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DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS—(*Correspondence*).

To the Editors of the U. C. Law Journal.

Hawkesville, 26th August, 1857.

GENTLEMEN,—I perceive that the *Journal* is to be published in Toronto, and that it is to make its appearance more regularly. It will not matter much to your readers where it is to be published; but that it is to appear more regularly is very important.

Among all the good things you are to do, I have to intreat you to recommend and advocate some plan by which a Schedule exhibiting a tariff of fees for Clerks and Bailiffs can be framed so plain that all Judges, Clerks, and Bailiffs can have but one opinion respecting it. There are two items in the tariffs which are causing much jarring and controversy. In cases of foreign service, "for entering Bailiff's return to summons to Defendant, 3d," is taken by some Clerks and Judges to mean that the original Clerk is entitled to this fee; others that the foreign Clerk must have it; and another class contend that each Clerk has a right to charge it. I belong to the latter class; both the foreign and original Clerk have to receive these returns, and must enter them in a book. Then if they *must perform the service*, they are clearly entitled to the fee. In the Schedule of Bailiff's fees, "drawing and attending to swear to every affidavit of service of summons when served out of the Division, 1s." In some counties the bailiffs are not allowed to make this charge at all; in this county the Bailiff is allowed this item on every summons sent from another county or Division for service in this Division, and for every service he makes beyond the bounds of the Division. This unfortunate state of things gives rise to frequent disputes, and elaborate correspondence between the Clerks. Still they cannot settle the question.

The foregoing was written at the time the June No. of the *Law Journal* was received, and thrown by from pressure of other business. The July No. afterwards came to hand, from which it appears you have not received any communications on the subject of "Protection of Court Books and Court Papers." My impression was, after reading that article, and considering the immense importance of the question, that almost every Clerk in the land would apply himself to the subject of a strong letter in support of your views. That kept me from touching it. It is surprising none have taken it up, but possibly each one thought as I did, "all the rest will do it." The personal interest of the Clerks, the first consideration with most men, is or should be quite sufficient to enlist every Clerk in the cause; but the importance to the community of having those books and papers safely kept is of such vast magnitude as cannot be properly estimated. You have stated the subject correctly. I can add nothing to the force of your remarks, but will mention that for the six months from 1st January to 30th June, 1857, the amount of claims entered for suit in this Court is about £4000; that about £2000 has passed through my hands from defendant to plaintiff; that about £1000 remains in the shape of unsatisfied judgments; and the difference of about £1000 is made up of sums which plaintiffs have abandoned, failed to establish, withdraw, &c. I have not gone thoroughly into the matter, not having the time to spare for so extensive a labour, but from a rough estimate I feel confident the above figures are near the mark. When it is considered that this is an inland county; that this division is composed of only one township, and that the newest, thinnest populated, and most remote of any township in the county, some idea may be formed of the enormous sums of money passing through the hands of Clerks, and of the vast importance of the business transacted by them in the older and more populous localities.

I have purchased one of Wilder's Safes at a cost of nearly £50, in which I can keep the books and most important papers, but there is not room for all the papers. Now I am out of pocket that large sum, and for all the books and stationery. The public receive the benefit; I receive fees, it is true—the fees in the tariff, which are meagre enough for the labour performed; but there are a great many things Clerks have to do for which no fees are allowed. Should any dispute this, I will furnish the *figures and items* for their information.

The simple fact of the matter is, that just so long as Clerks are compelled to furnish books, stationery, office room, fuel, &c., so long are they suffering an injustice, for Division Courts are now fixtures. Had this remuneration to Clerks been withheld only in the beginning, while the institution was only an experiment, and yielded so soon as the utility of the Courts was known and appreciated, there would not have been much cause of complaint. But they are now a permanent institution of the country; and it would be about as safe for Government or Parliament to attempt to gag the Press as to dispense with Division Courts. Then why continue the anomaly and injustice?

M. P. E.

M. P. E. must not expect what the wisdom of man has not yet attained. It is impossible to produce a document "so plain that all concerned can have but one opinion respecting it." There is, however, a body in existence having power to pronounce authoritatively on all questions affecting the Courts—the Committee of County Judges. And we have no doubt that should it be made to appear that the points on which doubts have arisen, or upon which there have been conflicting decisions are numerous, the Judges would assemble to determine them by rule. At page 220, Vol. 2 of this *Journal* are some notes upon the points specified.

Our correspondent's statistics and remarks give very full support to the observations made by us in a previous number. We hope to see other Clerks following his example.—*Eds. L. J.*

BAILIFFS.

We have heard nothing lately concerning a movement by Bailiffs towards securing a better remuneration for their services. Nothing like an early commencement. Parliament will probably meet in February next, and petitions should be prepared from the various localities, and be in the hands of members, so as to be presented in the early part of the Session.

But let not officers flatter themselves with the belief that it will be only necessary to lay their case before the Legislature to obtain relief. Petitions are of very little value unless properly backed up. They will be quietly laid on the table unless the matter set forth be fully explained, and the relief prayed for urged with vigor. The just claims of Bailiffs must be advocated. Now no advocate can accomplish much unless he be properly instructed, and the more strongly he is impressed with the justice of the case the more effective will be his advocacy.

What we advise is this—Let one or more of the best informed Bailiffs in each County be selected to

wait upo.. the member or members representing the locality. Let this committee ascertain where it will suit their member's convenience to receive them, and give an hour or two to the acquirement of a knowledge of their position and claims. At the appointed time the Committee should be prepared with a memorandum, to be left with the member, explaining everything in full; but they should not content themselves with this; the whole matter should be fully opened to their representative, any additional information he might ask given, and any objections that might occur to him answered, so as to convince him of the justice of the Bailiff's claims and the reasonableness of the alterations in the law asked for, and thus to secure his hearty assistance in the House.

The Committee should, before leaving, take care to learn his impressions and intentions respecting their petition, and the same should be reported to a Central Committee. By taking a course such as this, the effort could not fail to be effective.

We have now told Bailiffs, and in good time how to look after their own interests, and how they may best recomplish the legitimate improvements which they seek in their condition. If they act with promptness and decision success awaits them. If they choose to confine themselves to mere grumbling or to desultory action, they will be left as they are to the end of the chapter.

SUITORS.

[continued from page 160.]

Punishment of Fraudulent Debtors—The Judgment Summons clause in the Division Courts Act.

The grounds on which a debtor may be committed, as mentioned in the last number, must be shown to exist by *legal* testimony. The proceeding, it will be borne in mind, is one affecting the personal liberty of the debtor. A proceeding to *punish*—and therefore the Judge will always require reasonable strictness in proof. Where proof can be obtained of facts warranting a commitment, it should be prepared before the hearing, that is, the witnesses necessary to make out the facts should be summoned in the usual way. The plaintiff can in such cases obtain subpœnas for his witnesses just as he might on an ordinary trial. Let it be particularly noticed in getting up proofs that any written document—such as a bill of sale, assignment, or the like, the contents of which it is necessary to prove, cannot be given in evidence as a conversation between parties or a contract committed to writing might. The original must be produced, and proved, as a general rule, by the subscribing witness. Parties in whose possession such instruments are, can be subpœnaed to produce them, or if they have been lost, or destroyed, or cannot be obtained, a copy of them, where possible, should be given in evidence. If they are in possession of the debtor, he should be notified to produce them; if he do not do so after notice, secondary evidence may be given of their contents.

In cases under the 2nd head, as mentioned in the previous number, very nice and difficult questions frequently arise, and we would strongly recommend parties to obtain professional advice as to what will be necessary to prove in the case, and also the services of a professional man to conduct the inquiry before the Court.

After a party has been once committed for a fraud, &c., he cannot be again committed on the same ground, though he may, in case of fresh fraud or fraudulent omission to pay, be committed a second time.

No imprisonment, however, operates as a satisfaction of the debt or judgment, or deprives the plaintiff of the right to take out execution in the same manner as if the imprisonment had not taken place.

In conclusion, we would suggest the propriety of registering every judgment over £10, where the debtor is supposed to have any claim to real estate. It costs very little, and it will be an additional security to the creditor. An execution against lands may be obtained where the judgment is beyond £10; but as these acts must be done through an attorney, we need not further notice them.

MANUAL, ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—By V——.)

[continued from page 160.]

Executions from other Courts.

A provision in the Common Law Procedure Act, 1857, sec. 24, may be here noticed. It places executions from the Courts of Queen's Bench, Common Pleas, County Courts, and Division Courts on a common footing. One is not to have precedence over the other; but priority of *time*, when the execution is delivered to the officer to be executed, is in all cases to determine the right to the goods seized. The subject as being one of pressing importance, was examined in the August and September numbers of the *Law Journal*, and the matter set down may be considered as engrafted on this treatise.

Claims to Goods seized.

It has so far been presumed that the goods seized under execution are the undisputed property of the defendant or execution debtor, and that no opposition has been made to seizure by the Bailiff. But this is not always so. The officer making a seizure is frequently met with claims by third parties to the whole or some portion of the property seized. Sometimes two or more persons appear laying claim to different portions of the property seized: or the landlord of

the premises on which the defendant's goods have been seized puts in a claim for back rent alleged to be due to him.

Such claims, until the law of Interpleader was introduced into Division Courts, often placed Bailiffs in a most awkward position. Claims of this kind, grounded on fraud, were and are common enough, but *bona fide* claims have been and may every day be made involving fair questions as to right of property. The dilemma of both Bailiff and judgment creditor under the old law was this—When a claim was made, the bailiff naturally enough required an indemnity before proceeding to a sale; he had no sufficient means of finding out the character of a claim made; if the plaintiff refused an indemnity, he still had his remedy against the officer refusing to act, if it could be established that the goods seized were in fact the property of the defendant; but this might not be easily done. If the plaintiff gave an indemnity, he was exposed to the expensive process of a suit in the Superior Courts to determine the question; while the bailiff to whom an indemnity was refused was open to an action by one person for "not selling," and was threatened or in danger of another action by another person "if he did sell;" and there was no middle course for the Bailiff—he was compelled to take one risk or the other.*

Under the seventh section of the Division Courts Amendment Act (which superseded a similar provision in the Act of 1851), should a claim be made to goods, property, or security taken in execution or attached by third parties, those really interested in the matter, namely, the judgment creditor and the claimant, may be brought into Court by the Bailiff, in order that the question may be tried between them, and when the case is determined the Bailiff of course knows the course proper for him to pursue.

It is now proposed to consider claims by third parties to goods seized—claims of landlord to rent in arrear—and the practice or proceedings by way of Interpleader under the statute to determine such claims.

(*To be continued.*)

* Judge Gowan, writing in 1851, mentions a case in point. The bailiff of a Division Court acting under an execution, seized I believe, a cow and calf as the property of the defendant in the execution. A relative of the defendant laid claim to the property seized; the bailiff declined proceeding unless indemnified. The plaintiff, thinking the claim unfounded from certain suspicious circumstances in the matter, gave a bond of indemnity to the bailiff, who then sold under the execution. An action was then brought by the claimant against the bailiff to recover damages for the seizure; it was defended. When the record was carried down for trial, the parties and their witnesses were obliged to come to the county town—a considerable distance. A verdict was given in favour of the claimant for £6. 5s.; and no doubt the original plaintiff had to pay the damages and costs. That suit must have caused the parties a loss and outlay of upwards of £40. A similar claim could now be tried and adjudicated upon in the township where the parties reside, at the cost of 40s.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., *Barrister-at-Law.*
(Hilary Term, 20th Vic.)

Davy and Russel v. Cameron.

Death of Plaintiff while rule nisi pending—Practice—C. L. P. A., sec. 248—Retrospective effect of.

A trial in ejectment was had in 1854, and a verdict found for the plaintiff. In the following term a rule *nisi* was obtained for a new trial, which, owing to the loss of some exhibits, was not argued until 1856, and was then discharged; in the meantime the plaintiff died, leaving a will by which he devised the land to certain persons in trust.

The court, on application, allowed judgment to be entered *nunc pro tunc*, and a suggestion to be entered of the death, leaving it to be afterwards determined whether the C. L. P. A., sec. 248, would apply retrospectively.

Ejectment, brought on the 14th of September, 1853, for part of the west half of lot No. 1, in the sixth concession of Madoc (about ten acres.)

This cause was tried in 1854, and a verdict rendered for the plaintiff, Colin Russell.

In Easter term, 1854, a rule *nisi* was granted for a new trial, or to restrain plaintiff from taking possession of any but a certain specified portion of the premises, which rule *nisi* was enlarged from time to time at the request of Russell's counsel, and was discharged in Trinity term, 1856—(See 14 U. C. R., 483.)

In Febuary, 1855, Russell died, and defendant had continued still in posession.

In Sepetember, 1856, a judge's summons was taken out and served on defendant, to shew cause why the legal representatives of Colin Russell should not be allowed to enter a suggestion of his death after verdict, having first made a will duly executed, whereby he devised all his real estate to his wife, and two others, as trustees; and why upon such suggestion the devisees in trust should not have execution, &c.

This summons was enlarged till Michaelmas term, that the application might be made to the court.

Crooks, in that term obtained a rule to shew cause why the devisees should not be at liberty to enter a suggestion on the roll of the death of Russell after verdict, and of the devise to them in trust; and why, on such suggestion being entered, the devisees should not be entitled to have execution upon the verdict, by delivery of possession to them: or why judgment should not be entered as of Easter term, 18 Vic., on the ground that the death of Colin Russell occurred during the pendency af the rule *nisi* against the verdict, and before judgment was given thereon.

Richards, shewed cause, and cited Vaughan v. Wilson, 4 Bing. N. C. 116; Freeman v. Tranah, 12 C. B. 406; Lawrence v. Hodgson, 1 Y. & J. 368; Doe dem. Taylor v. Crisp, 7 Dowl. 584; Fishmongers' Company v. Robertson, 3 C. B. 970.

Robinson, C. J.—I doubt whether we could properly make the order desired as to entering a suggestion. If the 248th clause of the Common Law Procedure Act could be applied in an action of ejectment commenced before that act was passed, which it is not necessary now to determine, I think it clearly could not be applied where as in this case, the plaintiff died before the passing of the act.

The suit, it is contended on the other side, had abated, the long delay (much more than two terms,) after the verdict, not being from any delay of the court in determining upon the application but from the delay af the parties in urging it; and whether it was an intentional delay of theirs, or occasioned by any accident which the court could not be responsible for, would make no difference, as the defendant contends, but that the action must be looked upon as abated for that judgment could not be entered in the name of the deceased plaintiff, as it might have been under the statute of 17 Car. II., ch. 8, if within two terms, or void after two terms, if the delay had been clearly the act of the court.

The circumstances which occasioned the delay in bringing on the rule *nisi* for argument, are stated in the report of the case.

When it was last before us (14 U. C. R., 483,) I entertained then a strong opinion that we could not properly allow judgment to be

entered *nunc pro tunc* under the circumstances. My brothers inclined to the contrary opinion; and as the cause of delay was rather an accident than *laches*, and there are some modern cases which shew a disposition in the courts to extend the indulgence, in their discretion, to cases where it cannot be said that the delay arose from the act of the court (*a*), I do not oppose the allowing judgment to be entered as of the term after the trial. This, however, will only give to the personal representatives of Russell the means of recovering the costs of the action. The most important object is to obtain possession. It is no longer possible to give possession to the plaintiff Mr. Russell, in whose favour the verdict was.

If this case could be treated as coming under the Common Law Procedure Act, sec. 218, we should have to consider whether the words, "legal representative of such claimant," as they stand in that clause, mean the representative of the title, or the heir or executor of the deceased plaintiff, according as he died seised of a freehold or a term. Considering the nature of the proceeding directed by the statute, and that it affords fair opportunity to the defendant to put the party who is dispossessing him to the proof of his title, I think the legislature probably intended that a person claiming from the deceased plaintiff as devisee, should be allowed to sue out a writ of revivor; and if so, that leaves no other difficulty than that which I have stated, that this proceeding given by the act can hardly be extended to a case where not only the action was brought, but the plaintiff's death also occurred before the act was passed.

I doubt whether we can properly carry it back, but as I understand my brothers do not feel any difficulty on that point the rule can go, and the question can be brought up formally, if it shall be contended on the other side that the Common Law Procedure Act cannot be applied to this case.

BURNS, J.—I think the rule should be made absolute, that the judgment may be entered *nunc pro tunc* in favour of Colin Russell, for whom the verdict was found. The court granted a rule *nisi* on the application of the defendant, in the term after the verdict was rendered, which rule could not be brought on to be argued by reason of the exhibits filed at the trial having been mislaid, and the rule was enlarged from time to time. Now although it may be argued that it was not the act of the court that the exhibits were mislaid, and could not be found, yet it was certainly the act of the court in granting the rule *nisi*, which prevented the plaintiff from entering up judgment upon the verdict; and if that rule had not been granted, the plaintiff could have entered up the judgment, whether the exhibits had been forthcoming or not. The want of the exhibits both parties have felt impeded their pressing an argument upon the court, and if they had argued the case without them the court would have felt it impossible to give any satisfactory decision. The cases are all collected in Evans v. Rees (12 A. & E. 167.) Six years later Mr. Justice Wightman, in Miles v. Bough, (3 D. & L. 105, 10 Jur. 390) considered the point again. There, as in this case, there was an argument upon the death of the plaintiff. It was a case involving questions of law and fact. After the trial of the issues in fact, the defendant moved for a new trial, and obtained a rule *nisi*, which upon argument was disharged, and then the plaintiff set down the issues in law to be argued, which did not come on to be argued till a year afterwards, before which time the plaintiff died. Mr Justice Wightman said, "It was contended for the defendant, that the only cases in which judgment could be entered *nunc pro tunc*, were those in which nothing remained to be done at the time of the death of the parties, but to pronounce judgment; and the case having been heard, the court, instead of giving judgmeut immediately, took time to consider, and the death intervened before the judgment was pronounced. Upon examination, however, of the cases which are reported on this point, it appears to me that the practice is of far more liberal extent; and in such cases as the present the court has allowed judgment to be entered *nunc pro tunc*, unless the delay was occasioned by the *laches* of the plaintiff, or some prejudice arose to the other party, to which he would not otherwise be subject."

Suppose then the judgment to be entered *nunc pro tunc*, the next question is whether, the judgment having been entered, and the death of the plaintiff having happened before the passing of the Common Law Procedure Act, the parties claiming through the plaintiff are entitled to the benefits of the 248th section, to enter a suggestion upon which to have the benefit of the judgment, without being driven to a new action. I do not think that the representatives of the deceased plaintiff would be driven to a new action, even if the Common Law Procedure Act had not passed, for it appears to me their course would be to sue out a *scire jucias quare haberent possessionem non* as respects the land, joining the personal representative in the writ as plaintiff, in order to have execution for the costs. See Foster on *Scire Facias*, 189, quoting Bac. Abr. "*Scire Facias*," C. 5.; Roll. Abr. 889, where it is said that in a real action the heir shall have the *scire facias*, and in a mixed action, if the lands to be recovered be fee simple, the heir and executor shall join in the *scire facias*, and the heir shall have the execution as to the lands, and the executor execution as to the damages. I understand the meaning and effect of the Common Law Procedure Act to be, that the writ of revivor and suggestion, the truth of which may be tried, are substituted for the *scire facias* It appears to me the 248th section affected the state of the case as it then would have stood, if judgment had been entered and no delivery of possession thereupon had taken place. I see nothing to prevent the claimants having the benefit of entering a suggestion, and if the defendant denies the truth of it, then of course there must be a trial thereupon. It would be absurd to compel them to go over the same ground again in establishing their title, upon which the court has given judgment in favour of the person from whom they claim.

MCLEAN, J, concurred.

Rule absolute.

(*a*), See Evans v. Rees, 12 A. & E., 167; Miles v. Bough, 3 D. & L., 105

(Easter Term, 20 Vic)

GRIMSHAWE v. THE GRAND TRUNK RAILWAY CO. OF CANADA.

14 & 15 Vic., ch. 51, sec. 11, sub-sec. 16—Arbitration—Notice of desistment.

Under the 14th & 15 Vic. ch. 51, sec. 11 sub-sec. 16, a notice for lands may be desired from, and new notice given for the same lands, even after the arbitrators named in the first notice have met, and are engaged in the arbitration; and an award made by them after such notice of desistment is void.

Quære, whether the arbitration under the second notice can also be desisted from, or whether the power extends only to the arbitrators first appointed.

Per McLean, J.—The award made by the first arbitrators was also bad in this case, for under sub-sec. 15, an award cannot be made by two arbitrators, when the third refuses to act.

This was a special case, stated in effect:—

This is an action brought by the plaintiff against the defendants for the recovery of £3,116 5s. 9d., which sum was awarded to the plaintiff upon referenee pursuant to the Railway Clauses Consolidation Act, in manner and form as set forth in the declaration and plea in this cause (which was referred to as part of the statement of this cause), and by the consent of the parties and by the order of the Honourable Sir John Beverley Robison, Baronet, Chief Justice of our Court of Queen's Bench, dated the 29th of May, 1857, according to the Common Law Procedure Act, 1856 the following case has been stated for the opinion of the court, without any pleadings.

The plaintiff was seized in fee of certain lands in the township of Hamilton, in the county of Northumberland, being part of lots Nos. 3, 4 and 5, in concession B; and the defendants laid out their railway over and across the same, and occupied a portion of the same, containing seven acres and twenty-nine hundredths of an acre of meadow land, and served the usual notice requiring the same for the purposes of their railway, said notice having been so served on the 14th day of March, 1856.

And they, the defendants, immediately thereafter took possession of the land mentioned therein, and enclosed and fenced the same, and made their railway theroon, long before the said award was made, and long before the service of the said notice by them, the defendants, of their intention to desist from their said first notice; and the defendants have continued ever since to possess and use the said land for their said railway.

That the notice so served on the 14th day of March was in the words and figures following, that is to say;

"Notice.—To Thomas Grimshawe, of the township of Hamilton, in the county of Northumberland, Esquire. Take notice, that

the Grand Trunk Railway Company of Canada require, for the purpose of their railway, that portion of lots numbers three, four and five in concession B, in the township of Hamilton aforesaid, in which you claim to be seized of an estate in fee simple, comprised within the description following, that is to say, seven acres and twenty-nine hundredths of an acre, and being, composed of parts of lots three, four and five in concession B of the township of Hamilton aforesaid, the same having been selected by the aforesaid company for the site of the Grand Trunk Railway of Canada and which has been staked off by the said company according to the plan of the said railway: and take notice further, that the company are willing to pay, in accordance with the provisions of the "Railway Clauses Consolidation Act," the sum of £433 15s., as compensation for the fee simple of the said piece of land hereinbefore described, and damages sustained in consequence of the said Railway; and that unless such sum shall be accepted by you as such compensation aforesaid, and unless, upon your signifying your acceptance thereof to the said company, you shall procure all proper and necessary parties to join in conveying the said piece of land unto the said Grand Trunk Railway Company of Canada, proceedings will be taken by the said company, in accordance with the provisions of the said "Railway Clauses Consolidation Act," for the purpose of obtaining a title to the said piece of land; and take notice further, that in the event of the sum above mentioned not being accepted as full compensation for the fee simple of the said piece of land, Thomas Eyre, of the town of Cobourg, Esquire, will be appointed as the arbitrator of the said Grand Trunk Railway Company of Canada, and as such to act in pursuance of the provisions of the said "Railway Clauses Consolidation Act."

Dated this 13th day of March, A.D., 1856.

THOMAS GALT, Solicitor,
G. T. R., of Canada.

And on the said notice was endorsed a certificate by John K. Roche, a sworn surveyor for Upper Canada, in the words and figures following, that is to say:

"I, John Roche, of the town of Port Hope, being a sworn surveyor of that part of the province of Canada, formerly constituting the province of Upper Canada, do hereby certify and declare, that the piece of land in the annexed notice described, is shewn on the map or plan of the Grand Trunk Railway, deposited in the office of the clerk of the peace of the county of Northumberland, in which county the said piece of land is situate, and that the said piece of land is required for the railway of the said company: and I do hereby further certify and declare, that I know the said piece of ... d in the said annexed notice described, and that the sum of £433 15s. in the said annexed notice offered by and on behalf of the said Grand Trunk Railway Company of Canada, is, in my opinion, a fair compensation for the said piece of land, and for all damages sustained by the construction of the said railway. In testimony whereof I do hereby give this my certificate, in pursuance of the provisions of the "Railway Clauses Consolidation Act."

Dated this 13th day of March, A.D., 1856.

(Signature) JOHN K. ROCHE.

And the plaintiff, within ten days after the service of the aforesaid notice on him, caused a notice to be served on the defendants, of which the following is a copy, that is to say:

"To the Grand Trunk Railway Company of Canada.—I, Thomas Grimshawe, of the township of Hamilton, in the County of Northumberland, Esquire, hereby give you notice that I refuse to accept the sum of money mentioned as compensation in the notice served on me under date of the thirteenth day of March instant; and further, that I have appointed John Montgomery Campbell, of the township of Haldimand, and in said county, Esquire, as my arbitrator.

"THOS. GRIMSHAWE.

"Dated this 20th day of March, 1856."

And after service of the last mentioned notice, the arbitrators so appointed by the plaintiff and the defendants duly appointed John Shuter Smith, Esquire, as third arbitrator, of which the plaintiff and the defendants had notice; and the said three arbitrators had a sitting on the 24th day of June, 1856, pursuant to appointment, of which due notice was given the plaintiff and to the defendants; and they the said arbitrators were duly sworn, and took the oaths prescribed by the said statute to perform the duties of their office, and then adjourned their sitting, at the request of the said Thomas Eyre, till the 3rd day of July following, at a certain hour and place, of which the plaintiff and the defendants had due notice:

That on the said 3rd day of July, before the meeting of said arbitrators, a notice of which the following is a copy, was, by direction of the Grand Trunk Railway Company of Canada, served personally on the plaintiff:

"Take notice, that the Grand Trunk Railway Company of Canada do not desire to proceed any further under the notice served upon you of the 14th day of March last past, and that the same is, in pursuance of the 16th sub-section of the eleventh clause of the "Railway Consolidation Act," hereby desisted from: any damage or costs sustained or incurred by you in consequence of the said notice and desistment will be promptly paid by the company."

That on the said 3rd day of July, at the said time that the above notice was served, and before the meeting of the arbitrators, a new notice was given by the company, under the provisions of the said 16th sub-section, for the same lands as those mentioned in the first notice, but with an alteration in the amount, the company thereby offering £450 in place of £433 15s. and naming the said Thomas Eyre as arbitrator for the company in case the sum therein mentioned was refused, which said notice was accompanied by the certificate of a sworn surveyor of Upper Canada, disinterested in a matter, and not being the arbitrator named in the notice, that the land named in the notice is shewn on the map or plan of the Grand Trunk Railway, deposited in the office of the clerk of the peace of the county of Northumberland, in which the land is situated: that he, the said surveyor, knew the said land, and that the sum so offered was in his opinion a fair compensation for the land, and for all damages sustained by the construction of the said railway.

That after said new notice had been given, the said arbitrators, John Shuter Smith and John Montgomery Campbell, knowing that the said new notice had been given, and that defendants had given notice as aforesaid of their having desisted from said first notice, having met at the place and hour appointed, the said other arbitrator, Thomas Eyre, then stated his intention of not being present (he having been informed by the defendants of their having desisted from said first notice) the said two arbitrators, John Shuter Smith and John Montgomery Campbell, then present at the request of the plaintiff proceeded to take evidence on the part of the plaintiff, and at the said meeting adjourned the said meeting until the ninth day of July then next, at a time and place of which the said Thomas Eyre had due notice, on which said ninth day of July the said Smith and Campbell (the said Thomas Eyre not being present), at the time and place so appointed made an award of which the defendants had immediate notice, neither the said defendants nor any one on their behalf attending before the said arbitrators on either of the two last mentioned occasions.

That on the 16th day of August, 1856, the said Thomas Grimshawe not having appointed any arbitrator to act on his behalf, pursuant to the said new notice, an order, of which the following is a copy, was made by George M. Boswell, then being Judge of the county court of the United Counties of Northumberland and Durham:

"*In the matter of the arbitration between the Grand Trunk Railway Company of Canada, and Thomas Grimshawe.*

"Upon reading the notice and certificate served upon the said Thomas Grimshawe, on the 3rd day of July last past, and the affidavits and papers attached thereto, this day filed, and it appearing to my satisfaction that the said Thomas Grimshawe has not, within the time appointed by statute for that purpose, notified to the said company his acceptance of the sum offered by them in the said notice so served upon him, I do hereby, in pursuance of the Railway Clauses Consolidation Act, and upon application of the said company by their counsel, appoint J. Stoughton Dennis, of the city of Toronto, a sworn surveyor for Upper Canada, to be sole arbitrator for determining the compensation to be paid for the land and damages referred to in the said notice; and I do hereby fix and appoint Monday, the 15th day of September instant, as the day on or before which the award of such sole arbitrator shall be made in the premises."

That the said order was made by the said Judge at the request of the defendants and that the sole arbitrator thereby appointed proceeded thereunder to make, and did make an award, which award is agreed to be considered for the purpose of this action a valid award, if the defendants had power to desist from the first notice aforesaid, and the reference thereunder. (But the plaintiff expressely reserves his right to object to the said last-mentioned award, if the judgment of the court shall be against him in this case.et i

That the said judge's order was made after a protest by the plaintiff, he having attended before the said judge at the time of making such order, and having formally protested against the same, and having given notice to the said Judge, and also to the defendants, of the said first-mentioned award, and the aforesaid proceedings prior thereto.

The questions for the opinion of the court are:

First. Whether under the acts stated in the foregoing case the award made by the said Smith and Campbell is a valid and good award, and binding on defendants.

Secondly. Whether under the facts, as hereinbefore stated, the defendants had power to desist (in manner aforesaid) from proceeding under the first notice, so as to put an end to the arbitration thereunder.

If the court shall be of opinion that the defendants had power to desist from proceeding under the first notice, so as to put an end to the said arbitration, or that the award in the declaration mentioned is not a valid award, then judgment of *nolle prosequi*, with costs of defence, shall be entered for the defendants.

"If the court shall be of opinion that under the facts stated the award in the declaration mentioned is a valid award, and binding on the defendants, then judgment shall be entered for the plaintiff for £3,216 5s. 9d., and interest on the sum of £3,116 5s. 9d. from the said ninth day of July until judgment, and costs of suit, upon payment whereof the defendants shall be entitled to a good and sufficient deed in fee simple from the plaintiff for the land mentioned and described in said first notice.

D. B. Read, for the plaintiff, cited Webb v. Manchester, &c. R. W. Co. 1 R. W. Cas. 599; Schwinge v. London and Blackwall R. Co., 1. Jur. N. S. 368; Meynell v. Surtees, lb. 742; Evans v. Lancashire and Yorkshire R. W. Co., 17 Jur. 880; 7 R. W. Cas. 126.

Galt for defendants.

The statutes referred to are noticed in the judgment.

ROBINSON, C. J.—The 11th clause of the Railway Clauses Consolidation Act, 14 & 15 Vic.. ch. 51, provides, in a manner substantially the same as the English Railway Clauses Consolidation Act, for enabling companies to occupy and acquire such land as they may find necessary for the construction of their railway, and for giving compensation to the proprietors of the lands taken.

The provisions are much the same in both, which require the company to mark out and give notice of the land which they will require, and to tender the sum which they assume to be the reasonable value of such land, naming at the same time an arbitrator on their part, to join with others to be chosen, for assessing the value in case the sum tendered shall be rejected, and providing for the arbitration which in such cases is to follow.

But our statute 14 & 15 Vic., ch. 51, sec. 11, sub-sec. 16, contains the following enactment, which is not to be found in the Imperial Statute (8 & 9 Vic., ch. 20): "Any such notice for lands, as aforesaid, may be *desisted from*, and new notice given, *with regard to the same or other lands*, to the same or any other party; but in such case the liability to the party first notified, for all damages or costs by him incurred in consequence of such first notice and desistment, shall subsist."

We have to determine in this case what is the proper construction and effect of that clause.

1st. Does it apply to so late a stage of the proceedings as had been arrived at in this case; that is, when the arbitrators had been all appointed, and had met, and were engaged in the duty which they had undertaken, though they had not yet determined upon the value?

2nd. If so, does it necessarily put an end to the authority to proceed further in the arbitration, so that an award afterwards made under that notice is void?

We need not go further, and consider what proceedings should take place under the new notice, because the whole question now before us is whether the award made under the first notice can be enforced, notwithstanding a new notice was given before the award was made.

On the plaintiff's side it has been contended that it can never have been meant that under this provison the authority of the arbitrators who were proceeding under it should be in effect revoked, which is what the defendants contend for, because then, if the company should be dissatisfied with the third arbitrator chosen, or should be alarmed by or dissatisfied with the disposition shewn by the three after they have met, they can disable them by giving a new notice; and that by persevering in that course, and giving new notices till they are satisfied by what they hear and see that such an award will be made as may suit their views, they can effectually control the whole proceedings: and they argue that no such privilege of interrupting the arbitration being given to the proprietor of the land, it never can have been meant to be applied as the defendants are endeavouring to apply it, or the parties would stand on a very unequal footing.

There is much force in this argument, though to push it to its length as I have stated, it assumes what is perhaps not clear—that if the defendants by the new notice they have given have in effect revoked the authority of these arbitrators, it must follow that they can go on giving new notices under the same provision until they have procured such arbitrators as will suit them.

That may or may not follow. At present I do not consider that it would. We are not now called upon to detemine that point, but only whether the proceedings of the arbitrators first appointed can be thus cut short.

By the Imperial statute 8 & 9 Vic. ch 20, sec. 126, it is enacted that after any appointment (of arbitrators under the act) shall have been made, neither party shall have power to revoke the same without the consent of the other.

This shews plainly enough what the parliament which passed that statute thought just to provide in such cases.

Whoever framed our statute 14 & 15 Vic. ch. 51, must, it is plain, have had these English clauses under his view. No one who compares the two acts can doubt it; and so we must assume had the Parliament of Canada which passed the act now in question. And when we find that the Parliament of this Province not only left out of their statute that express enactment of the English act which prevents revocation of the submission by either party, but also inserted this 16th sub-section of the 11th clause, which they found no precedent for in the other, a strong argument arises from it that they did intend to allow the company to put an end to the authority of the arbitrators who should be chosen under the first notice, at least, by giving a new notice.

I do not know whether a precedent was found for such a clause in other enactments for similar purposes either in England or elsewhere.

It is contrary to the general principles of legislation, and the decisions of courts in England, that a power should exist of recalling the first notice.

The question had been discussed in England both in reference to the Railway Consolidation Clauses Act, 8 & 9 Victoria, ch. 20, and the general act which provides power to take lands for other public works, 8 & 9 Vic. ch. 18, and other statutes of an earlier date giving similar powers. I refer to the cases of Rex v. Hungerford Market Company (4 B. & Al. 327), and Tower v. Lynn Railway (4 R. W. Cas. 615) Regina v. Commissioners of Woods, &c., (19 L. J.,) (Q. B.) 497.

It is very clear that we cannot deny that the notice given under our general act can be recalled, for the language on that point is perfectly explicit; and one can imagine the considerations that might suggest such a clause, and might make the Legislature think it proper to adopt it, and with the intention too that it should have the effect which the defendants in this case contend for.

But we have only to consider what is in fact its obvious import and effect.

The company, after serving a notice of land required by them, might for good reasons change their mind, either in regard to the quantity which they had specified, or its precise locality, and the proprietor could hardly object to the reasonableness of the Legis-

nature allowing them to do so before the arbitration had been proceeded in, or at any time before it was closed; but here, it may be urged, there has been no such change of intention, the same land being specified in the second notice as in the first.

Still that is no argument that we can accede to, for the 16th sub-section, whis we are considering, expressly allows a new notice to be given "with regard to the *same or other* lands." There is no doubt on that point.

Another ground on which it might seem just to allow the first notice to be recalled, and a new one given, would be when the company might, on more mature deliberation, desire to increase their offer, which might perhaps supersede the necessity of going on with the arbitration, and might save them costs.

Here there is just a semblance, and that is all, of the defendants having proceeded on that ground, for they do specify in their new notice a value a few pounds higher than they had offered in their first. We can have little doubt, however, that this slight difference does not account for the steps taken by them. They desired no doubt, and have not disavowed it, to submit the matter to other arbitrators, because they were not content with those who had been chosen.

Can they then, as a matter of right, and under a fair application of the statute, attain that object? I do not think that we can decide otherwise. The position in which the 16th sub-section stands in the 11th clause makes it evident, I think, that it was meant the discretion might be used after all the arbitrators had been appointed, and they had entered upon their duties.

And I can only look upon the notice of desistance from the first notice as a discontinuance of all further proceedings under it. This I think is shewn by the provision that the company shall be liable to the other party for any costs incurred by him in consequence of the first notice. And indeed, without that consideration I do not see what we could hold to be the meaning of desisting from the notice, which the company is in express terms allowed to do, if all might still go on under the notice desisted from as it would have done otherwise.

In the absence of any explanation in the statute to the contrary I can only understand by the 16th sub-section that all future proceedings under the notice *desisted from* are to cease, and that a new arbitration is to be entered upon under the new notice.

Therfore in my opinion, according to the terms of the case submitted to us, a *nolle prosequi* is to be entered, for according to the view which I take of the clause submitted to us, the act of the arbitrators in going on and making an award after the notice had been "*desisted from*," to use the phraseology of the statute, was a void act.

I do not think that the legal question raised here is at all affected by the fact of the defendants having erected and constructed their road, and being now in possession of the plaintiff's land. That is not necessarily wrongful, because the statute allows them to take possession in certain cases before an award made, and when no agreement has been come to. If this is not one of those cases, it would only follow that the right to take and keep possession is subject to be questioned:—it could have no influence on the legal construction of this clause.

McLEAN, J.—The Railway Clauses Consolidation Act, section 11, establishes a mode by which a railway compauy may obtain any lands necessary for the construction of their road, and the manner of proceeding by arbitration, to ascrtain the value of such lands, when there is a difference of opinion upon that subject. A part of the plaintiff's property being required by the defendants for their railway track, they offered to the plaintiff £433 15s as compensation for the land they desired to obtain, at the same time accompanying their proposition with the certificate of a sworn surveyor, in the form prescribed by the seventh sub-section of the section referred to. The plaintiff promptly rejected the amount proposed, and named an arbitrator to act in his behalf, with one previously appointed by the defendants, to settle the question of value. They appointed a third arbitrator, and all met, at a time appointed, for the purpose of deciding upon the matter submitted to them, on the 26th of June, 1856. At the request of the arbitrator named by the defendants the meeting was adjourned from that day till the 3rd of July following of which due notice was given before the arbitrators met on the 3rd July, a notice was served on the plaintiff, by direction of the defendants, under the 16th sub-section of the same clause, "that the defendants did not desire to proceed any further under the notice served upon the plaintiff on the 14th of March last past, and that the same was in pursuance of that sub-section desisted from, and that any damages or costs sustained or incurred by the plaintiff in consequence of such notice, and of the defendants' *desistment* (the term used in the act) would be promptly paid by defendants. After the giving of such notice the arbitrator appointed by defendants refused to attend, or to go on with the reference under the notice of the 14th of March.

On the 3rd of July the Defendants gave to the plaintiff a new notice, and offered £150, the only variance between it and the former notice being a slight variance in the amount which they were willing to pay; and they at the same time notified the plaintiff to appoint an arbitrator on his behalf, to act with the *same* arbitrator for the defendants, in reference to the valuation of the land, in the event of the last proposition not being accepted.

The plaintiff not considering that the defendants could legally abandon the first reference, and so require him to enter into another, did not again appoint an arbitrator, but two of the arbitrators previously appointed proceeded to make an award in the absence of the third, and allowed by such award to the plaintiff the sum of £3,116 5s. 9d. as the value of his land and damages—upon which award this action is brought. The statement of the case shews that the plaintiff not having appointed an arbitrator to act with the arbitrator named in the second notice of the defendants, an application was made to George M. Boswell, Esquire, judge of the county court, to appoint a sole arbitrator between the parties, and that on such application a sworn surveyor was appointed, in pursuance of the 9th sub-section of the 11th clause of the statute, who duly made his award in the matter.

The questions now submitted in the special case agreed upon, are—1st. Whether under the facts stated the award made by two arbitrators after notice of the defendants desisting to act on the first notice, and in the absence of the arbitrator who refused to act, is a valid and good award, and binding on the defendants. 2ndly. Whether under the facts stated the defendants had power to desist, in the manner mentioned, from proceeding under the first notice, so as to put an end to the arbitration thereunder.

The answer to each of these questions depends upon the view taken of the other, for if the award be held valid, then the defendants must be held to have had no right, by desisting from their first notice, to put an end to all proceedings under it; and if they had that right, then the award cannot be maintained.

The 15th sub-section referred to, certainly confers an extraordinary authority on a railway company, in giving them the power to desist from or stay proceedings on any notice such as that served on the plaintiff on the 14th of March, and to give a new notice to the same party, with regard to the same or other lands, at any time before award, when it may suit the convenience or caprice of the agents of a company. The exercise of this power in this case can scarcely be regarded as otherwise than a vexatious proceeding, for the defendants could scarcely have desisted from their first notice for the purpose of adding so paltry a sum as £16. 5s. to their former offer, as a temptation to the plaintiff to accept their proposition, and at the same time ask the plaintiff to appoint an arbitrator to meet the very same individual, who having taken upon him the duties at the first meeting subsequently refused to attend or to act under the original notice.

No doubt some object was expected to be gained by the defendants in desisting from their first notice, or they would not have done so; but it certainly bears the appearance of trifling with the plaintiff, and it may have been that the defendants desired to get rid of some one of the arbitrators, whose decision was likely to be less favourable than suited their views. While the plaintiff was bound to submit to the award, whatever it might be, and had no means of getting rid of any of the arbitrators, the defendants could avail themselves of the very unusual authority referred to, to dissolve the reference whenever they had reason to think the award was likely to exceed to any extent their ideas of the value of the plaintiff's land.

But the question is not whether the power which they have exercised in the case was rightly or wrongly conferred: the only question is whether in fact they have it, and on this I must say that I can scarcely think there is any doubt

It may be reasonable that a railway company should be at liberty to withdraw an offer of small amount, and to make a larger for land required by them, rather than await the delay and expense of an arbitration; but the same authority to desist would enable them to withdraw a large and to substitute under a new notice a small offer of compensation, with a view to take their chance before an arbitration, and the provisions of the sub-section 16 certainly authorises such a proceeding, subject only to the costs which may have been incurred under the former notice. When it authorises a *new* notice to be given "with regard to the same or any other lands, to the same or any other party," it could not have intended that after the new notice given the old one should still continue in sufficient force to justify proceedings under it. The words as they appear to me, are too plain to admit of any construction but such as the defendants have given them by their mode of proceeding, and there appears to me to be no alternative but to declare the award made by two arbitrators under the first notice invalid.

Besides the objections taken, it appears to me that the making of an award by two arbitrators in a case where the third has refused or failed to act, must be invalid under the 15th sub-section of the 11th clause of the Railway Clauses Consolidation Act. That act provides, that if any arbitrator *appointed* by the *parties* shall die before the award be made, or be disqualified, or refuse or fail to act within a reasonable time, then on proof of the fact before the county court judge, on the application of either party, such judge may in his discretion appoint another arbitrator in the place of the one previously appointed by him, and the company and the party may each appoint an arbitrator in the place of their arbitrator deceased or not acting, but no recommencement or repetition of prior proceedings shall be required in any case.

Now when one of the arbitrators refused to act, as is shewn in this case, if it were considered that the original notice still continued good, that section provides a means of reorganizing the arbitrators; but it seems to forbid the idea that an award may be made by two after the death of the third or his refusal to act. This objection to the award has not been formally taken, but the facts are disclosed, and we are asked to say whether under these facts the award can be considered valid. Of course it cannot be valid if the mode contemplated by the statute has been departed from in making it without the consent of parties.

BURNS, J., concurred.

Judgment for defendants.

CHAMBERS.

(*Reported for the Law Journal, by* C. E. ENGLISH, ESQ.)

REGINA v. TOWNSEND.

Hab. Corp. ad test. when granted.

A writ of *habeas corpus ad testificandum* may be issued to the Warden of the Provincial Penitentiary to bring a convict for life before a Court of Oyer and Terminer and General Gaol Delivery, to give testimony on behalf of the Crown in a case of murder.

(September 7th, 1857.)

Harrison, on the part of the Crown, applied for a writ of *habeas corpus ad testificandum*.

The facts appeared to be as follows:—

At the Fall Assizes, in 1854, a true bill for murder was found against the prisoner *Townsend*, and against *William Bryson*, *George King*, and *John Lettice*. The prisoner Townsend at that time had fled the country, but *Bryson* was tried upon the indictment, and found guilty, and upon his conviction was sentenced to be hung, but had his sentence commuted by the Executive to imprisonment in the Provincial Penitentiary for life. It was said that *Townsend* has been since apprehended, and at the time of the application was awaiting his trial at the then approaching Assizes to be held at Cayuga.

The application was for a writ of *habeas corpus*, in order to have the testimony of *Bryson*.

BURNS, J.—I find no statutory provision which applies exactly to the present case in this Province.

The two Statutes, 3 Wm. IV. cap. 2, s. 8, passed before the Union, and 4 & 5 Vic. cap. 24, s. 11, passed since the Union, and applying to the whole Province, are almost in the same words, but they seem rather to provide for the case of a prisoner confined within the county where the court is actually sitting, and that the court before whom such prisoners may be required, shall make an order for the attendance of the prisoner. I have no doubt the Court of Assize, Oyer and Terminer, &c., could, under these Statutes, make the necessary order to any gaol or prison out of the county where the court is sitting to bring up a prisoner; but then under these Statutes no order could be made until the Court is opened, and to await the arrival of a witness from a distant prison, or where it would be necessary to make proper arrangements for the transmission of a prisoner, as in the present case would be attended with much delay and inconvenience.

The Imperial Statute 44 Geo. 3 cap. 102, makes provision for a Judge of any of the Superior Courts in England or Ireland, granting a *habeas corpus* to bring up a prisoner before any Court of Record, to be examined as a witness in any cause or matter civil or criminal; but that Statute is not in force in this country. The 173d section of the C. L. P. A. 1856, does not touch the question in this case.

The case of *Rex* v. *Burbage*, 3 Burr. 1440, is an authority to show that independently of the Statutes, a common law authority exists to grant the writ of *habeas corpus ad testificandum*, where the witness is in execution. *Vide* 1 Chit. Crim. Law, 610; also other cases may be cited—they are collected in a note to *Har. Com. Law Prac. Acts*, *p.* 330.

I therefore order the writ to issue, directed to the Warden of the Provincial Penitentiary, to produce the body of *William Bryson*, confined in his custody in the Penitentiary, before the Court of Oyer and Terminer and General Gaol Delivery to be held in the County of Haldimand on the 22d September to give evidence upon an indictment against *William Townsend* for murder, then and there to be tried.

MACPHERSON v. GRAHAM.

Writ of Trial—Guarantee—Practice.

In an action on a guarantee, a writ of trial may be obtained, if the defendant have no other objection than the mere fact of the action being on a *guarantee*.

(22d June, 1857.)

This action was brought on a written guarantee for £254. 4s. 1d., dated 2d September, 1856, by which defendant undertook and promised to be liable to stand for the whole or any balance which might remain due on certain promissory notes made by S. S. Graham in favor of the plaintiffs.

The plaintiff took out a summons for a writ of trial on the usual grounds, the pleas pleaded being "non assumpsit" and "satisfaction."

Jackson appeared for the defendant, and objected that an action on a *guarantee* does not come within the provisions of the Statute, and stated that this was the only objection he had to urge.

RICHARDS, J., granted the order.

MELDRUM v. TULLOCH.

Practice—Attachment—Garnishee.

In garnishee applications an order to *attach* a debt will be granted, though the amount be not stated: but a summons to pay over will not be granted unless amount be stated.

(31st July, 1857.)

Jackson, on behalf of the plaintiff, made the ordinary application for a garnishee order in this case, under 194th sec. C. L. P. A, 1856, on an affidavit stating that judgment had been recovered, and was still unsatisfied, that the garnishees were *indebted* to the defendant, and that they were within the jurisdiction of the Court.

RICHARDS, J.—I will grant you an order attaching the debt whatever it may be, but I cannot grant the order for the garnishees to appear and show cause why they should not pay over, because the *amount* of the debt is not stated, and I cannot say whether they should appear before the County Judge, or a Judge in Chambers, to show cause why they should not be ordered to pay the amount.

Woolly v. Tweedle.

Irregularity—Enlargement of Summons—Service of Summons.

In general there must be a true copy of a summons granted in Chambers served on the opposite party; at least there must be nothing calculated to mislead in the copy served.

Irregularities in technical applications, where there are no merits, cannot in general be remedied. An enlargement of a summons will not be granted for the purpose of remedying them in such cases.

(14th August, 1857.

Action of Ejectment.—*Blevins*, on the part of the Plaintiff, applied to set aside the Appearance entered, &c., for irregularity, on the ground that the notice of claim filed with the appearance and served, was not *directed* to the Plaintiff, as required by the Statute (though it was regular in every other respect).

A summons was granted and signed by Robinson, C. J.; but in making the copy served the name "Harrison" (the Co. C. Judge) was subscribed thereto, instead of "Robinson," as shown by the opposite party, who therefore refused to appear to the summons, he happening to be in Chambers on other business.

Blevins urged—that the summons should be made absolute, on the ground, as he contended, that a true copy of the summons need not be served, but it is sufficient that the opposite party have due notice of the application, which it was evident he had in this case. 2nd. If this notice be not deemed sufficient, then he applied for an enlargement, for the purpose of *re-serving* it.

Robinson, C. J., decided against him on the first ground, and as the application was purely technical and had no merits whatever to be considered—*Held*, that the party making it should be held strictly to the regularity of his own proceedings; and that if he should happen to make a slip, as was done in this case, it ought not to be overlooked.

Mitchell v. Dobson.

Insolvency—Final Discharge—Repealing of Statute.

The *fraction* of a day is never taken into consideration in determining the operation of a Statute.

If an order is obtained under a Statute which is repealed by another Statute the same day the order is made, the repealing Statute will be held to operate from the first part of that day, and overrule the order.

Jarvis (*S. M.*) applied to set aside the writ of *fi. fa.* issued in this case, and all proceedings thereon, on the ground that the defendant had obtained his final discharge under the Statute as an Insolvent Debtor, after judgment had been signed but before execution issued in this cause.

McDonald, for the plaintiff, replied that there is some doubt whether all the discharges obtained under the Insolvent Debtors' Act, 1856, are valid and final, or will operate as a complete discharge of all previously existing claims. He contended that as the final order for defendant's discharge was made, in this case, on 31st March last, the day on which the Statute repealing the above Act received the consent of the Crown, and came into operation, the fraction of a day could not be taken into consideration in determining the time of the operation of a Statute of Parliament; and that as every Statute takes precedence of all other transactions on the day on which it comes into operation, this order was invalid (*a*).

Jarvis replied that the final order was signed at one o'clock, and the Repealing Act assented to at four o'clock, P. M., on the same day, and that the Statute could not, in its operation, revert back and vitiate this order.

Burns, J., refused the order on the ground that a fraction of a day is never taken into consideration, in fixing the time of the operation of a Statute.

Bank of Montreal v. Yarrington.

Garnishee—Application—Costs.

A Judgment Creditor will not be allowed the costs of a Garnishee Application, either against the Judgment Debtor or the Garnishee.

The usual Garnishee order and summons had been granted in this cause, and no one appearing on behalf of the Garnishee at the return day of the summons, the judgment creditor applied for an order for the garnishee to pay over the amount of the judgment debt, *together with* the costs of the application to be tried by the master.

Robinson, C. J., granted an order for the garnishee to pay over the amount of the judgment debt, but declined to order costs, on the ground that this is a special provision for the accommodation of the creditor, and therefore it is sufficient for him to receive the designed benefit by paying for it. A judgment creditor is not entitled to put the debtor to additional cost, by availing himself of a special provision of this kind instead of pursuing the ordinary method. He said if any authority were shown for giving costs, he would re-consider it.

(*a*) Regina v. Edwards, 9 Exchr. 32 & 628; Latless v. Holmes, 4 T. R. 660; The King v. Biers, 1 Adol. & E. 327.

Levisconte, Exrs., &c., v. Pecel.

Ejectment—Service of Writ—Judgment for want of Appearance.

Where a landlord applies to be allowed to enter judgment in ejectment, for want of appearance, against a tenant who has absconded and cannot be personally served—the action being on a power to reenter for non-payment of rent—he must, if possible, produce the lease and show that he is entitled to re-enter.

(August 5, 1857.)

This was an action of ejectment, and *A. R. Dougall* moved for an order that the claimants (plaintiffs) might be allowed to enter judgment for want of appearance by defendant, and tax costs, pursuant to the Statute. (C. L. P. A. 1856.)

The affidavit produced shewed that the action was to dispossess a tenant on account of a forfeiture of the term by non-payment of rent. And it was sworn that the defendant had abandoned the premises and the country, leaving the dwelling house on the premises locked up and secured.

It was also sworn that the writ had been served by nailing up a copy, with notice of plaintiff's title, on the door of the house; that it remained up some days and was then torn down by some one unknown.

Robinson, C. J.—The method of proceeding is pointed out by sec. 263 C. L. P. Act, 1856; and I do not see the occasion for an order to enable plaintiff to enter judgment after such service as this clause authorises, and as has been made in this case when defendant does not appear—though there is an obscurity, or rather an inconsistency, in that respect, in the clause.

If I make any order to allow judgment to be entered, which, according to one part of the clause, seems to be contemplated, I must be satisfied as to the lessor's power to re-enter; and I should see the lease, if it can be produced (*a*).

(*a*) The lease was afterwards produced, and upon that and the affidavit annexed to it, the order was made.

IMPERIAL STATUTE.

21 Vic., Cap. LIV.

An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers and other Persons intrusted with Property.

(August 17, 1857.)

Whereas it is expedient to make better provision for the punishment of frauds committed by trustees, bankers, and other persons intrusted with property: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Trustees fraudulently disposing of property guilty of a misdemeanor.*—If any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or purposes, or shall, with intent aforesaid, otherwise dispose of or destroy such property or any part thereof, he shall be guilty of a misdemeanor.

2. *Bankers, &c. fraudulently selling, &c. property intrusted to their care, guilty of misdemeanor.*—If any person being a banker, merchant, broker, attorney or agent, and being intrusted for safe custody with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use such property or any part thereof, he shall be guilty of a misdemeanor.

3. *Persons under power of attorney fraudulently selling property guilty of misdemeanor.*—If any person intrusted with any power of attorney for the sale or transfer of any property shall fraudulently sell or transfer or otherwise convert such property or any part thereof to his own use or benefit, he shall be guilty of a misdemeanor.

4. *Bailees fraudulently converting property to their own use guilty of larceny.*—If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny.

5. *Directors, &c. of any body corporate or public company fraudulently appropriating property.*—If any person, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply, for his own use, any of the money or other property of such body corporate or public company, he shall be guilty of a misdemeanor.

6. *Or keeping fraudulent accounts.*—If any person, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the money or other property of such body corporate or public company, otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, he shall be guilty of a misdemeanor.

7. *Or wilfully destroying books, &c.*—If any director, manager, public officer, or member of any body corporate or public company shall, with intent to defraud, destroy, alter, mutilate, or falsify any of the books, papers, writings, or securities belonging to the body corporate or public company of which he is a director or manager, public officer or member, or make or concur in the making of any false entry, or any material omission in any book of account or other document, he shall be guilty of a misdemeanor.

8. *Or publishing fraudulent statements guilty of misdemeanor.*—If any director, manager, or public officer of any body corporate or public company shall make, circulate, or publish or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to such body corporate or public company, or to enter into any security for the benefit thereof, he shall be guilty of a misdemeanor.

9. *Persons receiving property fraudulently disposed of, knowing the same to have been so, guilty of misdemeanor.*—If any person shall receive any chattel, money or valuable security which shall have been so fraudulently disposed of as to render the party disposing thereof guilty of a misdemeanor, under any of the provisions of this Act, knowing the same to be so fraudulently disposed of, he shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the party guilty of the principal misdemeanor shall or shall not have been previously convicted, or shall or shall not be amenable to justice.

10. *Punishment for a misdemeanor under this Act.*—Every person found guilty of a misdemeanor under this Act shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to suffer such other punishment, by imprisonment, for not more than two years, with or without hard labour, or by fine, as the court shall award.

11. *No person exempt from answering questions in any court; evidence not admissible in prosecutions under this Act.*—Nothing in this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court of law or equity, or in the courts of bankruptcy and insolvency; but no answer to any such bill, question or interrogatory shall be admissible in evidence against such person in any proceeding under this Act.

12. *No remedy at law or equity shall be affected; convictions shall not be received in evidence in civil suits.*—Nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any offence against this Act might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in this Act contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

13. *No prosecution shall be commenced without the sanction of some judge or the Attorney-General.*—No proceeding or prosecution for any offence included in the first section, but not included in any other section of this Act, shall be commenced without the sanction of her Majesty's Attorney-General, or, in case that office be vacant, of her Majesty's Solicitor-General: provided that where any civil proceeding shall have been taken against any person to whom the provisions of the said first section, but not of any other section of this Act, may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this Act without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending.

14. *If offence amounts to larceny, person not to be acquitted of a misdemeanor.*—If upon the trial of any person under this Act it shall appear that the offence proved amounts to larceny, he shall not by reason thereof be entitled to be acquitted of a misdemeanor under this Act.

15. *Costs of prosecutions.*—In every prosecution for any misdemeanor against this Act the court before which any such offence shall be prosecuted or tried may allow the expenses of the prosecution in all respects as in cases of felony.

16. *Misdemeanors not triable at sessions.*—No misdemeanor against this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

17. *Interpretation of certain terms.*—The word "trustee" shall in this Act mean a trustee on some express trust created by some deed, will or instrument in writing, and shall also include the heir and personal representative of any such trustee, and also all executors and administrators, liquidators under the Joint-Stock Companies Act 1856, and all assignees in bankruptcy and insolvency.

The word "property" shall include every description of real and personal property, goods, raw or other materials, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and such word property shall also denote and include not only such real and personal property as may have been the original subject of a trust, but also any real or personal property into which the same may have been converted or exchanged, and the proceeds thereof respectively, and anything acquired by such proceeds.

18. *Act not to extend to Scotland.*—This Act shall not extend to Scotland.

PUBLISHERS' NOTICE.

MR. THOMAS, *of our Establishment, purports making a tour in the Western portions of the Upper Province during the present month, and will take the opportunity thus afforded of soliciting subscriptions, and making collections, for this Journal.*

TO CORRESPONDENTS.

T. B. P.—Your inquiry is answered under heading "Correspondence."

H. T.—The information you want may be found on page 162 of Vol. I. of this Journal

W. K.—You are wrong: the latest case is *Boyle* v. *Wiseman*. 11 Ex. 360. It is quite opposed to your opinion.

M. P. E.—Your communication is answered on first page, under heading "Division Courts."—"Correspondence."

E. W. S.—Your letter is too personal in its reflections for insertion in this Journal.

A JUROR.—No Coroner has a right to refuse the presentment of his Jury, how much soever he differ from it.

A MAGISTRATE.—A Magistrate's Summons must, as a general rule, be personally served

JUSTITIA.—Your letter is answered under heading "Correspondence."

TO READERS AND CORRESPONDENTS.

No notice taken of any communication unless accompanied with the true name and address of the writer—not necessarily for publication, but as a guarantee of good faith.

We do not undertake to return rejected communications.

Matter for publication should be in the hands of the Editors at least two weeks prior to the number for which it is intended.

Editorial communications should be addressed to "*The Editors of the Law Journal, Toronto or Barrie.*"

Advertisements, Business letters, and communications of a Financial nature, should be addressed to "*Messrs. Maclear & Co., Publishers of the Law Journal, Toronto.*"

Letters enclosing money should be *registered*;—the words "Money Letter" written on an envelope are of no avail.

Correspondents giving instructions with reference to the LAW JOURNAL, should be careful to give *the name of their Post Office*. When a change of address is made, the old as well as the new Post Office should be given.

FINANCIAL MATTERS.

Parties in arrears for the LAW JOURNAL will particularly oblige the Proprietors by remitting the amounts due to them immediately. The aggregate of the sums now outstanding and unpaid is very large, and while the prompt payment of a small debt cannot be of any moment to the individual, delay at this time very seriously affects the Proprietors of the Journal. We expect, therefore, that our friends will pay *prompt* attention to this notice.

NOTICE.

The UPPER CANADA LAW JOURNAL, when mailed from the Office of the Publishers, is not liable to postage.

THE LAW JOURNAL.

OCTOBER, 1857.

THE ACTS OF LAST SESSION.

The Right of Appeal in Criminal Cases.—(20 Vic., Cap. 61.)

It is a common saying that "second thought is the best thought." Often men resolve to do things which in cooler moments they heartily repent. Many a verdict has been pronounced that the jurors would give worlds to be able to re-call and re-consider. How often have men lost their property,—nay, their lives owing to mistaken impressions produced on the minds of jurors? How often have the same results followed a want of preparation or an unexpected turn in the course of testimony? It is the wisdom of the law to preserve life, liberty, and property. It is the design of the administration of the law "to attain the justice of the case." The practice of granting new trials in cases where property and civil rights are at stake is of the greatest antiquity. The policy of the practice has never been questioned, but on the contrary, been the subject of just admiration. It is a graceful acknowledgment of human frailty, and an unmistakeable proof of the laws anxiety to do wrong to no man. It is that feeling defined in the Institutes of Justinian as "constans perpetua voluntas jus suum cuique tribuere,"—a constant and perpetual will to render to every one that which belongs to him. But of all rights appertaining to men in the social state that of property is much inferior to both *liberty* and *life*. It having been ascertained that for "the doing of complete justice between man and man" in civil cases, an opportunity of re-considering verdicts was essential, so in criminal cases for a like purpose the like opportunity is desirable. Jurors, judges and witnesses are quite as liable to err in a criminal as in a civil case. To admit the "soft impeachment" in the one instance and deny it in the other, is simply childish and absurd. Every verdict involves one or more propositions of fact, each having its legal consequences. It is for the jury, under the direction of the presiding Judge as to the law, to find the facts of a case, which if found in the general form of "guilty" or "not guilty" which as usually happens is the verdict in a criminal case, may be the doom of the accused. For the prevention of the consequences of mistakes in *law* there has been in Upper Canada since 1851 a Statute allowing the reservation of points of law arising out of criminal cases for the deliberation and opinion of the full Courts—upon the adjudication of which either for or against the accused is the judgment to stand or be reversed: (14 & 15 Vic., cap. 13). Judges, however, are not less likely—indeed not so likely to err as jurors. Hence the propositions of fact, either owing to prejudice, indifference, or want of comprehension, may be untruly found. Were the finding under such circumstances to be conclusive, the law would be an instrument of wrong and not the arbiter of right. Hitherto such, much to the reproach of our system of jurisprudence, has been the state of the law. No longer shall it be so—thanks to the legislature of last Session.

The Act, in its preamble, takes no pains to conceal the defect, but boldly and plainly recites that "by law the right of appeal on convictions for criminal offences is *allowed* only on questions of law reserved by the Judge, by whom such offences are tried:" (20 Vic., cap. 61). This is the mischief—now for the remedy. "Where *any person* shall be convicted before any Court of Oyer and Terminer or Gaol Delivery or Quarter Sessions of any *treason*, *felony* or *misdemeanor*, *such person* may apply for a new trial to either of the Superior Courts of common law where such conviction has taken place before a judge of either of such Courts, or to such Court of Quarter Sessions when the conviction has taken place at such sessions upon any point of law or question of fact *in as full and ample a manner as any person may now apply to such Superior Court for a New Trial in a*

civil action, &c.:" (s. 1). The significance of this language is not to be misunderstood, and the effect of it not to be depreciated. In all cases, whether civil or criminal, there shall be the right to apply for a new trial in as full a manner as by law application may now be made in civil cases. Hitherto, though in some cases of misdemeanor new trials might be had, yet in no case of felony was there the right to make the application: (Archd. Cr., Office, 96). Now for all crimes, whether treason, felony, or misdemeanor, there is the right. The Act is remedial to the fullest extent. In its construction it must be borne in mind that there is a subject and an object. The subject is, "any person convicted, &c." The object is, "a new trial, &c." The person convicted may not only apply for a new trial, but is allowed to do so in a certain manner "in as full and ample a manner as any person may now do &c., in a civil action." The application may be grounded "upon any point of law or question of fact." It must be made to either of the Superior Courts where such conviction has taken place before *a* Judge of either of such Courts,—that is to say,—"before any Court of Oyer and Terminer or Gaol Delivery," and to "the Court of Quarter Sessions when the conviction has taken place at such Sessions." The time of the application is not however so clearly expressed as the place of the application. With respect to convictions before Courts of Oyer or Gaol Delivery it is enacted that the person convicted "shall not be allowed to make any application to either of the Superior Courts for a new trial, unless such application shall be made to such Superior Court on or before the last day of the first week of the term *next succeeding such Court of Oyer and Terminer or Gaol Delivery.*" But with respect to convictions before Courts of Quarter Sessions upon which applications for New Trial must be made to Quarter Sessions, which Courts have no terms as distinct from sittings, there is much difficulty in ascertaining the real meaning of the legislature. The part material reads thus, "or to such Court of Quarter Sessions when the conviction has taken place at *such* Sessions:" (s. 1). Does not this intend an application during the same Sessions as the verdict is rendered? We apprehend that it does. The Legislature is, however, much to blame for using language so doubtful in an Act so important. The whole of the sessions, like a term of the Superior Court, is considered but as one day in law, and therefore the justices may alter and set aside their own judgment or order at any time during the sessions, (*In re The Inhabitants of St. Andrews, Holborn, and St. Clement, Danes.* 2 Salk. 606), but cannot do so at any subsequent Sessions: (*The King* v. *the Justices of Leicestershire*, 1 M & S, 442). The Court, though bound to assemble at the times prescribed by Statute, may adjourn to a day subsequent to the time so appointed, (5 Chitty's, Burns, Justice, 204, note), provided the adjournment be not to a period beyond the time fixed by Statute for the meeting of the next Sessions: (*Rex* v. *Grince*, 19 Vin. Abr., 358). In doubtful cases, if time for deliberation were required, there is nothing to prevent the Court adjourning for days, weeks, or months, as deemed most expedient, and then hearing and determining the application for a new trial. These observations, of course, are mere expressions of opinion which can not be taken as positive law, so long as the Statute is unexplained by the Courts.

We have to mention that from the rule or order of Sessions granting or refusing a new trial, there may be an appeal "to either of the Superior Courts of Common Law:" (s. 2). The case must be transmitted by the Sessions to the Superior Court "on or before" the first day of the term of such Superior Court *next after the time when such rule or order shall have been made,*" and "*thereupon* such Superior Court shall have full power and authority to hear and *finally determine, &c.*" In like manner any person convicted before a Court of Oyer and Terminer or gaol delivery who has the right to apply for a new trial to either of the Superior Courts of Common Law if dissatisfied with the decision of such Court, may appeal to the Court of Error and Appeal: (s. 4). In this case also there are limitations as to time: "Provided no appeal shall be made to such Court of Error and Appeal, unless allowed by such Superior Court or two of the Judges thereof in term or vacation—and provided also that such allowance shall be granted and appeal heard *within six calendar months after such conviction affirmed,* unless otherwise ordered:" (s. 4). The rule or order of the Court of Error and Appeal is final and conclusive: (*Ib*).

It is also enacted that "no sentence of death in any case of capital felony shall be passed to take effect, until after the expiration of *the Terms* next

succeeding the sitting of the Court at which such sentence of death shall be passed." (s. 5.) Is it intended that no sentence of death shall be carried into execution until the expiration of more than one term, next after the sitting, when such sentence was pronounced? If more than one—how many terms are intended? If one only be intended, why is the word "terms" used? "Terms," strictly speaking, must mean at least *two* terms. There is one term allowed for an appeal to either of the Superior Courts—this is of right. Then *with the allowance* of two judges of that Court, there *may* be an appeal to the Court of Error and Appeal. But suppose the judges decline to allow the appeal—what then? Is it still necessary that more than *one* term should expire before carrying the sentence into execution? May not the word "terms" be an error, and the word "term" intended? There is much to be said for and against this supposition. It is well that "the Judges of the Superior courts of Common Law, or a majority of them and the said Court of Error and Appeal" have "full power and authority from time to time to make such rules and orders as they may consider necessary more effectually *to carry out all or any of the provisions of this Act*:" (s. 6.) Unless we are greatly mistaken, there are two or three of the provisions which much need rules or orders to carry them out. We have done our duty in directing attention to them.

THE FLOUR TRADE.

In Upper Canada there is a very large class of persons engaged in the buying and selling of flour. For the benefit of such persons, and of such of the profession as may be called upon to advise them, we purpose in this article to notice some recent and important decisions of commercial interest.

The quality of a barrel of flour, like the quality of any other commodity, greatly influences its price—the better the quality the greater the price, and *vice versa*. But when flour in quantities of hundreds or thousands of barrels exchanges hands, it is utterly impossible for the purchaser to examine each particular barrel. For this reason it has become the custom of millers to stamp each barrel as being of a certain quality having reference to the standards established by law. The standards or grades rank thus:—

Very superior....."Extra Superfine."
Second quality...."Fancy Superfine."
Third quality....."Superfine."
Fourth quality....."Superfine, No. 2."
Fifth quality ....."Fine."
Sixth quality....."Fine Middlings."
Seventh quality..."Ship Stuff," or "Pollards."
Farine Entiere.....E. T. N. (19 & 20 Vic. c. 87, s. 23.)

Until recently, there was no expresssed opinion of the Courts as to the *effect* of flour brands. Everybody knows that no brand can make bad flour good, or *vice versa*, and that Inspectors appointed bylaw in Quebec, Montreal, Toronto, and other large cities, daily alter millers' brands. The question, then, naturally arises—Does not a miller who brands flour "Extra Superfine," and sells it as such, warrant to his vendee that such is the quality of the flour? At a trial in the City of Toronto, a member of a firm most extensively engaged in flour-dealing, swore that "he should not value the millers' brand as anything, for that they brand according to their fancy!" His opinion seems to have been that of many others of a similar occupation; but at length turns out to be wholly erroneous. Our Court of Queen's Bench, after the most careful consideration, has decided that "a person manufacturing flour, who marks it of a particular quality, warrants its being of that quality:" (*Chisholm* v. *Proudfoot*, 15 U. C. R. 203.) We do not think it necessary to detail the facts of this case; for the principle was fairly and prominently recognized. The reason of the decision is beyond all dispute. A man who manufactures flour must be assumed to be acquainted with the different qualities of the article, and when he brands a barrel of a certain quality must be taken to have exercised his judgment and arrived at the conclusion that the barrel so branded deserves to be described as branded. Upon the faith of this brand the purchaser deals and pays his price. If the brand be untrue, the purchaser is deceived. If not intended to be true, wherefore is it used,—unless to deceive? This the law cannot and will not countenance. The fact that Inspectors are appointed whose duty it is, upon request and payment, to examine flour, does not at all affect the legal question. It is assuredly important and in fact necessary for men sending flour abroad to send with it some evidence of its having been officially inspected. This the course

of trade demands. But flour intended for home consumption rarely if ever undergoes examination by authorized Inspectors. The parties relying upon the representations of each other deal without the intervention of any public officer.

The rule that the brand is a warranty does not apply except as between the manufacturer and *his* vendee. In this case the quality of the article and the use of the brand are entirely under the control of the seller, who is himself the manufacturer. When parcels of flour are passed from one to another among merchants, the use of a brand as descriptive of the article sold does not make the vendor liable as upon a warranty: (*Bunnell* v. *Whitlaw*, 14 U.C.R. 241.) In this case the vendor is understood to sell the lot according to the designation by which he received it; and *without an express undertaking* is not liable if the description be untrue—unless, perhaps, knowing it to be untrue, he purposely conceal the fact.

Whenever a barrel of flour is marked of a particular grade, such as "Extra Superfine," &c., it must be taken to be not only of that quality but *sweet*. Our common sense teaches us this. We should not think it necessary to make special mention of it, only that lately there being some doubt upon the point, it was made the subject of legal adjudication: (*Bain* v. *Gooderham et al*, 15 U.C.R. 33.) Defendants, flour dealers, contracted to sell "300 barrels (more or less) Elgin Mills, guaranteed to inspect No. 1 Superfine in Montreal at 32s. 6d. per barrel." The flour was immediately afterwards sent to Montreal by the purchaser, and was inspected by the public officer. The result of the inspection was as follows:

"248 barrels—Sour Fancy Superfine.
54 " —Rejected, do. do."

Hence an action. The defendants maintained that the guarantee did not bind them to deliver sweet flour or flour that would inspect as sweet at Montreal, but that it only related to the *grade*, viz–"No. 1 Superfine," and not to its *condition*. The Court, however, held that a contract guaranteeing flour to pass inspection as "No. 1 Superfine," has attached to it a necessary implication that it be sweet. As flour is in Canada an article of universal consumption, the security of the public no less than the maintenance of good faith between man and man, alike required the decision so righteously pronounced in this case.

TO LAW STUDENTS.

We have been informed that during last Trinity Term, the Law Society refused to entertain the application of three gentlemen who desired to be examined and admitted attorneys under the new act, upon the ground that the applicants were not in a position to avail themselves of the provisions of the Act. The ground of rejection is easily explained, and the explanation of it may be of service to others. The term of service of each of these gentlemen expired on the first or second day of the term *during which they made application for admission*. Now it is provided by S. 3 of 20 Vic. cap. 63, that "no application for examination and admision of any person under this section shall be *entertained*, nor shall any person be examined, sworn, admitted, or enrolled as an Attorney or Solicitor, unless he shall at least fourteen days *next before the first day of the term in which he seeks admission* have left with the Secretary of the Law Society of Upper Canada, his contract of service and any assignment thereof, together with an affidavit of the due execution thereof *and of due service thereunder* and a certificate of his having attended the sittings of the court or courts during the Term as hereinbefore provided." Before an affidavit of due service can be made the service must have been effected *i. e.*, the term of service have expired. This affidavit must not only be made but filed with the Secretary of the Law Society, fifteen days next before the first day of the term in which the applicant seeks admission. It is therefore manifest that no person whose articles expire within fifteen days of a term or during a term, can during *that* term be eligible for examination.

THE LOCAL COURTS OF UPPER CANADA.

A correspondent asks us to correct a statement in an article under this caption which appeared in the August number. "You name (says our correspondent), several counties which produce a surplus in the shape of fee fund, and go on to say, that in all the others there *is* a deficit. This "all" would include Huron and Bruce, which you speak of as one of the least productive. Writing from the return based on the income of 1855, you might seem to be correct, but then accuracy would require you to speak in the past tense."

Our correspondent goes on to say he feels "tolerably confident there was no deficit for the last half of the year 1856, and I believe there was not for the first half; as to 1857, I can speak positively for the half year, ending 30th June last. There was a considerable surplus, although the charge upon the fund had been increased, and the income was in fact more than enough to have met the full charge upon any County fund under the present law as to salaries."

We were at great trouble to procure accurate information for the article in question, and have since made further enquiries as to Huron and Bruce. We will give figures, and let them speak for themselves.

For the half year ending 31st December, 1856, there *was* a deficiency in Huron and Bruce of £180 19s. 8d.; for the half year ending 30th June last, there was a surplus of £160 5s. 7d. For the year ending 30th June last, there was a deficiency of £20 14s. 1d.

If our figures be right, our correspondent is wrong —first in the particular of which he feels "tolerably confident"—for there *was* a "deficiency in the last half of the year 1856,"—and secondly, in the assertion that the income for the half year ending June, 1857, "was in fact more than enough to meet the full charge upon *any* County fund," &c., whereas, "in fact and in truth" it would fall short of doing so by £189 14s. 5d. ! !

The object of our article was to show, that the Province was actually deriving an income from the Local Courts for the past half year, which would probably exceed £2,000 at the end of the year.

This position would not be controverted by any defective information as to Huron and Bruce, but the reverse: nor should we have noticed the supposed error, if our correspondent's position did not call for some answer to his request.

The latest information we have been able to obtain shows a surplus of over £2,759 for the last half year, which would indicate a surplus for the year of £4,300, just £2,300 *more*, instead of less, than we originally inserted. Our language was to the effect that, at the close of this year the Province would derive a revenue from the Local Courts of over £2,000.

We quite agree that "the increase of population, wealth and business in the western part of Canada, renders it unsafe to rely upon any but *recent* statistics;" and this (we are willing to believe it, as no one is more competent to speak on the point than our correspondent,) is especially true of these Counties" (Huron and Bruce.)

Our statistics *were* the very latest that could be procured at the time we wrote. Statements of facts, in this Journal are always founded on reliable evidence—and even if in error in any trifling detail, our friends ought scarcely to expect us to enter into long explanations of points which do not affect the correctness of a broad position.

CHAMBER REPORTS.

We subjoin short notes of several cases, which have been handed to us too late for publication in full in our present issue:—

WILSON ET AL. *v.* BULL ET AL.

Interpleader.—Loss of claimant's affidavit.

If claimants affidavit be lost in the course of transmission, he may be allowed to file another affidavit. Or if his claim sufficiently appear from the affidavit of the execution creditor, the usual issue may be at once directed.—Per Robinson, C. J.—6th August.

IN RE JONES (*ex parte* KETCHUM).

Costs.—Attorney and Client.—Taxation.

A bill settled for more than one year cannot be referred to taxation. When a reference is allowable, it can only be of charges for professional services. A revision of taxation will not be ordered where the grounds of the original reference to taxation have for any reason failed or become or be found invalid.—Per Robinson, C. J.—7th August.

REG. EX REL. CAGER *v.* SMITH ET AL.

Municipal Elections.—Duty of returning officer.

A returning officer should literally observe the directions of the Statute as to keeping poll-books. Though he fail to do so, his conduct will not in all respects vitiate an election in other respects regular. A returning officer cannot after the close of the poll add his vote for one of the candidates.—Per Robinson, C.J.—18th April.

RICHMOND ET AL. *v.* PROCTOR ET AL.

Final judgment on confession.—Regularity.—Power of Judge in Chambers.

A cognovit may be executed by the attorney of the party giving it. A Judge in Chambers will not set aside a final judgment regularly entered.—Per Robinson, C.J.—6th August.

SCHOFIELD ET AL. *v.* BULL ET AL.

Interlocutory judgment.—Setting aside.—Power of Judge in Chambers.

An interlocutory judgment will not be set aside to enable a defendant to plead matters arising subsequent thereto. A Judge in Chambers will not in general entertain a question as to the validity of an order of discharge for insolvency in the nature of a bankruptcy certificate, granted under 19 & 20 Vic. cap. 93.—Burns, J.—8th August.

RACEY *v.* CAMERON.

Affidavit to hold to bail.—Irregularity.—Waiver.

An affidavit to hold to bail on a promissory note must show the note to be overdue, either directly by stating the fact, or indirectly by giving the date of the note and time it became due. If a defendant after application to set aside an arrest for irregularity put in bail, he thereby waives the irregularity.—Per Robinson, C. J.—18th August.

C. Gooderich & Co., Burlington, Va., we see are about to publish "Chalmer's Opinions," a valuable work now out of print, and most difficult to be procured at any price. They are requesting orders for the work which will be printed with all "convenient despatch." The proposed Edition will contain about 800 pages, medium Octavo. The price in Law binding will be Five Dollars—the price asked for the English edition is Five Guineas. To show the character of the work, the publisher submits the opinions of Mr. Justice Aylwin, Honorable C. J, Lafontaine and others, but its best recommendation to the Lawyer and the Statesman in Upper Canada who has has examined the work, will be found in the letter which we subjoin from the Chief Justice of Upper Canada, and it would be superfluous for us to add a word in commendation. We heartily wish the spirited publishers every success. Orders should be sent in at once to the publishers, or to their Agents, Messrs. Armour & Co., Toronto.

Toronto, March 28, 1857.

Dear Sir,—I am glad to see that it is proposed to republish Chalmer's collection of Opinions of eminent Lawyers on questions chiefly relating to the British Colonies. It is a work difficult to be procured in England, and it will be a valuable service rendered to the profession to afford them more general access to a work which contains many able discussions by Lawyers of great eminence, on both sides of the Atlantic, of questions highly interesting, both in an historical and legal point of view.

I am, dear Sir, yours very truly,

J. B. ROBINSON.

Chauncey Gooderich, Esq.

We occasionally see *The Quarterly Journal of Richmond, Va.* It contains original articles, reports of cases and other interesting matter. So far as we have had opportunities of judging, the work we should say is conducted with much ability, and might well find a place in every law library. There is a very good article in the July number, on *Imprisonment for debt*, in which the "mawkish lamentation and misapplied sympathy" of the day are well handled; and correct and enlightened views are propounded on the subject.

The editor has very freely expressed sentiments which he "knows run counter to a great mass of prejudice and misapprehension." We admire the courage of our Virginian cotemporary, and trust his able advocacy will be followed by favorable results.

In other columns will be found a copy of the recent Imperial Statute intitled, "An Act to make better provision for the punishment of Frauds committed by Trustees, Bankers and other persons intrusted with property." We commend it to the law officers of the crown in this colony. One clause which provides that persons receiving property fraudulently disposed of knowingly, the same to have been so shall be guilty of a misdemeanor, will be read with interest at the present time in Upper Canada.

Amongst other Acts of importance passed during the recent Session of the Imperial Legislature, there is one of especial concern to the legal profession in the colonies. It provides that attorneys and solicitors of Colonial Courts may under certain conditions be admitted to practise *in Courts of Law and Equity in England.*

The provisions of the recent English divorce Act are widely discussed. At an early date we shall lay the Act or a reliable summary of it before our readers.

The Report of the English "Common Law Judicial Commissioners" is at length published. It is a blue book of 181 pages, and is described by a cotemporary as being "much ado about nothing." The changes recommended as to the business of the Courts are few and unimportant.

The Law Society of Upper Canada has passed rules, under the authority of the new Act, for the admission of Attorneys.

MONTHLY REPERTORY.

CHANCERY.

L.C. FARINA *v.* SILVERLOK. *July* 8.

Injunction.—Liberty to bring action.—Extension of time.

Where the plaintiff's bill was retained for a twelvemonth, with liberty to bring an action, the time was extended the day before the twelvemonth had expired—it appearing that the plaintiff had a *bona fide* intention of bringing the action, and had not been culpably slow in taking steps towards bringing the matter to adjudication.

In this case the matter had been proceeded with up to the hearing, but the plaintiff withdrew the record in consequence of the absence of his counsel.