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DIARY FOR NOVEMBER.

1 Tuesday..... *All Saints*
5 Saturday ... ... Articles, &c., to be left with Secretary of Law Society.
6. SUNDAY ..... *24th Sunday after Trinity.*
12 SUNDAY ..... *25th Sunday after Trinity.*
16. Wednesday ... Last day for service for County Court.
20. SUNDAY ..... *26th Sunday after Trinity.*
21. Monday ..... Michaelmas Term begins.
25. Friday..... Paper Day Q. B.
26. Saturday..... Paper Day C. P. Declare for County Court.
27. SUNDAY ..... *1st Sunday in Advent.*
28. Monday ..... Paper Day Q. B.
30. Wednesday .... *St. Andrew.* Paper Day Q. B.

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. Ardagh & 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.

The Upper Canada Law Journal.

NOVEMBER, 1864.

DEATH OF VICE-CHANCELLOR ESTEN.

This upright man and eminent judge, after a short illness, died at his residence, on Beverley street, in the city of Toronto, on the night of Monday the 24th of October last. His death was by no means unexpected. For several years he was a great sufferer, owing to a painful malady, of which it is said his father died. In September last he submitted to a surgical operation, but owing to his failing health, there was not strength enough remaining to withstand the effects of the shock. Though for the time relieved from pain, his strength waned, the lamp of life grew dim and was finally extinguished. Bright hopes were at one time entertained of his ultimate recovery, but Providence had otherwise decreed. He sank and sank till he fell asleep in his Saviour, in full expectation of a blessed immortality Until the last he was conscious of all around and about him. He made it his constant study to read the Word of God, and when too weak to do it, had it read by members of his family. Shortly before his death he gave them his parting blessing, and left them—never more to see them in this life.

The deceased was not merely an eminent lawyer, but a most devout Christian. Notwithstanding the great labors of his judicial office, notwithstanding the wear and tear of the day appointed for man to labour, he each Lord's Day not only found time to attend the House of God and worship with the adults of his flock, but was himself a teacher in the Sunday School connected with St. George's Church, in which parish he lived, and in which he died. It was beautiful to behold the distinguished lawyer, who, during the week, listened to most abstruse arguments and decided most difficult questions of law, on Sundays gently and unaffectedly teaching the lambs of Christ's flock the way to Heaven. He was a truly good man—loving to his family and kind to all with whom he came in contact.

His father was Chief Justice of the Bermuda Islands. His grandfather was Attorney General of the same Islands. He himself was born at St. George's, Bermuda, in the year 1805. He was educated in London, England. He studied law at Lincoln's Inn, and subsequently became a conveyancer at Exeter. He came to Canada in the year 1837, and made Toronto the scene of his future life, where he practised with success at the bar till the year 1859. He was one of the few legal men then in Canada that knew anything of equity law. He was, therefore, in 1849, when the Court of Chancery was reorganized by the appointment of a Chancellor and two Vice-Chancellors, made the senior Vice-Chancellor. His learning adorned the Bench, whilst his courtesy to the bar made it a pleasure to practise before him. He was, beyond all question, the most profound real property lawyer in Upper Canada. His caution was as great as his learning. His whole aim was to discharge the duties appertaining to his office conscientiously before God and man. He was always influenced by the purest and most noble motives. To the poor he was always a benefactor. To the young he was kind and considerate. To his family he was a loving father, whose precept was always good, and whose example was as good as his precept.

He was, comparatively speaking, a young man at the time of his death, being only 59 years old. He looked much older than he really was. His life was a sedentary one. He was a close student and a hard worker. Idleness he abhorred. What he considered his duty to be, that he rigidly and sacredly performed. He felt also that whilst doing his duty as a judge, he owed a duty to the Judge of all men, and while discharging the former he never forgot the latter. Thus he lived and died—a great lawyer, and, what is still better, a sincere Christian. Peace be to his memory.

STAMPS ON LAW PROCEEDINGS.

The fees and charges payable to the Crown upon law proceedings in Upper Canada form a very considerable item in the revenue of the country.

We are not prepared at this moment to state the amount collected, but are safe in saying, that, not by tens of thousands, but by hundreds of thousands of dollars it is represented. Nearly the whole establishment of the County

and Division Courts is sustained from the fees collected from suitors in proceedings in these courts, and the fees in the superior courts cover a large amount of the expenses connected with the superior courts of law and equity.

Hitherto the fees were collected and accounted for through the agency of between three hundred and four hundred persons; and this branch of the revenue laws, so to speak, demanded the most constant, la rious, and active supervision to manage and to protect the government from loss. This great array of officers—from the clerks of the Crown down to Division Court officers—were each required to give security by bond to the Crown for the faithful collection and payment over of the fees; and from the default, negligence or ignorance of subordinate officers, the losses to the revenue were frequent and considerable, the parties themselves and their sureties often proving to be insolvent when the necessary steps were taken against them on their bonds upon default made. The power of appointing these officers did not in all cases rest with the Crown, and in some instances the government were not even aware of the existence of certain officers authorized to collect the fees until years after their appointment.

It is not to be wondered, in such a state of things, that the revenue from these sources fell off notwithstanding that the law business of the courts greatly increased, and that money collected from suitors never found its way into the public chest.

This is not the occasion to speak of what we have always thought an evil—that suitors in the courts of justice should be taxed in their individual capacity for the maintenance of the tribunals which ought to be supported from the general revenue of the country; inasmuch as every individual has a right to appeal to them to vindicate a wrong committed; nor yet to refer to the fact how heavily the tax presses on suitors in the Upper Canada courts. But, guarding ourselves against any admissions on this head, we turn to the consideration of the new law for the collection of these fees by means of stamps.

The change made we look upon with unmixed satisfaction as one imperatively demanded by the existing state of things, one giving strong assurance that the public will derive the benefit of the collections made under the several statutes imposing fees on law proceedings. The stamp system has long been found the most simple and inexpensive method of collecting fees and charges, and the very best means of effectually guarding against frauds in this branch of the revenue. In the first place, the number of responsible agents will be reduced from three or four hundred to forty or fifty, and if these be required to prepay for stamps we do not see how it is possible for the government to lose a shilling.

It is not to be expected that a new system will at once work smoothly or can be perfect in all its details, nor do we expect that it will at first be palatable to all. Most men are naturally indisposed to change, and not until the positive advantages of the new system are known and felt, will the plan of stamps receive unmixed and universal approval. There are some matters of detail that may be greatly improved, and perhaps it is scarcely fair to criticise arrangements which are expressly stated to be but temporary in their character. Had the law not come into force till the first day of January, there would have been ample time for the Executive to have perfected arrangements; as it is, everything had to be done in haste, the new law coming into force on the 1st October, and, as we are informed, it was expressly intimated from the Audit Office that the arrangement for the distribution of stamp was only temporary.

In providing for stamp distributors through the country, the government, we are informed, with a single exception —the city of Toronto—appointed the County Crown Attorney in each county for that duty, and most justly we think, for these officers will, by the new law, lose the four per cent. they were entitled to upon the local courts moneys—that is, the fees passing through their hands—and, besides this, being local officers appointed by the Crown, they would seem the most proper agents for the performance of any fiscal duty, and they are so recognised by the statute law of the country. To multiply distributors would be to increase the trouble and risk which the new law was intended to avoid; but then, the public convenience requires, more especially for the purposes of the Division Courts, that stamps should be procurable all over the country, and it was accordingly intimated to the county attorneys that they would probably find it necessary to employ an agent to supply stamps in each locality where a Division Court was held, the appointment of such agent resting with themselves, the county attorney being held responsible for the stamps entrusted to them: and it was at first signified that clerks of courts, whose duties it would be to cancel stamps, would not be eligible. This disqualification was unwise (upon this point we refer to communicated matter under the head of Division Courts, from a gentleman of standing connected with those courts). The proposed disqualification has, however, since been reconsidered, and it is announced on authority that there will be no objection to clerks being appointed by county attorneys as distributing agents. Postmasters have both the sale and cancellation of stamps for postages, and every paper cancelled must show the date of cancellation, and all

must pass under review of the judge, so there could be no possibility of fraud on the revenue, and therefore we think the proposed disqualification very wisely reconsidered.

Possibly the arrangement now made will be somewhat modified, and if so we think it might work well. The county attorneys would, of course, have to make an allowance to the local distributors, and two and a half per cent. on sales would be probably fair. As regards the city of Toronto, the distributors of stamps there might reasonably make the same allowance to the profession purchasing stamps in quantity. At all events, for public convenience, one or more agents to supply stamps resident in business parts of the city should be appointed. It would be most unreasonable to compel professional men to run up to Osgoode Hall for every stamp required, and no one would like to be out of the money to keep a supply of stamps by him without some little advantage from the outlay in advance.

According to the arrangements already made, three classes of stamps have been issued, distinguished by the letters "C F," "L S," and "F F."

1st. Those marked F F, for the Law Fee Fund, which means those to be made use of for fees payable upon writs and proceedings in the County, Surrogate, Insolvent and Division Courts, as well as upon applications to, and proceedings had before, the county judges, unconnected with any suit or proceeding in a court.

2nd. Those marked C F, for the Consolidated Fund, which means those to be made use of for fees payable upon writs and proceedings of and in the several courts of Error and Appeal, and the superior courts in Upper Canada.

3rd. Those marked L S, for the Law Society or Osgoode Hall Fund, which means those to be made use of for fees payable upon certain writs and proceedings of the superior courts for the Law Society Fund, in addition to those marked C F.

When any document or writ is liable to the payment of a fee both to the Consolidated Fund and to the Law Society Fund two distinct stamps must be affixed.

The stamps are about one and three quarter inches long by an inch broad, far larger than is necessary for any purpose, nor are we willing to accept the full length figure of Justice with her scales as an equivalent for the great inconvenience in affixing the stamps. Indeed it is often difficult to find space for them on the document to be stamped. The adhesive matter, too, is not the best, and, to all appearance, the document that is much handled will be sure to part from Justice and her scales, so imperfect is the mode of attachment.

We believe the proper and most convenient course would be for the government to sell stamped paper, on which writs, summonses and documents of the kind could be printed. This might readily be done at all events in the superior courts. The cost to the government of the paper would be small, and the *little provision* that fees for any amount between the round sums of ten, twenty, and thirty cents, &c., are to be replaced by a stamp of the higher denomination, increases the fees quite enough to cover the charge. At all events this should be done for the convenience of the profession. The Act provides for, and plainly contemplates *stamped paper*. It is the way in which the stamp revenue is collected in England, and we do hope this "licking" may be dispensed with; but if "the powers that be" must have the nasty process continued, in charity they ought to give the smallest possible surface to lick.

The operation of affixing stamps in court causes no little delay in the progress of business; if stamps were impressed this delay would be saved, at all events, in the superior courts. It may not be possible, under the existing tariff of fees to dispense with stamps at the hearing of causes in Division courts, but printed summonses might very well be issued with the stamp impressed on the documents as suggested.

Under an old provision in England regarding stamps, officers were appointed to attend courts of justice to see that the revenue was not defrauded. A similar duty is imposed on the judges here under section 17, which enacts, that "The court in which any such matter or proceeding is, or is pending, which ought to be, but is not so duly stamped, shall not, nor shall any judge of such court take or allow any matter or proceeding to be had or taken upon, or in respect of such matter or proceeding, though no exception be raised thereto by any of the parties, until such matter or proceeding has been first duly stamped." And under section 20, the stamps used are at once to be cancelled.

As the County Crown Attorney will no longer receive fees for the Fee Fund, he will not be in a position to pay as heretofore the county judge's salary, in part or in whole, as is now done from the fees, and the present seems a most appropriate time to carry out the suggestion of the Auditors made in the Report on the public accounts, (dated 1st March, 1860,) which was to pay the judge quarterly by warrant The following is the paragraph in the Report to which we allude: "In our last year's report we alluded to the anomalous position of the Upper Canada Law Fee Fund. The local officers collect the fees and pay the salaries of the county judges out of them, depositing the balance (if any) half-yearly, and if the fees are insufficient, the deficiencies are made up at the end of each half-year by the issue of warrants. It would be much more in accordance with the system pursued in all other branches of the public service, if the judges were paid by quarterly

warrants, and the whole of the fees were deposited with the Receiver General."

But from another point of view the arrangement was objectionable, for the value of an income depends in no small degree on the regularity in time of payment, and many judges had to complain of great delay, in some cases of positive default, in receiving their salaries. The amount of fees, too, vary very much, and no safe calculation could be made as to the receipts at the usual periods. This would not be felt in over-paying counties, such as York and Peel, Simcoe, Welington, &c.; but the counties that had an overplus after paying the judge's salary were few, and the arrangement in the other counties has long been felt as a positive grievance. And, moreover, it was felt that the county judges ought to receive their salaries direct from the government, and not from a local office in their own courts. We trust this subject will engage attention, and that the suggestion of the Auditors will be made the rule hereafter.

One word more on the subject of stamps: we hope that the members of the profession, and all those out of the profession who require to use stamps, will be disposed to give the new law a fair trial, and to bear in mind that the best machinery must have some time, and requires some handling, before it can be made to work smoothly and well.

A DISGRACEFUL LIBEL.

Much is said in these days about the power of the press. All admit the power, but the wanton exercise of power often becomes an abuse. The press in the hands of upright conscientious and honest men is an engine for good; but in the hands of rash and malicious men may become an engine for evil.

We know not and we care not who is the editor of a newspaper published in Kingston, and named the *British American*, but a recent writer in that paper has gone far beyond the legitimate exercise of the power of the press by abusing the Chief Justice of the Common Pleas for refusing a certificate for costs in an assault case tried before him at the last Kingston assizes. No doubt the official acts of all public functionaries are open to all fair criticism, but judicial reputation ought never to be rashly assailed, and to vilify and misrepresent the conduct of those intrusted with the administration of justice is an offence of a very serious nature, "tending with the ignorant and the wicked to lessen the respect due to the law itself."

What are the facts so far as the Chief Justice is concerned? He presided at the trial of an action (*Beach* v. *Ferguson*) brought for an assault. The action was brought in a Superior Court, and the jury awarded to plaintiff only $75 damages, an amount within the jurisdiction of a County Court. Application was then made to the Chief Justice under the statute for a certificate to the effect that the cause was a fit one to be withdrawn from the County Court and commenced in the Superior Court. The Chief Justice in the exercise of the discretion vested in him by law refused the certificate. For so doing the Chief Justice is accused of partiality and improper conduct.

No appeal lies from the exercise of discretion by a judge having authority in his discretion to grant or refuse an application. But suppose an appeal not merely to other judges, but to the public, right and proper, can it be said that the learned Chief Justice improperly refused the certificate? If the cause were a "fit" one to be withdrawn from the County Court there must be some reason for holding it so? It is not because any difficult question of law arose on the trial; for all admit that none such did arise. Then how did it become a fit cause? Not because seventy-five dollars damages was given, for that *prima facie* shows it to be a fit cause only for the inferior court that has jurisdiction in such cases to the amount of two hundred dollars.

There was nothing in the cause to make it anything but an ordinary one, beyond the fact that the parties were "newspaper men." We cannot see that newspaper men "who delight to bark and bite," are to be treated otherwise than like other members of the human family, who in like manner misconduct themselves. No doubt the parties to a cause may have a great estimate of its importance. This is but vanity—often, as in the case before us—followed by vexation of spirit. But others, who cannot see the causes in such a light, are not to be accused of venality and partiality. The Chief Justice in the calm discharge of a judicial duty adopted the verdict of twelve sworn jurors on a question of damages as his rule of conduct, and refused to certify. No man unconnected with the parties to the suit could properly have done otherwise if in his position. For this the Bench is attacked and sought to be brought into contempt. We must protest against such conduct. No man having at heart the good of society should lend himself to such an attack. The Bench is not to be lightly assailed. It is of the utmost importance that our judges, while honestly discharging their responsible duties, should be sustained and respected.

None who know the Chief Justice will think the less of him by reason of anything that has appeared in the Kingston newspaper to which we have alluded. Our purpose in referring to the libel is not to vindicate the Chief Justice, but to withstand what appears to us to be an abuse of the liberty of the press. The Chief Justice requires no vindication at our hands. His reputation as a man and a lawyer is too

lofty to be affected by attacks from such a source. But others not so eminent may, if the evil be not checked, be subjected to like treatment, and so the administration of justice be made to suffer. We trust that the occasion for these remarks shall never again arise. Newspaper writers, *like judges, have a duty to perform, and like judges should* decline the performance of the duty where their passions or their interest is likely to blind their judgment.

NEW APPOINTMENT.

The appointments that have been made for the distribution of law stamps, in accordance with the provicions of the 25th section of 27 & 28 Vic. cap. 5, appear in the *Gazette* of the 8th ultimo.

Wm. W. Baldwin, Esq., son of the late Hon. Robert Baldwin, has received the appointment of distributor of law stamps for the united counties of York and Peel and the city of Toronto.

We have the greater pleasure in recording this fact, as his name recalls the memory of one who was both an upright man and a conscientious lawyer, whom in life all respected, and whose death all deplored. The appointment is a good one, and that is saying a great deal in times when merit is not always the passport to offices in the gift of the government.

DEATH OF CHIEF JUSTICE TANEY.

We notice by our American exchanges the recent death, at the ripe age of 86, of the Hon. Roger B. Taney, for nearly thirty years Chief Justice of the United States.

The deceased was a man eminently fitted to discharge the duties of the high office which he so long held. He acquired early in his judicial career, and preserved till his last moments, the respect of the bar, and confidence of the public. He died not only an eminent lawyer but a sound jurist. His memory will long live in the annals of his country. His industry and his ability—his honesty and fidelity, were proverbial. His courtesy to the bar endeared him to its members; and his uniform kindness of disposition won the hearts of the public.

He was born in Maryland, where his ancestors, an old English Roman Catholic family, had settled in the beginning of the 17th century. Admitted to the bar in 1799, he soon afterwards took an active part in public life. Delegate to the General Assembly in 1860, State senator in 1861. In 1831 he was appointed, by President Jackson, Attorney General of the United States. Nominated by the President to the Secretaryship of the Treasury, he was opposed by the Senate, which was politically against him. In 1835 the same Senate opposed his appointment as an associate judge of the Supreme Court. On the death of Chief Justice Marshall, however, a senate of a different political complexion confirmed his nomination to the Chief-Justiceship. This was in January, 1837, since which time until his death the nominee of General Jackson retained the elevated position to which he was then appointed.

He was, if we remember aright, the third Chief Justice of the United States, Judge Marshall being his immediate predecessor. Mr. Chase, ex-Secretary of the Treasury, is spoken of as his successor.

STAMPS IN COUNTY COURTS.

In County Courts, under the late Stamp Act, it will be necessary to affix *Fee Fund* stamps of the following value:

On every Writ of Summons or Capias ad Respondendum..	$0 30
Every Verdict.....	1 30
Every Certificate of Proceedings made by a Judge, to be transmitted to the Court of Queen's Bench or Common Pleas.....	0 50
Every Rule requiring a Motion in open Court.....	0 30
Every Rule or Order of Reference	0 30
Every other Rule or Judge's Order.....	0 30
Every Recognizance of Bail taken by a Judge	0 30
Every Affidavit administered by a Judge	0 20
Every Writ of Subpœna.....	0 20
Every Reference on a Bill, Bond, Note, Covenant, Account or Claim.....	0 60
Every Judgment entered.....	1 30
Every Oath administered in open Court.....	0 20
For every Special Hearing before the Judge (19 Vic. c. 99, s. 18).....	1 00
For very day's sitting in taking Examination and Evidence.	2 00
On every Reference to the County Judge from the Superior Courts, *Two Dollars per day* for every day's sitting in taking the Examination and Evidence (19 Vic. c. 90, sec. 18).	
Twenty Cents per folio on the Evidence taken by the County Judge, on Reference to him from the Superior Courts.	
For every Report on the Examination and Evidence, on the Reference to the County Judge by the Superior Courts	1 00
In Applications and Proceedings, other than in Suits in any Court of Civil Judicature, the same fees (as nearly as the nature of the case will allow) as are payable under the Act for the relief of Insolvent Debtors (19 Vic. c. 90, s 21).	
EQUITY JURISDICTION.	
Every Claim filed.....	0 30
Every Writ of Summons, or other Writ under the Seal of the Court.....	0 30
Every Order or Application for Order.....	0 30
Every Hearing, *One Dollar;* to be increased, in the discretion of the Judge, to a sum not exceeding.....	2 00
Every Oath administered in Court.....	0 20
Every Certificate under Seal of the Court.....	0 30
Every Sitting in taking an Account or other Sitting.....	1 00

The practice in County Court Chambers in Toronto is to require that every Rule, Order, or other document, &c., requiring signature, must have the proper stamp or stamps affixed thereto and obliterated by the Clerk before the same be signed.

The same practice is as nearly as possible followed in the Clerk's office.

All the stamps used in the County Courts must be Fee Fund stamps (marked F. F.).—*Communicated.*

SELECTIONS.

CAPITAL PUNISHMENT.—ROYAL COMMISSION.

The beneficial mitigation of the severity of our Penal Code, begun by the late Sir Samuel Romilly, and partly, though to a very small extent, effected during his life, was sure ultimately to occasion a public inquiry, as to the necessity for retaining the punishment of death for any offence. That inquiry has not arrived too speedily;* a demand for it having been accelerated by a flexible exercise, for several years, of the prerogative of pardon, whereby the law has been rendered in its operation very uncertain, and far more frequently non-capital than capital.

In the debate on capital punishment in the House of Commons, on the 3rd of May last, on Mr. Ewart's motion, which resulted in the issuing of the above Commission, it is remarkable that arguments in favour of continuing the capital penalty founded on theology or natural justice were almost entirely abandoned, one speaker only having alluded to what he considered to be the expressed will of the Almighty. It may therefore, it is believed, now be regarded as generally admitted (at least, by all persons familiar with those facts necessary to be known in order to arrive at a true solution of the question), that necessity alone can justify the State in visiting a citizen with death; consequently, that death inflicted for sentimental reasons only—for example, for the sake of vengeance, or from a sense of justice—is a proceeding utterly indefensible, and as irrational as is beheading the corpse of a traitor, or as an attempt to wash out blood by blood. It is believed, therefore, that it would be agreeable, if not to the whole nation, at least to a large and increasing number of the most respectable and best informed portion of it, if our laws could, consistently with the public welfare, be rendered entirely non-capital. That innocent persons have occasionally been condemned and executed is a fact, alas! indisputable, and very recently some remarkable examples of the miscarriage of juries, in cases not capital, have reminded the public, that the possibility of the like fatal and irremediable error must exist, so long as the capital penalty is retained.

One of the first, and perhaps the first, of the inquiries brought under the consideration of the Commissioners, will therefore be—whether there is from any and what cause a reluctance in juries to convict on trials for capital offences; and whether any distinction is made by juries when the victim of murder is an infant; and if, contrary to our anticipations,* it should be found that there is no such reluctance, and that human life is equally protected at all ages from malicious attempts to destroy it—advocates for the abolition of capital punishment will no longer be able to avail themselves of the reluctance of juries to convict, as one of their favourite arguments; but on the other hand, should such reluctance be found to exist, and should it appear that human life is not equally protected from murder at all ages, and that from these causes guilt is likely to escape, and occasionally escapes conviction, it appears difficult to continue for any beneficial purpose the capital penalty. Whether it should be continued depends, however, upon many other considerations besides those last referred to. At present as regards malicious homicides the law is, and has been for several years, theoretically capital, but in the great majority of convictions practically non-capital, and hence it may be predicated that the Commissioners will recommend either the abandonment of the death penalty, or surround the sentence of death with such new circumstances, as will, if possible, render the infliction of it satisfactory to the public.

The causes that produced the Commission may be stated to be, first, the increased regard for human life arising from many years of domestic tranquillity and the consequent progress of the nation in humanity and civilisation; secondly, the belief that the death punishment is either not a deterrent, or if a deterrent, is attended with circumstances that render its infliction productive of more evil than good, or that it is, as a deterrent, not greater than, or so great as, hopeless penal imprisonment or hopeless penal servitude for life would be; thirdly, the co-existence with the two former causes of an irresponsible power in the Crown to stay the executioner's hand, after the convict has been sentenced to die. The word "irresponsible" is used because the power has been exercised on allegations brought *ex parte* to the notice of the Crown, without any public investigation, and in the absence of any agent to protect the public welfare. The first of the foregoing causes, operating on the last, has now for some years occasioned frequent and extraordinary public manifestations for mercy where the slightest doubt of guilt has appeared to exist, and in cases even where the Court has been satisfied with the verdict. It has also caused the law to be administered, not on an uniform principle, but on a principle vibrating in its movements according as it is operated upon by the public, or a portion of the public. Hence, one murderer has been executed, whilst another, for an offence precisely equal in degree, has escaped. In some cases an inquiry after verdict and sentence of death is made, in others not, although justice requires that if further inquiry be allowed in any case, it should be made in all, since all verdicts are fallible. Now a penal law ought not to be varied in its operation, for to the extent to which it is relaxable, it ceases to be penal; and yet having regard to public opinion, the death penalty can at present be carried out in a comparatively few cases only. Thus the deterrent effect of the law if such deterrent effect exist, is so uncertain as to be reduced to a *minimum*. The second of the three before mentioned causes that occasioned the commission, has greatly augmented the power of the first; and has also raised a question entirely independent of considerations arising from religion or humanity—in short a question of police; for the abolitionists of capital punishment, without availing themselves of the arguments in their favour founded on Christian theology or civilisation, allege that, having regard to the causes of murders, the death penalty is not only not deterrent, but that from its demoralising operation it tends to foment those vicious passions that give birth to the crime.

For the purpose of ascertaining whether the capital penalty is or is not at all, or to any, and in any to what extent, deterrent, the psychology of murderers will, it is presumed, be investigated, so that the report may be satisfactory to men of science who have made psychological facts their special study. Upon this branch of inquiry it is believed that much information, with which the public is only partially acquainted, may be adduced by the examination of physicians of experience and learning, and others. There seems, indeed, to be little doubt that the psychological causes of murder may be ascertained with exactitude, and that those murders that have been brought to the notice of the public are types of all undiscovered murders; and if by referring to trials for murder for a series of years, the motives which occasion the crime seem to be such as to defy repression by the death penalty, the Commissioners

* The expediency of a Royal Commission to inquire into the operation of capital punishment was suggested in 1860. *See* Law Amendment Society's papers, 17th Dec., 1860.

* From 1858 to 1862 convictions for murder were 322 out of 1,000. For all other offences 755 out of 1,000.—Communicated by H. T. Humphreys, Secretary to the Anti-Capital Punishment Association.

will hardly fail to point out its inutility from that cause alone. Under this head of inquiry it may possibly be ascertained, that when any passions are sufficiently excited, no self-control from reasoning about consequences exists, and that the murderous intent or passion is that on which the death penalty has, if any, the most feeble operation. Moreover, on examining the origin of murders, the Commissioners will probably discover that one and all arise from cupidity, and that cupidity has its varieties capable of classification, and is a more powerful emotion than the fear of death. The following statement shows how easily murders and the causes of them may be classed.

The Varieties of Cupidity which occasion Murders.	Cases that have actually occurred, proving each variety, with their Dates.
	21st December, 1846.
1. Despair	1st—Hannah Reid found drowned in Waterloo-dock, London, with the body of her recently born infant bound to her waist, her arms clasping the child to her bosom.
	2nd—All suicides.
2. Superstition.	Suttees and the voluntary prostration of human beings for death, before the crushing wheels of the Juggernaut.
	16th May, 1854.
3. Lust.....	Lewellin Garratt Talmage Harvey, aged 30, murdered Mary Richards, aged 21, having dragged her into a coppice and violated her person, and stunned her with blows of which she died.
	24th December, 1828.
4. Gain...	1st—Burke and Hare, who at Glasgow had suffocated several persons to sell their bodies for anatomical purposes.
	19th July, 1849.
	2nd—Rebecca Smith, a pious and devout Sabbatarian, the mother of eleven children, ten of whom she poisoned, and was executed for poisoning the last, a month old. The reason she alleged was to save her children from want.
	1st January, 1845.
5. Love of a false but good reputation.	1st—Tawell, a married man, in apparent affluence and very charitable, murdered at Salt Hill a woman, Sarah Hart, with whom he cohabited.
	2nd—All murders of newly born bastards, now so common.
	18th August, 1847.
6. Anger.....	The murder, early in the morning, of the Duchess de Praslin at Paris, by her husband, who afterwards committed suicide. Violent altercations had long existed between them.
	16th February, 1846.
7. Hatred	The murder of James Bostock, in Drury Lane, by his apprentice Wicks, who had received a debt due to his master of 15*s.*, and could account for 4*s.* only. He told his master he had lost 11*s.* of it, and proposed paying it back at 2*s.* 6*d.* a week, but his master insisted on deducting the 15*s.* from his week's wages; for which he shot him dead a day or two afterwards.
	1st October, 1861.
8. Revenge	Murder of Mr. Mark Frater, a tax-collector, at Newcastle-on-Tyne, by a carpenter named Clark, for distraining his work tools. The distress was made in the previous July. Immediately after the murder Clark exclaimed, "It's all right, he has robbed me and I have paid him."
	20th September, 1860.
9. Jealousy.....	A bailiff named Harrison was in the occupation of a cottage in which the prisoner Lockey's wife lived with three children by a former marriage. Harrison slept below, Mrs. Lockey above. Lockey became jealous of Harrison, and on his way home from work was heard to use violent language, and, soon after he arrived at home, he attempted to murder both his wife and Harrison, and killed Harrison.
10. Envy	The first historical murder.

Can it be for a moment credited, that fear can have had any operation in restraining any one of the foregoing homicidal passions, especially if they be excited by inebriation? and yet it is believed that there is no cause of murder that may not be attributed to one or more of them. They are adduced here as examples. The fear of death is, in truth, a very feeble opponent to the other emotions of human nature. When contending with cupidity it invariably gives way, whether the object of the cupidity be good, for example, to save life from drowning or to win a battle in a just war—or bad, as to commit a murder from revenge, or to fight as a mercenary.

Although human nature is, as regards its elementary properties, the same throughout the world, the social institutions of one nation are not necessarily applicable to every other; and therefore no sound argument can indisputably be raised in favour of the abolition of capital punishment in this country because its abolition has worked well in others; but if the abolition of the death penalty has not increased crime, amongst a people unquestionably less civilised than we are, it is a legitimate argument to allege that it would not be followed by any increase of crime with us.

Sir James Mackintosh, who presided for seven years as Judge of the Supreme Court of Bombay, in his last address to the grand jury is represented to have said:

"In the seven years ending 1763, there had been 141 capital convictions, out of which there were 47 executions, averaging nearly seven a year. A gradual reduction of punishments took place, and in the seven years ending 1804, under the presidency of Sir William Syer, the convictions for murder were 18, and the executions 12 (not quite two a year). During the seven years of my presidency, dating from 1804, there were but six murder convictions *and no executions*. Yet there was during that entire period no diminution in the security of the lives or property of men."

If then the fact of the abolition of capital punishment amongst a people comparatively barbarous having led to no increase of crime, affords sound ground for its abolition, how greatly is the weight of that argument increased when applied to countries as civilised as our own, in which executions have, without any public disadvantage, been abolished? How then can it be contended if the suspension or abolition of the law of death operates satisfactorily in Louisiana, Rhode Island, Michigan, and Wisconsin; in Laenwarden, Utrecht, Bruns-

wick, Denmark, Belgium, Berne, and Tuscany (in which last State the punishment of death has for the third time been by law abolished), that it will operate in the same manner with us?

This will be an important and interesting subject for the inquiry and consideration of the Commissioners.

Respect for life—whether of animals or of man—is a sentiment created by civilisation. What boy ever refrained from robbing birds of their nests from any natural feeling of pity? What barbarian ever hesitated to take away life from a feeling of compassion or a sense of religion. Now surely wilful homicides must correspond in number with the degree of value placed on human life; for amongst a people by whom it is held very sacred there must be few—by whom it is lightly regarded there must be many. The object of our institutions should therefore be to consecrate human life.

Another of the objects of inquiry therefore probably will be whether the death penalty—independently of the manner of executing it—has or has not any and what operation, either in encouraging humane feelings, or checking their development; whilst one of the inquiries specially mentioned in the Commission is the operation of the manner in which the death sentence is executed. Should the report advise the abolition of the death penalty that inquiry will become unnecessary except for the purpose of illustration; but it is very important that there should be very satisfactory evidence adduced as to the operation on the public morals of public executions—because, notwithstanding the report, the legislature may retain the capital penalty. Upon this head of inquiry numerous witnesses should be examined, that the tendency of public opinion may be ascertained. It is believed that much more extensive and valuable evidence may be obtained on this head, than that adduced before the Select Committee of the House of Lords on executions in jails in 1856. In Tasmania, executions are not, we are informed, conducted in public—and we are also informed that no evil has arisen therefrom—and in other countries, it may be (Prussia is one) that death sentences are carried into effect before a limited number of witnesses. The Commissioners will doubtless be able to obtain valuable evidence as to the effect of such executions—and to ascertain whether there is any reason to suppose they create suspicion of foul play, or tend to encourage assassination.

That a great change of opinion as to the expediency of retaining the death penalty has occurred, is certain, from the course taken by the House of Commons on Mr. Ewart's motion. The Commissioners will doubtless ascertain the causes of this change, with reference to which the Home Office will be able to furnish important evidence, by supplying the Commissioners with the particulars of the applications to the Home Secretary for a commutation of the death sentence during a period of years, the number of such applications, and the reasons for refusing or acceding to them. Doubtless these reasons are recorded; if not, they ought to have been. They will, if afforded, probably prove to be the most interesting and important matter adduced before the Commissioners, especially if the expediency of retaining the prerogative of mercy should, directly or indirectly, be brought under their consideration.

From what was preceded, it will be observed that the Commissioners will exhaust the subject of their commission by proceeding under four heads of inquiry, viz.

1st. The operation of the death penalty on juries

2nd. Whether it operates at all, or to any and what extent as a deterrent; an inquiry which suggests two topics for consideration, viz.

(1st.) The emotions which end in murder and what are the counteracting emotions, and whether the fear of death is one of them.

(2nd.) The operation of the abolition of the death penalty in those countries in which it has been abolished.

3rd. The operation of the death penalty on the morals of the people, irrespective of the manner of executing it.

4th. Its operation when publicly executed.

With reference to the first head of inquiry, it may be observed as remarkable, that after the capital penalty became a dead-letter law as regards the following offences, viz., sodomy, burglary with violence, robbery with wounds, and arson of inhabited houses, there was on the whole both a decrease of crime and an increase in the proportion of convictions.* Those who advocate its entire abolition have therefore a *primâ facie* argument in their favour. It may, indeed, be legitimately contended that the *onus probandi* is thrown on those who uphold the continuation of the death penalty, and that the moment the question presents itself, it is fairly open to grave doubts, whether a lawful penalty analogous in its results to that of the crime it punishes, can have any operation in discouraging the crime.

The just indignation which a murder excites in the survivors of the crime, cannot be regarded as existing for any other object than to urge the survivors to prevent a repetition of the offence, for which a jail is as serviceable as the executioner, except so far as the example of death may operate. If then executions are unjustifiable simply as measures of justice, and unnecessary to prevent a second offence by the same individual, they can be maintained only for financial reasons or because they are terrific; but surely the possibility of a wrong verdict justifies the State in providing a criminal convicted capitally with food and clothing, for if he be innocent and executed he is removed beyond the power of human compensation. Is then capital punishment in murder cases deterrent? With reference to which it may be observed, that although, for example, rebellions may be suppressed, and war, and anarchy terminated, by a wholesale resort to it—(especially if the death be frightful and public, as, for example, blowing men from guns, crucifixions, and the like)—that however the law of terror may operate upon large masses of mankind, concerting and bound together for a common object, yet as regards crimes by individuals—by

* The following table, communicated by H. T. Humphreys, Secretary to the Anti Capital Punishment Association, establishes this statement.

Crimes.	Five years from 1852 to 1856.		Five years from 1857 to 1862.		Decrease of convictions per cent.	Decrease of committals per cent.
	Committed.	Sentenced to death.	Committed.	Sentenced to death.	—	—
Sodomy	227	69	183	65	5 8	19 7
Burglary with violence	50	38	39	35	8·	29·
Robbery with wounds	55	33	31	16	51 5	4 6
Arson of inhabited houses	22	12	13	5	58 5	40·8
	360	152	266	121	...	...

PROPORTION OF CONVICTIONS TO COMMITTALS.

	From 1852 to 1856	From 1857 to 1861.
Sodomy	30 per cent	35 5 per cent.
Burglary with violence	66 "	89 7 "
Robbery with wounds	60 "	51·6 "
Arson of inhabited houses	54·6 "	38·3 "

persons who isolate themselves from their fellow men, for the purpose of secretly committing crime—it is open to serious doubt whether the punishment of death does operate as a preventive. It has not been necessary to re-enact the death penalty for arson, cattle-stealing, forgery or burglary, or indeed for any crime great or small; and there are examples showing that, as regards murder, the death penalty has had no operation even in the vicinity of the gallows. In three successive years there were three murders in Derbyshire in two of which the murderers were brought to the scaffold at Derby, and the third was that by Townley.

In conclusion it may be observed that the Report cannot satisfactorily steer a middle course, and therefore the Commissioners must find it expedient or not expedient to retain the death penalty. If it be retained, its operation must be rendered certain and impartial, either by abolishing the prerogative of mercy, or affixing some condition to the exercise of it which will insure responsibility. It is not probable that the Crown will be advised to abandon, or even to qualify its power of mercy, and yet as long as it exists it will rest with the Crown whether the life of a convicted criminal shall be spared or not, and hence public agitation for reprieves will again and again occur, and none of the existing evils arising from the importunity of the public to save human life can be terminated. This appears to be one of the strongest arguments to prove the inexpediency of the death penalty being retained. If executions were allowed only in cases in which the jury found a verdict of guilty, and life were to be spared only when, with the verdict, circumstances extenuating the crime were found, that would be qualifying the prerogative of pardon; and there has been more than one instance in which it has been found expedient to commute the death sentence, notwithstanding an unqualified verdict of guilty, satisfactory both to the jury and the judge; and such cases will, of course, occur again. Nor would this objection be entirely removed were a second trial allowed by way of appeal, and a second verdict of guilty were found. The possibility of error would still exist, though the probability of error would be greatly diminished. At present there is no criminal appeal, nor is the subject of criminal appeals referred to the Commissioners, who must therefore proceed as if there could be no second trial for murder. Neither are they at liberty to enter into the question whether it is or not expedient to qualify in any way the prerogative of mercy. If, on the other hand, the Commissioners should report that it is inexpedient to retain the capital penalty all these difficulties would be removed. Connected with the abolition of capital punishment is that of secondary punishment, as to which great difficulties have hitherto existed. None, however, have been found when a criminal has been reprieved, and therefore these difficulties are clearly not insuperable. Irremissible but not unpardonable life punishment would answer for the purpose of deterring others, better than death; and that punishment should be penal in a greater degree than for any other crime, but should not be accompanied by any species of torture. There would be no difficulty in defining the servitude to which murderers should be subjected, so as to mark the enormity of the offence; but one unalterable condition should be that no ticket-of-leave system should apply to them.

Much power of good and evil is vested in the Commissioners. The future social welfare of the community is largely concerned in the conclusion they may come to. The death penalty, if retained, however seldom it may be inflicted, will be a fact operating on the morals and manners of the people, far and wide, on other matters of conduct affecting domestic society, besides attempts on human life the abolition of it will have an influence equally extensive. Whether of the twain is the better adapted for the security of human life, and for the progress of civilisation, the Commissioners have to decide.* —*Law Magazine.*

INDEFINITENESS AND UNCERTAINTY OF PLEADING.

A pleading is not considered indefinite nor uncertain, if the precise nature of the charge or defence therein contained is apparent (Code, § 160). Therefore, indefiniteness in allegations of matter which ought to come from the other side, such as admissions of part payment by the adverse party (*Van Demark* v. *Van Demark*, sp. t., 13 How. 372), or in allegations responsive to irrelevant matter in the adverse pleading (*Barshall* v. *Tillou*, sp. t., 13 How., 7), cannot be objected to.

But if a pleading fails so to state the facts which it sets up as to enable the adverse party and the court to identify the transactions to which it refers, and to comprehend the nature of the defence which it contains, it is fairly open to objection on this ground.

So, if it is uncertain whether one claim or defence, or more than one, is intended to be set up, the pleading may justly be censured as indefinite. (*Clark* v. *Farley*, 3 Duer, 645; *Forsyth* v. *Edminston*, sp. t., 11 How., 408.)

The following allegations, among others, have been criticised as too indefinite. An averment that a party was "compelled to pay" without saying how (*Patton* v. *Foote*, 1 Wend., 209; *Packard* v *Hill*, 7 Cow., 442), that he was "duly appointed" administrator, receiver, &c., without saying by what court (*Seri* v. *Coit*, sp. t., 5 Abb., 482); or that he was "discharged by due course of law" (*Currie* v. *Henry*, 2 Johns, 433); that "a large sum" was illegally assessed (*Heywood* v. *Buffalo*, 14 N. Y., 544); that a judgment recovered by A. "belongs" to B. (*Martin* v. *Kanouse*, 2 Abb., 327; 11 How. 567); or that B. is "owner by purchase" of a note payable to A. (*Prindle* v. *Caruthers*, 15 N. Y., 425; see *Brown* v. *Richardson*, 20 id., 472), that a note was given "by mistake, for a greater sum than was due" (*Seeley* v. *Engell*, 13 N. Y. [3 Kern.] 542; rev'g S. C., 17 Barb., 530); "that the plaintiff is indebted to the defendant on account of previous transactions" (*Wiggins* v. *Gans*, 3 Sandf., 738; Code Rep., N. S., 117); or "for services," without showing what kind of services (*Chesbrough* v. *N. Y. & Erie R. R. Co.*, sp. t., 26 Barb., 9; 13 How., 557; see *Furey* v. *Lee*, sp. t., 10 Abb., 143); or that the defendant "wasted and mismanaged" certain property consigned to him (White, J., *Webb* v. *Putzel*, MS., June, 1863). So, where it was essential to a cause of action that a certain act should not have been done in January, 1858, an averment that it was not done "in January, 1855, nor at any time thereafter," was held too indefinite, though not bad on demurrer (*Andrews* v. *Murray*, sp. t., 9 Abb., 13).

A negative pregnant, or conjunctive denial of several allegations, is liable to correction as indefinite, but not on any other ground (see *Wall* v. *Buffalo Waterworks*, 18 N. Y., 119; *Doran* v. *Dinsmore*, 33 Barb., 36; 20 How., 503).

The court may, on motion, require a pleading, indefinite or uncertain within the meaning of the rules heretofore stated, to be made definite and certain by amendment (Code, § 160).

This is the only remedy against such defects, except by procuring a bill of particulars or copy of account, in the appropriate cases. They cannot be reached by demurrer (*Dagal* v. *Simmons*, 23 N. Y. 491; *Prindle* v. *Caruthers*, 15 id. 425).

* Since the above was written Her Majesty has been pleased to direct letters patent to be passed under the Great Seal, appointing the Most Noble Duke of Richmond, the Right Hon. Lord Stanley, M.P., the Right Hon. Stephen Lushington, D C L., Judge of Her Majesty's High Court of Admiralty; the Right Hon. Sir John Taylor Coleridge, Knight; the Right Hon Thomas O'Hagan, Attorney-General for Ireland, James Moncrieff, Esq., M. P., Advocate for Scotland; Horatio Waddington, Esq., John Bright, Esq., M P., William Ewart, Esq., M P., Gathorne Hardy Esq., M P., George Warde Hunt, Esq., M P., and Charles Neate, Esq., M P., to be Her Majesty's Commissioners to inquire into the provisions and operation of the laws now in force in the United Kingdom under and by virtue of which the punishmen tof death may be inflicted upon persons convicted of certain crimes, and also into the manner in which capital sentences are carried into execution

Though a party may sometimes have his choice between demanding a bill of particulars or a copy of an account, and a motion of this kind (see *Farcy* v. *Lee*, sp. t, 10 Abb. 143), he cannot have both remedies for the same cause, and after procuring a copy of an account, even if it is defective, he cannot move to make the complaint more definite on points covered by the account (*McKinney* v. *McKinney*, sp. t., 12 How., 22). And where a pleading could be made more definite only by giving the particulars of numerous items, this motion is not favored, the proper remedy being by application for a bill of particulars, or an account (*Cudlipp* v. *Whipple*, 4 Duer, 610; 1 Abb., 106; *St. John* v. *Beers*, sp. t., 24 How. 377).

Only reasonable certainty can be required. The court will not compel a pleader to be precise in stating the contents of a writing which he has lost (*Kellogg* v. *Baker*, sp. t., 15 Abb. 286).

This motion is subject to the same rules in regard to the time within which it must be made, as a motion to strike out irrelevant matter. In general, no affidavit is necessary on this motion, but we can conceive of cases in which a pleading might seem, on its face, sufficiently definite, and which nevertheless might be quite otherwise, and in which the necessity of amendment could not be made apparent without an affidavit. For example, a defendant sued upon a note might have several notes outstanding, precisely similar in amount, payees, and date, to one of which he might have a good defence, and to others none. We think that, in case of the plaintiff's refusal to show him the note, he might properly move to have its number stated in the complaint, instead of resorting to the more tedious process of discovery and inspection. In such case, an affidavit would clearly be necessary.

It has been intimated (*Brown* v. *Southern Michigan Railroad Co.*, sp. t., 6 Abb., 237) that no uncertainty would be remedied which did not appear on the face of the pleading but the case is poorly reported, and no affidavit seems to have been used.

The notice of motion ought, in our opinion, to state in what respect more definiteness is required, so that the adverse party may have an opportunity to amend without waiting for an order; and no relief should be granted upon a mere general motion that the pleading "be made more definite." Such was the practice in chancery on exceptions to answers for insufficiency (*Stafford* v. *Brown*, 4 Paige, 88.) And at law upon special demurrers (*Currie* v. *Henry*, 2 Johns, 433; *Snyder* v. *Croy*, id. 428); for which latter proceeding this motion is a substitute (*Prindle* v. *Caruthers*, 15 N. Y. 425, 431; *Kellogg* v. *Baker*, sp. t., 15 Abb. 286), and to the former of which it also bears a close analogy. The party whose pleading is ordered to be made more definite must serve it as amended within the time specified by the order, or within twenty days after notice of such order, if no time is fixed by it. (Rule 57, Supreme Court.) In case of non-compliance with the order, whether by neglecting to serve any new pleading at all, or by serving one objectionable on the same grounds as the original, the entire pleading will be stricken out. (*Wiggins* v. *Gans*, 3 Sandf. 738; Code Rep. N. S. 117.) —*N. Y. Transcript.*

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 Post Office."

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

STAMPS IN THE DIVISION COURTS.

We subjoin some extracts from a communication handed to us on this subject, based on the supposition that clerks of Division Courts were to be ineligible as local distributors of stamps. But as clerks are now declared eligible for sub-distributors, as mentioned in an article elsewhere on the distribution of stamps, the subjoined remarks have little to bear upon, but we give them as the views of a gentleman of standing connected with these courts, and one well conversant with details.

"A circular has been issued instructing the county distributors, thus appointed, to appoint local or sub-distributors for the convenience of the division courts, suggesting however that clerks of division courts are ineligible for the office. * * * *

Now why are clerks of division courts ineligible to the distribution of stamps? The 24th section of the Stamp Act appears to us to avoid any such exception against clerks of division courts which the government regulations suggest. The act does not either by express provision or by implication make the clerks of division courts or clerks of county courts ineligible; and if these regulations hold the former ineligible, why not the clerks and registrars of the other courts? We are at a loss to understand this singular distinction. Reading the 24th and 25th sections of the act together, we are to suppose that notwithstanding the convenience permitted by the 24th section, *i. e.*, that the Receiver General may allow to "*any person*" who takes at any one time stamps to the amount of $5 or upwards five per cent. commission, it is deemed better to give some one individual in each county a monopoly in the sale and distribution of stamps, and the exclusive benefit of the five per cent. discount.

We confess ourselves apprehensive that these *ad interim* arrangements may lead to inconvenience, and become to some extent inoperative, in so far as the division courts are concerned. The clerks of division courts may, in common with other persons, purchase stamps at par, and use them at pleasure, or not do so as they please. They will not have the benefit of the five per cent. discount it is true, but they cannot be prevented from keeping stamps on hand, and in that way may be engaged largely in the distribution of them, so that the regulations practically become a "dead letter." It will be impossible to prevent their keeping them for all comers. The county distributor is to be allowed five per cent. for his trouble of distribution, supplying his sub-distributors with stamps, and the appointment of these officials is to be at his risk and upon his responsibility, and at his expense out of the five per cent. commission." * * *

The writer then enters into some particulars to show the great trouble and inconvenience the local distributors would be at in distributing stamps, and thinks that clerks would keep a supply at the place of sittings as well as at their office, and thus become distributors. The writer then goes on to say:

"Some may say, 'It matters not that the clerks thus distribute stamps, if the clerks purchase them; that is all the government require.' This is a fallacy. The destruction of the stamp, when a proceeding is had requiring a stamp, is what the law requires, and a guarantee that the same stamp shall not be used again for the same purpose after it has been once cancelled, is what the govern-

ment should aim at. These essentials will not be secured by withholding the distribution of the stamps from the clerks, or by depriving them of the benefit of the five per cent. discount, by way of commission on their sale. These precautions can only be secured by a searching investigation instituted by some person in authority, say the county judge or the county crown attorney, whose duty it should be to examine all writs and proceedings from time to time in each court, and to finally cancel and obliterate all stamps theubefore used. Frauds will be committed under any regulations, and it will be found impossible to avoid them entirely.

The 24th section was framed with an idea of adaptation to the condition and convenience of the division courts and their suitors and clerks. In the other courts stamps will be affixed to the proceedings by the attorneys conducting them; but in the division courts where legal gentlemen are seldom employed whilst the proceedings preparatory to trial are progressing, and never afterwards, the clerks will be obliged to act for both parties, and see that stamps are properly used and cancelled; and it is to be regretted that clerks are thus cut off from the advantages of a section of the statute so well planned as the 24th section."

Judge McQueen, of Woodstock, has addressed a letter—of which the subjoined is a copy—to each of the division court clerks of his county. Being of interest in connection with the law of division courts we transfer it to our columns.

WOODSTOCK, October 3rd, 1864.

SIR,—Under an act of the last session of Parliament, stamps are to be used in lieu and in payment of all fees payable to the fee fund.

Every summons, hearing, order and judgment issued, heard, made or given after the 1st inst., must, therefore, be stamped with a stamp corresponding in amount with the amount of the fee payable to the fee fund in each case.

Under the 15th section of the act there must be an application for the hearing of each cause, and to this application must be affixed a stamp representing the amount of the fee payable for such hearing.

Such application may, I think, be in the following form:

In the —— Division Court for the County of Oxford.

A. B., Plaintiff; and C. D., Defendant.

Claim, $ ——

Required a hearing in this cause.

Dated —— day of —— 186 A. B., Plaintiff.

As the fee for hearing a defended is greater than the fee for hearing an undefended cause, and the fee may be increased by order of the judge to $2, parties requiring a hearing must be prepared with stamps for such greater or increased fee, and also with stamps for the order and judgments to be attached to each the moment given, otherwise the hearing, order or judgment to which no stamp is not then and there applied will be void.

The stamps can at present be obtained at the office of the County Attorney.

D. S. McQUEEN, *J. C. C.*

To the clerk of the —— Division Court.

CORRESPONDENCE.

TO THE EDITORS OF THE UPPER CANADA LAW JOURNAL.

GENTLEMEN,—Your opinion on the following would much oblige the subscriber.

A., a merchant, places in suit twenty accounts. In due time the Clerk of Division Court receives money on five of the twenty, and applies the money thus received for costs on the twenty. A. then demands the money received by the Clerk on the five, although A. is still indebted to the Clerk for costs on the twenty. Is the Clerk justified in keeping the money collected on the five to apply for costs on the twenty, when no agreement has been made between A. and the Clerk as to costs? Yours, &c., L. S.

[We incline to think that the clerk could set up his claim for costs, by way of set-off to the plaintiff's claim for money paid into court, if sued by the plaintiff. An agreement would probably be presumable from the facts. The clerk stands somewhat in the position of a solicitor; and if the question came up, as it would on application to the judge to compel the clerk to pay over the money, we think the judge would view it as the superior courts would, on application to compel money to be paid over. A court of equity would not part with a fund within its control, till the solicitor was satisfied. On broad grounds, and by analogy to proceedings in the superior courts of law and equity, it seems to us the clerk might apply moneys received to repay the fees out of pocket, and his own fees.—EDS. L. J.]

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

CONNORS v. DARLING.

Magistrate—Illegal commitment—Trespass—C. S. U. C., ch. 126.

The plaintiff was arrested upon a warrant issued by defendant, a magistrate, and brought before him. Defendant examined the plaintiff, but took no evidence, said he could not bail, and committed the plaintiff to gaol on a warrant reciting that he was charged before him on the oath of W. H. with stealing. The plaintiff did not ask to be heard or to give evidence.

Held, that defendant was liable in trespass, for, assuming that the plaintiff was properly brought before him, yet the commitment without appearance of the prosecutor, or examination of any witness, or of the plaintiff according to the statute, or any legal confession, was an act either wholly without or in excess of jurisdiction, and therefore within the second clause of Consol. Stat. U. C., ch. 126.

That section is to be confined to cases in which *the act by which the plaintiff is injured*, is an act in excess of jurisdiction: but the magistrate's protection depends not on jurisdiction over the subject matter, but over the individual arrested.

Appeal from the County Court of the County of Simcoe.

The declaration contained several counts, the first in trespass for imprisoning the plaintiff and sending him to gaol, the others in case against defendant as a magistrate. *Plea*, not guilty, by statute.

At the trial notice of action was proved, and also that a constable arrested the plaintiff on a warrant from defendant (not put in,) and he was brought before defendant, who examined him. No evidence was taken. Defendant said he could not take bail, and committed the plaintiff to gaol on a warrant. The plaintiff did not ask to have a hearing or to bring evidence, nor an investigation of the charge. The warrant of commitment recited that the plaintiff was charged before defendant on the oath of William Hall, for stealing and "tueftuously" carrying away a logging chain, found on plaintiff's premises, and commanded the constable to take

the plaintiff to gaol, and the gaoler to receive and keep him until delivered by due course of law. On this the plaintiff was sent to gaol; and an indictment, with verdict of not guilty endorsed at the Quarter Sessions, was proved

On objection taken that defendant acted within his jurisdiction, the learned judge held that trespass would not lie, and that there was no evidence of want of reasonable and probable cause on the other counts; and a nonsuit was entered. In the following term a rule to set it aside was obtained in the court below, and after argument the following judgment was there given.

Gowan, Co. J —The evidence for the plaintiff on the trial disclosed substantially the following facts:—

That on the 6th of November last, the plaintiff was arrested by a constable under a warrant, (produced, but not put in) stated to have been issued by the defendant, as a justice of the peace, the charge being for stealing a chain from one Hall: that on the same day the constable brought the plaintiff before the defendant at the latter's house, in Medonte:—

That Hall (the alleged prosecutor) was not present at the time, nor was any person sworn or examined as a witness, so far as appeared in evidence from the witnesses: that the defendant examined the plaintiff in respect to the charge (how or in what way did not appear); that after such examination the defendant said he could not take bail in such a matter; but the plaintiff did not ask to have any hearing or investigation, or produce or offer to procure any evidence on his behalf, or to give bail to the charge: and that after the examination the defendant made out a warrant of commitment, which was produced and proved, and delivered it to the constable, and he in execution of it lodged the plaintiff in the county gaol:

That the plaintiff and defendant were strangers to each other.

The first count in the declaration, upon which the plaintiff mainly relied, does not allege that the act complained of was done maliciously, &c.

At the close of the plaintiff's case it appeared to me that the defendant, a justice of the peace, although his proceeding was most irregular, could not be said to have been acting without jurisdiction, and that therefore the action of trespass was barred by the 1st section of ch 126, Consol. Stats. U. C., the defendant having pleaded the general issue by statute to the declaration.

In the other counts want of reasonable and probable cause "&c" was alleged, and this allegation I thought the plaintiff had failed to shew; and I nonsuited the plaintiff.

If the act done by the justice was in a matter in which by law he had not jurisdiction, or exceeded his jurisdiction, (under the second section of the act,) the nonsuit was improperly directed, and I should have allowed the case to go to the jury; and in this lies the main question.

As observed by Parke, B., in *Calder* v. *Halket* (3 Moo. P. C. C 76) a judge has an immunity in respect of any act of a judicial nature within the general scope of his jurisdiction, and whether there was any irregularity or error in it or not, would be dispunishable by ordinary process of law; and the principles laid down in relation to judicial officers are not without application to magistrates. At all events the object of the Magistrates' Act is obviously to give magistrates entire protection in regard to acts, however irregular, if within their jurisdiction, unless done maliciously and without reasonable or probable cause. The learned judge also referred to *Dosewell* v. *Impey*, 1 B. & C. 169; *Dicas* v. *Brougham*, 6 C. & P. 249. 1 Moo & Rob. 309; *Mills* v. *Collett*, 6 Bing. 85; *Somerville* v. *Mirehouse et al*, 9 W. R. 53, 3 L T. Rep. N. S. 294; *Houlden* v. *Smith*, 14 Q. B. 841, (in which most of the authorities are referred to): *Ex parte Thompson*, 3 L. T. Rep. N. S. 294; *Kendall* v. *Wilkinson*, 4 E & B. 680.

Under the commission of the peace, justices have a general power for conservation of the peace, and the apprehension and commitment of felons.

The commission gives them jurisdiction in all indictable offences to discharge, admit to bail, or commit for trial.

Persons apprehended for offences that are not bailable, and persons who neglect to offer bail for offences which are bailable, must be committed (Hawk P. C., Book 2, ch. 16, sec 1). Where the accused is brought before a magistrate, it becomes his duty to take and complete the examination of all concerned, and to discharge or commit the individual suspected, as soon as the nature of the case will permit (Chit Crim. Law, vol i., p 73).

The mode of taking examination was regulated by the act of 2 Ph. and M., ch. 10, and at the present day by the English act 16 Vic., ch. 179, from which act our statute ch 102, Consol. Stats. C is taken, and now regulates the duties of justices out of sessions, in respect to indictable offences.

The warrant under which the plaintiff was imprisoned, regular on its face, and in the form given by ch. 102, states that the plaintiff was charged before the defendant, a justice of the peace, on the oath of Wm. Hall, for that the said James Connors did, on or about the first day of October last, steal and theftuously carry away from the possession of the said Hall, in the county of Simcoe, a chain, and that the said chain was found in the plaintiff's possession, &c.

Upon the authority of *Haylocke* v. *Sparke* (18 Eng L & E Rep. 269, 1 E. & B 471) the warrant put in by the plaintiff is evidence for the defendant of the facts recited.

What does it shew in respect of jurisdiction?

I collect from it that the defendant, a justice of the peace, acted on a charge upon oath before him by the owner of property; that the charge was against the plaintiff for stealing, and from a place within the county, and that the stolen article was found in his possession; and that upon this charge the defendant was committed for trial, the evidence of the constable shewing that the party was previously brought up on a warrant for the charge, and examined. I assume the offence as stated in the warrant shows an indictable offence. At all events no objection was taken on this head, and if defective in technical accuracy no objection would probably lie. (See secs. 16 and 22, ch 102, Consol. Stats. C.; *Rex* v. *Judd*, 2 T. R. 255; *Rex* v. *Croker*, 2 Chit. 138, 18 Eng. C. L Rep., 279.)

How then does the matter stand? Larceny (stealing) is an offence within the jurisdiction of a justice of the peace, and upon which he may commit for trial. It is charged as done within the local jurisdiction. It is charged upon oath. The party (plaintiff) was before the justice. Can it be said, then, that the defendant, in granting the warrant, was acting without power, when as respects subject matter, place and person, he had a general jurisdiction to deal with the charge? The defendant decides to commit the plaintiff for trial after examining him. In doing so without observing the statutory directions as to examination, he committed a great error, a gross irregularity, but I think he cannot be held responsible for this wrong decision, the matter being one over which he had a general jurisdiction. Such presumption as might arise in the poverty of facts in evidence, would not be against the magistrate.

According to the warrant, oath of the offence was made the day it was granted, defendant had power to enter on the case: surely an erroneous decision cannot strip him of authority. If he mistook the law, does he lose jurisdiction?

If the plaintiff desired an investigation, why did he not ask it. Is there not a waiver by him in some sort of an enquiry?

It is urged that the provisions in secs. 30, 31 and 32, of ch. 102, Consol. Stat. C., not having been pursued, the defendant had no jurisdiction, and secs. 52 and 57 are referred to in this connection. I cannot think the failure to follow the procedure prescribed in respect to examination takes away jurisdiction, though the magistrate might be otherwise punishable for not following the directions of the statute. If the argument were pushed, it might be contended that any departure from the practice laid down would make the justice a trespasser.

I am referred to several cases where magistrates were held liable for committing a party on remand for an unreasonable time, but no case I have examined seems to touch the question whether gross irregularity and disregard of the statutory directions in the particulars referred to leaves a magistrate entirely without jurisdiction. I have some doubt whether a warrant to answer is not spent when the accused is brought before a justice of the peace, and whether something more than there is evidence of having taken place may not be necessary to give the justice jurisdiction over the person of the plaintiff, but I do not see that I am bound to presume there was nothing done, in the face of the warrant,

which recites a charge on oath made before the justice the day it is dated.

I regret that I have not been able to consult all the cases Mr McCarthy for the plaintiff referred to at the argument, particularly one in the Irish Reports, but it is satisfactory to know that whatever my decision, one party or the other is to take the opinion of the superior courts. I confess I am somewhat shaken in the strong opinion I expressed at the trial that the magistrate was acting within his jurisdiction, yet, as at present advised, I cannot say that the act done, as presented by the evidence, can by no possibility be justified under the general power of a justice of the peace,—that it was one in which the defendant acted without jurisdiction. I am alive to the dangerous consequences of any departure by magistrates from the settled practice, yet what passed at the examination we do not know. The fact only is in evidence that the plaintiff was examined by the defendant before he made out the commitment and that the plaintiff did not ask for a hearing or investigation when defendant said he should commit him. If it was a fact that the plaintiff (as is sometimes done in police courts) waived a hearing and investigation, I presume the defendant could have put it in evidence. As it is, there is the mere naked fact, that he was examined.

In the other courts there is the usual allegation of malice and want of probable cause. With the facts just stated before me, I conceived there was no evidence of the want of reasonable and probable cause, for there was an information on oath, a charge of larceny, an examination of the plaintiff, the stolen article found in his possession, and the fact that the plaintiff and defendant never met before and were perfect strangers to each other, and an apparent assent, at all events no objection, to the commitment without the preliminary investigation. I therefore withdrew the case from the jury. The indictment with the minute of not guilty endorsed was put in, but the fact of guilty or not guilty is not a criterion as to reasonable or probable cause; and it may have been that the judge who tried the charge would not have disturbed the finding if the verdict had been guilty, the facts and circumstances bearing against the prisoner, or it may have been otherwise; but the simple fact of not guilty does not shew of itself want of reasonable cause. I do not think there was anything in the evidence from which to conclude that the magistrate had any other motive than simply to bring the plaintiff to justice in the exercise of his office.

The rule *nisi* granted is discharged with costs.

From this judgment the plaintiff appealed.

McCarthy, for the appellant, cited *Scavage* v. *Tutcham*, Cro Eliz. 829; *Edwards* v *Ferris*, 7 C. & P 542; *Haylocke* v. *Sparke*, 1 E. & B 471; *McCreary* v *Bettis*, 14 U. C. C. P. 95; *Gardner* v. *Burwell*, Tay. Rep 247; *Lawrenson* v. *Hill*, 10 Ir. C L. Rep. 177; *Bott* v. *Ackroyd*, 28 L. J. M. C. 297, 5 Jur. N. S. 1053, 7 W. R. 420.

W. H Burns, contra, cited *Haacke* v. *Adamson*, 14 U C. C. P. 201; *Fawcett* v. *Fowlis*, 7 B. & C. 394; *Morgan* v. *Hughes*, 2 T. R 225; *Bonnell* v. *Brighton*, 5 T. R. 186; *Warne* v. *Varley*, 6 T. R. 449; *Ex parte Thompson*, 3 L T. Rep. N S. 294.

HAGARTY, J, delivered the judgment of the court.

It may be well to notice a few of the cases that seem most in point

Edwards v. *Ferris* (7 C & P 542), where the defendant meeting two constables in the street with the plaintiff, in charge for drunkenness, verbally told them to take him to the lock-up, and bring him up next day. Patteson, J., said, "It is a magistrate's duty on all occasions either to examine into the question, or if there is a reason why he cannot examine into it, he is not to interfere at all, and he should let the constable take the party somewhere else." The magistrate was held liable in trespass.

Davis v. *Capper* (10 B. & C. 28) is a very important case. A magistrate, before whom the plaintiff was legally brought on a regular information, remanded her for a fortnight. Trespass was brought. The jury found the commitment was *bonâ fide*, and without improper motive, but that the the time for which the commitment was made was unreasonable. Lord Tenterden, giving judgment (page 38), held that trespass, not case, was the proper remedy: "A special action on the case could not have been maintained, because that must be founded on some improper motive which the jury have negatived. And whether we consider this commitment is absolutely void from the beginning, as being for an unreasonable time, or consider it void *pro tanto*, i e, for so much of the time as was unreasonable, still an action of trespass would be maintained, because every continuance of a party in custody is a new imprisonment and a new trespass * * The duty of a magistrate is to commit for a reasonable time, and if he commits for an unreasonable time, he does an act which he is not authorised by law to do. In the case of *Rex* v. *Gooding* (Burn's Justice, 24th edition, vol. i., p. 1009) the judges were of opinion that a party so committed was not in lawful custody, and therefore that another who had aided such person in escaping from prison was not guilty of any offence against the law."

Section 30 of chapter 102, Consol. Stats. C., directs that where a person appears, or is brought before any justice, charged with any indictable offence, "such justice or justices before he or they commit such accused person to prison for trial, or before he or they admit him to bail, shall, in presence of such accused persons (who shall be at liberty to put questions to any witness produced against him) take the statement on oath or affirmation of those who know the facts and circumstances of the case, and shall put the same in writing, and such disposition shall be read over," &c, &c.

Section 32 provides that after all witnesses are examined the justice of the peace shall read the deposition of the accused, and ask him if he has anything to say, &c

Section 42 allows a remand for a reasonable time, not exceeding eight days.

Section 57 directs commitment after all evidence is heard, when strong presumption of guilt arises.

In *Lawrenson* v. *Hill* (10 Ir. C. L. Rep. 183) Pigot, C. B., says, "The duty of a magistrate, in dealing with a party charged with a criminal offence, is prescribed by 14 & 15 Vic, ch 93 He is bound, before he commits for trial, among other matters, to take down the evidence against the accused in the shape of a written deposition on oath This is no new law. It has been, as to felony, the law in England since 2 & 3 Ph. & M ch. 10. * * "If (p. 191) the evidence at the trial established that he acted in a manner in which he had not jurisdiction, or in which he exceeded his jurisdiction, then he did not issue the warrant in the due execution of his duty. * * The question (p. 186) is, whether, with a view to the application of the second section of the statute, (the protection of Magistrates' Act) the matter in which the defendant acted is to be considered as consisting of the whole transaction of the enquiry before him, in which he had a general jurisdiction to commit for felony, or as consisting of the act of issuing the warrant for the plaintiff's arrest, which was done without or in excess of jurisdiction, and upon authority, as well as upon the reason of the thing, in my judgment the latter is the proper mode of treating the matter in question."

The words of the act of Philip and Mary, sec. 2, are, "Such justice or justices, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him," &c, &c.

The case of *Barton* v. *Bricknell* (13 Q B 392) has a most important bearing The justice had convicted the plaintiff for Sunday trading in a penalty and costs, with an alternative that the plaintiff should be put in the stocks for two hours, if penalty and costs were not sooner paid. The plaintiff's goods were seized on the conviction, which was afterwards quashed, and trespass brought against the defendant.

Coleridge, J., after complaining of the faulty wording of the statute, and the apparent contradiction of the first and second sections, says, "We must then try to construe them so as to give effect to the whole of the act; and I think we do this if we confine sec 2 to cases *in which the act by which the plaintiff is injured* is an act in excess of jurisdiction, for instance, if the plaintiff in the present case had been put in stocks under the illegal alternative, and the action had been brought for that, in which case, probably, trespass might have lain."

Erle, J., says, "The justice had jurisdiction to convict, and to order payment of the penalty and costs, and to levy them by

distress. All these things he had to do in the execution of his duty, and he had jurisdiction to do them; but there was a defect in the conviction, as the justice ordered an alternative beyond his jurisdiction. If anything had been done in respect of the wrongful order, it would have been an act beyond his jurisdiction, but there was nothing of the sort. * * I think the case is precisely that which sec. 1 is intended to protect. Then I think the construction of sec. 2 must be so controlled by sec. 1, as to be consistent with it, and this is done by so construing sec. 2 as to confine its application *to cases in which the cause of action arises from the excess of jurisdiction*, as it would have done in this case if the plaintiff had been put in the stocks."

Leary v. *Patrick et. al.* (15 Q B. 226), is worthy of notice. On an information laid, and summons served, the plaintiff was convicted in his absence. While justices were sitting the plaintiff was brought in, and was told he was convicted. He asked might he go to his van, and was told by one of the defendants that if he went he must go in custody. There appeared to be no more formal commitment than this. He was kept in prison till next day, and in the meantime his goods were seized under defendant's distress warrant, reciting conviction for penalty, and 12s. costs. A conviction was subsequently drawn up, but was silent as to costs. The conviction was quashed by the sessions, and trespass was brought for the imprisonment and seizure of goods. The action was held maintainable for both. Lord Campbell says that the Protection Act "leaves the remedy of the party injured the same as it would have been before that act, in cases in which the justices have acted without jurisdiction, or have exceeded their jurisdiction provided the conviction has been quashed before action. * * I am of opinion that in doing the acts complained of, the justices have exceeded their jurisdiction; for whether they had jurisdictions to adjudge that the plaintiff should pay costs or not, they did not in fact adjudge that he should pay them."

In *Cleland* v. *Robinson* 11 U. C. C. P. 416) we had to consider the state of the law, and there Lord Denman's words in *Caudle* v. *Seymour* (1 Q. B. 892) are quoted:—"The magistrate's protection depends, as my brother Coleridge has observed, not on jurisdiction over the subject matter, but jurisdiction over the individual arrested;" and Coleridge, J., adds, "It is true that the magistrate here has jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case, it must be shewn that there was a proper charge upon oath in that case."

The learned judge in the court below felt naturally embarrassed in this very peculiar case, and in his very carefully considered judgment at last, with much hesitation, decided in favour of the magistrate, and that the case was governed by the first section of the act.

The fact that there was an information on oath duly laid, charging the defendant with felony, no doubt creates considerable doubt in every mind.

After much reflection, we have arrived at the conclusion that, assuming everything in favour of the defendant, and that all was regular up to the appearance of plaintiff before him to answer the charge, the commitment for trial of the plaintiff without the appearance of the prosecutor or examination of any witness, or statutable examination of the plaintiff, or confession by him as allowed by law, was an act of defendant either wholly without or in excess of jurisdiction, and that he is liable therefor in trespass.

The way to test the matter seems to me to be this: by the information duly laid the defendant had power over the plaintiff's person to bring him before him on the charge. When the plaintiff was before him, what further power had he over him? He could remand for a reasonable time for good cause, or he could proceed under what for three centuries, since the days of Philip and Mary, was the law of England, and is in substance our law now. "Before he shall commit or send such prisoner to ward, he shall take the examination of such prisoner or information of those that bring him."

But without remanding, and without any regular examination, or without confronting the witnesses and the accused, has he any jurisdiction over the plaintiff's person to send him to gaol to await his trial?

We have seen that even where he might remand, if the remand was for an unreasonable time it was wholly void, and the magistrate a trespasser. We see that this case answers the position taken by Erle, J., and Coleridge, J., that the second section is to be confined "to cases in which the act by which the plaintiff is injured is an act in excess of jurisdiction," as where the justice had the plaintiff legally before him and legally convicted him, and legally ordered distress of his goods, but illegally added the alternative of the stocks. As he never had been put into the stocks the justice was not liable in trespass. Had the plaintiff been put in the stocks trespass would have lain (*Barton* v. *Bricknell*, 13 Q. B. 396, already cited.)

We can see no jurisdiction whatever in a justice to commit for trial a person brought before him on a charge of felony, no one appearing to prosecute, no examination of witnesses, and no confession under the statute or otherwise It is suggested that the plaintiff may have confessed his guilt to defendant The answer is that the evidence suggests nothing of the kind.

We have not overlooked the language of the third section of the statute, and consider that it does not affect the conclusion at which we arrive.

We gather from the evidence that there is no imputation of bad faith or improper motive in the justice, but the fact remains that the plaintiff has suffered an illegal imprisonment. If the law be so tender of the personal liberty as to make (as in *Davis* v. *Capper*, already referred to) a justice acquitted of all bad motive, a trespasser for remanding or committing for an unreasonable time, it is difficult to see why as great a liability should not be incurred for a totally unwarranted commitment for trial at an assize or sessions that might not be held for months.

We are willing to see every reasonable protection given to magistrates, but we think the law would be in a singularly unsatisfactory state if there could be no redress for such an injury, committed in clear violation of the precise words of the statute law, although without improper motive in the person causing the injury.

The statute law gives the most ample protection to magistrates, and really leaves many grievous wrongs committed by them in exercising their great powers wholly without redress. We are unwilling to see this freedom from responsibility extended further than it has heretofore been. If the defendant here has incurred no civil responsibility, we hardly see how any redress can be hereafter had for heavy injuries to liberty and property, committed possibly from mere ignorance, but no less damaging in their results than if committed from vindictive or malicious motives.

The law strives anxiously to guard persons from being committed to gaol except on a clearly defined charge made by witnesses brought face to face with the accused, and we cannot accede to the argument that what was done by this defendant can in any view be considered as a mere error in judgment, as an "act done by him in the execution of his duty with respect to any matter within his jurisdiction." We think it falls within the second section, and that this appeal must be allowed, and the rule for setting aside the nonsuit in the court below should have been made absolute.

Appeal allowed.

See *McDonald* v. *Bulwer*, 11 L. T. Rep. N S. 27, in the Court of Common Pleas, in Ireland, following *Lawrenson* v. *Hill* above cited, p. 648.

In the matter of Alanson C. Sheley and The Corporation of the Town of Windsor.

By-law—Delay in moving against.

The court, because of the long delay in moving, refused a rule nisi to quash a by-law passed eighteen months before, for licensing and regulating houses of public entertainment, the objection being that it was not before the final passing approved by the electors.

O'Connor applied for a rule *nisi* to quash a by-law of this corporation, passed on the 25th of February, 1863, entitled "A by-law for licensing and regulating houses of public entertainment, and for other purposes therein mentioned," or to quash sections 2 and 6 thereof, on the ground that the same was not before the final passing thereof approved by the electors of the municipality, as

required by sub-sec. 6 of sec 246 of the Municipal Institutions Act; and that the by-law does not limit the number of licenses to be issued.

DRAPER, C. J.—We think the long delay between the time of the passing of this by-law, which took effect on the 1st of March, 1863, and the time of this application, affords a sufficient reason for our not exercising the summary jurisdiction conferred by the 195th section of the act.

If the by-law is void for the reasons offered, or for any other reasons, our not interfering will not either prevent persons injured by its enforcement from obtaining redress, nor will it sustain proceedings which would be unauthorized if it were not for its assumed legality. On the other hand, after so long a delay and apparent acquiescence in its provisions, we do not see reason to apprehend any great evil from our not discussing the questions raised in a summary manner. Probably after this notification the council of the corporation will satisfy themselves whether there is any omission in passing it, or any other defect in it fatal to its validity, and if so, annul it before any new difficulty arises. We refuse the rule.

Rule refused.

MALCOLM MCPHATTER AND ALEXANDER MCPHATTER v. LESLIE AND INGRAM.

Sale of goods—Estoppel—Notice of action under Division Courts Act.

In an action for seizing goods under Division Court attachments, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer. *Held*, that this plaintiff could not afterwards be permitted to set up that the sale was void because fraudulent as against the plaintiffs' creditors, and to maintain trespass for seizing the same goods as if they were his own

Semble, that notice of action to a Division Court clerk is sufficient if it complies with C. S. U. C. ch. 19, ss. 193, 194, though it may not contain all that is required by ch. 126, for the latter act does not overrule or vary the former, but they establish rules for distinct cases.

Trespass *de bonis asportatis*, on the 23rd of October, 1863. *Second count*, laying the same trespass on the 24th of October. *Third count*, trover for the same goods, laid on the 28th of October.

Each defendant, by the same attorney, pleaded not guilty, by statutes 22 Vic., ch. 19, sec. 194, and 22 Vic., ch. 126, sec. 11, both public acts, Consol. Stats. U. C.

The case was tried in Guelph, in March, 1864, before John Wilson, J.

The plaintiff proved service of notice of action on the defendant Leslie, clerk of the Second Division Court of the county of Wellington, on the 16th of November, 1863, and on the defendant Ingram, a bailiff of the same court, on the 17th of November, 1863. A copy of the warrant under which Ingram acted was also demanded.

Ingram was called by the plaintiffs. He proved that he seized the goods mentioned in the declaration on the 23rd of October, 1863, advertised them on the 24th, and sold them on the 28th. He produced twelve warrants of attachment signed by the defendant Leslie, as clerk of the Division Court, addressed to him (Ingram) as bailiff, commanding him to seize, &c, the personal estate and effects of the plaintiffs. He said he also had two executions against the same goods signed by Leslie, which he produced.

He sold on the attachments, and took the goods away on the 23rd of October, and returned the proceeds to Leslie. The amount of attachments was about $229. He put in a list of the things sold, and evidence of their value was given.

On cross-examination of Neil McPhatter, one of the plaintiffs' witnesses, he said that the plaintiff Alexander had told him they (the plaintiffs) had sold a few things to Neil McPhatter (not the witness) that creditors whom the plaintiff Alexander named had threatened them, and they assigned some things to Neil to prevent it. This Neil, the witness, was plaintiff's hired man, and did not pretend to own the property. The other Neil was a cousin of the plaintiffs, and swore the property was theirs; that he had bought it to give them time to sell it, and he set up no claim to it at the sale. The sale to him was two or three days before the bailiff seized. He told one of the creditors the property was his, but he issued an attachment and gave it to the bailiff for his claim for wages.

A nonsuit was moved for, on the ground that defendant Leslie was entitled to the protection of ch. 126, Consol. Stat. U. C. The learned judge held that the action failedas against the bailiff, but overruled the objection as to Leslie, with leave to move.

On the defence were put in a number of warrants of attachment against the plaintiffs, and the affidavits upon which the defendant Leslie granted them. All these affidavits stated that the deponent was a creditor (stating for what sum) of the plaintiffs: that deponent had good reason to believe, and verily did believe, that the two plaintiffs in this suit were about to abscond from the province, or to leave the county of Wellington, with intent and design to defraud the deponent, taking away personal estate liable to seizure under execution for debt. It was also proved that there were numerous judgments recovered against the plaintiffs, on some of which there were executions in the sheriff's hands.

It was further proved that a sale by auction was made on the 20th of October, 1863, of the goods afterwards seized by the bailiff, and that Neil McPhatter was the purchaser. A bill of sale of that date was drawn up, in which the vendor was stated to be the plaintiff Alexander, and he signed a receipt for payment of the price, $337, in full, at the foot of the bill of sale, to which the auctioneer was a subscribing witness. On the same day an agreement by way of lease was executed, between Neil McPhatter and the plaintiff Alexander, whereby Neil agreed to lease the same property to Alexander, for one year, for the sum of $137, provided that if Alexander paid Neil $137, with interest, before the 20th of October, 1864, the property was to belong to Alexander, and if not it was to remain the property of Neil, and "this lease shall become null and void."

The auctioneer stated that Alexander and Neil came to him to sell the property, which he did, and Neil became the purchaser. Neil and a woman were bidders. Five or six persons were at the sale. Something was said about cloaking the property. Alexander said that they owed Neil $200, and were to allow him this on the sale, and were to give credit for the $137. The auctioneer put up a notice three or four days in Graham's bar-room, in Galt. He understood they did not want the sale made public in Clyde; it was however advertised in three or four places. Alexander said the sale was made to secure Neil, and to raise money to pay one Atwood, who had an execution. Atwood was at the sale. He swore that he supposed it was on his execution, and got paid in money and its equivalent.

Neil McPhatter was re-called by the defendants, and swore the plaintiffs did owe him $17: that there were people at the sale: that he and Alexander bid one against another: that the plaintiff Malcolm knew nothing of all this: that all the things were delivered to him, and he took none away.

The learned judge directed a verdict in favour of the bailiff, and said the affidavits did not authorise the issue of the warrants of attachment; and that, so far as the plaintiffs were wronged by the seizure and sale on the attachments, the defendant Leslie was liable, but not for any goods sold on Atwood's execution, which was for $88 55, and on which, according to the endorsement thereon, a seizure was made on the 5th of October, 1863, by Ingram, and a considerable part of the property sold on the 28th of October was taken in execution. Atwood had a second execution for the same amount, and issued on the same day, on which also the same property was seized, according to Ingram's endorsement, on the 3rd of October. He also directed that if any of the goods, after satisfying these executions, were sold by the plaintiffs to Neil McPhatter, although fraudulently, the plaintiffs could not recover for them, for the sale would bind them, though void as against creditors; and if the jury found that any goods were seized under the attachments which had neither been sold under the executions nor yet to Neil McPhatter, the plaintiffs were entitled to recover for those goods at all events.

The defendants' counsel objected, 1. That whatever had been paid to creditors who had issued attachments should be allowed to Leslie in mitigation of damages. The learned judge declined so to direct. 2 That the jury should have been directed that if Alexander alone sold the goods to Neil, he could not join in this action, though Malcolm could sue alone: and that Leslie was not responsible for any sale made by Ingram; and that the learned

judge should have told the jury to deduct from the sale those goods which had been seized under the two executions, whereas they had been told to deduct that sum from the first goods sold by the bailiff to satisfy the executions

The jury found a verdict for the defendant Ingram, and against Leslie for $400.

In Easter Term *M. C. Cameron, Q C*, obtained a rule *nisi* for a nonsuit on the leave reserved as to Leslie, or for a new trial as to Leslie, the verdict being contrary to law and evidence, and for excessive damages, and for misdirection, in charging that the affidavits produced were insufficient to justify the issuing of the warrants of attachment, and that notwithstanding the sale by one plaintiff the action was properly brought by both, and that Leslie was answerable for the sale by the bailiff, and that notwithstanding the judgments recovered in the division court were satisfied by the proceeds of the sale of the goods, the defendant was not entitled to have such judgment considered in mitigation of damages, and that defendant Leslie was not entitled to notice of action under the statute, ch. 126 He cited *Bell* v. *Peel*, 15 U C Q B 594; *Ferrier* v. *Cole*, Ib 561; *Cinq Mars* v *Moodie*, Ib 601; *Buffalo and Lake Huron R W Co* v. *Gordon*, 16 U C Q B 283; *Anderson* v. *Grace*, 17 U. C. Q. B. 96; *Graham* v. *Smart*, 18 U C Q B 482; *Caron* v. *Graham*, Ib. 315; *Harrison* v *Brega*, 20 U C Q B 324; *Quackenbush* v. *Snider*, 13 U C C. P. 196; *Moran* v *Palmer*, Ib 528.

During this term *Freeman, Q. C.*, shewed cause, citing *McKenzie* v. *Mewburn*, 6 O. S. 486; *Boyle* v. *Ward*, 11 U C. Q. B. 416; *Sowell* v. *Champion*, 6 A. & E. 407.

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

The notice of action did not contain all that the Consol. Stats U. C. ch 126, requires, for neither the name and the place of abode of the plaintiffs nor the name and place of abode of the attorney was endorsed upon it, and if the defendant Leslie was entitled to such a notice, it was clear he had it not. I felt inclined at first to hold that the reason on which Macaulay, C. J., held that a sheriff was not entitled to notice under ch 126 might apply also to this defendant, the clerk of the Division Court. But even then he was entitled to notice under the Division Courts Act, and so the cases were dissimilar.

In *Dale* v *Cool* (4 U. C C. P 462), Macaulay, C. J, held that "On reference to 13 & 14 Vic, ch. 53, sec. 107, the 14 & 15 Vic, ch 54, sec. 5, and the 16 Vic, ch. 177, sec. 7," he thought the bailiff entitled to notice, and that the objection was open to him on the plea of not guilty *per stat*. The first of these three acts is the Division Courts Act, the second is the act for the protection of magistrates and others, and the third is the Division Courts Extension Act, though I presume sec 14, and not sec 7 was meant In *Anderson* v *Grace* (17 U C Q B 96) the Chief Justice says, it is the act 14 & 15 Vic which must govern, because the previous enactments giving protection are repealed by that act. But Con. Stat U. C. ch. 19, secs. 193, 194, provides expressly for notice and limitation of action for any thing done under that act, and though the enactments of the 14 & 15 Vic are re-enacted by Consol. Stat. U. C. ch 126, it appears to me that we cannot hold that the latter chapter was intended to overrule or vary the provisions of ch 19 of the same statutes, but that they were establishing rules for distinct cases

I think, therefore, that the clerk in this case having been served with a notice of action, such as ch 19 requires, cannot successfully object to the want of additional formalities which ch. 126 requires.

It is not, however, in our view, necessary to determine this point, for after much reflection we have arrived at the conclusion that after the sale made by Alexander McPhatter through the form of an auction, which the auctioneer swears he thought was intended to pass the property, he cannot maintain an action for trespass to that same property as being his own.

The case in principle is very like that of *Cinq Mars* v. *Moodie*, (15 U C Q B 601) and the defence is open under the general issue, not guilty *per stat* In that case one Brown was held to be precluded from selling certain goods under an execution, though there is very strong ground for holding they were in fact the goods of his execution debtor, because he had been party to a proceeding by which those same goods had been sold to the plaintiff in that action under colour of an execution and sale by the sheriff, which, almost beyond question, was a fraud upon other creditors of the execution debtor.

The plaintiff Alexander cannot, it appears to us, be permitted to set up that his own sale to Neil McPhatter, attested by the auctioneer, through whose agency it was made, was wholly void, because it was fraudulent against the creditors of the plaintiffs, and to insist that three days after such sale he was clothed with all the rights of owner of the goods

On this ground, and without adverting to other objections, we are of opinion the rule for a nonsuit should be made absolute.

Rule absolute.

As to the effect of the disability of one plaintiff to sue upon an action in which others join with him, see *Brandon et al* v. *Scott*, 7 E. & B. 234.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, *Esq., Barrister-at-Law*)

CLARK v. GALBRAITH.

Rules on sheriff to return writs—Four or six-day rules?—Con. Stat. U. C. cap 22 sec 276—Rule Pr. T. T., 1856, No 101.

Quære.—Can rules on the sheriff to return writs, since Con. Stat. U. C. cap 22, sec 276, with a view to proceedings to bring the sheriff into contempt, be properly made four day rules, as intended by the statute, or six-day rules, as required by rule T. T., No 101, of 1856?

Semble.—A four-day rule is perfectly regular.

Sed qu—The effect of the decision of the Court of Queen's Bench, in this case, in refusing a rule nisi for an attachment on the sheriff.

(Chambers, June 2, 1864)

Foster obtained a summons on the sheriff of the united counties of Frontenac, Lennox and Addington, to show cause why an attachment should not issue against him for his contempt in not returning the *fieri facias* issued in this cause, pursuant to the rule herein, dated 30th April, 1864, upon grounds disclosed in affidavits and papers filed.

The affidavits showed that a search had been made in the Crown office, and that the writ had not been returned there by the sheriff. The plaintiff's attorney also stated that it had not been returned to him or to his office

S. Richards, Q C., for the sheriff, opposed an order being made, because the rule which was served on the sheriff required him within four days after its service to return the *fieri facias*, instead of allowing him six days, according to the 101 Rule of Court of T. T. 1856. Har. C. L. P. A 638, which declares that "All rules upon sheriffs to return writs, or to bring in the bodies of defendants, shall be six-day rules, and shall be issued from the same office whence the writ was sued out." That the 103rd rule provides that the sheriff shall file the writ in the office from which the rule to return the same was issued, at the expiration of the rule; and that the C. L. P. Act, sec 276, does not conflict with the rule, because this act deprives the sheriff of his fees if he fail to return the writ in four days, and the rule is for a wholly different purpose; that the sheriff should have six days within which to make the return, before he be subject to be attached. He referred to the Act. 3 Wm. IV. cap. 8, sec. 18, from which this section of the C. L P. Act was taken. *Hilton et al.* v. *McDonell et al.* 1 U C. Cham. Rep. 207.

English, contra, contended that the C. L. P. Act, although a re-enactment of the act of 1833, was peremptory that the sheriff should return the writ; and if he did not do it, then he was necessarily in default, and was liable therefore to be attached.

ADAM WILSON, J.—The Consolidated Statutes of Upper Canada, chapter 22, section 276, enacts that "In case a writ delivered to the sheriff for service or execution has remained in his hands fifteen days, and in case he has not been delayed from returning the same by an order in writing from the party from whom he received the writ, his attorney or agent; and in case he be afterwards ruled to return such writ, he shall not be entitled to any fees thereon, unless within four days after being so ruled he returns the writ by post to such party, his attorney or agent"

This enactment, then, in effect provides, 1st, that in certain cases the sheriff may be ruled to return writs; 2nd, that when he is so ruled, he shall not be entitled to any fees thereon; 3rd, un-

less he returns or encloses the same by post to the party, his attorney or agent, within four days after being so ruled.

This act does not say what length of time is to be specified in the rule, within which the sheriff must return the writ; and therefore it is argued that the six days given by the rule may properly be allowed to the sheriff, within which he shall return the writ, to save him from contempt and attachment; that the four days under the statute may have their full effect also in case of his default by depriving him of his fees; and that under a six-day rule he must, to entitle himself to his fees, return the writ in four days, but that he has the full six days before he can be considered as in contempt.

I do not see how the sheriff could be deprived of his fees, or be treated as in default, for not returning a writ in four days, if the rule allowed to him six days to do so. It must follow, then, that when the sheriff is called upon to return a writ, the rule should specify that if within four days he fail to do so, he shall not be entitled to any fees; and if within six days he fail to do so, he will be treated as in contempt; or else there must be two rules upon the sheriff, either simultaneously or consecutively, one a four-day rule, the other a six-day rule, to accomplish the necessary objects. There is perhaps no objection in embodying both purposes in the one rule, but there would seem to be valid objections to the separate rules. The object of both rules is to procure a return of the writ. Why, then, should two rules be taken out at the same time, to effect this same purpose? Why is it to be assumed that the sheriff will suffer the forfeiture of his fees, so as to make it necessary for the party (to avoid the additional loss of these four days) to sue out the second rule at the same time? Again, if the two rules should not be issued together, the sheriff will in effect be allowed ten days instead of six days before he can be punished for his contempt; for in many cases the forfeiture of the fees may be no punishment, or no adequate punishment, to the sheriff for the injury he may bring upon the party by the withholding of his writ from him.

The Legislature have thought that the sheriff can properly return a writ in four days, and it has expressly authorized a four-day rule (as I read the section) to issue to procure the return. The Legislature have also provided for the writ being delivered or enclosed by the sheriff by post to the party or his attorney or agent. The rule of court declares that all rules on the sheriff to return writs shall be six-day rules. The statute, however, authorizes, as I have stated, four-day rules. Rule 103 provides that the sheriff shall file the writ in the office from which the rule to return it has issued. The statute declares it may be returned or mailed to the party or his attorney or agent. I do not see how the rules of court and the statute can be made to operate harmoniously or beneficially, unless by providing in one rule on the sheriff for the two purposes of loss of fees and of contempt—the first by a default after four days, the latter by a default after six days.

I cannot say that a rule calling on the sheriff to return a writ in four days can be wrong, when it is permitted by the statute; and it appears to me that this loss of fees to the sheriff was not the object which the Legislature had in view. When it authorized such a practice to be pursued, the object was to procure the return of the writ; and the loss of fees was to be the penalty, or one penalty at all events, for disobedience of the rule. If the only penalty, why attach? If not the only penalty, why wait two days longer? A rule of court has been disobeyed. No return has been made within the time fixed by the Legislature. What then is wanted to constitute a complete default, and therefore a contempt? Nothing.

If this were a case not hampered by the Chambers decision of *Hilton et al* v. *McDonell et al.*, and not so strongly in conflict with the rule of court, I should be obliged to hold according to the view which I take, that the order in this case should be made; but I cannot disregard either the previous decision or the rules of court, and therefore I must decline to make any order in such a case until the practice is settled by the court. In Trinity Term last, *English* applied to the Court of Queen's Bench for a rule *nisi* on the sheriff, but it was refused.*

* See sec. 34 of 28 Vic cap 28, which allows the sheriff eight days (both days inclusive) after requisition in writing to return a writ; and in case of wilful neglect or refusal, makes the sheriff liable to be ruled to return the writ, and to be further proceeded against as in other cases of contumacy to orders or rules of court.—EDS. L. J.

WARTELL v INCE.

Ejectment against tenant refusing wrongfully to go out of possession—Recognizance conditioned to pay damages and costs—Con. Stat. C. C., cap 27, secs 57, 58

A tenant under a lease for three years having a right to purchase the fee simple, to be exercised upon notice to be given to the landlord during the term, who gave the notice but held over after the expiration of the term, without paying rent, was ordered, after appearing to a writ of ejectment served upon him for the recovery of the possession of the premises within a fixed time, to enter into a recognizance by himself and two sufficient sureties in a fixed sum conditioned to pay the costs and damages, which should be recovered by the claimant in the action of ejectment brought against him.

The fact that the claimant was not the original landlord, but the mortgagee in fee of the land from the original landlord, and therefore owner of the reversion and entitled to claim possession, was held not to make any difference in the the obligation of the tenant to give the security, the reversioner, whether landlord or his vendee, being entitled to avail himself of the provisions of the statute in that behalf.

(Chambers, July 13, 1864.)

This was an action of ejectment. Plaintiff, after defendant had appeared, obtained a summons calling on the defendant to shew cause why, within such time as the presiding Judge in Chambers should fix, the defendant should not enter into a recognizance for himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which may be recovered by the claimant in this action in pursuance of the statute in that behalf.

Plaintiff filed a lease, made the 13th of May, 1860, between Thomas Fuller, architect, of the first part, and the defendant, described as a barrister-at-law, of the second part, by which Fuller let the premises in question in this cause to the defendant for three years, at the rent of £50, payable quarterly. It contained the usual covenants to pay the rent, &c. The lease then concluded with a clause that the defendant should have the right of purchasing the premises at any time during the term that he may elect for £837 10s. And Fuller covenanted for himself, his heirs or assigns that he or they at any time during the term whenever the defendant should signify his intention to purchase, by mailing a notice of such intention, addressed to Fuller at his last place of residence, would sell and convey in fee simple, free from dower and all other encumbrances whatsoever, the said premises to the defendant in fee for the sum of £837 10s., payable by the defendant after having made such election to purchase, and immediately upon receiving such conveyance free from all encumbrances.

It was sworn that the defendant had enjoyed the premises during the three years, and that his interest had expired; that some short time before the expiration of the lease, the defendant gave notice to Fuller of his intention to purchase the premises, and demanded an abstract of title, which the defendant said he proceeded to have made out but had great difficulty in making it; that about the 29th of September, 1863, the abstract was served on the defendant; that it was afterwards corrected and served again about the 13th of October, thereafter, and that defendant had taken no objection to it.

Plaintiff was mortgagee in fee of the premises under an indenture of mortgage from Fuller, made and executed before the expiration of the term.

The ejectment summons issued on the 28th of April, 1864, and was served on the 30th of the same month. Before the writ was sued out possession was demanded of the defendant but he refused to give it up. He was also served with a notice informing him that he would be required to give security for the costs and damages in the action.

The defendant appeared to the writ and put in a notice of title, by which he denied the plaintiff's title and set up title in himself under the agreement to purchase.

J B Read shewed cause to the summons. He insisted on the right to purchase, upon which the defendant had acted, having put an end to the relation of landlord and tenant between the parties, and therefore the defendant, although he admitted he was holding possession without a legal title, was yet not holding over his possession as a tenant after the expiration of his tenancy, and if so could not be called upon to give the security demanded of

him, but whatever Fuller might have been entitled to, this claimant was never entitled to as he was not the lessor.

H. Cameron, for the plaintiff, contended that the existing demise was not put an end to at law upon the election made by the defendant to purchase, that this lease expired by efflux of time, notwithstanding the election so made, and the defendant having remained in possession after the expiration of his tenancy, was a person holding over within the meaning of the statute he referred to. *Robinson* v. *Smith*, 17 U. C. Q. B. 218; *Jenrihan* v. *Gallagher*, 9 Grant, 488.

ADAM WILSON, J.—The defendant had a term created by deed for three years, from the 15th of May, 1860, which would therefore continue to subsist for that period as a valid and legal estate, unless expressly determined by surrender or other effectual method. The defendant contends that the election which he has exercised to purchase the property in fee simple, has put an end to the term of years, so that from the time when he gave notice of his election to purchase, he no longer stood in the relation of tenant for years to the owner of the reversion, but in the character of a vendee of the freehold, and when the three years expired by lapse of time, that he did not then hold over as tenant against his landlord, but was in possession as such vendee.

In case the term or interest of any tenant of any lands, holding the same under a lease or agreement in writing for any term or number of years certain, or from year to year, expires or is determined either by the landlord or tenant, by regular notice to quit, and in case a demand of possession be made upon the tenant or any person holding under him, and in case the tenant or person refuses to deliver up possession, and the landlord thereupon proceeds by action of ejectment to recover possession, he may, at the foot of the writ, address a notice to the tenant or person requiring him to find such bail if ordered by the court or a judge, (Con. Stat. U. C., cap. 27, s. 57.) Upon the appearance of the party and upon the landlord producing the lease or agreement, &c., and upon affidavit that the premises have been actually enjoyed under the lease or agreement, that the interest of the tenant has expired, and that possession has been lawfully demanded, the landlord may move the court or apply to a judge for a rule or summons for the tenant or person to show cause why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which may be recovered by the claimant in this action, and the court or judge may, on cause shewn, or on affidavit of the service of the rule or summons, if no cause be shewn, make the same absolute in whole or in part, and order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to find such bail with such conditions, and in such manner as shall be specified in the rule or summons or the part of the same so made absolute (sec. 58).

When the defendant elected to buy under the provisions of the lease he did not then necessarily and immediately put an end to his estate for years. In equity, no doubt, he did so, or perhaps it might rather be that he would do so or not, according as the vendor would or would not be able to perfect the title. Until it was known whether this would be done or not the term would be in suspense and the rent also as consequent upon it. It might not be beneficial to the tenant that his term should be absolutely determined by his election to purchase without any regard to whether it was to the benefit of his purpose or not, for in this manner he might lose the interest in a long beneficial leasehold, merely by electing to buy the reversion, while the vendor might never be able to perfect his title to it. But during the time of the treaty for the purchase of the reversion, the term and rent would, in equity, probably both be suspended, and the tenant would, during such suspense, be in as a vendee and pay interest instead of rent. *Townley* v. *Bedwell*, 14 Ves. 591. Besides this, it is clear that Fuller had first to make a good title to the defendant before their relative positions were to be altered, for he is to convey free from all encumbrances, and the defendant is to pay the purchase money after electing to purchase, and immediately upon receiving such conveyance free from all encumbrances.

The mere election to purchase, particularly where from a title having to be first made perfect by the vendor, or from any other cause the tenant may never be bound to accept the reversion, does not operate as a surrender of the term. The term still subsists (*Doe dem. Grey* v. *Stanion*, 1 M. & W. 695), and rent is still distrainable at law for the same. See also *Furle* v. *Darby*, 15 M. & W. 601. The term however would in this case expire by efflux of time on the 15th of May, 1863. The question then arises, to what claim is the defendant's prolonged possession referrable. Is it in right of his agreement to purchase, or is it a mere tortious holding over after the expiration of his tenancy? He was never let into possession as a vendee. He had the right of possession as a tenant when he elected to become a vendee, and his holding over after the term cannot, without the consent of his landlord, be converted by the defendant into an actual assent by the landlord to the rightfulness of such an occupation commenced at a time when the landlord could neither give nor withhold his consent.

It appears from the papers filed that the defendant, whatever the landlord meant, intended to keep the possession as a vendee, presuming he had the right to do so, but I think the affidavit filed requires me to consider the proceedings of the defendant with a great deal of caution.

In an ordinary case I might feel much difficulty in saying that the possession of a person having the right to purchase and having elected to purchase, being in possession for about one year after the determination of his lease before the landlord disputed his possession, and negociating all the time respecting his right as vendee, was and could only be the possession of such person as a tenant wrongfully holding over. Yet on the facts of the case, and the character of the defendant's possession not being a fact or act in law, but a matter of fact only, to be ascertained and determined by the circumstances, I do not think I can say that his character as tenant has ever been clearly and unequivocally altered, so that I think I ought to hold that the defendant is still a tenant wrongfully holding over the possession against his landlord, and that he is within the provisions of the statute in question.

I find no difficulty in extending the same rights to this claimant, who is a mortgagee in fee from Fuller the lessor, under a mortgage executed before the defendant's lease expired, which I would have extended to Fuller had he still continued the landlord, although this is the ground upon which Mr. Read most strongly opposed the present application.

The defendant must therefore be ordered to find security for the equivalent of the rent, at $200 a year, from February, 1863, when it was last paid, till November, 1864, when possession may, if it can be, be recovered, making $350, and in the further sum of $100 for the costs of the suit, making a total of $450.

The recognizance will be in a penalty in double the amount conditioned for the payment of the costs and damages of the suit The two sureties must also become responsible in the like penalty, but in the same recognizance jointly and severally for the due payment of the costs and damages of this suit.

Order accordingly.

TORRANCE ET AL v. HOLDEN ET AL.

Relief of bail—Defendant not charged in execution.

The fact that a plaintiff has not charged in execution within two terms after judgment a debtor who has given bail to the action, is no ground for ordering an *exoneretur* to be entered on the bail piece.

(Chambers, July 13, 1864.)

R. A. Harrison obtained a summons calling on the plaintiffs to shew cause why an *exoneretur* should not be entered on the bail piece in this cause, on the ground that plaintiffs had not used due diligence in proceeding to charge one of defendants in execution, and on grounds disclosed in affidavits and papers filed.

The action was commenced by writ of summons on 17th November, 1863. On 16th December following a writ of capias for the arrest of defendant was issued, and on 21st of same month, defendant having been arrested, put in bail to the action. On 14th January, 1864, plaintiffs entered up final judgment, but allowed the terms of Hilary and Easter to elapse without charging defendant in execution.

J. R. Whitley shewed cause, contending that the remedy of the bail was to surrender their principal in order that he might, if not charged in execution in due time, be discharged out of custody.

R. A. Harrison, in support of the summons, argued that it is the duty of a plaintiff to proceed with all reasonable expedition against a defendant on bail, and that allowing two terms after judgment without charging defendant in execution was not proceeding with reasonable expedition. He referred to Petersdorf on Bail, 419, Rule 99, Har. C. L. P. A., 837; 1 Chit. Archd., 823; *Brash* v. *Latta*, 5 U. C. L. J. 226: *Curry* v. *Turner*, 9 U. C. L. J. 211.

DRAPER, C. J.—I do not find any authority for entering an *exoneretur* on a bail piece, on the ground that defendant has not been charged in execution within two terms next after the entry of final judgment. The bail can certainly relieve themselves by surrendering their principal, and i. .e, being in custody, is not charged in execution within the time required by law, he can obtain relief. I must decline making any order on this summons.

Summons discharged.

SALTER v. MCLEOD.

Interpleader—Application to rescind original order on the ground of delay—How styled—Costs of the day—How and when obtained.

A summons to rescind an interpleader order directing an issue to be tried as to the ownership of disputed property must be styled in the original cause, and not in the interpleader suit, which is a mere collateral proceeding to the original cause.

No costs of the day for not proceeding to trial pursuant to notice in an interpleader suit will be allowed till the termination of the proceedings.

(Chambers, July 16, 1864.)

This was an interpleader issue.

Defendant obtained a summons calling on the plaintiff to show cause why the order of Chief Justice Richards, directing the trial of the issue, should not be rescinded, on the ground of delay in proceeding to the trial of the issue, and why plaintiff should not be ordered to pay to defendant the costs for not proceeding to the trial of the issue at the last spring assizes for the county of Essex.

Certain stock in a gravel road had been seized by the sheriff of the county of Essex, in a suit of McLeod against Rankin, as being the property of the latter, and so liable to execution. The stock, shortly after seizure, was claimed by the plaintiff, as executrix of Paul J Salter, deceased. The sheriff thereupon applied for relief, and an order was made by Chief Justice Richards, in the usual terms, directing an issue to be tried at the then next spring assizes for the county of Essex, wherein Maria Salter should be plaintiff, and the execution creditor, McLeod, defendant; and the question to be tried, whether, at the time of the delivery of the writ of execution to the sheriff, the stock was the property of plaintiff or of Arthur Rankin, the execution debtor. The issue was tried at the spring assizes for 1863, and resulted in a verdict in favor of the plaintiff in the issue. It was afterwards set aside, and a new trial granted. Plaintiff gave notice of trial for the fall assizes of 1863, but afterwards countermanded it. In February, 1864, defendant made application for a change of venue, but his summons, obtained for that purpose, was discharged.* He then summoned a special jury for the last spring assizes for the county of Essex. Plaintiff gave notice of trial, and entered his record, but, owing to the absence of Arthur Rankin, a necessary and material witness for plaintiff, withdrew it. Hence the alleged delay and claim for costs of the day.

John Paterson showed cause, contending that the summons was irregular, and should be entitled in the original cause of *McLeod* v. *Rankin;* and that under no circumstances could an order be made for costs of the day, or any other costs, till the final determination of the interpleader issue.

John O'Connor supported the summons.

RICHARDS, C. J.—The objection is taken, that the application to rescind the interpleader order must be made in the original action.

I think the objection must prevail, as the interpleader proceeding is one springing entirely from the original action. It seems that any order granted in that action must be on an application in it, and not on the collateral proceeding.

I think that, though possessing many of the characteristics of an action, the interpleader proceeding is not strictly a suit in the eye of the law, and, not being commenced by a writ, was not formerly a matter in which error would lie.

In *King* v *Simmonds*, 7 Q. B., in error, Tindal, C. J., at page 311, said, "In effect the feigned issue and judgment thereon is no more than an interlocutory proceeding in another suit, in the nature of an interlocutory judgment, wherein the court are subsequently to act in disposing of the rights of parties; and it has already been decided that the judgment so called * * * is not a judgment to be entered on record in the ordinary way, but in the special manner pointed out * * *."

In the view here expressed, the feigned issue is considered like an interlocutory proceeding in *another action;* and if this be correct, then the application to set aside the order granted in the original suit cannot properly be made in the interpleader proceeding, it being in effect like another action.

Then, can the costs of the day be obtained in the interpleader proceeding, for not proceeding to trial pursuant to notice? *Hood Bradbury*, 6 M. & G. 981, expressly decides that such an application cannot be granted. Maule, J., said, "The rule is settled, that no costs on interpleader motions are allowed until the proceedings have terminated."

I think the summons must be discharged with costs. The defendant, however, will be at liberty to apply in the original suit to rescind the interpleader order for not trying the issue within a reasonable time; and the judge who hears the matter discussed will then decide whether he will rescind the order or allow the plaintiff to take the issue down again to trial upon terms.

This seems to be the mode of terminating the proceedings suggested by the late Mr. Justice Burns, in *Sewell* v. *The Buffalo and Brantford Railway Company*, Co. 3 U. C. L. J. 29, 30.

Summons discharged with costs.*

RAMSAY ET AL v. CARRUTHERS.

Con. Stat. U. C. cap 73—Property of woman married before 4th May, 1859—How far liable to execution for husband's debts—When to be seized.

The property of a woman married before the 4th May, 1859, without any marriage contract or settlement, is protected as against creditors of her husband, whose claims were contracted *after* 4th May, 1859, and not otherwise.

But where the seizure for a debt contracted before the 4th May, 1859, was not made in the lifetime of the wife, it was held that the property having passed by her death to the next of kin, under the Statute of Distributions, was not liable to be seized by the creditors of her surviving husband.

His interest, however, under the statute, as husband surviving, and that interest only, was held to be liable to the execution.

(Chambers, July 19, 1864.)

This was an interpleader summons, obtained at the instance of the sheriff of the united counties of York and Peel, in consequence of two claims made to goods which he (the sheriff) had seized in this case as the goods of the defendant.

The notice of claim was in writing, and is as follows:—"Take notice, that the goods seized by you (except the piano) in the case of *Armour* v. *Carruthers*, belong to the estate of the late Mrs. Carruthers, of which F. F. Carruthers is sole administrator; and that the said piano belongs to Miss Georgina S. Carruthers; and that unless you relinquish the same at once, an action will be brought against you therefor."

The defendant, in an affidavit, of the 17th June last, swore: that the goods seized in the house occupied by him, on Sutton street, were not and never have been his goods and chattels; that with the exception of the piano, some music and other books, and several small articles, which are the exclusive property of his daughter, Georgina Sophia, he (the defendant) claims all the rest of the goods and chattels in the house and premises, and holds the same as administrator of the estate of his late wife; that the goods and chattels so seized are not nor is any part thereof his property, but belong exclusively to the said estate; that he is in debt to the estate for money drawn from the bank, belonging to said estate, over and above the value of his interest therein; that his daughter, Georgina Sophia, enjoys her own property entirely independent o. the defendant; and that he holds letters of administration to the estate.

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* 10 U. C. L. J. 76.—EDS. L. J.

* A summons was afterwards obtained in the original suit, as above suggested, but discharged on the term. of the payment of the costs of the day, payment of costs of the application, and undertaking to proceed to trial at the fall assizes.—EDS. L. J.

The defendant, in an affidavit of the 4th July, swore, in addition, that the piano was originally purchased for his daughter by her late mother, with her own individual monies, and was presented to her in the month of June, 1862, on her coming of age; that his wife died in the month of April, 1863; that at the time of her death she left money in the bank, in London, England, and which he drew out through the Bank of British North America here, as administrator, amounting to about $640, of which sum he used for his own purposes about $480; that the furniture and effects in the house he valued at about $400, exclusive of the piano; that there are three children, issue of his said marriage; that the income enjoyed by his wife during her lifetime was derived from property in Russia, left by her father in the hands of trustees, for the support of his several daughters, free from the debts, control or engagements of their husbands, and the same was remitted periodically to each of them, his wife's income being drawn here through the Bank of British North America, upon her own personal identification and receipt; that no portion of her income or property was at any time reduced into his possession, or that he had or ever could exercise any control over the same; and that the said goods and chattels were bought by his wife, with her own monies, and he never was the owner of the same.

Georgina S. Carruthers made affidavit, with respect to the piano, "the music books, several other books, and a great many articles of ornament or otherwise, standing about the room," to the like effect as her father.

The defendant, in an affidavit of the 12th July, swore, after repeating partly what had been before stated, that the piano in question be returned as the property of his wife in the schedule of her property filed for administration, but it was done in forgetfulness, and while he was in distress of mind; that since his property was sold under execution by A. H. Armour, in 1858, he has never possessed nor owned any goods or chattels of any kind whatever; that he never had possession of or control over any portion of the income of his wife, and in the use of it he acted only under her own immediate dictation; that his wife purchased all the goods seized in the cause with her own monies, on her return from England in 1859, and subsequently; and that none of the goods were reduced into his possession, further than his use of them in his house may amount to such.

Mr. Kerr made an affidavit that judgment was entered by Armour against the defendant about the 28th April, 1857, on a cognovit given in 1856, for £404 16s. 6d.

Burns, for the claimants, showed cause, contending that the goods, having been the separate estate of the wife, could not—as the marriage was before the 4th May, 1859, and the debt in question was contracted and judgment recovered against defendant before that time—be taken for the debts of her husband; and that the piano and music books, &c., claimed by Miss Carruthers, could not at all events be taken by the sheriff for the defendant's debts, as they were a gift to her direct from her mother, who had bought them with her own means, and had presented them to her daughter more than two years ago

Crombie, for the execution creditor, contended that there could be no exemption in this case, as the marriage was contracted and the debt incurred before the 4th May, 1859, and the goods never were properly settled as the separate estate of the wife.

Adam Wilson, J.—The defendant states, in his affidavit filed, that all the property in question was bought by his wife, in 1859 and since that time, with monies the proceeds of her own personal estate.

A woman, since the 4th of May, 1859, married before that day, may, notwithstanding her coverture, and although there be no marriage contract or settlement, have, hold and enjoy (besides her real estate) "all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts and obligations contracted after the 4th of May, 1859, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried—any law, usage or custom to the contrary notwithstanding," Con. Stat U. C. cap 73, sec 2

This being a debt not contracted after the 4th May, 1859, but long before it, and a judgment entered also against the husband for the amount long before that day, the property of the wife, provided for in the above section, could, in the lifetime of the wife, be taken for her husband's debts, in precisely the same manner since the 4th of May, that it could have been taken before that time; and in what manner and to what extent that could have been done before the passing of the act, appears from the cases of *Carne* v *Brice*, 7 M & W. 183; *Tugman* v. *Hopkins*, 4 M. & G. 389; in the first of which cases it was held that the goods which a wife had bought with the monies of her own personal estate, could at law be seized for her husband's debts.

In this case, however, the seizure has not been made during the lifetime of the wife, but since her death; and although by the section just referred to the wife's property may be taken for her husband's debts, under the circumstances provided for under that section, yet there is in fact, since the 4th May, 1859, such a condition of things as a separate personal estate of the wife, which she is to have, hold and enjoy, notwithstanding the absence of a marriage contract or settlement, in as full and ample a manner as if she were sole and unmarried.

The defendant's wife, then, having been entitled in law, since the 4th May, 1859, to the full possession, control and enjoyment of her own personal and separate property, received certain sums of money as part of it, and with such monies bought certain goods for her ordinary household and family purposes. The money was her own when she got it, subject to its liability to seizure for her husband's debts contracted before the 4th May, 1859. The goods which she bought with her money were her own also, subject in like manner to be taken for her husband's debts. But during all the time they were liable to be taken, they were not taken They could only be taken for such purpose while they were the *wife's* property: the moment they ceased to be hers, they ceased to be liable for her husband's debts.

Now, upon her death, the goods, *as her property*, passed to her husband and children, under section 17 of the act, in like manner as they would have been distributable among the wife and children in case the goods had been the property of the husband, and he had died intestate.

I think, therefore, that if, under the prior law, the goods of the wife, which had not, in the husband's lifetime, been reduced into possession by him, could not be taken after his death as his goods to satisfy his debts, neither can these goods in question be taken under the present execution since the wife's death; for the charge was not enforced when it might have been enforced, and the property and right of property in the goods, which were exclusively in the wife, have now passed to others.

This charge was not a specific one, following the goods, and attaching upon them, into the hands of the next of kin, or into the hands of any person to whom they might lawfully have come before the charge was enforced and made operative by seizure; and although it might by the statute have been enforced against the wife in her lifetime, it by no means follows that it can be enforced against her next of kin after her death, as if it were still her property.

Under the former law, the personal property of the wife, which had not been reduced into possession by the husband during the coverture, did not pass to the husband as his own by virtue of his marital right, but he could make it his own by taking out letters of administration to her estate, when he became entitled to all such property under it as her next of kin.

So, under the former law, the wife surviving her husband took her own choses in action not reduced into possession by him, in her own right, against the representatives of the husband (Co. Litt. 351; *Langham* v. *Nenny*, 3 Ves. 469; *Seawen* v. *Blunt*, 7 Ves 294; *Wilkinson* v. *Charlesworth*, 11 Jur. 644).

This being so, I find great difficulty in holding that the present property can be followed into other persons' hands, when that property was not subjected to the charge under the statute while it was the wife's property.

Under the former law, the wife's choses in action, not reduced into possession by the husband in her lifetime, vested in him by his administering to her estate, and the right to them vested in him by survivorship and before administration, *Humphrey* v. *Bullen*, 1 Atk. 458; *Elliott* v. *Collier*, 3 Atk. 527. But this is not so as respects the wife's separate property under the recent

statute The husband had no title to it, and could by no act of his acquire any such right during the coverture, and he has none now, more than as one of the next of kin by his survivorship If property of the wife, not reduced into possession by the husband, may be taken on an execution against his goods, and yet, if not so taken in the husband's lifetime, cannot be taken after it, because it is then vested in the wife, much more so should the husband's creditor be prevented from following that property after the wife's death, which was hers absolutely while she lived, notwithstanding the marriage, and which the husband could not by any act whatever control or dispose of during the coverture.

To give the creditor the right of following the wife's separate property under this act after her death, which he had never sought to charge during her life, would be a greater injustice than to permit her property not reduced into possession by her husband in his lifetime to be followed as his after his death; because in the latter case he could have made the property his own at any time by an act done by him for that purpose, without his wife's consent, and the creditor could have done so too at any time during his lifetime, even against the husband's consent; while in the former case the husband never could have made the property his own by any act whatever of his, unless with his wife's consent (*Parr* v. *Newman*, 4 T. R 638); although the creditor could have done so against the husband's consent, and against the wife's consent too; but not having done so in their joint lifetime, he could not, I think, do so after the husband's death in the one case more than in the other; and he cannot do so for the like reasons in the present case; and for the same reason after the wife's death, when *her* property is then transferred to other persons, in whose hands I do not conceive it to be charged with any specific lien or claim of or for the husband's debts not enforced or acted upon before his wife's death.

The goods in question having been the wife's personal and separate estate, cannot, therefore, in my opinion, after her death, be, as they could in her lifetime, followed for her husband's debts. His own share of them, under the statute, may, I think, be attached; and probably his indebtedness to the estate beyond the value of his share does not legally deprive him of his property in such share, or subject it to a lien, as it would if it had been partnership property.

It is not very material to consider the effect of the alleged gift of the piano by the mother to her daughter; because, although it may be contended that the gift should have been treated as invalid against the father's creditors during the mother's lifetime, yet the creditors did not then interfere; and even if it be considered as part of Mrs. Carruthers' personal estate, it will be within the like protection as the rest of the estate.

I am not at all prepared, however, to say that the piano might not have been presented as a gift by the mother to her daughter, and have stood available as a gift against the claims of the father's creditors, if made fairly and honestly, and not for the mere purpose of defeating or delaying his creditors; but I see no reason why it should not stand now. For the reason before given, I think the creditors cannot impeach the gift since the mother's death.

The property presented to Miss Carruthers should, according to my view, be omitted from the assets of the estate of Mrs Carruthers, in computing (if it be necessary to compute) the value of the property, for the purpose of determining the worth of the defendant's share in the same.

If the parties are content to accept of my decision, I shall direct that the value of the defendant's share of his wife's personal estate (omitting all the property given to Miss Carruthers, as before stated) be subjected to the execution in this cause, and that the rest of the property be acquitted from this execution. But if the parties are not willing to accept my decision as final, then I order that an issue be tried, for the purpose of settling whether the defendant as administrator as aforesaid, and Miss Carruthers, are not entitled to the possession of the property as against the plaintiffs; in which proceeding it would be better, as there is probably no dispute as to facts, that a case should be stated for the opinion of the court.

If an issue be accepted, I will settle the terms of the order; and probably it can be arranged that only one suit may be brought, in which the two claims of the defendant as administrator, and of Miss Carruthers as donee may be fully protected and represented.

I order that no action be brought against the sheriff by any of the parties now before me, nor by any of them against any of the others of them.*

CHANCERY CHAMBERS.

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

BOWMAN v. BOWMAN.

Garnishee order—Attachment of debts in hands of administrator.

A debt due to an administrator in his representative character cannot be attached to answer a debt due by the administrator in his private capacity.

Whitley moved to set aside a garnishee order obtained by the defendant attaching all debts due by the defendant Summerfelt to the plaintiff on the grounds stated in the judgment.

Fitzgerald, contra.

SPRAGGE, V. C.—The plaintiff filed her bill in this cause as administratrix to the estate of her late husband, William Robert Bowman: the bill charges the defendants with having possessed themselves of portions of the estate, and seeks an account from them.

This cause and all matters in difference between the parties was referred to arbitration, and the arbitrators found that the plaintiff had no cause of action or suit against the defendants Bowman, and awarded against her their costs of suit, and of the reference and award. As to the defendant Summerfelt, they found that the plaintiff had cause of suit against him, and awarded that he should pay to her $266 39 cents, which sum they found that he was liable to pay to her as the administratrix of the estate of her husband.

The defendants Bowman obtained a garnishee order—Summerfelt being the garnishee—that all debts due by him, the garnishee, to the plaintiff, should be attached to answer an amount therein referred to, being the costs awarded to be paid by the plaintiff to the defendants Bowman.

The principal question raised upon this application is, whether the sum awarded to be paid to the plaintiff can be attached to answer the sum payable by the plaintiff to the defendants Bowman, and I am of opinion that it cannot.

The point was in effect decided in the old case of *Hodge* v *Cox* (Cro. Eliz 843), referred to in Lock on Foreign Attachment, p 45, as authority for this passage: "A debt due to a deceased person cannot be attached on a plaint against his personal representative, although he be sued under that description, unless he be sued for a debt due from the deceased."

In the late case of *Hirsch* v. *Coates* (25 L. J. C. P. 315) the judgment creditor had, before judgment, assigned certain debts which were afterwards the subject of garnishee proceedings, and it was held that they could not be garnished In the course of the argument Cresswell, J., asked: "Why should we give a larger operation to the 61st section than to an assignment in bankruptcy, the object of which is to give everything possible to the creditors?" And Willes, J., in giving judgment took the same ground; and the Chief Justice said: "and it must be a debt in respect of which the judgment debtor has a beneficial interest." In *Westoby* v. *Day*, 22 L. J Q B. 418, one of the grounds of decision was that the judgment debtor must have a beneficial interest in the debts garnished, and not be a mere trustee

Here it is not contended but that the costs payable by the plaintiff to the defendants Bowman is a personal debt against the plaintiff, and not against the estate; and that the debt sought to be garnished is a debt not due to the plaintiff personally, but to the estate of which she is administratrix; and it follows, I think, that to allow that debt to be garnished would be to pay a private debt of a personal representative with the moneys of the estate. It is not shewn nor even alleged that the plaintiff is beneficially interested in the money payable by Summerfelt; it is alleged in

* The usual interpleader order was taken out, but the suit has been settled between the parties.—EDS. L. J.

the bill and for aught that appears it is the fact that there are several creditors to a large amount now pressing for the debts due to them by the estate; such creditors might have great reason to complain if a debt due to the estate, instead of being applied in paying them, were applied in paying the costs awarded to be paid by the plaintiff.

The case as presented to me is the naked one of a debt due to an estate being sought to be applied in payment of a debt due not from the same estate but from the personal representative of the estate; a point which I think could admit of no reasonable doubt even if there were no authority against it.

The garnishee order must be discharged with costs.

MANNING v. CUBITT.

Production of papers—Principal and agent—Parties.

Three members of a vestry being appointed a building committee, and by it, one of the three treasurer thereof: the treasurer being a sub-agent cannot be compelled, in a suit, by a member of the vestry on behalf of himself and all other members except such treasurer, who was the defendant, to produce papers in his hands as treasurer—the other members of the committee being necessary parties.

Semble where a defendant admits, in his answer, the possession of documents, and in answer to an order to produce files an affidavit excusing production, the answer and affidavit must be read together.

The argument came on in Chambers on motion for an order *nisi* or commitment for non-production under an order to produce.

Cattanach for the plaintiffs.

Moss for the defendant.

ESTEN, V. C.—This is a suit by a member of the vestry of St. John's Church, Darlington, on behalf of himself and all other members of the vestry except the defendants, for an account of the dealings of defendant Cubitt, in his character of churchwarden, which he formerly was, and for the specific delivery of all books and papers in his possession connected with that office. In this suit an order was obtained directing Mr. Cubitt to produce all papers and documents in his possession relating to the matters in question in the cause in the usual terms. He resists the production of certain documents which are in his possession, and the reason he assigns for such refusal is that the documents in question do not belong to the vestry, but to certain persons composing a committee which had been appointed to superintend the erection of the church, of whom he was one, and of whom he had been appointed the treasurer. Supposing these documents to be in his possession as such treasurer, this application, which was for an order *nisi* for his commitment, would raise the question, whether if a person appoints another his agent and he appoints a sub-agent and delivers to him documents connected with the business of the agency, the principal could file a bill against such sub-agent alone, and without making the agent a party, for an account of his dealings as agent, and to compel the production of papers in his possession as such sub-agent; and I should think that such a suit could not be maintained, nor the sub-agent compelled to produce the documents so in his possession, although indisputably the property of the plaintiff in a suit so constituted. Mr. Cubitt states that these documents are the property of the building committee. I should doubt the correctness of that assumption, except perhaps as to the private account book. It can hardly be doubted that the persons composing the building committee would, if present, be compellable to produce these documents; but I think their agent could not be so compelled in their absence; and if that be so, it can make no difference that he happens to be one of the building committee himself, or to have filled the office of churchwarden at the same time that he acted as treasurer of the building committee. It does not however appear that he has these documents in his possession as treasurer. It is quite consistent with the affidavit that they might have been surrendered to the vestry by the building committee, and that they may be in the defendant's possession as late churchwarden, in which case he would be compellable to produce them. I will not grant the order *nisi* at present; and the defendant may have an opportunity of amending his affidavit. I may add, that it appears to me that where the defendant has by his answer admitted the possession of documents material to the question, and afterwards the common order is obtained under which the defendant produces an affidavit excusing the non-production of documents, the answer and affidavit must be received together, and the court will form its conclusion upon both combined.

In the present case the answer seems to admit the possession of two documents as churchwarden, which the defendant by his affidavit claims to withhold, but under such circumstances I should think greater weight was due to the affidavit.

MASTER'S DECISION.

PECK v. CUSTEAD.

Mortgage of lease of nursery grounds—Mortgagor and Mortgagee—Redemption—Contract made in Ohio sought to be enforced in Canada—Rate of interest—Mortgagee in possession carrying on business and making advances and improvements, on the supposition that redemption will never be asked for—Subsequent charges for salary and remuneration for conducting business—Mingling of accounts—Report.

Bill filed to redeem a mortgage.

The ordinary decree as in redemption cases was made with a reference to the master at Goderich to take the account.

The report was accordingly made, and was accompanied by the following judgment on settling it. The facts of the case sufficiently appear therein.

R. COOPER.—The plea is, that the plaintiff is entitled to redeem on payment of principal and *interest*, and a material question is, at what rate the interest should be charged. The contract was in Ohio, in April, 1854, and the note, which by the language of the assignment is made part of it, calls for ten per cent. Is this to be cut down to 6 per cent.? The decree is made in February of the present year, and I must take it that the Court had in view the law as it now stands, and founded its decree in aid of the mortgagor in default, upon what had occurred between the parties, as well in the foreign country as here where the property is, and where the parties have dealt since, upon the footing of the mortgage transaction, which took place in Ohio in 1854. The contract was not in violation of the laws of the place where it was made; but it is contended that the laws of the country where the contract is sought to be enforced should govern. There is much in the argument of the defendant that it is not he who here seeks to *enforce* any such contract. Mistaking the law, he looked upon himself as an absolute owner under the assignment made in Canada; and default being made in the payment of the debt, but for the equity dealt out by this Court in aid and ease of the plaintiff, the property had become absolute in the defendant, although he did not, when spoken to on the subject, object much to be redeemed, but only looked upon his offers to that effect as matters of favour. There is no evidence that, until this argument took place, the ten per cent. was objected to. The contract for it was in a manner confirmed in Canada by the conduct of the parties, and I can see no departure from the law of Canada in carrying out a contract which was good where it was made, which was secured by property in Canada, and which was recognized in Canada after the law was so changed as to assimilate it, as far as necessary for such a contract as this, in both countries, and after the Court has refrained from giving me any direction to cut it down. If I am not to allow ten per cent. what is to be allowed? It is contended that the proper allowance is that which the law of Canada prescribed at the date of the transaction. This, it seems to me, cannot be right. The decree is not for the redemption of any mortgage made in Canada. The security decreed upon was given in Ohio, and the Court here directs me to take an account of *that* mortgage transaction. It cannot be said that it was only converted into a mortgage in Canada. The instrument subsequently executed in Canada was absolute, and upon that alone no decree for redemption would have been pronounced. Without the clause for redemption in the instrument executed in Ohio this account would not have been taken, and I am directed to take an account of debt and interest, as I understand it, upon *that* mortgage transaction. It was argued that the account must be governed by the law of the country, as it then was, where the *property is situate*. The cases cited in support of this view are cases where the bargain was for security on real estate, or where

the contract was entirely in the one country. Here the contract was in reference to a mere chattel interest, and the bargain, though begun in the foreign country, was carried into effect in the other, and then a Court in this country decrees the redemption. As to the place where the contract was to be performed, that was as much one place as the other. The instrument called for payment in Ohio though the chattels were here; and the simple fact is, that the Court here has thought the transaction should be looked at as single, and, it seems to me, has left me no power to depart from its terms. The Court above, to which, as I understand, this report is going, can readily cause this mode of calculation to be corrected if I am wrong. The money was worth ten per cent., the parties contracted for it, and unless the law is plainly against its being recovered, which I do not see, it would be inequitable to refuse it. And it must be carried on in the account on that debt to the close of the account, while six per cent. only is allowed on the "further advances," and the two classes of charges will be separated in the account annexed to the report.

The next question to dispose of is, as to the allowance for the wages or salary of the mortgagee. It is clear that the mortgagee in possession can only recover any remuneration when the case is exceptional in his favour. This case is not so. If it differs from decided cases, it does so in this particular, in such a way as tells against the mortgagee. In his account he gives credit to the mortgagor for receipts, and charges himself with proceeds, and he supports his method of presenting the account by showing that it was necessary to carry on the business somewhat expensively (importing new and superior stock), in order to keep it up and collect his own money. On that money he is receiving, as I have already stated, ten per cent. If he could charge $600 a year, partly for employing additional capital and labour, so as to get his money in more speedily—if he could do this at the expense of an outlay to the extent of $600 per annum—what could hinder a capitalist in a similar position from spending $6,000 or $60,000, and thus placing the mortgagor in a hopeless position as to his redemption? It is to prevent this that the well known general rule against such allowances is applied, and especially where such expenditure might involve large risks to the mortgagee on transactions not governed by his judgment nor under his control. The authorities may appear to be severe against mortgagees in possession on the subject of expenses for management; but this is, it appears to me, just the case to which the authorities should apply. The salary is not only charged for the management of the thing mortgaged, but for the management of an additional business in which the mortgagor had no voice. There is, in fact, no mortgage of a mercantile business, but only of certain chattels, in the deed of April, 1854. The importation business is separated from the other in this report, the consequence of its being impossible to find how much of the charge relates to the mortgaged trees and how much to the business now excluded from consideration—these consequences must fall upon the accounting party. The $600 a year must be disallowed. But the disbursements for working the nursery ground should be fairly allowed. Actual necessary expenses only should be allowed to the defendant.

The defendant claims certain payments in the nature of subsequent advances on the mortgage security. I think that these advances were made in good faith on the security of the mortgaged lease, and should be allowed as proved. In other words, if the defendant had not felt himself secured in that way, he would have made no such advances. The payment of the rent in arrear was the very means of preserving the things mortgaged, and was clearly a payment which should be tacked to the first debt, and the same may be said of the other advances now allowed. But there is no agreement as to interest upon the further advances, and interest must therefore only be charged at the rate then allowed in Canada.

Several charges are made for commission, freight and the like, in selling and completing the sale of trees. Now it is plain from the evidence of the defendant himself that much of this expense has accrued from dealings with the after-acquired property, what is called the "subsequent importations" of trees, which were imported for the very proper purpose of enhancing the business of the nursery. It is evident that all this was done by the defendant under the impression that all was, or was to be, his own, and with no expectation that such a decree as this would ever be pronounced. Among other evidence of this is the fact that the charge for salary is not in his books, but is only made in his present account under the decree. The decree *does* pronounce this to have been a mortgage throughout of an unexpired term of a property of peculiar value, and the value of which, having reference to the trade might fluctuate very much. The mortgagor might come in at any time, for the agreement of April 1854 contains an express clause for redemption, and, what is equally important, clearly defines the property mortgaged. Under all the circumstances, though every possible consideration, within the bounds laid down by the authorities, as to expenditures and the like, should be shown to a mortgagee who, being ill-advised and in a country to which he was new and whose laws perhaps he did not understand, he cannot be permitted to convert a small mortgaged property into something entirely different *in corpus* and keep his debtor at arm's length by saying—"You can never redeem, for you will now have more money to pay than you are able." It is necessary, under this decree, to separate the dealings with the importations from the dealings with the chattel property mortgaged as completely as possible, both as to profit and loss and as to outlay. To do this with accuracy as to figures, it may as well be said at once, is clearly impossible, for the accounts have not been kept separate: much is yet uncollected, and no human skill can distinguish in money the separate results. And here again, if anyone is to suffer from the mingling of the accounts it must not be the mortgagor, though he may have known that the accounts were not kept separate. The law throws upon the trustee the responsibility of keeping the accounts properly, if he has the custody of the books and the hold of the business. But this rule is not to be applied more rigidly than the cases compel us to apply it. The accounting party gives credit to the mortgagor for the proceeds of all the sales, both of old and new stock, claiming credit for all his outlay respecting both. The mortgagor seeks to have him deprived of all allowance for his outlay, and to have him charged with the full credit given in his account. This method might be just and in accordance with the practice of the court, if the transactions had been between partners, trustee and *cestui que trust*, or mortgagee and mortgagor in possession under ordinary circumstances—the accounting party knowing his position and being bound to keep accounts accordingly. But here the decree takes the mortgagee in a manner by surprise. He was somewhat misled by the mortgagor who has permitted the mortgagee to become a mortgagee in possession, and thus assume serious responsibilities, when he, the mortgagee, did not know but that he was the absolute owner (for he got an absolute conveyance in Canada) and while the mortgagor, from the position assumed throughout before me, appears, I think, to have known the relative positions of the parties well, and to have let the defendant go on with the business under a false impression until he, the plaintiff, could manage to ask to redeem on the footing of means which he may recently have obtained, but which he obviously could not command when it was necessary to pay arrears of rent to the ground landlord, Macdonald, and which was admittedly paid by the defendant. All these proceedings were known to the present plaintiff as they went on, and yet the Court has given him a most favorable decree. The accounts have been kept without reference to the defendant's true position, and it would be unjust and inequitable were he saddled with all the consequences of a literal rendering of all the entries, apparently against himself, in books which he kept for no such purpose as this accounting. For the mortgagor then to refuse the other credits for losses or charges on imports and separate business, and still claim credit for all the receipts because they are admitted in the account now brought in, of the accounting party, would not be correct. The only fair and proper course, in view alike of the terms of the decree, the decided cases and the well known equitable jurisdiction of the Court, is to separate entirely the new business and the outlay and proceeds of it, in like sums from year to year from the items accurately charged on both sides, whether by so doing the redemption money is increased or decreased. We must therefore strike off the charges for importations on the one hand and like amounts annually from the credits given on the other.

The mortgaged property and the whole transaction are both peculiar; and the decree contains no directions varying from those given in ordinary mortgage cases. There was a lease expiring, and a number of valuable fruit trees on the leased premises. These are mortgaged. The mortgagee goes into possession, and forthwith deals with the landlord, paying him the back rent, and then proceeds with the business as if it were entirely his own. The property has now changed its character. The same trees are not all there, or, if they are, they are of a different value—some improved, and some become of less value, by growth. What property, or what value of property, is to be redeemed, will be for the court to say on further directions, as well as to deal with the peculiar circumstance of the approaching expiry of the lease, and the right of the mortgagor to remove the trees on redeeming.

Several important points have arisen which, it is satisfactory to know, will receive the attention of a court of appeal; and without feeling very confident that my conclusions have been perfectly correct in a case so curiously complicated, and in which some facts and questions are strangely obscured, I have endeavored to place the report in such a shape, that any inaccuracies can be readily got at and corrected. The following cases and statutes are referred to *Harvey* v. *Archibald*, 3 B. & C. 626; *Adams* v. *Clapton*, 6 Vesey, 226; *Jones* v. *Smith*, 2 Vesey, Jr. 376; *Langstaff* v. *Fenwick*, 10 Vesey, 405; *Leith* v. *Irwin*, 1 M. & K. 288; *Chambers* v. *Goldwin*, 5 Vesey, 834; Chitty on Contracts, 710; Coote on Mortgages, 343, 356; Spence's Eq. Jur. 2 p. 629.

INSOLVENCY CASES.

(Before the Judge of the County of Wentworth)

WORTHINGTON v. TAYLOR.

Insolvency Act, 1864.

A witness appearing upon an order granted by the judge under sec. 10 sub-sec. 4, is not bound to be sworn until his expenses are paid.

The insolvent who appeared by virtue of the same order is not entitled to claim payment of his expenses before being sworn, and he may be examined before as well as at or after the meeting mentioned in sub-sec. 1 of sec. 10

(Hamilton, September 17, 1864).

The plaintiff having filed a petition under section 10, sub-section 4, obtained an order (pending the return of a petition filed by the insolvent to set aside an attachment for compulsory liquidation) for the examination of the insolvent and other persons. At the time appointed for the examination of the witnesses, R. N. Law, a witness, objected to be sworn until his expenses were paid.

McKelcan, for the plaintiff, contended that the witness must be sworn, and that he had no claim for payment of his expenses, unless allowed them out of the estate or otherwise, as the judge might afterwards order, under section 10 sub-section 6.

A. LOGIE, Co. J.—The witness is not bound to attend, or if he attend is he bound to be sworn until he is paid his expenses. The practice of the superior courts must be adopted in this court, so far as it is applicable. The provision of section 10, sub-section 6, as to the payment of the allowance to witnesses out of the estate or otherwise, must be taken to apply to the case of a witness summoned to appear by the assignee on behalf of the estate.

The insolvent was then called and objected to be sworn on the same ground.

A. LOGIE, Co. J.—He is not entitled to claim payment of his expenses before being sworn, he and his estate are in the hands of the court, he is bound to appear whenever required, and provision is made in the act for an allowance to him.

It was further objected on behalf of the insolvent that he could not be examined previous to the meeting of creditors mentioned in sub-sec. 1 of sec. 10.

A. LOGIE, Co J.—Under sub-sec 2 he may be examined at *any time* by order of the judge, as well before as after the meeting of creditors. At the meeting of creditors mentioned in sub-sec 1, the creditors have a *right* to examine the insolvent *without a judge's order*. Under sub-sec 2 they may have him examined at any other time upon obtaining a judge's order for that purpose

A withdrawal of the petition to set aside the attachment was then filed for the insolvent, and the examination was not further pressed.

WORTHINGTON v. HAMILTON.

The Insolvency Act has not a retrospective effect, so as to make an act of insolvency committed before 1st September, 1864, sufficient to support an attachment issued after that day.

Refraining from entering an appearance to an action by a creditor on a specially indorsed writ, whereby that creditor obtains judgment and a priority over other creditors is not *in itself* a procuring of his goods &c., to be seized or taken in execution within the meaning of the act: but it is open to the creditors to show such facts and circumstances as would satisfy the judge that the taking in execution was through the procurement of the insolvent.

(Hamilton, September 17, 1864).

On the return of a petition to set aside an attachment for compulsory liquidation granted in this cause, *Sadlier*, for the insolvent, contended that the attachment should be set aside, on the ground that the act has not a retrospective effect, the affidavits on which the attachment was issued shew that the act of insolvency was committed on 30th August, before the act came into force. An attachment issued after 1st September cannot be supported by an act of insolvency committed before that day (*Maggs* v. *Hunt*, 4 Bing 212). The affidavits further shew that the only act of insolvency was in allowing a creditor who sued for a just debt (for the *bona fides* of the debt is not disputed) to obtain judgment by default The mere failure to enter an appearance is not a *procuring* of his goods to be taken in execution within the meaning of the act: there must be some overt act committed by the insolvent. In *Beekman* v. *Workman*, 1 U. C. Q. B. 531, the giving of a cognovit for a just debt when pressed by the creditor, was held not to be a procuring of the goods to be taken in execution.

McKelcan, contra, contended that the words *has procured* in clause *d* of sub-sec. 1 of sec. 3 shew an intention on the part of the Legislature to give that clause a retrospective effect; on the 1st September, when the act came into force, it could have no other effect. The spirit and intention of the act must be looked at. The intention was to prevent fraud and fraudulent preferences, and such a liberal construction should be adopted as will carry out the spirit of the act. The affidavits sufficiently shew that the act of the insolvent in allowing one judgment to go by default, and defending the actions brought by other creditors for just debts, was a fraudulent preference within the meaning of the act.

A. LOGIE, Co. J.—The cases of *Maggs* v. *Hunt*, 4 Bing. 212; *Surtees* v. *Ellison*, 9 B. & C. 750; *Huson* v. *Heard*, 9 B. & C. 754; and *Palmer* v. *Moore*, 9 B & C. 754, shew that an act of bankruptcy committed after the passing of the act 6 Geo. IV. cap. 16, but before it came into force, will not support a commission issued after it came into force. The stat. 6 Geo. IV. cap. 16 was passed in May, 1825, repealing all former bankruptcy acts. It came into force on 1st September, 1825, so that between May and September there was no bankruptcy act in force, and the act 6 Geo. IV. had no clause giving it a retrospective effect. In these respects it is singularly like our Insolvent Act. In *Maggs* v. *Hunt*, a commission of bankruptcy was issued after the act 6 Geo. IV. came into force, upon an act of bankruptcy committed in July previous and before it came into effect; and the court held that the commission could not be sustained upon such an act of bankruptcy. The case is exactly in point, and I think should govern the decision of this case. Besides it would be unjust to give the statute a retrospective effect, so as to include as an act of insolvency what at the *time* of its commission might legally and properly be done. I do not think that the use of the words *has procured*, &c., in clause *d* of sub-sec. 1 of sec. 3, a sufficient indication of the intention of the Legislature to give that clause a retrospective effect, as argued by Mr. McKelcan.

As to the second point raised it appears to me quite clear that merely refraining from entering an appearance, whereby a creditor on a specially endorsed writ enters judgment by default, and thereby obtains a preference or priority over other creditors, is not *in itself* a procuring of the debtor's goods, &c., to be seized, levied on, or taken in execution within the meaning of the Insolvent Act. There must be some *overt act* of the insolvent himself. The case of *Beekman* v. *Workman*, 1 U. C. Q. B. 531, is a direct authority upon that point There the giving of a cognovit for a just debt when pressed by his creditor, was held not to be within the meaning of similar words in the former bankruptcy act. But though *in itself* such an act would not be an act of insolvency, yet

the circumstances under which the preferential judgment was obtained may be such as to satisfy the judge that the judgment was obtained through the procurement of the debtor, and these circumstances may be shewn by the other creditors. For instance, if the debtor asked his creditor to sue him, and undertook not to defend his action, but to defend other actions, so that he might obtain the first judgment; or if, without the knowledge of the creditor, finding himself pressed by others, the debtor got his own attorney to sue for the debt due to this particular creditor, and entered no appearance, though he did appear and defend other actions brought against him: in these and similar cases there could be no doubt but that the debtor procured his goods to be taken in execution. See *Aldred* v. *Constable*, 4 E. Q. 674, and the cases there cited, as to a fraudulent preference in contemplation of bankruptcy being inferred from circumstances. In this case it is unnecessary for me to determine whether sufficient facts are shewn to satisfy me that the taking in execution of the debtor's goods was through his procurement, as the attachment must be set aside on the first ground.

Attachment set aside without costs.

BAGWELL V. HAMILTON ET AL.

A banker is a trader within the meaning of sub-sec 2 of sec 3 of the act.

The fact of the trading as well as of the act of insolvency must be proved by the affidavits of two credible witnesses in addition to the affidavit of the creditor to support an attachment issued on the act of insolvency, created by sub-secs. 2, 3 & 4 of sec 3.

A trader who had ceased to trade before 1st September, 1864, cannot be proceeded against under sub secs. 2, 3 & 4. But it is not necessary for plaintiff expressly to state in his affidavits for the attachment that the defendants were traders since the act came into force.

(Hamilton, 19 September, 1864).

An attachment was issued on the affidavits of the plaintiff and one Mrs. Farr, two creditors for sums exceeding $500, shewing a demand made by them under sub-sec 2 of sec. 3, and that defendants had not paid the debts or presented a petition or called a meeting of their creditors as provided by the act.

On the return of a petition to set aside the attachment *Burton* appeared for the defendants, and *Daniel* for the plaintiff.

Burton contended that the defendants were not traders within the meaning of the act, and if they were they had ceased to be traders before the act came into force, and such trading would not support the attachment issued upon the act of insolvency, mentioned in sub-secs 2, 3 & 4 of sec. 3, and cited *Surtees* v. *Ellison*, 9 B & C. 750. And also that the trading and insolvency were not proved by the affidavits of two credible witnesses in addition to plaintiff's affidavit as required by sub-sec. 7 of sec 3. That the proceedings were irregular, the fiat for the attachment being in the names of plaintiff and Mrs. Farr, while in the attachment and declaration the plaintiff appeared alone as plaintiff.

Daniel applied for leave to amend his writ and declaration, and as to the other objections contended that a banker is a trader, and that the debt contracted while defendants were traders and still subsisting, is sufficient to support the attachment, though the defendants may since have ceased to trade, and relied on *Baillie* v. *Grant*, 9 Bing 121.

A. LOGIE, Co. J.—The Insolvent Act does not define traders or say what shall constitute trading; nevertheless traders are distinguished from non-traders, and sub-secs. 2, 3 and 4 apply only to traders. In the absence of any declaration in this act as to what shall constitute a trader, the definition of the word given in the former bankruptcy act 7 Vic. cap. 10 sec. 1 may be taken. On the ground, therefore, that a banker was formerly declared to be a trader, and also because I consider that the business of a banker in merchandizing with and making a profit out of the money, goods and effects of other persons, is to all intents and purposes a trading. I hold that a banker is a trader. The affidavits do not state the fact of the defendants being traders so fully as they ought to do, but still the trading is, I think, sufficiently stated to enable me to sustain the attachment on that ground. They are described as bankers, and the plaintiff alleges that they deposited the money with them as bankers.

The act should receive a liberal construction in matters of form so as to support the attachment, which will enure to the benefit of creditors. The variance between the fiat and the writ and declaration is, I think, amendable, and it is such an amendment as should be made.

Another objection taken is that the fact of the defendants being traders and the act of insolvency are not proved by the affidavits of two credible witnesses, as required by sub-sec. 7 of sec. 3. I think this a fatal objection. The 7th sub-section applies to all acts of insolvency as well as under the 2nd as under the 1st sub-section. Here we have only the affidavits of plaintiff and Mrs. Farr. On this ground the attachment must be set aside.

As to the other ground that the defendants had ceased to be traders before the act came into force, the case of *Surtees* v. *Ellison*, 9 B. & C. 750, appears to settle that point. In this case, however, it does not appear by the plaintiff's affidavits that the trading had ceased when they were made. The defendants state in their affidavits that the trading had ceased. On that the parties are at issue, but as the attachment must be set aside on another ground, it is unnecessary to determine this point.

Attachment set aside without costs.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

ROBINSON ET AL V. TYSON.

1. The averments in a declaration that the "plaintiff was ready and willing" to receive goods and pay for them on delivery and shipment, is a material one, and necessary to be proved.
2. Where oil, at a stipulated price, was to be delivered at the cars of a railroad depot, it was held, that a plaintiff who sued for non delivery of the same must, in order to recover, have proved his readiness to receive and pay for it.
3. Where oil is purchased in bond, the purchaser is under no obligation to give the bond required from the owner by the 47th section of the In. Rev. laws.

Marshall & Brown for plaintiffs in error.

Purviance, contra.

Error to the Court of Common Pleas of Alleghany County.

The opinion of the court was delivered by

STRONG, J.—The first and second points propounded to the court below by the plaintiffs in error, and which the court refused to affirm, may be considered together. They constituted, in effect, a prayer that the case should be taken from the jury, and that peremptory instructions should be given that the plaintiff could not recover. It is obvious that an affirmance of the points could not be justified by anything less than the fact that the declaration set out no cause of action, or that proof was totally wanting to sustain some one or more of its material averments. It alleged a contract of the defendants to deliver to the plaintiff, on board the Pennsylvania Railroad Company's cars, within a reasonable time, one hundred barrels of oil, of a given description, for which the plaintiff agreed to pay a stipulated price. It further averred a neglect and refusal of the defendants to deliver the oil within a reasonable time, and that the plaintiff had always been ready and willing to receive it and pay for it, as provided in the contract. The uncontradicted evidence proves that on the 6th day of November, 1862, such a contract was made between the parties; that on the next day following they met to arrange for the delivery and reception of the oil, and that it was then agreed the delivery should be made within two or three days, or as soon as the funeral of a person then deceased was over, and the defendants had time. It was, however, never delivered, and this suit was brought on the 28th of November, 1862. That the declaration set out a sufficient cause of action is plain, unless it was defective in not averring a demand had been made for delivery. There was proof, however, of what dispensed with the necessity of a demand, namely, that the parties fixed a time for the delivery. It may be this should have been averred in the declaration, but the absence of such an averment is no sufficient reason for reversing the judgment. An amendment would have been granted, of course, had it been asked. But it was objected there was no averment of proof of tender of the price. It was not necessary. There was an allegation of readiness to receive the oil and pay for it, and no more is required in the pleadings in such a case. Thus it is ruled in *Waterhouse* v. *Skinner* (2 Bos. & Pul. 448) that in an action for the non-delivery

of goods, the plaintiff need only aver that he was ready and willing to receive and pay for them, and a refusal to deliver, without averring an actual tender To the same effect is *Rawson* v. *Johnson* (1 East. 203), and the doctrine is repeated in *Bronsen* v. *Wyman* (4 Seld. 182). Indeed where, by the terms of the contract, the delivery and payment of the price are to be made, not at the vendor's place of business, but at some other place, there can be no actual tender, if the vendor refuses to deliver the goods. And if a tender need not be averred, it need not be proved.

But though the court would not have been justified by any defect of the pleadings, in directing a verdict for the defendants, or, in other words, in affirming their first and second points, there was a radical failure in the evidence. The averment contained in the declaration, that the plaintiff was ready and willing to receive the oil and pay for it on its delivery and shipment in the cars, was a material one, and was necessary to be proved. In *Rawson* v. *Johnson* (1 East.), already cited, the plaintiffs averred a readiness to accept and pay for the malt the defendants had engaged to deliver. This was held sufficient without stating a tender; but Lord Kenyon said that under the averment as made, "the plaintiffs must have proved they were prepared to tender and pay the money, if the defendant had been ready to receive it, and to deliver the goods." In *Porter* v. *Rose* (12 Johns, 209), it is decided that the averment of a readiness to pay, like other material averments, must be proved on the trial. *Topping* v. *Root* (5 Cowan, 404) decides the same. So does *Coonley* v. *Anderson* (1 Hill, 522). And such is the universally recognized doctrine. It is not said there must be direct proof that the vendee was present at the time and place appointed for the delivery, with the money in hand with which to make payment, but there must be evidence from which a jury may legitimately infer that he was then and there ready. The reasonableness of the rule is well illustrated in the present case.

By the contract, the obligations of the parties were concurrent. The delivery of the oil and the payment of its price, were to be at the same time. Where the plaintiff resided, we are not informed by the evidence, though it does appear that almost immediately after the contract was made, he left for Philadelphia. It does not appear that he was himself, or that he had any agent at the cars, at the time fixed for the delivery. But the instant the oil was in the cars at Pittsburgh, the defendants had a right to their money. They were not bound to wait till it had arrived at Philadelphia, or whatever place might have been its point of destination. Until they received the price, they might retain possession. And the plaintiff's readiness to receive the oil, and to pay if he was ready, was a positive fact within his knowledge, and capable of being proved by him. To prove it, however, he made no attempt, and so far as any evidence exists in the cause, it rather tends to prove that he was not ready. He was not, therefore, entitled to recover, and the jury should have been so instructed in answer to the defendant's points.

We cannot forbear remarking that we do not approve of such a mode of presenting points to a court as was adopted in this case. The attention of the judge should have been directed specifically to the defect in the proof, instead of requiring him suddenly to pronounce upon the whole case, as if it had been a demurrer to the evidence.—*Pittsburg Legal Journal.*

GENERAL CORRESPONDENCE.

Collectors of taxes—Right to levy—Costs of distress.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—Can a township collector of taxes charge a fee, say for warrant, mileage, service, &c., on a distress warrant for taxes, where there is no by-law of the council giving the collector fees for doing so? The by law simply gives the collector say eighty dollars for collecting, but does not give any power of distress, nor does it establish any fees for costs in case of distress. Sec. 243 C. S. U. C. cap. 54, page 581, gives each council the power of appointing certain officers; also to regulate the fees. It would appear that if the council neglected to pass a by-law establishing collectors' fees in case of distress, that the collectors could not charge costs in case of distress, as the statute does not give him any tariff of costs to charge. Sec. 96 cap. 53, page 670, C. S. U. C., gives the collector power to collect *with costs*, which tariff of costs, I suppose, must be established by the council; if not, the collector might make his own tariff, which certainly cannot be the meaning of the law. And if that be the case, the collector would be compelled to make the collection of the rate for the $80, and could not charge for expense of distress. What is your opinion?

Collector.

Walsingham, Sept. 14, 1864.

[We are not aware of any statute regulating the costs of a collector who levies taxes by distress. Con. Stat. U. C. cap. 123, regulating the costs of levying distresses for small rents and penalties is not in terms applicable. We know that it is the practice for collectors to issue warrants of distress to ordinary bailiffs, who are accustomed to charge as in the case of a distress for rent. We have always had our doubts as to the legality of such a mode of procedure. We should think that the power given to the council of every township, city, town and incorporated village not only to appoint such officers as are necessary in the affairs of the corporation, but to regulate "the remuneration fees, charges and duties of such officers" (Con. Stat. U. C. cap. 54 sec. 243, sub-ss. 2 and 3) is one that might be used with advantage to meet the difficulty suggested by our correspondent.—Eds. L. J.]

Articled clerk—Filing of articles of service—When time commences to run.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—My articles of clerkship are dated May 6th, 1863, but were not filed until August 18th following—more than three months afterwards. Do you think I might go down in Trinity Term, commencing about 18th August? It would, I presume, be utterly impossible to go down in Easter Term, commencing about 16th May?

Yours obediently,

17th September, 1864. Student.

[Where the articles and affidavit required by the statute are not filed within three months next after the execution of the contract, the service can only be reckoned from the date of the filing.—Eds. L. J.]

Convictions—Returning formal convictions after copies given of informal convictions—Convictions under by-laws—Form.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—You will confer a favor by replying to the following questions, which relate to matters of general interest.

1. A person is committed of an assault, or any offence punishable under the Summary Convictions Act, cap. 103,

Con. Stat. Canada. The defendant gives notice of appeal, under the U. C. Appeal Act, cap. 114, setting forth his grounds of objection to the conviction. The magistrate gives the defendant a copy of his conviction, but afterwards and before he returns it to the Clerk of the Peace, amends it, or, more correctly speaking, draws up a fresh conviction to meet the objections stated in the notice of appeal, so that at the trial of the appeal the defendant has nothing to urge against the conviction with which he is there met; the Court deciding or ruling that the conviction brought into Court by Clerk of the Peace is what it has to deal with.

Can the magistrate so amend his conviction? If he can, I do not see the least use of giving notice of appeal.

I have read the law as it appears in your Journal of 1860, I think under the title "Summary Convictions," where it is stated that the notice of appeal is against the order or decision of the magistrate made or given at the hearing before him, and not to the formal conviction that he may afterwards draw up and return to the Court; but I would still be obliged by your opinion upon the above case as one that has not been decided.

2. In convicting under a municipal by-law, I see that by Stat. 27 Vic., cap. 18, it is not necessary to set out the by-law in the conviction; but should not the title of the by-law be set out? The schedule of the Act appears to make this necessary. If the title be not set out would that be a good ground for quashing the conviction.

I am, gentlemen,

Your obedient servant and subscriber,

A. B.

Dunnville, October 17, 1864.

[1. After a magistrate has delivered to the defendant a copy of the conviction, as that upon which the subsequent proceedings have been founded, he is not thereby precluded from drawing up and returning a conviction in more formal shape, and the latter must be taken as the only authentic record of the proceedings. Thus, after a distress and warrant of commitment issued, the party having applied for copies of the proceedings, copies were furnished to him by the justice's clerk, and the justice afterwards drew up and returned to a *certiorari* another and more formal conviction dated as of the day when the original proceedings were had, and on a motion for a criminal information against the justice, on the ground that though magistrates ought to be indulged within a reasonable time for drawing up convictions, yet when drawn up and issued by their authority to the parties, and acted upon by the parties, they ought not to be altered; and it was urged that the parties, by such alteration being permitted, were liable to be drawn into unnecessary expense, as in that very instance, the defendant having received from the justice's clerk a copy of the conviction which was clearly bad, had been induced to take proceedings to relieve himself against it: but the Court refused to grant an information saying that if the magistrate had done no more than return the conviction in a more formal shape, instead of sending it up in the informal one in which it was first drawn; and, supposing the facts warranted the return actually made, it was not only legal but laudable in him to do as he had done. And in answer to the argument of the defendant being drawn into the expense of litigating the conviction, the Court observed that a mere informality in the manner of drawing up the conviction ought not to be the inducement for litigating it, but some substantial defect in the justice and legality of the proceeding before the magistrate (*Rex* v. *Barker*, 1 East, 188).

2. Either the by-law must be set out, or the conviction be in the form given to the schedule to Stat. 27 Vic., cap. 18. That form seems to make necessary the recital of the title of the by-law. We are inclined to think that an omission of the title of the by-law, where it is clearly shewn that the by-law has a title, would be a good objection to the conviction for want of form, but which could be cured by the return of a new conviction to the sessions.—Eds. L. J.]

Reports—Arguments of counsel.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—Allow me through your Journal to offer a suggestion to the Reporters of the Courts.

I think if they would give the *arguments* of counsel in their reports of cases, it would be much better. At present the most important, at least a *very important part* of the case is given thus:—"A. shewed cause, and cited, &c.;" "B., in support of the rule, cited, &c." In England the reporters always report the arguments.

Yours, &c.,

17th September, 1864. Subscriber.

[Our correspondent is not singular in his opinion. It is shared in by all who have occasion to use our Upper Canada Reports. Of late, in this respect, as in others, we have observed a change for the better. It is to be hoped that the new reporter of the Common Pleas, whoever he may be, will be a man chosen for his fitness alone, and that he will do credit to those with whom the appointment rests.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. *Re* Johnstone.

Stuemvoll v. Hales.

Will—Construction—Gift to children of A. and his wife, and B.

A testator directed that when the youngest child of Mr. and Mrs. W. (who was his sister) came of age, a fund should be divided among the then surviving children of Mr. and Mrs. W. and C. H. who was no relation, and was then unmarried). The will then directed that Mr. and Mrs. W. should enjoy the income during their joint lives, after which it was to be divided as before mentioned.

Held, that C. H., and not her children, was entitled to share with the children of Mr. and Mrs. W.

L. J. RE PATTERSON.

MITCHELL v. SMITH.

Donatio Mortis causâ—Promissory note.

Where the circumstances are such as to indicate an intention to make a testamentary gift, and the intention fails for want of proper attestation, a *donatio mortis causâ* will not be presumed.

COMMON LAW.

Q. B. DENTERS v. TOWNSEND.

Bill of exchange—Autre action pendant—Abatement—Equitable jurisdiction of the court.

To a declaration on a bill of exchange endorsed by the drawer to the plaintiff, the defendant (the acceptor of the bill) pleaded that it was taken by the plaintiff with notice of a former action against the defendant on the same bill by a former holder of it, still pending and without consideration.

Held, that the plea was bad for not showing that the bill had not been taken up by the drawer; but

Held, also, that if the plea had shown that the bill was negotiated by the plaintiff in the former action, with notice to the transferee of the pendency of that action, it would still have been bad.

The remedy of the defendant in such a case, is to apply to the equitable jurisdiction of the court.

EX. ELWORTHY v. SANFORD AND OTHERS.

Landlord and tenant—Property in lease—Executor de son tort.

An indenture of lease remains the property of the lessee, though the lease has been determined by forfeiture and re-entry.

Plene administravit by an executor *de son tort* is no defence, either legal or equitable, in bar of an action of trover, trespass, or for money received, at the suit of the personal representatives of the deceased.

C. P. MAYER v. DRESSER.

Bill of lading—Consignee no right to deduct value of missing goods from freight.

A consignee of goods under a bill of lading, has no right to deduct from the freight the value of goods contained in the bill of lading, but not delivered to him; his remedy is by cross action.

C. B. COUSTON v. ROBINS.

Deed of arrangement, neglecting to plead in action—Setting aside judgment.

A defendant, who, before action, had executed a deed of arrangement, did not appear, but allowed judgment to go against him by default. Upon an application to stay proceedings upon the judgment, upon the ground that the deed had been executed,

Held, that it ought to have been pleaded, and that the defendant might have a rule *nisi* to set aside the judgment and be let in to plead the deed, on paying costs, and on terms to be ordered by a judge.

C. C. R. REG v. COLLINS AND OTHERS.

Misdemeanour—Attempt to commit felony, putting hand into an empty pocket with intent.

A conviction for an attempt to commit a felony cannot be supported, unless it appears upon the evidence that the felony might have been completed, if there had been no interruption.

If, therefore, upon indictment for attempting to commit a felony by putting the hand into a woman's pocket, with intent to steal her property therein, it appears that she had nothing in her pocket, a conviction cannot be sustained.

EX. WILLIAMS v. JONES.

Gratuitous license to use really—Liability of licensee—Negligence—Master and servant.

A. gratuitously allows B. by himself and his servant, to use a shed for a particular purpose.

Held, that B is not liable for negligence, not connected with his employment, of which the servant is guilty while using the shed, and by which the shed is burnt down.

REVIEWS.

TABLE OF STAMPS TO BE USED IN PAYMENT OF FEES ON LAW PROCEEDINGS. Published by C. A. Backas, Booksellers, &c., Toronto Street, Toronto.

This appears to be a useful as well as a careful compilation. The author, though a barrister, has not seen fit to make known his name as the compiler. He perhaps thought that the work was not of sufficient merit or importance for him publicly to identify himself with it. Perhaps at some future day we shall know more about him as an amateur or compiler. In the mean time he need not be at all ashamed of the little brochure before us. A knowledge of the different kind of fees payable to the Crown on law proceedings, and the amounts of those fees, is absolutely necessary to all who may be called upon to issue writs, file affidavits, or take other proceedings in the courts. The want of that knowledge may not only result in the loss of stamps thrown away, but in void procedure, followed by consequences most serious. It is the aim of the compilation before us to bring home that knowledge in convenient form to all who need it. We cannot vouch for its accuracy in detail; but as we have some knowledge of the compiler, we trust we can with confidence recommend his compilation. The price is only twenty-five cents.

APPOINTMENTS TO OFFICE, &c.

JUDGE.

JAMES JOSEPH BURROWES, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court in and for the Counties of Lennox and Addington. (Gazetted October 1, 1864.)

SHERIFF.

OLIVER THATFORD PRUYN, Esquire, to be Sheriff of the Counties of Lennox and Addington. (Gazetted October 1, 1864.)

COUNTY CROWN ATTORNEY.

WILLIAM HENRY WILKISON, of Osgoode Hall, Esquire, Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney in and for the Counties of Lennox and Addington. (Gazetted October 1, 1864.)

CLERK OF COUNTY COURT.

JOHN B. McGUIN, Esquire, to be Clerk of the County Court in and for the Counties of Lennox and Addington. (Gazetted October 1, 1864.)

CORONERS.

THOMAS CHAMBERLAIN, Esquire, M.D., and SAMUEL CRAWFORD MACDONNELL, Esquire, Coroners, County of Lennox and Addington. (Gazetted October 1, 1864.)

JOHN LANG BRAY, Esquire, M.D., Associate Coroner, County of Kent. (Gazetted October 29, 1864.)

JOHN SHEET, RICHARD KIDD and COLLER M. CHURCH, Esquires, Associate Coroners, County of Carleton. (Gazetted October 29, 1864.)

NOTARIES PUBLIC.

JAMES P. GILDERSLEEVE, of Kingston, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted October 29, 1864.)

EDWARD P. REMON, of Ottawa, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted October 29, 1864.)

TO CORRESPONDENTS.

"L. S.," under Division Court Correspondence.

"Collector," "Student," "A. B.," and "Subscriber," under General Correspondence.