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DIARY FOR APRIL.

2. Saturday .... Last day for notice of trial York and Peel Assizes.
3 SUNDAY..... *Low Sunday.*
4. Monday ..... County Court and Surrogate Court Term commences.
9. Saturday. .... County Court and Surrogate Court Term ends
10. SUNDAY ..... *2nd Sunday after Easter.*
11. Monday ..... York and Peel Spring Assizes.
17. SUNDAY ..... *3rd Sunday after Easter.*
23 Saturday ..... *St. George.*
24. SUNDAY ..... *4th Sunday after Easter.*
25 Monday ..... *St. Mark.*
30. Saturday..... Articles, &c, to be left with Secretary of Law Society Last day for completing Assessment Rolls. Last day for Non-Residents to give Lists of their lands.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

APRIL, 1864.

THE LATE CHARLES C. SMALL.

One by one the old landmarks of Upper Canada are being removed. Scarcely a month passes that we are not called upon to chronicle the death of some old and much respected inhabitant of this part of the province. One by one the pupils of the venerable Bishop of Toronto are being summoned to their last home—he being left as it were to look after the spiritual comfort of each and all, so long as it may please providence to extend their earthly pilgrimage.

Charles Coxwell Small cannot be allowed to leave us for ever without a parting word to his memory. Though less distinguished as a lawyer than Sir John B. Robinson and other great pupils of the Bishop, who lately have left this world, he was not less distinguished in all the attributes which go to make up the character of the gentleman and the christian. It pleased providence for years to afflict him sorely, but, notwithstanding pains and trials, he never forgot the courtesy that one man owes to another and the devotion which every man owes to his God.

The family of the deceased is one of the oldest in this part of the province. His father, John Small, came to Upper Canada with Governor Simcoe in 1792, and for many years held the office of clerk of the Executive Council and of the Crown in Upper Canada. His son, Charles, was born in "Little York," now Toronto, on 31st December, 1801, in the house in which afterwards he breathed his last. This house was built on the site where for many years the Executive Council chamber stood. Mr. John Small, his father, resided there surrounded by the primeval forest at a time when bears and wolves, even within the memory of Mr. Charles Small, were heard to growl around the house. It is now one of the most densely populated parts of the city of Toronto.

The subject of this notice received his early education in Bath, England; but it was finished, as we have already intimated, under the careful and able training of the present Bishop of Toronto. He was also at one time a pupil of the late Venerable Geo. O'Kill Stuart. We have little to recount of his "school-boy days." He became a student of the law under the late much esteemed Sir John B. Robinson, and was called to the bar of Upper Canada as early as April, 1824—having for two years previously acted as deputy for his father. He never practised his profession; for in 1825 he was appointed clerk of the Crown and Pleas in Upper Canada, which office he held till the day of his death. He was one of the few officers in the civil service at the present time who held his commission from the Imperial Government. In 1828 he visited England, and in that year was married at Fulham Church, near London, to Frances Elizabeth Innis, by whom he had five sons and two daughters, all of whom survive him. His wife died in 1857. His eldest son, John, is now chief clerk in the office of the Court of Queen's Bench, and discharges the duties of that office with much ability.

Until 1849, there was only one court of common law of superior jurisdiction in Upper Canada—the Queen's Bench. Mr. Small was the clerk of that court, and until 1849 received all the fees of the office for his own use. Out of the fees he paid his deputies in the several districts of Upper Canada, and all other expenses connected with the office. His income, however, was a handsome one. In 1849, the fees were directed by the Legislature to be funded. It was in that year the Court of Common Pleas was first established. Provision was made for the appointment of a clerk of the Crown and Pleas in each of the Courts of Queen's Bench and Common Pleas, at an annual salary of £400 per annum. Mr. Small continued to hold the office in the Queen's Bench or senior Court, and Mr. Heyden, his now successor, received the appointment in the Common Pleas. But as the office in the Queen's Bench had been for a long time held by Mr. Small, special provision was made for the payment to him of an annual salary of £750, free and clear from all taxes and deductions whatsoever. His successor receives only £400 per annum.

In 1840, Mr. Small, while suffering from a severe attack of tic doloreux, was put by his physicians under a course of mercury, and while subject to its influence he in that

year caught a severe cold, which brought on a violent attack of neuralgia that increased in intensity month by month till December following, when the lower part of his body became paralyzed, and he completely lost the use of his lower limbs. Occasionally he suffered excruciating pain, but notwithstanding always endeavoured to discharge the duties of his office with his wonted care.

In early life he was a keen sportsman, much given to fishing, shooting and boating. He was also an officer in the Sedentary Militia, and as Colonel of the 4th North York Regiment did good service during the rebellion of 1837. Years before the rifle was taken up as a weapon of warfare by the English volunteers, Mr. Small publicly advocated that the militia of this colony should be made familiar with its use. He was foremost in rifle matches, and ever ready with his purse to contribute generously for prizes for "the best shots." He himself, in 1839, carried off the medal from a host of competitors from all parts of Upper Canada. He was, before 1840, a man of great bodily and mental activity; and since that year, notwithstanding his infirmity of body, was a man of very active mind. He took a great interest in agriculture, and up to the time of his death managed one of the best cultivated farms in the immediate vicinity of Toronto. He was always among the first to experiment with and introduce new machinery in agriculture, and shortly before his death was a successful competitor for prizes at Provincial and County Fairs. He was indeed a man of untiring industry, and of late years did all in his power by his purse and by personal exertions to promote sound principles of agriculture in Upper Canada.

In 1860, notwithstanding his bodily infirmity, he visited England and made an extensive tour on the continent of Europe, thoroughly enjoying the scenes incident to foreign travel, but without any permanent benefit to his health or amelioration of his bodily sufferings; and though he availed himself of the advice of the best surgeons and physicians of the day, he returned to Canada little if any thing better than when he left.

Mr. Small was careful and methodical in every matter of business. He was at all times obliging to the members of the profession, several of whom he had known from childhood and by all of whom he was respected. The methodical habits which he evinced as a public servant he carried with him in the management of his property and even in the government of his household. Several weeks before the day of his death he arranged his affairs with the utmost detail.

His appearance was prepossessing. His face was well formed and handsome, indicating not merely much vivacity, but much intellectuality. His frank smile seemed to belong to one who knew little either of physical or mental suffering. He was at all times confiding and cheerful. His desire to make those about him contented and happy caused him to endeavour to conceal the pain which often agonized him, and in spite of himself at times clouded his face. His hospitality before the death of his wife was unbounded. Since then both he and his daughter, though in a quieter manner, were ever ready to welcome those who enjoyed the pleasure of their acquaintance. His death has caused a void which long will be felt by a numerous circle of friends.

He was buried on Monday the 21st March last, at the family vault near Toronto. The body was borne to the grave by six of his old servants, followed by a numerous concourse of mourners, including his venerable preceptor the Bishop of Toronto.

A GOOD APPOINTMENT.

We congratulate the profession upon the appointment of Mr. M. B. Jackson to the responsible office of clerk of the Crown and Pleas, in the Court of Common Pleas. His learning and experience will enable him to discharge the duties of that office with credit to himself and satisfaction to the profession. He is certainly the right man in the right place. Our only regret is that his declining health should have rendered it necessary for him to abandon his lucrative practice for the acceptance of such an office. But in doing so no doubt he has acted prudently, and we hope that his expectations of renewed health, owing to diminished toil, will be fully realized. The salary attached to the office is £400 per annum.

THE BENCH AND THE BAR.

We learn from our Kingston exchanges that Kenneth Mackenzie, Esq., who for ten years has been judge of the county court of the United Counties of Frontenac, Lennox, and Addington, has resigned the judgeship and is about to practise the profession of the law in the city of Toronto.

We welcome the learned gentlemen to the ranks of the profession in the city of Toronto. He was called to the bar in Michaelmas Term, 1843, and for nine years successfully practised his profession in the city of Kingston, before his elevation to the Bench. His experience both at the bar and on the Bench must be of great service to him now that he is about once more to fight the battle of life in the profession to which already he has devoted so much of his time.

The bar of Kingston last month presented him with an address, of which the following is a copy:—

KENNETH MACKENZIE, ESQ., Q. C.:

The members of the Kingston bar avail themselves of the present opportunity of tendering to you their respectful acknow-

ledgments of the kindness, courtesy and attention, which you at all times exhibited towards them, during the many years wherein you have presided over the Courts of these Counties.

While meeting you officially as a Bar, for the last time, we do assure you that you will carry with you to the City of Toronto, where we understand you are about to return to the active duties of your profession, our warmest wishes for your professional success and future prosperity, results which we confidently anticipate must follow, from the integrity, impartiality and zeal which have always marked your judicial career.

The following was the reply of the learned gentleman :—

SIR HENRY SMITH AND GENTLEMEN OF THE KINGSTON BAR :

I receive your address with pleasure, and sincerely thank you for the expression of kind sentiment which it contains.

It has been truthfully observed that the connexion between the bench and the bar is a most intimate and peculiar one; and that it is not too much to say that they pass their lives in each other's presence, and that it is to themselves to whom they must look, if there is anything to commend or to find fault with. The suitors of the Courts, or even the general public may form a wrong estimate, whether for censure or praise. "It is among ourselves that we are best understood and are most truly known."

A good feeling between the bench and the bar should be on all occasions fostered and maintained by mutual good offices of courtesy and forbearance to each other. The remembrance of the general good feeling which has subsisted for many years between you and myself will be a source of real gratification to me in time to come.

In voluntarily retiring from the honorable and responsible office which I have held for the last ten years, I am delighted to be assured that I carry with me the good wishes of so intelligent and discerning a body of gentlemen as the Kingston Bar.

Our judges both of superior and inferior courts should have greater salaries than they now receive—salaries sufficient to secure from the ranks of the profession the best talent that the profession can afford. It is a disgrace to a colony like Canada that its chief justices and other judges of superior jurisdiction have no greater salaries than bank clerks in England, bank managers in Canada, and stipendiary magistrates in the West Indies and other colonies. Parsimony in the payment of Judges is false economy. Better far to pay judges liberally, than to lower the standard of the Bench. Fortunately, our Bench, so far, possesses the entire confidence of the profession and of the public. We hope such may long be the case, notwithstanding the niggardly conduct of our collected wisdom—conduct which is well calculated to bring about a contrary result.

REPORTS AND REPORTERS.

Now that the subject of law reports and law reporters is attracting so much attention in the mother country we avail ourselves of the opportunity of giving to our readers some well written remarks from our cotemporary—*The Legal Intelligencer*, of Philadelphia. The writer says :—

"The office of reporter requires some of the rarest qualities of the professional character, and some qualities which, though not of the kind strictly professional, must necessarily attend them. The union of the two classes is not common. Certainly the office requires, as a preliminary, constant attendance in court, good education and knowledge in the law; study of the record before, during, and after argument; intelligent apprehension of the argument on both sides, and after all a thorough understanding and mental possession of the opinion itself. In these things intellectual qualities of a common order will not suffice: nor habits of business either indolent or careless. Nothing material must be overlooked; nothing not material may be possessed. If constant communication is not had with the judges and the court in the progress of the report—a matter difficult where judges are so scattered—the report will not be of the most perfect kind. Yet all this is but preliminary. There is requisite, as literary qualification, power, first of all, in *presenting* the case—presenting it, we mean, with the skill of the *mise en scene;* giving to its different parts their place, proportion, and due effect. In narrating there must be order and condensation; and both must be accompanied by exactness and elegance of expression, such as are not the possession of all good thinkers, nor of all good lawyers, nor even of all educated men. Every good lawyer, therefore, is not competent to fill such a post. The professional drudge will do nothing but disgrace it. Neither is the mere scholar a sufficient person. * * * * * *

"Then comes the syllabus or marginal abstract. The syllabus of a judicial opinion, though formally no part of the case itself, is, practically, the most important part of the report. It is, as it were, *the docket entry* of the judgment upon which we rely for *notice* of the judgment, and are justified in relying. We may add that in the hands of an able reporter, the syllabus may serve, and ought to serve, a higher purpose than convenience of reference. In reading a written opinion, even when we have the case well stated in advance, we are sometimes at a loss to know precisely what is the *gist* of a judgment; and what remarks are only inducement or surplusage. A reporter who has attended the argument ascertains what are the points on which the judgment hinges; and it is *his* duty to announce at the head of his case—not every dictum, every truth which the judge may have used for illustration, for argument, for analogy—*but* that *one* point which alone it was understood by the court that it really decided. Accordingly, it is not uncommon to find the syllabus of an able and conscientious reporter of repute, like Burrow, or Durnford, or East, or Johnson, or Binney, referred to when an opinion is ambiguous or obscure, as the evidence of what the court did, in fact, decide. The shading of the judicial argument has been lost in the black and white of a printed decision; the *emphatic point* of an adjudication may be missed by the distant reader in the length and illustrations of the opinion. The reporter it is, who, catching wisdom "as it flies," —from what he *imbibed* in the progress of the case, from his study of the pleading; from his attention to the argument, and from his consideration of the current observations of the court itself is to light up and illustrate the opinion in its true and genuine meaning."

The same writer thus proceeds, in language fully justified by the occasion, to expose what has been called reporting the decisions of the Supreme Court of the United States :

"The Reports of the Supreme Court of the United States have been for many years past—ever since the time, in fact, that Mr Wheaton ceased to report them—eminently discreditable to our professional character, abroad, and a vexatious burden every way to those among us who were obliged to read them, at home. They have been in some cases almost unintelligible except to the counsel who argued, or to the judges who decided them. The careless or stupid way wherein whole deeds, and wills, and documents of every kind have been thrust in, bodily, when the case may turn upon two lines or but two words of them; the whole way, in short, in which the cases are stated, and the arguments of counsel are not stated—unintelligible itself, and making unintelligible every other part of the proceeding—has long disgusted the profession, and prevented any one from reading the Federal Reports of cases in their last adjudication, if they could possibly help it. We say little of the miserable shifts that have been, *sometimes*, resorted to for swelling the volumes; considerations, these last, prompted by motives quite beneath the attention or even the contempt of an honorable mind. But carelessness, stupidity, disorder in stating, and reporting the body of the cases is not all. The profession *for forty years* has had to complain of acts of incompetency and error, by the operation of which the decisions of the court—the court of supreme authority throughout the land—are in effect falsified, the Bar misled, and the law abused. We charge that in repeated instances, in the syllabuses of cases, the decisions of the court have been grossly misrepresented, and that it is certified by the reporter to the profession that the court has decided that which the court has not decided."

Without designing to be personal we think we may say that there are some law reporters in Upper Canada who might profit by a perusal of the foregoing remarks. No duty is more important than that of *faithfully* and *expeditiously* furnishing to the profession and the public the decisions of the superior legal tribunals of the Province. It is not every man who is capable of being a good law reporter. There is required a combination of knowledge and business talents which few men possess. But still such men may be found, and when found should be accepted. Merit should be the only qualification for a law reporter, and appointments secured or held by other influences are not only unjust to the deserving, but pernicious to the best interests of the law and its administration.

ELECTIVE JUDICIARY.

The Supreme Court of the State of Pennsylvania is, as we understand, composed of five judges, one of whom is chief justice. These judges are from time to time elected by the people. During the month of November last, on the eve of an election for judge, the question as to the constitutionality of what is commonly called the Conscription Act came before the court. Three of the judges (including the chief justice) were of opinion that the act was unconstitutional, and the court so decreed. Two of the judges dissented from the decision of the court.

This decision was opposed to the enthusiastic notions of the people of the state, who seem determined to carry on the present war *per fas aut nefas*. One of the judges (Lowrie), a most able and upright man, who decided against the constitutionality of the Conscription Act, presented himself for re-election. The consequence was that he was rejected by the people, and a man who was "sound" according to the popular idea of the question was chosen in his stead.

No sooner had this new judge taken his seat, than a motion was made before him to dissolve the injunction granted by the court of which Lowrie, J., was a member; in other words, to get the court as newly constituted to reverse its decision of November last. This novel experiment was made in January last and with entire success. The people are jubilant, but "wise men are in tears."

We subjoin, from the *Legal Intelligencer*, some of the withering remarks made by Chief Justice Woodward, who, in affirmance of his previously expressed opinion, dissented from the decision of the court as newly constituted.

"The time and manner of bringing forward this motion would seem to indicate that it was a sort of experiment upon the learned judge who has just taken his seat as the successor of Judge Lowrie. Does any-body suppose it would have been made if Judge Lowrie had been re-elected? I presume not. Are we to understand, then, that whenever an incoming judge is supposed to entertain different opinions on a constitutional question from an outgoing judge, every case that was carried by the vote of the retiring judge is to be torn open, re-discussed, and overthrown? God save the commonwealth if such a precedent is to be established! The personnel of this court is very changeable. In less than twelve years that I have been here, I have sat with twelve gentlemen, including the four brethren now with me. We come and go by elections, if other causes do not remove us; but let it never be said that our records are as unstable as ourselves, or worse still, as unstable as the vicissitudes of politics. Many estates in Pennsylvania are held and enjoyed to-day by virtue of votes that Judge Lowrie has cast in this court during the last twelve years. If this constitutional question, which was decided in the same way, is to be re-opened, because his successor is presumed to differ in opinion, I see not how any of the other questions are to be considered settled or the cases concluded. If these defendants are entitled to have Judge Lowrie reversed in this summary and unprecedented manner, I know not how we are to deny other suitors the same privilege. The general rule is, that courts do not allow themselves to be experimented upon. I would hold to that rule very firmly. I cannot admit that a popular election should overthrow a judicial record. I maintain that the decision of the 9th of November is the law of this court, and will be until it is regularly reversed or avoided according to established judicial rules, and as such is entitled to be respected and obeyed by all orderly and loyal citizens."

A lover of justice cannot fail to admire the outspoken sentiments of the chief justice. It is refreshing to find a man surrounded by circumstances strongly tending to warp

his judgment uttering such manly sentiments. Possibly he will, when the time comes to present himself before the people for election, be rejected—but not disgraced. His outspoken thoughts will continue to live in the breasts of thinking men when "the time-servers" of the day and all belonging to them are buried in oblivion.

DIVISION COURTS LEGISLATION.

Several correspondents have written to us for information as to Mr. McMaster's bill to amend Division Courts Act, introduced during last session of the Legislature, and now before Parliament. For the information of all, we subjoin a copy of the bill.

AN ACT TO AMEND THE DIVISION COURTS ACT.

Whereas it is expedient to amend the Act respecting the Division Courts, being the nineteenth chapter of Consolidated Statutes for Upper Canada: therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The sixth, seventh, eighth, tenth, eleventh, fourteenth, fifteenth, and twenty-third sections of the said Act are hereby repealed.

2. A Court shall be holden in each Division once in every three months, or oftener, in the discretion of the Council of the County or Union of Counties; and the Council of the County or Union of Counties may appoint, and from time to time alter, the places within such Division at which such Courts shall be holden.

3. The Council of the County or Union of Counties may appoint, and from time to time alter the number, limits, and extent of every Division, and shall number the Divisions, beginning at number one.

4. When a junior County separates from a senior County or Union of Counties, the Division Courts of the United Counties which were before the separation wholly within the territorial limits of the junior County, shall continue Division Courts of the junior County, and all proceedings and judgments shall be held therein, and shall continue proceedings and judgments of the said Division Courts respectively; and all such Division Courts shall be known as Division Courts of such junior County, by the same numbers respectively as they were before, until the Council of the junior County appoint the number, limits, and extent of divisions for Division Courts within the limits of such junior County, as provided in the third section of this Act.

5. Whenever the Council of any County or Union of Counties, alter the number, limits, or extent of the Division Courts within such County, all proceedings and judgments had in any Division Court before the day when such alteration takes effect, shall be continued in such Division Court of the County or Union of Counties, as the judge directs, and shall be considered proceedings and judgments of such Court.

6. At the first meeting of the Council of any senior County after the issue of any proclamation for separating a junior from a senior County, or at any subsequent meeting of such Council, the said Council shall appoint the number (not less than three nor more than twelve,) the limits, and extent of the several divisions within such County, and the time when such change of divisions shall take effect.

7. The Clerk of the County, in a book to be kept by him, shall record the divisions declared and appointed, and the places of holding the Courts, and the alterations from time to time made therein, and he shall forthwith transmit to the Clerk of the Peace of the County a copy of the record.

8. The clerks and bailiffs of the Division Courts in each County or Union of Counties shall from time to time be appointed, and may from time to time, at pleasure, be removed by a board composed of the Judge, the County Attorney, the Warden, the Treasurer and the Registrar residing at the County Town of such County or Union of Counties; which board shall meet for the purposes of this Act at the Court-house of the County or Union of Counties, on the first Monday in each of the months of January, April, July, and October, and on such other days as they shall be summoned to meet by the Judge; and any three of the said board shall constitute a quorum thereof, and be competent to exercise all or any of the powers thereof, but the Judge may dismiss any such officer *ad interim*, subject to appeal to such board

9. Clerks or bailiffs, and other officers of Division Courts, shall not, during their terms of office as such, be qualified to be members of any municipality, or to vote at or directly or indirectly take any part in any parliamentary or municipal election.

10. All persons holding offices as clerks or bailiffs, or other offices of Division Courts, at the time of the passing of this Act, shall continue to hold such offices until their successors are appointed under this Act, and may continue until the thirty-first day of December next to hold also any municipal office, and be deemed qualified to hold the same, notwithstanding the provisions of this Act to the contrary.

11. No clerk or bailiff of any Division Court shall directly or indirectly purchase, or acquire any interest in any note, debt, or account susceptible of collection, or claim pending, or judgment rendered in such Court, on pain of forfeiture of his office as such.

12. In construing this Act, the words "the Judge" shall mean the senior or acting Judge of the County Court of the particular county in which the Division Courts are respectively situated.

Mr. Scatcherd, of cheap law notoriety, has introduced a bill of great importance, so far as Division Courts are concerned. The following is a copy of it:

AN ACT TO EXTEND AND INCREASE THE JURISDICTION OF DIVISION COURTS IN UPPER CANADA.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Jurisdiction.

1. The judge of every Division Court may hold plea of and may hear and determine in a summary way, for or against persons, bodies corporate, or otherwise—all actions on promissory notes or bills of exchange, where the debt or damages claimed do not exceed two hundred dollars.

Examination of debtors—Attachment of debts and proceedings against Garnishees.

2. The sections of the Common Law Procedure Act of Upper Canada, numbered from two hundred and eighty-seven to two hundred and ninety-nine, (both inclusive) are hereby extended to the Division Courts, and also to judgments and parties, and debtors and judgment creditors and judgment debtors, and to those indebted to judgment debtors, and to the debts due by them, and also to garnishees in the several Division Courts of Upper Canada, in so far as the same can be made applicable for affording satisfaction and facilitating the recovery of debts and judgments in the said Division Courts by attachment.

3. All proceedings and matters under this Act, had in the Division Courts, shall be disposed of after the practice of the said Courts without formal pleadings, and the powers of the Courts and officers, and the proceedings generally thereunder, shall be as nearly as may be, the same as in other cases which are within the jurisdiction of the said Division Courts.

Commissioners to Examine Witnesses.

4. The sections of the Consolidated Statutes for Upper Canada, chapter thirty-two, numbered from nineteen to twenty-one, both inclusive, are hereby extended to the Division Courts, and also to suits and plaints, and evidence, parties and witnesses therein, so far as the same can be made applicable.

5. The same costs shall be allowed for commissions issued under this Act and proceedings connected therewith, as may be allowed from time to time for commissions issued in the County Courts in Upper Canada, subject to such reduction as the judge before whom the cause is tried may think reasonable, and such judge shall also have the power to apportion the costs between the parties as he

may think proper, provided always that hereafter it shall be no ground for granting a certificate for County Court or Superior Court costs in any suit within the jurisdiction of a Division Court, that it was necessary to issue a commission in such suit.

Absconding Debtors

6. In order to facilitate the recovery of debts and judgments in the Division Courts by attachment against absconding debtors, the sections of the Consolidated Statutes Upper Canada, chapter twenty-five, numbered from twenty-three to twenty-eight, both inclusive, are hereby extended to the Division Courts.

7. When a bailiff of a Division Court sues to recover the outstanding debts of an absconding debtor, the action or suit may be brought *in any Court of competent jurisdiction.*

8. The one hundred and ninety-ninth section of the Division Court Act is hereby extended to any debt or demand within the jurisdiction of the Division Courts, as increased by this Act, and to any person or persons so indebted.

Executions.

9. Every writ of execution (if unexecuted) may at any time, and from time to time before its expiration be renewed by the party issuing it for thirty days from the date of such renewal, by being marked in the margin with a memorandum to the effect following: renewed for thirty days from the —— day of —— A.D. 18 —, signed by the clerk of the Division Court, who issued such writ, or by his successor in office; and a writ of execution so renewed shall have the effect and be entitled to priority according to the time of the original delivery thereof to the bailiff. 22 Vic. c. 22, s. 249, Consolidated Statutes Upper Canada.

10. The production of a writ of execution, marked as renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, 22 Vic., c. 22, s. 250, Con. Stat. U. C.

11. The cost of a renewal of an execution shall be the same as for the original writ of execution.

New Trials.

12. Except in cases of appeal under the Municipal Assessment Act, the judge, upon the application of either party, within fourteen days after the trial, and upon good grounds being shewn, may grant a new trial upon such terms as he thinks reasonable, in all matters, plaints, suits, controversies, or questions which shall have been or may be tried before him, and may in the meantime stay proceedings therein.

Jury in Interpleader and other cases.

13. Either party may require a jury to try any fact controverted in any case under the one hundred and seventy-fifth section of the Act respecting Division Courts, or any fact controverted in any action of replevin brought in a Division Court, or any fact arising under any proceeding under this Act, or the judge before whom any such fact is controverted may, if he thinks proper, order the same to be tried by a jury.

14. If either of the parties require such jury, he shall proceed in the manner pointed out by the one hundred and twentieth section of the Act respecting Division Courts, or may make a request to have a jury impannelled, at any sittings of the Court, and if the judge requires a jury, such jury shall be summoned under the one hundred and thirty-second section of the said Act respecting Division Courts.

15. Any jury summoned and returned to try any controverted fact under this Act, or under the said one hundred and thirty-second section of the said Act respecting Division Courts, shall be sworn or affirmed (in cases where affirmation is allowed by law instead of an oath) "well and truly to try such controverted fact or facts as may be in dispute or issue between the parties, and to give a true verdict according to the evidence," and such jury shall not be sworn under the one hundred and thirty-first section of the said Act.

Affidavit.

16. The affidavit or affirmation referred to in the one hundred and third section of the Act respecting Division Courts may, if made out of Upper Canada, be taken before the judge of any Court of Record, or before the mayor of any city or town, or before a notary public.

Appeals.

17. Appeals shall be allowed from the Division Courts to a Superior Court of Common Law in all actions or suits brought on promissory notes or bills of exchange, where the debt or damages claimed exceed one hundred dollars.

18. The sections of the Consolidated Statutes for Upper Canada, chapter fifteen, numbered sixty-seven and sixty-eight, are hereby extended to the Division Courts, and also to actions or suits therein, and to parties thereto (within the meaning of the preceding section) in so far as the same can be made applicable.

19. Whenever the words "Superior Court" or "County Court," or "Superior" or "County" or "Sheriff" or Court," are or is made use of and occurs in either of the said sections of the Common Law Procedure Act, or in either of the said sections of the Consolidated Statutes for Upper Canada, enumerated in this Act, they shall be taken to mean "Division Court," or "Division" or "Bailiff of Division Court," as may best suit the context so as to apply the provisions of the said sections to the purpose of this Act, and the objects contemplated hereby.

20. This Act and the said Division Courts Act, and the several sections of the Common Law Procedure Act, and the several sections of the Consolidated Statutes for Upper Canada, chapter fifteen, chapter twenty-five and chapter thirty-two enumerated in this Act, in so far as any suit, plaint or proceeding authorised by this Act is concerned, shall be read as if they formed one Act, or part of the said Division Courts Act.

21. This Act shall apply to Upper Canada only, and shall come into force on the first day of January, A.D., 1864, and not before.

CONVEYANCING BY COUNTY JUDGES.

Hon. Mr. Currie has introduced a bill having for its object the prevention of conveyancing by county judges. We are surprised to find that such a bill is deemed necessary. It enacts that

No judge of a County Court in Upper Canada, shall, during the continuance of his appointment as such judge, directly or indirectly, practice or do any manner of conveyancing or prepare or draft wills for any person or persons whomsoever, or draw or prepare any papers or documents to be used or filed in any Court presided over by such judge or any other county judge, under the penalty of forfeiture of office, and the further penalty of four hundred dollars, to be recovered by any person who may sue for the same by action of debt or information in either of the Superior Courts of Common Law, one-half of which pecuniary penalty shall belong to the party suing, and the other half to Her Majesty.

Hon. J. H. Cameron and Mr. McConkey have both introduced bills (No. 69 and 74), which are as nearly as possible copies of each other and of the following:—

AN ACT TO AMEND CHAPTER NINETEEN OF THE CONSOLIDATED STATUTES FOR UPPER CANADA, INTITULED "AN ACT RESPECTING DIVISION COURTS."

Whereas it is desirable to lessen the expense of proceedings in Division Courts in Upper Canada, and to provide, as far as may be, for the convenience of parties having suits in these Courts: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. Any suit cognizable in a Division Court may be entered and tried and determined in the Court the place of sitting whereof is the nearest to the residence of the defendant or defendants, and such suit may be entered and tried and determined irrespective of where the cause of action arose, and notwithstanding that the defendant or defendants may at such time reside in a county or division other than the county or division in which the Division Court is situate, and such suit entered.

2. It shall be sufficient if the summons in such case be served by a Bailiff of the Court out of which it issues, in the manner provided in the seventy-fifth section of the Division Courts' Act; and upon judgment recovered in any such suit a writ of *Fieri Facias* against the goods and chattels of the defendant, and all other writs, process, and proceedings to enforce the payment of the said judgment, may be issued to the Bailiff of the Court, and be executed and enforced by him in the County in which the defendant resides, as well as in the County in which the judgment was recovered.

3 This Act shall be read as incorporated with, and as part of, the said Division Courts' Act, and the foregoing sections shall be considered as inserted next after section seventy-one in the said Act, and the authority from time to make rules and to alter and amend the same (given under the sixty-third of the said Act) shall extend to the provisions in this Act contained.

A FIRST-CLASS LAW REPORTER.

We are very glad to observe that the Supreme Court of the United States has appointed John W. Wallace, Esq., of Philadelphia, to the position of Official Reporter of its decisions, Judge Black having resigned.

Mr. Wallace is well known to the profession as the author of an excellent work, in which all the English law reports and reporters are reviewed, and the various criticisms of the Courts upon them collected. He has also edited, with Judge Hare, the American Leading Cases, and is now, we believe, editor of the Philadelphia *Legal Intelligencer*. It is to his pen that we are indebted for the extremely entertaining and instructive articles on the "Curiosities of the Reports," which have appeared from time to time. He has, moreover, published some volumes of regular reports under his own name.

We look with confidence for a very different style of reports of the Supreme Court decisions, under the hand of Mr. Wallace, from those which Mr. Benjamin C. Howard so long imposed upon a suffering profession. Mr. Wallace has the ability, the industry, and the conscientious sense of what is due to his task and to the bar, which are necessary to constitute a successful reporter. He will not, we are confident, stuff his books with judgment rolls and bills of exceptions; and we look for the best series of reports from his hands which have ever been seen in America.

We felicitate the Supreme Court upon its selection, as honorable alike to the Court and to the gentleman of its choice.—*N. Y. Transcript.*

SELECTIONS.

THE OLD LAWYERS OF NEW YORK—ALEXANDER HAMILTON.

To write of Hamilton is of necessity to repeat the substance of much that has been written, and with which many readers are familiar; still there are very many who, from want of inclination or facility of access to the necessary books, know little of this great man. The writer expects only to throw together such facts as will be an illustration of the capacity and ability of Hamilton, and in a condensed form give all that the general reader requires.

Alexander Hamilton was the grandson, on the paternal side, of "Alexander Hamilton of the Grange," Scotland. His grandmother was the daughter of Sir William Pollock. His father was a merchant in Santa Cruz, and Alexander was born at the island of Nevis, 11th of January, 1757. He attended a woman's school at Santa Cruz, and related the fact that when so young as to recite standing at his teacher's knee he was compelled to repeat the Decalogue in Hebrew. At twelve years of age he was placed in the counting house of Mr. Cuyu, a merchant at Santa Cruz, where he remained with a strong disinclination to mercantile pursuits and an expressed wish for military service, till his sixteenth year, when, in 1772, he arrived in Boston, and almost immediately came to New York. Very soon afterwards he went to a grammar school at Elizabethtown, N. J., the school being under the patronage of Gov. Livingston and Dr. Boudinot, who soon became his warm friend. He pursued his studies with great zeal and earnestness, and before the end of the year was considered fitted for College. He entered King's (now Columbia) College and made rapid progress, and very early displayed great power and skill with the pen, contributing articles, mostly on political matters, to the leading papers.

The Boston Tea Riot occurring, Hamilton went to Boston, and, entering warmly into the feelings and views of the Colonists, earnestly espoused their party. On his return to New York he wrote some able articles on the subject of the differences between Great Britain and the Colonies, and at once threw all his energies into the cause. The Continental Congress convened, and in the papers he sustained their meetings and acts, and at nineteen years of age it was said of him, and the appellation was permanent, that he was the "Vindicator of Congress."

Immediately after the battle of Lexington, having for some time previous, in conjunction with some other young men, under Major Fleming, received military instruction, he was, on the 14th of March, 1776, appointed Captain of the Provincial Company of Artillery. In command of this body he covered the retreat of the Continental army from Long Island, when the enemy forced them back to New York, and then to New Jersey. He went with the army into New Jersey, and participated in the battle of Monmouth. In March, 1777, he was appointed aid to General Washington, and was with him in the battles of Germantown and Brandywine, with the rank of Lieutenant Colonel. From causes not requiring to be narrated here, he resigned his position on Washington's staff, and though the General apologized and requested him to return, he persistently refused, but still remained on terms of personal intimacy with his late chief, and was one of his warmest friends.

In 1780 he married the second daughter of General Phillip Schuyler, of Albany. This lady was not only one of the most beautiful ladies of her day (and those who saw her in the latter years of her life could imagine how beautiful she was), but she was highly accomplished and most thoroughly educated. She survived her husband nearly fifty years, and was till her decease one of the ornaments of the best society in the Union.

Col. Hamilton, subsequent to his severance from Washington's military family, commanded a battalion of the New York line, and was present with his command at the battle of Yorktown, which closed the great drama of the Revolution, enjoying to a great degree the love and confidence of Lafayette. In 1798, a standing army was created by Congress, Washington being General in-Chief or Commander, and Hamilton a Major-General.

He went to Albany, after leaving the army, and studied law for a few months, his son and biographer says, "devoting his time to procedure," and was, at the July term, 1782, licensed as attorney. The rule which had been held firmly against Burr, admitted about the same time, seems to have been easily relaxed in Hamilton's case. From the knowledge displayed in his professional career, from the importance and number of cases submitted to and argued by him, it is apparent much more time than a "few months" was by him devoted to the study of law; but no one of his biographers gives us light on

the subject. He was admitted counsel the following spring. Hamilton, as was mentioned of Burr, was benefited by the Act of the Legislature excluding Tory lawyers from practice. He came to New York, and was soon doing a large business. An opportunity occurred in his early career which enabled him to take a stand among the leading members of the bar, and a case, too, peculiarly adapted to the training and bent of his intellect. How many a young lawyer has pined away years of his life without ever being able to have a case of importance enough to attract the attention of his fellow lawyers or of the public, and whose professional reputation seems to have been circumscribed by a cordon of circumstances by him wholly uncontrollable! A physician needs no startling case to bring practice and fame; he can win his way, if he has ability and science, to a full practice and eminence by persistent effort; but a lawyer must have something to bring him markedly before the public, or he must have influential and what, for want of a more appropriate word, may be called affirmative friends.

A law was passed by the Legislature providing that the owners of stores and houses in New York could recover rent of the tenants who had occupied the premises while the city was in possession of the British, without regard to confiscation or a payment of rent to the owner who had purchased under the British rule.

Hamilton was employed for the defence in an action under this statute. He took the ground, with boldness and courage, that the law was nugatory, and that, by the treaty of peace and the law of nations, all claims that originated under the belligerent occupation of the city were thereby cancelled. It is much to be regretted that his argument has not been preserved; it must have been exhaustive and cogent, for the Court, with marked reluctance, decided in favor of his position. As analogous cases will arise after the present war is ended, such an argument, from one of the fathers of the Revolution and the Constitution, would be most valuable. Public indignation was aroused by the decision of the Court, and a public meeting was called on the subject; but it had no effect, for all the other causes, and they were numerous, were abandoned after this decision.

In 1786, Hamilton, after having served in the Legislature, was sent to the Second Continental Congress at Anapolis as a delegate, and in the succeeding year was also elected by the Legislature a delegate to the Congress at Philadelphia, in which the Constitution was first proposed. In the same year appeared the first number of those celelebrated and able papers, the *Federalist*. To their sound reasoning, perspicuous style, and convincing argument, must be attributed the subsequent adoption of the Constitution by the State of New York. At this present time, when there is an upheaving of the very elements of popular liberty, when crude and undisciplined minds are daily doling out their milk-and-water views of the Constitution, and the Union is convulsed to its very centre, Congress could do no better thing than to republish those papers, and strew them broadcast over the land. The people, and political and partisan editors, could alike learn the great philosophical and political truths from whose parturition the Federal Constitution was born.

Hamilton succeeded Robert Morris as the "Manager of Finance," under the Colonial Congress, and was selected by President Washington as his Secretary of the Treasury, on the inauguration of the Government. Of his financial policy it is not necessary, nor will the space allowed for this article permit me to write. At that time, and for years afterwards, his plans met alike the wants and necessities of the Government, and received the fullest approbation of the financial and business community. His plan of an United States Bank was adopted, and continued to control, not only the finances of the Government, but all the private business of the country, till Jackson, backed by the Democratic party, vetoed its recharter.

Hamilton himself probably never, with all his sagacity, saw that such an institution, in the hands of ambitious and unscrupulous men, would eventually actually rule the country. His reports and numerous papers on the subject of finance might well be perused now by all students of political economy, especially as the monetary affairs of the Government are fast drifting to an unknown sea.

On the first division of political parties, Hamilton became the real, though John Adams was the nominal, head of the Federal party. Before this, he and Burr had very often been associated as counsel in the same cases, but political differences then involved personal estrangement; but, more than that, the Federal lawyers held a private meeting and resolved not to be associated with Democratic lawyers. This resolution was rigidly carried out towards Col. Burr. This action of the Federal lawyers did more to advance Burr's business than any other cause, for, in nearly every case of importance in which Hamilton was employed, Burr was retained on the opposite side.

That the former was a remarkable lawyer cotemporary history testifies; but, unfortunately, so few facts are detailed of his professional career, and many years have elapsed nearly sixty—since his demise, that it is impossible to gather the opinions of his fellow lawyers, as few, if any, now survive. His reputation as an advocate and orator has survived, and that he was unsurpassed in these essentials of success, there is little question. He was employed in many and important cases, and though his strictly professional career was comparatively short, he was certainly ranked in the first class of the lawyers of his day.

Allowing that his intellectual powers were equal to Burr's, the fact that while Burr was studying, and was constantly in full practice, Hamilton was in the Continental Congress or the Cabinet, leads us to the conclusion, almost inevitably, that he was not Burr's equal as a lawyer. The physical and mental organization of man is such that he cannot scatter his powers over a mass of important subjects, and then surpass or equal a man of equal mind who has given his sole attention to one subject in that subject; and there is no evidence that Hamilton was an exception to the general rule. His military and political fame, his known and appreciated talents, and his powerful and extended social position would have made a successful lawyer.

It is unnecessary, and not pertinent, to open here the controversy in relation to the fatal duel between Burr and Hamilton. Personal and political animosity was strong between them, both were men of a high sense of honor, and of unquestioned personal courage. Duelling was then the recognized mode by which gentlemen, and especially officers, settled their difficulties. Burr believed that Hamilton's remarks were an insult, and he challenged him. Hamilton was, in principle opposed to duelling, but had not the moral courage to face the opinion of the public, and he accepted the challenge, and the duel was fought on the Banks of the Hudson, at Weehawken; Hamilton fell at the first fire, mortally wounded, dying shortly afterwards, on the 12th of July, 1804. He fell, not only a victim to a barbarous custom, but a false and cruel public opinion, in the prime of his manhood, and in the midst of his usefulness.

In personal appearance he was not unlike his great rival. He was under the medium size; his figure was slight, but compact and nervous. He was well proportioned, his complexion was clear and his cheeks rosy. He bore constantly a cheerful and pleasant countenance, and though affable to all, he was dignified. His motions and movements were graceful, and his manners frank and cordial. His voice was clear, sonorous and musical. His forehead was well developed, and his head was large and well shaped. His, too, was one of those forms and faces which seem to shadow the character of the man, and to impress on all a claim to superiority.

It has frequently been said that the men of the Revolution seem to have been created and trained especially for that great event, and as we look now, after the lapse of nearly three quarters of a century, at the monuments standing thickly around us commemorative of their wisdom, their sagacity, and their almost prophetic political vision, we must bow, almost in adoration, before their funeral urns.

Hamilton appears to have been the recipient of peculiar gifts for every crisis and every emergency. A young student, not legally of age, he championed with giant power the cause of liberty and republican government. Scarcely putting aside the pen, he assumed the sword, and became a marked and distinguished soldier; brilliant, bold, sagacious and sanguine.

Fresh from the field of blood and carnage, his ear still vibrating with the sound of martial music, he entered the Colonial Congress, and amid the great men there became a leading statesman.

The finances of the country, with few resources, and heavy expenditures, required a master mind and knowledge of finance. Hamilton, leaving the Senate-house, became Secretary of the Treasury, bringing order out of chaos, and placing the money-ed matters of the country upon a practical and safe foundation.

Politically, his views, though republican, were nevertheless inclined to a strong centralized or federal government, but he yielded measurably to the opinions and arguments of others. He had the examples of the Republics of Greece, Rome and France before him, and was fearful that ours would be a repetition of their weakness; but time has shown that his fears were groundless.

Well may his name and his works be treasured by us—an eloquent and forcible writer, a soldier, statesman, financier and lawyer, he truly filled one of the greatest roles of any man of the age in which he lived.—*N. Y. Transcript.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from* 9 *U. C. L. J., page* 318.)

Whenever demand is made for the perusal and copy of a warrant, a bailiff should comply with the same even if the form of the demand seems objectionable, for the officer has everything to gain and nothing to lose by doing what is required of him; and although the party making the demand has already in some other way obtained a copy of the warrant, yet that will not excuse the bailiff from giving perusal and copy when required (*Clark* v. *Woods*, 2 Exch. 396), for the provision in the statute only relieves the bailiff from responsibility when he has a warrant, acts in obedience to it, and gives perusal and copy when demanded, that the party giving the warrant may be looked to (*Jones* v. *Vaughan*, 5 East. 448). It will be observed that, by the 195th section of the act, this must be given within six days to free the officer from liability, and no action can properly be brought against the bailiff till after that time has expired, or if brought, the officer will have a good defence under the statute (*Jones* v. *Vaughan*, 5 East. 448); and, even after the six days have expired, he may bring himself within the protection of the statute by giving the perusal and copy, if in the mean time no action has been brought against him, and he would in such case be entitled to a verdict on proof of his warrant (*Clark* v. *Woods*, 2 Exch 395; *Munday* v. *Stubbs*, 20 L. J. C. P. 50, *Parton* v. *Williams*, 2 B. & Ald. 333).

A few practical suggestions may here be given.

As bailiffs are required to return all precepts, warrants, &c., to the clerk, within a limited time, the documents after the return day will be in the possession of that officer; and if the demand be made after the return day, the bailiff should inform the person making the demand that the warrant, &c., has been returned in due course, and that the person intending to bring the action, his attorney or agent, demands perusal and a copy of it at the clerk's office. If willing to go to the clerk's office, the demand can of course be complied with then. If not willing, the bailiff must obtain the warrant from the clerk and submit the same to the party, his attorney or agent, for perusal and copy. Under the circumstances stated, the clerk would be bound to put the bailiff in a position to comply with the demand made; if he failed, the county judge would make an order on him to comply, and, if refusing from any improper or corrupt motive, it would be a ground for his removal from office, for he it is who would be answerable for any defect or irregularity on the face of the warrant and not the bailiff. If the bailiff furnishes a copy, care should be taken that it exactly corresponds with the original warrant, the letters "L. S." marking the place where the seal is stamped upon or affixed to the document, and it should be examined by a third party, who can also witness the fact of compliance and be able to prove it if disputed at the trial.

If the demand be complied with within six days, or as before stated at any time before action actually commenced, and an action be afterwards brought against the bailiff, or any person who acted in his aid, for anything done in obedience to the warrant, without making the clerk of the court who signed or sealed the warrant a defendant, then, on producing or proving such warrant at the trial, the defendant (bailiff) will be entitled to a verdict, notwithstanding any defect of jurisdiction or other irregularity in or appearing by the warrant. And if the action be brought jointly against clerk and bailiff, or other person who so acted in his aid, such bailiff or other person will be entitled to a verdict, notwithstanding the defect or irregularity; and if a verdict be given against the clerk, the plaintiff will be entitled to his costs against him to be taxed in such

manner as to include the costs which the plaintiff is liable to pay to the defendant, for whom a verdict has been found (secs. 196, 197). But to be entitled to any defence, the bailiff must have pleaded the general issue "by statute" (sec. 198, and see *Sayers* v. *Findlay et al.*, 12 U. C. Q. B 155).

Under the Imperial Act 24 Geo. II. it has been held that the officer will not be entitled to the protection of the statute when he does not act in obedience to the warrant, and so under the Division Court Act as already noticed, or if he refuses or neglects to give perusal and copy he may be sued like any other person, and even if it be given, but there is no remedy against the clerk, the bailiff will himself be liable. Thus if a bailiff has a warrant for a certain amount, which before seizure is tendered to him, but he refuses to take it unless fees which he claimed are paid him, and no such fees are due, then if the bailiff afterwards seized for his fees the clerk would not be liable for this act but the bailiff would, and no demand of perusal and copy would be necessary (*Cotton* v. *Kadwell*, 2 N. & M. 399); or if a bailiff, having a warrant to levy a small sum, seizes an unreasonable and excessive quantity of property, the bailiff would be liable without demand, but the clerk would not be responsible (*Sturch* v. *Clarke*, 4 B. & Ad. 113). The mere payment of the amount of a warrant to the execution creditor will not in all cases have the effect of superseding the same, at least not to make clerk and bailiff liable because of a levy thereafter, as the following case upon the English County Courts Act will show.

A. obtained judgment in the County Court against the plaintiff, who was ordered to pay the debt and costs by a specified day to the clerk of the court. The money not being paid, a summons was issued under the 9 & 10 Vic. c. 95, s. 98, calling upon the plaintiff to attend and show cause why he had not paid. The plaintiff did not attend as required by the summons, and upon proof of the personal service upon him the judge, under sec. 99, ordered him to be committed for seven days or until he should sooner be discharged by due course of law. Under this order the clerk of the court issued to the bailiff a warrant of commitment, upon which the amount of debt and costs was endorsed, and under which the plaintiff was arrested. Before his arrest, but after the issue of the warrant, the plaintiff paid the debt and costs to A, who wrote a letter to the clerk of the court informing him of the fact. The plaintiff having sued the clerk and bailiff far false imprisonment—*Held* that the action could not be supported, as the order and warrant were regularly issued and were in force at the time of the arrest and were not superseded by the payment to A. and the notice to the clerk of the court (*Davis* v. *Fletcher*, 2 E. & B. 271).

CORRESPONDENCE.

Acting under false colour of Court Process.

To the Editors of the Law Journal.

Gentlemen,—I wish to obtain your opinion on the following case. An individual is in the habit of adding the following in print to his bill for goods: "The Division Court Act requires a party sued to pay the costs of the judgment, and under the circumstances therein mentioned to commit a defendant not paying for 40 days. You are required at your peril to pay the above account." Is it legal in the party to do this, and if not what means could be taken to punish him. An answer will much oblige. Yours truly,

A Clerk of D. C.

[We have no doubt the party may be found guilty of felony under the 181st section of the act, as knowingly acting or professing to act under false colour of process of the court. *R.* v. *Evans*, 7 Cox C. C. 293, and *R.* v. *Richmond*, 8 Cox C. C. 200, are leading cases bearing upon the subject. The matter, at all events, is a fair one for judicial enquiry.

The mode of proceeding would be for the party complaining to lay an information before a magistrate for the offence, under the 181st section, putting in proof the document that our correspondent speaks of, and the service of it by the party complained against. The magistrate would then issue process for the appearance of the party, when evidence should be taken making out a *prima facie* case, which it would be the duty of the magistrate to send to the assizes for trial by indictment, taking recognizances from the complainant, the witnesses, and the defendant, in the usual manner.]—Eds. L. J.

Jurisdiction—Amending particulars.

J. M.—A Division Court judge has no power to deal in any way with a case beyond the jurisdiction of the court; and if the particulars disclose on their face a cause of action not within the jurisdiction, the judge should at once stop the case. He has no power to amend the particulars by substituting a cause of action which he has power to take cognizance of Our correspondent should have sent us a copy of the particulars.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Wallis, Executor of Samuel Harrold v. Nelson Harrold.

Use and occupation.

Executors may sue for use and occupation of testator's land during his lifetime, but such action will not lie where the agreement has been that the tenant should pay in produce, not in money.

[Q. B, H. T, 27 Vic. 1864.]

The declaration claimed money payable by defendant to the plaintiff for the defendant's use during the lifetime of the testator, and by his permission, of a messuage and lands of the testator, and for the defendant's use after the death of the testator, by permission of the plaintiff as executor, of a messuage and lands

of the plaintiff as executor as aforesaid—with counts for interest and upon an account stated.

Pleas.—1. Never indebted. 2. Payment. 3. Statute of Limitations. 4. Set-off.

The plaintiff's particulars of demand were for nine years' rent due upon the north half of lot No. 2, in the 1st concession of Tecumseth, from the 1st of April, 1854, to the 1st of April, 1863, at the rate of £30 per annum.

The trial took place at the city of Toronto, in November, 1863 before Adam Wilson, J.

The testator, Samuel Harrold, died about the 20th of August, 1862, and the action was commenced on the 4th of July, 1863. At the opening of the plaintiff's case, it was objected that the defendant could not be liable in this action for the use and occupation of the land after the testator's death, and the learned judge so ruled. It did not appear certainly when the defendant first took possession, but in the result that became immaterial. He left the farm in the autumn of 1862, after his father's death. Evidence was given to establish the annual value of the place.

On the defence it was proved that a year or eighteen months before the testator's death he stated to a witness (his brother-in-law) in speaking of his sons, William and the defendant, that William was on one farm and defendant on the other: that William had paid him all up, and that all he expected from defendant was what he had to live upon, pork, flour, and so on: that he got pork, flour, and butter from defendant: that he did not expect money from defendant; William was to pay money, and defendant to give provisions. This witness said he was aware that testator was continually getting flour, pork, butter and so forth from defendant.

There was other evidence clearly shewing that defendant had been in the habit of *delivering flour, pork, &c., to* the testator in Newmarket, up to the year 1862; and William Harrold, the defendant's brother, stated that he understood from the testator that he was not to get any money from the defendant for the farm, and he also said he was certain there never was a bargain that defendant should pay any certain amount for the place. A receipt signed by the testator was proved, as follows: "Tecumseth, March 16th, 1861. Received from Nelson Harrold half barrel of flour, being the amount of rent due up to date."

The learned judge ruled that there was evidence to go to the jury in support of the action. He left to the jury to fix a reasonable annual compensation for the use of the farm—to say whether it was payable in money or in kind—whether any part had been paid—and whether the receipt of March, 1851, was signed by testator and given in settlement up to that date, telling them that the plaintiff could not recover for more than six years preceding April, 1862.

The jury found that the receipt of March, 1861, was a settlement up to that time: that the rent from 1861 to 1862 was £27: that there was an agreement the rent should be paid in kind and not in money, and that five hundred pounds of flour had been delivered after the date of that receipt; and they gave a verdict for the plaintiff for $95.50.

Leave was reserved to the defendant to move to enter a nonsuit.

In Michaelmas Term *Robert A. Harrison* obtained a rule to shew cause why a nonsuit should not be entered pursuant to leave reserved, or a new trial be granted, the verdict being contrary to law and evidence. He cited *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; *Churchwardens* v. *Ford*, 2 H. & N. 446; *Osborne* v. *Jones*, 15 U. C. Q. B. 296; *McAnnany* v. *Tickell*, 23 U. C. Q. B. 22; *Hellier* v. *Silleox*, 19 L. J. Q. B. 295; *Denniston* v. *Digan*, 10 Jr. C. L. Rep. Ap. 7; *Champion* v. *Terry*, 3 B. & B. 295; Ch. Plg., vol. 1, p. 350.

McMichael showed cause, and cited *Cripps* v. *Hartnell*, 8 L. T. Rep. N. S. 765, S. C., 2 B. & S. 697; *McDonald* v. *Glass*, 8 U. C. Q. B. 245; *Gerow* v. *Clark*, 9 U. C. Q. B. 219.

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

We do not find that one of the cases cited bears upon the question whether an ordinary action for use and occupation will lie where the premises were occupied under an agreement that the tenant should pay his landlord in produce and not in money; and this is the question upon which the motion for nonsuit must be decided, for we have no doubt that executors may maintain an action upon any contract, express or implied, made between the testator and a third person.

The finding of the jury establishes the existence of a special contract between the testator and the defendant to pay rent in produce, not in money, for the use of the farm which the defendant occupied. This finding consequently negatives any implied or express contract to pay in money, and as the declaration is framed it requires proof of an express or implied contract to pay money. The rule for nonsuit must therefore be made absolute.

Rule absolute.

KONKLE v. MAYBEE.

Mortgage—Lease by mortgagor—Ejectment—Month's notice.

In April, 1861, R mortgaged the land in question to defendant for $1000, payable on the 23rd of April, 1863, with interest in the meantime half yearly, covenanting that after default defendant might enter, that if he should make default and defendant should after expiration of the time for payment have given written notice demanding payment, and a calendar month should have elapsed without payment, defendant might enter and lease or sell; and defendant covenanted that no sale or lease should be made, nor any steps taken by him to obtain possession, until such notice should have been given. There was a proviso that until default after such notice R. might hold possession. In May, 1861, defendant assigned this mortgage to the plaintiff. R. in November, 1862, being in possession, leased to defendant for two years, and in December following he conveyed his equity of redemption to the plaintiff. Nothing appeared to have been paid on the mortgage. In July, 1863, the plaintiff brought ejectment.

Held, that the plaintiff might recover without having given the month's notice, for having acquired the land, and lost his claim to the debt, there was no one on whom a demand of payment could be made.

[Q. B., H. T., 27 Vic., 1864.]

Ejectment for one acre and twenty perches in the township of Grimsby, described by metes and bounds.

The plaintiff's notice of claim was under two deeds from William H. Rogers, one in favour of defendant, the other in favour of plaintiff, and under a deed from the defendant to the plaintiff. Defendant's notice of title was under a lease from William H. Rogers to defendant, dated the 1st of November, 1862. The summons in ejectment was tested on the 7th of July, 1863.

The case was tried at Niagara, in October, 1863, before Richards, C. J.

The defendant was called as a witness for the plaintiff, and stated that he got possession of the property in question from W. H. Rogers.

By indenture dated the 23rd of April, 1861, William H. Rogers and Alice his wife, in consideration of $1000, granted and sold to the defendant the premises in question, *habendum* in fee, with bar of the wife's dower; subject to a proviso that if Rogers should pay to defendant $1000, with interest at ten per cent., the principal on the 23rd of April, 1863, the interest half-yearly on the 23rd of October and on the 23rd of April in each year, the same should be void. And Rogers covenanted that after default in payment it should be lawful for defendant, his heirs and assigns, peaceably to enter into, have, hold, &c., the premises, without the let, suit or hindrance of him (Rogers), his heirs or assigns, or any person whomsoever; and if Rogers should make default in paying the principal and interest, and the defendant should, after the time for payment had expired, have given notice in writing demanding payment, and one calendar month should elapse after notice without payment being made, defendant, his heirs and assigns, might enter into possession and take the rents and profits, and make leases, and sell and convey the premises. And defendant, for himself, his heirs, executors and administrators, covenanted with Rogers, that "no sale or notice of the lands, hereditaments and premises, shall be made or given, or any lease made, or any steps taken for obtaining possession thereof by" defendant, "until such time as one calendar month's notice in writing as aforesaid, shall have been given," &c. Provided, that until default should be made in payment of principal and interest after notice in writing demanding payment of the same, as before provided, it should be lawful for Rogers, his heirs and assigns, to hold, &c., the lands, without interruption from defendant, his heirs and assigns: and provided always, that until default should be made in payment of the said sum of $1000, after notice in writing demanding payment, Rogers, his heirs and assigns, might hold, &c., the lands without hindrance from the mortgagor, his heirs or assigns.

On the 16th of May, 1861, the defendant made an assignment of this mortgage to the plaintiff as a collateral security, Rogers continued in possession up to the 1st of November, 1862, and by indenture of that date demised and leased the same premises to the defendant, *habendum* for two years from the date, at a rental of $120 payable in advance. Nothing was shewn to have been paid on the mortgage. In December, 1862, Rogers conveyed his equity of redemption to the plaintiff.

On this evidence the defendant had a verdict, with leave to the plaintiff to move to enter a verdict for him.

In Michaelmas Term, *J. H. Cameron, Q. C.*, obtained a rule to shew cause why the verdict should not be entered for the plaintiff, pursuant to leave reserved.

Robert A. Harrison shewed cause, citing *Toronto Permanent Building Society* v. *McCurry*, 12 U. C. C. P. 532; *Stevenson* v. *Cuthertson*, Ib. 79.

Galt, Q. C., supported the rule.

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

We think it quite clear this rule should be made absolute.

The case is this:—Rogers being seised in fee, on the 23rd of April, 1861, makes a mortgage in fee to the now defendant; the principal money is to be paid on the 23rd of April, 1863, and the interest half-yearly. The mortgage contains a covenant from the mortgagor that the mortgagee may enter on default, and is subject to a proviso, that if default is made, and if the mortgagee shall after the time for payment is expired have given notice in writing demanding payment, and a calendar month shall elapse after such notice without payment, the mortgagee may enter, receive rents and profits, make leases and sell. And the mortgagee covenants not to sell or lease, or take steps for recovering possession, until such calendar month's notice in writing has been given. On the 16th of May, 1861, the defendant assigns the mortgaged premises and his rights as mortgagee to the plaintiff. Rogers continues in possession, but makes default in payment of the interest, and after such default makes a lease for two years, to be computed from the 1st of November, 1862, to the defendant, who enters. Neither principal nor interest being paid, Rogers, in December, 1862, conveys and releases his equity of redemption to the plaintiff, who on the 7th of July, 1863, brings this ejectment. The objection raised to his recovery is that he has not given the notice in writing required by the proviso, and therefore this action is brought too soon—relying on the later proviso, that until default shall be made in payment after notice in writing demanding payment as aforesaid, &c.

The case of *Wilkinson* v. *Hall* (3 Bing. N. C. 508), establishes the doctrine, that an agreement that a mortgagor shall remain in possession until default is made in payment of interest or principal, operates as a re-demise of the mortgaged premises until the day for payment arrives and no payment is made. There is a fixed period, at which on a given event, *i. e.*, non-payment, the term created by the re-demise expires. The last proviso above referred to differs in this respect, for there is no certainty as to the time when the event which will determine the tenancy must happen, for it is uncertain when the mortgagee may serve notice demanding payment, and the month only begins to run from the service of that notice.

Independently of that difference, there is another and most important one. The notice is to be one demanding payment, which necessarily implies a right to payment in the party making the demand, and a right in the party on whom the demand is made to redeem the fee by making the payment. But in this case the right of redemption was extinguished, and the plaintiff, though he first derived title under the mortgage, had acquired the land and lost the claim to the debt, and the defendant never had the right to redeem. No demand of payment could therefore be effectually made, and the want of it cannot, therefore, in our opinion, prevent the owner of the land from treating the defendant as a tenant at sufferance.

The cases of *Pmhorn* v. *Souster* (8 Ex. 763), and *Jolly* v. *Arbuthnot* (4 DeG. & J. 224, 5 Jur. N. S. 689), may be referred to with advantage as to the operation and effect of leases made by mortgagors.

Rule absolute.

KELLY v. BULL.

Seduction.

A declaration by a woman that defendant seduced her daughter and servant, whereby she lost her services *Held*, good, either at common law or under the statute, without alleging the father's death.

[Q. B., H. T., 27 Vic., 1864.]

Declaration.—Mary Kelly, by R. G. D., "her attorney," sues John Bull, who has been summoned, &c. "For that the defendant, John Bull, debauched and carnally knew Mary Kelly, the daughter and servant of the plaintiff, whereby the said Mary Kelly became pregnant with child, and the plaintiff lost the services of the said Mary Kelly for a long time, and incurred expenses in nursing and taking care of her, and about the delivery of the said child."

Demurrer.—That the said action is brought by the plaintiff as the mother of the said Margaret Kelly, without alleging the death of the father of the said Mary Kelly.

The points marked in the margin of the demurrer for argument on the part of the plaintiff were:

1. That there is not, upon demurrer, any presumption, either from the name "Mary" or the pronoun used, that the plaintiff is the mother, the plaintiff may be the father.

2. The defence that the father survives, if true, should have been pleaded, with the other facts necessary to make that defence, as the declaration, assuming it to be under the statute, shews a *primâ facie* right in the plaintiff.

3 But the declaration is good at common law, for it shews the relation of master and servant, the seduction, and the consequent loss of service and damage.

McMichael, for the demurrer, cited *Browne* v. *Smith*, 1 U. C. P. R. 351; *McLeod* v. *McLeod*, 9 U. C. Q. B. 331; *Lake* v. *Bemiss*, 5 U. C. C. P. 430; *McKay* v. *Burley*, 18 U. C. Q. B. 251.

Dalton, contra, cited *Mabon* v. *Townsend*, 1 Dowl. N. S. 634; *Scott* v. *Soans*, 3 East 111; *Whitfield* v. *Todd*, 1 U. C. Q. B. 223; Chy. Plg. I. 273.

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

We do not pretend to reconcile all that is said in the many cases in our own courts since the passing of the act respecting seduction, but we have neither heard nor read anything to induce us to think that this is not a good declaration, either with or without the statute. We cannot understand why it should be necessary to aver the death of the father. If he be living, the defendant has ample means of availing himself of a defence. Unless we are prepared to hold that no declaration by a woman can be good, without averring that she never had a husband or that her husband is dead, we cannot give way to defendant's argument.

We do not see why the declaration is not good at common law, for the loss of a servant's service.

Judgment for plaintiff on demurrer.*

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Reporter to the Court*)

KEHOE v. BROWN ET AL.

Division Court—Judgment—Transcript of—Filed in County Court—Examination of Defendant thereupon—Con. Stat. U. C. secs. 12, 41.

Declaration in trespass on the case to which the defendant B. pleaded, that having recovered a judgment in the Division Court, against the *now* plaintiff for the sum of $60 odd, and the execution issued thereupon having been returned *nulla bona*, a transcript of the judgment was obtained and filed in the County Court; upon this a writ of execution was issued, which being returned *nulla bona*, an order was made by the learned judge of the County Court under sec. 41 of Con. Stat. U. C. c. 24, calling upon the now plaintiff to appear before the clerk of the court and be examined, &c., &c. In accordance therewith he did appear and was examined, &c., &c, and a report and return was made in compliance with the order. Upon reading such report, &c., the judge of the County Court issued a summons calling upon plaintiff to shew cause why he should not be committed, &c., and on return thereof the plaintiff not appearing, and no cause being shewn to the contrary, the judge ordered that a writ *ca. sa.* should issue within five days; which was issued accordingly, whereupon plaintiff was imprisoned.

To this plea plaintiff demurred. 1st. Because the judgment and amount for which *ca. sa.* issued was less than $100. 2nd That the judgment on which the *ca. sa.* issued is founded on a judgment of the Division Court, that the plaintiff

* *M. C. Cameron, Q. C.*, for the defendant, at the conclusion of this judgment applied for leave to plead, but the application was refused

was not bound by the statute to attend to be orally examined, and even if he did so, he could not be arrested on such examination being unsatisfactory.

Held. 1st, That though the plaintiff could not sue out a *ca. sa. for* a less sum than $100, as per sec 12; still under sec. 41 there is no such limitation, as under this section, the process awarded is not obtained by the plaintiff, but is given by the court or judge, and under section 143, Con Stats U C ch 19, by the filing and entry of the transcript the judgment of the now defendant became a judgment of the County Court, and he was entitled to pursue the same remedy upon such judgment as if it had been originally obtained in the County Court, and hence defendant was bound to appear and be examined, &c., under sec. 41, ch. 24, Con Stat. U. C.

(C. P., M. T., 27 Vic., 1863.)

The declaration charged the defendants with a trespass to the person of the plaintiff, and with imprisoning him.

The plea by Brown sets up a justification of both the trespass and imprisonment under a writ of *ca. sa.* ordered to be issued by the judge of the County Court of the county of Hastings, under sec. 41 of the Con. Stat. for U. C., ch. 24, the substance of which is as follows: that the now defendant Brown sued the now plaintiff in one of the Division Courts of the county of Hastings, and recovered $59.35 for debt, and $3.43 for costs against the now plaintiff by judgment of the said court.

That execution issued from the said court against the goods and chattels of the now plaintiff to levy the sum so recovered with interest, which was delivered to the plaintiff to be executed; and that the bailiff afterwards returned *nulla bona* to the same.

That Brown obtained from the clerk of the said Division Court a transcript of the judgment, &c., and filed the same in the office of the clerk of the County Court of the county of Hastings, and thereupon the same became and was by operation of law a judgment of the County Court according to the statutes.

That Brown retained his now co-defendant Dougall, who was and is an attorney in the superior courts in this province, to proceed upon the said judgment in the County Court for the recovery of the money claimable on the same.

That Brown sued out execution from the County Court against the goods and chattels of the now plaintiff for $63 43 with interest from the 17th of Feburary, 1862, besides the costs of the writ and the sheriff's fees, and delivered the same to the sheriff of Hastings, who returned it *nulla bona*.

That while the judgment was in full force, and the now plaintiff, then still being and residing in the county of Hastings, and within the jurisdiction of the said County Court, Brown, by Dougall as his attorney, under and pursuant to sec. 41, ch. 24, of the Con. Stat. for U. C., made application to, and in due form of law obtained from, the judge of the County Court an order that the plaintiff should attend before Ansom G. Northrup, the clerk of the County Court, at such time and place as he should appoint, and submit himself to be verbally examined on oath touching his estate and effects, and as to the property and means he had when the debt or liability, which was the subject of the action in which judgment had been obtained against him, was incurred; and as to the property and means he had at the time of the making of the said order of discharging the judgment; and as to the disposal he had made of his property since contracting such debt or incurring such liability.

That the now plaintiff attended and submitted to be examined pursuant to the order. And the clerk of the County Court returned the examinations and order together with his report in writing on the proceedings taken thereunder, in compliance with the order.

That the judge of the County Court upon reading the said examination and report issued a summons calling on the now plaintiff (still being resident in the county) to attend before the judge at the court house, in Belleville, on the third day inclusive after the day of service at noon, or as soon thereafter as counsel could be heard, to show cause why the now plaintiff should not be committed to the common gaol of the county of Hastings, being the county in which the now plaintiff then resided; under and by virtue of the said statute, upon the ground that the now plaintiff had not on his examination made satisfactory answers respecting his property, or why upon the like grounds a writ of *capias ad satisfaciendum* should not issue upon the said judgment in this County Court.

That the summons was duly served on the now plaintiff, and at the return thereof no cause having been shown to the contrary, the said judge upon reading the said oral examination, the summons, the affidavit of service thereof, and other papers then filed in the court in the cause, did under the said statute and in due form of law direct that a writ of *ca. sa* should issue within five days thereafter against the body of the now plaintiff, and before the five days was expired a *ca. sa.* was issued by Brown by Dougall, his attorney, out of the County Court, directed to the sheriff of the county in the words following:

[In the usual form but marked in the margin.]

* * * * * * * *

"Issued from the office of the Clerk of the County Court of the County of Hastings, by order of William Smart, Esquire judge of the said county, under and by virtue of the sec. 41, ch. 24, of the Con. Stats. of Upper Canada.

(Signed,) A. G. NORTHRUP, Clerk."

That the *ca. sa.* was endorsed according to law, and when endorsed was delivered by Brown, by Dougall his attorney, to the sheriff to be executed; and thereupon the sheriff took the now plaintiff and imprisoned him as in the declaration mentioned, and as he lawfully might for the reasons aforesaid, which are the trespasses in the declaration mentioned.

The plea by Dougall is to the same effect, showing that he acted as the attorney of Brown the then plaintiff.

The plaintiff demurred to both pleas, and assigned the same causes. 1st. That the sum for which the writ of *ca. sa.* issued and the amount of the judgment on which it is based, is less than $100. 2nd. That the judgment in the County Court is founded on a judgment removed from a Division Court, and on such judgment a defendant is not bound by the statute to attend to be orally examined touching his estate; nor could he, if he did attend and was examined, be arrested by a *ca. sa.* or otherwise in consequence of the answers given on such an examination being unsatisfactory or otherwise, upon which joinder is taken.

R. P. Jellett appeared for the demurrer, and contended, that no *ca. sa.* can issue for a recovery exclusively of costs for less than $100, Con. Stat. U. C., ch. 24, secs. 1 and 12, and that no *ca. sa.* can issue upon a judgment removed from a division court.

Robert A. Harrison, contra. The *ca. sa.* is still in operation, and the defendants are entitled to succeed under their justifications pleaded, unless the writ on its face, or on the pleadings, be wholly void. *Reddell* v. *Pakeman*, 3 D. P. C. 714; *Blachenay* v. *Burt*, 4 Q. B. 707; *Prentice* v. *Harrison*, 4 Q. B. 852; *Rankin* v. *DeMedina*, 1 C. B. 183; *Blew* v. *Steinau*, 11 Exch. 440; *Collett* v. *Foster*, 2 H. & N. 356; *McCarthy* v. *Perry*, 9 U. C. Q. B. 215.

That section one applies only to the *capias* pending the suit, and not to the *capias* issued for satisfaction after judgment. See schedule A, No. 2, of the C. L. P. Act.

That the imperial act, 7 & 8 Vic., ch. 96, secs. 57 and 59, provides, that no person shall be taken or charged in execution, &c., for less than £20, &c., which language is prohibitory, and under which the writ may be void, although not set aside; but that is quite different from the language of the 12th section of our act.

That section 59 of the imperial act allows a *ca. sa.* in certain cases, such as fraud, although the debt be less than £20. *Brooks* v. *Hodgkinson*, 4 H. & N. 712. And if process be irregularly issued it is the act of the court, and no action lies against either the party or his attorney. 10 Co. 76*a*; *Read* v. *Jones*, 4 U. C. C. P. 424; *Perkins* v. *Proctor*, 2 Wils. 382; *Doswell* v. *Impey*, 1 B. & C. 169; *Cave* v. *Mountain*, 1 M. & G. 257; *Mills* v. *Collett*, 6 Bing. 85.

That this *ca. sa.* is as punishment and not as satisfaction. *Henderson* v. *Dickson*, 19 U. C. Q. B. 449.

R. P. Jellett, in reply. This process is illegal on its face, and not merely irregular. *Ley* v. *Louden*, 10 U. C. Q. B. 380.

ADAM WILSON, J.—The Division Courts' Act of Upper Canada, ch. 19 sec. 143, enacts: "Upon filing such transcript" (of the judgment obtained in the Division Court) "in the office of the clerk of the County Court in the county where such judgment has been obtained, or in the county wherein the defendant's or plaintiff's lands are situate, *the same shall become a judgment of such county court*, and the clerk of such County Court shall file the transcript on the day he receives the same, and enter a memorandum thereof in a book to be by him provided for that purpose."

And section 145 enacts:—"Upon such filing and entry the plaintiff or defendant may, until the judgment has been fully paid and satisfied, *pursue the same remedy* for the recovery thereof, or of the balance due thereon, *as if the judgment had been originally obtained in the County Court.*"

Under these sections there is no doubt that the judgment which the plaintiff in the inferior court had, has by the filing and entry of the transcript "become a judgment of the County Court," and that the plaintiff is upon such judgment entitled to "pursue the same remedy for the recovery thereof as if the judgment had been originally obtained in the County Court."

One of these remedies is the right to examine his debtor, under section 41, before alluded to. This is an answer to the second cause of demurrer.

But it is said that there being a recovery for a less sum than $100, such a right of examination and committal does not exist at all, whether the recovery was had in the County Court or in one of the superior courts. No doubt this is so where the plaintiff in the proceeding is the actor, for he certainly cannot sue out process for the satisfaction of his debt unless his recovery is for at least $100, exclusively of costs, according to section 12 of the act.

It is not so, however, where the proceedings are founded upon the special provisions contained in section 41, in which there is no such limitation as to amount, and under which the process awarded is not obtainable by the plaintiff, but is grantable by the court or judge, even although it is by way of satisfaction, and not as when an order is issued to punish the party for his disobedience or contempt.

The case in 4 H. & N. 712, *Brooks* v. *Hodgkinson*, shews the difference between the plaintiff issuing the writ, and the judge doing so, and also shews that the judge may act when the debt is below the general statutory amount, which would not authorise the plaintiff in acting. I see then no direction that, under the special circumstances where a judge is called upon to act, there is any limit placed to the sum below which, upon a judgment an examination shall not be allowed to be had when the statute itself imposes no such restriction. Nor do I think there can be any reason why, until the last shilling of the claim is paid, the the debtor should not be bound to account for his property whenever the judge in his discretion thinks it proper to call upon him to attend for the purpose.

The supposed minimum of $100 may in many cases be relatively quite as large a sum to some creditors as twenty times that amount may be to others, and the effect of construing the statute according to the plaintiff's view of it, would be to make this very wholesome provision of discovery, operative for the larger and wealthier creditors, but a dead letter to those of smaller means and in needier circumstances.

We must take the clause as we find it, and I read it as an independant provision, and not governed by any of the preceeding sections in the act.

As against these objections, I have no difficulty in determining them in favour of the defendants.

Per cur—Judgment for defendant.

Prouse v. Glenny and Corporation of Mariposa.

Trespass, qua. clau. freg.—Highway—Bridge—Con. Stat. U. C, ch. 54, sec. 313—Notice of action.

Declaration in trepass, *quare clausum fregit*, on the south half of lot 19, in the sixth concession of Mariposa, alleging the erection and construction of a bridge and other works thereon. The defendants pleaded not guilty, per stat. 14 & 15 Vic., ch. 54, sec. 2, and Con Stat. U. C., ch. 126, sec 1.

On the trial it appeared in evidence that plaintiff was the owner of the *locus in quo*, and that a line had been run intended for a road about twenty years before by one H., between lots 19 and 20, intended to be four rods wide; the line was marked, and about fifteen years ago a bridge was built and the *locus in quo* was improved by the township council, and that statute labour has been done thereon, and money expended by the township council for fifteen years past. The old bridge having been carried away by a freshet, it was replaced by a new one, which was so placed that it encroached about eighteen inches on the plaintiff's land Another witness, a provincial land surveyor, stated it to be about a chain on plaintiff's land

The defendants contended they were entitled to notice of action, upon this point leave to move was reserved, the jury finding for the plaintiff $50 damages.

On motion for a new trial,

Held, that the road and public bridge having been constructed many years ago, and public money and statute labour having been expended thereon, under the authority of the 313th section of Con. Stat. U. C. ch., 54, it must be deemed a public highway. The verdict was therefore set aside and a new trial ordered, notwithstanding the amount recovered was less than £20, a public right being involved, the rule as to smallness of damages did not apply.

Held, also, that the corporation was entitled to notice of action, but the other defendant was not. (C. P. M. T., 27 Vic., 1863)

Plaintiff's writ was sued out on the 27th of October, 1862. Declaration in trespass, *quare clausum fregit*, alleged that defendants entered certain lands of the plaintiff, being the south half of lot No. 19, in the sixth concession of the township of Mariposa, in the county of Victoria, and constructed, erected, and built a bridge, road and other works on the same. Plaintiff claimed £250. Defendant pleaded: 1. Not guilty per statute 14 & 15 Vic., ch. 54, sec. 2, and Con. Stat. U. C., ch. 126, sec. 1. 2. Lands not the lands of plaintiff. 3. Leave and license.

At the trial, before Hagarty, J., at the spring assizes for the county of Victoria, it appeared that the plaintiff was the owner of the south half of lot No. 19 in the sixth concession of the township of Mariposa; that about twenty years ago one Huson ran the line of a road between lots Nos. 19 and 20 in that concession, the road intended to be four rods wide, but whether the road was laid out under the authority of the quarter sessions, or of the county council, did not appear. The line of the road was marked out, and about fifteen years ago a bridge was built and the road improved adjoining the *locus in quo*, by the township council. One of the plaintiff's witnesses stated he had done statute labour on the old road and bridge years back, and that the township had expended money for the road and bridge for fifteen years past. The same witness, who had resided near the place for twenty-nine years, stated that not much of the road was kept on Huson's line, they moved it west in to plaintiff's land, which was then cleared. They did not keep to the road very closely. He thought it was an accident building the old bridge in the wrong place. The old bridge was travelled for about fourteen years, then a freshet came, and the township council determined to build a new bridge, the north end of which was about two rods to the west of the old bridge, and threw the south end some eighteen inches on to the plaintiff's land, and where the line crossed the bridge it was some five feet more on plaintiff's land than the old bridge; this witness also stated the bridge injured plaintiff's access to the water; that there was no fence at the bridge, and the present bridge did not occupy more land than the road as travelled, nor any more land than the road would occupy if no bridge was there.

A provincial land surveyor took an observation, and ran a line from the post at the south end of the concession, marking the road parallel to the side line of the towhship as far north as the creek over which the bridge stretches, and he found the bridge west of the road allowance nearly a chain on the plaintiff's land.

All parties considered the travelled road on the proper line until about a year before the trial, when the surveyor ran the lines. Another witness for plaintiff, an old inhabitant, stated that it was more feasable to build the old bridge a little further west than the true line, and so it was done.

For the defence it was urged, that the corporation was entitled to notice of action, the act complained of being done by them in discharge of a public duty. For the plaintiff it was objected, that in the way in which the statute was referred to the question could not arise. Leave was reserved to the defendant to enter a nonsuit on this point as to the corporation.

It was further objected, that the place referred to was a public highway, and that in putting up the new bridge the defendant did not go further west than the line of the old travelled road. For the plaintiff it was urged, if plaintiff permitted the old bridge to be constructed, and the road travelled on his land off the line of road surveyed, he did so in ignorance of his rights, and was not bound thereby.

The presiding judge referred the question to the jury. The defendants witnesses to prove there was no difference to any amount between where the old and new bridge were placed as affected plaintiff's land; that from the west side of the old road to the fence of plainliff on the west side of the road was about three rods, the bridge was about sixteen feet wide, and on the east side of the bridge there was no fence. One of plaintiff's witnesses, re-called for defendant, said the new bridge was about five feet more west than the old one, but he did not consider the new bridge

went more on to the plaintiff's land than the old travelled road would have been if there had been no bridge. The new bridge at the end went about a foot more west than the old one, and went that much further west on the old road. There was a fence on the west side of the road at plaintiff's place which is there still; the foot in excess was taken from drowned land. Another witness understood the road was four rods wide; it was turnpiked about fifteen feet wide.

The learned judge told the jury that the old road and bridge travelled for years, and public money expended on it, could not under our laws and statutes be disturbed, however ignorant plaintiff may have been of his rights. He also directed if the new bridge was not further west than the old, at the place complained of, or if it was not further west than the land actually used and travelled as the old road, the plaintiff could not recover; or, in other words, he left it to the jury to say if the extra quantity of plaintiff's land taken for the new bridge, if any, was a piece of land to which the public had acquired a right by user, and was it actually within the land used as a high road.

The jury found a verdict for the plaintiff, damages $50.

In Easter Term last, the late *Eccles, Q. C.*, obtained a rule to shew cause, on the first day of Trinity Term, why a nonsuit should not be entered, pursuant to leave reserved at the trial, on the ground that no notice of action was proven to have been given to the corporation, or why a new trial should not be had on the ground that the verdict was contrary to law and evidence, no proof having been given that defendants trespassed on the plaintiff's land, or beyond the boundaries of the established road, highway, or right of way, and on the ground that no damage to the plaintiff or his land was shewn, and on grounds disclosed in papers, affidavits, and plans shewn.

During Trinity Term, *Eccles, Q. C.*, moved his rule absolute, and *Hector Cameron* shewed cause, and contended that the reference to the statute in the margin of the plea was not sufficient; it should also under the rule have referred to the tenth section, which makes it necessary to give the notice of action, if such notice ought to be given to a corporation in a matter like this, which he denied. He objected to the affidavits as not shewing any new matter or discovery of fresh evidence, and therefore they ought not to be received; and as to the plan accompanying the affidavits, he filed an affidavit to shew that the surveyor who made it was in court at the trial, and was not called for the defendants. He then contended that the user of the land, by the construction of the old road and bridge, and the expenditure of public money on it, and of statute labour, did not constitute it a highway; and if it did, no more than was actually used for that purpose could be said to have passed from plaintiff by these acts. That allowing the land to be used as a highway was no evidence of a dedication, as there must be the intent to dedicate, which could not exist, when plaintiff thought the land was taken as part of the road as laid out.

The following cases were referred to for defendant: *Allan* v. *The City of Toronto*, 6 U. C. C. P. 334; *Carmichael* v. *Slater*, 9 U. C. C. P. 423. For plaintiff: *Dovaston* v. *Payne*, 2 Smith's Leading Cases 124; *Regina* v. *Gordon*, 6 U. C. C. P. 213; *Lawes* v. *Hawkins*, 8 C. B. N. S. 848; *Regina* v. *Plunkett*, 21 U. C. Q. B. 536; *Barraclough* v. *Johnson*, 8 A. & E. 99; *Belford* v. *Haynes*, 7 U. C. Q. B. 464; Angell on Highways, 113, 120.

RICHARDS, C. J.—As to the question of nonsuit for want of notice of action to the corporation, of the statutes noted in the margin, which can properly be referred to, ch. 126 of Con. Stats. of Upper Canada, is the only one which was in force when the acts complained of were committed. The first section of the act seems inapplicable, being only intended to apply to actions brought against officers for acts done by them in matters within their jurisdiction, whereas it is here contended the defendants had no right or jurisdiction whatever over plaintiff's land; that what was done was without their jurisdiction. The tenth section seems the one which should have been referred to. If the defendant had applied to amend at the trial, *Burridge* v. *Nicholetts*, 6 H. & N. 383, is an authority to show that the judge might have amended, and it is equally an authority to shew if the objection had not been taken at the trial, it could not be raised on the motion to enter a nonsuit. As the other defendant was acting under the authority of the commissioners appointed by the corporation, and he is not entitled to notice, the learned counsel for the defendant did not strongly press for a decision in favour of the corporation on that ground, which, under the facts, assuming the objection at the trial to mean the omission to refer to the tenth section of the statute in the margin of the plea, we could not grant.

As to the facts stated in the affidavits filed for defendants, most of them could have been proved at the trial if proper steps had been taken for that purpose, and we would not, under ordinary circumstances, be justified in granting a new trial to enable a party to give evidence on a new trial which he might have given on a former trial, but which for some reason not satisfactorily explained he failed to do.

The map annexed to the affidavits, though more complete than that put in by the plaintiff at the trial, in all essential parts differs very little, if any, from that of the plaintiff.

We think the charge of the learned judge correct, and that the evidence strongly preponderates in favour of the defendants. The fact that the road and old bridge were constructed many years ago, and that public money and statute labour were from time to time expended thereon, seems scarcely to be denied. The plaintiff's case rests entirely on the ground that the new bridge on the south end is some twelve or fifteen inches further west than the old one, and that where the line of plaintiff's land crosses the new bridge the latter is some five feet further west than the old one; thus assuming that all the public acquired in relation to this road and bridge by the expenditure of the money and statute labour was simply the right to use the ground on which the bridge stood, though its approaches were wider than the bridge; and the road throughout, of which this was a part, seemed to be considered as established four rods wide. The fence on the plaintiff's land on the west side was not within several rods of the bridge, and the portions of the road approaching the bridge indicated a wider space than that occupied by the bridge itself. Under these circumstances we think the finding of the jury ought to have been the other way. One of the grounds taken by the plaintiff seems to be this, that where a highway has been surveyed and a road constructed, which was intended to be on the line so surveyed, if the road should differ from the true astronomical line mentioned as its course on the original survey, then the road so constructed at a considerable outlay of public money and statute labour as this was, and intended to be the permanent highway, must be considered as the property of the original owner, though it has been used as a highway without interruption for over fifteen years, and the public must construct anew the road and bridges which some ingenious surveyor may discover is not on the true astronomical line that is indicated by the course of the described road originally intended to be set out.

We are asked to assent to this view of the law on the ground that as all parties were mistaken in supposing the road so constructed was on the proper line, and that plaintiff and those under whom he claims could not be supposed to have dedicated the land actually used as a highway to the purposes for which it had been so long applied. Under the present state of our law it is not necessary to discuss this question at any length; but for myself I shall only add, that it would require much stronger authorities than I have as yet met with to induce me to assent to the proposition. I think, however, section 313 of the Upper Canada Municipal Act, Con Stat., ch. 54, sets the question at rest. It enacts that any roads whereon the public money has been expended for opening the same, or whereon the statute labour has been usually performed, shall be deemed public highways. I think the evidence establishes that this is such a road.

The amount of the verdict being under twenty pounds, and no misdirection on the part of the learned judge, it would in ordinary cases be allowed to stand, but as this is a case in which the rights of the public are to a certain extent involved, and one which, if the verdict is allowed to stand, their rights might be prejudiced, I think we ought to grant a new trial.

Rule absolute for a new trial on payment of costs.

Per cur.—Rule absolute.

COMMON LAW CHAMBERS.

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

GILLESPIE ET AL v. SHAW ET AL.

Attorney -Costs—Attorney and client—Party and party—Pressure—Special circumstances—Sheriff—Poundage.

Where an attorney, having had for three years a judgment on confession for a large amount, gave defendants to understand that his charges against plaintiff were $200, which defendants understood to mean all his charges, including as well costs between party and party as costs between attorney and client, which sum defendants, in consideration of forbearance, promised to pay and did pay, the attorney was not allowed afterwards to treat the $200 as paid for costs between attorney and client only, and to proceed for costs between party and party incurred prior to the giving of the note

Where defendants, in 1860, in consideration of forbearance, promised to pay a demand of $200, which the attorney said he had charged to his clients, but which was not strictly in whole recoverable from defendants, it was held that it was too late in 1863 to call upon the attorney to deliver a bill of items for the $200, although such a bill was demanded at the time the note was given; and it was also held that the pressure of an execution against lands in 1860 was not a sufficient "special circumstance" to entitle applicant to have his application succeed, notwithstanding the lapse of time.

Quære—The right of the sheriff to poundage where money is apparently made by pressure of executions in his hands, but not made by or through him?

(Chambers, Feb 2, 1864.)

Robert A. Harrison, on the 11th July last, on behalf of the defendants, obtained a summons, upon certain affidavits and papers, calling on the plaintiff's attorney (Hon. J. S. McDonald) to show cause—

1. Why he should not, within two weeks, or within such other time as should be appointed, deliver to the defendant James Shaw, or to his son Henry D. Shaw, their attorney or agent, a bill of costs, containing items of the services rendered by him in this cause as attorney for the plaintiff prior to 18th February, 1860, and for which he exacted the sum of $200 from the said James Shaw and Henry his son.

2. Why he should not give credit for all sums of money received by him as such attorney from the defendant James Shaw or his son, for or on account of costs in the cause.

3. Why the bill, when delivered, with credits, should not be referred to the Master to be taxed.

4. Why the said attorney should not refund what, if anything, should, upon the taxation, appear to have been overpaid.

5. Why the Master should not tax the costs of the reference, and certify what, upon such reference, shall be found due or owing to or from either party in respect of such bill and demand, and of the costs of such reference, to be taxed according to the event of such taxation, pursuant to the statute.

The summons also called upon the attorney to show cause—

1. Why he should not deliver a bill to James Shaw, containing items of all services rendered by him in this cause as attorney for the plaintiff, other than the services already mentioned; and for which, or some of them, the sheriff of the United Counties of Lanark and Renfrew was authorized by the attorney to levy upon the lands of the defendants the sum of £27 16s 5d.

Then followed heads numbers 2, 3, 4, 5, the same as those above set out with respect to his first charge.

The summons then called upon the sheriff to show cause—

1. Why he should not be deprived of all poundage and claim of poundage in this cause.

2. Why he should not be deprived of the cost of advertising the defendants' lands, and all claims in respect thereof.

3. Why he should not deliver to the defendants a bill of his charges for all services necessarily and reasonably performed by him in relation to the writs of execution placed in his hands in this cause.

The 4th, 5th, 6th and 7th heads then follow, precisely as the 2nd, 3rd, 4th and 5th in the charges above stated.

The summons next called upon the plaintiffs to show cause—

Why, upon payment to the attorney and sheriff of what, if anything, should be found to be due to them or either of them, the plaintiffs should not cause satisfaction to be entered on the roll in this cause.

The summons then called upon the plaintiffs, the plaintiffs' attorney and the sheriff to show cause—

Why such other order as might be necessary should not be made as to costs or otherwise howsoever.

This summons was enlarged from time to time until the 16th December last, when it was argued before Mr. Justice Adam Wilson.

James Shaw, one of the applicants, swore that he and Richard Shaw gave a confession of judgment to the plaintiffs, on which judgment was entered on the 29th September, 1855; that J. S. Macdonald was the plaintiffs' attorney; that the plaintiffs' costs, taxed on entering judgment, were £7 14s. 4d.; that on the 17th September, 1857, a *fi. fa.* against lands was issued and delivered to the sheriff of Lanark and Renfrew (copy and endorsements annexed); that up to the month of February, 1860, various payments were made to the plaintiffs, when an arrangement was made with them that Henry D. Shaw should become security to the plaintiffs for payment of the greater part of the balance then due, and that he should give his promissory notes to the plaintiffs for the same, which he did; that when this arrangement was made the plaintiffs insisted that, as a part thereof, all the costs, charges and expenses which their attorney had up to that time a right to claim in any way, whether as between party and party and taxable against the defendants, or as between attorney and client and only claimable from the plaintiffs themselves, should be fully paid by the defendants to the said attorney; that, in the presence of A J. Patterson, then acting as the plaintiffs' agent, and of H. D. Shaw, he applied to J. S. Macdonald, in his office at Cornwall, for a bill of his costs, charges and expenses, so that he might know the amount, when the said J. S. Macdonald stated that the amount was £50; that, thinking the amount exorbitant, he asked J. S. Macdonald what it was for, and to give him a bill of particulars, which he refused to do; that a letter produced, marked B, is in the handwriting of J. S. Macdonald and is the letter enclosing the notes to be signed by his son Henry, in favor of the plaintiffs, in pursuance of the arrangement, and also the note for $200 for the said costs, &c.; that the letter produced, marked C, is in the handwriting of J S. Macdonald, wherein he replies to some remonstrances made by H. D. Shaw in regard to his claim; that on the 8th March, 1860, deponent made a note for the $200, payable to and endorsed by his son, at six months, which was sent to the plaintiffs expressly for the said claim of $200 by J. S. Macdonald, and which the plaintiffs transmitted to him, and which note was afterwards paid in full by Henry D. Shaw: that on the 6th February, 1863, the full balance of principal and interest was paid to the plaintiffs, and the receipt annexed, marked D, was given by the plaintiffs; that notwithstanding the payment of the $200 to J. S. Macdonald, the sheriff has been instructed by him to levy from them the sum of £27 16s. 5d. upon the writ against lands; that the paper produced, marked E, was the certificate of the sheriff setting forth the items composing the £27 16s. 5d.; that, excepting three renewals of the writ against lands, and whatever necessary letters were written after February, 1860, all the items in the certificate were anterior to the payment of the $200, and were abundantly covered and satisfied thereby; that he considered the claim for $200 to be exorbitant at the time, but as the plaintiffs would not complete the arrangement unless it was paid, he and his son were obliged to submit to it, but considered the claim attempted to be enforced through the sheriff and levied (as if the $200 had never been paid) a grievous imposition, and contrary to all that is just, fair or right; that notwithstanding it was agreed between the plaintiffs and defendants that in case H. D Shaw met the payments which he had undertaken to make as aforesaid, the defendants' lands should not be advertised or brought to sale, the sheriff, without any authority from the plaintiffs, as appeared from the letter of one of them, annexed, marked F, advertised the defendant's lands for sale in the end of 1862, and has since kept such sale adjourned from time to time; that the sheriff threatened to proceed to a sale unless the costs and charges claimed by the plaintiffs' attorney, and also the sum of $226 75c., which the sheriff claimed for poundage and other fees, as mentioned in the memorandum annexed, marked G, were paid to him; and that as no money had ever been paid to or through the sheriff, or had ever been collected by him, his claim for poundage was illegal.

Henry D Shaw confirmed the affidavit of James Shaw, so far as he (Henry D. Shaw) is concerned, and verified, among others, the following documents, viz.:—A copy of letter sent by him to J. S.

Macdonald. A copy of a second letter sent by him to J. S. Macdonald. Copies of three letters sent to plaintiffs, and the answers thereto. The promissory note for $200, and the plaintiffs' letter acknowledging the receipt of the money to pay the note, and transmitting the note. Copy of *fi. fa*, issued 17th September, 1857, renewed five times, indorsed to levy £3,888 15s. 5d., with interest from 14th July, 1857; £7 14s. 4d. costs taxed, with interest from the 29th September, 1855; and £2 8s. 7d for writs and sheriff's fees on former writs, and 20s. for each renewal. The letter of the plaintiffs' attorney, dated the 18th day of February, 1860, sending the notes to be signed, including the one for $200 (with respect to this one he said, "You will also require to sign the note to myself for $200, to cover my charges and trouble in this affair, now running over five years. I must have this closed now.") The answer to this, dated 23rd February, 1860, from H. D. Shaw to J. S. Macdonald, in which H. D. Shaw says he encloses the notes for the plaintiffs' claim, and "your letter and note for $200 I handed to my father, who resides at Smith's Falls." The answer to this, dated 25th February, 1860, from J. S. Macdonald to H. D. Shaw, in which he says he would retain the plaintiffs' notes till the one for $200 was sent. He adds, "I care not what arrangements you may enter into as to that amount; the condition of the acceptance of your proposal, according to my instructions, was, that the charges to which plaintiffs were liable should be paid by you." H. D. Shaw's letter of the 27th February, 1860, to Mr. Macdonald, alleging that the giving of the note for the $200 or the settlement of his costs was not a condition precedent to the arrangement being a final one, which was made at Cornwall, and that, as he understood it, J. S. Macdonald and James Shaw were to settle the costs between themselves. A letter from H. D. Shaw, dated also 27th February, 1860, to the plaintiffs, arguing against J S. Macdonald's view of the settlement, and of his (H. D. Shaw's) being liable for the costs. A letter from the plaintiffs to H. D. Shaw, dated 28th February, 1860, saying they understood from Mr. Patterson "that the payment of Mr. Macdonald's charges was one of the conditions necessary to give effect to the agreement in other respects. A letter from H. D. Shaw to the plaintiffs, dated 2nd March, 1860, in which he says his father asked J. S. Macdonald for a bill of particulars, which had not been rendered, and "Should my father pay a bill of such an amount without knowing what it is for, or is Mr. Macdonald's charge for drawing up a confession of judgment £50?" He also says, "At the same time my father desires me to say that he is willing to pay what just legal claims you have gone to at his expense; or if you will say that Mr. Macdonald's claim of £50 for what he has done in this cause is a just one, he will pay it—wishing, however, to be furnished with a bill of particulars, to ascertain what the claim is made up of—also wanting to know if Mr Macdonald's claim covers all charges in this case, whether with sheriff or otherwise howsoever." A letter from the plaintiffs to H. D. Shaw, dated 5th March, 1860. They say—Mr. Macdonald agrees with Patterson that payment of his charge of £50 was part of the arrangement. "It is a matter for which he declines to give any detailed account, but considers he is entitled to the amount named for the trouble and responsibility he has had in advising in this matter. We admit he has had a good deal of trouble, first and last, extending over a period of five years, and during which time numerous stays, &c., have taken place, at the instance and for the benefit of the defendants, and searches at ours (all including consultations and opinions, and a good deal of correspondence), for which we are liable to Mr. Macdonald; and although we might not be able to recover the whole amount under execution, we consider we are entitled to be relieved from the payment of it, in consideration of the delay granted, and in conformity with the arrangement to that effect at Cornwall, when, so far as we have heard, no objection was made by your father to the amount named by Mr. Macdonald. Mr. Macdonald says his charge is exclusive of sheriff's fees." A letter from H. D. Shaw to the plaintiffs, dated 8th March, 1860, stating that "In consideration of your stating that you are liable for the claim in question to Mr. Macdonald, I enclose you note made by my father and endorsed by me, at six months, payable at your office, for £50, being in settlement of all claims for legal advice and expenses that J. S. Macdonald has against you." A letter from the plaintiffs to H. D. Shaw, dated 10th March, 1860, saying they had sent the note for £50 to J. S. Macdonald. The note itself. The acknowledgment by the plaintiffs to H. D. Shaw, dated 18th September, 1860, of the amount of the note transmitted by H. D. Shaw. A receipt in full of debt and interest from plaintiffs, dated 6th February, 1863 A letter from plaintiffs to H. D. Shaw, dated 15th November, 1862, rejecting H. D. Shaw's proposal, and saying they will not disturb the arrangement made unless the whole amount is paid, and saying the advertising of the lands has not been at their instance. The detailed statement of costs, amounting to £27 16s. 5d., still claimed by the plaintiffs' attorney, dated 6th July, 1863, beginning with the costs taxed on entering judgment, £7 14s. 4d. The memorandum of the sheriff's fees, claiming poundage on £4,000, $260; filing and return of writ, 75c.; two notices for papers, $1 each, $2;—$262 75c.

The sheriff made affidavit—that on the 18th September, 1857, he received *fi. fa.* against lands to be executed; that writ remained in his hands (excepting when taken to be renewed) in full force from 18th September, 1857, to date (20th August, 1863); that about the respective dates thereof he received from plaintiffs' attorney letters produced respecting the writ; that at the special request of the defendant, he delayed obeying said instructions, in order to procure for them if possible an extension of time, "but finding that I could not, and that the time was nearly expired, I obtained a description of the defendants' lands, and was about to advertise the same for sale, and partially prepared the advertisement, when I was made aware that some arrangement had been made between the parties for securing the payment of the amount endorsed on the writ, or the larger part thereof; that such arrangement, so far as I believe, has been carried out," &c.; that arrangement was made by pressure of writ, &c.—lands were worth £3000; that about the 1st September, 1858, he received a letter from plaintiff's attorney (produced); that about the end of October, 1862, other creditors of defendants pressed their executions against their lands in his hands, whereupon he advertised the lands—advertisement first published about the 6th November, 1862; that the plaintiffs' attorney knew of such advertisement, and wrote a letter (produced), and that about £400 of debt was then due; that about the 8th February, 1863, he received a letter (produced) from plaintiffs' attorney; that, some dispute arising as to costs, he wrote to the plaintiffs' attorney, and received letter in answer; that while writ was in his hands, it was his belief the writ was in force, and had priority over other writs against defendants; and if priority had not been so preserved, settlement by the defendants would not have been made.

Hon. J. S. Macdonald, the plaintiffs' attorney, made affidavit—that the defendants pleaded for time on the execution, and spoke of its being renewed from time to time; defendants thus got time for nearly three years; that before the conclusion of the arrangement, in 1861, with Mr. Patterson for plaintiffs, defendant desired to know if it would affect the validity of the execution against lands, which was still to remain as a guarantee for the fulfilment of the arrangement, and, as Shaw explained to him, the mode of settlement which had been arranged; that his charge against plaintiffs for consultations and for special attendances, expressly demanded to be held in Montreal, on the subject of this claim, and for lengthy attendances also in his office at Cornwall, which consultations and attendances, together with correspondence, extended over five years, was $200; that he recollected distinctly telling the parties present the charge of $200 was against the plaintiffs alone, and it was of no consequence how the plaintiffs and defendants settled—he should look to the plaintiffs alone for that charge; that he never meant or contemplated that the taxed costs included in the *fi. fa.*, nor the writs, &c., should form part of the $200, as it was part of the arrangement that the writ against lands should remain in the sheriff's hands as security, to be acted on in case of default (as proof of this he referred to his letter of 27th March, 1860, to plaintiffs); that it was always his intention to charge his clients with a fee of $200, irrespective of any arrangement between the plaintiffs and defendants. The letter from himself to plaintiffs says, "The note for $200 may be regarded as covering my charges anent your suit against the former (James Shaw), except the small amount of costs included in the judgment, and the writs of execution issued thereon, which, I take it, you have included in your several settlements. With the sheriff's fees I have nothing to do."

J. B. McLennan, a partner of J. S. Macdonald, made affidavit that he was a student of J. S. Macdonald's when settlement was made, and that he is aware the $200 was given for the amount to be charged by way of retainer to plaintiffs as well as for consultations and lengthy correspondence about the suit.

James Shaw, in reply, made affidavit—that the writ was to stand as a security over his lands for the due payment of the notes by H. D. Shaw; that when he asked J. S. Macdonald for a bill of particulars of the £50, J. S Macdonald said "he would give no bill of particulars," and, Mr. Patterson refusing to carry out the arrangement unless he agreed to pay the £50, he was obliged to submit; and that J. S. Macdonald never said to him the £50 was a charge against the plaintiffs alone, irrespective of the costs of the suit; and he (deponent) understood it to be in full of all costs and charges of every kind, save sheriff's fees.

S. Richards, Q. C., showed cause for J. S. Macdonald and the plaintiffs.

Mr. Watt showed cause for the sheriff.

Robert A. Harrison in support of the summons, argued that the $200 note was given for costs; that it covered *all* costs up to the time it was made; that a person who has paid, or is liable to pay, the bill of an attorney, may have an order for the delivery and taxation of the attorney's bill (Con. Stat. U. C. cap. 35, sec. 38; *In re Lees*, 5 Beav. 419; *In re Thomas*, 8 Beav. 145; *In re Beasey*, 8 Beav. 338; *Painter* v. *Lensell*, 8 Scott, 435; *In re Bynold*, 9 Beav. 260; *In re Glass and Macdonald*, 9 U. C. L. J. 111); that where the application is for the *delivery* of a bill, and not merely for reference of a bill to taxation, there is no limitation as to time of application (*Ib.* sec. 28, *et seq.*); that "the special circumstances" clauses are therefore inapplicable in such a case (sec. 30); that even if applicable, the pressure of the attorney at the time the note was given was sufficient "special circumstances" (*In re Bennett*, 8 Beav. 467; *In re Jones*, *Ib.* 479; *In re Wells*, *Ib.* 416; *In re Tyson*, 7 Beav. 496; *Ex parte Wilkinson*, 2 Coll. 92; *In re Rawe*, 22 Beav. 177; *In re Kinnear*, 5 Jur. N. S. 423; *In re Lett*, 8 Jur. N. S. 1119; *In re Pugh*, 8 Jur. N. S. 586); that the reference may be had not only after payment, but after payment and an agreement not to tax (*Woosman* v. *Woods*, 1 Dowl. P. C. 681; *In re Stephens*, 2 Phill. C. C. 562); that he sheriff, not having made the money, was not entitled to poundage, but only to reasonable remuneration for services actually rendered (*Morris* v. *Boulton*, 2 U. C. Cham. Rep. 60; *Corbet* v. *McKenzie*, 6 U. C. Q. B. 665; *Thomas* v. *Cotton*, 12 U. C. Q. B. 1; *Walker* v. *Fairfield*, 8 U. C. C. P. 95; *Henry* v. *Commercial Bank*, 17 U. C. Q. B. 104; *Brown* v. *Johnson*, 5 U. C. L. J. 17).

ADAM WILSON, J.—The first question is—assuming that the two claims of $200 and the costs of the suit might both have been made by the plaintiffs' attorney at the time when the settlement of February, 1860, took place, were they both made or not? If they were both made, or can be presumed to have been both made, then will arise the question, whether they both can be maintained? If they were not both made, or cannot be presumed to have both been made, then it will not be necessary to consider any other than the one which was so made.

To determine this question I must look at the statements made concerning what took place at the time respecting it. James Shaw in the sixth paragraph of his first affidavit says—"When the arrangement was made in February, 1860, the plaintiffs insisted, as a part thereof, that all costs, charges and expenses which their attorney had, up to that time, a right to claim in any way, whether as between party and party, and taxable against the defendants, or as between attorney and client, and only claimable from the plaintiffs themselves, should be fully paid and satisfied by the defendants to the said attorney." Henry D. Shaw confirms the affidavit of James Shaw. The documents filed by the defendants' attorney upon this point are to the following effect:—Letter of J. S. Macdonald to Richard Shaw, in mistake for H. D. Shaw, dated 18th February, 1860 saying—"You will also require to sign the note also herewith to myself for $200, to cover my charges and trouble in this affair, now running over 5 years, I must have this closed now." Same to H. D. Shaw, dated 25th February, 1860—"I will retain the notes you sent until the one you sent to cover charges shall reach me. I care not what arrangement you may enter into as to that amount. The condition of the acceptance of your proposal, according to my instructions, was that the charges to which the plaintiffs were liable should be paid by you." The plaintiffs' letter to H. D. Shaw, 28th February, 1860—"When Mr. Patterson returned from Cornwall we understood from him that the payment of Mr. Macdonald's charges was one of the conditions necessary to give effect to the agreement in other respects." Letter from H. D. Shaw to plaintiffs, 2nd March, 1860—"At the same time my father desires me to say that he is willing to pay what just legal claims you have gone to at his expense; or if you will say that Mr. Macdonald's claim of fifty pounds for what he has done in this case is a just one, he will pay it; wishing, however to be furnished with a bill of particulars, to ascertain what the claim is made up of; also, wanting to know if Mr. Macdonald's claim covers all charges in this case, whether with sheriff here or otherwise whatsoever" Letter from plaintiffs to H. D. Shaw, 5th March, 1860, saying—"Shortly after its receipt" [the receipt of H. D. Shaw's of 2nd March] "we had an opportunity of making known its contents to Mr. Macdonald, who happened to call at our office on his way to Quebec." "He agrees with Mr. Patterson, &c." "He declined to give any detailed account, &c." "We admit he has had a good deal of trouble for which we are liable to him; and although we might not be able to recover over the whole amount under execution, we consider we are entitled to be relieved from the payment of it in consideration of the delay granted, &c." "Mr. Macdonald says his charge is exclusive of sheriff's fees." Letter from H. D. Shaw to plaintiffs, 8th March, 1860, sending therein the $200 note, "being in settlement of *all* claims for legal advice and expenses that Mr. J. S. Macdonald has against you in suit against James Shaw and son up to this date." From the defendants' case I can form no other opinion than that the two hundred dollars was in *full* of all claims which Mr. Macdonald had in that suit against the plaintiffs, and which would necessarily include those which the plaintiffs had against the defendants—that is, the costs between attorney and client necessarily include those between party and party, and something more. Mr. Macdonald in his letter of the 18th February, 1860, speaks of the $200 "to cover my charges and trouble in this affair, now running over 5 years," and making no distinction between party and party and as between attorney and client, and giving no intimation that he still meant to claim the costs in the suit. So again in his letter of the 25th February, 1860, Mr. Macdonald speaks generally of the note for $200 to cover charges, and that his instructions were that the charges to which the plaintiffs were, liable should be paid, &c. Now, to cover charges means, of course, unless clearly and unequivocally explained, *all* charges, and not only a part of them; and that defendants were to pay all the charges "that the plaintiffs were liable for," shows that the defendants had to pay something more than taxed or taxable costs, but still including such costs. The plaintiffs, too, in their letter of the 28th February, 1860, speak generally of "Mr. Macdonald's charges." H. D. Shaw in his letter of the 2nd March, 1860, to the plaintiffs, desires to be informed by them "if the $200 covers *all* charges in this case, whether with the sheriff here or otherwise whatsoever;" and the plaintiffs in their letter of the 5th of March say, that Mr. Macdonald says "the $200 is exclusive of sheriff's fees." Surely if it were also exclusive of any *other* charges, especially the costs of the suit, this sum could have been excepted also? Does not this very letter shew that the $200 did include, in the plaintiffs' opinion, the costs in the suit; for they say we might not be able to recover *the whole amount* under execution, but we consider we are entitled to be relieved from the payment of it! They could not have so written if they did believe that *no part* of the $200 was recoverable under this execution, because it was altogether beyond the costs in the suit. Under this information and impression to be gathered from the very outset, but here very plainly stated, H. D. Shaw gives the note for $200, telling the plaintiffs that the note is in settlement *of all claims* for legal advice and expenses that J. S. Macdonald has against them in the suit against James Shaw and son *up to this date*, and the plaintiffs accepted it.

It is impossible, therefore, that the plaintiffs can compel the defendants to pay the costs of the suit in addition to this $200; and, therefore, Mr. Macdonald, as plaintiffs' attorney, can enforce no such claim, either against the defendants, whatever he may

do or be able to do against the plaintiffs themselves; which it is not necessary for me to decide, although I should think there would be some difficulty in doing even this.

This is the view which I take of the case from the defendants' statements; and the question is, can it be or is it displaced by the answers on the part of Mr. Macdonald? The plaintiffs themselves make no statement whatever. Now, Macdonald states very positively that he told the parties present at the settlement of February, 1860, that his charges of $200 was against the plaintiffs alone, and that it was no consequence to him how the plaintiffs and defendants settled, as he should look to the plaintiffs alone for that charge. He also says that Mr. Patterson for the plaintiffs required the defendants to pay this charge as part of the arrangement for a settlement, as the expense had been incurred for their convenience. I have no doubt that Mr. Patterson did require this to be borne by the defendants, but one would also suppose he did not mean that the plaintiffs should remain liable as they were for the costs of the suit at the time this settlement was being made; and it may be quite true that the $200 might be and was, as stated to have been, a charge against the plaintiffs alone, for no doubt it was so, as it certainly was not a charge against the defendants to that extent. But that leaves the very point untouched—whether the $200 did or did not include the costs of the suit: and it may well be said that the $200 was stated to have been a charge against the plaintiffs alone, because it included a considerably larger sum than the mere costs of the suit, yet it may not have been the fact that it was stated to or was understood by the parties that the costs of this suit was to be paid by the defendants, or were claimed by Mr. Macdonald, in addition to the sum of $200. Mr. Macdonald does not say that he made any such statement, or that the parties understood anything differently from what is now expressed by the defendants, that the $200 includes *all* the costs up to that date, except the sheriff's fees: but he says (which is no doubt the fact) that "I never meant or contemplated" that the taxed costs, nor the writs, &c., should form part of this sum of $200, so charged against the plaintiffs: and the letter he refers to of the 27th of March, 1860, addressed to the plaintiffs, is certainly a corroboration of that fact (if a corroboration were required) because he there says distinctly to cover all "his charges, excepting the costs in the judgment." But this letter was written nearly six weeks after the arrangement was made, and is communicated to the plaintiffs alone. If they are willing to accept of this view of the case, it is quite right they should be bound by it. But it can make no difference as far as the defendants are concerned; nor does it it at all overrule the statements contained in the letters above referred to, of the 18th and 25th of February, 1860, that the $200 were to cover "my charges and trouble in this affair, now running over 5 years;" for these statements were made nearer to the time of the settlement than was the letter of the 27th of March, and they were made to H. D. Shaw, who was to pay *all charges*. Mr. Macdonald also says it was always his intention to have charged his clients $200 for his services, irrespective of any arrangements between the plaintiffs or defendants by which a settlement might be brought about. This is not disputed; for the question is, what was said to and done towards the defendants at the time of the settlement in February, 1860, respecting Mr. Macdonald's costs, and not what was intended by Mr. Macdonald, and not stated and not understood; for just the contrary appears to have been understood by the defendants, and, I think, by the plaintiffs or their agent, too.

I am obliged, therefore, to say that the sum of $200 was to be in full of the plaintiffs' attorney's *whole* costs, and of all costs and charges whatsoever, excepting sheriff's fees, up to the time of settlement in February, 1860; and that the costs of the suit and writs, &c, incurred up to that time, being included in that sum, have been already paid and are not claimable from defendants as a sum distinct from the $200.

Then as to this sum of $200, treating it as the costs between attorney and client, and as necessarily including the costs of the suit as between party and party, can the plaintiffs' attorney be called upon to render a bill of them, and to have them taxed as asked for by the summons? The defendants, in February, 1860, were told by the attorney that his charges against his clients were $200. He refused to give the defendants a bill of particulars of such claim. The plaintiffs would not settle with the defendants unless they would pay this sum to discharge them. The plaintiffs and the defendants consented to do so, not to the attorney but to the plaintiffs, and accordingly did pay it to the plaintiffs in full settlement to that time. And they now, in July, 1863, ask to have the items of this claim rendered and referred to taxation, and the balance, if any there be above what was strictly claimable by the attorney from his clients, refunded to them. If this can be done, it must, I think, be only under such "special circumstances" as the statute clearly contemplates; and because the plaintiffs, as "the parties chargeable," might have made such application themselves. But I am quite clear that the plaintiffs could not and cannot so apply, and I refer to the decision of Mr. Justice Hagarty in *Re Glass*, reported in 9 U. C. L. J. 311, and to the authorities there cited, as conclusive upon this point. The plaintiffs are quite concluded as between themselves and their attorney from re-opening this charge, and the defendants are, therefore, also concluded.

It is often the case, however, that the defendants in such a case may have full relief against the plaintiffs themselves, although they cannot reach the plaintiffs' attorney. And the next question is, whether upon this summons I can make an order that the claim of $200 should be submitted to the master as between the plaintiffs and defendants? I think I cannot do so. The plaintiffs have not been called upon to answer such a case specifically, but even if they were, I do not see how I could make such an order, for in the event of any deduction being made from that sum the loss would fall solely upon the plaintiffs; and this was the very thing that the defendants themselves represented to the plaintiffs so particularly in their bargain with the defendants, to have stipulated that defendants should guard the plaintiffs from: and now, having paid this amount to the plaintiff, and having had the full benefit of the bargain by an indulgence of more than three years' time, it would be a gross breach of faith on the part of the defendants if they could draw the plaintiffs into a controversy now respecting these costs which the defendants solemnly engaged they would not do when they obtained the very great favor from the plaintiffs which saved them, as it appears, from utter ruin, at no other gain to the plaintiffs personally than the payment of 6 per cent. interest. The case of *Smith* v. *Algar*, 1 B. & Ad. 603 would show, if authority were wanting, that the plaintiffs might make this demand upon the defendants for the forbearance they were getting, and that the defendants can get no relief against it.

As to the sheriff, he is entitled to *some* fees, because he had the writ in his hands for execution for a period of two years, during all which time it was in full force—that is, for the year from its first issue, and for the first renewal of it for one year longer. If he did anything during that time amounting to a levy, he may be entitled to poundage; but I cannot make out from his affidavit or from the papers he has filed, that he has advertised or made or procured a list of lands for seizure or sale during these two years. And although he certainly has since advertised the defendants' lands for sale, and although all parties, plaintiffs, defendants and sheriff, considered that the writ was still a continuing and valid writ in his hands for execution (for it was expressly agreed between the plaintiffs and the defendants that the writ should remain in the sheriff's hands as a security upon the defendants' lands, against the default of H. D. Shaw to meet the notes which he had given), yet as it has been decided that only one renewal of the writ can be made (*Neilson* v. *Jarvis*, 13 U. C. C. P. 176) it follows that in strict law, whatever the parties may then have supposed to the contrary, no legal proceedings could be taken by the sheriff after the expiration of one renewal, unless in continuation and completion of such proceedings as had been validly commenced by the sheriff while the writ was still in force. It may be thought to be scarcely generous on the part of the defendants to resist the claim of the sheriff to some greater compensation than he may be entitled to under the strict application of the law. But with this I have nothing to do. If the sheriff is a loser in this respect, he has himself chiefly to blame, for it was unquestionably not his place, in the face of the many directions from the plaintiffs' attorney to proceed on the writ, "to delay at the defendants' request obeying said instructions, in order to procure for them, if

possible, an extension of time:" and he will not be the first one who, after going out of his way and incurring serious risk to serve another, has, notwithstanding the great service he has rendered, received neither pay nor thanks for his pains. I cannot say positively the sheriff is not entitled to poundage, for I cannot make out with certainty that he did not make a sufficient levy during the two years the writ was in force, to entitle him to it. I can only say that he is not entitled to it unless he did make such a levy, and it will be for the master to determine this. But I infer rather from his affidavit that he did not make a levy within that time. I must, therefore, refer his claim to the master for taxation.

As to the plaintiffs' attorney, I must discharge the summons so far as it relates to the $200, because the defendants are not entitled to re-open the settlement which was made as to that sum, either against the plaintiffs' attorney or the plaintiffs themselves; but I must make the summons absolute as to the sum of £27 16s. 6d., in order that the plaintiffs' attorney may, if so disposed, furnish a bill of such items which he may claim to be entitled to for services performed since the settlement of February, 1860. And I must direct that on payment by the defendants to the plaintiffs' attorney of such costs as may be allowed to him, from the time of the settlement in February, 1860; and on payment to the sheriff of such fees and expenses as may be allowed to him, the plaintiffs shall sign satisfaction of the judgment in this cause, upon payment to them of the costs attending the same. And for the purpose of giving effect to this order, I shall refer the questions of taxation to the master.

I shall make no order as to the costs of this application for or against any of the parties; but the costs of the reference shall abide the event.

Order accordingly.

GLENNIE v. ROSS.

Capias—Arrest by artifice—Denial—Effect thereof.

Where application was made for the discharge from custody of a defendant, arrested under a writ of capias, upon the ground that his arrest was procured through a trick, by means of the use of criminal process, which, when it had served its purpose was abandoned, and the affidavits filed in answer, positively denied the trick and all collusion of every kind, the judge without inquiring into the question, whether the arrest of defendant under the criminal process was legal or illegal, discharged the summons

(Chambers, Feb. 5, 1864.)

Defendant obtained a summons calling on the plaintiff to shew cause why the arrest of the defendant under the writ of *capias ad respondendum*, issued in the cause, should not be set aside, and the defendant be altogether discharged from the custody of the sheriff of the county of Waterloo, on the ground that the defendant was collusively arrested in the city of Toronto, and taken to the town of Berlin, in the county of Waterloo, under and by a virtue of a warrant on a criminal charge, and on a charge that he had thereatened to take the life of the plaintiff, for the sole purpose that he might be arrested under said writ of capias at the said town of Berlin, instead of the said city of Toronto, and that having been so arrested on said charge, and conveyed to said town of Berlin, he was then given up by the officer who had him in custody on said charge, to the officer who arrested him under said writ of *capias ad respondendum*, and on grounds disclosed in affidavit and papers filed.

Defendant swore that on Saturday, 16th January last, he was arrested under and by virtue of a *capias ad respondendum* issued in this cause, and was then imprisoned in the common gaol at Berlin, in the county of Waterloo, and had ever since been detained a prisoner in custody under and by virtue of the said writ of capias. That on 15th January last, he was arrested at Toronto by a constable who called himself Detective Crowe, who arrested deponent under and by virtue of a warrant in his hands, issued by one William Hendry a justice of the peace in and for the county of Waterloo, on the information of the above named James Glennie, in which said warrant it was stated that deponent had threatened to take the life of the said James Glennie, and the said Detective Crowe at the time he so arrested deponent at Toronto, as aforesaid, informed him that he would take him before a magistrate in the said county of Waterloo, when deponent would be required to give sureties to keep the peace. That accordingly the said Detective Crowe took deponent a prisoner to Police Station number one, in the city of Toronto, and kept him there till late in the night, when the train was about leaving the railway station for Berlin and the west, when he and his assistant took deponent to the railway station, and thence by train to Berlin, where they arrived about three or four o'clock on the morning of Saturday, 16th January last, and from the time of their arrival, until about nine o'clock and until after deponent was arrested by the sheriff's bailiff or deputy, under and by virtue of the said writ of capias, he was detained a prisoner under close watch by virtue of the said warrant by the said constable Crowe. That on the back of the said warrant was endorsed an affidavit of the plaintiffs attorney in this cause, testifying the genuineness of the signature of the said William Hendry to the said warrant; and about eight o'clock in the morning of Saturday, 16th January last, the said Crowe sent word (as he informed deponent) to the said attorney, giving him information that deponent was there in his Crowe's custody, and at the same time the said Crowe told deponent that he would immediately be brought before a magistrate to be bound over to keep the peace; and he the said Crowe then went with deponent to the residence of a lawyer in Berlin, that he might employ counsel to appear before the magistrates court, which deponent expected would be held forthwith, but soon after his return from the said lawyers residence to the tavern were they were staying, the deputy sheriff or bailiff of the sheriff of the county of Waterloo, came in to the said tavern and arrested deponent under and by virtue of the said writ of capias, while deponent was in the custody of the said Crowe; and immediately after the said deputy sheriff or bailiff entered the said tavern, he was followed by the said attorney, and the said Crowe soon after deponent's arrest by the sheriff's bailiff, informed deponent that he had given deponent up to the said sheriff's bailiff, and further said he was aware that deponent was to be arrested under the said capias. That at the time he was so arrested under the said writ of capias, the said sheriff's bailiff then served upon him a copy of the said writ, which said copy so served upon deponent was annexed to his affidavit. That the said sheriff's bailiff only arrested deponent under the said writ of capias, and did not take or hold him under the said warrant; but then soon after took deponent to the said common gaol, and deponent had ever since been a prisoner in custody under said writ of capias, and no further or other proceedings whatever had been taken against him, to his knowledge, on the said warrant; but he was informed the same was abandoned, and in truth he, deponent, never threatened to take the life of the said James Glennie, nor did he ever make any other threats against him, nor did he give any reason or ground for the issuing of such warrant against him. That at the time of his arrest in this suit, and at the time of his arrest under the said warrant, and at the time of making his affidavit he had not any intention whatever to quit Canada; and there was not then any reason for apprehending him under a writ of capias to prevent him leaving Canada, as it is his intention to remain in this country.

Robert A. Harrison shewed cause. He filed among others an affidavit of the attorney for the plaintiff, wherein it was sworn: That on the 26th day of December last past, he issued concurrent writs of *ca. re.* in this cause, directed to the sheriffs of York and Peel and Waterloo respectively. That on the 6th day of January last, he sent to his Chancery agents the said writ, directed to the sheriff of the United Counties of York and Peel, to be put into the sheriff's hands there, and instructed his said agents to request the sheriff to appoint a detective or special bailiff for the purpose of making the arrest, for the reason that he did not think the sheriff's officer could find the defendant, who as deponent was informed, was keeping himself concealed. That in answer to his letters to his agents, he received a letter stating that the sheriff was not willing to appoint a special bailiff, but that they had asked the detective, who knew of Ross' whereabouts, to point out the defendant to the sheriff's bailiff; and in said agents letter from said agents, there was enclosed a magistrate's warrant which had been in the hands of the detective (and which deponent since learned had been sent to him by the plaintiff himself without deponent's privity) for the purpose of having proof of the signature of Mr. Hendry, the magistrate issuing the said warrant; being well

acquainted with Mr. Hendry's signature, deponent made the affidavit himself, and returned it to his agents. That he has enquired at the sheriff's office in Toronto, and found that a concurrent writ of *ca. re.* in this cause was received in said office on 17th day of January last, and remains there still. That about eight o'clock on the morning of the 23rd day of January last past, a person representing himself as the assistant of Detective Crowe, called at deponent's house and informed deponent that Detective Crowe was at the hotel in Berlin, with the defendant in charge upon a magistrates warrant, and that they had sent for the plaintiff Deponent said to him that since the defendant had been arrested upon a warrant, the detective should take him before a magistrate so soon as the plaintiff arrived. That soon after deponent went to his office and had only been a few minutes there, when the bailiff of the sheriff of Waterloo came to him, and said that the defendant, against whom he had a writ of *ca. re*, was in Roat's Hotel. Deponent told him to keep a watch upon defendant, and as soon as the detective had disposed of him on the warrant to arrest him. The bailiff then left deponent's office, and a few minutes afterwards deponent went in to Roat's Hotel, which is about forty yards from his office, and went into the bar room and found the person who came to his place in the morning, the sheriff's bailiff, and a person whom the sheriff's bailiff introduced to deponent as Ross, the defendant and one other person whom deponent did not know, and did not speak to, but who on the afternoon of the same day, some hours after Ross the defendant had been in gaol, deponent was told, was Detective Crowe—after being introduced to the said defendant by the said bailiff, as aforesaid, deponent was speaking with the defendant when Mr. W. H. Bowlby, barrister of Berlin, came into the bar room and called out defendant, and the person whom he afterwards understood was Detective Crowe. Deponent then left the hotel and went to his office, fully expecting that the defendant would be taken before a magistrate, and held to bail upon the plaintiff's information—after which deponent certainly did intend to have him arrested on the writ of *ca. re.*, then in the sheriff's hands, in this cause, and was greatly surprised when he heard in the afternoon that he was in custody of the sheriff before he had been taken before a magistrate. Deponent positively swore that there was no collusion between him and the attorney of the said plaintiff, or otherwise, and the said Detective Crowe, to have the said defendant brought to the county of Waterloo on the said warrant, for the purpose of having him arrested on the said writ of *ca. re.* in this cause, nor did he, deponent, ever speak or write to the said Crowe on this subject, either on the occasion above referred to or any other, to my knowledge.

Mr. Harrison also filed an affidavit of plaintiff, wherein was stated the information which lead him to the belief that defendant threatened his life, and wherein it was most positively sworn that there was no collusion between him and Detective Crowe, to have defendant brought from Toronto to the county of Waterloo, there to be arrested on civil process; but on the contrary thereof, he caused the peace warrant to be issued against defendant in good faith, and never abandoned it.

Other affidavits to which it is not necessary to refer, were filed in corroboration of those made by plaintiff and his attorney, denying collusion, &c.

Mr. Harrison then argued that the application of defendant was rested on the alleged ground of collusion or a trick, that the affidavits which he filed displaced that ground, that if there was no trick it was clear that a person arrested on criminal process might be afterwards detained on civil process, even at the suit of the party who had caused him to be arrested on the criminal charge (*Palmer* v. *Rogers*, 6 U. C. L. J. 188.) But even if a trick were shown and not answered, unless the trick were designed to gain an advantage on criminal process, which a party could not obtain on civil process such as an arrest on a Sunday, that the trick *per se* was no ground for prisoner's discharge (*Willes* v. *Gurney*, 8 B. & C. 771; *Mackie* v. *Warren*, 5 Bing. 176; *Jacobs* v. *Jacobs*, 3 Dowl. P. C. 675: *Re Ramsden*, 15 L. J. Q B. 264 M. C.: *Stem et al* v *Valentiren*, 27 L. J Q B 236.

D. McMichael, in support of the summons, contended that a peace warrant issued in Waterloo had no force in York or Peel, notwithstanding the endorsement. That the custody therefore, both in York and Peel and Waterloo was illegal, and that whether a trick or not, plaintiff had no right to cause him to be arrested until he had completely regained his liberty from the illegal custody (*Webb* v. *Darwell*, Barnes, 400; *Ex parte Eggleton*, 23 L. J. M. C. 41; *Pearson* v. *Fewens*, 5 Bing. N. C. 567.)

HAGARTY, J.—I am not prepared to accede to Mr. McMichael's argument. The summons is rested on the ground of collusion, and all allegations of collusion are contradicted by the affidavits filed on the part of the plaintiff. Mr. McMichael admits that he has no case directly in point, and in the absence of such I shall discharge the summons, leaving him if he desires to do so, to move the court against my order.

Summons discharged.*

GLENNIE v. ROSS.

Con. Stat. U. C, cap 22 sec 33—Rule T T 20 Vic. No 100—Time to declare against a prisoner—Effect of not doing so.

Held, that under sec 32 of the Common Law Procedure Act, coupled with Rule No. 100 of 20 Victoria, a plaintiff is bound to declare against a defendant in close custody, within the term next after the arrest

Held also, that the fact that defendant had, during the term, made application for his discharge from custody, which application was refused before the end of the term, was no sufficient excuse for not declaring during the term

Held also, that a defendant once supersedeable is always supersedeable

(Chambers, Feb. 23, 1864.)

Defendant, on the authority of *Tyson* v. *McLean*, 1 U. C. Prac. R. 394, obtained a summons, calling on plaintiff to shew cause why the defendant, William Ross, should not be absolutely discharged out of the custody of the sheriff of the county of Waterloo, under the capias issued against him in this cause on entering a common appearance, on the ground that the defendant being a prisoner in the close custody of the said sheriff, in the gaol of the said county, under the said writ of capias in this cause, and having been arrested thereon before last Hilary Term, no declaration in this cause was filed and served on the defendant before the end of the term after his arrest; and no declaration has yet been filed against the defendant, contrary to the rule and practice of this honourable court in that behalf, and on grounds disclosed in affidavits and papers filed.

Defendant swore that he was arrested by the bailiff of the sheriff of the county of Waterloo, under and by virtue of a writ of *capias ad respondendum* in this action, on the 16th day of January last, and was then taken into custody upon the said writ, and was imprisoned for want of sureties for his appearance thereto, and ever since he was arrested had remained in the common gaol of the said county of Waterloo at the town of Berlin a prisoner in custody, under the said writ of *capias ad respondendum*, which said writ was issued from the office of the deputy clerk of the Crown and Pleas in and for the said county of Waterloo, on or about the 13th day of December last. That he had not been served with any declaration in this cause, and was informed by the deputy clerk of the Crown, that no declaration had been filed. That he had not put in special bail, but ever since the said 16th day of January last, had remained charged in custody upon and under said writ.

There was filed an affidavit of the gaoler, wherein he swore that no declaration had been served on him, or given to him in this action.

There was also an affidavit of the deputy clerk of the Crown, to the effect that on the 18th February, 1864, he made due search on all the files in his office, and in the bonds thereof, for the purpose of ascertaining if a declaration had been filed in this action, and that no declaration had been filed.

Robert A. Harrison showed cause. He filed an affidavit of the attorney for plaintiff, wherein it was sworn, that on 22nd January last, the defendant made application to a judge in Chambers, to be discharged from the custody of the said sheriff, on the ground that he had been arrested by trick and collusion. That the summons obtained on the said application was discharged by Mr. Justice Hagarty, the judge presiding in Chambers. That when his agents in Toronto advised him that the said summons had been discharged, they also informed him that the judge had granted the defendant

* Defendant did not move against the order

leave to apply to the full court to be discharged, on the grounds aforesaid, and his agents further stated that they understood the defendant intended to apply in term. That owing to the uncertainty of the defendant's action in this respect, and waiting to see if he would apply to the full court during its sittings which ended on 14th February last, he did not file and serve a declaration in this cause, as he should otherwise have done. That he was instructed by the plaintiff to declare in this cause, and take the same down to trial at the present Spring Assizes, to be held in and for the county of Waterloo, on the 21st day of March, 1864. That he verily believed if the defendant was discharged from custody, without giving bail in this cause, the plaintiff will lose the benefit of any verdict he may obtain herein.

An affidavit of Mr. McMichael was filed in reply.

It also appeared that plaintiff had, on the Monday following term, obtained a summons for further time to declare, which was still pending at the time of this application.

Mr. Harrison, argued that there is now no practice making it obligatary upon a plaintiff, to declare against a defendant in custody during the term next after his arrest, so long as plaintiff proceeds to trial in the term next after issue joined, and causes defendant to be charged in execution within the term next after trial. That the old practice was to bring the prisoner into court by writ of *habeas corpus*, in order to receive the declaration. That sec. 32 of the Common Law Procedure Act, which enacts that if any defendant be taken or charged in custody, &c., the plaintiff *may*, before the end of the term next after arrest, declare against him, &c., was merely an enabling statute. That the word "may" as used in it, was permissive not obligatory (Con. Stat. U. C. cap. 2 sec. 18, sub. s. 2.) That *Tyson* v. *McLean*, was decided under statute 12 Vic. cap. 73 sec. 24, and determined that Rule No. 100 must be received as interpreting "may" as used in 12 Vic. cap. 73, to mean "must." That rule No. 100 having been made before the Consolidated Statutes became law, cannot be looked to as putting an interpretation on these statutes. That even if "may" as used in Con. Stat. U. C. cap. 22 sec. 32, were read "must," it did not mean "must" under all circumstances, and that the attorney for plaintiff in this case had shewn sufficient cause for not declaring during the term next after the arrest (2 Chit. Archd. 9 Edn. 1140, 1141.) And whether or not a summons having been obtained for further time to declare before this application was made, the summons ought to be made absolute and the application fail.

M. C. Cameron, *Q. C.*, contra, argued that even if sec 32 of Con. Stat. U. C. cap. 22, were read as an enabling section merely, still it enacted that the plaintiff is to declare in the manner and according to the directions contained in the 100 and 132 Rules of the Superior Courts of Common Law, made in Trinity Term in the twentieth year of Her Majesty's reign. That the effect of this stipulation is to incorporate with the statute the rule No. 100, to which reference is therein made, and that by the terms of that rule, in all cases in which a defendant shall have been or shall be detained in prison on any writ of capias, &c., the plaintiff in such process *shall* declare against such defendant, before the end of the next term after such arrest, &c.; otherwise such defendant *shall* be entitled to be discharged from such arrest, &c., upon entering a common appearance, unless further time to declare shall have been given to such plaintiff by rule of court or order of a judge That *Tyson* v. *McLean*, is as much law since the Consolidated Statutes as before them. That plaintiff having neglected to declare during the term next after the arrest, defendant immediately after the last day of term became and was supersedeable. That being once supersedeable he was always supersedeable. That the summons for further time to declare not having been obtained and made absolute during the term, could not effect defendants right to be discharged (*Horner* v. *Spencer*, 1 F. & F. 412). That no sufficient excuse was shewn for not declaring within the time limited by the statute and rule.

MORRISON, J., having taken time to consult his brother judges as to the proper interpretation of sec. 32 of the Common Law Procedure Act, made the summons absolute for the discharge of defendant from custody, upon entering a common appearance.

Order accordingly.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq., *Barrister-at-Law, Reporter to the Court*)

MILLER v. START.

Mortgage—Evidence—Costs.

In a suit by a prior against a mesne incumbrancer, on the argument of the cause, by consent, an affidavit was read which stated an agreement on the part of the prior incumbrancer to be postponed to the latter, when the court gave liberty to the plaintiff to cross examine the deponent upon the statements contained in his affidavit, which permission not being acted upon by the plaintiff, his bill was dismissed with costs.

Gray, for the plaintiff

Proudfoot and *Wilkinson* for the defendants, other than Start, against whom the bill was taken *pro confesso*.

VANKOUGHNET, C.—In this case the bill must be dismissed with costs, as the equity which the plaintiff sets up against the defendant Taylor is displaced by the evidence. There is an unfortunate contradiction in the testimony of the two professional gentlemen, Messrs. Start and Gray, only reconcilable as to what occurred in Mr. Start's office, on the assumption that Mr. Start took it for granted that all parties present, including Mr. Gray, knew of the agreement by which Leigh had consented that the mortgage to himself should be posponed to the deed to Start. Start swears that this was well understood between the parties before they met in his office. It seems an extraordinary arrangement for Leigh to have made, and only explicable by his anxiety at once to get money, which Mr. Start was to advance and did advance out of his own means on the express understanding that he was to have a free title to the property to enable him to raise money on it to re-pay himself his temporary advances. While Mr. Gray and Start contradict one another as to what passed in the office of the latter, another witness, John Start, in his affidavit, which it was consented should be read as evidence, swears positively that Leigh agreed to be postponed to Start. When this agreement was made he does not say. I offered to the plaintiff the opportunity of cross-examining him under a commission, as he resides in Buffalo, but this was declined, and I must therefore assume the affidavit to be true, and so treating it, it turns the scale in favour of the defendants.

DUNCAN v. GEARY.

Practice—Venue—Imperfect description of premises.

The absence of a venue in the margin of a bill is not a cause of demurrer. Nor is a description of the premises which omits the township or county.

In a bill for foreclosure of a mortgage, it is not necessary to state the property or the parties to be within the jurisdiction of the court. If it be necessary that the one or the other should be within the jurisdiction that will be presumed in favour of the bill till the contrary appears.

Semble, that no venue being stated in the margin of the bill is an irregularity, and may be taken advantage of by motion to compel the insertion of a venue.

This was a foreclosure suit, the bill in which had been demurred to, on the grounds mentioned in the head-note and judgment. On the case being called on for argument,

Taylor appeared for the plaintiff, and referred to Story's Equity Pleading, secs 487, 489, Drewy's Equity Pleadings, page 37; Daniel's Practice, page 397, as shewing that the objections taken to the bill were not grounds of demurrer.

No one appeared in support of the demurrer.

VANKOUGHNET, C. This bill is for the foreclosure of a mortgage. It describes the mortgagor as of the township of Aldboro, and proceeds in the usual way to the description of the premises, which is, however, imperfect, being stated to be lot A, in the 6th concession, without naming any township or county.

If it were necessary it might perhaps be assumed for the purposes of pleading that the lot must be taken have been stated as in the township of Aldboro, that being the only township named in the bill, and that for this purpose it was sufficiently referred to by the article "the" in the description "the sixth concession." The defendant demurs to the bill on the grounds, 1st, that no venue is stated in the margin of the bill. 2nd, that it does not appear, nor is it stated that the property is within the jurisdiction of the court. There is nothing, I think, in either objection. The venue is no part of the bill, in no way affecting the matter of it, the relief prayed for, or the jurisdiction of the court. It is merely

required under the orders to be inserted as fixing the place for the examination of witnesses, not even as denoting the county where the proceedings are to be carried on, or the cause heard. The absence of it may be an irregularity which can be taken advantage of by a motion calling upon the plaintiff to insert a venue, or to take the bill off the files for the want of it.

It is not necessary to state the property or the parties to be within the jurisdiction of the court. If it be necessary that one or the other should be within the jurisdiction that will be presumed in favour of the bill till the contrary appears. I do not think the imperfect description of the premises any cause of demurrer. In England when a claim is filed on a mortgage it is simply stated that by an indenture, &c., the plaintiff is mortgagee of certain premises therein described, and this, I think, is sufficient here, although the form given under our orders (which however, are not imperative in regard to it) provides for a short description of the premises. It may be more convenient, and particularly for the plaintiff, that the form in this respect should be followed, but as the premises can be ascertained by reference to the deed, sufficient certainty for the purposes of the suit is afforded.

CHANCERY CHAMBERS.

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

WINTER v. HAMBURGH.

Order to elect.

Defendants, suing at law and in this court for the same matters, are entitled, on filing their answer, to obtain an order against plaintiff to elect, on præcipe, and it is not necessary that all the defendants should apply for such order.

The motion to discharge such order should be made in Chambers; if made in court it will be refused or referred to Chambers, and the costs of the day given to the defendants. The court in its discretion will allow both suits to proceed only when the proceedings at law are ancillary to those in equity

It is not necessary that such order should be obtained by all the defendants.

The plaintiffs' original bill, filed in 1860, set out that the owner of real estate in 1822, conveyed certain premises in the county of Holton to the wife of the defendant Hamburgh, in trust for one Emma Winter, then a minor, and who afterwards became the wife of the plaintiff Jacob Winter, and by whom he had several children, his co-plaintiffs, she having died shortly before the bill was filed.

The bill further alleged that shortly after his wife became of age, and on the eve of her marriage with Jacob Winter, she was prevailed on by Mrs. Hamburgh and her husband to convey her estate to them.

This conveyance was alleged to have been obtained by undue influence, and to have been a fraud on the marital rights of Jacob Winter, and the bill claimed to have it rescinded, and the premises declared to belong to the plaintiffs as the representatives of Emma.

The defendants were F. Hamburgh, (his wife being now dead,) and others claiming under Hamburgh and his wife.

In July, 1862, the plaintiffs' solicitor, having for the first time seen the conveyance of 1822, which had not been registered, was of opinion that by reason of some defects it was ineffectual to pass any estate, and thereupon he obtained a new conveyance from the grantor to the plaintiffs.

On application to his Honour Vice-Chancellor Esten, the plaintiffs were allowed to amend their bill by setting up this second conveyance, his Honour at that time remarking that, for reasons similar to those set forth in the judgement, such amendment could not aid the case of the plaintiffs.

Immediately on obtaining the second conveyance the plaintiffs brought an action of ejectment against the defendants and others, tenants of the premises, claiming title under the deed obtained in July, 1862.

The defendants Francis and Henry Hamburgh, defended the common law suit, and also filed their answer to the amended bill, denying the plaintiffs' title, and the fraud with which they were charged, and alleging among other grounds of defence, that the plaintiffs were prosecuting both suits for the same cause, and they thereupon obtained the common order to elect, which was served upon the plaintiffs' solicitor.

The plaintiffs moved upon notice to discharge this order, which was returnable *before the court*; this being objected to on the ground that such an application was properly a Chamber motion; the consideratson was accordingly adjourned into Chambers.

O'Reilly, Q. C., and *Foster*, for the plaintiffs, contended, that as the common law action had been already tried and a verdict given against the plaintiffs with liberty to move, that for this reason, and because plaintiffs were infants, and the action at law would in fact aid the judgment of this court, the order should be rescinded, or plaintiffs at least should be permitted to take the judgment of the court in banc, and cited *Tremliston* v. *Kemmis* 1 Ll. & G. Tem. Sug. 29.

J. C. Hamilton, contra. The court will usually on motion to discharge an order to elect, refer it to the master to ascertain whether the suits are for the same matter, unless their objects are quite opposite—*Hagne* v. *Curtis* 1 Jac. & Walk. 449.

In the present case the relief sought in both suits is clearly the same—all that the plaintiffs are entitled to can certainly be obtained in this court, and the defendants should not be harrassed with the defence of two suits. As the relief sought at law is not for the purpose merely of assisting in this suit, but for obtaining possession of the land claimed by the bill, the court will not allow both suits to proceed at the same time—*Royle* v. *Wynne*, 5 Jur. 1002; S. C. 1 Cr. & Ph. 252; *Mills* v. *Fry*, 3 V. & B.9; *Hollier* v. *Hedges*, 9 Ir, Eq. R.37; *Young* v. *Lucas*, 1 V. & B.381; *Cocknell* v. *Chalmely*, 1 Russ. & My. 418; *Carrick* v. *Young*, 4 Madd. 437; and Madd. Ch. Pr. vol. 2, p. 462, were also referred to.

SPRAGGE, V. C.—The plaintiffs by their bill as amended are proceeding upon inconsistent titles.

The amendment (I agree with my brother Esten, who granted it) seems futile. If the conveyance of 1822 was operative, the conveyance of 1862 introduced by amendment is a mere nullity. If not operative, the plaintiffs had no *locus standi* in this court when they filed their bill, and moreover they would stand now in this court upon a mere legal title, and the same title upon which they are proceeding at law.

It is clear that the proceedings at law and in this court are in respect of the same subject matter.

The circumstance of the plaintiffs being unable to obtain at law the full remedy that they can obtain in this court does not entitle them to proceed in both—*Royle* v. *Wynne*, on appeal from the Vice-Chancellor. Neither does the circumstance that the plaintiffs are uncertain as to their title; that was also the case in *Royle* v. *Wynne*. It was a question whether the estates passed under a residuary devise; if they did the plaintiff's remedy was in equity; if they did not, the remedy was at law. He sued both at law and in equity, and was compelled to elect.

Cocknell v. *Chalmely* is an authority for the same position.

The plaintiff is in fact in such cases proceeding upon inconsistent titles; as they are doing in this case apart from the amendments.

The plaintiffs' position seems to be shortly this; they are suing at law and in equity for the same subject matter, and apart from the amendments, upon inconsistent and contradictory titles; and with the amendments upon the same titles as are insisted upon at law.

This appears to me therefore to be clearly a case in which the plaintiffs cannot be allowed to proceed at law and in this court at the same time. If it were open to me to exercise a discretion, I should be disposed, I think, to allow the plaintiffs to proceed at law to judgment, restraining execution, and staying proceedings in this court in the meantime. But the court can only exercise its discretion when the proceedings at law are ancillary to those in equity. This is not the case here. Lord Cottenham was explicit upon this point in *Royle* v. *Wynne*, a case which in several respects very nearly resembles this.

Tremliston v. *Kemmis* is an authority the other way. It is difficult to distinguish it from *Royle* v. *Wynne*, but the latter case was decided after *Tremliston* v. *Kemmis*, and by the Lord Chancellor of England, and I am bound to follow it. Lord Cottenham, too, decided upon an appeal and repudiated the having such discretion as had been claimed by the Lord Chancellor of Ireland—

a discretion which I gather from his language he would have exercised if, in his judgment, he possessed it

My conclusion is, that the defendants are entitled to retain their order to elect, and that the plaintiffs' application must be refused with costs.

I do not think there is any thing in the objection that the order to elect was taken out by some, not by all, of the defendants.

SIMPSON v. THE OTTAWA AND PRESCOTT RAILWAY COMPANY.

Duty of receiver of a railway company.

Where the receiver of a railway company was appointed to receive "the rents, issues and profits of the railway," *held*, that it was his duty to receive the gross receipts of the company for the carriage of passengers, freight, mails, &c. and to pay the bills for running expenses thereon" and not to receive only the surplus after paying the expenses.

The order for the receiver's appointment should direct the payment to him of the tolls and profits arising from the railway.

This was an application for an order on the defendants to pay over to the receiver, who had been appointed in the cause, all moneys derived from the earnings of the railway. The motion was resisted on the ground that all the company was bound to pay over to the plaintiff was the balance of such earnings after deducting the necessary expenses of working the road.

Read, Q. C., for the plaintiffs.

McDonald, contra.

SPRAGGE, V. C.—The receiver is appointed under the order of of the Court of Appeal, and is a "Receiver of the rents, issues, and profits of the railway" The application which I have to dispose of involves the question whether the receiver is entitled to receive, and it is his duty to receive, the gross receipts of the company for the earnings of passengers, freight, the mails, and the like, or only the surplus that may remain after paying the expenses of the company.

It is urged on behalf of the company, that although receivers have been appointed, by the court, of dock companies' tolls, canal companies' tolls, and market fees; that there is yet but one instance of the appointment of a receiver to a railway company. That *Fripp* v. *The Chard Railway Company*, 17 Jur. 557, was the case of a canal company, which is correct; and that in the one instance of such an appointment to a railway company, *Russell* v. *The Great Anglian Railway Company*, 3 McN. & G. 125, it was uncontested, and was in fact a mode agreed upon between the company and a favoured creditor of giving the latter preference, and that also appears correct. But there is case of *Furness* v. *The Catheram Railway Company*, 32 L. J. Reports, 170, in which Sir John Romilly appointed a receiver to a railway company.

I understood Mr McDonald to argue from the supposed circumstance of their being no case of the appointment of a receiver to a railway company, not that no receiver can properly be appointed, for that point is concluded by the order for the appointment of one in this case, but that the business of railway companies is essentially different from that of canal companies, dock companies, and the like; and that the duties of a receiver must consequently be different. That in the case of canal and dock companies the expenses of conducting the business are comparatively small, and the business itself much less complicated, consisting in little more than in receiving and keeping the works in repair, and paying the servants of the company, while railway companies are their own carriers, involving a great variety of business and of expenditure; and it was contended that the business of a railway company could not be carried on if a receiver had to be applied to for all the moneys necessary for these various purposes.

I agree that where the court cannot interpose usefully it should not interfere at all, and that it should interfere only so far as it can interfere usefully I think, therefore, that if the payment into the hands of the receiver of the gross receipts of the company be incompatible with the working of the company, then he should be restricted to the receipt of the surplus, after payment of the necessary expenses of the company. But unless this be shewn, and shewn clearly, I think that the gross receipts should be paid to the receiver. This is the usual course in other cases. It affords, no doubt, to the creditors a better security, that all that is available shall reach his hands, than if a surplus, to be ascertained by the companies own officers, were to be paid over. In fact, if that were the only duty of the receiver, that is, to receive the surplus and pay it over, *cui bono* appoint him at all; the creditor would probably derive as much benefit from an order on the company to pay into court from time to time the balance in hand, to be verified by affidavit.

The argument to be drawn from the circumstance of there being no case in England of the appointment by the Court of Chancery of a receiver to a railway company, if there had been no such case, is much weakened by another circumstance—that of the facility with which receivers may be appointed by justices, at the instance of mortgagees. They may be appointed to receive the whole or a competent part of the tolls or sums liable to the payment of the interest, or principal and interest, as the case may be, and I am not informed whether the practice under the statute is to leave sufficient in the hands of the company for the estimated cost of working the road; or to direct the receiver to receive the whole; but it is clear the payment of the gross amount of tolls, &c., to the receiver may be ordered—a pretty plain indication of the opinion of the legislature that such a course is not incompatible with the working of a line of railway. And in *Furness* v. *The Catheram Railway Company*, the appointment was of a "receiver of the said railway, and of the tolls and profits arising therefrom" This appears from a report of the case upon its coming before the Master of the Rolls, 27 Beav. 358; in the following year. It would have been well if the same language had been adopted in the order made in this case. "Rents, issues, and profits" are not so appropiate in the case of a railway, but must be taken to mean the same thing.

The *management* of the railway must remain in the hands in which the legislature has placed it—it is no part of the duty of the receiver to interfere with it. The respective duties of the governing body of the company on the one hand, and of the receiver on the other, are well defined in the case of *Ames* v. *The Trustees of the Birkenhead Docks*, 20 Beav. 350; The person appointed in that case was the chairman of the trutees, and he was appointed "Reciever of the rates and tolls, and of the rents of the property of the corporation, without salary, and without giving security." Sir John Romilly said, "I am of opinion that he is the receiver of the mortgagees, and that he has under the order of this court removed the trustees from the possession and receipt of the rates, tolls, and rents. I dissent from the argument which suggests that in that event the powers of the act vested in the trustees are superseded, and that it has thereby become impossible so long as this continues for the undertaking to be lawfully carried on. What the receiver takes are the rates, tolls, and rents. Out of the moneys so received by him he pays the expenses of the undertaking, and the interest of the mortgagees, and the balance into court The undertaking continues to be managed by the trustees; they enter into contracts, they engage and dismiss workmen and servants, they do all the matters which are entrusted to them by these statutes. The expenses they incur in so doing are paid by the receiver, who in that character has nothing to do with the management. He simply pays the bills and moneys which the trustees require him to do, subject to account hereafter, if any thing improper should take place in relation to such payment."

Now I see nothing in all this at all incompatible with the due and efficient working and management of the railway by the president and directors of the company. So far as the application asks for more than this I must refuse it, but the company has been wrong, in my judgment, in refusing to pay over to the receiver any thing but the surplus of its receipts after retaining their expenses.

I think it is the right and duty of the receiver to watch the expenses of the company, to remonstrate with its officers and servants when, in his judgment, they are needless or excessive; and when due attention is not paid to his representations to present the matter to this court; and this more especially if any case should come under his observation of expenses incurred otherwise than in good faith. He will of course have a right to the fullest information as well from inspection of the books as otherwise. I think all this necessarily flows from the nature of his duties. He is called on to pay out moneys as for expenses properly and neces-

sarily incurred, and he should to a reasonable extent see that they are such. I apprehend little or no practical difficulty in carrying this out.

I am not in a position at present to say what will be a proper remuneration to the receiver. If by per centage I should know what amount of money will pass through his hands. Nor am I able to say how much of the receiver's time will be occupied in his duties. The duties certainly are important ones, and should be fairly compensated for, not extravagantly, but still with a reasonable degree of liberality.

GENERAL CORRESPONDENCE.

Summary convictions—Defects in form.

To the Editors of the Law Journal.

Gentlemen,—The public are indebted to you and your correspondents for drawing attention to the law of summary convictions and appeals.

While there is a uniform mode of procedure in the Superior Courts, the County Courts and Division Courts, in civil proceedings, it seems quite inconsistent that in criminal cases there should be a law of proceeding varying in so many cases in this with tribunals where a layman acts as a judge. Unless the whole law on the subject be made so plain that "he who runs may read," I see no other remedy for the evil than to give jurisdiction to the Division Courts, or to appoint properly trained men as stipendiary magistrates—one or more, who would go circuit in each county.

I know of quite a number of cases in which convictions were quashed for some slip of the magistrate in preparing them—cases in which there could be no doubt of the defendants' guilt. Of course the defendants got no costs. But in cases of another kind, where guilt or innocence is doubtful, it is not easy to say what should be the rule as to costs. The defendant ought not to be the loss, and, on the other hand, the complainant should not pay for the mistake of the magistrate who tried the case. Yours, J. B.

Simcoe, 15th February, 1864.

Law reporters and law reporting in U. C.

To the Editors of the Law Journal.

Gentlemen,—Those of your readers who may have had an opportunity of perusing the recent numbers of the English Law Journals will have noticed that an agitation has sprung up on the subject of law reports and law reporting. A meeting of the members of the bar was recently convened by the Attorney General of England, to consider the state of law reporting.

Two resolutions were passed at this meeting.

1. That the present system of preparing, editing and publishing, the reports of judicial decisions in this country requires amendment.

2. That a committee of members of the bar be appointed to consider the best means of improving the system of preparing, editing and publishing the reports of judicial decisions, and to report thereon to a public meeting of the bar.

Looking to the form of these resolutions, and comparing the present system of reporting as it obtains in England with our own in this province, has suggested this communication.

If the profession in England are dissatisfied with their reports, combining as they do the requisites of accuracy, expedition and cheapness, how loud must be our complainings when we regard the present condition of our own reports—with especial reference to those of the Courts of Chancery and Common Pleas, making especial exception to those of the Court of Queen's Bench.

Our reporting system is regulated by act of Parliament. Con. Stat. U. C. ch. 36.

By this enactment (sec. 1), reporters are to be appointed by and are amenable to the Law Society of Upper Canada for the correct and faithful discharge of their respective duties, including the *publishing* of their reports; and it further enacts that there shall be one reporter for the Court of Queen's Bench, one for the Court of Chancery, and one for the Court of Common Pleas. No reporter, however, is to be appointed or removed (sec. 3) without the assent of the judges of the particular court to which the reporter is proposed to be or has been appointed.

By section 4, it is provided "that each respective reporter shall report, not only such decisions of the court to which he is reporter as may be delivered in writing, but also the substance of such of the oral decisions thereof as are of general importance; *and shall without delay cause such reports to be fairly entered in a book, and submit the same for the inspection of the judges of such court; which reports, after due examination and correction, shall be signed by such judges respectively.*"

Sections 5 and 6 of the same act provide for the reporting and *publishing* of the decisions of the several judges of the said courts when sitting in the Practice Court or in Chambers, and also of the Court of Error and Appeal.

Sec. 7 provides that the aforesaid reports shall be published, and the profits to arise from such publication are to belong to the reporters respectively, in addition to which they respectively receive a salary of $600 from the Society; and it is understood that they commute the profits of publication with the publisher at something about £250 a volume, so that they should receive about £400 per annum.

Be the cause what it may, the profession have great reason to complain of the dilatoriness in the publication of the regular reports of the Courts of Chancery and Common Pleas. The last number issued for the latter court reports cases decided in Trinity Term, 1863. The last number of the Court of Queen's Bench is complete; and I think the profession will agree that the work of the reporter of this court is well done, and that in point of fullness and accuracy they are highly commendable. As to the reports of the Court of Chancery—

Volume	1	was	published	in 1850.
"	2	"	"	in 1851.
"	3	"	"	in 1853.
"	4	"	"	in 1855.
"	5	"	"	in 1857.
"	6	"	"	in 1859.
"	7	"	"	in 1860.
"	8	"	"	in 1862.

Volume 8 professed to report the decisions of the court rendered in 1860 and 1861. It is remarkable, however, that only 74 pages are devoted to the decisions of the latter year.

Volume 9 was commenced in 1862, in which year we got three numbers, or 160 pages. In 1863 we got seven numbers or 400 pages. In 1864, at this date, the volume is *yet incomplete!!* The cases reported in this volume are the decisions of the court rendered in the year 1862!! How many more decisions of the year 1862 have yet to be reported? When we are to get those of 1863 and those of the present year, it is evidently impossible to determine. Without referring to the carelessness and inaccuracy which is displayed in some of these reports, and which is of course excusable, it is lamentable to observe how dilatory the reporter has been of late years in their publication. I am not prepared to admit that number is the test of excellence, but no one can deny that the bench and the bar must experience great inconvenience, and the litigious public a full share of mischief, which the delay on the part of the Chancery reporter involves. When are we to obtain the numerous valuable and important decisions of the court pronounced in the years 1862, 1863, and 1864, the want of which entails so much inconvenience? Some reform is needed.

The present unfortunate state of the reports of the Court of Chancery may be owing to the operation of many causes. The gentleman who is the reporter of the court is also the registrar of the court and the clerk of the Court of Error and Appeal. His duties require him to be *constantly* in court, taking notes of the arguments and recording the decisions of the judges, and it will be readily admitted that he has not much time for reporting "in office hours." Then what with his official duties, the other regular duties of his position as registrar and clerk of the Court of Error and Appeal, the scarcely less important duty of reporting is lost sight of and neglected. In fact, without any disparagement to this officer, it cannot be denied that the cause of the non-promulgation of the reports is that the reporter, from the circumstances aforesaid, is *overworked*. Still the bench and the profession and public, and the *future* of our profession, must not suffer on this account. It must not be forgotten that "the reports are the recognized records so to speak of our tribunals, to deliver to the present and hand down to all future time the decisions of our judges in matters of law."

The subject of my communication evidently requires ventilation; and if the exertions of the bench and the bar do not put the matter right, a more energetic reform must be solicited from "high quarters."

VERITAS.

Toronto, March 10, 1864.

[The remarks of our correspondent will find an echo from many a city, town and village, in Upper Canada, where members of the profession "most do congregate." The tribute which he pays to the reporter of the Queen's Bench is no more than that learned gentleman well merits. We believe that the reporter of the Common Pleas is making extra exertions to pull up for lost time, with a determination in the future to be second not even to the reporter of the Queen's Bench. We are disposed to think that our correspondent suggests the true cause of the apparent remissness of the reporter to the Court of Chancery, when he says that he, in his office of registrar of the court, is "over worked." This, however, as our correspondent observes, is really no excuse to the profession, who have the right to expect the reports to be carefully and expeditiously issued by some person who has not only the ability but the time to do what is required of him. We trust that the present reporter of the Court of Chancery will be able, by the engagement of competent assistance or otherwise, to give full satisfaction to the profession. He is a good lawyer, and, apart from the question of time, there is really no reason why his reports should be inferior to those of the Queen's Bench.]—EDS. L. J.

Privileges of a Peer—No exemption from oath as a witness.

TO THE EDITORS OF THE U. C. LAW JOURNAL.

GENTLEMEN,—In the *Leader* of the 15th March last, near bottom of sixth column, is an article headed "The Privilege of a Peer in Canada." At Richmond, C.E., the magistrate, after some hesitation, allowed Lord Aylmer to give his evidence "on his honor as a peer." 1 Black. Com. p. 12, n. 2 (an old edition), says it is so allowed in courts of equity and in judicial matters in Parliament only, not in courts of law. Now, be it either way, it should be clear. Being an invalid, I can do no more than point it out, knowing you will be sure to put it right for justices of the peace, though, as there are not likely to be many occurrences of the kind in Canada, little harm would ensue. But the *outside* lawyers might think we knew no better, if allowed to pass unnoticed. Yours,

AN OLD AND OBLIGED FRIEND OF THE U. C. L. J.

[The claim to exemption from the obligation to take an oath, advanced by Lord Aylmer, was as illegal as it was presumptuous. Though a peer is privileged, while sitting in Parliament, to give his verdict upon his honor, he ought not to be examined as a witness in any cause, whether civil or criminal, or in any court of justice, whether inferior or superior, unless he be first sworn. A peer, refusing to take the necessary oath as a witness, is, like any other witness under similar circumstances, guilty of contempt, and liable to be committed and fined, in the discretion of the court. Indeed it seems that even the Sovereign cannot legally claim that which Lord Aylmer presumptuously demanded—exemption from the rule which requires oral testimony to be given upon oath. (1 Tay. Ev. 2nd ed. p. 1072.)]—EDS. L. J.

Powers of executors and administrators over real estate—Probate.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—When an executor or administrator takes out probate or letters of administration as the case may be, he merely seems to get the disposal of the "personal estate and effects" (secs. 32, 33, cap. 16, Con. Stat. U. C.). Yet administrators and executors dispose of *real* estate of the intestate or testator. How can this procedure be reconciled? Again,

suppose an executor takes out probate for the county of York, for instance; can he sell real estate in the county of Ontario, or in any other county in Upper Canada, supposing his testator died in the State of New York, and had property in both or other counties, *real* and personal? An answer through your journal will oblige

Your obedient servant,
A Law Student.

Ottawa, March 21, 1864.

[The power of an executor to sell real estate is derived from the will of his testator. If the will does not give him the power, the probate certainly cannot do so. Probate in general has nothing whatever to do with realty. An executor having power to sell under the will, can, we presume, exercise the power without obtaining probate of the will. An administrator has no such power, for the reason that there is no will giving him the power. The Surrogate Court cannot give the power either to executor or administrator to interfere with realty.]—Eds. L. J.

Master and servant—Wages—Warrant—Exemption Act.

To the Editors of the Law Journal.

Gentlemen,—You will confer a favor, in your next, by answering the following:

A. sues B. for three months' wages, before a magistrate, and gets judgment. B. has been sold out previously, under two executions from a Division Court, and everything sold but one cow, which the Exemption Act protects.

Quœry—Can an execution issued by the magistrate sell the only cow left by the bailiff, or is said cow protected from seizure and sale under the 5th section of the 24th Victoria, chapter 25, under a magistrates execution, or not?

Yours, An Old Subscriber.

[The question put by our correspondent is one of much difficulty. If we look upon a proceeding before a magistrate, at the instance of a servant, founded on a complaint of non-payment of wages, as in the nature of civil process for the recovery of a debt, the Exemption Act might be held to apply. But certainly not so if looked upon as a *quasi* criminal proceeding. We cannot undertake to say which view would prevail with the courts, for as yet the point has not, so far as we know, received a judicial determination. We have not at present the time necessary to devote to the consideration of the question in order to enable us, in the absence of decided cases to draw our own conclusions.—Eds. L. J.]

Uncertificated Attorney in Upper Canada—Right to recover fees in County Courts.

To the Editors of the Law Journal.

Gentlemen,—Is an attorney who has neglected to take out his certificate for two years, and who, during that time, has conducted suits in the county courts, entitled to the fees and charges as an attorney in such suits; and is the only remedy against him in such cases a suit for the £10 penalty mentioned in the Act relating to Attorneys in Upper Canada? According to the English Act, attorneys who have neglected to take out their certificates are not entitled to any fees. Does the Upper Canada Act repeal or annul that provision of the English Act?

Yours truly, A. B.

Hamilton, March 28, 1864.

[By our act it is made the duty of every practising attorney or solicitor annually in Michaelmas Term to pay to the Treasurer of the Law Society certain "certificate fees," and it is thereupon made the duty of the Secretary to deliver to the attorney or solicitor one or more annual certificates (Con. Stat. U. C. cap. 35 s. 49).

If the attorney or solicitor omit taking out the annual certificates within the time limited, he can only obtain them on payment of additional sums of money by way of penalty (sec. 56).

If any attorney or solicitor practices in any of the courts of Queen's Bench, Chancery or Common Pleas without such certificates, he is made liable to a forfeiture of $40, to be paid to the Treasurer of the Law Society for the uses thereof (s. 57).

Now the English Act goes further, for it provides not only for the issuing of annual certificates to attorneys and solicitors but in express terms declares "that no person who shall sue, prosecute, defend or carry on any action or suit, or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate, which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward or disbursement for or in respect of any business, matter or thing done by him as an attorney or solicitor as aforesaid, while he shall have been without such certificate as last aforesaid" (6 & 7 Vic. cap. 73 s. 26).

We feel great difficulty in saying that in Upper Canada, in the absence of such a provision, an attorney or solicitor who omits to take out his annual certificates is incapable of recovering his fees. The forfeitures of $40 would appear to us as at present advised, to be the only penalty; and it is worthy of remark that it is recoverable where the attorney or solicitor practices without certificates in the Queen's Bench, Common Pleas or Chancery, and not where he practises in County Courts or other courts than there specifically named.]—Eds. L. J.

MONTHLY REPERTORY.

COMMON LAW.

C. P. Cook and another v. Lister.

Bill of exchange—Part payment to indorsee by drawer—Action against acceptor—Reduction of damages.

Although part payment to the indorsee by the drawer of a bill of exchange is, in general, no answer to an action by the indorsee against the acceptor for the whole sum, yet, in the case of an accommodation bill, or (where the bill is not an accommodation bill) where the state of accounts between the acceptor and drawer is such that the drawer is really the debtor of the acceptor, such part payment by the drawer shall be taken in reduction of damages, and if sufficient money be paid into court to cover the damages so reduced the defendant shall succeed.

Q. B. STANNARD v. LEE AND ANOTHER.

Contract—Conditions—Work not done "as rapidly and satisfactorily" as employer requires—Unreasonable and capricious requisitions—Power to re-enter—Deduction from money due—Penalty.

On a contract to do work to the satisfaction of the engineer of the employers, with a condition that if the works should not proceed as rapidly and satisfactorily as required by them they should have power to re-enter, employ additional men to complete the works, and charge the expense to the contractor,

Held, that if the works were not proceeding as rapidly and satisfactorily as they required they could enforce the conditions, and (if not appearing that they had acted *malâ fide*), the contractor could not aver that they had done so "capriciously" and "unreasonably."

EX. BRUCE v. JONES.

Ship—Marine insurance—Policy—Contract of indemnity—Several policies.

In an action on a policy of marine insurance, it was proved that the ship was insured in several policies, and that the owner had recovered a large portion of the value of the ship under some of these policies. The judge directed the jury that the plaintiff of the action could only recover the difference between the value in the ship and the sum recovered under the other policies.

Held, that the direction was right.

CHANCERY.

V. C. S. POSTGATE v. BARNES.

Married woman—Husband defendant—"When he shall come within the jurisdiction"—Pleading—Negative plea—Answer.

A married woman by her next friend filed a bill for an account and settlement of property, which she claimed as next of kin of her father. She alleged that she believed her husband was abroad, and made him a defendant, "when he shall come within the jurisdiction." Demurrer for want of equity and want of parties overruled.

The bill alleged that the intestate died possessed of real property, consisting of freehold land at places therein described, and prayed for an enquiry as to the real estate.

Plea, that the intestate was not seised or possessed of or entitled to any real estate whatsoever.

Held, a good plea, although unaccompanied by an answer.

V. C. K. ROSE v. SHARROD.

Practice—Trustee's costs—Assignee of married woman—Separate receipt.

When a married woman is entitled to a life interest to her separate use, under her marriage settlement, her receipt alone to be a sufficient discharge, that is not a restraint upon anticipation; but where the trustees, upon the clause as to the separate receipt, consider it so far doubtful that they refuse to pay, either to the married woman or her assignee, and a bill is filed, they are still entitled to their costs in priority.

REVIEWS.

The EDINBURGH REVIEW FOR JANUARY (Leonard, Scott & Co.) is at length come to hand. The contents are unusually heavy, but withal readable. The first paper on thermo-dynamics establishes that the great agencies of heat, light, electricity and magnetism, which produce such wondrous changes on the face of the globe, are but expressions in different language of one and the same great power. The second is a review of Charles Merivale's History of the Romans under the Empire. The third is a review of some recent French memoirs, containing a daily record of the monotonous grandeur of Versailles for forty-four years. The fifth deals with a vast topic—the progress of India. The sixth deals with Dean Milman's history of the Jews and Dean Stanley's lectures on the history of the Jewish Church. The remaining papers are headed—Scottish religious houses abroad—The Negro race in America—Froude's history of England, and a very suggestive paper on Ireland and Irish emigration.

GODEY'S LADY'S BOOK. The number for April is before us. This magazine reaches us with unerring regularity. The number for April opens with another fashion plate from the celebrated house of A. T. Stewart & Co. of New York. It contains besides a Dinner Dress, L'Elegante, four different styles of Head Dresses, Carslet a Bretelles, Carsage en Mousseline, and about sixty other engravings of fashions and fashionable work, besides the usual amount of entertaining and instructive reading matter.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Honorable WILLIAM HUME BLAKE, late Chancellor of Upper Canada, to be a judge of the Court of Error and Appeal for Upper Canada, to take rank and precedence therein next after the Chief Justice of the Court of Common Pleas for the time being. (Gazetted March 12, 1864.)

SHERIFFS.

ROBERT NEEDHAM WADDELL, Esquire, to be Sheriff of the United Counties of Northumberland and Durham, in the room and stead of James Bonwell Fortune, Esquire, removed. (Gazetted March 12, 1864.)

CHARLES DICKENSON, Esquire, to be Sheriff of the United Counties of Leeds and Grenville, in the room and stead of Adiel Sherwood, Esquire, resigned. (Gazetted March 12, 1864.)

CLERKS OF THE CROWN.

LAURENCE HEYDEN, Esquire, to be Clerk of the Crown and Pleas of the Court of Queen's Bench of Upper Canada, in the room and stead of Charles Coxwell Small, Esquire, deceased. (Gazetted March 26, 1864.)

MAUNSEL BOWERS JACKSON, Esquire, *to be Clerk of the Crown and Pleas* of the Court of Common Pleas of Upper Canada. (Gazetted March 26, 1864.)

COMMISSIONERS.

JASPER T. GILKISON, of Brantford, CHARLES THOMAS DUPONT, of Manitoulin Island, and WILLIAM LIVINGSTON, of Delaware, Esquires, to be *Commissioners under the provisions* of Cap. 81 of the Consolidated Statutes of Upper Canada. (Gazetted March 26, 1864.)

CORONERS.

TITUS CROOKER, of Milton, Esquire, M.D., Associate Coroner, County of Halton. (Gazetted March 12, 1864.)

JAMES McINTOSH, of Martintown, Esquire, M.D., Associate Coroner, United Counties of Stormont, Dundas and Glengarry. (Gazetted March 12, 1864.)

DANIEL FORREST, of Collingwood, Esquire, Associate Coroner, County of Simcoe. (Gazetted March 12, 1864.)

WILLIAM CLARKE, of Paris, Esquire, M.D., Associate Coroner, County of Brant. (Gazetted March 12, 1864.)

EDWIN WILLIAM TEGART, of Scotland, Esquire, M.D., *Associate Coroner*, County of Brant, (Gazetted March 12, 1864.)

DAVID BONNER, of Fleshington, Esquire, M.D., Associate Coroner, County of Grey. (Gazetted March 26, 1864.)

EDMUND BURKE DONNELLY, of Windsor, Esquire, M.D., Associate Coroner, County of Essex. (Gazetted March 26, 1864.)

WILLIAM NICOLSON ROSE, of Newcastle, Esquire, M.D., Associate Coroner, United Counties of Northumberland and Durham. (Gazetted March 26, 1864.)

NOTARIES PUBLIC.

JOHN GEARY, of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 12, 1864.)

THOMAS HODGINS, of Toronto, Esquire, LL.B., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 12, 1864.)

WILLIAM HENRY ARCHER, of Yorkville, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 12, 1864.)

MICHAEL O'DRISCOLL, of Pembroke, Esquire, Attorney-at Law, to be a Notary Public in Upper Canada. (Gazetted March 12, 1864.)

EDWARD C. MALLOCH, of Perth, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 26, 1864.)

ROYAL PLATT HURLBUT, of Warkworth, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 26, 1864.)

TO CORRESPONDENTS.

"A CLERK OF D. C."—"J. M."—Under "Division Courts."

"J. B."—"VERITAS"—"AN OLD AND ATTACHED FRIEND OF THE U. C. L. J."—"A LAW STUDENT"—"AN OLD SUBSCRIBER"—"A. B."—Under "General Correspondence."