Rex* v. *Ashton*, 8 Mod. 175

A defendant may be convicted of several offences of the same kind, and of several penalties in the same conviction. —*Rex* v. *Swallow*, 8 T. R. 286.

But under particular acts of Parliament *only one offence* can be committed on the same day. As under the statute 29 Car. II. c. 7, for exercising a trade on the Lord's Day. —*Crepps* v *Durden*, Cowp. 640; and see also *Rex* v. *Matthews*, 10 Mod. 26; *Rex* v. *Lovett*, 7 T. R. 152.

When several parties are convicted, several and distinct penalties should in *general* be imposed, but where any person or persons are prohibited from doing *an act* under a penalty, it is a joint offence, and only one penalty accrues. *Rex* v. *Bleasdale and another*, 4 T R. 809.

It is also sufficient in general, and since the statute relating to summary convictions it is proper to direct the penalty to be distributed as the law directs; but if the act creating the offence gives a discretionary power to the magistrate, either as to the proportions in which the penalty is to be distributed among different persons, or for different purposes, or as to the persons or objects to receive the penalty, an adjudication that the forfeiture be disposed as the law directs would be bad.—*Rex* v. *Dempsey*, 2 T. R 96; *Rex* v. *Symonds*, 1 East. 189; *Rex* v. *Seale*, 8 East 568, 573; *Rex* v. *Smith*, 5 M. & S. 133.

Where a commitment formed a part of the adjudication, and it was ordered that "the defendants should lie in prison till they pay their fine," no precise fine being mentioned, the conviction was quashed.—*Rex* v. *Elwall*, Stra. 794; 2 Lord Raym. 1514.

A conviction for obstructing a highway, and order to pay a continuing fine until the removal of such obstruction, was held bad in *Regina* v. *Huber*, 15 U. C Q. B. 589.

In *Regina* v. *Robertson*, 11 U. C. Q. B. 621, a conviction of an apprentice and order that he should give sufficient security to his master to make satisfaction, and in default of such satisfaction to be imprisoned, &c., was held bad, because the justice did not determine what satisfaction should be given.

Where costs are ordered to be paid the amount must be specified, otherwise the conviction will be quashed for uncertainty. —*Rex* v. *Hall*, Cowp. 60; *Rex* v *Ferguson*, Trinity, 3 & 4 Wm. IV. U. C.; R. & H. Dig. 121.

Fourth. Hand and seal of magistrate. A conviction should be under the hand and seal of the magistrate. It thereby becomes a record of the conviction —Dick, Q. S 895. Without his hand and seal it would be bad, and would be quashed.

It is usual, though not necessary, to add the date of the adjudication; but an impossible or incongruous date, if the conviction be complete without it, may be rejected as surplusage and will not vitiate —*Rex* v. *Picton*, 2 East 196

(*To be continued*.)

NEW TRIALS IN INTERPLEADER CASES.

The subjoined letter is inserted as desired.

If the writer knew of the case of *Reg*. v. *Doty* at the time of writing his first communication he should have referred us to it; if he withheld a reference to it with any sinister design, he acted a most disingenuous and unprincipled part. As legal journalists we desire to place before our readers the best information that our experience and research can furnish, and no question is answered without being first considered. But it is very possible that a decided case may escape the attention of the most diligent. The queries inserted and answered in the *Law Journal* are not merely for the individual querist, but that all its readers may have the benefit of the information conveyed To suppress a case within the knowledge of a querist is manifestly unfair alike to the conductors and readers. We are willing to believe that Mr Whipple did not know of *Reg*. v. *Doty* when he first wrote to us It is the first matter of the kind that has occurred in the six years since this publication was commenced and we trust it will be the last Correspondents should know and feel that the conductors of this Journal can have no wish as to any debated question, other than, as a great Judge once said, to know what the law really is. We must admit that *Reg*. v. *Doty* escaped our notice, because it is a criminal case Still we believe our opinion that a new trial may be granted at the present day in Interpleader cases is correct.

Reg. v. *Doty*, (13 U. C. Q. B. 398) was a criminal case reserved. The defendant was convicted of perjury committed before the Judge on an Interpleader proceeding in the Division Court. So far as material to the point under consideration the facts were as follows: An interpleader summons was sued out, and the judgment creditor and claimant appearing, the case was heard before a Deputy, duly appointed, who decided against the claimant. Subsequently the judge ordered a new trial, and on the second trial the defendant Doty gave the evidence upon which he was convicted of perjury. Several objections were taken at the trial. That bearing on this point was, that an adjudication having taken place before the acting judge, such adjudication was final, and that being so, no new trial could be granted, and that therefore the second trial was extra-judicial.

The learned Chief Justice of the Common Pleas, in delivering judgment, after quoting the 13 & 14 Vic. ch 53,

sec 102, and 16 Vic ch 177, sec 7, said, "I think tha an adjudication having been made by competent authority was final and conclusive, and that it was not competent for the Judge under the 84th sec of 13 & 14 Vic ch. 53, to grant a new trial" This decision was in the year 1856, and upon statutes no longer in force. At that time the proceeding by way of Interpleader was based on 7th sec. of 16 Vic cap 177, which contained no such general provision, enabling the Judge to grant new trials as was contained in the original act 13 & 14 Vic. ch. 53, sec 84, which fact may serve as a clue to the ground of the decision. But we have now to deal with the law as contained in the Consolidated Act, cap 19. By that act it is provided that the orders, judgments, and decrees of the Courts shall be final and conclusive between the parties (sec. 55), and in the Interpleader clause (sec. 175) the same language precisely is used, namely that the order of the judge "shall be final and conclusive between the parties." Then the judge by sec. 107 "upon the application of either party within fourteen days after the trial, and upon good grounds shown may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings." The whole law is now contained in the same act, and to contend *at the present day* that the words "shall be final and conclusive between the parties," in the Interpleader clause debars the judge from granting a new trial, would be something like an absurdity *when the same language is used to cases under the general jurisdiction.* If it were so it would seem as if there could be no new trial in any case.

The present statute we take it puts the decrees and orders of the Division Courts on a similar footing with the judgments of the Superior Court, as Parke, B. observed in *Robinson* v. *Sheghan* (12 Jurist 401) on an analagous enactment, a man may apply to the judge to set aside the judgment, but, if not aside it binds him.

On still broader grounds there is a stronger reason for delegating the power to grant new trials in Interpleader cases than in any other class of cases which came before the Division Courts From *their* nature they involve more difficult and intricate questions of law and fact. They generally embrace larger and more valuable rights Indeed there may be said to be no limit as to value in respect to the subject matter, and the very act of bringing the suit may be made to operate as a stay of proceedings in the superior courts respecting the same claim.

If there be good reason for the provision authorising a new trial in any case in the Division Courts, it applies in a high degree to Interpleader cases

In view then of the law as it now stands and the considerations referred to, we reiterate a strong opinion that a new trial on proper grounds be granted in Interpleader cases in like manner as in other cases before the Division Courts.

Mr Whipple's letter we give verbatim on the ground mentioned in the first part of this article.

To the Editors of the Law Journal.

HAMILTON, 29th OCT. 1860.

GENTLEMEN, -In answer to my communication of 8th August last, I see that you are of opinion that a Judge of a Division Court has the legal right to grant a new trial on Interpleader. I beg to refer you to the following report, *Regina* v. *Doty* on 398 fol., of 18th vol. U. C. Queen's Bench Reports, 19th Vic., Trinity Term.

Please notice this in your next issue, and

Oblige your obedient servant,
E. S. WHIPPLE.

IMPORTANT TO COUNTY COUNCILS.

In other columns will be found the report of a case (*Gibson and the Counties of Huron and Bruce*) decided under section 70 of the Assessment Act, as to the proper *mode of equalizing assessment rolls* of local municipalities, and the remedy, if an unjust *equalization* (if we may be permitted the expression) be effected. We confess, however, that little light is thrown upon the meaning of the statutable provision in question, and little hope of redress held out to such rate-payers or such townships as may have reason to complain that their more wealthy and more powerful neighbours have made use of their powers for purposes of injustice or oppression.

We pass no judgment on the merits or demerits of the particular application which elicited the judgment we now publish. The court, unfortunately, does not appear to have power to deal with a case of the kind, and simply informs the applicant that his statements on affidavit are denied by affidavit, and it (the court) cannot interfere. The court, however, goes further. It says, that even if there were the power to interfere, that power could not be satisfactorily exercised by a tribunal not possessed of local knowledge, such as the members of county councils are supposed to possess.

If members of county councils, possessed of the requisite local knowledge, were to act in all cases free from selfishness—if they were in all cases to act dispassionately and disinterestedly—in performing the important duty entrusted to them by the legislature, there would be no cause for a higher or other tribunal; but we know that some men are prone to save themselves and their property at the expense of their neighbours, and that county councils are not free from such men. So long as our human nature remains what it is, we think there should be some check upon the proceedings of county councils, in the matter of equalization of assessment rolls of local municipalities.

We admit that at present we cannot suggest the remedy, unless it be that mentioned by the court in the case to which we have made allusion, viz., election at the polls. So far as the enactments under which the case was decided are *unintelligible, the remedy* is in the hands of the legislature.

DECISIONS OF COUNTY COURT JUDGES.

It is a fact that several of our County Court Judges do not write their opinions *on legal questions* raised for decision in their courts, and do little more than say, "Rule absolute," or "Rule discharged."

It is not for us to conjecture why the opinions are not prepared and *delivered* as by the judges of the superior courts. In some instances the cause *may* be want of time—in others, want of inclination—in others, want of proper books to consult—but be the cause what it may, there are judges who *do not* write their opinions.

In the event of an appeal, *the want of a written judgment* becomes not only a serious want, but a direct violation of the statute in that behalf. It is provided by the statute (Consol. Stat. U. C., cap. 15, sec. 68, p. 92) that the judge, after certain *preliminary requisites, shall,* at the request of the party appellant, certify under his hand to either of the superior courts of common law, named by such appellant, the pleadings in the cause, and all motions, rules or orders made, granted or refused therein, "*together with his own charge, judgment or decision thereon,*" &c.

We should be sorry to say that our remarks have a general application. Far from it. There are many honorable and praiseworthy exceptions, and among these, it is not necessary for us to mention, that his Honor Judge Mackenzie, of Frontenac, Lennox and Addington, is one. We take great pleasure, and receive much instruction in the perusal of the judgments of that learned gentleman, and are sure that our readers are as pleased as ourselves to be put in possession of his *judgments*.

County Court clerks would discharge a duty to the profession by the publication of decisions of their judges. The publication of the cases will cost nothing, for our columns are at all times *open to such contributions.* We continually invite them, but either *from the fact that many* county judges do not deliver their judgments in writing, or that county court clerks do not take the trouble to forward them, we do not receive as many as we would wish.

In this number we have the *pleasure of publishing two* judgments recently delivered by Judge Mackenzie. One is now under review in the Court of Queen's Bench, and will be in all probability confirmed. It has common sense at its base, and that is *no small recommendation.*

THE LAW AND PRACTICE OF THE DIVISION COURTS.

We have at last succeeded in obtaining a promise from a gentleman fully competent for the undertaking, to write for the *Law Journal* a serial, embracing the whole or some *branches* of the law and practice of the Local Courts.

The want of such a work has been long felt, and after a standing offer for some years of a pecuniary inducement to produce it without response, *at least none* from capable persons, we are now indebted to the disinterested kindness of a friend who, no doubt like ourselves, desires to acquit himself in some part of "the debt which every man owes to his own profession."

We hope with the new year to commence publishing the work in question in our columns, and within reasonable *limits, will continue to do* so as fast as it may be furnished to us.

In the meantime, we are asked to request any County Judge who would be willing to give the benefit of his *experience to the writer upon* questions where there is diversity of opinion, to signify his assent to us, that upon *proofs* or otherwise, his views may be ascertained—(though not published unless requested).

This request we sincerely trust will meet ready response, seeing that the object in producing the work is not one of gain, and the end aimed at being such as every County Judge must be deeply interested in.

CROWN LANDS' NOTICE.

Attention is directed to an important advertisement in other columns, directed to debtors to the crown, in respect to crown lands, and to squatters.

"CURIOSITIES."

(From the Legal Intelligencer.)

Samuel C. Perkins, Esq., handed us, some time since, the following curious and explicable *Land Contract*, which he tells us that he actually received from the West. It certainly deserves "a corner in the *Legal*." Mr. Perkins observes well, that "it would take more than one court or one jury to construe it:"

$130 "Greenville, Feby 26, 1858.

Written agreement made between Sarah Roberts and Patrick Hart in conditions to pay her the Balance of the money when the other party has fixed their arrangements that is McNuiny who purchased the three fourths part of John Roberts formerly, and according to this statement the said Patrick Hart is to pay Sarah Roberts the Ballance on or about the tenth of next month

his
PATRICK ✗ HART
mark

Present—John Queen
J. Edward Taylor."

JUDGMENTS OF MICHAELMAS TERM.

The following are the days appointed for the delivery of judgments.

QUEEN'S BENCH.

Saturday .... 15th December, 10 o'clock.
Saturday .... 22nd " 2 o'clock.

COMMON PLEAS.

Saturday .... 15th December, 2 o'clock.
Saturday .... 22nd " 10 o'clock.

CHANCERY EVIDENCE.

(From the Legal Intelligencer.)

The report of the commissioners who were appointed to inquire into the mode of taking evidence in the English Courts of Equity, which has been lately published in England, contains a number of practical suggestions that apply to our own as well as to the English system of procedure in Chancery; and we presume that a brief summary of the results of their investigations, and of the conclusions to which they have arrived, may not be uninteresting to American professional readers.

This Commission was composed of sixteen members—all of them lawyers and judges of the greatest eminence. The living ex-Chancellors, the present Lord Chancellor, the Master of the Rolls, one of the Vice Chancellors, the Attorney General of England, and the Chief Justices of the Court of Queen's Bench and of the Common Pleas, have concurred in the report which has been submitted to Parliament. The character of this Commission entitles their determinations to the respectful attention of all who are interested in the subject that they have been investigating.

The question that they were required to solve was simply this; which is the better system of taking evidence in suits in Equity,—the oral examination of witnesses before an examiner appointed for the purpose of taking down the testimony and reporting it to the court, or the adduction of evidence *viva voce*, at the hearing before the court? Their report upon this question is quite elaborate, but we think that we shall be able to condense, within the space to which we are limited, the pith of all their conclusions.

The practice now followed in England is very similar to our own. Every party in an equity cause is at liberty to verify his case, wholly or partially by affidavits, or wholly or partially by the oral examination of witnesses before one of the official examiners of the court in which the suit is begun, or before an examiner specially appointed to take the testimony. When affidavits are filed, the opposite party has the right to require the attendance of the deponents in an examiner's office for the purpose of cross-examination. The usual practice is to sustain the allegations in the bill and answers, or pleas, by oral testimony before the examiner.

In considering the question whether they would advise the entire abolition of this practice, and the substitution of the system of adducing the evidence *ore tenus*, before the court, that is to decide the facts as well as the law of each case, the commission found it necessary to examine a large number of professional witnesses, with a view to know what their experience had been, and how far a change was really desired by the profession. The testimony has been appended to the report, and is very voluminous. The profession seem to be of one opinion, that the system of taking evidence before the examiners should, except in some special cases, wholly cease, and that all evidence should be adduced either on affidavit or *viva voce* at the hearing. The Commissioners have embodied the result of their deliberations in eighteen resolutions, which will no doubt before long form the basis of an Act of Parliament. They recommend—and we present the most important of these resolutions—that facilities should be afforded for the trial of material facts contested between the parties, upon *viva voce* evidence, to be given before the judge who is to decide upon them, or before a jury—that when a party has filed an affidavit in support of his case, any opposing party may, within such time and in such manner as by general order shall be fixed, give notice that he requires the production for cross-examination at the hearing of the deponent who has made the affidavit—that at the hearing of the cause the *viva voce* examination and the cross-examination of witnesses shall be had in the presence of the judge, as to the matters included in any such notice as aforesaid, and affidavits shall only be received of such facts and documents as the judge shall consider not to be included in the terms of the notice—that where both parties shall agree in desiring that a trial should be had before the court, and the assistance of a jury, as before a judge at Nisi Prius, and shall agree on the issues to be tried, they shall be at liberty to apply to the court to order the trial to be had.

These are, we believe, the most important of the resolutions that the Commission have submitted for the approval of Parliament, and if they should be adopted, as our readers perceive, the result will be, the abolition of the present plan of taking testimony in Chancery, and the substitution of the common law system of oral examination of witnesses before the court. We need not pause to show that all the objections which are found to apply to the old practice, attach to it in this country as well as in England. American lawyers, while they usually work with less caution and care than English lawyers, are, it is true, more expeditious in the management of their cases. But we are much mistaken if our equity lawyers are not of opinion that the delay which seems, under the existing system, to be necessarily an incident to the prosecution of a complicated case in Chancery, is often dangerous and disastrous to those who are intrusted in its determination. If the experience of clients were taken, there would be but one opinion upon the subject.

The writer of this article is the examiner at the present time, in a case in equity, which was begun in 1857. The examination of the witnesses will probably occupy several months, and before the case is heard upon bill, answer and evidence, another year will doubtlessly run by. It would be neither strange nor unnatural if, by the time the cause is ready for argument, the parties in interest had lost all heart in the matter, and become tired and disgusted with the whole proceeding. A counsel, not unfrequently loses his interest in an equity cause long before it is settled. Many other cases intervene—are begun and determined, while it is pending. That intimate, familiar and vivid knowledge of the case in all its bearings, which is so important and necessary to the proper discharge of his duties, becomes blunted very often during its pendency; and when he comes to prepare for argument, he approaches the cause as he would a new subject. We will not dwell upon that which is, after all, the great objection to the examination of witnesses and the adduction of the proof in a case, beyond the sight and hearing of the court. We mean the (appearance and deportment of the witnesses,) total loss to the court of the manner, style, while they are subject to the examination and cross examination of counsel. If correctness and completeness of evidence are to be wished for, beyond all things else, in cases at law, they are much more desirable in cases in equity, where fraud, in one or other of its myriad shapes, is the element upon which many a controversy totally depends; and if there is one thing upon which jurists and legal philosophers, as well as the merest practitioners perfectly agree, it is, that the greatest security for absolute truthfulness in the giving of evidence, as well as for perfect trustworthiness

in testimony, is the examination of the witnesses face to face with the tribunal which is to decide the cause. We need not now enlarge upon this topic.

The suggestions that we have made, though they have not the merit of novelty, deserve consideration. The abolition of the existing method of taking testimony in Courts of Chancery, would perhaps involve the necessity of erecting separate Chancery tribunals, and severing entirely the Courts of Law and the Courts of Equity. But that is a change to which many of the profession here, as we happen to know, are decidedly friendly, and which must be brought about before a very long time. We will revert to this branch of the subject in a future article.

GRAND JURIES.

(From the Jurist.)

AMONG the bills which were brought into Parliament during the last session, but failed in passing into law, is one introduced into the House of Lords by Lord Chelmsford to carry out, in a modified form, a theory which has prevailed for some time among a certain school of law reformers—that grand juries are a useless and injurious appendage to our criminal courts. In furtherance of this view, two bills for their almost total abolition within the metropolitan districts were introduced into the House of Commons by that learned Lord when Sir Frederick Thesiger, which, however, failed of success; although it is not improbable that the discussions on them gave rise, in some measure, to a salutary statute—the Vexatious Indictments Act, to which we shall advert presently.

The principle involved in these bills was, whether the grand jury ought to be abolished as bad in principle; or whether, supposing the objections taken to it to be not altogether groundless, they are such as could be removed by judicious measures of reform; or, even if this could not be effected, whether they are not overborne by the inherent advantages of the system.

The Institution of the grand jury rests on three principles—first, that no man ought to be subjected to the inconvenience, danger, and odium of a public trial for any serious offence by the mere action of the officers of the Crown, or of any tribunal appointed by it—a salutary guard to the liberty of the subject; secondly, that every subject has a right to bring a criminal to justice, whether the so doing be agreeable or otherwise to the Executive; thirdly, the placing in the hands of a number of persons taken from the upper classes among the people a right, by presentment, of their own knowledge, to bring to the notice of the Executive and of society the existence of any evils or abuses within the district where they reside, even though neither the Executive nor an individual has founded, or perhaps could legally found, proceedings upon them. The constitutional functions of the grand jury are well described by the present Common Serjeant (Mr. Thomas Chambers) in a paper read by him before the Juridical Society in December, 1858, the perusal of the whole of which we strongly recommend to our readers.

"When a conflict is going on between prerogative and liberty, between popular rights and the power of the Crown, or when some obnoxious law is sought to be enacted or repealed, at such times the press and the people are both stimulated to unwonted activity and energy, and the liberty of speaking and printing is taken full advantage of. The popular passions find vent and voice at great public meetings, where vehement speeches are made, strong resolutions passed, strong memorials and petitions adopted. All this is done roughly—sometimes even fiercely; much that is unwise, much that is unjust, much that is untrue, is uttered and believed. Authority becomes provoked, and attempts measures of repression; and it commonly begins by selecting the most prominent and noisy exponents of the popular will as the subjects of indictment for seditious or treasonable libel; or it goes further, and apprehends the most violent members of a mob, and charges them with seditious tumult and riot. Or the Government may resort to more extreme measures—may call in the aid of the military, and the blood of the people may be spilt on the scene of some immense gathering; and then, in all probability, the criminal law will be invoked on both sides—the Government arming itself with indictments against individuals for sedition or treason; the people defending themselves with indictments against officers and soldiers for man-slaughter or murder. In such crises as these the grand jury has, over and over again, rendered invaluable service. The subject has been protected by them in the fullest exercise of his right to demand (though clamorously) the redress of his grievances; the Crown has been vindicated in its constitutional efforts to repress sedition and insurrection. The force of the shock is broken when order and liberty meet in these their rudest conflicts. The bitterness of the strife is allayed, when the rulers and the populace are in angry collision with each other, by a court so constituted as to have sympathies with both parties, and fitted, therefore to act as mediator between them. The harshness of authority is mitigated by its acting through such an organ; the lawless impulses of the disaffected subside when they have the opportunity of appeal to a proper tribunal. The scene of conflict is thus shifted from tavern halls and open commons to the arenas of justice. Both parties change the weapons of their warfare—both appeal to the law. The demagogue stops his inflammatory harangue to advise with his lawyer; the Government recalls its troops and instructs the Attorney-General. The result of this is, that the greatest political questions come on for discussion in our criminal courts, and come on under circumstances very favourable for their correct solution. By ignoring a bill, the grand jury, in sympathy with a people oppressed, calmly rebukes the Crown—by finding a bill, they tranquilly coerce the lawlessness and violence of the mob; they stand midway between the opposing parties, and avert a direct shock; they save the authorities from a more mortifying defeat by stopping their proceedings in limine; they save liberty from discredit by chastising its excesses by the law; and they accomplish all these purposes better than any other tribunal which could be devised to replace them.

* * * * * * *

"But the grand jury not only interposes a shield between the Crown and the subject to protect the latter from the oppression of power; it gives to him also a weapon wherewith he may assail the organs and ministers of prerogative, for he may go with his bill of indictment before that court, and accuse of malversation, or undue rigour, or dishonesty, or injustice in the execution of his functions, any officer of the Government; and may succeed in putting the accused on his public trial at a time when it might be difficult to find a Crown-appointed magistrate, sitting in open court, willing to place himself in an attitude of hostility to the authorities, by holding the accused person to bail. Were this right withdrawn the subject might become impatient and irritated beyond endurance by petty acts of extortion or harshness, for which the law offered him no adequate redress: were this liability removed, those in places of authority might be encouraged to misdemean themselves in their office."

Let us now see what are the arguments used against grand juries by the school of law reformers to which we have alluded. First, they argue against the system generally, that this institution was, or at least with the progress of time has become, valueless, and if so, an hindrance to the administration of justice; that the secrecy of the tribunal renders it irresponsible; that it furnishes facilities for fraud and oppression, by giving an opportunity to a wicked person to go before a secret tribunal, and, without notice to the party accused, to get a bill of indictment found against him, which, whether true or false, may be used as an engine of extortion—further proceedings being abandoned if the prosecutor can be bribed—so that justice is defeated if the defendant be guilty, or an infamous wrong is inflicted upon him if he be innocent. In support of

this, Sir F. Thesiger assured the House of Commons, when introducing one of his bills, that some old women were almost frightened out of their senses at the apprehension of bills of indictment being preferred against them. And, with respect to metropolitan grand juries in particular, it is further urged, that all cases of alleged crime are so well sifted by the police magistrates as to render all further preliminary investigation wholly needless.

In answer to the last of these arguments, it is to be observed, that, so far as the constitutional functions of the grand jury are concerned, it is impossible to take a distinction between metropolitan and provincial districts. However excellent the metropolitan police magistrates may be, still they are the servants of the Crown, and as such *not* the proper persons to decide a question which the constitution has wisely entrusted to the people. Nay, more, the entrusting such a power to them would be sure in time to work their deterioration, by holding out a temptation to the Executive to appoint to those offices persons in whom the sense of justice and constitutional freedom were not strong. As to the secrecy of the tribunal, it is one of its advantages, in many cases at least; and the proposal to abolish it on this account amounts to saying, that in no case ought proceedings to be taken to bring a criminal to justice without first giving him notice of the intention, and consequently an opportunity to escape condemnation by flight. And although the first of the above arguments has considerable foundation in fact, the remedy for the evil consists, not in abolishing the grand jury, but in taking security from persons preferring bills before them to go on with the prosecution if the bills are found, and perhaps also by strengthening the law against groundless prosecutions. There is a good precedent for the former of these, which existed at the time Sir F. Thesiger first attempted to abolish the grand jury. Formerly any person might file a criminal information in the Queen's Bench for a misdemeanor against any other, and such informations were frequently resorted to as a means of extorting money; (see Arch. Crown Office Prac. 17); but the abuse was effectually put a stop to by the 4 & 5 Will. & M. c. 18, which enacts, "The Clerk of the Crown in the King's Bench shall not, without express orders given by the Court, in open Court, receive or file any information for a misdemeanor, before he shall have taken or shall have delivered to him a recognizance from the person procuring such information to be exhibited, in the penalty of 20*l.*, conditioned to prosecute such information with effect." And the Legislature last year acted on this principle in the Vexatious Indictment Act, 22 & 23 Vict. c. 17, which contains the following important provisions:—

By sect. 1 no bill of indictment for certain offences shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her Majesty's Attorney-General or Solicitor General, or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary authorised by the 14 & 15 Vict. c. 100, to direct a prosecution for perjury.

By sect. 2, if a charge or complaint is made of any of those offences, and a justice of the peace refuses to commit or hold the party to bail, if the prosecutor desires to prefer an indictment the justice may take his recognisance.

This statute extends to the following offences, and it may well be a question whether it might not be beneficially extended to many others, and perhaps even to all bills of indictment not really prosecuted by the Executive:—Perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling-house, keeping a disorderly house, and an indecent assault.

But, nothwithstanding the precedent supplied by the 4 & 5 Will. & M. c. 18, the failure of his two former bills, and the passing of the Vexatious Indictment Act, Lord Chelmsford, in the House of Lords, did not loose sight of the idea cherished by him as Sir F. Thesiger, in the House of Commons. Still impressed with the notion of the inutility of the metropolitan grand juries, he brought in a bill, "to make better provision concerning the procedure against persons charged with indictable offences within the metropolitan district," under which modest and unpretending title is concealed, though in a diluted form, the vicious principle we have been discussing. The bill passed the House of Lords, but not the House of Commons. It provided, that after a person had been committed to take his trial by a metropolitan police magistrate, an information, to have the effect of the finding of a grand jury, should be filed in lieu of an indictment. But, evidently pressed by the weight of the arguments used against his former attempts at legislation upon this object, there was a clause empowering the prosecutor to prefer an indictment in the event of the magistrate dismissing the charge; thus placing the prosecutor in the odious and difficult position of pressing a charge that had been rejected by a magistrate—a topic sure to be urged to a tribunal with the most mischievous effect by the accused and his counsel. Pressed also by the constitutional objection, there was likewise a proviso that nothing therein contained should apply to "any charge of treason or misprison of treason, or of any other offence against her Majesty, the State, or the Government; nor to any charge of any nuisance to any highway, bridge, or river, or of any nuisance affecting the safety or health of any of her Majesty's subjects." The first clause of this sentence is evidently framed on the assumption, that if an offence is against the State or Government, that fact must appear on the face of the proceedings in the first instance, and can neither lurk under a charge of an offence apparently of a different character, or be developed in the course of the proceedings. As already stated, this bill did not pass into law.

The attack on the grand jury system in our day, as observed by the Common Serjeant in the paper already quoted, is a signal example of a tendency which some time back was more active than at present. "The distinguishing feature," he remarks, "of our English administrative system, both civil and criminal, is its popular element. The distinguishing feature of all our modern changes of it is the introduction of a professional and official element. . . . . . The effect of our modern reforms has been to withdraw *the people* from the tribunals, and replace them by *officials*—to have more judges and fewer juries.

* * * * * * *

"Narrow reasons, plausible enough—special objections, not without weight—may be assigned as the ground of changes which may have wider consequences than the reformer contemplates. Cheapness and speed may be attained at a cost incalculable. My own opinion certainly is, that the stream of justice is not only more picturesque, but more useful, and more fresh and wholesome, when it winds, perhaps slowly, between devious but natural banks, than when it rushes through professional and official conduits, where it not only loses a grace, but may contract a hardness."

We trust that, with the failure of Lord Chelmsford's bill of 1860, we have witnessed the last attempt to overturn one of the most ancient and valuable institutions of the country; and that such attempts will be replaced by sound and well-considered measures to increase the efficiency of the grand jury, by the removal of whatever either was objectionable in its original constituton, or, through lapse of time or altered circumstances, has become injurious at the present day.

WHAT MAY WE DO WITH OUR OWN?

(From the Solicitors' Journal.)

We understand that, at a recent convivial meeting, but which has hitherto attracted little or no attention, was started by a learned conveyancer, and that the debate thereon, as conducted by A., B., and C., was to the following effect :—

A.—I have had a doubt as to the soundness of the practice of conveyancers, with respect to separate provisions for married women, in not making any distinction between adults and infants. Is it clearly correct?

B.—Settlement of money—Trust for a married female *infant* for her life for her separate use—Declaration by the settlor that the trustees shall be accountable for the income, during her infancy, only to him, and that, as between settlor, his executors, &c., and the trustees, her receipts, notwithstanding her *infancy*, shall be good discharges. Would not that be good? Put these cases—

1. You give me sixpence to give to a boy who sweeps a crossing. I give it. Am I discharged of the sixpence?

2. Legacy to be given by executors to deserving poor. They give £5 to a distressed needlewoman, aged 20. Are they not discharged?

3. I buy a pair of gloves in a shop of a boy aged 15, and pay him 3s. 6d. Am I discharged?

4. Must you inquire of a lad, who serves out railway tickets, whether he is of age, in order to be safe in paying him for them?

A.—When you (B.) advance unsound propositions and essay to defend them, you may exclaim, with just exultation, "*Si Pergama dextra defendi possent etiam hac defensa fuissent.*"

1. Your first instance is that of income devoted to the separate use of a female infant covert. If payment to her would be good at all, I submit that it would be warranted only as she may be deemed, either the agent of her husband (which, in point of law, she may be), or the recipient of his bounty (which her infancy would not prevent her from accepting); for I conceive that she cannot have the income directly to her *separate use* in the ordinary legal, or rather equitable, acceptation of that term, because she cannot exercise any substantive, independent, discretion. It is familiar that an infant cannot execute a power, and what is money but power? Unless it proceed from the husband, I know of no legitimate channel through which it can reach her so as to be at her sole disposal. It cannot be considered as a "bread-and-butter-girl's" pocket money, because married ladies, young or old (as we know), do not wear pockets, but dip their hands periodically into those of their husbands. Could she make a testamentary disposition of the savings of such income? Suppose I bequeath £1,000 to an infant spinster for her separate use, is it not clear that my executors could not safely pay it to her? Would coverture, supervening upon infancy, give her capacity to receive it?

2. Then as to your second instance, of my giving you sixpence (more probably a copper), to give to one of Lord Shaftesbury's boys, I submit that it proves nothing, because I am a free agent, and may, at my pleasure or caprice, scatter my guinea-fees on the pavement of Fleet-street (not, perhaps, justifiably, even in a legal point of view), or authorise another so to dispose of them. I may fling my purse down Carisbrook Well, (not, however, without committing a trespass), but my discretion (or rather my power of so abusing it) ends with me, for if I direct my executors to dispose of it after a similar fashion, they, I apprehend (with great deference to certain opposite dicta advanced in the course of this discussion), would be accountable to my residuary legatee or next of kin—unless indeed, in a suit, to be instituted by or on behalf of the bottom of the well (apparently the party most deeply interested), the court would decree a specific performance of the direction. In the absence of a valid disposition, the law ordains a successor, and a valid disposition supposes a capable object or reasonable purpose.

3. Your next instance is that of a legacy to be given by executors to deserving poor, and of which they give five pounds to a distressed needle-woman just out of her teens. This you see is *charity*, and in no respect distinguishable on principle from the ordinary action of an hospital or dispensary.

4. If your next problem—that of your buying a pair of gloves in a shop of a boy aged fifteen and paying him 3s. 6d. (a monstrous price for a conveyancer)—is not to be solved by the *lex mercatoria*, it has an answer in the presumption that young doeskin is the authorised agent of some competent vendor; but as all presumptions are liable to be rebutted, it may happen that, unless you proceed with reasonable circumspection, you may find yourself, not only not "discharged" from the 3s. 6d., but onerated with a heavier weight of metal. To the remaining query (as to the underdone lad who serves out railway tickets), a similar answer may, I think, be given.

C.—A man, a living man, may do what he pleases with his money, or other personal chattels, so only that he does not injure or annoy his neighbour. A father may give £20,000 to his infant daughter, whether married or unmarried, but I think he cannot make a settlement and direct that the income of the settled property shall be paid to an *infant* daughter, whether he (the settlor) shall be living or dead. A settlor cannot contravene the policy of the law. A man, during his life, may do anything he pleases with his money, however absurd, but this power ceases on his death. Every testamentary disposition is subject to the rules of law, and if I recollect right, Sir John Nichol set aside a will because it "sounded to folly." A bequest of money to be thrown down a well would be void, not merely on the ground of absurdity, but also, according to certain recent decisions (sound or unsound), because it infringed the rule against perpetuities! The right of a residuary legatee, or of the next of kin, is only to be defeated by a valid bequest, and if money be bequeathed to an infant, he or she cannot give a good discharge for the same. An infant may sell his time and labour and he is competent to receive the price. If an infant were to invent a useful machine, I think he might sell it, and a purchaser would be safe in paying the purchase money. To this extent an infant may contract, and may be considered to have the power of a person *sui juris*. A shopkeeper fills his shop with goods to be exchanged for money, and he may direct how the exchange is to be carried out, whether by a living hand or otherwise—it might be effected by machinery the price of the goods being marked thereon. In such a case an infant may clearly be the agent for carrying out the exchange on behalf of the shopkeeper. His competency is not involved; the law assumes that he only says and does what his master directs. Railway tickets may be delivered by machinery, and the money paid into a wooden hand. If executors have money to give in charity they may give to an infant, for it is to relieve his bodily wants,—assuming that the infant is of sufficient age to be able to expend the money for such a purpose. Executors, in such a case, would not be justified in giving £5 to a child of four or five years old.

[As we do not profess *tantas componere lites*, we leave this, not unimportant, problem to be solved on the reassembling, with renovated powers, of the grave body to whose love of curious inquiry it is attributed.]

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."

CORRESPONDENCE

To the Editors of the Law Journal.

Nov. 7th, 1860.

GENTLEMEN,—I would feel obliged if you would give your opinion through the *Law Journal* upon a decision which was given in a Division Court upon the following facts:

A. recovered judgment against B. in the 2nd Division Court.

The defendant B. recovered judgment against C. in the 3rd Division Court, and gave to one D. an order upon the clerk for the amount of his judgment against C.

After this order was given the bailiff of the 2nd Division Court seized upon the judgment obtained by B. against C. under execution in the suit of A. against B. The clerk paid no attention to this seizure, but paid the amount realized upon the judgment against C. over to D. who held the order.

It was held upon these facts that the clerk took the proper course: and that the seizure and notice, *would not* hold *against* the *order*.

B. was insolvent at the time he gave the order. T.

[We think the decision is correct. Presuming that the order given by B. to C. was designed to transfer the benefit of the judgment to the latter, that it was at all events in the intention of the parties an assignment of the judgmen in B's favor without fraud and for a valuable consideration, we think as against D. the property was changed. Under the law of garnishment the equitable transfer of a debt is recognized, and why not in the present case. But a most important question arising in the case our correspondent does not notice. Could the judgment be seized at all under an execution? Some years ago our opinion, expressed in this Journal, rathe leant to the view that it could, and now we are by no means convinced that it could not. Yet this opinion is very much shaken by the case of *Calverley* v. *Smith*, reported in vol. 3, p. 67 of this Journal. The principle there laid down, though not exactly analogous, bears very strongly on the question.—EDS. L.J.]

To the Editors of the Law Journal.

Brockville, 9th Nov. 1860.

GENTLEMEN,—Does the act 23 Vic. cap, 25, apply to the Division Courts? The 3rd section of that act furnishes a substitute for section 254 of chap. 22 of the Consolidated Statutes of Upper Canada, which clearly applies only to the Superior Courts and the County Courts. But the 4th section by its wording would seem clearly enough to apply to every court in Upper Canada from which a writ of execution may issue. If this act should be held to apply to the Division Court execution it is manifest that the form of the writ of execution prescribed for and now issued from the Division Court is opposed to the law (that is so far as the exception to certain goods is concerned) and commands the bailiff to do what the statute declares shall not be done under any writ. As this question is of some importance to many of your readers, and as your views, expressed in print, are always considered with respect, because given cautiously, and not without deliberation, an answer would oblige, Yours truly, D.

[The act clearly applies to Division Courts. Section 2 fits the existing Division Court Law to altered exemptions provided in sec. 4. Section 3 does the same thing for the Superior Courts.

Of course the old form of writ is wrong and should be altered to square with the new law. If D. will look over recent numbers of the *Law Journal* he will see that a caution has already been given on this head and a suggested form given for altering the writ.

The alteration we gave was from an execution which had been submitted to Judge Gowan, and approved by him. For further information on this subject we refer our correspondent to the last August number of this Journal.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

TRINITY TERM. 1860

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law*

IN RE. GIBSON AND THE UNITED COUNTIES OF HURON AND BRUCE.

Assessment Act sec 70—Equalization by County Council—Authority of Courts to interfere—Setting aside By-laws

It is provided by the Assessment Act, s 70, that the Council of every County shall yearly, before imposing any County rate, and not later than the first day of July, examine the assessment rolls of the different townships, towns and villages in the County for the preceding financial year, for the purpose of ascertaining whether the valuation made by the assessors in each township, town or village for the current year bears a just relation to the valuation so made in all such townships, towns and villages; and may, for the purpose of County rates, increase or decrease the aggregate valuation of real property in any township, town or village; adding or deducting so much per cent. as may, in their opinion, be necessary to produce a just relation between all the valuations of real estate in the County; but that they shall not reduce the aggregate valuation for the whole County, as made by the assessors

Held, upon a complaint against a County Council of unfair equalization, that the court has no authority to place itself in the situation of the Council, and to judge for them; still less to place itself above them, and overrule their valuations, upon whatever ideas the court may entertain as to what would be more just or more reasonable in regard to amount, and that it is not the province of the court to judge of the reasonableness of the valuations by comparing the value set upon land in one municipality, with the value set upon land in another

Semble If it were there are various circumstances to be taken into consideration, as bearing upon the question of computation and value of which the court has not the means of judging, for want of that local knowledge which the members of the County Council, chosen by the people themselves, must be supposed to possess

Quære: As to the proper method of carrying the act into effect Per Robinson, C. J. "I confess I think that although the person who framed the 70th and 71st clauses of chapter 55, may have understood very clearly himself what he intended, he has not succeeded in making the meaning quite intelligible to others"

Held also Although the statutes do require that by laws to be passed for certain purposes shall contain particular recitals and provisions, yet the court is not at liberty to infer anything against the validity of the by law, unless it can see clearly on the face of the by law, or have otherwise shown to it, that the by-law was passed for a purpose which required them to be inserted

Mr. Harrison, in this term, obtained a rule on the Corporation of the United Counties of Huron and Bruce, to show cause why their by-law No. 8, intitled "A By-law to raise within the United Counties of Huron and Bruce the sum of fifty-one thousand dollars for general local purposes for the year 1860," or so much of it as relates to the townships of Morris, Grey, Howick and Turnberry, in the county of Huron, or some one of those townships should not be set aside with costs

1st. Because the Council of the United Counties did not, in June last, 1860, when equalizing the valuation in the different municipalities of the said United Counties, examine the assessment rolls of the different townships, towns and villages, for the preceding financial year, in order to ascertain whether the valuations made by the assessors in each case for the current year bore a just relation to the valuation, &c., made in all such townships, towns and villages in the said United Counties.

2nd. Because the valuations in the different townships, towns and villages in the county of Bruce, as pretended to be equalized by the Council, bore no just relation to the valuations in the townships, towns and villages of the county of Huron, but were made and equalized independently of them.

3rd. Because the valuations in Huron are not made to bear any just relation to each other: but new townships—such as Morris, Grey, Howick and Turnberry—are excessively and disproportion-

ately taxed, as compared with the older townships of Tuckersmith, Goderich, Colborne and Biddulph, which is contrary to the statute

4th. Because the Council, while pretending to equalize the valuations of the United Counties for the purpose of county rates, did not diminish or increase the aggregate valuation of real property in the different townships, towns and villages in the United Counties, by adding or deducting so much per cent. as might be necessary to produce a just relation between all the valuations of real estate in the United Counties; but proceeded arbitrarily to classify the townships of the United Counties at certain rates per acre, without regard to the aggregate valuations of real property in such townships, towns and villages.

5th. Because such classification and valuation as regards new townships in Huron, compared with the valuations in older townships in the same county, was unjust and erroneous, and tends to impoverish and ruin the new townships.

6th. Because the by-law moved against, in apportioning the rate among the municipalities in the United Counties, relates to the valuations for the preceding financial year, rather than to those for the current year as compared with those of the preceding financial year, which is contrary to the statute.

7th. Because the by-law is in other respects illegal

And the rule also called upon the Municipal Council of the United Counties to show cause why the by-law No 9, entitled "A By-law to raise by assessment within the County of Huron the sum of forty-six thousand two hundred and thirteen dollars, for the purpose of paying interest and sinking fund on the gravel road debentures, and improvement of roads and bridges within the County of Huron," should not be set aside with costs.

1st. Because, for the reasons before stated (in relation to the by-law No. 8), the equalised assessment rolls of the townships, &c., in the United Counties, for the current year, are unjust and illegal, and have no just relation to the valuation made in such townships, towns and villages.

2nd. Because the Council did not proceed according to law in equalizing the valuations.

3rd. Because the pretended equalization so made bears oppressively upon the new townships, as compared with the older, more populous, and more wealthy townships.

4th. Because the by-law No. 9, instead of imposing a rate for the purposes mentioned in it, upon the whole ratable property within the jurisdiction of the United Counties of Huron and Bruce, restricts the rate to the former county, and expressly excludes the latter county from its operation.

5th. Because it is not shown on the face of the by-law that the debts mentioned in it are debts falling due within the current year.

6th. Because the by-law leaves it uncertain whether the money to be raised under it is to be applied to debts contracted before the passing of the by-law, or to debts contracted by it.

7th. Because, according to the recitals in by-law No 9, the money is to be raised for *one* object, viz, for paying the interest and sinking fund on debentures issued for making gravel roads in the county of Huron, and in providing roads and bridges in that county, without stating where or for what account such debentures were issued, or when payable, and by what authority issued; and by the enacting clause it appears that the money is to be expended for *two* objects, viz., to pay the interest of the gravel road debentures, and for the improvement of roads and bridges (without stating what roads and bridges) in the county of Huron; and so the by-law is inconsistent and uncertain.

8th. Because, if the objects be two, it does not appear what portion of the money to be raised is intended for one, and how much for the other.

9th. Because no day is named in the financial year in which the by-law was passed, for its taking effect.

10th Because the by-law does not state when the debts mentioned in it are payable, or their amount.

11th. Because the by-law is in other respects illegal

And in this same term, *Mr. Harrison* obtained also a rule on the defendants, to show cause why a writ of mandamus should not issue, commanding them to examine the assessment rolls of the townships, towns and villages in the said United Counties, for 1859, for the purpose of ascertaining whether the valuation made in each township, town, &c., for the current year, bears a just relation to the valuations, &c, made in all such townships, &c: adding or deducting so much per cent as may be necessary to produce a just relation between all the valuations of real estate in the United Counties: but not to reduce the aggregate valuation thereof for the whole United Counties, as made by the assessors, according to the true intent of the statute in that respect; and to take care that the valuations in the townships of Morris, Grey, Howick and Turnberry, in the said county of Huron, bears a just relation to the valuations of real property in the townships of Tuckersmith, Goderich, Colborne and Biddulph, and all other the townships, towns and villages of the United Counties; and to do whatever the court may see fit to command in the premises

The by-law No. 8 was passed on the 30th June, 1860 The by-law No 9 was passed on the same day.

Mr. Harrison cited the Assessment Act, sec. 70, and *Regina* v. *The Commissioners of the Land Tax Fund for the Tower Division of Middlesex*, 2 E. & B 694.

Stephen Richards, Q C, contra.

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

First, as to the application to quash those by-laws By-law No 8 recites that it is necessary to raise and levy upon all the ratable real and personal property liable to taxation in the United Counties of Huron and Bruce, fifty thousand dollars, for general county purposes, for the year 1860, and it specifies what those purposes are, and the sum required for each. Among these are, administration of justice, salaries, and councillors' fees, grammar school, printing, stationery, &c, jurors, contingencies, township treasurer's commission—giving an amount for each—and besides those the following: Court house debentures, $1,160; Maitland bridge debentures, $2,596; Biddulph gravel road debentures, $1,280; Municipal loan fund debentures, $26,610;—the whole making up the $51,000. It then recites that the amount of ratable property within the counties of Huron and Bruce, amounts to $11,182,040, according to the equalized valuation of the different municipalities within the said United Counties for 1859; and that it will require the sum of 4⅗ mills in the dollar, to be raised upon the equalized assessed value of all the ratable real and personal property within the said United Counties of Huron and Bruce, to make the sum of $51,000, to be expended as set forth above. And it enacts, that there be raised, levied and collected from all the ratable real and personal property within the United Counties, liable to be assessed within the then present year (1860), $51,000, to be expended as set forth in the foregoing schedule. Sec. 2.—And that the $51,000 be apportioned and levied from the respective municipalities within the said United Counties, according to the equalized value of the assessments for 1859, as their contingent proportion respectively of the sum required for the purposes before mentioned, and which are more particularly set forth in the schedule at the end of the by-law, and forming part of the same. Sec. 3.—And that the sum to be collected shall be paid to the county treasurer by the collector, and be by him paid to the County Council on or before the 25th December, 1860, who shall apply the same to the purposes mentioned in the by-law. Then in the schedule is set down the proportion that each municipality has to pay of the $51,000. This forms the whole of that by-law.

The by-law No. 9 recites that it is necessary to raise $46,213, for paying the interest and sinking fund on the debentures issued for making gravel roads and bridges within *the said* county; and *that the town reeves for the county of Bruce are unwilling that a* like or any proportionate sum should be raised within the county of Bruce; wherefore it was necessary to levy a special rate upon the county of Huron for the said purposes. It next recites that the amount of ratable property in the county of Huron is $7,675,229, according to the last equalized assessment rolls of the municipalities within the said county of Huron, being for the year 1859, and that it will require six mills in the dollar, fully to be raised upon the equalized value of all the ratable real and personal property in the County of Huron to make up the $46,213. And Sec. 1 enacts that there be raised, &c., upon the property, real and personal, within the County of Huron liable to be assessed during the present year 1860, $46,213 as a special tax over and above other rates and taxes, to be expended in the payment of the interest and sinking fund of the gravel road debentures, and the improvement of roads and bridges in the County of Huron. Sec.

2 enacts that the $16,213 shall be apportioned and levied upon the said respective municipalities within the said County of Huron, according to the equalized value of their *assessments for the year* 1859, as their contingent portion respectively of the sums required for the purposes before mentioned, and which are more particularly set forth in the schedule at the end of the by-law, and forming part of the same. Sec. 3. And that the sums so to be levied, &c., shall be paid over by the collectors to the proper officers as provided by law and by them paid over to the County Treasurer on or before the 25th December, 1860, who shall apply and pay the same to the purposes for which they have been specially appropriated by this by-law. Then follows a schedule specifying the proportion of the $16,213 that each municipality has to pay. This forms the whole of By-law No. 9.

The applicant Gibson makes an affidavit that he is an inhabitant and ratepayer of the Township of Howick in the County of Huron, and as such has an interest in the by-law, and a copy of the by-laws is stated by him to have been received by him from the Clerk of the United Counties, as they stand in the printed pamphlet annexed to his affidavit. The clerk certifies them to be true copies, and that they were passed on 20th June, 1860. Gibson swears that he received them certified under the corporate seal. The clerk refused, Gibson says, to give him a copy otherwise than by certifying at the foot of each by-law as printed in the pamphlet. The by-law seems to be sufficiently verified, though I confess I was long in detecting the seal, if it can be called one, to the clerk's certificate.

Then as to the by-law No. 8, I do not see that we should be justified in setting it aside on the grounds stated, when we find how the complaints and objections of Gibson are met. Most clearly we have no authority to place ourselves in the situation of the Council and to judge for them, still less to place ourselves above them and overrule their valuation upon our ideas merely of what would be more just and more reasonable in regard to amount. They are to be judges, and undoubtedly they have better means of judging than we have. I speak now merely in reference to what is complained of as to the hard and unequal effect of the valuation. There is no question that they were bound to conform to the directions of the statutes in the method of proceeding; that is, they are not to violate them. It is imputed to them that they have done so in this case; but I do not see that is made out satisfactorily, when we look at the affidavits on both sides.

The affidavits filed in answer to this application state positively that the Council did examine the assessment rolls of the year 1859, as well as those of the current year 1860, and we cannot therefore assume that the contrary statements are true, and act upon them as if they were undisputed. So also as regards the alleged unequal operation of the by-law, the statements are denied on oath and in a very circumstantial manner, and I repeat that as regards the reasonableness of the valuations and the conclusions to be come to on that point, by comparing the value set upon land in one municipality with the value set upon land in another, it is not our province to judge of that; and if it were, still there are various circumstances to be taken into consideration as bearing upon the question of computation and value, which we have not the means of judging of, for want of that local knowledge which the members of the Council, chosen by the people themselves, must be supposed to possess, and doubtless do possess. It is not merely the fact that one township has been long settled, and another not so long, that should alone influence the judgment in making the comparison, nor the number of inhabitants, though these are circumstances that naturally should have been, and we may suppose must have been taken into consideration. Quality of soil and of timber, abundance or scarcity of water, convenience of communication by land or water, distance from market, and the description of inhabitants as well as their numbers, are matters that require to be considered in comparing one township with another; and when these and all other matters have been considered, the conclusions which they may seem to lead to are by law to be formed by the Council and not by the Court. I do not mean to say that there might not be some case so extraordinary in its circumstances as to warrant this Court in giving effect to complaints urged against a by-law of this nature, which might be more or less connected with the propriety of the valuations settled by the Council under the 70th and 71st clauses of the existing Assessment Act (ch. 55). It is not necessary to determine that point, for certainly this does not appear to be a case in which injustice can be shown to have been done, so monstrous and so manifest as to leave no doubt that the Council did not exercise that authority with an honest intention. Doubtless the Council were bound to follow the directions of the statute in their method of proceeding; but having read the affidavits on both sides, we think we cannot say that they have disregarded the directions of the legislature. As to the land in the one county being valued independently, and without regard to the value of the lands in the other county, that appears to be satisfactorily disproved. The fourth objection is repelled by the affidavits filed on the part of the Council. The Legislature, indeed, have not attempted to prescribe by what method of proceeding the townships, towns and villages, shall all be made to bear a just relation to each other in regard to the assessed value of property. They could hardly have succeeded in any attempt to do so. It must of necessity be left to the judgment of those who are to conduct the operation. We may suppose the Council fixing upon some one township or town, &c., in the first place, as that in which the value appears to have been assigned with the strictest regard to truth and justice, and then having selected such a standard we may suppose them taking up each other township, town, &c., and adjusting the valuation by such standard. In doing this the Council must be governed by their own judgment, and could not in the nature of things have any rule given to them by which they could arrive at any particular result. It must be entirely a matter of opinion, whether if land cleared or uncleared in township A. is valued at such a sum per acre, land in township B. ought to be valued at any and what other sum per acre. When the Council shall have adjusted the proportionate value which land in one township bears to land in the other, and shall have compared them all by some one standard, then they have to ascertain and express how much per cent. must be added to or deducted from the assessments in each township respectively to make them all bear a just relation to each other. That is not given as a rule or method of proceeding that can guide or assist the Council in adjusting the relation between the several townships, but as a method by which they are to express to the collectors the effect of the relation which they have established as leading to an addition or deduction of so much per cent. to or from the assessment of each individual, according as they have found the assessment that had been made in the particular township too high or too low as compared with the standard which they have resolved to abide by. This direction to the collector makes his duty afterwards simple and precise enough. But the business of the Council in equalizing the assessments so as to make all the townships, &c., bear a just relation to each other, is one that cannot be accomplished by any arithmetical calculation. No two bodies of men, and no two individuals, could be expected to arrive at the same conclusions if they attempted to make the adjustment independently of each other. The Legislature have not attempted to instruct them how they are to proceed in order to do equal justice: they have done the best they could in committing the duty to them, in general terms, of equalizing *the assessments* so as *to produce a just relation*, but have necessarily left it to them to work out the problem as they best can. It is a thing more easily talked of than done. I confess I think that although the person who framed the 70th and 71st clauses of ch. 55, may have understood very clearly himself what he intended, *he has not succeeded in making his meaning quite intelligible to others.*

As regards the other by-law, No. 9, besides taking some of the objections to it which were made grounds of complaint against by-law No. 8, an additional objection is taken (the 4th objection), for which there certainly is no foundation, for the 28th section of the Municipal Act expressly provides "that the Councils of United Counties may make appropriations and raise funds to enable either county separately to carry on such improvements as may be required by the inhabitants thereof." In that respect therefore there has been nothing wrong done by this by-law.*

There are objections of another kind made to this by-law, which

* This objection having been raised by inadvertence was abandoned by counsel on argument.

are all founded upon the assumption that it is a by-law passed for raising money for services not belonging to the current year, or to *pay debts not falling due within that year. But we do not see* that we should be warranted in treating this by-law as one of that description. For all that appears on the face of it, it is open to no such objection. The interest and sinking fund spoken of may have no relation to any other than the current year, and the same may be said as to the improvement of roads and bridges, which required money to be laid out upon them. The Statutes do require that by-laws to be passed for certain purposes shall contain particular recitals and provisions, but from the absence of any such recitals and provisions, we are not at liberty to infer anything against the validity of the by-law, unless we can see clearly on the face of the by-law, or have otherwise shown to us, that the by-law was passed for a purpose which required them to be inserted. If, for all that appears, the by-law may be legal we are not to conjecture the existence of facts that would render it illegal. It is upon this principle that awards made by individuals are dealt with, and we should not be less considerate in upholding by-laws made by municipal councils, which are chosen by the people, and are intrusted by the legislature with extensive powers. It is difficult to foresee how much public inconvenience may be sometimes occasioned by quashing by-laws after they have been acted upon, and though this can never be admitted as a reason for sustaining what has been clearly shown to be illegal, it is a strong reason for declining to quash a by-law except on some clear grounds. We do not see any case of illegality clearly made out against the by-laws now moved against, and therefore discharge the rule for quashing them, with costs.

As to the application for a mandamus, we do not see the necessity for giving any such general directions to the Municipal Council as we are asked to give. We do not find that they have violated the statute in their mode of proceeding, or that they have left anything undone which they were required to do. The case cited of *The Queen* v. *The Commissioners of Land Tax Fund for the Tower Division of Middlesex*, 2 Ell. & Bl. 694, is only an authority for showing that the Court may issue a mandamus to compel a legal and just assessment, when they see a clear ground to interpose, but the reasoning in the case and the manner in which it was disposed of, shows that the Court will not interpose unless upon some specific and clear ground.

We think this rule also must be discharged with costs.

COMMON PLEAS.

Reported by E. C. Jones, Esq., Barrister-at-Law.

RETTINGER v. MACDOUGALL.

The plaintiff was employed by defendant as foreman in a printing office, and brought this action to recover wages due him, proving on the trial that the defendant was in the habit of settling the amount thereof weekly. The jury on this evidence found that the hiring was a weekly one, and the court refused to disturb the verdict. When the hiring is general, it is presumed by law to be by the year.

Declaration for work and labour, account stated, and for wages as the hired servant of defendant.

Plea, never indebted.

The case was tried at Guelph, in November, 1859, before *Burns*, J. The plaintiff went into defendant's employ, as foreman in a printing office, in March 1857, and received $13 per week up to December, 1857; after that time he was to get $10 per week. A statement had been made up of his wages on the 10th April, 1858, by one Macpherson, who was defendant's book-keeper, when the balance due to the plaintiff was stated to be $399 99. Another statement was made up by Macpherson, up to 1st October, 1859, showing a balance due the plaintiff of $531 66. After which the plaintiff left the defendant's employ. The day before he told the defendant of his intention to leave. Defendant said he did not want the plaintiff to go; but if he wanted to go he might go; if determined to go he might go. Between April, 1856, and Oct., 1859, plaintiff had been paid $638 32. No evidence was given as to any agreement between the plaintiff and the defendant of the term for which he was engaged; it was only shewn that his wages were to be computed and allowed by the week. For the defendant it was contended that on the evidence the hiring was a general hiring, which in law amounted to a yearly hiring, and therefore the plaintiff *was not entitled to recover any wages for the year 1859, until* that year was expired. The learned judge left it an open question to the jury to say whether it was a weekly hiring or no. They found it was a weekly hiring, and gave plaintiff a verdict for the full amount of his claim.

In Michaelmas term, *M. C. Cameron* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection in not directing that without evidence of a hiring for specified time, the law would presume a yearly hiring.

In the following term, *Boultbee* showed cause. He cited *Baxter* v. *Nurse*, 6 M. & G., 935; *Huttman* and *Bulnois*, 2 C. & P. 510; and insisted also that if the hiring had been by the year, there was evidence that the defendant agreed that the plaintiff might leave when he did, citing *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Lilley* v. *Elwin*, 11 Q. B. 742.

DRAPER, C. J.—The first point, and indeed I think the only important one which we are called upon to determine, is the objection to the direction of the learned judge at the trial. It was insisted then, and has been again argued before us, that he should have told the jury that as the only evidence was that of a general hiring, they should therefore find that it was a hiring by the year, and that the plaintiff could not therefore recover for any part of the last year, as he quitted the defendant's service before that year expired. The judgment of *Tindal*, C. J., in *Baxter* v. *Nurse* (6 M. & G. 935) appears to me to afford a complete answer to this objection. He remarks that in cases where a general rule with regard to questions of hiring have been established, it has been in conformity with some established usage to be gathered from evidence, and that the finding of a jury in such a case, in conformity with such general usage cannot be considered a rule of law, and after stating that in the case before him, he thought the evidence was of a weekly hiring, still even if it had shewn a general hiring, he thought the question ought to have been left to the jury whether, under the circumstances of the case, there had been a hiring by the year. And *Cresswell*, J., said that though an indefinite hiring was a hiring for a year, if any other facts appeared, *such as payment by the week*, the presumption of a yearly hiring might be rebutted, and that he thought this was an open question for the jury. It appears to me unnecessary to go further to sustain the correctness of the mode in which this case went to the jury.

The doctrine that a general hiring is (in the absence of any thing to qualify it) a hiring for a year, is clearly settled by *Fawcett* v. *Cash*, 5 B. & Ad., 904, and *Beeston* v. *Collyer*, 4 Bing., 309; and there is nothing in *Baxter* v. *Nurse* conflicting with that doctrine. If the jury had found a general hiring, they would have declared the plaintiff's engagement was by the year, and have given damages only in relation to such service. But the question was specially left to them, and they have found there was a particular hiring—a hiring by the week; and if they are right the plaintiff should retain this verdict.

If they had found that the hiring was general, I should not have thought the verdict contrary to evidence; but I cannot say there was not evidence to sustain the conclusion that the hiring was by the week, and it is on that ground that in my opinion this rule should be discharged. I do not think the evidence justified the conclusion that the defendants assented to the plaintiff's leaving his employment. If anything had turned upon that, I should have been inclined to grant a new trial.

COUNTY COURTS.

In the County Court of the United Counties of Frontenac, Lennox & Addington. before his Honor JUDGE MACKENZIE.

THE CITY OF KINGSTON v. SHAW.

Held, that a Sheriff is not liable under Statute 8 Anne, cap. 14, for the removal of goods off premises in respect of which rent is due unless at the time of removal he either had notice or otherwise received knowledge of the rent being due, and afterwards removed the goods without paying the rent.

(October 18, 1860.)

This was an action under the Statute 8 Anne, chap. 14, against the defendant, as one of the Coroners of the United Counties of

Frontenac, Lennox and Addington, for taking goods off certain premises of the plaintiffs demised by them to one Thomas Mulhall, and which goods were seized by the defendant, under a writ of *fieri facias* issued out of this Court at the suit of the Sheriff of the Counties against the goods of one Isaac T. Hance, without first paying half a year's rent, which was in arrear by Mulhall to the plaintiffs at the time of the seizure

There were two counts in the declaration The first count contained the usual allegations of a demise by the plaintiffs of the premises in question to one Thomas Mulhall; of six months rent being due and in arrear from Mulhall to the plaintiffs, of the seizure of goods on the demised premises under a *fieri facias* at the suit of the Sheriff against Hance by the defendant as Coroner of the United Counties, and of the removal and sale of the goods, with the following averment as to notice

And the plaintiffs, in fact, say that after the said seizure and taking of the said goods, and the said removal thereof by the defendant, and before the sale of the said goods by the defendant under pretence of and to satisfy said execution, and while the tenancy of the said Thomas Mulhall so still subsisted, the plaintiffs gave notice to the defendant as such Coroner charged with the execution of the said writ of the aforesaid rent being due and in arrear to the plaintiffs from Mulhall in respect of six months rent of said premises, and then requested the defendant that the plaintiffs might be paid their rent so due and in arrear, but which the defendant wrongfully refused to do

The second count alleged that the plaintiffs issued a warrant of distress to a Bailiff, who distrained the goods to satisfy the rent aforesaid; and that the defendant, as Coroner as aforesaid, removed the goods under the pretence of the said writ of *fieri facias*, without paying the rent aforesaid to the plaintiffs, with an averment as to notice to the defendant as in the first count, with an addition that the plaintiffs forebade the defendant to sell the goods until the said arrears of rent had been paid to the plaintiffs

The defendant, among other pleas, pleaded to the first count—"That the plaintiffs did not, after the taking of the said goods and chattels in the said messuage and tenement by the defendant, as in the first count mentioned, or at any time before the removal of the same, giving notice to the defendant; nor had the defendant at any time before the removal of the said goods any notice or knowledge whatsoever of the said rent or any part thereof, or any rent whatsoever being due and in arrear from the said Thomas Mulhall to the plaintiffs."

To this plea the plaintiffs demurred.—The principal ground of demurrer assigned by them being, that no such notice as in the plea mentioned is necessary before the removal of goods.

To the second count, the defendant pleaded, among other things, "That, after the removal of the goods by the defendant, there remained goods on the said premises sufficient to satisfy the rent in the declaration alleged to be due"

To this plea the plaintiff demurred also, assigning as grounds of demurrer, that it was not pleaded to any particular count, and that it disclosed no ground of defence whatever At the argument the learned counsel for the defendant very properly abandoned this plea as untenable.

The defendant gave due notice that he intended, at the argument, to take exception to the first count of the declaration, "That it is not sufficient to aver in the declaration that the Coroner had notice that rent was in arrear after the removal of the goods from the premises; on the other hand, that it should contain an averment that the Coroner had notice of the rent being in arrear before the removal and sale"

And to the second count, "That it should contain an averment that the Coroner had notice that there was rent in arrear before the removal of the goods from the premises."

Agnew for demurrer.

A. S. Kirpatrick, contra.

MACKENZIE, JUDGE.—By the Statute 8 Anne, cap. 14, section 1, it is enacted: "That no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives terms of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent"

It will be seen that nothing is said in the statute about notice being given by the landlord to the Sheriff or party charged with the execution of the writ. I find in the form of a declaration under the Statute of Anne, given in 2 Chitty on Pleading, 630, an averment of a notice being given by the landlord to the Sheriff after the taking of the goods on the messuage, and during the continuance of the tenancy and before the removal of the goods from the premises under pretence of the execution. And in a note annexed to it, it is stated the omission of the averment would be fatal, unless after verdict In Archibold's Treatise on the Law of Landlord and Tenant, published in 1855, at page 250, I find a form of a declaration under the Statute in question given, containing the following averment in reference to notice: "And the plaintiff saith that after the said seizing and taking of the said goods so being in the said messuage as aforesaid, and before the removal of the same under the pretence of the said writ, the plaintiff gave notice to the defendant so being then Sheriff of the said County as aforesaid, of the aforesaid rent being due and in arrear to the plaintiff from the tenant, and then requested the defendant that the plaintiff might be paid his rent so due, in arrear and unpaid before the said goods and chattels or any part thereof should be removed from or out of the said messuage and premises" There is also, at page 249, a form of notice given. And the author, at page 250, makes the following observation: "Although the Sheriff will not be liable to the landlord unless he have notice of the landlord's claim; yet, if the Sheriff or his officer have knowledge of it in any other way—from the landlord, or from any other person—it will be sufficient." In a precedent given in the case of *Risley* v *Ryle*, 11 M. & W. 16, there is a similar averment of notice. And, indeed, in every precedent and form of declaration I find in the books under the Statute 8 Anne, cap 14, I find an averment that the landlord gave notice to the Sheriff, before the removal of the goods from the demised premises, of the rent being in arrear and unpaid. In the case of *Palgrave* v. *Windham*, 1 Strange, 212, the Court seemed to hold that such notice from the landlord, to the Sheriff or his officer, was necessary to sustain the action. In the case of *Waring* v. *Dewbery*, 1 Strange, 67, the same doctrine was countenanced by the Court. The case of *Smith* v *Russell*, 3 Taunt, 400 and the case of *Coyler* v. *Speer*, 4 Moore, 473, are in favor of this view of the case. In the case of *Arnett* v. *Garnett*, 3 B. & Ald. 440, ABBOTT, C. J., said: "It is true that the Sheriff does not become a wrong-doer by the act of removing the goods until he has notice of the landlord's claim, and, perhaps a notice may be necessary to support an action against him as a wrong-doer" HOLYROOD, J, said: "It is true that no action would lie against the Sheriff, for any act done by him, before he had notice of the landlord's claim" And in the case of *Andrews* v *Dixon*, 3 B. & Ald 645, the Court said: "If, indeed, a Sheriff has no reason to suppose any rent to be due, he will be protected in case he pays over the money to the execution creditor The notice to the Sheriff is only for the purpose of establishing, beyond doubt, his knowledge of the landlord's claim If that knowledge can, by any other means be brought home to the Sheriff, he will be liable." In Lush's edition of Saunders on Pleading and evidence, at page 888, I find it laid down, "That the Sheriff must be proved to have had notice of the landlord's claim; but, if it appear that the sale had been conducted with great secrecy and despatch, it is for the jury to say whether he knew of the fact that the rent was in arrear, though no notice had been given to him before the sale" And there seems to be a distinction between a proceeding against the Sheriff by way of motion, and an action for Tort, for removing the goods. In Archibold's Landlord and Tenant, 250, it is laid down, that "Where it is intended to proceed by way of motion, it will be sufficient if such claim came to the knowledge of the Sheriff or his officer at any time whilst the goods remained in his hands, although after the removal of them from the demised premises." But it would appear to be otherwise, when an action at law is brought against the Sheriff, for wrongfully removing the goods

from the premises, without paying the landlord his rent. In Archbold's Landlord and Tenant, 251, I find it stated, "care must be taken not to omit stating, in the declaration, the notice to the Sheriff."

I find in all the precedents and forms of declaration in the books, under the Statute 8 Anne, *cap.* 14, *containing averments* of notice to the Sheriff of the landlords claim for rent, before the removal of the goods from the demised premises. And the general run of the authorities, for the last 150 years, has countenanced the necessity of such averments of notice, before the removal of the goods. I must hold, therefore, that both the counts in the present declaration, are insufficient, for want of averments that the defendant had notice of the plaintiff's claim for rent, before he removed the goods from the premises demised by them to Thomas Mulhall. The judgment of the Court must, consequently, be for the defendant, on the demurrer. I do not mean to hold, that it is necessary to aver, in the declaration, that the notice was given by the plaintiff to the defendant I think it would be sufficient to aver, in the declaration, that the defendant knew the plaintiff's claim for rent before he removed the goods from the premises; or that he had notice of such claim before such removal.

Judgment for the defendant on the demurrer

Ross v. Fraser.

Summons—Misnomer in Copy—Service—Appearance—Effect thereof

An original writ of summons at the suit of A B, was issued from the County Court on 13th August, 1860 On same day defendant was served with what purported to be a copy of the summons, but contained the name of C D as plaintiff instead of that of A B On 14th August an appearance was entered for defendant at the suit of C D

Held, that the service was a mere irregularity and the appearance a nullity

(Chambers, Oct. 28th, 1860)

Macarow for the defendant obtained a summons to set aside the judgment, the writ of *fi. fa* and all proceedings had in this cause, upon the ground that no copy of any writ of summons was served upon the defendant, and upon grounds disclosed in affidavits filed.

Agnew showed cause.

MACKENZIE, JUDGE—An original writ of summons against the defendant, was issued out of this court at the suit of Hugh Ross, the present plaintiff, on the 13th August, 1860. On the same day, the defendant was served with a copy of a writ of summons, purporting to have been issued on the same day, out of the same court, at the suit of Hugh Fraser, instead of Hugh Ross On the 4th August, an appearance was entered by D Macarow, Esq, for the defendant, at the suit of Hugh Fraser, the plaintiff named in the copy of summons served upon the defendant. On the 27th August, the original writ of summons, at the suit of Hugh Ross. together with an affidavit of service thereof was filed On the same day, costs were taxed and judgment signed against the defendant, at the suit of Hugh Ross; and, subsequently, the goods of the defendant were seized under a writ of *fi. fa.*, issued at the suit of Hugh Ross.

It will be seen that the original writ of summons had not been filed until thirteen days after the appearance was so entered for the defendant, at the suit of Hugh Fraser.

The defendant contends that, in entering an appearance, at the suit of Hugh Fraser, he did all that he was required to do by the copy of the writ of summons served upon him, and that the plaintiff had no right to sign judgment after such appearance had been entered. The plaintiff, on the other hand, contends that the service of a copy of summons, having the name of Hugh Fraser in it, instead of Hugh Ross, in the original, is a mere irregularity and not a nullity, and that the defendant should have moved to set aside the service as irregular, instead of entering an appearance to a defective copy. In support of this position the plaintiff's counsel, Mr. Agnew, cited *Cinquemars* v. *Equitable Insurance Company*, 2, U. C. P. R., 207, where an application was made to set a judgment aside, on the ground that no writ of summons was ever served. Robinson, C J., in giving judgment, said: "Independently of the delay in moving, it is fatal to this application that we are not asked to set aside the service of process, nor any of the proceedings anterior to the judgment The case of *Brooks* v. *Roberts*, 1 C. B. 636, and of *Wardle* v. *Hardwicke*, 4, D. & L 740, are in point to show that the defendant should not succeed in his present motion, for it supposes all before the judgment to be regular, and excepts to the signing of judgment only, which, for all that appears, is perfectly regular, if the previous proceedings are regular, and they are not moved against." He also cites the case of *Wilson* v. *Story*, 2 U. C. P. R, 304; the case of *Street* v *Macdonell*, 1, U. C. P. R, 65, and the case of the *Bank of Upper Canada* v. *Vanrochis, et al*, 2, U. C. P. R, 382, and *Holmes* v. *Russell*, 9 Dowl 487.

By the 2nd section of the Common Law Procedure Act, it is enacted, "That all personal actions, not bailable, shall be commenced by writ of summons, according to the form given" All writs issued must be under the seal of the Court out of which they issue; and by the 15th section it is enacted, "That the writ of summons issued may be served in any county in Upper Canada, and the service thereof, whenever practicable, shall be personal." Personal service means serving the defendant with a copy of the process, and showing him the original, if he desire—1 D. & L., 599 It is held that the original writ need not be shown to defendant unless he at or within a reasonable time after service, make a demand to see it—*Petel* v. *Ambrose*, 2, B. & C, 761. The copy of the writ is a very different thing from the original writ. The copy is an act of the party; the original is an act of the court itself; its own process accredited by its own seal, and signed, certified and issued by its own officer on a proper præcipe filed. Originally, when a writ was issued, it was entered upon a roll. Now a præcipe is filed. The appearance directed by the statute, and mentioned in the writ of summons, means an appearance to the *original* writ of summons, and not an appearance to a copy of a writ.

When formerly actions were commenced by a writ of capias, the Sheriff was commanded to have the body of the defendant in Court upon a certain day; but the exigency of writ of non-bailable process was answered by the defendant filing a common appearance with the proper officer. This appearance was always to the original writ issued by the Court, and not to the copy served by the party. When a defendant is served with a copy of a writ of summons, in my opinion the effect of such service is to inform him that an action has been commenced against him in the Court, and that the court had issued an original writ of summons against him. He may demand to see the original at the time of service, or he may go to the office and examine the præcipe or the writ itself if filed, and if he find that the copy served upon him differs from the original, he should move to set the process aside for irregularity. The Courts have held over and over again that such a proceeding as the defendant complains of is a mere irregularity and not a nullity. If the Court should uphold the principle that a party who may be served with a piece of paper purporting to be a copy of an original writ of summons, may, without knowing whether an original writ was ever issued or not, file an appearance to such copy, it might be called upon to adjudicate upon—unauthorized copies which might be served on parties out of malice or amusement by mischief-makers. Before a party can properly enter an appearance to a writ of summons, he should be certain that an original is issued. This can be effected by demanding to see the original at the time of service, or by examining the præcipe or the original writ in the proper office; for if a defendant enters an appearance to a copy of a writ of summons not authorized by an original, the appearance may be treated as a nullity.

In the case under consideration, the original writ of summons and the copy served upon the defendant are the same in every respect (excepting the name of the plaintiff) In the original it is Hugh Ross, the correct name; in the copy it is Hugh Fraser. When a party is served with a copy of a writ of summons, he should take care before he enters an appearance to see that an original is issued, as his appearance must be to the original writ issued under the seal of the Court, and certified by its officer, and not to the copy; and if such party find a variance between the original writ issued and the copy served, he should take proper steps to put the matter right, and not enter an appearance to an unauthorized copy, as the present defendant has done

I find in Harrison's excellent Manual of Costs, at page 33, tha an allowance of 2s 6d. is made in the tariff to defendants "for attending to examine writ and præcipe." If the present defendant had taken the trouble to examine, as I think he ought to have done, the records of the Court, he would find that no original

writ of summons issued against him on the 13th day of August last, at the suit of Hugh Fraser, but he would find that one had issued at the suit of the present plaintiff, Hugh Ross, on *the very day by the precipe on file.*

On the authority of the cases cited, I must hold that service of the copy in question is a mere irregularity, and that the appearance entered by the defendant to a copy unauthorized by an original was a nullity, and that the plaintiff had a right under the statute to treat it so, and to enter his judgment as he did. The summons to set aside the judgment, therefore must be discharged. But as the plaintiff himself has committed the first error by serving an irregular copy of the original writ of summons on the defendant, I will allow him no costs.

Summons discharged without costs.

DISTRICT COURT. PHILADELPHIA,

WESTERN R. R. CO v. ROBERTS.

A broker or other agent vested with a mere authority to sell, without authority to deliver, will not be presumed to be also authorized to receive the purchase money, even though the article is delivered by his principal to the purchasers, without demanding from them the payment of the purchase money at the place of shipment A purchaser who has bought from an agent for cash, cannot pay in anything other than the cash without the principal's consent, and if the purchaser pay the agent in notes, to be by him turned into cash for the account of the principal, the purchaser will subject himself to the risk incident to the process of conversion and to responsibility for any loss that might happen from a want of fidelity on the agent's part while about the conversion of the notes

If the purchaser employ the agent of the vendor, to sell the notes given for the article purchased for his (the purchaser's) account and risk, any loss incident of the fulfilment obligation will fall on him, and not on the vendor, toward whom the obligation is to be fulfilled unless the agent agrees before he sells them and has authority from the vendor to agree, that the notes are taken and held at the risk of his principal, the vendor

HARE, J —In May, 1857, Francis H Jackson, a broker, residing and doing business in Boston, was employed by the Western R. R Company of Massachusetts, to sell one hundred tons of old railroad iron, for their account Jackson, who was not entrusted with the possession or custody of the iron, and who, so far as the evidence given at the trial went, acted throughout as a broker, and not as a factor, sold the iron to the defendants through the instrumentality of Lewis Ralston, a broker of this city. The iron was to be delivered by the railroad company, at Hudson, in the State of New York, and the terms were cash, payable on delivery. When the delivery was effected, is not clearly apparent, all the evidence on the subject being a receipt or bill of lading, dated June 15, 1857, and given at Hudson, by the master of the barge N F. Barnes, for one hundred tons of railroad iron, shipped by the Hudson and Boston Railroad Co. for the account of, and to be delivered to the defendants; but it must have taken place either at or before the date of this receipt, and there was nothing to show that neither Jackson or Ralston, had anything to do with it; Jackson, who alone had any direct relations with the railroad, stating in his answer to the third interrogatory of the commission issued to take his testimony, that he did not know where the iron was when sold, nor when or where it was actually delivered On the 23rd of June, 1857, the defendants placed two notes in the hands of Lewis W. Ralston, each for $1,800, at six months, with directions to sell or discount them for their account, and took his receipt for the notes. On the 6th of July, 1857, Ralston gave the defendants another receipt, in the following language:

"Received, Philad'a, July 6, 1857, three thousand three hundred and sixty dollars, being nett proceeds of two notes dated June 1, at six months, for eighteen hundred dollars, and June 5, at six months, for eighteen hundred dollars, of Messrs. A. & P. Roberts given me to be sold on account of purchase of old rails off of the Western Railroad.

"$3,360. (Signed) "LEWIS W. RALSTON."

At the trial, Ralston was called to the stand by the plaintiffs, for the purpose of proving the sale, and on being cross-examined by the defendants, stated that he received the money as mentioned in the receipt. That he had sold the iron for the account of the plaintiffs. That he had received the notes from the defendants, and for their account That he had paid no part of the proceeds to them or to the plaintiffs, but had on the contrary, appropriated the whole to his own purposes. That the proceeds of the notes were to have been paid to the defendants, or appropriated according to their directions That the proceeds *were intended to be applied to the* payment of the iron that such was the defendants intention.

Three questions were left by the court to the jury. First, whether Ralston had authority to receive payment? Secondly, whether the payment alleged to have been made to him was of such a nature as to fall within the scope of his authority, if he had it? And, finally, whether the proceeds of the notes were or were not received and held by him as a payment, or in other words, whether he received and held them for the account of the plaintiffs or of the defendants The jury found a verdict for the whole amount of the purchase money: and their finding cannot be set aside and a new trial granted, if any one of the questions submitted to them was properly found for the plaintiffs, nor unless all of them should have been answered affirmatively and in favour of the defendants

All the authorities on the subject concur, that while a factor, or other agent armed with an authority to sell, and entrusted with the possession of and right to deliver the thing sold, will be presumed, in the absence of evidence to the contrary, to be also authorized to receive the price; (for the protection of the principal, who would otherwise have no means of enforcing his lien for the purchase money,) a mere authority to sell, without authority to deliver, will not extend to the receipt of the purchase money, and will cease to exist with the negotiation and completion of the contract of sale No one can imagine that the mere employment of A by B to find a purchaser, and make a bargain for the sale of his horse or house, will authorize A. to take the price and acquit the purchaser, although the case is widely different if A be entrusted with the possession of the horse, or armed with the right to give a deed for the house. The evidence here was that neither Jackson nor Ralston, who was, be it observed, employed solely by Jackson, had the possession of the iron, which formed the subject of this sale, and it was, on the contrary, delivered at Hudson, at a distance from their residences and places of business, without there being anything to show that this delay was in consequence of an instruction or order proceeding from them, and was not made directly by the plaintiffs to the defendants. The only circumstance appearing at the trial to vary the case, or render it different from that of a naked authority to sell, was that the iron was delivered by the vendors to the purchasers at Hudson, without asking for the purchase money, from which it is argued that the jury should have inferred that Ralston was authorized to receive that here, which the Western Railroad Company omitted to demand and receive at the place of shipment. Had the iron been consigned, or made deliverable to or by Ralston, the argument would have been a strong one, and perhaps irresistible But as it was not, the only conclusion that can legitimately be drawn from the failure of the vendors to exact payment on delivery, is that they were willing to trust the solvency of the purchasers, and not that they meant to enlarge the authority of the agent by whom the sale had been effected, or render a payment to him equivalent to a payment to themselves personally. That a man who has employed an agent to sell a horse, which he retains in his own stable, and does not place in the keeping of the agent, sends the horse to the purchaser on receiving a notification of the sale from the agent, proves that he trusts the purchaser, but not that he places any larger confidence in the agent If, therefore, the delivery of the iron was a circumstance in favor of the defendants, it was but a circumstance, which must be presumed to have been considered by the jury, and it is not a sufficient reason for assuming, in opposition to their verdict, that Ralston was authorized to receive payment for the iron, as well as to sell it.

But even if Ralston possessed full authority both to sell and receive payment, it will not help the defendants, unless he was paid: and here the case is perhaps more strongly with the plaintiffs than on the former point. For nothing is plainer than that a purchaser who has bought from an agent for cash, cannot pay in anything other than the cash, which has been promised, without the consent of the principal, nor in any way that varies the terms of the contract or of the agency, and charges the principal with a greater responsibility than he would have to bear if those terms had been pursued and complied with. Some of the cases on this head will be found collected in the argument of counsel in the case

of *Parkison* v *The Guardians*, 1 Hurlstone & Homan, 524, 525, and although held by the Court to be inapplicable there, are of unquestioned authority when the circumstances are such as to fall within them, *Sykes* v *Gyles*, 5 M. & W. 645, *Scott* v. *Irving*, 1 B. & Ad 605; *Partridge* v *The Bank of England*, 9 Q B 396. It is therefore plain, and was indeed conceded, that the defendants, who had bought from Ralston for cash, could neither pay him in notes, nor give him notes to be turned into cash for the account of his principals, without subjecting themselves to the risk incident to the process of conversion, and submitting to any loss that might happen from a want of fidelity on his part while he was about it It is however argued that although the defendants would necessarily have been answerable for the laches or misfeasance of Ralston in selling the notes, there was nothing to prevent them from agreeing with him before the sale, and at the time when the notes were placed in his possession, that they should be sold for their account and risk, but that the proceeds should be received and held for the account and at the risk of the plaintiffs. This position however, is exceedingly questionable. A party who employs the agent of another, and in one sense, adverse party, to act in a business common to both, employs one whose duty and loyalty are in fact pre-engaged; and ought to derive no advantage from this course, which he would not have had from the employment of a third person. If the defendants had employed an agent of their own to sell their notes, instead of employing the plaintiffs' agent, the proceeds would have been at their risk, until they had not only accounted with, but obtained payment from their agent; and they certainly cannot be in a better position because they choose to employ the plaintiffs' agent to transact that which was essentially their own business. It was their duty, and not the duty of the vendors, to find the means of payment, and to sell notes for the purpose, if there was no better course open; and the loss incident to the fulfilment of this obligation, ought to fall on them, and not on those towards whom the obligation was to be fulfilled And it is at all events plain, that the money received from the sale of the defendants' notes, cannot be viewed as being the money, and at the risk of the plaintiffs, and not of the defendants, in the absence of proof of a binding agreement to that effect, before the notes were sold, or of an appropriation to the use of the plaintiffs afterwards That an agent employed by a debtor to sell a horse for the purpose of procuring the means of payment, is also the agent of the creditor, does not render the horse less the debtor's, nor deprive him of the right to countermand the sale, or say what use shall be made of the purchase money, after a sale has been effected, unless there is some agreement to the contrary with the agent, and the latter is authorized so to agree *Prima facie* the horse is still the debtor's, until sold, and the price received for it his afterwards; and it necessarily follows that the risk must also be his, and not the creditor's; and if he would get rid of this responsibility, he must show when and in what manner it passed from his shoulders, and was shifted to those of the opposite party. Now here there was an entire absence of proof that Ralston either agreed or had authority to agree, to take and hold the notes at the risk of his principals, before he sold them, and the preponderance, if not the whole weight of the evidence, was that there was no appropriation of the proceeds of the notes to the payment of the iron, while they remained in his hands, and before they were misapplied to his own purposes. The utmost, therefore which the defendants could ask, consistently with the evidence, was an instruction that the money produced by the sale of the notes might be rendered the plaintiffs money, and put at their risk by an order or direction to that effect from the defendants, or a mere exchange of receipts with Ralston after it had been received by him, and before he had devoted it to any other purpose. And the jury were told that if such a direction was in fact given to, or agreement made with him while he still held the money, there was no necessity for his handing it over in order to get it back again, and the payment would be a good one, if he was duly authorized to receive it. That a verdict was rendered for the plaintiffs under this instruction, and not for the defendants, was no doubt because Ralston himself testified positively, although not without some embarrassment arising from the situation in which he had unfortunately placed himself, that although the intention was that the money should go in payment of the iron, it had never been actually so appropriated, and had consequently, always remained in his hands, so long as it did remain there as the money, and subject to the control of the defendants, and not of the plaintiffs. I regard this testimony as being nothing more than the conclusion which the law would have drawn, had he not so testified, in the absence of proof of a specific appropriation of the money after he had received it, other than that recited in the receipt of July 6th. For even if the recital that the money receipted for, was the proceeds of notes "given to be sold on account of the purchase of railroad iron," is to be considered as meaning that the notes were given on account or in payment of the price of the iron, it would not be less true that the defendants could not in law give notes as a substitute for cash, or bargain that an agent solely authorized to receive cash, should take and sell notes at the risk of his principals, instead of cash And even if this were not so, the jury would still have been fully entitled to give credence to the statements of Ralston, that no such bargain or agreement was in fact made, in preference to his previous written or unwritten declarations.

I have hitherto considered this case as it arose, and was presented by both parties at the trial, in obedience to the well known rule that everything which is not made to appear by some legitimate means of proof, it is to be regarded as if it did not exist in fact. But some additional matter is now brought forward, consisting of a correspondence of the plaintiffs with their agents, and of the agents with each other, which the plaintiffs have with much liberality, placed at the disposition of the defendants since the verdict, and which the defendants wish to have examined in aid of their motion for a new trial. This correspondence is not, in any proper sense of the word, after-discovered evidence, because the defendants might have obtained and produced it at the trial if they had thought proper, as readily as at the present moment. Still, if the letters thus laid before us showed, or even tended materially to show, that the defendants had in point of right and justice, paid a demand once which the verdict would compel them to pay again, I should have been disposed to go to the utmost verge of the discretion given by the law, for the sake of preventing injustice by granting a new trial. But on looking at the documents in question, it appears that although Jackson was empowered to direct the delivery of the iron, and it was in fact delivered on his order, Ralston had no such authority, and on the contrary, acted in a merely subordinate position to Jackson, exercising no control over the property sold, and having nothing to do with its delivery. And when Jackson, who remained or had been kept in ignorance of the payment alleged to have been made to Ralston, wrote to the latter, urging him to press the defendants to pay, he did not authorize or request Ralston to receive the money, and on the contrary, required that the defendants should remit it directly to plaintiffs, But even if the correspondence showed, which it fails to do, that Ralston was authorized to receive payment, it would still fall far short of showing that the defendants were authorized to pay him in notes instead of money, or that the funds which came to his hands from them, were received not for their account, but for that of the plaintiffs. There is nothing in the evidence now laid before us, to change the conclusion at which we had arrived without it, and it is, consequently, unnecessary to consider whether the circumstances under which it is presented, are such as to render it admissable as an element in our decision.

The result of the whole is, that there is no sufficient reason in point either of fact or of law, for setting aside the verdict, and we discharge the rule for a new trial.

SUPREME COURT OF PENNSYLVANIA.

BARCLAY RAILROAD & COAL CO. v. JOSEPH INGHAM.

Where damages are claimed for any injury, caused by a nuisance, it is competent for the defendant to show that the whole cause of mischief could have been removed for a small sum, with a view to the admeasurement of damages

The right to erect a mill-dam, conferred by the Act of 1803, is but a license to the riparian owner, subject to be revoked whenever the public interest requires it

But in respect to the creeks and smaller streams of Pennsylvania, the practice of the Land Office has been to include them in warrants and surveys as part of the public lands, they belong to the owners of the tracts within which they lay, who may convey the bodies of the streams to one and the adjoining land to another

Nature of "creeks and small rivers" in Pennsylvania defined and expounded.

Error to Common Pleas of Bradford Co. The opinion of the court was delivered by

WOODWARD, J.—The first error assigned is for rejecting the defendants' offer to prove that it would not cost more than $140 to remove the bar in the creek from the head of Mason's pond and upwards, so as to admit a free flow of water. It would seem that this bar was the principal nuisance complained of by the plaintiff. It was this, that according to his views, caused the back water in his tail-race, to the injury of his machinery. It was chiefly, if not altogether, for this, that his witnesses estimated his damages at from $3,000 to $8,000, and for which the jury gave him a verdict of $3,472.

Now, why it was not competent for the defendant to show, in an answer to a claim for so large damages, that the whole cause of mischief could be remedied for $140, we cannot understand. It was alleged on the part of the defendant, that this bar was in part, at least, the result of the natural action of the water, but whatever the cause of its growth, whether the natural flow of water or the artificial embankments of the Railroad Company, or both combined, the company claimed that it could be removed for the inconsiderable sum mentioned in the offer. Had the jury been persuaded of this, they could never have given the verdict they did. The court should have given the company a chance to persuade the jury, and to this end should have admitted the evidence. It went directly to the admeasurement of damages. It was much more certain proof in its nature, than those speculative views on which damages in such cases are too often assessed. For this error of the trial the cause must go back.

But we find no other error upon the record. The second point of the defendants' was answered in their favour, and the court refused, properly, to affirm their first point. That the defendants had a legal right to erect the embankment in the construction of their railroad on the plaintiff's land, was a truism under the law of their incorporation, which the learned judge did not mean to deny, but the other proposition that the company were not liable for damage done to the plaintiff's *water power*, if it was situated on the part of Towanda creek which had been declared a public highway, was the pith of the first point, and this was negatived, as it should have been.

In respect to the great rivers of the State, such as are navigable by nature, and therefore public highways by the common law, it has been repeatedly declared that the Mill-dam Act of 23rd March, 1803, is but a license to the riparian owner, subject to be revoked whenever the interests of the public requires it. This doctrine was applied in *Monongahela Nav. Co.* v. *Koons*, 6 W. & S. 112, to the Youghiogeny, which is one of the streams enumerated by C. J. Tilghman, in *Shrunk* v. *The Schuylkill Nav. Co.*, 14 S. & R. 79, as among the "principal rivers" of Pennsylvania. And again, in *Susquehanna Canal Co.* v. *Wright*, 9 W. & S. 11, the same doctrine was applied to the Susquehanna river, which, as well as its principal branches, has always been considered a public river. And once again, in the *New York and Erie Railroad Co.* v. *Young*, 9 Casey, 181, it was applied to the North Branch of the Susquehanna, always a navigable river, according to the common law definition that has obtained in Pennsylvania.

In all these cases, the right claimed by the riparian owner was a permissive right to use rivers, the soil of which had never been granted by William Penn, his successors, or the Commonwealth. The rivers, and the bed of the rivers, belonged to the Commonwealth, and constituted part of the eminent domain. Private surveys bounding on them were stopped at low-water mark. Where the Commonwealth, by its legislature, authorized riparian owners along such streams to erect dams for their own convenience and profit, it was a sort of public license, like the fisheries and ferries which, by numerous Acts of Assembly, were granted in all our public rivers. And being a mere license to trespass on the public domain without any consideration received therefor, it had none of the indefeasibility of a contract, and might be revoked at the will of the sovereign, or to be granted to another.

But in respect to the creeks and smaller streams everywhere found in Pennsylvania, the practice of the land office, whether under the Proprietaries or the Commonwealth, has been to include them in warrants and surveys, as part of the public lands. Streams thus falling within the lines of a survey, were covered by it, and belonged to the owner of the tract, who might afterwards convey the body of the stream to one person, and the adjoining land to another. When any of this class of streams formed the boundary of such tract, the grantee acquired title *ad filum aquæ*. *Coovert* v. *O'Conner*, 8 W. 477. There is but one difference between a stream running through a man's land, and one which runs by the side of it; in the former case he owns the whole, and in the latter but half. *Starr* v. *Child*, 20 Wend. 149. It is customary to speak of these streams as not navigable, in contradistinction to those larger rivers not granted by the Commonwealth, and which are called navigable.

In England, those streams only are called navigable, in which the tides ebb and flow; but with us, all our public rivers, whether fresh or salt, are navigable, and hence a very erroneous idea has sprung, that such rivers only are public highways, and that in the lesser streams granted by the Commonwealth to purchasers, the public have no right until they are declared by law to be highways. This is a misconception, produced no doubt by the very indefinite term navigable—a word which may mean an ascending, as well as descending navigation, by boats of considerable burthen, or merely a descending navigation by arks and rafts, at all seasons, or by arks and rafts in seasons of freshets. Our ideas of public and private rights in streams of water, ought not to be dependent on so vague and indeterminate a word.

If we go back to Magna Charta, we shall find it written in the xxiii cap. *Omnes Kidelli deponantur*, &c., a clause which has been translated, "All rivers from henceforth, shall be utterly put down by Thames and Medway, and through all England, but only by the sea coasts." This I understand to have been a formal declaration and vindication of the right of all up-stream people to have an unobstructed channel in streams capable of being used for transportation, not only for purposes of trade and commerce, but also for the ascent of fish, which sometimes were indispensable for subsistence. Accordingly, it is laid down by Lord Hale, (see Hargrave's Tracts De Iure Maris, cited in Angell on Water-courses, s. 535,) "All rivers above the flow of tide-water, are by the common law, *prima facie* private; but when they are naturally of a sufficient depth for valuable floodage, the public have an easement therein, for the purpose of transportation and commercial intercourse; and in fact, they are public highways by water."

This I apprehend is an exact definition of our creeks and smaller rivers, such as have been granted by warrant and survey. They are private property, but if of sufficient capacity at any stages of water to be used for transportation of lumber or other goods, they are held subject to that public easment which our English ancestry guarded with great jealously, as numerous old statutes subsequent to Magna Charta abundantly attest. When, therefore, our legislature declares such streams to be public highways, the act is merely declaratory of the common law, but beneficial nevertheless, as bringing the stream within the protection of the remedial provisions of the Mill-dam Act of 1803. This latter act is by its terms applicable to "any navigable stream of water *declared by law* a public highway," and it is itself declaratory of the common law, in the clause which forbids him who erects or maintains a dam "to obstruct or impede the navigation of such stream, or prevent the fish from passing up the same."

Now, to apply these rules and principles to the case in hand, Ingham was the owner of land under a patent issued 3rd November, 1786, and which was bounded by Towanda creek. He was thus the absolute owner of one-half of the stream—of the bed of it, and of all the water-power it contained, subject only to the public right of passage for such craft as was suitable to the capacity of the stream, and to an unobstructed passage of fish. In 1803 the legislature declared this part of Towanda creek "a public highway for the passing of rafts, floats, or other vessels." This did not abridge Ingham's right of property. The legislature could not take away without compensation, property fairly vested in him. He was as truly and as entirely the proprietor of the premises after the Act of 1813 as before. The water-power was property, and it was his property. He might improve it by damming his half of the stream, or with the consent of his opposite neighbour, the whole of it, and of the water-power so improved he could no more be despoiled, without compensation made to him in the forms of

the Constitution, that he could be deprived of the solid acres granted to him by the Commonwealth

His dam must not obstruct the navigation of the fish, because he took title from the Commonwealth subject to that servitude or public right—one of the ancient English "liberties" which Magna Charta rescued from oblivion—which numerous old statutes, in the times of Henry IV. and the Edwards, defined and defended—which the immigrants brought over with them, and which Penn expressly recognized in the 22nd Sect of his first frame of Government, adopted in 1803—and which became, in this manner, an indefeasible condition of Pennsylvania tenures The Mill-dam Act of 1803, was a fuller provision for the regulation of this public right, and supplied a statutory remedy for its infringment, but was not a license to Ingham to build on his own land. When he improved his water-power, he did it, not as tenant at will, under a revocable license, but on the sure footing of that dominion which an owner exercises over soil that he holds, in fee simple, from his sovereign. This conceit, that the Commonwealth granted a license in 1803 to build on land she sold and was paid for before 1786, may lead very logically to the conclusion that it was competent for the Commonwealth to revoke the license in 1803 and grant to the Railroad Co the right to destroy Ingham's water-power, without compensation, but it is only a conceit after all, and can afford no solid basis for the conclusion claimed. It may be harmless if not strictly correct language to speak of the Act of 1803 as licensing riparian owners along our "principal" rivers to use water-power which, never having been granted to a citizen, belongs to the State as a sovereign, but when applied to such streams as the Towanda creek, which having been granted by the sovereign, are private property, it is false language, and it begets false ideas. If it were, indeed so, that the Act of 1803 makes every mill owner along these lesser streams a mere tenant at will, it would be palpably unconstitutional; but regarded as an act for the regulation and defence of a supervening common law right of the public, subject to which the mill owner bought and has always held his land and water-power, it is constitutional and wholesome legislation

For these reasons we are of opinion that the main proposition in the defendants' first point was correctly denied, and the judgment is reversed only because of the rejection of the evidence mentioned in the first bill of exceptions.

Judgment reversed and a *venire facias de novo* awarded.

MONTHLY REPERTORY.

CHANCERY.

M. R. FRANKS v. BROOKER. *Jan.* 25.

Will—Legacy—Ambiguity.

Testator bequeathed a certain sum of money to trustees in trust for his daughter E for her separate use independent of her husband, and after the decease of E to her husband for his life with remainder to all and every the children of E. by her present or any future husband.

After testator's decease E's husband died and she married again. E. died leaving her second husband her surviving On bill filed by second husband against trustee of the will. *Held*, that the benefit of the gift was confined to the husband living at the date of the will and the death of the testator.

V. C. K. DAVIES v. BOULCOTT. *Jan.* 25.

Practice—Appointment of representative.

Where a decree for sale has been made of an insolvent estate, and the legatees have disclaimed, the executors renounced, and an administrator *ad litem* is dead, the court will *ex parte* on motion appoint a personal representative on production of an affidavit as to the insolvency of the estate and notice to the parties entitled to administer.

V. C. K. FORWARD v. EDGINTON. *Jan* 27, 31.

Assignment—Priority—Notice—Husband and wife.

Where a husband in right of his wife who is one of the representatives of an intestates' estate assigns his share in the estate for value, and becomes insolvent, notice to the wife, if proved is not notice to both the representatives, a wife being under the dominion of her husband has constructive notice of his acts.

The principle applicable to a trustee who is also a *cestui que trust* and assignor of a fund applies also to a *feme covert* on the question of notice.

V. C. W. DRUMMOND v TRACY. *Jan* 30.

Judgment—Power of sale—Executor—Abstract of title.

Real and personal estate was given by the testator's will to A. one of his daughters and his sole executrix upon trust to sell and convert (with power nevertheless to suspend such sale for such period as she should think fit) and stand possessed of the clear moneys arising from such sale in trust for the testators three daughters A. B and C it being declared that A's receipt should be a good discharge to purchasers

After the testator's death, A. married and with the concurrence of her husband caused the real estate to be sold by auction E. becoming the purchaser. Shortly after the contract for sale but *before the completion of the purchase judgments were entered up* against A's husband to an amount far exceeding the purchase money. Upon the refusal of E. to complete his purchase until the judgments had been satisfied, specific performance decreed with costs, the court holding that the judgment creditor could not interfere with the sale out of the proceeds of which no beneficial interest accrued to A and the other *cestui que* trusts, until the testators debts, &c , had been discharged and his estate administered.

Although it may not be necessary to insert upon the abstract the particulars of an equitable charge which has been already paid off, the fact of such a charge having effected the property should not be concealed from the purchaser.

V C. W. MITCHELL v. COLLS. *Jan.* 30.

Settlement—Construction—"Unmarried"—next of kin of wife.

By the settlement made upon the marriage between A. and B. a sum of stock was settled to the separate use of B (the wife) for her life with trusts after her death as to one moiety for children of the marriage as to the other moiety for the husband for his life after his death upon the same trusts as had been declared of the first moiety. In default of children taking vested interests (attaining 21 or dying under that age leaving issue) upon trust as to the whole for the husband for life and after his death according to the appointment of B ; and in default of such appointment upon trust for the person or persons who at the death of B. should be of her blood and in kin to her and would have been entitled under the statute of distributions "in case B. had died possessed thereof intestate and unmarried."

B. died in child birth, leaving an infant daughter who survived one day only.

Held, that the infant daughter was entitled under the ultimate limitations in default of appointment as B's next of kin under the statute of distributions.

L. C PARISH v SLEEMAN. *Feb.* 11.

Landlord and tenant—"All outgoings."

Agreement between landlord and tenant for the lease of a farm for a term of years at a yearly rent "free of all out goings"

Held, that the word "out goings" included the land tax and title commutation rent charge.

L. J. NELSON v. SEAMAN. *Feb.* 24.

Practice—Parties—Trustee of an equity.

A fund was paid into court by the executors of a deceased trustee A *cestui que* trust appointed new trustees under a power in the settlement, but the property was not assigned to them or transferred into their names. An incumbrancer filed a bill to secure the fund to which he made the executors parties.

Held, that the new trustees were also necessary parties.

In re WILTSHIRE'S ESTATE.

Will—Administration summons—Admission of assets—Priority of legacies—Annuity.

An executor cannot be charged upon an admission of assets on an administration summons.

A testatrix bequeathed the residue of the monies to arise from her real and personal estate to the children of W., and directed that her trustee should in the first instance out of such residue pay an annuity of £20. The assets were insufficient.

Held, that the pecuniary legatees were entitled to be paid in priority to the annuitant.

V. C. K. CRAIG V. WHEELER. *Jan.* 23.

Will—Conversion—Annuities—Leaseholds—Lands—Rents—Reference.

If a testator gives personalty or personalty and realty combined, whether charged or not to one for life with remainder over, and there is no specific indication of intention, either that he wishes it to be held in specie or converted, an intention that he wishes it to be converted will be presumed. But if there is on the face of the will any specific indication of intention either way this rule as to conversion does not apply.

An inference that a testator contemplated an appropriation of a fund for a particular purpose is not a sufficient indication of a wish that there should be a conversion.

The words "lands" and "rents and profits" do not point to leaseholds if there be freeholds although sufficient to pass leaseholds. If the Court considers that there ought to be a conversion it may still direct a reference to chambers to ascertain whether it will be for the benefit of the parties that the property should be held in specie.

V. C. S. GREENWAY V. GREENWAY. *Jan.* 16, 17.

Will—Construction—Real and personal estate blended together—Estate tail—Conversion.

A testator gave his real and personal estate in trust as to the annual income for E & C or the heirs of their bodies, and if either should die leaving heirs of his body his share should go to such heirs, but if one die without issue then the whole income should go the survivor, and in case of his death to his heirs. But in case both should die without issue, then the whole property to be equally divided among his next of kin. And he appointed executors with power to sell, dispose of and convert into money his real and personal estate by public auction on private contract as to them should seem meet.

Held, that upon the whole language of the will, there was a conversion of the real estate, and that there was no devise in specie to E and C as tenants in tail.

COMMON LAW.

Q. B. REGINA V. JOHNSON. *Feb.* 8.

Practice—Indictment for obstructing highway—New trial.

Where a defendant is acquitted on an indictment for obstructing a highway the court will not grant a new trial on the ground that the verdict is against the evidence.

C. P. WARNE V. HILL. *Jan.* 30.

Costs of the day—How suit entered—Both parties in default.

A case was called on at the sittings of the court and the plaintiff and his witness not being present the judge ordered a non-suit to be entered upon which the defendant immediately left the court. Soon after he had gone the plaintiff arrived and discovered that the jury had not been sworn upon which the learned judge said that he would wait for the defendant till one o'clock.

The defendant however had left the town and therefore did not appear and the judge then ordered the words "struck out" to be substituted for "non-suit." The plaintiff it appeared had mistaken the judge to say the day before that common jury cases were not to be taken on that day and therefore he and his witnesses had not come into court.

Held, that as the defendant was in default in not seeing that the jury were sworn and the plaintiff in default in not being in court when the cause was called on, the costs of the day and this rule should be costs in the cause.

EX. C. *Feb.* 4.

CAZENOVE ET AL. ASSIGNEES V. B. E. ASSURANCE CO.

Policy of insurance—Condition—Forfeiture—Untrue statement.

A policy of insurance effected by A. on his own life was subject to a condition that it was to be void in case any untrue statement was contained in any document deposited with the Insurance Company in relation to the insurance by the assured. Certain documents were so deposited with the company containing, among other matters the questions following:—*Q.* "Whether assured had since infancy had disease requiring confinement?" *A.* "No." *Q.* "How often had medical attendance been required?" *A.* "One year ago." *Q.* "For what period confined to bed or house?" *A.* "A week." *Q.* "Name and address of medical attendant employed on occasion of such disease?" *A.* Dr. B." In fact the assured had subsequently to the disease attended by Dr. B. another and a dangerous illness, for which three other medical men had attended him.

Held, that the above answers were untrue and also the policy void.

Q. B. PRIOR AND OTHERS V. WILSON. *Feb.* 7.

Damages—Contract over—Notice.

A ship belonging to the defendant was taken by the plaintiffs for the purpose of carrying coals to the coast of Africa. It was known by the defendant that Admiralty contracts were out for sending coals to this coast and that the bills of lading were to be sent in by the 31st of December. The defendant having failed to perform his contract. *Held*, that he was liable in damages for the expenses incurred by the plaintiffs in consequence of such failure in the performance of their contract with the admiralty, the above notice of that contract being sufficient to render him in law so liable.

REVIEWS.

Among our late exchanges we have received—

THE WESTMINSTER REVIEW, for October. New York; Leonard Scott & Co.

The first article under the head of Neo-Christianity, contains a review of a book now in its second edition, formed of a chain of essays by several of the leaders of thought in the English universities.

The second article is a review of "*Seven years Residence in the Great Deserts of North America*," and gives some statistical information regarding the Indian population of this continent, the extent of their territory, the usual reference as to the origin of the American tribes, with some remarks upon the character, social organization and form of government of the Aboriginals.

There next appears a just and well written paper upon the Biography of Robert Owen, the great Social Reformer.

The *Organization of Italy*, affords some interesting pages upon the laws and particular government of the Italian States.

A very learned paper upon the *Antiquity of the Human Race*, forms a fitting conclusion to the criticism which the theory of Darwin as to its origin, has produced, but like much of that disunion there appears a hesitation in offering a strong support to any opinion.

In succeeding papers we have a view of the social position of Russia and the improvement promised to, by the generous efforts of Alexander II, an article upon the English National Defences, and an interesting paper upon Thackeray as a *Novelist and Photographer*.

THE NEW YORK DAILY TRANSCRIPT.—We regularly receive this well-known daily. We understand that the proprietors have in contemplation the establishment of the weekly Transcript, which, containing the latest rulings of the English and American Courts, will afford to the legal profession convenient and useful information.

THE LUZERNE LEGAL OBSERVER; published at Scranton, in the State of Pennsylvania, has reached us. We shall be glad to exchange.

THE AMERICAN RAILWAY REVIEW; published in New York, is also received. This weekly publication is entirely devoted to the interests of the Railway community in America, from whom the Review should command a generous support. The editorial and other matter indicates the presence of ability, very necessary in dealing successfully with the important interests which it represents.

In the UNITED STATES INSURANCE GAZETTE, with a large quantity of statistics, is contained a continued article upon "The Law of Fire and Life Insurance," which, in view of the amount of litigation upon this matter, possesses peculiar interest. It is edited by G. E. Currie, New York City.

THE LOWER CANADA REPORTS; edited by M. Lelievre, of Quebec, contains as usual reports of the most important cases decided by the courts of the Eastern section of the Province.

THE MONTHLY LAW REPORTER: published at Boston, by George P. Sauger, has come to hand. A well-written article upon an Elective Judiciary, offers the decided opinions of some distinguished professional men of the New England States against the system of elective judges; and indicates the existence of an extended belief that the attempt, as made particularly in the State of New York, has been a lamentable failure. This, with the decisions of the Supreme Courts of several States, forms the matter of a most valuable pamphlet containing about one hundred pages.

THE LAW MAGAZINE AND LAW REVIEW; THE CHRISTIAN EXAMINER AND THE EDINBURGH AND LONDON QUARTERLIES have been received.

In the first named Review we see a critical article upon the Law of Torts; an interesting condensation of the judicial statistics of England and Wales for the years 1858 and 1859, wherein is shown the chief statistical particulars developed by the criminal investigations of those years; a lecture upon commercial law gives the reader a connected and interesting account of the early efforts of the nations about the shores of the Eastern Mediterranean; the character of the commercial laws of Greece: and under the influence of the much discussed *De Lege Rhodiante Jactu* the laws which Rome framed for the guidance of that people who in her later ages, though the occupation of the shopkeeper not so ignoble as her orator and philosopher of earlier days had pronounced him.

THE CHRISTIAN EXAMINER of Boston is an adherent of th doctrines of the Unitarian Church and an exponent of what is styled the advanced religious thought of America. Conducted with a confessed ability it occupies a foremost place among the literary periodicals of this continent. The motto of the magazine is from the pen of St. Augustine: "*Pono si sapientia Deus est—verus philosophus est amator Dei.*"

THE TOUR OF H. R. H. THE PRINCE OF WALES THROUGH BRITISH AMERICA AND THE UNITED STATES: By a BRITISH CANADIAN. Montreal: Printed for the Compiler by John Lovell, 1860.

This is the title of a very useful brochure from the pen of a young Canadian. The volume, containing nearly 300 pages, preceded by a striking likeness of the Prince, is most handsomely bound. It reflects much credit upon the industrious compiler, and the enterprising publisher. Here we have preserved what a few years hence will be found no where else a faithful and detailed account of the progress of H. R. H. Albert Edward through Canada and the United States.

The compilation is evidently the work of a young man of little experience in book-writing, but we expect that a few years hence he will be in that capacity better known to the public. He is at present known to us, and we sincerely congratulate him upon this his first production in the book line. When we mention that he is not only very young, but self-educated, and the occupant of a humble post in the public service, we are sure that the readers of the volume who may chance to see these remarks will, while profiting by his industry applaud his well-directed efforts. It is much to his credit that he so employs his leisure moments as to produce a volume that would be a credit to a person much older, more experienced, and more learned than himself. While many in the subordinate offices of the public service are passing their leisure time in idleness, or perhaps worse than idleness, this young man—the son of a widow, and her chief support—is steadily pushing forward so as to make himself a more useful and more distinguished member of the community in which he lives. We wish him—and every young man like him—full success. Horace Greely, the powerful editor of the *Tribune*, was once a poor boy, with prospects much less slender than those of "The British Canadian" who compiled the volume about which we have made these remarks.

GODEY'S LADY BOOK for January, 1861, is received. It is really a superb number. It opens with a magnificent title, comprising six distinct engravings and five Statuettes. The fashion plate also is superior to any in coloring that we have hitherto seen in any published magazine. The proprietor, however, admits that he is still improving, and promises that future fashion plates will be better than that contained in the number under review. It is said that "Godey" contains at least 400 pages more reading than any other similar magazine, twice as many engravings, at least 48 more colored fashion plates, and full 300 engravings more than any other magazine. The circulation is now about 150,000. It is only by reason of this immense circulation that such a magazine can be sold at a price so low as $3 per annum, or 25 cents per number. This is the answer to the London *Times*, that says, "How Mr. Godey can afford to give so much matter for about one English shilling, we cannot comprehend." Now is the time to subscribe, and to the wives and daughters of our patrons who have not yet subscribed we say, allow not the new year to begin without sending your subscription to Godey. Address, Louis A. Godey, Philadelphia.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC, UPPER CANADA.

CORNELIUS DANFORD PAUL, of St. Thomas, Esquire.—(Gazetted Nov. 24, 1860.)

HENRY FRANCIS ELLIS, of St. Thomas, Esquire.—(Gazetted Nov. 24, 1860.)

LEWIS J. C. FREDERICK, Esquire.—(Gazetted November 24, 1860.)

DONALD PROCTOR ROSS, of Toronto, Esquire, Attorney-at-Law.—(Gazetted November 24, 1860.)

EDWARD M. CHADWICK, of Waterloo, Esquire.—(Gazetted Nov. 24, 1860.)

TO CORRESPONDENTS.

"T." and "D."—Under "Division Courts," page 277.

We have received another communication from "B." on the subject of "exemption from distress under landlord's warrant," which came to hand too late for publication in this number. We will gladly give it a place in our next, and we may state now for the benefit of those interested in the question at issue, that the writer further upholds the view of the matter put forward by him in our last number.

The letter of a correspondent as to the effect of registered judgments, is mislaid.