DIARY FOR DECEMBER.

1. Thur. Paper Day, C. P. Clerk of every Municipality except Counties to return number of resident rate-payers to Registrar General. Re-hearing Term in Chancery commences.
2. Frid. New Trial Day, Q.B.
4. SUN. *2nd Sunday in Advent.*
5. Mon. Last day for notice of trial for County Court. Paper Day, Q.B. New Trial Day, C.P.
6. Tues. Paper Day, C.P. New Trial Day, Q.B.
7. Wed. New Trial Day, C.P.
9. Frid. New Trial Day, Q.B.
10. Sat... Michaelmas Term ends.
11. SUN. *3rd Sunday in Advent.*
13. Tues. General Sessions and County Court Sittings in each County.
14. Wed. Grammar and Common School assessment payable. Collector's roll to be returned unless time extended.
18. SUN. *4th Sunday in Advent.*
19. Mon. Nomination of Mayors in towns, Aldermen, Reeves, Councilmen, and Police Trustees.
24. Sat... Christmas Vacation in Chancery commences.
25. SUN. *Christmas Day.*
26. Mon. *St. Stephen.*
27. Tues. *St. John Evangelist.*
28. Wed. *Innocents Day.*
31. Sat. Last day on which remaining half General Sinking fund payable. School returns to be made. Deputy Registrar in Chancery to make return and pay over fees.

THE

Canada Law Journal.

DECEMBER, 1870.

RETAINERS AND RETAINING FEES.

(FIRST PAPER.)

In Bouvier's Law Dictionary the definition of the legal term "*to retain*" is this: "To engage the services of an *attorney*, or *counsellor*, to manage a cause, at which time it is usual to give him a fee called the retaining fee." According to Wharton's Law Lexicon "the retaining fee" is "a preliminary fee given to a *counsel*, along with the retainer, in order to ensure his advocacy." These definitions by American and English authors, respectively, mark the difference between American, and we may add Canadian, and English law on the subject of retainers. We propose to say a few words about retainers and retaining fees: first, in so far as barristers are concerned, and then, so far as pertains to attorneys and solicitors. A great deal of doubt exists upon the precise meaning and effect of a retainer as regards counsel, and this is chiefly occasioned by the fact that questions of disputed retainers are seldom referred to, and seldom, if ever, adjudicated upon by the court. The settlement of such matters is invariably left in the hands of the barristers themselves, and usually one of Her Majesty's counsel is called in to arbitrate upon any question of conflicting retainers. In Ireland, the rules upon the subject were adjusted at a general bar-meeting in 1864, but we are not aware of any similar settlement touching this code of professional etiquette by the English or Canadian bar. We find references to the subject of retainers occasionally cropping up in the reports, and by the light of these and other guides, we shall seek to set forth the commonly received understanding of the profession thereupon.

A retainer may be either *general* or *special*: that is, it may have reference to all suits and causes in which the client shall be a party in every court wherein the counsel retained practises, or it may be limited to some particular cause against the client, and usually one in which proceedings have been already instituted. A general retainer is prospective in its character; not so the special retainer. On the part of the counsel, an acceptance of the retainer implies that he engages to assist the client with his advocacy; on the part of the client, the retainer amounts to an undertaking that he will send a brief to the barrister retained. The barrister cannot pick and choose his retainer, but is bound to accept any general retainer proffered, and he is also bound to accept any special retainer, provided always that he has not been previously retained, generally or otherwise, for the opposite party.

Some transactions, commonly supposed to amount to retainers, are not so really. For instance: the getting counsel's opinion on a case before the commencement of proceedings is not a retainer in such action when it is brought. The employment of the barrister here is simply as chamber counsel. Again: the getting counsel to draw pleadings does not involve a retainer in the suit or action. The barrister's employment in this instance is merely that of a draughtsman. And similarly, as to advising upon evidence. The very eminent counsel who appeared in *Earl Cholmondely* v. *Clinton*, during argument, stated the rule thus: "a counsel advises on pleadings, not being retained, and is the next day retained on the opposite side, and may then advise for such opposite party:" G.Coop. 80 S.C. 19Ves. 261, and the court confirmed this representation made at the bar.

There are other practices as to retainers, which called down the reprobation of Sir

Samuel Romilly, such as retainers without the intention to send a brief, unless the opposite party sends one; and *intermittent* retainers where an occasional brief during the progress of the cause is contemplated. "*Retainers to your friends; briefs to your enemies*" is a beggarly device, whereby it is hoped to neutralize the power of those counsel, whose opposition is dreaded, but whose advocacy clients are unwilling to remunerate. Where there is a retainer but no brief, the understanding appears to be this: if the client, through inadvertence, omits to send a brief, and a brief is tendered by the opposite party, the client should be notified that he may repair the oversight; if however, the omission is deliberate and intentional, the brief of the opposite party can be accepted at once, and without notice. See *Ex p. Lloyd*, Mont. R. 74 *n*, and Brunker's Digest, 258. In the case cited, Lord Eldon, sitting as "*amicus curiæ*," in effect declared that a barrister is bound to act for the party by whom he is retained, so long as his services are required, but no longer: if a barrister receives the usual retainer at the commencement of a suit, and acts repeatedly as counsel thereunder, and, afterwards a general retainer is sent him on the other side, which is followed up by a brief for the next motion, no brief for that motion being sent by the side originally retaining him, he should accept such brief.

These observations, however, must be subject to certain considerations which professional delicacy can alone regulate, and which are thus stated by Lord Eldon. "The practice of the bar in my time, was this: If a retainer was sent by a party, against whom the counsel had been *employed*, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client, stating the circumstance, and giving him the option. That has, I believe, been relaxed; and the course now is as it has been represented at the bar. I do not admit he is *bound* to accept the new brief. My opinion is, that he ought not, if he knows anything that may be prejudicial to the former client, to accept the new brief, though that client refused to retain him." *Earl Cholmondely* v. *Clinton*, 19 Ves. 274, 275.

The last cases reported, in which the courts have declined to interfere in questions of retainer, are *Baylis* v. *Grant*, 2 M. & K. 316; and *Ex p. Elsee*, Mont. R. 70. In *Lucas* v. *Peacock*, 8 Beav. 1, it is queried whether a retainer ceases upon the counsel being appointed one of Her Majesty's counsel.

In our next paper we propose to discuss some points connected with a solicitor's retainer.

OBSTRUCTIONS.

We feel sure many readers of the *Law Journal* will share the gratification we experience in noticing a recent decision of the Court of Queen's Bench in the case of *The Queen* versus *Plummer*, argued during last Michaelmas Term.

It was an application to quash a conviction made by the Police Magistrate of London, Ontario, in the case of one Plummer, who was held to have contravened a city by-law in riding a velocipede along the sidewalk. The by-law in question provided—

"That no person shall, by any animal, vehicle, lumber, building, fence, or other material, goods, wares, merchandize, or chattels, in any way encumber, obstruct, injure, or foul any street, square, lane, walk, sidewalk, road, bridge, or sewer now being or hereafter to be laid out and erected, (except as hereinafter provided with respect to buildings)."

It was urged by counsel for the defendant that the word "obstruction" means something of a permanent nature, and does not apply at all to a velocipede in motion, which takes up no more room than a single person. But Adam Wilson, J., in discharging the rule remarked—

"A velocipede, I should say, may be an obstruction or encumbrance on a sidewalk. All that has to be done is to give the words a reasonable latitude in interpretation, just as we have to do when we use them. Now, to ordinary comprehension, a horse, or a waggon, or a drove of sheep or oxen, driven along the sidewalk, would be understood to be an obstruction or encumbrance to the legitimate use of it by those desirous of using it.

I understand this language off the Bench, though not the most exact or scientific, and I do not know why I should not understand it as sufficiently precise for the purpose on the Bench; and I understand it to mean, that whoever, by any of the means described in the by-law, prevents foot travellers from the free, safe, and convenient use of side-walk, offends against the enactment."

In support of this view his Lordship cited

the words of the Vagrant Act (32-33 Vic. cap 28, Ca.):

"All persons loitering in the streets or highways, and *obstructing* passengers by standing across the footpaths, or *by using insulting language*, or in any other way, shall be deemed vagrants."

We trust this decision may give the *coup de grace* to the velocipede mania, now fast disappearing, but which for a short time made our streets a theatre for the acrobatic displays of aspirants after bycycular notoriety. It only remains for some philanthropist to carry the matter a little farther, and invoke judicial authority for the suppression of those terrible "obstructions," the perambulators which careless nursemaids propel so skillfully against the sensitive tibiæ of unwary pedestrians. We congratulate the London magistrate on the result of the argument, and invite him to "carry the war into Africa," and head a crusade against the "perambulator-propellers" as well as the "velocipedestrians."

JUDICIAL SENTIMENTS.

We cannot forbear to notice the following very remarkable passage in a speech delivered by Mr. Lawrence, the Chief Justice of the Supreme Court of Illinois, in reply to an address presented to him by the Law Institute at Chicago, on its recent opening. After saying (the *Chicago Legal News* is our authority) that the Bench, if cordially supported by the Bar, could "calmly face any degree of popular passion or partisan clamour, trusting its vindication to the bar, and strong in the conviction that the upright magistrate will certainly be honored in the end by the very community whom his judgments may have offended," he says:

"But a better and deeper reason than this can be given why the bench and bar should keep fully alive the sentiment of brotherhood. It is a fact which cannot be denied that, as a people, we are undergoing rapid deterioration. Our social, political and commercial morals are sinking to a lower and lower grade. We are no longer content with the acquisition of wealth by patient toil, to be when won, as wisely expended as it has been honestly earned. A fevered and insane passion for money has gained possession of the minds of men, and at this moment, is doing more to corrupt our national life than all other causes united. This maddening love of gold, to be expended, not in the modes which shall make American life the highest development of modern civilization, but in coarse and barbaric display, or what is still worse, in the ways that lead to the debasement of public morals, is leading us, as a nation, down the dance of death. Corruption has become a systematic and almost shameless means of power, and contemporary events at times recall the period when the Roman Empire entered upon its swift descent to ruin. Wise men begin to doubt the ultimate success of our institutions, and already proclaim that in the metropolitan city of the continent, republicanism, as an instrument of municipal government, stands a confessed failure; day by day we seem to be drifting further and further from our ancient anchorage toward an unknown coast whose atmosphere is laden with poison and death.

That it is in the power of the bench and bar of the country, unaided, to arrest the downward tendency of the times, is not to be supposed. Nevertheless we can do something, and, if properly aided by other conservative elements of society, can do much to check it. We can, at least, make a noble struggle, and be the last to fall. Common as it is to utter vapid witticisms in disparagement of the bar, the well-known truth, nevertheless is, that the men who, in better times, have done most to create and mould our political institutions and control the social forces of the country, have belonged to the profession of the law. If you, gentlemen of the bar, can constantly live up to the highest and noblest traditions of professional life; if you can keep ever fresh and bright the sentiment which doubtless now animates you, that the true ambition of the lawyer is not the acquisition of wealth, but of that pure professional fame which is to be won by the exercise of your high vocation in a spirit of the most punctilious honour, and with an ever present consciousness that you, as well as the court, are ministers at the altar of Justice; and if the various judicial tribunals of this state shall so perform their duties as to command the confidence and support of such a bar, shall be so clear in their high office that not even a disappointed litigant can venture to charge them with unholy motives—then the judiciary and the bar standing together, will, in the future, as in the past, furnish a sure protection against wrong, and keep alive in the hearts of all good men the hope that our downward tendencies as a people may be stayed, and that we may get back upon those ancient ways wherein we walked in the better days of the republic."

Now considering that these are the words of an American, they are very remarkable, and

bespeak the Chief Justice to be not only manly, independent and free from servility to popular clamour, but as having a high sense of what the bench and the bar owe to their country and themselves. But at the same time, the words show that corrupting influences have gone so far that he feels it to be not merely idle, but wrong and unpatriotic to pretend to gloss over their results.

Men, who, like Chief Justice Lawrence, would courageously dare in the face of an excitable nation, whose national self appreciation amounts to a mania, and on a public occasion to state their convictions of the corruptions, social, political and judicial, existing in their country, might well be looked upon as the saviours of their country. The words are also weighty with caution to those who blindly admire the external glitter of that state of things which is above pourtrayed.

We have seen* what such periodicals as the *American Law Review* have said of the gross corruptions in the judiciary, in some of the States. Unless there are sufficient of those who act up to the sentiments of Chief Justice Lawrence, it may well be feared that when he trusts to the judiciary to help to save the country, he leans upon a broken reed.

We are sorry to notice the death, on the 30th ultimo, of Mr. Prince, Judge of the Algoma District, better known to the public as Colonel Prince. We shall refer to the subject again.

A correspondent of the *Albany Law Journal*, writing from England, gives a flowery description of the proceedings at an assize town, before and at the opening of the court, and describes the old-fashioned ceremonies and curious attire of the judge and officials engaged, and the interest manifested by the public in the proceedings. He concludes thus: "A fellow-traveller said, 'An American judge could not be hired to go through that exhibition.'" Possibly not. But it would appear, if American writers are to be believed, that American judges can be "hired" to do things which would make the ears of the meanest tipstaff in an English court of justice to tingle.

* Ante Vol. IV, p. 301.

SELECTIONS.

THE LATE SIR FREDERICK POLLOCK.

At the bar Mr. Pollock, who died on 29th August last, rose into practice with a rapidity which finds no example in our day of keener competition and stronger personal interest. The Northern Circuit was the scene of his early success. He possessed faculties which could not fail to commend him to attorneys: an accurate and comprehensive memory, acute perception, perfect mastery of monetary accounts and the course of mercantile business, unwearied industry, and, above all, that peculiar power over the mind of his audience which never forsook him even in the final stage of his legal career. As counsel in general causes he was infinitely superior to Brougham, who, as a member of the same circuit and commanding business by his political fame, was one of his most frequent antagonists. But while the mind of Brougham was dissipating itself over a multitude of themes, social, philosophical, and parliamentary, to such an extent as to lead him to the comparative neglect of the briefs of humbler clients, Pollock never failed to bring the whole force of his gigantic intellect to bear upon the particular cause before him. Brougham won glory, but Pollock won verdicts. It is impossible at this distance of time, when all his legal contemporaries are silent in the grave, to state the exact measure of his success on the Northern Circuit, but we suppose that no counsel ever reaped a more golden harvest, or more thoroughly enjoyed the confidence of his clients and of the public on any circuit.

As a politician Mr. Pollock was a follower of Sir Robert Peel, as far as concerned the leadership of that statesman up to the year 1844. We have no means of judging how far he would have adhered to Sir Robert in the last epoch of the Peelite reign. It is enough to say that though a true Conservative he was a man of broad and liberal views, and not by any means disposed to base his policy upon mere party considerations.

As a judge he was master of his art. In the first place, his excellence was universal. He was great in banco and great at Nisi Prius. The whole page of law lay open before his eyes familiar to him as household words. His memory for precedent was not less remarkable than his grasp of the principles of jurisprudence, and he had power to express in terse and lucid language correct and just ideas. Perhaps in the public eye he was most eminent in criminal trials and at Nisi Prius. No one who has heard him can forget the extraordinary influence which he was capable of exercising over the mind of a jury. After speeches from counsel of length and eloquence, the Lord Chief Baron would turn to the jury, and in a few sentences of marvellous force impress them with his view of the case, smash-

ing to atoms the elaborate structure which the ingenuity of counsel had built up as a support to a rotten cause, and exposing the position of the unhappy suitor in all its weakness and folly. Or again, if the trial was of deep importance, involving a serious and embarrassing conflict of evidence, and loaded with an abundance of testimony of various import, the Chief Baron would with patience, skill and care sift the chaff from the wheat, balance point against point, fact against fact, and lead the jury by an easy and faithful process to a sound conclusion. If the Chief Baron had a fault on the Bench it lay in his exceeding tenderness towards the accused. At times he almost forgot in the impulse of a heart of deep benevolence the stern dictates of justice, but it is presumptuous to say that he erred substantially in this tendency, and if he did err he can hardly be denied forgiveness.

The judicial career of Sir Frederick Pollock dates from the second day of Easter Term 1844. Lord Abinger had died on April 8th in that year at Bury St. Edmund's while on the Northern Circuit, and Sir Frederick, who was at that time Attorney-General, succeeded almost as matter of course to the office of Lord Chief Baron. According to custom, he was first called to the degree of Serjeant-at-law, and gave rings with the appropriate motto, '*Audaciter et strenue.*' Sir W. W. Follett was thereupon promoted to be Attorney-General, and Sir Frederick Thesiger to be Solicitor-General. The first reported judgment delivered by Sir Frederick as Lord Chief Baron was in the case of *King* v. *Phillips*, on a point of pleading; the last reported case in which he delivered judgment was *Bickford* v. *Davy*, upon the allowance of certain interrogatories; and the last reported case in which he took part was *The Attorney-General for the Prince of Wales* v. *Crossman*, on June 26, 1866. The period of twenty years and two months intervening between the first and the last of these cases embraced two epochs in legal history, and two of the cases named constitute signs of their respective times. It is a long stride, in a metaphysical sense, from the era of special demurrer to the era of discovery at common law, and it is worthy of note that the career of Sir Frederick was spread very equally over the old and the new order of things. The reports of his judgments commence with the middle of the twelfth volume of Meeson and Welsby. The four remaining volumes of that series, the eleven volumes of 'Exchequer Reports,' the seven volumes of Hurlstone and Norman, and the volumes of Hurlstone and Coltman contain enduring records of his industry and learning. In the *Law Journal Reports* the record begins in the thirteenth volume of the new series, and continues to p. 215 of the thirty-fifth volume. What a mass of labour, what a variety of legal achievement finds witness in these ponderous pages! What uniformity of skill, of wisdom, and of zeal is therein displayed. The vast fields of technical pleading, of legal and equitable principles, of statutory construction, of commercial, civil, criminal, and fiscal law, of practice, of the rules of evidence, over which his intellect and his energy travelled as therein mapped out for the guidance of future ages journeying in the same paths of noble learning. And what a roll of names is that of his puisnes on the bench, and what a number of them he outlives! In his first year of office he was aided by Parke, Alderson, Rolfe, and Gurney. In 1864 Gurney died, and Platt succeeded. Parke rose to the peerage as Lord Wensleydale, Rolfe became Lord Justice and Lord Chancellor as Lord Cranworth. Both lived to a good old age; both were outlived by Sir Frederick. Baron Watson, elevated to the bench some few years after him, died many years before him. Barons Martin, Bramwell, Channell, and Pigott have survived him; so also has Baron Wilde, now Lord Penzance. But these are men not of his own generation. Then again, what a host of notable lawyers has pleaded before him at the bar, and how many of these have also died before him! The genius of Sir W. W. Follett has become historical. Sir T. Wilde, who became Attorney-General on the fall of Sir Robert Peel, and who afterwards was Lord Chancellor Truro, Sir J. Jervis, who served as Solicitor-General under Sir T. Wilde, and who became Lord Chief Justice, Sir W. Atherton, Attorney-General, the Right Hon. Stewart Wortley, Solicitor-General — all of these have passed away before him. Lord St. Leonards alone has outlived him, of all the great lawyers who were his equals in age.

If we attempt to regard the life of Sir Frederick Pollock as a whole, we are almost overpowered by the contemplation of its success. 'There is a skeleton in every house,' was the reflection of not the least philosophic of novelists; and if we put before us any number of men who have been children of fortune, we find almost invariably some flaw in their lives, something wanting to complete happiness, something which they themselves longed for in vain. That imperfection is so constant as to bear analogy with the general system of nature. One man wins a title and wealth, but has no heir to inherit them; another has an heir to disgrace his name and tarnish his honour. One man has been stripped of the partner of his life at a period when the loss is beyond reparation; another is unfortunate in his domestic relations. One man wins wealth, but after such a life of self-denial and poverty as to find no real recompense in the reward. Another heaps up riches, but earns not the esteem of his fellows, nor even his own contentment. One man ascends to renown, but by means which his friends can only hope to forget, and which his enemies resolve to remember. Another achieves fame and money, but dwells not in the heart of a single being on earth. All these, and there is no limit to

the illustrations, are tempted 'in silence and at night,' to exclaim that all is vanity. But, unless we are grossly mistaken, Sir Frederick Pollock was an exception to what we may call the rule of humanity. What is there which man can desire that he had not? What is there which man desires to be free from that was not absent from him? Does a man love length of years? He lived four score years and seven. Does a man desire health? He never knew what sickness meant. Does a man desire riches? He had more than enough to satisfy the reasonable wants of his temperate spirit, and to provide for all who had natural claims upon him. Does a man desire success in his particular calling in life? He had success, uniform and perfect. Does a man desire the good opinion of his fellow-man? Who ever bore ill will to his benevolent disposition, or ever breathed a suspicion of his integrity. Does a man long for sons and daughters to respect and love him and to perpetuate his name? Sir Frederick has been heard to say that not one of his numerous progeny ever did an act to cause him a moment's uneasiness.

Then, if these things be so, how can we mourn that at last the acute intellect and the sound body have sunk in sleep? When the first Lord Hardwicke knew that death was approaching he acknowledged readily that he could not complain of death, for in life he had been fortunate above all men; and this is precisely the feeling with which we regard the career and the death of Sir Frederick Pollock.

It is difficult, if not impossible, to draw a distinction between what he owed to the original bounty of nature and what he owed to himself. How far a man can fight against and defeat evil instincts, how far he can neglect the use and blunt the edge of the bright impulses of nature is not taught us by any philosophy. But this we may say, that Sir Frederick Pollock cherished and developed all the gifts which a bounteous Providence had bestowed upon him. If he had talent, he enlarged its limits and increased its wealth by assiduous toil. If he had physical health, he was careful by temperance and regularity of life to preserve and improve it. If he had opportunities, he grasped them quickly and retained them. If he had an honest, a truthful, and an upright nature, he never suffered even a temptation to advance against these bulwarks of integrity.

And he was happy also when he had turned his back on Westminster Hall, its fatigues and its glories. At one time amusing himself with photography, at another reverting to his old and favourite study of mathematics, at another instituting a novel research into the authorship of the letters of Junius, he preserved to the last his intellectual activity. The political controversies of the day, the Continental problems of war and peace, the Transatlantic war, all these things were studied and discussed by him with juvenile ardour. In his pleasant home at Hatton he exercised a generous and a wide hospitality, and was at all times ready to converse with old and young with equal sympathy and kindness. Anecdotes of days long gone by, his own early life, the social and political scenes in which his boyhood, youth and manhood were passed, all these were told and painted with consummate skill and with rare accuracy. That strange faculty for the recollection of dates—not in years only, but in months and in days—which was so curiously exhibited by him in the *Princess Olive's Case* in the Probate Court, frequently displayed itself in familiar talk even in the latest years of his life. But we must here stay our hand. We have said enough to show that in our judgment, if Sir Frederick Pollock was excellent as a lawyer, he was yet more excellent as a man.—*Law Journal.*

SPECIFIC PERFORMANCE IN CASES OF HARDSHIP.

Hilton v. *Tipper*, V C. S., 16 W. R. 888.

The present case is noticeable as a somewhat broad assertion of the jurisdiction of courts of equity, under Lord Cairns' Act (21 & 22 Vict. c. 27), to order the payment of damages as an alternative to decreeing specific execution of contracts, in every case where justice will be satisfied by doing so. The Court, in the first instance, assumed the jurisdiction to decree specific execution of contracts, for the reason, according to Lord Redesdale, in *Harnett* v. *Yielding*, 2 Sch. & Lef. 554, that damages at law will not always put the plaintiff in as good a position as if the contract were specifically performed. Where that is so, said Lord Redesdale, the Court will interfere, and decree specific performance. It will not be decreed, however, his lordship added, in effect, against a person who is not competent to execute the contract. The Court, therefore, will not interfere where a party is called upon to do an act which he is not lawfully competent to perform, or which it is impossible for him to perform. Thus the Court will not decree specific performance of a contract to convey land, where the contracting party has a bad title, unless on terms of the party seeking performance of the contract accepting such title as the contracting party can give. These rules depend on general principles of equity and fairness, and partly, no doubt, on the rule that the Court will not make a decree which it cannot compel performance of. When a party contracts to sell, he contracts impliedly to give a good title; but, if he has not a good title to give, how can he be compelled to give that which he has not got, and cannot get? And now that the Court can decree specific performance or give damages at its option, it is probable that the Court will be loth to decree specific performances, except strictly in accordance with the rule of Lord Redesdale referred to above. For there can be no doubt that, prior to the Act,

specific performance was sometimes decreed in doubtful cases, sooner than send the parties to a court of law—a difficulty which cannot arise under the present practice.

The Court will sometimes be in doubt, of the two modes of relief, which to give, particularly in cases of hardship, where the contracting party should be put to serious inconvenience or expense by the specific execution of his contract. The case to which we are about to refer arose thus. The defendant was lessee of premises under a covenant not to assign or underlet without the lessor's leave. In ignorance of the obligation he was under, he agreed to grant an underlease to the plaintiff. When the plaintiff came for his underlease, the defendant had arrived at the true meaning of his covenant, and had applied to the freeholder for leave to underlet. This the freeholder refused to give, except on terms which, though certainly not in appearance exorbitant, involved a payment, to making which the defendant preferred being defendant in a chancery suit. In the result, it appearing that the contract was not impossible to be performed, specific performance of it was decreed, with an alternative reference as to damages, in case the defendant should be unable to perform his part of it.

The meaning and object of the clause in Lord Cairns' Act, which gives the Court jurisdiction to direct the payment of damages either alternatively or in substitution for specific performance, is clearly laid down by Sir G. Turner, L.J.. in *Ferguson* v. *Wilson*, 15 W. R. 80, L. R 2 Ch. 77, to be that the Act extends only to cases where the plaintiff has or would have had before the passing of the Act an equitable right to have specific execution of his contract. It was never intended to enable parties to get damages where they have entered into a contract impossible to be performed by the other party—where there is a contract and nothing more, the parties must go to law, as heretofore. Where, as in the present case, there is a contract, and a subject of that contract which is *per se* capable of specific execution, and the Court will decree specific execution accordingly, where the subject of contract may or may not prove capable of execution, either from the incompetency of the party to perform it, or the hardship to which he would be exposed in the course of performance (provided that the extent of the hardship was not known to the contracting parties at the date of the contract), the Court will make an alternative decree for the payment of damages in the event of the defendant being unable to perform his part. But it must not be forgotten that according to *Ferguson* v. *Wilson*, where no relief by way of specific performance is possible, no claim for damages can be sustained.—*Solicitors' Journal.*

DURATION OF A CARRIER'S RESPONSIBILITY.

Shepherd v. *The Bristol and Exeter Railway Company*, 16 W. R. 982.

This case involved the important question —How long does a carrier's liability *as carrier* continue? A common carrier is, as such, under a peculiar liability differing from that of any other kind of bailee. He is said to be an insurer, and is liable for all injuries to the property committed to his care, unless the injury be caused by the act of God, or by the king's enemies. A carrier may at common law exempt himself from this liability, and may enter into a special contract for the carriage of goods upon any terms that may be agreed upon. In the absence of any special contract he is liable as an insurer. In *Shepherd* v. *The Bristol, &c., Railway Company* injury was done to some cattle carried by the defendants. The cattle had been carried safely, but were injured in a pen on the defendants' premises after the actual carriage was completed. The first question was one purely of fact, viz., whether the cattle had in fact been delivered to the plaintiff? The second question was whether, if the cattle had not been delivered, the defendants were liable for the injury *as carriers?* If the defendants were responsible as carriers for the cattle during the whole time they remained in their possession, the defendants were, under the circumstances, liable to compensate the plaintiff for the damages done, as the injury had not resulted from the act of God or of the king's enemies. If the defendants were not responsible as carriers, the plaintiff could not recover without proof of negligence, of which as a fact the defendants had not been guilty. The defendants liability, therefore, assuming that the cattle had not been delivered to the plaintiff, depended solely on the question whether they were liable as carriers.

The Court were divided in opinion on the second question, which is the only one we need notice here. Bramwell and Channell, BB., held that it was not material to consider whether or not the cattle had in fact been delivered to the plaintiff, because even if they had not been delivered the defendants were not liable as carriers, as nothing remained to be done in and about the carriage of the cattle at the time the injury occurred. Martin, B., dissented from this view, and held that the liability of the defendants as carriers continued until delivery, and that there had been no delivery. The opinion, therefore, of Martin, B., differs entirely from that of the other two learned judges. The question is of great importance to railway companies and to all who are in the habit of sending goods by railways. The common law liability of carriers often works very inconveniently, and it would probably be a great improvement if this liability were altogether removed, and the rights of the carrier and of the goods owner were left to be

ascertained either by a special contract between them or by an application of the ordinary rules which govern all other classes of bailments. As, however, this special liability of carriers still exists, its logical consequences should be admitted, and it seems more consistent with general principle to hold with Martin, B., that a carrier is liable as carrier so long as he holds goods under the original bailment for the purposes of carriage than to decide with Bramwell and Channell, BB., that a carrier's liability is divided into two parts, although there is but one contract, and that the carrier is liable as an insurer while the goods are actually been carried, but is only liable as an ordinary bailee after the carriage is over; especially as it may be that a deposit of the goods after the transit is over is as necessary an incident of their carriage as the placing them in a truck upon the railway. As the case stands at present, however, the opinion of the majority of the learned judges constitutes an authority in favor of their view of this question.—*Solicitors' Journal.*

A WORD ABOUT LAW LIBRARIES.

BY F. W. HACKETT.

It is said that a distinguished professor once commented as follows upon a grammar in which the author had made an ostentatious parade of learning: "I do not like to see a man put all that he knows into one book." No doubt many a man can do this, and the result would not be an inconveniently bulky volume either; still, it must be admitted that our indignant critic's position was well taken. Let us reverse the process, however, and we do not find so much to condemn. A man may acquire all his book-learning from a single work, and, if he only pursue his study with dilligence, his attainments may by no means be despised. Indeed, there is an oriental saying: "Beware of the man of one book."

Frequently one most thoroughly enjoys a book when absent from home, or at some point where reading matter is inaccessible, and where the volume that engages the attention is almost the only one at hand. It is not so much that you must read that, or nothing at all, as it is that there is nothing else to divert the attention. Every one must have felt the difficulty of confining himself to the perusal of a single volume while in the midst of a large library. The influence of the surroundings is distracting. The temptation is almost irresistible to "browse around," to take down this or that book, as fancy dictates, and glance over a few pages, till a new train of thought, or a more engaging title draws off the attention in another direction. Magazines and newspapers, when found in connection with a general library, have much to answer for in seducing readers from the enjoyment of more solid reading.

It is especially true in law studies that long continuous study, and a careful reviewing of a few books, will make a good and accurate lawyer, so far as a knowledge of the books will make a lawyer at all. Many a leader at the bar, distinguished for profound legal acquirements, has astonished the world by the scantiness of his law library. Where a man is carrying the contents of his books in his head the number of volumes need not be large. Judge Marshall studied but few text-books, but those he mastered. His opinions are remarkable for an almost entire absence of authorities.

To day, it is not considered absolutely necessary for a student to read Coke on Littleton. But, in old times, no one was thought fit to enter upon practice without a painstaking and protracted seeking of these fountains of the law. The anecdote will bear repetition of the student who had been set to work upon Coke, and had read it four times. Upon asking his preceptor, a most eminent lawyer, "What shall I take up now?" the reply was, "Read Coke again." There was a grim humor about the advice, but, if faithfully followed, we do not believe the student's time was misemployed. If law treatises were read for their freshness, our young friend had already studied Coke four times too many. But to master a tough subject, to comprehend a proposition that fairly makes your head ache, is to train the intellect and to develop the lawyer. An esteemed judge, of deservedly high reputation for his ready knowledge of common law and his acute and logical opinions, once remarked that the only books he ever studied were Blackstone, Kent, and Chitty on Pleading. "They were all that were put into my hands," said he "but I read them over and over again." * * * * *

It is by no means a misfortune to a young practitioner that he has not easy access to a large or a complete law library. Of course, if there is one in his town, he ought to avail himself of its advantages. At a certain stage, in almost every case, the more thorough the search into the authorities the better. But there is great profit in arguing out a case upon general principles, and prosecuting the line of argument as far as one can without seriously feeling the need of authority. When the point has been well thought upon, the decisions may be looked up to more advantage. Where counsel are well aware that every report and treatise is close at hand for reference the temptation is strong to do nothing in the way of original reasoning, but simply to hunt up and classify what the judges have hitherto said upon the subject. To be sure, dissecting an opinion, comparing it with the case at bar, and determining just what it is worth, as authority, requires the best talent of the lawyer. Not seldom, too, in the pressure of a large practice, a point must be set up and sustained in a hurry, and the ready lawyer knows just what books to consult, how to find the cases bearing upon the question, and how to "eviscerate" (as Choate would say) their meaning.

"A man knows a thing," observes Dr. Johnson, "when he knows it in terms, or knows just where he can find it." A knowledge of how to use a library, of course, comes only with experience.

A certain degree of familiarity with a large collection of books is, indeed, almost indispensable to a great lawyer. But before this work is to be done, it is well if the busy practitioner has acquired the habit of looking at a point in his own original way, with little or no aid from somebody's previous labors. He will have taken an important step toward the development of his reasoning powers, which, if he be master of broad elementary principles, will tend to make him something more than what is sometimes contemptuously termed "a mere case lawyer." It is interesting to note that those who have succeeded best before our Supreme Courts are, in very many instances, men whose early days were passed in the rigid school of country practice, where books were scarce and knotty law points numerous; and where, thrown upon their own resources, these lawyers framed their arguments upon their own ingenious reasoning, with but little assistance from text-books or adjudicated cases.—*Albany Law Journal.*

Chief Justice Holt once, during the revolution, committed to jail one of the fortune-telling imposters then called French prophets; next day a disciple of this man called at the judge's house and demanded to see him, astonishing the servant by ordering to say that he "must see him, because he came from the Almighty." This extraordinary message being delivered, Holt desired the man to be shown in, and asked him his business.

"I come from the Lord, who bade me desire thee to grant a *nolle prosequi* for John Aikins, his servant, whom thou hast thrown into prison!"

"Thou art a false prophet and a lying knave!" returned the chief justice, "if the Lord had sent thee it would have been to the attorney-general, for the Lord knoweth it is not in my power to grant a *nolle prosequi*."

Curran once got out of a serious scrape by an execrable pun. He had incurred a rich Irish farmer's displeasure by a severe cross-examination in court; and some days afterward, being out for hunting, his horse and the chase carried him into a potato field owned by this man. Seeing him there, the man came up and said: "Oh! sure you're Counsellor Curran, the great lawyer. Now, then, Mr. Lawyer, can you tell me by what law you are trespassing upon my grounds?"

"By what law, Mr. Maloney?" replied Curran "Why, by the *lex tally-ho-nis*, to be sure."

The pun so delighted Mr. Malony that he let its author off for the trespass.

CANADA REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

In re Elizabeth Cooper and Jane R. Cooper.

Coroner's inquest.

A coroner's inquest held on Sunday is invalid.

[Chambers, July 30, 1870.—Galt, J.]

Writs of *habeas corpus* and *certiorari* were granted by Morrison, J., on 23rd July, 1870, to bring up Elizabeth Cooper and Jane R. Cooper, who were committed on a warrant charging them with the murder of a child and concealment of birth.

The writs being returned, and notice having been duly given to the Attorney General of Ontario,

John Paterson moved for the discharge of the prisoners, on the ground that they were in custody of the gaoler on a warrant of commitment made on Sunday, the 22nd May, 1870, by John P. Kay, one of the coroners for the County of Bruce, pursuant to an inquisition indented on that day. The depositions, as appeared by the return to the *certiorari*, were also taken on that day. He cited *Dakins' Case*, 2 Saund. 291 *a*; Lewin on Coroners, p. 279; Boys on Coroners, p. 167.

No one appeared for the Attorney General.

Galt, J.—The inquest and inquisition, being judicial acts done on Sunday, appear to me to be void. As, therefore, there is nothing to support the warrant, the prisoners must be discharged.

Prisoners discharged.

Florey v. Royal Canadian Bank.

Costs—Election by plaintiff to reduce verdict.

When a plaintiff, after argument of a rule *nisi* to enter nonsuit or for a new trial on the ground of excessive damages, elects to reduce his verdict, instead of submitting to a new trial, with costs to abide the event, he is not entitled to the costs of opposing the rule *nisi*.

[Chambers, Aug. 26, 1870—*Wilson, J.*]

A summons was obtained to review the Master's taxation of the plaintiff's bill of costs on the following facts:

There was a verdict for plaintiff for $870. The defendants obtained a rule *nisi* to enter nonsuit for new trial on the ground, amongst others, of excessive damages. Upon this rule the court gave the plaintiff leave to elect to reduce the verdict from $870 to $494, in which case rule to be discharged; otherwise there was to be a new trial with costs to abide the event. If the plaintiff should recover more than $494 then plaintiff should get his costs; if not, there were to be no costs to either party

The plaintiff consented to reduce his verdict to $494, and a rule was made that, "plaintiff consenting to reduce the verdict to $494, the rule *nisi* is discharged, and the verdict reduced accordingly," &c.

The Master held that plaintiff was entitled to no costs of opposing the rule *nisi*.

John Paterson showed cause, citing *McAndrew* v. *Adams*, 3 Dowl. 120.

McMichael, in support of summons, cited *Delisser* v. *Towne*, 1 Q. B. 333.

Wilson, J., after taking time to consider, discharged the summons, but without costs, saying the better opinion seemed to be that no costs ought to go to either party.

Hartleb v. Phelan.

Declaration — Irregularity.

A declaration which omits the name of the plaintiff in its commencement is irregular.

[Chambers, Sept. 6, 1870—*Mr. Dalton.*]

O'Brien obtained a summons to set aside the declaration in this case for irregularity with costs, on the ground that the plaintiff's name was omitted in the commencement of the declaration, he being merely referred to as "the plaintiff." He cited *White* v. *Feltham*, 3 C. B. 658; *Monck* v. *Northwood*, 2 U. C. L. J., N. S., 268; Har. C. L. P. Act (2nd ed.) p. 100, note *k*.

Mr. Falconbridge (Osler & Moss) shewed cause.

Mr. Dalton.—The declaration must be set aside unless the plaintiff amend, which he may do on payment of costs.

Order, with leave to amend.

Davidson et al v Grange.

Irregularity—Attorney—Vexatious conduct—Affidavit.

In a writ of *fi. fa.* and the endorsements thereon, the plaintiffs were styled defendants, and *vice versa*, the words being transposed throughout.

Held, that the writ and endorsements were clearly irregular.

Remarks upon the vexatious and oppressive conduct of an attorney in forcing a levy for costs without any necessity, after an offer of payment in a reasonable time and manner, and upon the introduction of irrelevant and improper matter into an affidavit.

[Chambers, Sept. 1, 1870—*Morrison, J.*]

Fenton obtained a summons in this case calling on the defendants to shew cause why a writ of *fi. fa.* issued herein and proceedings thereon should not be set aside with costs for irregularity, and on the ground that the writ was issued with undue haste, &c.

The irregularities were: 1. The plaintiffs were described as the defendants, and 2. The defendant as John George Grange instead of George John Grange. 3. The writ purported to be issued by A. L. as plaintiffs' attorney instead of defendant's attorney, and directed the sheriff to levy of the goods and chattels of the defendant instead of the plaintiffs, such direction being signed by the said A. L. as plaintiffs' attorney, &c.

And also to shew cause why satisfaction should not be entered upon the judgment roll upon payment by the plaintiffs of the amount of such judgment irrespective of the costs of the writ and sheriff's fees, or that such other order might be made in the premises as the judge may see fit.

From the affidavit filed by the plaintiffs' attorney it appeared, that on the 20th November, 1869, a rule for a new trial in this cause was refused, which fact came to his knowledge on the evening of the 22nd: that the following day he was instructed by the plaintiffs to notify the defendant's attorney that the costs would be paid without further proceedings; and on the 24th he wrote the following letter to the defendant's attorney:

"Toronto, 24th Nov. 1869.

"Davidson et al. v. Grange.

"We are desirous to incur no further expense in this case, and will pay your costs without putting you to trouble of entering judgment. Please send me by return post a copy of your bill of costs, and if we can agree on amount without taxation, we will send you a cheque therefor at once. If we cannot agree on amount, in forty-eight hours after I receive your bill, I will undertake to attend taxing office to tax costs on receiving one hours notice, and that a cheque will be given for amount on same day amount of costs is ascertained. Please let me have your bill by next post. Yours, &c. "F. F."

No reply was sent, but on the following day the plaintiffs' attorney received notice of taxation for the next morning at 10 o'clock. Mr. P., partner of defendant's attorney, attended the taxation, and admitted receiving the foregoing letter. The taxation proceeded on the Friday and part of Saturday, on which day only one item remained for consideration, viz., $25 witness fees, charged as paid to the plaintiffs attorney, which was objected to, and not then allowed by the Master.

The plaintiffs' attorney had to leave for Hamilton before the close of the taxation, intimating his intention to appeal against the allowance of the item of $25. Before leaving for Hamilton he wrote to Mr. P. the following note:—"It will be unnecessary to issue execution for the costs taxed to you in this cause, as I hereby undertake that the plaintiff will pay them on receiving notice of the amount; please send me a memorandum of the amount and I will see to it on my return from Hamilton to-night or early on Monday morning." This note Mr. P. received at 10 minutes to 12 o'clock. On the return of the plaintiffs' attorney that evening, he learned from his clients that the sheriff had made a levy.

It appeared also, that by direction of the partner of the plaintiffs' attorney, his clerk was instructed to get a cheque for the amount from the plaintiffs, which he did. This cheque he took to Mr. P., who was in the office of his Toronto agent. The cheque being payable to Mr. F.'s order he declined to take it, as it was not endorsed. He was told that Mr. F. would return that evening. It was then suggested that the cheque should be made payable to the order of his Toronto agents, which was declined, as he, Mr. P., required the money. The clerk, notwithstanding, proceeded to obtain the new cheque, but on arriving at plaintiffs' store he found the deputy sheriff there, where he had made a levy under the *fi. fa.* It appeared also that it was only a few minutes after the cheque to Mr. F.'s order was signed that the deputy sheriff made a levy, and that the deputy sheriff stated that Mr. P.'s orders to him were to put a bailiff in at once. The plaintiffs' attorney's clerk being present he told plaintiffs not to pay until Mr. F.'s return, upon which the sheriff said that as he had made a levy it need not be paid for a few days. The plaintiffs, who were wholesale merchants in Toronto, swore that they were worth

$30,000 over and above their debts, and generally had on hand $25.000 worth of goods.

The partner of plaintiffs' attorney stated in his affidavit, that on the Saturday he saw Mr. P. between two and thre o'clock, when he stated he would place the *fi. fa.* in the sheriff's hands. He told him that he knew nothing about the matter, it being attended to by his partner exclusively, who would return that evening from Hamilton, and suggested waiting until Monday, as the banks were then closed and the money could not be obtained before Monday. Mr. P. however declined to wait, alleging as his reason for his urgency that he had been treated sharply by Mr F. in the case and would not wait. He was then requested to delay until he could advise the plaintiff of the amount of costs and get their cheque, which cheque his clerk got. He also stated that Mr. P. did not affect to doubt or dispute that the plaintiffs' were in good circumstances, but he told him his reason for pressing was in retaliation for something that Mr F. had practised towards him The plaintiffs' attorney's clerk, among other things, swore that when Mr. P. refused the cheque payable to Mr F. he (P.) suggested that the cheque should be drawn payable to the order of his Toronto agents, but on leaving to get such a cheque he called after him saying he would not accept a cheque, he wanted the money. Notwithstanding his saying so, the clerk went to the plaintiffs' for a cheque so drawn. But on getting there he found the deputy sheriff with the *fi. fa*

Mr. P. in reply filed his own affidavits, from which it appeared that he received Mr F.'s letter of the 24th instant, but on that date he had made arrangements to enter his judgment, and so he did not reply to it. He also annexed the original note of Mr F. of the 27th instant, as shewing that he did not intend to object to the revision of the bill. The affidavit contained much matter quite immaterial and irrevelant to the merits of the application, and in some respects contradicted the affidavit filed on the part of the plaintiffs.

The plaintiffs paid to the agents of defendant's attorneys $204 72 pending this application.

Harrison, Q. C., shewed cause.

Fenton, *contra*, cited *Perkins* v. *National Assurance Association*, 2 Ex. N. S 71; *Cruikshank* v. *Moss*, 8 L. T. N. S 439; *Anon*, 4 Pr. Rep. 242; *Cullen* v. *Cullen*, 2 Chan. Cham. R. 94; *Reeves* v. *Slater*, 7 B. & C. 486.

MORRISON, J.—After hearing the arguments an order was made that the bill of costs should be referred to the Master for a revision of the taxation as to the item of $25, charged and taxed to the defendant's attorney as witness fees, paid him for attendance at the trial of this cause. The Master has since reported his disallowance of that item

Upon inspection of the *fi. fa.* and its indorsement it is evident that it was taken out in a great hurry; on its face the plaintiffs by name are styled defendants; the true name of the defendant is George John Grange, while in the writ he is styled John George Grange; by the indorsement the writ is issued by Mr. L., styling himself plaintiffs' attorney; and the direction to the sheriff to levy is to make the amount out of "the within defendants," and signed by Mr. L. as plaintiffs' attorney. The writ and indorsement are all irregular. The main point however is in respect to the conduct of the defendant's attorney.

When the rule *nisi* for a new trial was refused the defendant was entitled to enter his judgment and to recover his costs. In the case referred to in 4 Prac. Rep. 242, I had to deal with an application somewhat analogous to the one before me, and there I felt it to be my duty to remark upon the conduct of the attorney. The successful party has a right to the entry of his judgment, but, as I said in that case, where the person against whom the execution may issue is desirous of paying the amount so as to avoid the annoyance of a visit from a sheriff's officer and a levy being made on his goods, and gives clear notice that he is willing and ready to pay the amount forthwith, and there is no reason to suspect that he is acting other than *bona fide*, and that the recovery of the amount is in no way prejudiced; in the absence of some reasonable excuse, under such circumstances the placing a *fi. fa* in the sheriff's hands is, in my judgment, *primâ facie* vexatious, and the more so in a case like this, where the amount sought to be recovered was merely costs.

I have read carefully over all the affidavits, and I cannot arrive at the conclusion that the defendant's attorney was justified in the course that he took, for immediately after the rule *nisi* for a new trial was refused, he had a clear intimation that the amount of his costs would be paid when ascertained, and again, after the taxation of costs by the note of the 27th inst. he had a better intimation, with an undertaking from the plaintiffs' attorney that costs would be paid without further delay, while the obtaining the cheque, although it required the endorsation of Mr. F., indicated the strongest intention and desire of paying the amount On the other hand I see not the slightest pretence for the harsh proceeding of instructing the deputy sheriff instantly to make a levy, while it is also evident from the affidavit that the step was taken in retaliation for some alleged sharp practice on the part of the plaintiffs' attorney, which is no justification, but rather goes to shew that the proceedings so taken were an abuse of the process of the court I am therefore of opinion that besides the irregularities appearing on the face of the *fi. fa.*, and in the indorsement thereon, that the placing the writ under the circumstances in the sheriff's office, and instructing the sheriff at once to place a bailiff in possession, was a vexatious and oppressive act.

I think it proper to notice the way in which the affidavits filed by the defendant's attorney are drawn up. The affidavit should state only facts pertinent to the application, and upon which the party relies; it is for the court to draw the inferences and judge of their value. An attorney, who is presumed to know better, ought not to make and swear to statements such as I see in one paragraph of his first affidavit In explaining why a change was made in the bill for attendance at the trial as the attorney and $5 a day as a witness, he says: "It was too absurd to contend that such was meant in the face of my contention, and the affidavit of disbursements made, in which the amount sworn as paid to me was as witness alone;" and again in another paragraph, "as-

surely it is absurd to presume that after all the efforts I had been making to have the matter settled before I left town amicably, that I would have been so discourteous or unreasonable as not to have been quite willing to have shewn every consideration and courtesy had the clerk expressed any willingness to change the cheque or pay the amount. This I wished to do with all candour and fairness."

I see no ground for my assuming that this attorney made efforts to have the matter amicably settled. I can only see that the attorney was acting in the most rigid way to recover his bill of costs ($25 of which he was not entitled to), and without any excuse for the vexatious proceeding of placing the *fi. fa.* in the sheriff's hands, and inflicting further unnecessary costs on the plaintiffs.

On the whole the order will go to enter satisfaction on the roll; the defendant's attorney retaining out of the moneys paid in to abide the result of the application, $179.72, amount of the judgment after revision of the taxation of costs, and that the defendant refund to the plaintiff's attorney the surplus, $25 69, and that the defendant's attorney pay to the plaintiff's attorney the costs of this application, which I fix at $10.

Order accordingly.

DIVISION COURT CASE.

BEFORE HIS HONOR JUDGE JONES.

(*Reported by* B. F. Fitch, Esq., *Barrister-at-Law.*)

Fair v. James.

Grand Trunk Railway, *Garnishees.*

Division Court Act, 32 Vic. ch. 23 (Ont.)—Jurisdiction of Division Court under garnishee clauses—Foreign railway—Place of business.

Section 7, sub-sec. 1, of the Ontario Division Court Act, 32 Vic. ch. 23, provides that the garnishee summons shall issue "out of the Division Court of the division in which the garnishee lives or carries on business."

Held, in case of a foreign railway doing business within this Province, to mean that proceedings may be taken in the division in which the principal offices for the Province are located.

By 29 & 30 Vic. ch. 92, the Grand Trunk Railway Co., whose head office is at Montreal, leased the Buffalo and Lake Huron Railway, whose principal offices were at Brantford.

Held, that garnishee proceedings against the Company were properly taken at Brantford.

[Brantford, 1870—*Jones, Co. J.*]

In this case the primary creditor took garnishee proceedings under 32 Vic ch 23, against the Grand Trunk Railway Company at Brantford, it being the principal station on the Brantford line known as the Buffalo and Lake Huron Railway, and which had been leased by the former company The debt was for wages due the primary debtor for services on this branch line, and the cause of action arose at Brantford It was objected by the garnishees that the Division Court of the County of Brant has no jurisdiction over the Grand Trunk Railway Company under the garnishee clause of the above act, inasmuch as the company do not reside, live, or carry on business within the meaning of the act anywhere or in any place in the County of Brant, and that they do not so reside, live or carry on business anywhere than in the City of Montreal, in the Province of Quebec.

Jones, Co. J.—Where the garnishee proceeding are taken on a judgment already recovered against the primary debtor by the 6th section of our last Division Courts' Act, sub-section 4, the summons must issue from the court of the division in which the garnishee resides or carries on business. Although the phraseology of the two sections is slightly different, the provisions are, I think, substantially the same.

The debt owing by the garnishees in this case to the primary debtor was for wages earned and payable at the Brantford station, within this division. Had the primary debtor sued the garnishees for these wages the suit could have been entered and tried in this court, as the whole cause of action arose in this division. I mention this, as in the argument before me a good deal of stress was laid by the counsel for the garnishees, upon the hardship they would be subjected to could they be called upon to answer such suits as these at every Division Court along the line. I think there is nothing in this argument, for these garnishees may now be sued as defendants in any such court, provided the cause of action arose there; and, as a rule, it is more convenient to both parties that a case should be tried in the division where the cause of action arose, and where the witnesses, if any, would probably reside, than it would be to try it at Montreal or any other place where the garnishees might carry on business.

In the English authorities cited by the garnishees the same argument of inconvenience was raised, and it had a considerable weight with the court, but there a defendant can only be sued in the district where he resides or carries on business, except the special leave of the judge is obtained to sue him where the cause of action arose; but by our Division Courts Act, as already remarked, it is optional with the plaintiff to bring his action either in the division where the defendant resides or where the cause of action arose

The main question, however, is whether the garnishees carry on business within the meaning of the Act, at Brantford The evidence shewed that the debt owing by the garnishees to the primary debtor was for wages due the primary debtor for services on the branch line of the railway from Buffalo to Goderich, and that the cause of action arose at Brantford, which is the principal station on that line. This branch line was originally built and owned by the Buffalo, Brantford and Goderich Railway Company as an independent line. Brantford was the principal station, and the head offices of the company were situate at that place. The manufacturing and repairing shops for the whole road were also located there. That company becoming involved sold their road to the Buffalo and Lake Huron Railway Company, who continued and extended the same business that the old company had carried on at Brantford, at which place the head offices of the company, and the machine works and manfacturing and repairing shops for the road were still continued.

The Buffalo and Lake Huron Railway Company leased their road to the garnishees. See 29 & 30 Vic. ch. 92.

The garnishees have still continued the workshops at Brantford, where they have a superintendent of those works, Mr. Jones, who employed

the primary debtor. They have also there a local superintendent of the line, Mr. Larmour, who acts under instructions received by him from Montreal, at which latter place the chief offices of the company in Canada are situate. The general manager again receives his instructions from the Board of Directors in London, England, where the head office of the company is situate.

I think from the above consideration that Brantford stands in a different position from that of a principal station. It appears to be the place where the business of the line is centred and carried on.

The case of *In re Brown & The London and North Western Railway Co*, 4 B. & S. 326, is cited by the garnishees to shew that a railway corporation only carries on business within the meaning of the English County Court Act, at the place where their head office is situate and the general business of the company is transacted. But in the above case the defendants had their head office and general place of business in England, where they might be sued. Suppose their head office was in France and the business in England was carried on through instruction from such head office, would it be held that the company did not carry on business in England, and therefore that they could not be sued there?

The case I have supposed is very much like the position of the Grand Trunk Railway Co. as respects this Province. The City of Montreal, where the garnishees have their chief offices in Canada, is not in this Province, and our courts have no jurisdiction there. It is unto us a foreign country. To compel the plaintiff to go there to prosecute this matter would be to deny him any relief, for the Act under which these proceedings are taken does not apply to that Province.

When therefore the Legislature enacts that these proceedings may be taken against a garnishee at the place where he carries on his business, it must mean, I think, where the business is carried on in this Province. To put any other construction on the act would be to render its provisions nugatory.

Now the Buffalo and Goderich line of railway is a distinct branch not owned by the garnishees, like their main line, but leased by them and worked under a special arrangement with the Buffalo and Lake Huron Railway Company *. If the question is as to what place in this Province the garnishees carry on their business as regards this line, I think the answer would be Brantford, for the reasons I have already stated, and as I think it my duty to put such a construction on the act as will give effect to its provisions, I hold that the proceedings have in this case been properly instituted in this court, and that I have jurisdiction in the matter.

If it should be held that the garnishees could not be proceeded against at Brantford on the ground, that although their principal business as regards this line is carried on here, yet that it is so carried on under instructions from Montreal, would it not in effect be saying that neither could they be proceeded against at Montreal, because the business there is carried on under instructions from the head office in England.

* Since giving this judgment the Grand Trunk Railway have purchased the Buffalo and Lake Huron line, and the purchase was ratified by an Act of last Session, 33 Vic. cap. 9 (Can.).—Eds. L. J.

QUEBEC REPORTS.

SUPERIOR COURT—In Review.

Rooney v. Lewis, *es qual.*

Held, that under Con. Stat. Can. cap. 17, sec. 33, the only recourse against the first appraisement of the collector was an appraisement by two merchants as therein prescribed. An importer who preferred to pay the duties exacted by the collector had no action to recover them back.

[14 L. C. J. 155.—February 28, 1870.]

Mondelet, J.—The plaintiff, a merchant and importer of this city, brought an action, in 1866, in the Circuit Court for the District of Montreal, against defendant, the then acting collector, to recover $186 40, which he alleged was illegally exacted from him by the defendant, being an excess on the valuation of goods imported by plaintiff from Scotland. It is pretended that the fair value of these goods was $560 20, and not $746 40, and moreover, that the duty at the Custom House here should have been measured on the fair market price in the principal markets in Scotland at the time of the purchase. The defendant, on the contrary, maintains that it is to be determined by the fair value of the principal markets at the time of the exportation. It was, of course, necessary for the plaintiff to prove, first, the time of purchase; second, the time of exportation; third, the fair value of the principal markets of Scotland. Strange to say, none of these indispensable proofs are to be found in the answers of the witnesses, who, on a *commission rogatoire*, were examined in Scotland on behalf of plaintiff. It appears by the evidence that Rooney had made an advance of £500, for the purpose of getting the goods, but at what time we do not know, nor is it shown when the goods were manufactured, delivered and exported. The invoice has not been substantiated by proper evidence. The groundwork, or rather what should have been the groundwork of his claim, is therefore altogether wanting. I need not dilate upon the question as to whether the appraisement is to be made on the fair value of the goods at the time of the exportation or at that of the purchase. The law is clear; there can be no two opinions on that point. It is at the time of the exportation, and not at the time of the purchase. A difficulty was started at the hearing of the case with respect to the plaintiff, subsequent to the notice he gave of his intention of paying under protest, paying, instead of having the appraisement revised by two merchants, as he was invited by the acting collector to do. Is this a renunciation? Is the plaintiff deprived of his recourse? We find in our statute a word, upon the interpretation of which turns the solution of the question as to whether Rooney, not having resorted to the mode of submitting his claim to appraisers, and choosing to pay rather than do it, has or has not waived his right of any recourse. A case which was decided by the Supreme Court of the United States (*Rankin et al v. Hoyt*), in 1846, is cited against the pretensions of the plaintiff in the present case. By

this decision it appears that "the importer had a right to appeal to another board of appraisers, differently constituted; and if he did not choose to resort to them, he cannot with much grace afterwards complain that an over-estimate existed." It has been argued that the word "may," to be found in our statute, confers no obligation upon the importer to refer the difficulty to appraisers, and that no other expression but "shall" could have such binding effect. The answer to this objection is, that if the word "shall" had been used in the statute nothing could have been done, no payment could legally have been received by the collector, as long as such reference to appraisers had not taken place, even when all parties were agreed, which would be absurd. The interpretation, and the only rational one, is that it is optional for the importer either to refer his case to appraisers, in order to save his recourse, or to pay the dues, and there the matter ends For the above reasons, I am in favor of reversing the judgment appealed from (Berthelot, J., Circuit Court, Montreal). Both on the want of evidence and on law, the plaintiff's action should be dismissed.

Mackay, J.—The appraisement in 1866 gave an advance of 33½ per cent. beyond invoice value. Rooney paid, although notified by defendant, that if dissatisfied he could get a second appraisal by two merchants. McLellan, one of the witnesses examined, proves clearly that the $185 40 in dispute was paid only after such offer to Rooney. He preferred to pay rather than have recourse to the arbitration of merchants The law referring to this case is found in Con. Stat. Ca. cap. 17. It enacts that the collector, if doubting the truth of invoice valuations, may order a custom-house appraiser to value the goods, and upon his appraisal the collector may insist on further duty, but the importer need not pay this unless he please. He may insist, before making any payment, upon a further appraisal by two merchants, upon whose report the duties are to be *finally settled*. Before this statute, the 10 & 11 Vic. (1847) cap. 31, ordered the duties to be finally determined upon merely one appraisement, by two appraisers appointed by the Government. So, the later law afterwards put into the Consolidated Statutes was an extra liberty to importers This law (by which this case and *Joseph* v. *Lewis* are to be disposed of) is ordered by it-elf to be interpreted in favor of an efficient collection of the revenue. Section 33 says that if the importer is dissatisfied with the appraisement made as aforesaid, he *may* forthwith give notice in writing to the collector, who *shall* select two discreet merchants, &c. "But," plaintiff says, "the act does not provide that it shall be final, if the importer fails to call for a second appraisement by merchants chosen by the inspector. The effect of the act is to give the importer the right to apply to a tribunal of summary jurisdiction if he chooses. He 'may forthwith,' &c, but neither directly nor by implication is he *compelled* to do so. For his right to apply to the ordinary tribunals for redress from illegal exactions is nowhere taken from him The distinction observable in the use of the two words, 'may' and 'shall,' in section 33 of our act, as applicable to the individual and the public officer respectively, is quite remarkable," says the plaintiff, and he adds, "there are nearly analogous cases in 9 Price, p. 310, and in 10 Price, p. 138. In one a landlord was authorized to lay a complaint before two justices on a certain subject, who were empowered to adjudge upon it. But it was held that he was not thereby prevented from applying to the court if he chose."

As to the two words, "may" and "shall," referred to, they are proper words in their places. Had "shall" been used where "may" is, the importer would have had one right less; and look at the absurdity it would have led to. The second appraisal, in all cases, would be necessitated, though the importer might be willing to submit to the first, though dissatisfied. The two words, "may." and "shall" have occurred in like places in other Customs Acts in all countries. Though the act may not expressly make the first appraisal final, that first appraisement may be rendered a finality, that is, if the importer pay; preferring to do so rather than go into further appraisement Standing as at the date of plaintiff's payment to defendant after the first appraisal, what right had plaintiff? Had he the right to elect to come here, *or* to go before the tribunal of the merchants? He might elect to come here, he says; but the court holds the contrary. If the plaintiff prevailed, the Dominion would not get the duties of the statute, but duties after the mode of the plaintiff resorting to this court. The plaintiff's case is very different from that of the landlord in the case in Price; and very different from *Sharp* v. *Warren* cited, where a summary remedy was given by statute, and it was insisted that the parties could not have recourse to their previous right to sue by action at law. But the court held the contrary, and that the objection could only have weight if the statute had been imperative. Looking at the Customs Act of the Consolidated Statutes, at its object, and the tribunal of merchants it erects, we cannot doubt that the plaintiff had to resort to that tribunal if dissatisfied, and could resort to no other. That was and is a tribunal well fitted to dispose of such cases. The work to be done in such cases requires inspection of all manner of goods. How could this court perform such work? Then the duties are to be *finally* those of that tribunal (sec 33), and very properly. It concerns the public that the revenue be promptly gotten in. But under plaintiff's system enormous sums of customs duties money might be put into the *limbo* of the ordinary law courts, and enormous amounts of customs duties money might have to be held by the treasurer as in suspense.

The plaintiff says that his views are correct, and that this may be established by a reference to the recent act consolidating and amending the customs laws, 31 Vic cap 6, sec. 45. This statute adds a new provision to the former one, namely, that the decision of the proper officers shall be held to be final, unless the importer give notice of his dissatisfaction and appeal to the minister of customs, whose decision shall thereupon be final, *unless suit be brought for the recovery back of the duties illegally exacted*, within sixty days after such decision; and it expressly enacts, "that no suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until

such decision shall first be had on such appeal." But the recent act is new, positive law, and more favorable to importers than the earlier acts. The 10 & 11 Vic. was very unfavorable to the importer; under it there was only one appraisement, and it was decisive and final, settling the true and real value of goods at what was so appraised. Then came the 12th Vic., the act that these cases turn on; it allowed an appraisal beyond the first one, and such appraisement was evidently meant to be final. It does not read that the appraisement shall be final and conclusive, "unless," &c. Then comes the new law, 31 Vic., referred to by the plaintiff; it is still more favorable to the importer; but it is not to control this case. [His Honor cited Aylwin, J., in *Moffatt* v. *Bouthillier*, 5 L. C. Rep. p. 311, and a case in 4 Howard's R., to support the position that the plaintiff had no right to sue in this court, having refused to avail himself of the tribunal of merchants] The reading of these cases with our statute law leads the court to hold that plaintiff has no right of action against defendant But plaintiff is doubly estopped; for, from the evidence, he paid what he did under such circumstances, and with such knowledge as prevents him getting back what he paid His goods had not been seized. The plaintiff was not in defendant's power. He had other rights and other remedy to use, if he did not choose to pay defendant. But this other remedy was waived. Look at the case as at the time immediately before plaintiff paid Could Rooney, for instance, after notice of the first appraisement, refusing to pay the duties asked of him, have sued defendant? Could he have revendicated these goods, and dispossessed the customs without paying? No; he could only have moved for the reference to the merchants. If, however, he preferred to make a finality of the first appraisement, he could, on paying (as in this case he did), obtain his goods, and, if they were then refused, revendicate them. As to the value of the goods, the court is with the plaintiff.

Torrance, J., observed that his opinion was based mainly on the authority of the case cited from 4 Howard's Rep. 327–335, *Rankin et al* v. *Hoyt*.

The judgment is *motivé* as follows:

The court here sitting as a Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Circuit Court for the District of Montreal, the 30th of June, 1869, having examined the record and proceedings had in this cause and maturely deliberated;

Considering that there is error in the said judgment of the 30th of June, 1869, revising said judgment doth reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises;

Considering that the duties upon such importations as the plaintiff referred to in his declaration were, at the time referred to, appointed to be ascertained, finally adjusted and determined, and levied in and by the mode prescribed by chap. 17 of the Consolidated Statutes of Canada;

Considering that the plaintiff, though at first dissatisfied with the appraisement that the defendant had caused to be made of the woollen goods of the plaintiff, paid deliberately in April, 1866, the amount of duty that the defendant asked and took from him, he, the plaintiff, declining to have or move towards the other or further appraisement, to wit, by two discreet and experienced merchants, according to section 33 of said chapter 17, C S. C., and preferring to pay what he did to the defendant;

Considering that the plaintiff has not proved that the defendant wrongfully collected or took from him the money amount sought to be recovered by the present action;

Considering that, under the circumstances of this case, the defendant was justified in taking from the plaintiff the full amount for duty that the plaintiff paid him in April, 1866;

Considering the plaintiff's action in the Circuit Court unfounded for the reasons aforesaid, and under the law, the court doth dismiss the same with costs to the defendant against the plaintiff in the Circuit Court, and with costs of this Court of Revision to said plaintiff in revision, &c.

Mr Justice Mondelet concurs in the judgment, but is of opinion that the judgment should go further and decide that there is in this cause no evidence of the time at which the goods were exported from the place where they were bought, nor of the fair market value of such goods at the place whence they were exported.

Judgment reversed.

Davidson, *Petitioner*, and Baker, *Respondent*.

Held, 1. That when the certificate of election, granted to a lay delegate to "The Synod of the Diocese of Montreal" by the chairman of the Vestry meeting held for the election of lay delegates, is in form and found to be satisfactory by the committee appointed to examine the certificates of such lay delegates, it is not competent to the Synod to enquire into the validity of the proceedings at the Vestry meeting, or in any way to try the validity of the election certified to in the certificate.

2. That the second clause of the constitution of said Synod was and is legal.

[14 L. C. J., 165.—April 5, 1870.]

This was a writ of *quo warranto* for the purpose of ousting the defendant from exercising the office of lay delegate to "the Synod of the Diocese of Montreal."

The facts and questions raised are sufficiently shown in the following remarks of the Honorable Judge:

Per Curiam.—The *requête* of petitioner in this matter asks that Baker, the defendant, be held to have illegally usurped the office of lay delegate for Christ Church, Sweetsburg, in the Synod of the Diocese of Montreal, and to be guilty of unlawfully holding and exercising said office; that he be ousted from it; that the decision of the majority of the Synod against petitioner, Davidson, be declared illegal; that the petitioner be declared to have been duly elected as lay delegate to said Synod from said Church, and that the Synod be ordered to reinstate him as such lay delegate. The petition sets out with stating the Synod incorporation; it then proceeds to state an election in March, 1869, at the Easter meeting at Christ Church, Sweetsburg, at which election petitioner was duly elected a lay delegate to the Synod; that he received from the incumbent chairman at the meeting a certificate of his election; that he presented it at the Synod, in May, 1869, and claimed to take his seat; that the committee to report on certificates

passed upon his and approved it, and put his name upon the roll of delegates; that thereafter a motion, supported by affidavits, was made by a lay delegate, that the name of petitioner should be struck off the roll, and the name of Baker substituted for it; that the chairman ruled this to be out of order; but, upon an appeal from the chair, the majority of the Synod maintained the motion, and Baker then and there was admitted and the petitioner excluded from the Synod, &c. The defendant, Baker, by his answer, defends the action of the Synod, and claims that at the vestry meeting at Sweetsburg, he (Baker) was elected; that he had the majority of votes, and the chairman so declared at the time, but afterwards acted to the contrary, and gave petitioner, his son, the certificate; that at the Synod the chairman could not prevent the Synod disposing of the question as to whether Davidson or Baker had the right to sit; that clause number two, of the Synod constitution, relating to qualification of electors, was illegal and void, &c.

The 19 & 20 Vic cap. 121, and 22 Vic. cap. 139, enable the members of the Church of England and Ireland to meet in Synod. The meeting of Synod, and the adoption by it of a constitution, &c., followed this 22 Vic.; and the second clause of such constitution states who may be lay representatives, and how elected.

2. The lay representatives shall be male communicants of at least one year's standing, of the full age of twenty-one years, and shall be elected annually at the Easter meetings, or at any vestry meeting (specially called for such purpose by incumbents, after due notice on two Sundays), held by each minister having a separate cure of souls, and all laymen within the cure, of twenty-one years or upwards, entitled within such cure to vote at vestry meetings, or who hold pews or sittings in the church, though not entitled so to vote, who shall have declared themselves in writing to be "members of the United Church of England and Ireland, and to belong to no other religious denomination," *shall* have the right of voting at the election.

And in clause 5 the certificate of election is given as follows:

"This is to certify that at a meeting held this day for the purpose of electing delegates to represent this congregation or parish in Synod, being the parish or mission of ———, ———, a communicant of one year's standing, and of the full age of twenty-one years, was elected by the laymen of this congregation, who have a right to vote at such election, by virtue of their having, in accordance with the second clause of the constitution of the Synod of this Diocese, declared themselves in writing, in a book kept for that purpose, to be members of the United Church of England and Ireland, and to belong to no other denomination, and being qualified otherwise under the provisions of said clause.

"And such certificate of election shall be considered and taken as sufficient proof of the election; and such lay delegate shall continue in office till his successor is appointed."

And article 3 of the rules and order of proceedings reads as follows:

3. After this prayer the clerical secretary shall call over the roll of the clergy, to be furnished by the Bishop, and mark the names of those in attendance; and the secretary shall call over the names of the several parishes, missions or cures, when the certificates of the representatives having been presented, shall be examined by the secretary and a committee of two, to be named by the chairman for that purpose; and where found satisfactory, the names shall be recorded and read by the secretary.

The petitioner received the formal certificate of election from the incumbent of Sweetsburg. Much should be presumed in favour of such certificate, and the Returning Officer's Act ought to be presumed true and honest. That certificate was such presumptive evidence of Davidson's right to the office of lay delegate, that upon it, approved 11th of May, 1869, by the committee, and his name being recorded by the secretary, he ought to have been admitted to the Synod. The certificate, so approved, ought to have been held by the Synod then and there sufficient proof of Davidson's election. The decision of the chairman of the Synod was right; the overruling of it was wrong, and so was the erasing petitioner's name from the roll of delegates, and the inserting of Baker's instead of it.

The case has been presented not only on what was done in the Synod, but petitioner and defendant have also gone upon the merits of the election at Sweetsburg, and petitioner has to succeed upon this We see exactly all that passed there 29th March, 1869. The meeting was a curious one, and the incumbent presiding at it became perplexed by what took place, and was unsettled a little as to what to judge and do. Six at the meeting voted for Baker (if we include himself); three voted for Davidson. Baker was qualified to vote or to be elected; so were the three who voted for Davidson. The other five were not holders of pews or sittings, and had no title to pews or sittings, and had no vote. The church is a proprietary one, and has a title. Shufeldt explains it in his evidence in rebuttal. How different it is with Abraham Pickle and the others! As to these, could any of them maintain action against anybody as for disturbance to their possession thereof—*i. e.*, of any pew or sitting (under the Temporalities Act)? I think not.

The chairman at the election registered Thomas Cotton as a delegate to the Synod, and Baker as "elected by those who had no right to vote," and Davidson elected by those entitled to vote. (Two delegates were to be elected.) No proclamation or declaration of the result was made at the meeting, and none was necessary.

The certificate granted to Davidson by the chairman was so granted upon what he believed to be required by the constitution, article 2, above quoted. This article is said by defendant to be contrary to 22 Vic. cap. 139, and therefore illegal. But this must not control absolutely; it is to be taken with the 19 & 20 Vic. cap. 121. Following the 22 Vic. is the constitution of the Synod, and these three taken together control. The Temporalities Act 14 & 15 Vic cap. 176, has also to be considered to a certain extent, and it makes against defendant and his voters in a way, *e. g.*, as settling what is meant by holding a pew or sitting. The second section of this act enacts as follows: "That all pew-holders in such churches or chapels whatever, holding the same

by purchase or lease, and all persons holding sittings therein by the same being let to them, * * * after the passing of this act, by the corporation of such church or chapel, *and* holding a certificate from such corporation of such sitting, shall form a Vestry," &c. It is said, too, with some force, that the 31 Vic. has acknowledged the validity of the constitution of the Synod of Montreal, and so it has in enacting as follows: "Sec. 2. The said incorporated Synod shall have power from time to time to amend, repeal or alter the present constitution, canons, rules and regulations of the aforesaid Synod, &c, * * * but until so amended, repealed or altered, the constitution, canons, rules and regulations of the said Synod *presently* subsisting and in force, shall be and continue to be the constitution, canons, rules and regulations of the corporation aforesaid, created by this act." I think the constitution valid and binding.

The act of the public officer, with his testimony and the other evidence of record—that is, in favour of petitioner—is stronger than the evidence for defendant, and makes a good case for petitioner, whose petition is, therefore, maintained. The defendant is declared guilty of the usurpation charged against him by Davidson, and must be ousted. The petitioner, Davidson, is declared to have been duly elected, and entitled to his seat as delegate for Christ Church aforesaid. The Synod proceedings against Davidson, complained of, were unreasonable at the time they took place, and were and are illegal, and are overruled; and order must go to the Synod to admit the petitioner, Davidson, as a lay delegate from Christ Church, Sweetsburg, and reinsert his name as such in place of the defendant Baker's, in the roll of delegates; the whole with costs against defendant.

Judgment for petitioner.

ENGLISH REPORTS.

COMMON PLEAS.

Jackson v. Spittall.

Practice—Cause of action—British subject out of jurisdiction—Common Law Procedure Act, 1852, ss. 18 & 19.

The plaintiff sued a British subject living in the Isle of Man on a contract made there, the breach taking place within the jurisdiction of the Court. The plaintiff, under the Common Law Procedure Act, 1852, served the writ in the Isle of Man. The defendant, without waiting for the plaintiff to obtain an order to proceed, obtained an order to stay proceedings, on the ground that the whole cause of action did not arise within the jurisdiction.

Held, that the defendant was not bound to wait for the plaintiff to make an application to proceed before obtaining such an order.

Held also, that the phrase "cause of action" in the Common Law Procedure Act, 1852, s. 18, means the act on the part of the defendant, which gives the plaintiff his cause of complaint.

Held also, that section 19 is to be construed in the same way.

[18 W. R. 1162, C. P.]

The defendant in his affidavit stated that he had been served with a writ of summons for service out of the jurisdiction of the Court, and that the alleged cause of action, if any, wholly arose at Douglas, in the Isle of Man, out of the jurisdiction of that Court, and that no part thereof arose within it.

The plaintiff's attorney, in his affidavit stated that the action was brought to recover damages against the defendant, who is a resident in the Isle of Man, for a breach of an undertaking entered into by him with the plaintiff, in consideration of the plaintiff endorsing to him, at the request of Drinkwater, who was then indebted to the defendant, and to be held by the defendant merely as a collateral security, a bill of exchange or acceptance drawn by a company for £1,000, which the plaintiff held as trustee for Drinkwater, by which the defendant undertook that he would not part with the bill out of his possession, but would always hold the same without recourse to the plaintiff; and further the defendant, in violation of his promise, did part with the possession of the bill, and endorsed and negotiated the same to Drinkwater in Manchester, where Drinkwater resided and still carries on business. Drinkwater endorsed the bill to Buckley, Drinkwater having had full notice of all matters relating to the same, and after acceptance became due, the bill was dishonoured, the acceptors being a company in liquidation at the time of endorsement by Drinkwater to Buckley. The plaintiff was then sued upon his endorsement by Buckley in the Court of Exchequer: the action was defended by the plaintiff at the request of the defendant, and was tried at Manchester, when a verdict was found for the then plaintiff, and the plaintiff paid the amount of the verdict and the costs for defending the action. That the defendant was a witness in *Buckley* v. *Jackson*, and after the trial, the defendant, whilst at Manchester, requested the plaintiff to discharge the verdict and costs, and he undertook to refund the plaintiff. That this action was also brought to recover the amount paid by the plaintiff at Manchester on behalf of the defendant there, on his promise as above stated, and calculations were made between the plaintiff and defendant, as to the amount required to discharge the defendant's obligation to the plaintiff, and the defendant said he would proceed against Drinkwater for the wrongful endorsement.

The defendant in his affidavit of March 18th, 1870, states that he resides at the Isle of Man, and denies that he entered into an undertaking not to part with the acceptance, &c.; that the acceptance was not held by him as trustee, but as security for the payment of an acceptance of Drinkwater to him for £910; that the arrangement for giving up the bill to Drinkwater was made in the Isle of Man; that the plaintiff did not defend *Buckley* v. *Jackson* at his request, and that he was informed that the plaintiff was sued as the drawer of the bill.

There were other allegations in the affidavits filed by both sides immaterial to the present case.

On the 9th of April an order was made by Master Bennett on these affidavits — that the plaintiff do undertake to prove a cause of action which has arisen within the jurisdiction of the court against the defendant, and that the defendant be at liberty to appear within twenty-four hours after such undertaking being given; and in default of such undertaking, the suit and all

subsequent proceedings be set aside, plaintiff to pay the defendant the costs of the former action.

On the 2nd of April, upon plaintiff's application to rescind the above order, Baron Bramwell made the following order:—"That the order made herein by Master Bennett, directing payment by plaintiff to defendant of £5 10s., be rescinded. And as to the residue of the application to rescind the said order, I make no order."

Hughes having obtained a rule *nisi*, calling upon the defendant to show cause why so much of the order made by Master Bennett as was not rescinded by Baron Bramwell should not be rescinded,

Bridge showed cause on behalf of the defendant.

Hughes supported the rule.

The arguments and cases are set out in the judgment.

Cur. adv. vult.

The judgment of the Court (Bovill, C.J., and Keating, Montague Smith, and Brett, JJ.), was delivered by

Brett, J.—In this case the plaintiff sued the defendant, a British subject, living in the Isle of Man, upon an alleged breach of contract not to endorse a bill of exchange delivered to him as a security. The contract, it was said, was made in the Isle of Man; the breach by endorsing over took place in Manchester. The plaintiff, under the provisions of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), had served the writ of summons on the defendant in the Isle of Man. The defendant, without waiting for the plaintiff to take the next step of obtaining an order to proceed, took out a summons before the Master, and obtained an order to stay proceedings in this suit, on the ground that the whole cause of action did not arise within the jurisdiction of the Court. Upon this the plaintiff took out a summons before Bramwell, B., to set aside such order, and Bramwell, B., referred the matter to the Court. On the part of the plaintiff it was contended that the summons taken out by the defendant before the Master was premature, and therefore unauthorised; that the objection if otherwise valid, should only be taken when the plaintiff should apply for leave to proceed; and further, that the defendant's objection, if taken at the right time, was invalid, because in order to entitle the plaintiff to proceed, it was not necessary that he should satisfy the Court that the whole course of action, in the sense of every fact necessary to be proved in order to support the plaintiff's case, had arisen or taken place within the jurisdiction. On the part of the defendant it was contended that the summons before the Master was not premature: *Binet* v. *Picot*, 4 H. & N. 365, and *Diamond* v. *Sutton*, 14 W. R. 374; and that it was a fatal objection to any further proceedings in the suit by the plaintiff, that the whole cause of action, in the sense above-mentioned, did not arise within the jurisdiction. As to the first point we see no objection to the Master's order made with regard to the process of the Court, on the ground that it is made upon a summons taken out by the defendant instead of upon a summons taken out by the plaintiff. We agree with the decisions cited during the argument by the Court of Exchequer (viz., the cases hereinafter considered). The second point is one of great importance. Besides, its application to shipping contracts made in all parts of the world, the daily increasing trade with the more adjacent countries of the Continent, in the course of which numerous orders are given abroad, either to firms wholly foreign, or to British subjects resident and carrying on business abroad, but which orders are to be fulfilled in England, makes the question now before the Court, one of the greatest importance for mercantile interests. During the argument several decisions of the Court were cited. If in this case and those cited there had been an appeal to a court of error, we might have felt bound to decide in accordance with the latest decisions of the court of co-ordinate jurisdiction and have left the parties to appeal. But there is no such appeal; and, moreover, we find that the decisions are far from uniform. The cases relied on by the defendant are *Sichel* v. *Borch*, 12 W.R. 346; 2 H. & C., 954, which was an action by the plaintiff, as indorsee, against the defendant, as indorser of a bill of exchange. The defendant, who was a native of Norway, and carried on business in Norway, drew the bill there, and endorsed it and sent it by post to London, to H. Dresser and Co., who endorsed it to the plaintiff. The defendant was served in Norway with notice that the action had been commenced against him. The Court made absolute a rule to set aside the service, on the ground that the case was not within section 19 of the statute 15 & 16 Vict. c. 76. Pollock, C.B., and Martin, B., stated that the whole cause of the action must arise within the jurisdiction; that where the contract was made abroad, and the breach took place in England, the case was not within the statute. Pollock, C. B., referring evidently to the cases upon the construction of the County Courts Acts stated that it had been laid down in an analogous matter, that the term "cause of action," means "the whole cause of action." Pigot, B., expressed considerable doubt, but acquiesced in the decision. No previous case was cited. The former decision of the Court of Exchequer in *Fife* v. *Round*, 6 W. R. 282, was not cited, and the attention of the Court was not called to the difference of the rule applicable to the construction of statutes in questions of jurisdiction affecting superior and inferior courts. The next case relied on was *Allheusen* v *Melgarejo*, 16 W. R. 854, in which the defendant, a foreigner residing abroad, entered into a contract abroad with the plaintiffs to sell them a quantity of manganese, to be delivered at Newcastle-upon-Tyne. The Court, consisting of Blackburn, Mellor, and Lush, JJ., held that the whole cause of action did not arise within the jurisdiction, and therefore the case was not within the statute. They decided on the authority of *Sichel* v. *Borch*, and and they seem to have doubted the authenticity of the reports of the cases of *Slade* v. *Noel*, 4 F. & F. 424, and *Nettleford* v. *Funcke*, before Willes, J., at chambers (not reported). In the former decision of the Court of Exchequer, viz., *Fife* v. *Round*, a promissory note, by which the defendant promised four months after date to pay the plaintiff £150, was made in France, and delivered to the plaintiff there. The note was in the margin made payable at a London bank.

On being presented it was dishonoured. Bramwell, B., had made an order under section 18 of the Common Law Procedure Act, 1852, empowering the plaintiff to proceed. Upon a motion to set aside such order, it was argued that the cause of action did not arise in England, and the county court cases were cited. The Court, consisting of Pollock, C.B., Martin, Watson, and Channell, B.B., upheld the order; Pollock, C.B., and Martin, B., both stating that the cases upon the construction of the County Courts Act did not apply. In *Slade* v. *Noel* a cargo had been loaded abroad under a charter party made abroad, and the ship-owner claimed demurrage for delay at the port of discharge in England. Williams, J., at chambers, after, as it is stated, a careful consideration, held that the case was within section 18, and made an order empowering the plaintiff to proceed. In the case of *Nettleford* v. *Funcke*, Willes, J., in March, 1866, at chambers, held that on delivery of goods in England under a contract made abroad, an action brought for the price was within section 18, and made an order empowering the plaintiff to proceed. The same learned judge, in the case of *Allheusen* v. *Melgarejo*, which had been discontinued in the Court of Queen's Bench, and brought up on a new writ of summons in the Court of Common Pleas, after the decision above cited of the Court of Queen's Bench, made an order under section 18 giving leave to the plaintiff to proceed, and the plaintiff recovered large damages. This decision is reported in the *Weekly Reporter* of June 13, 1868 (16 W. R. 855), and the learned judge said, "I make this order according to the practice followed since the Act passed, and according to the construction of the Act which I have reason to believe was intended. The cases affecting the jurisdiction of the inferior courts are, I think, quite inapplicable. The superior courts had jurisdiction in such a case before the Act by proceedings in outlawry. They have such jurisdiction now on the subject-matter confessedly. If the defendant chooses to raise the question he can do so by motion, or perhaps by plea in abatement. I do not feel myself at liberty to depart from the usual practice without a decision of the Court in which the process is—viz., Common Pleas." Upon this state of the authorities, and in the absence of any appeal to a superior tribunal, we feel bound to enquire closely and anxiously for ourselves what is the true construction of sections 18 and 19 of the statute 15 & 16 Vic. c. 76. According to a familiar canon of construction, it is first desirable to consider what was the law at the time the statute passed. So far as relates to the question of jurisdiction, we apprehend that the superior courts of England did not decline jurisdiction in the case of any transitory cause of action, whether between British subjects and foreigners resident at home and abroad, or whether any or every fact necessary to be proved, in order to establish either the plaintiff's or the defendant's case, arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him when present in England. In *Ilderton* v. *Ilderton*, 2 H. Black. 145, Chief Justice Eyre, in discussing the question of the jurisdiction of the English courts to try questions arising abroad, and the fiction used as to laying the venue, says, (page 162), "Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it. But if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action the cause of which arises here, we have jurisdiction, &c. In the very infancy of commerce, and in the strictest times, as I collect from a passage in Brook, Trial, pl. 93, the cognisance of all matters arising here was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it; and in these days we should hardly hesitate to affirm that doctrine." In *Matthews* v *Erbo*, 1 Lord Raym. p. 349 "it was moved to set aside an execution upon an outlawry against the defendant, upon affidavit that the defendant was an alien merchant and lived beyond the sea, and so he will be out of the reach of the law." No objection was ever raised against the jurisdiction of the courts over the subject-matter; the difficulties which arose were always with regard to the mode of procedure. A British subject resident abroad could not be served there with a writ of summons. By a process somewhat intricate and tedious, but well established, he might be sued, nevertheless, to judgment and execution in respect of any causes of action over which the English courts had jurisdiction. The Court permitted a course of procedure against him which ended in his outlawry, and that being once established, the plaintiff proceeded to judgment and to an equivalent for execution against any property of the defendant in England. So with regard to a foreigner and alien, the Courts, by permitting a writ of *distringas* to issue against any property of his found within the jurisdiction, compelled him to appear, or pursued him to outlawry and judgment. And there is no trace of any objection ever having been maintained on the ground that in a transitory action there was no jurisdiction unless every fact necessary to be proved in order to support the action occurred within the jurisdiction. Such being the state of the law with regard to jurisdiction and procedure, the statute in question was passed. It is an Act to amend the process, practice and mode of pleading in the superior courts of common law, &c. It does not therefore, affect to give or to take away jurisdiction, but only to regulate process, practice and pleading in cases already within the jurisdiction. The mischief to be remedied is recited thus:—"Whereas the process, practice and mode of pleading in the superior courts of common law at Westminster may be rendered more simple and speedy; be it enacted." &c. The statute under the heading which precedes section 2, proceeds to deal with personal actions against defendants, whether in or out of the jurisdiction of the court: and in section 2 and subsequent sections deals not with jurisdiction, but with the writ of summons and the service of

it in the case of defendants residing, or supposed to reside, within the jurisdiction. Then, by section 18, the statute assumes to deal with the case of defendants being British subjects residing out of the jurisdiction: "In case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons," &c. In thus legislating with regard to the writ of summons, which is the commencement of the suit, there is no restriction or alteration of jurisdiction, and the kind of action is not here mentioned: it is not otherwise limited than by the heading before section 2, to the series of sections from section 2 to section 25, inclusive. The only limitation of kind of action, therefore, is that it must be a personal action. Section 18, then, having dealt with the writ of summons and the issue of it, proceeds to deal with the further continuance of the suit:—"And it shall be lawful for the Court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of a breach of contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made, &c, to direct from time to time that the plaintiff shall be at liberty to proceed in the action," &c. The order of the judge is not an order to enable the plaintiff to bring an action. The action is already brought by the issue of the summons. The court has already assumed jurisdiction if the action be personal and touching a subject-matter within the ordinary jurisdiction of the court. The order in question is an order made in the cause directing that the plaintiff may proceed in the action, that is to say, proceed in the action already previously instituted. Then arises the question in dispute, which is,—What is the meaning of the phrase "a cause of the action?" Now, in the drawing of the Act, that phrase is made applicable to two subsidiary phrases. If the section were expanded, it would read thus: "That there is a cause of action which arose within the jurisdiction or a cause of action in respect of the breach of a contract made within the jurisdiction." In the second collocation the phrase "cause of action" clearly does not mean the whole cause of action as contended for on behalf of the defendant. It means the breach of contract, which breach occurs out of the jurisdiction. But if the phrase "a cause of action," when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? Can the same phrase have two different meanings? Is not the natural reading rather this, that it means the same thing when applied to both? It is that which in popular meaning, and for many purposes in legal meaning, is, "the cause of action," viz., the act on the part of the defendant which gives the plaintiff his cause of complaint. In the first collocation, that is supposed to occur within the jurisdiction, in the second without the jurisdiction. If this be the true construction of section 18, it is also the construction of section 19, which is applicable to foreigners. By so reading the sections they are made applicable only to procedure, and not to jurisdiction. According to the title of the statute, and the recital of what it was intended to improve, they deal with the process and practice of the court. Section 24 shows that sections 18 and 19 are really substituted for the former intricate proceedings on a writ of *distringas* for the purpose of compelling appearance, or for proceeding to outlawry. If the construction contended for by the defendant be admitted, the statute, which is intended to apply only to the simplification of process and practice, is made to apply to jurisdiction; the phrase in the section which has been commented on is made to have two different meanings, and the jurisdiction of the superior court is limited and ousted by words in a statute, which, as it seems to us at least, do not clearly so enact. This last is contrary to a well-established rule of construction. For the reasons thus given, we are of opinion that the invariable practice of this court from the passage of the Act until now, has been and is correct, and that the Master's order in this case, staying further proceedings, was wrong and should be set aside.

Rule absolute.

CHANCERY.

Wanham v. Machin.

Mortgage—Sale of mortgaged property—Puisne incumbrancers—Costs of sale.

In a foreclosure suit by the second of several successive incumbrancers in which a sale was prayed, a decree was made and the estate sold, and the money paid into Court. *Held*, that the costs of the sale were not to be included in the costs of the suit, but each incumbrancer was to add his costs of the sale to his debt and be paid his principal, interest and costs according to priority.

[18 W. R. 1098.]

This was a question as to what was properly comprised in the costs of a mortgagee's suit.

The suit was instituted by a second mortgagee for foreclosure of the equity of redemption in the mortgaged property, but prayed for a decree for a sale instead of foreclosure.

There were incumbrancers subsequent in priority to the plaintiffs. A decree was taken for a sale, and the conditions of sale were prepared by one of the conveyancers to the Court. The conditions required the concurrence of the *puisne* incumbrancers in the conveyances to the purchaser. The property was put up for sale, and sold in lots to seven different purchasers, and the purchase money was paid into court.

The fund in court was sufficient to pay the first mortgagee his principal, interest and costs, but not sufficient to pay the principal, interest and costs of the plaintiffs in full.

It was not disputed that the fund in court must be applied first in payment of the costs of the suit, but the question was whether the costs of the sale as distinguished from those of the suit, and, in particular the cost of obtaining the concurrence of the *puisne* incumbrancers in the conveyances were to be added to the costs of the suit, or each incumbrancer was only entitled to add his portion of such costs to his principal and interest.

Jessel, Q. C, and *Batten* appeared for the plaintiffs, and contended that the proper course

was not to include the costs of the sale in the costs of the suit, but for each incumbrancer to add his costs of the sale to his principal and interest. It made no difference that the prayer was for sale and not for foreclosure. They referred to *Barnes* v. *Racster*, 1 Y. & C. C. C. 401; *Wild* v. *Lockhart*, 10 Beav. 320

Tyssen appeared for the first mortgagee and for the purchasers, but as it appeared that the first mortgagee would be paid principal, interest and costs in full in any case, he took no part in the argument.

Southgate, Q. C., appeared for the *puisne* incumbrancers, and contended that it must be assumed that their concurrence in the sale was required for some sufficient reason, and as the sale was primarily for the benefit of the prior incumbrancers, the costs of it ought to be included in the costs of the suit. He referred to *Hepworth* v. *Heslop*, 3 Hare, 485, and *Upperton* v. *Harrison*, 7 Sim. 444.

Lord Romilly, M R.—This is a case of a description which I think, on considering the point, and looking at the authorities, has not yet been decided. The question is this. It is a rule that a mortgagee is entitled to have his costs added to his security, and paid according to the order of priority of his incumbrance. The first mortgagee is entitled to his principal, interest and costs in all cases.

There are some distinctions between the costs of a suit and the costs of the sale of property in a suit. One of these distinctions is this. A mortgagee, having a mortgage of the property of a testator or intestate, and being also at the same time an unsecured creditor, files a bill for the administration of the estate, which includes a realization of the mortgage. Then the suit is an administration suit, and not a mortgagee's suit, and the costs are the first charge upon the estate. And if it necessary in the suit to sell the real estate, and the mortgagee consents to the sale, he is entitled to his costs before anything else, but all the costs of the sale are not to be paid in the absence of any arrangement. There may be steps taken which may alter the case. The second mortgagee may only consent on having his costs of the sale. Generally they are so small that the mortgagee agrees that they shall be paid first. Nothing like that has happened here, and I am informed that the costs are very great. I am of opinion, therefore, that the first mortgagee is entitled to have his principal, interest and costs paid first, and the same rule must apply to all the subsequent mortgagees.

In some cases a difference is made where it is necessary to sell certain property, and ascertain the rights of parties, and there are various parties to the sale arising out of different claims upon the real estate. But the costs of realizing the real estate ought not in general to be thrown on the proceeds of the sale in the first instance, but the principal, interest and costs of the mortgagee are to be paid before any other person is paid anything.

The only question which arises here is this, where the mortgagee institutes a suit for foreclosure and asks for a sale instead, and thereupon the *puisne* incumbrancers, being parties to the suit, concur, whether the costs of the sale ought not to be paid in the first instance, before the mortgage debt. Now on the whole, and considering all the cases, I do not think that, in the absence of any contract, I can make a distinction between the costs of the sale, and the other costs which a mortgagee is entitled to add to his security. They are both necessary for realizing the mortgaged property. The first mortgagee is entitled to be paid his principal, interest and costs, and I am unable on principle and authority to discover that any distinction ought to be made with respect to subsequent incumbrancers. The principle I have referred to regarding administration suits does not apply to the present case, and I only mention it to show that I have not neglected it.

Bubb v. Yelverton.

Ornamental Timber—Equitable waste—Tenant for life and reversioner—Injunction—Damages.

Although a reversioner is entitled as of right to have the tenant for life restrained from felling ornamental timber, yet, if he wait until after the felling of the timber, he will only be entitled to recover damages where actual damage to the reversion is proved.

[18 W. R. 1146, M. R.]

In February, 1866, the late Marquis of Hastings, the then owner in fee of the Donington Park Estates, contracted with Mr Charles Abney Hastings to sell the same to him reserving to himself a life estate without impeachment of waste, and in August, 1866, the purchase was completed. In March, 1866, the Marquis, acting under the advice of Mr. Thomas, an eminent landscape gardener, felled a number of trees growing upon various parts of the property, some of which grew in the shrubbery adjoining the castle. These trees consisted of elms, ash, spruce fir, larch, &c., and were sold in one hundred and five lots, producing £338. It appeared that Mr. Hastings, who at the time was, in equity, the reversioner, was aware of this proceeding, but took no steps in consequence. In November, 1866, the Marquis died, and this suit was instituted for the administration of his estate.

Mr Hastings now brought in a claim as reversioner, against the estate of the Marquis, for damages in respect of equitable waste committed by the felling such trees as came within the description of ornamental timber, or timber planted for shelter, and the question now came before the Court upon adjourned summons.

C C Barber and *Dauncy*, in support of the contended claim, that the trees felled came within the description of ornamental timber, or timber left standing for shelter, which the reversioner was entitled to have preserved as against a tenant for life without impeachment of waste, it not being shown that the trees felled were either thinnings or doing damage by their standing.

Sir R. Baggallay Q. C., *Jessel* Q. C., *C. Hall*, *Pemberton*, and *Rowcliffe*, for the several parties to the suit, were not called on.

July 29.—Lord Romilly, M. R. said that the law on this question had been misunderstood by the claimant. Where a tenant for life was felling trees planted for ornament or shelter, the reversioner had an absolute right to restrain him; but when the reversioner stood by and saw him fell

the trees, and afterwards applied to the Court, the case became one for damages only, and the sole question was how far the inheritance was actually damaged by the felling of the trees. If Mr. Hastings had applied during the felling of the trees, the Court would have granted an injunction, assuming that the cutting of the same was not beneficial to the adjoining trees. But Mr. Hastings had not done so, and the position resolved itself into whether the reversioner had suffered any damage. His Lordship was of opinion upon the evidence that he had not, except, perhaps to one large ash, which, it was said broke the sky line, and was ornamental where it stood. But upon the whole, he was of opinion that the acts of the Marquis had decidedly not been injurious to the property, and he therefore dismissed the summons.

EXCHEQUER CHAMBER.

Henkel and another v. Pape.

Liability for mistake in telegram—Telegraph clerk—Sender of message.

The defendant, by letter, desired plaintiffs to send him a sample Snider rifle, and added that he could probably fix an order for fifty. A few days afterwards he telegraphed to plaintiffs to send him "three" rifles, but the telegraph clerk, by mistake, telegraphed for "The" instead of for "Three" rifles, and the plaintiffs sent fifty rifles to the defendant, who refused to accept more than three of them.

In an action to recover the price of the forty-seven rifles from the defendant,

Held, that the defendant was not responsible for the mistake of the telegraph clerk, and was not liable,

[Ex., 19 W. R. 106.]

This was an action for goods bargained and sold, and for goods sold and delivered by the plaintiffs to the defendant; the defendant, except as to £7 which he paid into court, pleaded that he never was indebted.

The plaintiffs are gun manufacturers, having offices in London and a manufactory in Birmingham; the defendant is a gun-maker at Newcastle.

On the 3rd of June the defendant wrote to the plaintiffs asking them to "send sample Snider, and forward it immediately, as he thought he could fix an order for fifty." The rifle was accordingly immediately sent from Birmingham to the defendant. On the 7th of June the plaintiffs received the following telegram:—"Pape, Newcastle, to Henkel: Send by mail '*the*' Snider rifles same as pattern; must be here in the morning; ship sails then."

The plaintiffs accordingly sent off fifty rifles to the defendant. On the 9th they received the following letter from him:—"I am surprised that you sent fifty instead of three rifles; my telegram was to send 'three.'" The fact was that the telegraph clerk had by mistake telegraphed the word "the" instead of "three." The plaintiffs insisted on the defendant's taking and paying for all the rifles, but he declined to take or pay for more than three. The plaintiffs brought this action. The defendant paid £7 into court as the price of the three rifles, and contended that he was not bound to take or pay for the other rifles, and that he was not responsible for the mistake made by the telegraph clerk.

The case was tried at the last summer assizes at Guildford, before Blackburn, J., when the above facts were proved and a verdict was directed for the defendant, with leave to the plaintiffs to move to enter the verdict for them for £90 15s. less the sum of £7 paid into court.

Chitty moved accordingly.—He contended that the telegraph clerk was the agent of the defendant for the transmission of the message, and that the defendant was therefore liable for the mistake; and urged that the defendant had not taken the best means in his power to prevent mistakes, as he might have had the telegraph repeated, as appeared from a notice on the back of the telegraph form in these words—

"Telegrams may be repeated at the request of the sender, if he desires to adopt this extra security against risk of error, by being sent back from the office at which they are received to the office from which they are forwarded. The charge for repetition is one-half the ordinary tariff."

And he also urged that as the Post-office authorities were not liable for the mistake, it followed that the loss must fall on either the plaintiffs or the defendant, and that the latter ought to suffer because he as the sender of the message had entered into a contract with the Post-office authorities, whereas there wes no privity between the plaintiffs as the receivers of the message and the Post-office authorities: *Playford* v. *The United Kingdom Electric Telegraph Company, Limited*, 17 W. R. 968, L. R. 4 Q. B. 706.

The Court (Kelly, C B., Bramwell, Pigott, and Cleasby, BB) held that it was clear that the defendant had not entered into a contract for the purchase of the fifty rifles, but had only contracted to purchase three rifles, that the Post-office authorities were only defendant's agents to transmit messages in the terms in which he as the sender had delivered them, and that they had no authority to do more, and that therefore the defendant could not be made responsible because the telegraph clerk had made a mistake in transmitting the message; they accordingly

Refused the rule.

UNITED STATES REPORTS.

COURT OF APPEALS OF N. Y.

Herrick v. Woolverton.

A note payable on demand with interest is not a continuing security which becomes due only on demand; it is a debt in presenti, and a third party taking it ninety days after its date takes it subject to all the original defences. *Merritt* v. *Todd*, 23 N. Y., construed.

[2 L. G. 34.]

Appeal from an order of the General Term, Third District, granting a new trial on a verdict rendered at the Circuit, in favor of the defendant.

The action was brought on a promissory note made by the defendant, on the 9th day of February, 1861, for $1,500 on demand, with interest, to the order of H. D. Hawkins, and immediately on the same day endorsed by him, and delivered to Jonathan R. Herrick, who was the original holder of endorsee; who continued to hold it un-

til the 28th of April, or 1st of May, 1861, when he transferred it to his brother, Delaus W. Herrick, the plaintiff.

The note was executed and delivered to Jonathan R. Herrick upon a transfer by him to the defendant of fifty shares of the capital stock of the Bank of Albany. The plaintiff defendant, Hawkins, and Jonathan R Herrick, were at the time merchants, doing business in Broadway, in the city of Albany; and before the commencement of the action, the defendant duly tendered the stock, and demanded the note, which was refused.

The question of fact litigated at the trial, in regard to the execution and delivery of the note to Jonathan R. Herrick, was, whether as between him and the maker, it was, or was not, without consideration; or rather, whether it was given, as the defendant claimed, as a mere memorandum, by way of security for the return of fifty shares of the capital stock of the Bank of Albany, borrowed by the defendant from Jonathan R. Herrick; or, as claimed by the plaintiff, given to secure the payment for said fifty shares of stock purchased of said Herrick by the defendant. The plaintiff claimed that it was a sale of the stock, and that the note was given for the purchase price. The defendant claimed the transaction was a mere loan of the stock, to secure the return of which the note was made. Upon this issue the evidence was conflicting. No evidence was given by either party to show whether or not the plaintiff before, or when he took the transfer of the note, had any actual notice of the claim of the defendant; that it was executed to secure the return of the stock, or to shew whether or not the transfer of it to him from Jonathan R. Herrick was for a valuable consideration.

The court charged the jury among other things, that the note having been given nearly three months before it was transferred to the plaintiff, and all the parties living in the same street, doing business with each other, it was notice to the purchaser to inquire as to the note; and if he failed to make such enquiry, the note was open to any defence existing between the original parties. To which the plaintiff's counsel excepted.

The counsel for the plaintiff asked the court to charge that the note being payable on demand, *with interest*, it was a continuing security, and did not become due until an actual demand was made. The court refused so to charge, and the plaintiff's counsel excepted.

The jury found that the transaction was a mere loan of the stock, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose, and rendered a verdict for the defendant.

The plaintiff made and served a bill of exceptions, which was ordered to be heard in the first instance at the General Term, where a new trial was granted, with costs to abide the event, and the defendant appealed to this court, pursuant to the last clause of subdivision 2, sect. 11, of the Code.

Opinion by Foster, J. Delivered March, 1870.

The jury having found that the transaction between the defendant, who was the maker of the note, and Jonathan R. Herrick, who was the real payee or first holder, was a mere loan of the bank stock from the latter to the former, and that the note was made as a memorandum by way of security for the return of the stock, and for no other purpose, they virtually found that the paper, though in form a promissory note, was never intended as such between them; that it was issued to be used only for the purpose above specified, and was never intended by them to be issued, used, or circulated as a *promissory note*, and doubtless, as between them, it could not be claimed to be such; at least, unless default should be made by the defendant in the return of the stock, and it cannot be claimed, upon the evidence in the case, that such default had been made.

An important inquiry, therefore, is whether at the time the note was transferred from the payee to the plaintiff, it had become due, in such sense as to be dishonored; for if it was, then the plaintiff took it subject to all equities between the payee and maker, and he could not recover upon it, even though he took it without any actual notice of the defence and for a valuable consideration; for in such case the law implies notice to him of all exising equities or defences which the maker had to it as against the payee, and such presumption is conclusive.

If, therefore, the note was dishonored when the plaintiff received it, the charge of the judge and his refusal to charge as requested by the plaintiff's counsel were correct. This proposition of law is not disputed, and is well established.

The uniform consent of authority in this State was, that a note payable on demand must be presented within a reasonable time, or it would be deemed due and dishonored, so that a negligent transferee would take it subject to all equities existing between the original parties; and that the rule applied, whether the note was payable *with interest* or not. *Furman* v. *Haskins*, 2 Cains, 369; *Losee* v. *Durkin*, 7 J. R. 70; *Sice* v *Cunningham*, 1 Cowen, 397, where the same rule was held between subsequent holder and endorser. And *Wethey* v. *Andrews*, 3 Hill, 582, gives the same rule as applicable to notes on demand, *with interest*, holding that a note on demand with interest is a lasting security, but applying the rule to it that the demand must be made within a reasonable time; and says, that notes on demand, without interest, are due immediately.

The rule, as to reasonable time, which has been applied to such notes, has been quite different from the rule, in that respect, applicable to checks, as between drawer and holder, and to drafts or bills of exchange, as between drawer or endorser and holder, which requires them to be presented without delay. The rule as to such notes, requiring them to be presented within such time, as under all the circumstances of the case, and the situation of the parties, the court shall adjudge as matter of law, to be reasonable between them. In *Furman* v. *Haskins*, the note was held dishonored, where the transfer was made eighteen months after its execution. In *Losee* v. *Durkin*, where no special circumstances appeared, the court held, where the note was transferred two and a half months after it was executed, that in an action brought thereon by

the transferee, the maker might prove a payment, made while it remained in the hands of the payees, and in that case the note was payable *with interest*.

In *Sice* v. *Cunningham*, where the action was by the endorsee against the endorsers, it was held, that a note payable on demand, was due presently, and must be demanded within a reasonable time, and that a delay of five months in making demand of the maker, discharged the endorser; and the court also held, that proof of a parol agreement to vary the time of payment fixed by the note, could not be received.

In *Wethey* v. *Andrews*, the Supreme Court, for the first time noticed any distinction between demand notes, with or without interest. That was an action of the subsequent holder against the maker of a note on demand with interest. It was transferred from the payee to one Grimshaw, a purchaser thereof, within a week after it was executed, and within about a month after its execution he transferred it to the plaintiff, who paid him the money for it. The defendant, the payee and the first transferee, all lived in the same village, and the plaintiff lived within two and a half miles of them; and the defence offered was, that the note was executed without consideration. The plaintiff recovered, the court holding that the cases furnish no principle for fixing the time with exactness, when a negotiable note, payable on demand, shall be deemed dishonored, so as to let in a defence against the payee, as against one to whom it has been negotiated; that the note was *with interest*, and came to the hands of the plaintiff some four or five weeks after it was executed, and that no law adjudges such a note to be dishonored so soon after its date. In delivering the opinion, Cowen, J., says in substance, that if the note had not been on interest he should have thought it right to presume it had been demanded and payment refused, perhaps even at the time when Grimshaw obtained it; but he thought the contrary was to be presumed with regard to one which bore interest, and thought it would be contrary to the general course of business to demand payment short of some proper time for computing interest. He also cited the case of *Barough* v. *White*, as reported in 6 Dowl. & Ryland, and in 4 Barn. and Cres., as showing that such a note in England is considered as a continuing security and is not dishonored until payment is demanded and refused; but we are not informed that the court adopted that rule, and the whole case shows that it was meant to decide, and that such a note is not due or dishonored immediately.

Now, the precise question before the court in *Wethey* v. *Andrews*, was whether, in an action by a subsequent holder upon a note on demand, with interest, transferred by the payee *within a week* after its inception, the maker could set up the defence existing between him and the payee that the note was without consideration, upon the sole ground that it was dishonored by the delay of a week without demand for payment. The court was doubtless correct in its decision, and correct in saying that there was no case holding such a note to be dishonored; and in that respect, I think there is no distinction, in the cases to which the court alluded, between such notes and those payable on demand, without interest; for I am not able to find any case which declares a note on demand, without interest, dishonored by not being demanded or paid within a week after it is executed; and although, in the opinion, the judge treats the the case as though the material transfer took place four or five weeks after the making of the note, it is actually certain that no such question was involved; for it is perfectly clear, upon principle and authority, that if the transfer to Grimshaw was before the note was dishonored, the subsequent holder would succeed to all his rights as between him and the maker, irrespective of all questions of notice to or of valuable considerations paid by such subsequent holder. It would seem that the judge supposed that the rule held in the case of *Barough* v. *White*, which he cited, was different in England in regard to notes on demand, *with interest*, from what it was in regard to demand notes not on interest; and if so, I think he was mistaken. But whether the *opinion* expressed by the judge in *Wethey* v. *Andrews* was correct or not, it must be conceded that the law of that case was correctly decided.

The Supreme Court, in the case at bar, followed what was supposed to be the principle adopted by this court in the case of *Merritt* v. *Todd*, 23 N. Y. 28. It is doubtless true that this court held, in that case, that a promissory note, payable on demand, with interest, is a continuing security; that the endorser remains liable until an actual demand of payment; and that the holder, as between him and the endorser, is not chargeable with neglect for omitting to make such demand within any particular time; and whether the reasoning upon which the decision was based be correct or not, such is the decision of this court. It, however, only *decides* what the law is between holder and endorser; and the chief judge, in his opinion discriminates between that case and such as the one before us, and says: "It may be well to observe that the present question is not identical with the one which arises when, after the transfer of such a note, the maker seeks to introduce a defence existing against the first holder. The lapse of time, or the non-payment of interest after the regular period, or period for such payment have passed, may be sufficient to put the purchaser on inquiry, or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, *that a demand had been actually made and notice given to the first endorser, so as to charge him, while at the same time the maker would be let in to defend, if he had any defence.* Questions of charging the endorser, therefore, and questions of allowing an original defence to the maker may depend on very different considerations." In other words, that, as to the maker, the note might be considered dishonored, while, at the same time, as between the holder and endorser, the former has been guilty of no laches.

It is clear to my mind, that this court did not intend to decide what the rule should be as between maker and holder, but only as between holder and endorser, and therefore it cannot be claimed, as the Supreme Court seemed to suppose, that their decision in the case before us was required and controlled by the case of *Mer-*

ritt v. *Todd*. Nor does it prevent us from determining the questions presented here, according to the decisions in other analagous cases. In fine, it decides nothing in regard to such notes, as between maker and holder. And I am not aware of any case in this court, or in the Supreme Court, except the decision in this case of the court below, which in terms dissents from the ruling in *Losee* v. *Durkin*, or attempts to overrule it; and that case which was decided in 1810, held that such a note as this was dishonored when it had been held by the payee for two months and a half, so as to let in the defence against the subsequent holder, by payment to the first holder, while he owned the note.

It may be, that, as against an endorser of such paper, he may be holden, though the maker should have a defence arising between him and a first holder of it, for the reason that, by endorsing the note, he submits his liability without any certain fixed limits as to time, and to some extent consents to have his rights affected by the action of both maker and holder, even though as between *them*, it is due at once, so that the maker may pay it at any time; and the holder may demand payment, or sue the maker without demand at any time; that having endorsed such paper he has no right to complain that neither of them has taken such steps as to retire the note, or fix his liability at an earlier day.

It must be conceded, that under the rule which has obtained in this State, there has always been some doubt and uncertainty when such a note as this would become dishonored by want of demand or non-payment; but such uncertainty need not subject parties to any risk, where due caution is exercised.

I think it is not correct to say that such notes are *intended* for circulation from hand to hand as commercial paper. It is true that they do so circulate to some extent; but, generally, the notes which are issued and used for circulation are payable at a certain day, and in regard to which all the parties know when and how the liabilities of endorsers are to be fixed or discharged.

There is no good reason why such notes should circulate as commercial paper, any more than that paper payable at a time certain, and which is past due, should perform that office; for both alike must be paid whenever the holder requires it. And why should either kind be circulated? The obligation of the maker of either has matured, or, at farthest, matures on demand, which in both cases may be made at once; and if the holder wants to raise money on them, why not apply for payment, and receive it from the party from whom it is due, instead of selling it to some one else, who may the next moment make such demand? The very fact that the holder of such paper offers it for sale or circulation, seems to imply that there is some reason not apparent why he does not demand its payment of the maker. And surely no one can doubt that such paper *is* legally payable immediately after it is issued, if the holder demands it.

Independent of authority, the application of the rule which is held between holder and endorser in *Merritt* v. *Todd*, to the case of holder and maker would leave the time when the note would be payable quite as uncertain as it would be when it becomes dishonored under the rule as claimed by the appellant, while all the maker's actual intentions in issuing the paper might be frustrated; and he must have no right to pay it until the holder choose to demand it. For it cannot be that such note, as against the holder, is not payable until he chooses to demand it; and that, at the same time, the maker may pay it when he pleases. The rule adopted in *Merritt* v. *Todd*, as applied to the endorser, is that the note is due *only on actual demand*, and if it is applied as against the maker, it must be accompanied with all its legal consequences; and, of course, while the holder can require payment sooner or later, as he chooses; the only certainty on the part of the maker is, that he must be certain to have the money ready whenever it is called for, and yet continue liable to pay interest without any right to compel the holder to receive payment until he chooses to do so. And while such rule will enable the holder to carry out any intention that *he* may have had, to loan his money for such a time as is usual when made on the security of commercial paper, it affords no safeguard against a change of such intention on his part, and leaves any such intention of the maker without any protection whatever; for the note is due when demanded. The holder may be as vigilant or negligent as he pleases. The maker and endorser are bound to wait his time; and the only law of the case is his will. If we adopt it in this case, we should change the well established principle, that as to such a note, the statute of limitations commences to run from its date, so that it should commence only from the time of demand made, and thus add still farther to the security of the holder, and to the prejudice of the maker.

I think the case of *Merritt* v. *Todd* has extended the principle of continuing security in such a case to the very verge; and that to apply it between holder and maker would be putting the maker in the power of the holder to an extent which is entirely unnecessary. If it is the intention of parties that paper executed between them shall be a continuing security, and as a promissory note for the term of time at which interest is annually computed, it is much better that the paper should be made in such form as shall evidence such intention more clearly, and to give the parties the benefit of it, than to change the law so as to benefit the holder only.

In this country the law is, that a promissory note, payable on demand, unless demanded within a reasonable time, is considered as overdue and dishonored: *Ranger* v. *Cary*, 1 Metc 369; *Croswell's Executors* v. *Arrot*, 1 Sergt. & R. 180; *Loomis* v. *Pulver*, 9 J. R. 244; *Van Hoesen* v. *Van Alstyne*, 3 Wend. 75, 79. And the rule is the same even if expressed to be payable with interest; *Thompson* v. *Hale*, 6 Pick. 259; *Sylvester* v. *Crapo*, 15 Pick. 92; *Newman* v. *Kettelle*, 13 Pick. 418; *Wight* v. *Foster*, 13 Pick. 419; *Nevins* v. *Townsend*, 6 Conn. 5; *Losee* v. *Durkin*, and *Sice* v. *Cunningham*, *infra*. And, as in this State, no absolute measure of this reasonable time has been fixed. A day or two (*Field* v. *Nickerson*, 13 Mass. 131, 137), seven days (*Thurston* v. *McKenn*, 6 Mass. 428), and even a month (*Ranger* v. *Cary*, 1 Metc. 369), is not too long. While eight months (*American Bank* v. *Jenness*,

2 Metc. 288; *Ayers* v. *Hutchins*, 4 Mass. 370), three months and a half (*Stevens* v. *Brice*, 21 Pick. 193), and even two months and a half (*Losee* v. *Durkin*, 7 J. R. 70; and *Sice* v. *Cunningham*, 1 Cowen, 397, 404), have been deemed sufficient to discredit a note.

The statute of limitations commences to run from the date of a note payable on demand, whether without interest: *Newman* v. *Kettelle*, 13 Pick. 418; *Larson* v. *Lambert*, 7 Halst. 247; *Kingsbury* v. *Butler*, 4 Verm. Report, 458, or whether it be with interest: *Mason* v. *Mohawk Ins. Co.* 13 Wend. 267.

Cowan, J., in *Wethey* v. *Andrews*, and the chief judge, in *Merritt* v. *Todd*, appeared to suppose that in regard to the time when demand notes became due, there was a difference in England between those payable with interest and those on demand merely. And yet I think it will be found that no such distinction prevails there.

Formerly notes on demand were held to be due immediately: *Coop* v. *Doncaster*, Cro. Eliz. 548 Where it was contended that the said demand was parcel of the contract, so that the money was not due until demand, and that a demand by bringing the action would not do, but the court said, the duty of payment was "a duty maintained, and, therefore, these need no demand, as in other cases:" *Remhall* v. *Boyle*, 13 Modern Rep. 38. Where in an action upon a note payable on demand, it was moved in arrest of judgment that no demand was alleged in the declaration; but the court held it to be a debt *in prœsenti*, and that it was a debt plainly precedent to any demand. *Collins* v. *Demming*, 3 Salk, 227, decides the same point, and also holds that the statute of limitations commenced running from the date of the note. And 15 Viner's Abr. 103, note, is to the same point.

It is assumed that the rule in England now is, that a note payable on demand with interest, is a lasting security, and is not dishonoured until payment is demanded. In *Barough* v. *White* (as reported in 4 Barn & Cres. 325), which contains a report of what was said by each of the judges, the question was whether in an action brought by a subsequent holder of a note, on demand, with interest, for which he had paid value, the maker should be allowed to prove the declarations of the first holder while he owned it, that he gave no consideration for it to the maker. It was held that such declarations could not be given. And Bailey, J., in his opinion, says: "In this case no demand was proved, and the note being made payable with interest, to Arnott or order, makes it probable that the parties contemplated that the note should be negotiated for some time." And he also said, that the defendants did not identify the first holder with plaintiff, and that for these reasons the evidence was properly rejected. The three other judges placed their decision on the ground, that the declaration of a prior holder of a note cannot be given in evidence against a subsequent one, but that such alleged facts must be established by other proof. And such is the well settled law in this State. It is true that Littledale, J., also said he thought the note not overdue, and that it seemed to him that it was a lasting security. He, however, does not allude to the fact that it is with interest; and Holroyd, J., says it was not overdue, "for a note payable on demand is not open to the same suspicion, as a note overdue which is made payable at a particular time." In *Brooks* v. *Mitchell*, 9 Mees. & Wels. 15, it was decided that a promissory note payable on demand, with interest, was not to be treated as overdue, so as to affect an endorsee with any equities against the endorser, merely because it was endorsed several years after its date. Not an allusion is made by any member of the court that the note was on interest, and Parke, B., reiterates the assertion, that a promissory note payable on demand, "circulates for years," and "is current for any length of time." And the syllabus of the case takes no notice that the note was with interest.

But I have said, that in England there is no difference, in this respect, between notes on demand with interest, and notes on demand, merely. And I think the manner in which these two cases are treated by the judges, shows that they understood the rule to be, and that they were only applying the same rule to these notes, which they consider applicable to all other notes payable on demand. In *Haywood* v. *Watson*, 4 Bingham, 496, the action was against the maker on a note as follows: "On demand, I promise to pay to Cyrus Morrell, or order, £1,000, value received." Which passed to the plaintiff as subsequent holder long after it was executed, and the defendant attempted to set up a defence to it as against the first holder. But the court ruled that the plaintiff was entitled to recover on the ground, that when the plaintiff took the note it was not dishonored. And Parke, J., said "For though the note was made in 1824, it was payable on demand, and therefore could not be esteemed overdue till demand had been made." And the note was not with interest. I do not know how the English decisions on the subject are to be reconciled, for these cases hold, in conflict with the previous decisions, that all demand notes are continuing securities, and are not overdue or dishonored until actual demand, and yet they continue to decide that the statute of limitations commences to run against them from their date: *Norton* v. *Ellam*, 2 Mees & Wesb. 461. The action was on a note by which the maker promised to pay £400 on demand with simple interest, and the only question presented to the court was, whether the statute ran from the date of the note or from time of the demand. The counsel attempted to draw the distinction that the note was payable with interest, and therefore could not be due immediately, but the Court of Exchequer unanimously repudiated the idea, and say: "Then is there any difference when it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*." And as to notes payable on demand that do not stipulate for interest, the English decisions are uniform in declaring that the statute commences to run from their date.

I think, upon principle and authority, the note in question was dishonored at the time it was transferred to the plaintiff. And that neither the wants or convenience of business call for any change of the rule.

The charge of the judge therefore, and his refusal to charge as requested, were correct. The order of the General Term should be reversed, and the judgment rendered for the defendant on the verdict.

For reversal, Earl, C.J., Grover, Hunt, Foster, and Smith, JJ.

For affirmance, Lott and Sutherland, JJ.

Order of General Term reversed and judgment for defendant.—*American Law Times.*

GENERAL CORRESPONDENCE.

Payment into court—Costs—C.L.P. Act and Rule of Court.

To the Editors of the Law Journal.

Dear Sirs,—In reading Mr. Harrison's new Common Law Procedure Act, a discrepancy struck me as existing between section 102 of the Act and Rule 12, in regard to payment into Court. According to the section in the Act it would seem as if a defendant succeeding on the issue as to the balance of the claim over and above amount paid into court, would be entitled to the whole costs of suit, although the Rule says the costs would commence with "instructions for plea."

Further, by the section, if the plaintiff does not accept the amount paid into court in satisfaction, it would seem to be implied, that he would not be entitled to any costs, whereas the Rule gives costs up to payment into court. Has the point ever been decided in our courts?

There seems to be a difference between the English Act and ours (sec. 99), as our Act allows payment into court without a judge's order only in case of a *sole* defendant. The English Act is worded differently, and applies as well when *all* of the defendants pay in, the only necessity for an order being when such payment is made by one or more of several defendants.

Supposing a plea of *tender*, and payment into court on that plea, what is to prevent a plaintiff from taxing costs under the Rule?

Yours truly, A Barrister.

[We do not doubt but that there is an inconsistency between the section and Rule of Court referred to by our correspondent. The section appears to relate to a case where payment of money is pleaded in bar of the cause of action, which, if plaintiff refuses to accept in satisfaction, and there is only one issue, viz., the issue as to the sufficiency of the payment, if found for defendant, entitles defendant to judgment and costs of suit. The rule appears to apply to a case where, besides the issue on the plea of payment of money into court, which money the plaintiff accepts in satisfaction, there are other issues in respect of other sums, or other causes of action in the same action, and defendant succeeds in defeating the residue of the claim, in which case he is entitled to the costs of the cause in respect of the defence commencing at "instructions for plea," but not before.

This we take to be the distinction between the section of the Act and the Rule of Court.

When the money paid into court is accepted in satisfaction, and the only issue is on the plea of payment into court, plaintiff is entitled under the section to the costs of the suit. If other issues, then plaintiff is entitled under the Rule of Court to the costs of the cause in in respect to that part of his claim so satisfied, not to the time the money is paid in and taken out, without reference to the other issues.

Eds. L. J.]

Husband and wife—Trespass.

To the Editors of the Law Journal.

Gentlemen,—Can you give me any information upon the following point: A., an infant having a guardian appointed by Surrogate Court, marries. Before coverture a trespass is committed upon real estate of infant. In whose name can the suit be brought? Must the husband necessarily be a party? Can the infant sue in her own name by her guardian, ignoring the husband?

An answer to the above will greatly oblige,

An Old Subscriber.

County of York Winter Assizes will commence on the 9th January, 1871.

The Commissioners to revise the Statutes of the United States—Messrs. Chas. P. James, Benjamin Vaughan Abbott and Victor C. Barringer—have organized this Fall in Wash-

ington, and are pursuing the work assigned them. That task is no less than a complete rewriting of all the general and permanent laws of the United States upon a new and orderly arrangement, and with corrections embodying all the repeals and amendments; in fact, the law "as it is" of the National Goverment. Such tasks are usually prosecuted upon the plan of assigning to each Commissioner one share of the entire field, which he works out alone, and submits to his colleagues for revision. The Washington Commissioners are pursuing a different method. They meet daily as a board, and are examining the statutes, section by section, in their order, beginning with the latest, for the purpose of determining as to each section, whether it has been repealed or amended, whether it is of general importance, warranting its being incorporated in the new statutes, and under what chapter of the new arrangement it ought to go. The sections are marked in the margin, and, as the work proceeds, are to be cut out by a clerk, and assorted to the proper chapters. This preliminary labor will give each Commissoner a reliable collection of the existing provisions of law which the board have deliberately decided should be embraced in any chapter which he undertakes to draft, with memoranda of most of the repeals and amendments. This must very much facilitate the ultimate revision. The Bench and Bar of the country will be glad to know that it is the intention of the Commissioners to prosecute the work to completion at the earliest possible date.—*Legal Intelligencer.*

[It is somewhat amusing to see the great similarity between the editorial remarks on this subject in different legal papers in the United States. Whether the original article was written for the *Legal Intelligencer*, the *Pittsburgh Legal Journal*, or the *Chicago Legal News*, or whether inspiration was obtained by all three from another and a common source, it is impossible to say. It is strange at least that the language is almost identically the same in each.—Eds. L. J.]

Court of Error and Appeal.—This Court will, on the 12th January, 1871, hold sittings for the hearing and disposal of the cases mentioned in the following list. Also give judgment in cases previously argued, and dispose of such other business as the Court in its discretion shall see fit:—Williamson v. The Grand Trunk Railway Co.; Mossop v. Mason; Barrie v. Gillies; Fox v. Lipps, Stewart v. McKindsey; Bank of Toronto v. Fanning; Butler v. Church; Abell v. McPherson; Chisholm v. Emery; Bank of Montreal v. McFaul; Cameron v. Sanderson; Morley v. McKay; Barker v. Torrance.

The following are the rules and regulations made by the Governor General in Council, pursuant to the provisions of 32, 33 Vic., Chap. 29, Sec. 118, to be observed on the execution of the judgment of death in every prison, as well to guard against any abuse in such execution, as to give greater solemnity to the same, and to make known, without the prison walls, the fact that such execution is taking place.

1.—For the sake of uniformity it is recommended that executions should take place at the hour of eight o'clock in the forenoon.

2.—The mode of execution, and the ceremony attending it, to be the same as heretofore.

3.—A black flag to be hoisted at the moment of execution, upon a staff placed upon an elevated and conspicuous part of the prison, and to remain displayed for one hour.

4.—The bell of the prison, or, if arrangements can be made for that purpose, the bell of the prison, or other neighbouring Church, to be tolled for fifteen minutes before, and fifteen minutes after the execution.

Compensation for Railway Accidents — Facts and figures can be made to prove anything, but at times they are stubborn impediments to a theory or an idea. We last week gave a report, which had been deferred for want of space, of the debate at the Social Science Congress, raised upon the well-known paper of Mr. Brown, Q. C., on compensation for railway accidents. Ingenious arguments were advanced by many persons of note, but at the end comes Mr. T. Y. Strachan, who puts really a new colour on the whole subject. He says in effect to the railway companies of England this: 'You complain that you—that is, your shareholders—are mulcted enormously in these compensation cases. But if you had a fund of one farthing per passenger by way of an insurance against such claims on you, the money would be very nearly enough to clear off all your liabilities. The sum of one halfpenny per passenger would clear your liabilities and give you a handsome surplus. Do not say that one farthing or one halfpenny is an enormous tax. Your average fares are 2*s.* 10*d.* for first class, 1*s.* 4½*d.* for second class, and 10½*d.* for third class passengers. As to saying that your losses by these compensations impair your dividends, the sum thus taken from you is only 1¾*d.* per cent. on your passenger traffic, and but 2*s* 8*d.* upon two hundred and thirty millions of paid-up capital. If you consider that you have got plenty of money, and the best of counsel and attorneys to detect and expose fraud, you are not exactly the people for whom the Legislature is to pass exceptional Acts of relief.'

Richard A. Dawson, the colored graduate of the Law Department of the University of Chicago, was lately awarded a certificate of good moral character by the Superior Court of Chicago, with a view to his future admission to the bar, upon the motion of B. W. Ellis, of the Chicago bar, who was formerly a slaveholder in the State of Arkansas. Verily the world moves.

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