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DIARY FOR SEPTEMBER.

1. Tuesday..... Paper Day, C. P.
2. Wednesday... Paper Day, Q. B.
3. Thursday.... Paper Day, C. P.
5. Saturday ..... TRINITY TERM ends.
6. SUNDAY..... 14*th Sunday after Trinity.*
7. Monday..... Recorder's Court Sits.
8. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
13. SUNDAY .... 15*th Sunday after Trinity.*
15. Tuesday ..... Last day for service for York and Peel.
20. SUNDAY..... 16*th Sunday after Trinity.*
25. Friday ..... Declare for York and Peel.
27. SUNDAY..... 17*th Sunday after Trinity.*

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

SEPTEMBER, 1863.

THE LEADING STATUTES AS TO COSTS.

At common law costs were not recoverable *eo nomine* either by plaintiff or defendant. They were generally considered by the jury and estimated in the amount of damages. If the verdict was for defendant plaintiff was amerced to the king *pro falso clamore* (3 Bl. Com. 399.)

The statute of Gloucester, 6 Ed. 1, c. 1, passed in 1278, in substance enacts, that the demandant shall recover damages in certain forms of action specified, and that the demandant may recover against the tenant the costs of his writ purchased, together with the damages; and that the act shall hold place in all cases where the party is entitled to recover damages.

Though the costs of "the writ" only is mentioned in the statute, the statute has been held to extend to all the costs of the suit without reference to any particular scale of taxation, (2 Inst. 288, Witham v. Hill, 2 Wils. 91.) But where the damages are newly given by a statute subsequent to that of Gloucester where no damages were formerly recoverable, the plaintiff can recover no costs unless given by the statute which gives the damages, (Pitfold's case, 10 Co. 116 a; Gilb, C. P. 268; 1 Lill Abr. 467, b; Barnes 140; Cowp. 368.) If a statute subsequent to that of Gloucester gives double or treble damages in a case where single damages only were recoverable formerly, the costs also as parcel of the damages shall be doubled or trebled though no costs be given by the subsequent statute, (Cowp. 368, Hull, costs, 17; Tidd's Pr. 945.)

Costs were first given to a defendant on a writ of right of ward, (statute of Marleberge,) which became obsolete by the extinction of the military tenures; but now a defendant, by virtue of the 23 Hen. VIII., c. 15, s. 1, passed in 1535, and 4 Jac. 1, c. 3, s. 2, passed in 1606, is in general entitled to costs on judgment in his favor in all cases where a plaintiff would have been entitled to costs in case judgment had been given for the plaintiff.

The superior courts of law have jurisdiction in all actions great or small. Under the statute of Gloucester, a plaintiff in a superior court recovering any amount of damages, no matter how trifling, was entitled to full costs of suit. So long as this was permitted without limitation there was much vexatious litigation. The legislature, as we shall presently see, has from time to time endeavored to discourage vexatious actions, and to restrict trifling actions to courts of inferior jurisdiction.

The first act of the kind 43 Eliz. cap. 6, s. 2, passed in 1601, enacted, that "If upon any action personal to be brought in any of Her Majesty's courts at Westminster, (not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery) it shall appear to the judges for the same court, and so signified or set down before the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of forty shillings, or above, that in every such case the judge and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion."

When this act was passed the County or Sheriff's court had exclusive cognizance of all personal actions (not being for trespass *vi et armis* or for lands of freehold) under the value of *forty shillings* (6 Ed. 1, c. 8, *Vennard* v. *Jones*, 4 T. R. 495, Com. Dig. County C. 8), and therefore for the purpose of taking a case out of the inferior jurisdiction it was a common device to lay the damages in the declaration at an amount above forty shillings. The object of the statute of Elizabeth, and of other statutes of a like nature to which we shall presently refer, is to make such a device of none effect, and so compel plaintiffs' to elect the proper tribunals for their suits at the risk of losing either the costs of the suit or the great bulk of the costs. (Ib.)

Payment into court of a sum exceeding forty shillings, takes the case out of the statute and deprives the judge of the power to certify to deprive the plaintiff of costs, in the event of his recovering a sum less than forty shillings,

beyond the sum paid into court (*Richards* v. *Black*, 6 C. B. 443). The certificate, in cases where it is proper to grant it, need not be granted immediately after the trial (*Holland* v. *Gore*, 3 T. R. 38 *n*; and see *Woolley* v. *Whitby*, 2 B. & C. 580; *Johnson* v. *Stanton*, *Ib.* 621), and where a verdict is entered for plaintiff pursuant to leave reserved the judge who tried the case may then certify to deprive the plaintiff of costs (*Richardson* v. *Barnes*, 4 Ex. 128). If the certificate be not applied for at the proper time, it cannot be granted after judgment and execution; but in such a case the court may, if so disposed, set aside the judgment (*Lyons* v. *Hyman*, 5 Ex. 749). But if the judge, at the trial, express his intention of certifying, the certificate may be indorsed on the postea, after judgment and taxation of costs (*Foxall* v. *Banks*, 5 B. & A. 536; *Davis* v. *Cole*, 6 M. & W., 624). The judge has power, under certain circumstances, to rescind his certificate (*Anderson* v. *Sherwin*, 7 C. & P. 527), but if he do so at all, it must be within a reasonable time (*Whalley* v. *Williamson*, 5 Bing. N. C. 200). The court may inquire if the judge had power to certify, and if it find he had power, will not interfere with the exercise of his discretion (*Cann* v. *Facey*, 4 A. & E. 68; *Richardson* v. *Barnes*, 4 Ex. 128).

The statute of Elizabeth, so far as it relates to costs in actions of trespass, or trespass on the case, is, in England, repealed by the 3 & 4 Vic. cap. 24, to which we shall hereafter refer; but it would seem even in England to be still unrepealed as to actions on promises (per Maule, J., in *Morrison* v. *Salmon*, 10 L. J. C. P. 92) and other personal actions of that kind (*Townsend* v. *Syms*, 2 C. & K. 381). In Upper Canada, however, the statute of Elizabeth has not been, in express terms, repealed (*Pedder* v. *Moore*, 1 U. C. Prac. 117).

In 1623, for the further prevention of vexatious suits, it was enacted by 21 Jac. I, cap. 16 sec. 6, that "In all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons, in any of the courts of record at Westminster, or in any court whatsoever that hath power to hold plea of the same, after the end of this present session of Parliament, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same, any law, statute, custom or usage to the contrary in anywise notwithstanding."

This statute is confined to words spoken of the person (*Browne* v. *Gibbons*, 1 Salk. 206). It does not apply to slander of title (*Hale* v. *Warner*, 2 Tidd. Pr., 9th Edn. 997). It is confined to words actionable in themselves, or actionable only by reason of their being spoken of the plaintiff in his trade or business (*Surman* v. *Shellatto*, 3 Burr. 1688; *Collier* v. *Gaillard*, 2 H. Bla. 1062; *Burry* v. *Perry*, 2 Ld. Rayd. 1588; *Turner* v. *Horton*, Willes 438; *Grenfell* v *Pierson*, 1 Dowl. P. C. 406; *Goodhall* v. *Ensall*, 3 Dowl. P. C. 743). If special damages be laid and the words are not *per se* actionable, the statute is inapplicable (*Greaver* v. *Warner*, Hull 28; *Pedder* v. *Moore*, 1 U. C. Prac. R. 117) even though the declaration contain counts for words actionable *per se* (*Saville* v. *Jardine*, 2 H. Bl. 531; *Kelly* v. *Partington*, 5 B. & Ad. 645). But a plea of justification found for the plaintiff will not entitle him to full costs (*Halford* v. *Smith*, 4 East. 567).

The statute of James is not at all repealed or interfered with by the 3 & 4 Vic. cap. 24 (*Evans* v. *Rees*, 9 C. B., N. S., 391) nor by the act of Upper Canada Con. Stat. U. C. cap. 22 secs. 324, 325 which is a transcript of it (*Pedder* v. *Moore*, 1 U. C. Pra. R. 117) to both of which we shall hereafter refer.

In 1670, the Legislature of England, for the further prevention of frivolous and vexatious actions, passed the 22 & 23 Car. 2, cap. 9, which enacted, that "In all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify, under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto; and if any more costs in any such action shall be awarded, the judgment shall be void, and the defendant is hereby acquitted of and from the same, and may have his action against the plaintiff for such vexatious suit, and recover his damages and costs of such suit, in any of the said courts of record."

What the Legislature must have meant by this act was, that in all actions of trespass, assault and battery, and other personal actions, where damages less than forty shillings shall be recovered, the plaintiff shall have no more costs than damages, unless the case be such that the judge can truly certify that a battery was proved, or that the freehold or title to land came chiefly in question. If, therefore, there be actions of trespass, or personal actions, in which it might occur that title came in question, or that a battery was proved, but yet the judge does not certify that the fact was so, the plaintiff is restrained in his costs. And if there be actions of trespass or personal actions in which, from the nature of things, title could not come into

question, or a battery could not have been proved, then of course we need not look for a certificate, for it is enough that those circumstancer could not have have existed, in deference to which the Legislature had shown themselves willing to allow costs; and one would suppose it should follow as a consequence that, having no pretence in the latter class of cases for a certificate, the plaintiff must equally lose his costs. Instead of that, however, the courts determined that whenever there could be no pretence in the nature of things for expecting or asking a certificate, then the plaintiff should have full costs, because he could obtain no certificate! This appears to have arisen from from the Legislature adopting too general a form of expression when they spoke of "other personal actions," meaning, perhaps, actions for torts to the person or personal property. The courts held that the Legislature could not have intended the statute to apply to all actions that are called personal actions, which would include all actions that are not real or mixed; and, therefore, restricted the meaning to actions of trespass in which title might come in question, or trespass in which a battery might be proved The consequence was, that if a plaintiff before the recent statute, to which we are now about to refer, brought trespass for taking a dozen of potatoes, he was entitled to full costs, so far as the statute was concerned, though he recovered only sixpence damages (per Robinson, C. J., in *Hawkes* v. *Richardson et al*, 9 U. C. Q. B. 229).

To remedy this state of things the statute 3 & 4 Vic. cap. 24 was passed. It recites the acts of Elizabeth and Charles, and that the evils which those acts were intended to remedy "doth still prevail and increase;" and for remedy, after repealing so much of the act of Elizabeth as relates to costs in actions of trespass or trespass on the case, and so much of the act of Charles the Second as relates to costs in personal actions, enacts "That if the plaintiff in any action of trespass or trespass on the case, brought or to be brought in any of her Majesty's courts at Westminster, &c., shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default unless the judge or presiding officer before whom such verdict shall be obtained shall, immediately afterwards, certify on the back of the record or writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought. or that the trespass or grievance in respect of which the action was brought was wilful or malicious; provided always, that nothing herein contained shall extend to or be construed to extend to deprive any plaintiff of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations or enclosures, or for entering into any dwellings, out-buildings or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

This statute applies where a verdict is taken subject to an award (*Reid* v. *Ashby*, 13 C. B. 897; *Cooper* v. *Pegg*, 16 C. B. 264, 454; and see *Griffith* v. *Thomas*, 4 D. & L. 109), but the arbitrator may certify in the event of power being given him to do so (*Spain* v. *Cadell*, 8 M. & W. 129; *Bury* v. *Dunn*, 1 D. & L. 141). This statute, unlike that of Elizabeth, also applies, notwithstanding the payment into court of a sum exceeding forty shillings; and in such a case, if plaintiff obtains a verdict for a less sum than forty shillings beyond the sum paid into court, in the absence of a certificate, he will be deprived of costs (*Reid* v. *Ashby*, 13 C. B. 897). The fact of there being several issues on the record does not preclude the operation of the act (*Newton* v. *Rowe*, 1 C. B. 187). The judge has power to certify whenever the action is such that a question of right besides the mere right to recover damages might arise (*Morrison* v. *Salmon*, 9 Dowl. P. C. 387), and if such be the nature of the case, the court will not inquire into the exercise of discretion by the judge (*Shuttleworth* v. *Cocker*, 1 M. & G. 829; *Barber* v. *Hollier*, 8 M. & W. 813; *Bury* v. *Dunn*, 1 D. & L. 141). It is sufficient if the action is really brought to try a right, whether it is fitted for that purpose or not (per Maule J., in *Morrison* v. *Salmon*, 9 Dowl. P. C. 387). The proviso of the act includes trespasses by continuing after notice (*Bowyer* v. *Cook*, 4 C. B. 236). In cases within the proviso, the proper mode of obtaining costs is by entering a suggestion on the record that the trespass was committed after notice (*Ib.*) This suggestion is traversable (per Parke, B., in *Sherwin* v. *Swindall*, 12 M. & W. 786; *Watson* v. *Quilter*, 11 M. & W. 760), and leave to enter a suggestion may be obtained after the trial, although the judge has refused to certify (*Bowyer* v. *Cook*, 4 C. B. 286).

The Legislature of Upper Canada, in 1853, adopted the 3 & 4 Vic. cap. 24, without, however, in direct terms interfering either with the statute of Elizabeth or statute of Charles (16 Vic., cap. 175 sec. 26; Con. Stat. U. C., cap. 22 secs. 324, 325). It would have been a wiser course for our Legislature, when they applied themselves to the subject, to have, in express terms, repealed the statutes of Elizabeth, James and Charles, which have given rise to

most perplexing decisions, and substituted for them a plain and simple consolidation of those statutes (per Robinson, C. J., in *Pedder* v. *Moore*, 1 U. C. Prac. R. 119). But, not having done so, it follows that we can only take this isolated clause as it stands, and give effect to its provisions by allowing them to overrule any previous enactment with which they conflict (*Ib.*). It cannot be held that it virtually repeals all former laws on the subject, though it must be held to have virtually repealed whatever is clearly inconsistent with it (*Ib.*).

Division courts in Upper Canada have jurisdiction of all personal actions, where the debt or damages claimed do not exceed $40, and of all claims and demands of debt, account, or breach of contract or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100, as well as of actions of replevin, where the value of goods or other property or effects distrained, taken or detained does not exceed $40 (Con. Stat. U. C. cap. 19, s. 55, 28 Vic., cap. 45 sec. 6).

Subject to the following exceptions:

1. Actions for a gambling debt.

2. Actions for spirituous or malt liquors drunk in a tavern or ale-house.

3. Actions on notes of hand given wholly or partly in consideration thereof.

4. Actions of ejectment, or actions in which the right or title to any incorporeal hereditament, or any toll, custom or franchise comes in question.

5. Actions in which the validity of any devise, bequest or limitation under any will or settlement may be disputed.

6. Actions for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage.

7. Actions against a justice of the peace for anything done by him in the execution of his office, if he objects thereto.

(Con. Stat. U. C., cap. 19 secs. 54).

County courts in Upper Canada have jurisdiction—

1. In all personal actions where the debt or damages claimed do not exceed $200.

2. In all causes and suits relating to debt, covenant and contract to $400, where the amount is liquidated or ascertained by the act of the parties, or by the signature of the defendant.

3. To any amount on bail bonds given to a sheriff in any case in a county court, whatever may be the penalty.

4. On recognizances of bail taken in a county court, whatever may be the amount recovered, or for which the bail therein may be liable.

(Con. Stat. U. C., cap. 15, sec. 17).

5. In actions of replevin, where the value of the goods or other property or effects distrained, taken or detained does not exceed $200.

(Con. Stat. U. C., cap. 29 sec. 3).

Subject to the following exceptions:

1. Where the title to land is brought in question.

2. In which the validity of any devise, bequest or limitation under any will or settlement is disputed.

3. For any libel or slander.

4. For criminal conversation or seduction.

5. Actions against a justice of the peace for anything done by him in the execution of his office if he objects thereto.

(Con. Stat. U. C., cap. 15 sec. 16).

In case a suit of the proper competence of a county court be brought in either of the superior courts of common law in Upper Canada, or in case a suit of the proper competence of a division court be brought in either of such superior courts or in a county court, the defendant shall be liable to county court costs or to division court costs only (as the case may be) unless the judge who presides at the trial of the cause, in open court, immediately after the verdict has been recorded, certifies that it is a fit and proper cause to be withdrawn from the county court or division court (as the case may be) and brought in the superior court or a county court (as the case may be) (Con. Stat. U. C., cap. 22 sec. 328).

If the judge does not so certify, so much of the defendant's costs, taxed as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the county court or division court, shall, in entering judgment, be set off and allowed by the taxing officer against the plaintiff's county court or division court costs to be taxed; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxable costs, the defendant shall be entitled to execution for the excess (*Ib*).

The cases bearing upon the construction of the last mentioned enactments, showing the time within which the certificate may be given, the circumstances under which it ought to be given, and the effect of it not being given, have already been noticed in 7 U. C. L. J. 221, and need not be here repeated.

Under the various enactments to which we have referred where there is a verdict for a less sum than forty shillings, the following cases may occur:

1. In actions on the case for slanderous words, actionable *per se* if the plaintiff has a verdict for a less sum than forty shillings, the judge has no power to certify for costs, and plaintiff cannot, under any circumstances, have more costs than damages.

2. In *other* actions on the case and in actions of trespass,

if the plaintiff has a verdict for a less sum than forty shillings, he can have no costs whatever, unless—*first*, the judge certifies that the action was brought to try a right besides the mere right to recover damages; or, *secondly*, that the trespass was wilful and malicious; or, *thirdly*, unless it be suggested on the roll that the action was for a trespass to land, &c., after notice, *and* if the cause of action as to amount be within the jurisdiction of an inferior court, to entitle him to full costs must also have a certificate that the cause was preperly withdrawn from the inferior court.

3. In *all* personal actions (excepting trespass and case) if the plaintiff has a verdict for a less sum than forty shillings, and in the event of the cause of action being within the jurisdiction of an inferior as to amount, has a certificate that the cause was properly withdrawn, is entitled to full costs, unless the judge who tried the cause certifies, under the statute of Elizabeth, to deprive him of costs.

JUDICIAL CHANGES.

The Honourable Archibald McLean, on Monday, 24th August last, took his seat as President of the Court of Error and Appeal, in the room of the Honourable Sir J. B. Robinson, Bart., deceased.

The Honourable William Henry Draper, C.B., on same day, took his seat in the Court of Queen's Bench as Chief Justice of Upper Canada, in the room of the Honourable Archibald McLean, resigned.

The Honourable William Buell Richards, on the same day, took his seat as Chief Justice of the Court of Common Pleas, in the room of the Honourable William Henry Draper, C.B, transferred to the Court of Queen's Bench.

The Honourable John Wilson, the newly-appointed Puisne Judge, in the room of the Honourable William Buell Richards, promoted to the Chief Justiceship, on the same day took his seat in the Court of Common Pleas.

DEATH OF SIR CRESWELL CRESWELL.

The death of this able Judge has taken many by surprise. In July last, he was thrown from his horse and sustained an injury in his knee cap, which, contrary to the expectations of his friends, led to his death. He was the first Judge of the Divorce Court, the laborious duties of which he performed with marked success. Throughout life he was an able and distinguished lawyer. He was first generally known to the profession in 1822, when he became a contributor to Barnewall & Cresswell's Reports. He subsequently rose to a leading practice on the Northern circuit. In 1842 he was raised to a seat on the bench of the Court of Common Pleas, which he held till 1858, when appointed Judge of the Divorce Court. He was 65 years old at the time of his death. Sir James Plaisted Wilde is his successor.

EXPLANATION.

The Chief Justice of the Court of Common Pleas, in the matter of the Judge of the County Court of Elgin and Robert Macartney, one, &c., reported in 13 U. C. C. P. 74, and page 238 of this number, says: "I abstain from expressing any opinion as to whether the order is or is not in accordance with law, on the actual merits, because a perusal of the trust deed, or a disclosure of further circumstances, might change any view I should adopt upon the facts now apparent. There were, I should hope, *other facts* made apparent to justify the order, against which the attorney complains. I feel bound to assume this, as the order is of a different character from any which I have seen in any reported case," &c. The "other facts," which, in all fairness, ought to have been before the Court of Common Pleas on the application for the Mandamus, will be found, upon a perusal of *Ellison* v. *Ellison*, reported in other columns.

LAW SOCIETY—TRINITY TERM, 1863.

During this Term the following gentlemen passed the examination necessary for admission upon the books of the Law Society:—

In the University Class.—Messrs. John Cadenhead, B.A., Malcolm M. McMartin, B.A., Arthur L. Wilson, B.A., William G. Crawford, B.A., Hamilton F. Biggar, B.A., and John C. Deltor, B.A.

In the Junior Class.—Messrs. Alexander F. McLean, Horace Lapierre, Charles M. Masterson, Albert A. E. Lethbridge, Aaron I. Dunning, Alexander Dunbar, Samuel S. Robinson, Alex. M. Allan, John Gray, Stephen Gibson, jun., John Matthews, William A. McLean, Hugh S. S. Hubertus, Ralph H. Caddy, William E. Ledyard.

The following gentlemen were called to the Bar:—

J. A. Boyd, M.A., Toronto; B. F. Fitch, Toronto; Thomas Ferguson, Toronto; Robert Fraser, Toronto; C. B. Gordon Goderich; T. Holden, M.A., Toronto; John Hoskins, Toronto; George Lount, Toronto; A. Millar, Berlin; T. C. Patteson, Toronto; Charles E. Pegley, Chatham; A. R. Robertson, jun., Windsor; Richard Snelling, LL.B., Toronto.

The Benchers were so well satisfied with the written examinations of Messrs. Boyd and Hoskins, as to pass them without oral examination.

The following gentlemen passed as attornies:—John W Beynon, B.A., Perth; J. A. Boyd, M.A., Toronto; J. H. Dumble, Cobourg; Thomas F. Fairbairn, Toronto; D. C. Feeley, Cobourg; A. W. Lauder, Toronto; John Robertson, Gait; Richard Snelling, LL.B., Toronto.

Mr. Boyd, upon this occasion, received the same mark of the Benchers' approbation as in his examination for call to the Bar.

TO LAW STUDENTS.

It is enacted by Con. Stat. U. C., cap. 35, that no person shall be admitted and enrolled as an attorney, unless, at least fourteen days before the first day of the term in which he seeks admission, he has left with the Secretary of the Law Society, among other things, his contract of service, and an affidavit of due service thereunder (s. 3, sub-s. 4).

The only exception created by the Legislature is in the case of persons who entered into contracts of service prior to 1st May, 1858. With regard to such persons, if, by reason of the expiration of the period of the contract of service during a term of the superior courts of common law, it be impossible for the applicant to comply with the foregoing enactment, the Law Society is empowered, upon satisfactory proof that the day of expiration of the contract of service has not arrived, but will arrive previous to the last Thursday of the term in which the applicant seeks admission, to proceed with the examination, although the period of service has not expired (*Ib.* s. 24).

Therefore, in the case of a student whose contract of service has been entered into since the 1st July, 1858, and which contract of service expires either within fourteen days of a given term of the court, or during such term, as the law stands, the loss of that term is inevitable (*In re Macgachen*, 7 U. C. L. J. 147).

Not long since, a student of the last mentioned class made application to us to know what he should do; and upon reference to the learned Treasurer of the Law Society, who made no inquiry as to the date of his contract of service, we were told that the Society would proceed with the student's examination, and allow him to file an additional affidavit of service during the term, so as to be admitted during that term; and we accordingly made public the information thus received (see answer to law student in 9 U. C. L. J. 222).

We are now told that the Treasurer intended to confine his observations to students whose contracts of service were entered into prior to 1st July, 1858, and that his observations must be so read and understood.

We hasten, therefore, to add the necessary qualification to the remarks of the learned Treasurer, which at the time we would not have omitted, had the qualification been made.

The distinction between students whose articles were entered into prior to and since 1st July, 1858, might, we think, safely be abolished. If the Law Society be competent in the one case to exercise a sound discretion, we presume it would be equally competent to exercise a discretionary power, if conferred upon them, in the other. Young men who enter upon the study of the law, know nothing, before their studies actually commence, about the terms of the superior courts of common law.

FALL ASSIZES, 1863.

EASTERN CIRCUIT.

THE HON MR. JUSTICE JOHN WILSON.

Brockville	Tuesday	29th September.
Kingston	Monday	5th October.
Perth	Wednesday	14th "
Ottawa	Tuesday	20th "
L'Orignal	Tuesday	27th "
Cornwall	Monday	2nd November.

MIDLAND CIRCUIT.

THE HON. MR. JUSTICE MORRISON.

Whitby	Tuesday	29th September.
Lindsay	Monday	12th October.
Peterboro'	Thursday	15th "
Cobourg	Wednesday	21st "
Belleville	Monday	2nd November.
Picton	Wednesday	11th "

HOME CIRCUIT.

THE HON. MR. CHIEF JUSTICE RICHARDS.

Owen Sound	Tuesday	29th September.
Barrie	Monday	5th October.
Milton	Monday	12th "
Hamilton	Thursday	15th "
Welland	Monday	26th "
Niagara	Thursday	29th "

OXFORD CIRCUIT.

THE HON. MR. JUSTICE HAGARTY.

Cayuga	Monday	5th October.
Simcoe	Thursday	8th "
Stratford	Tuesday	13th "
Brantford	Monday	19th "
Woodstock	Monday	26th "
Berlin	Monday	2nd November.
Guelph	Monday	9th "

WESTERN CIRCUIT.

THE HON. THE CHIEF JUSTICE OF UPPER CANADA.

Goderich	Tuesday	29th September.
Sarnia	Tuesday	6th October.
Sandwich	Friday	9th "
Chatham	Thursday	15th "
London	Tuesday	20th "
St. Thomas	Tuesday	27th "

THE HON. MR. JUSTICE ADAM WILSON.

York and Peel	Monday	12th October.
City of Toronto	Thursday	29th "

COURT OF CHANCERY.

The business of the Court of Chancery is appointed to be transacted in the following order up to the Christmas vacation :—

1st—Saturday, 22nd August: Court, the Chancellor; Chambers, Mr. V. C. Spragge.

2nd—For week commencing 24th August: Court, Mr. V. C. Spragge; Chambers, the Chancellor; Wednesday, Thursday, Fri' and Saturday of this week are appointed for Re-Hearing Term.

3rd—For week commencing 31st August: Court, the Chancellor; Chambers, Mr. V. C. Esten.

4th—For week ending 7th September: Court, Mr. V. C. Esten; Chambers, the Chancellor.

5th—Mr. V. C. Esten will probably be the only Judge in town from the 14th Sept. up to the 12th October.

6th—The Chancellor will, in all probability, be the only Judge in town from the 12th Oct. up to the 9th Nov.

7th—For week commencing 9th November: Court, Mr. V. C. Spragge; Chambers, the Chancellor.

8th—For week commencing 16th November: Court, the Chancellor; Chambers, Mr. V. C. Spragge.

9th—For week commencing 23rd November: Court, Mr. V. C. Spragge; Chambers, the Chancellor.

10th—For week commencing 30th November: Court, Mr. V. C. Esten; Chambers, Mr. V. C. Spragge.

11th—For week commencing 7th December: Court, the Chancellor; Chambers, Mr. V. C. Esten.

12th—For week commencing 14th December: Court, Mr. V. C. Spragge; Chambers, the Chancellor.

13th—For Monday, Tuesday, Wednesday and Thursday of the week commencing 21st December: Court, Mr. V. C. Esten; Chambers, Mr. V. C. Spragge.

FALL ASSIZES, 1863.*

ASSIZE.	Last day for service of writ	Last day to declare	Last day for service of notice of trial.	Assize day.
Brockville	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Kingston	Sept. 8	Sept. 18	Sept. 26	Oct. 5
Perth	Sept. 18	Sept. 28	Oct. 26	Oct. 14
Ottawa	Sept 23	Oct. 3	Oct. 12	Oct. 20
L'Orignal	Sept. 30	Oct. 10	Oct. 19	Oct. 27
Cornwall	Oct. 6	Oct. 16	Oct. 24	Nov. 2
Whitby	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Lindsay	Sept. 15	Sept. 25	Oct. 3	Oct. 12
Peterborough	Sept. 19	Sept. 29	Oct. 7	Oct. 15
Cobourg	Sept. 24	Oct. 5	Oct. 13	Oct. 21
Belleville	Oct. 6	Oct. 16	Oct. 24	Nov. 2
Picton	Oct. 16	Oct. 26	Nov. 3	Nov. 11
Owen Sound	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Barrie	Sept. 8	Sept. 18	Sept. 26	Oct. 5
Milton	Sept. 15	Sept. 25	Oct. 3	Oct. 12
Hamilton	Sept. 19	Sept. 29	Oct. 7	Oct. 15
Welland	Sept. 29	Oct. 9	Oct. 17	Oct. 26
Niagara	Oct. 3	Oct. 13	Oct. 21	Oct. 29
Cayuga	Sept. 8	Sept. 18	Sept. 26	Oct. 5
Simcoe	Sept. 12	Sept. 22	Sept. 30	Oct. 8
Stratford	Sept. 13	Sept. 26	Oct. 5	Oct. 13
Brantford	Sept. 22	Oct. 2	Oct. 10	Oct. 19
Woodstock	Sept. 29	Oct. 9	Oct 17	Oct. 26
Berlin	Oct. 6	Oct. 16	Oct. 24	Nov. 2
Guelph	Oct. 13	Oct. 23	Oct. 31	Nov. 9
Goderich	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Sarnia	Sept. 9	Sept. 19	Sept. 28	Oct. 6
Sandwich	Sept. 12	Sept. 23	Oct. 1	Oct. 9
Chatham	Sept. 19	Sept 29	Oct. 7	Oct. 15
London	Sept. 23	Oct. 3	Oct. 12	Oct. 20
St. Thomas	Sept. 30	Oct. 10	Oct. 19	Oct. 27
York and Peel	Sept. 15	Sept. 25	Oct. 3	Oct. 12
City of Toronto	Oct. 3	Oct. 13	Oct. 21	Oct. 29

* This table, furnished by a Law Student, appears to have been carefully prepared, but we have not had sufficient time to examine it closely so as to vouch for its accuracy.

UNITED STATES JUDICIARY.

The judiciary system of the Union, excluding the Confederate States, comprises about four hundred and fifty Judges of Common Law and Equity Courts of Record. This is exclusive of County Courts, Probate Courts, and Justices of the Peace.

The salaries of these Judges range from $1,800—which is the usual salary of a Judge of the Supreme Courts in any of the smaller New England States, to $6,000, which is the salary of a Judge of the Supreme Court in California, and of the United States Supreme Court. The salaries in some of the Western States are as low as $1,200, but are, probably, in effect, increased by fees. That of the Chief Justice of the United States is $6,500.

The aggregate salaries of the four hundred and fifty judges is about $1,023,000, making an average salary of about $2,175.

Of these four hundred and fifty Judges who are charged with the administration of justice in the more important causes, about 200 compose courts whose judgments upon questions of law are regularly reported; and it may be said to be the chief business of at least two hundred Judges to hear and investigate questions of law, and deliver their opinions: which not only serve to determine the cause which gave rise to the investigation, but being published in the reports, *go to swell the bulk* of American jurisprudence.

JUDGMENTS.

ERROR AND APPEAL.

August 24, 1863.

The Corporation of the Town of Paris v. *The Queen*—Judgment given in Court below affirmed; appeal dismissed with costs.

Dickson v. *Ward.*—Appeal dismissed with costs.

Wisconsin Bank v. *Bank of British North America.*—Appeal dismissed with costs.

Jameson v. *Fisher.*—Appeal dismissed with costs.

QUEEN'S BENCH.

August 24, 1863.

Martin v. *Crowe.*—Judgment for plaintiff.

Boyle v. *Leslie.*—Appeal dismissed.

Irving v. *Hagaman.*—Rule discharged.

Dickson v. *McFarlane.*—Rule absolute to enter verdict for plaintiff.

Ganton v. *Siez*—Rule absolute for new trial without costs.

McCreary v. *McCreary.*—Rule absolute to reduce verdict to $150.

Principal Secretary of War v. *Corporation of the City of Toronto.*—Judgment for plaintiff.

In re. Rose and the United Counties of Stormont, Dundas and Glengary.—Rule absolute to quash two by-laws in part with costs.

The Queen v. *Jerrett.*—Rule absolute for new trial.

August 26th, 1863.

Smith v. *The Trust and Loan Co.*—Appeal dismissed with costs.

COMMON PLEAS.

August 24, 1863.

Laughtenborough v. *Watson.*—Appeal allowed.

Jacques v. *Beaty.*—Appeal dismissed.

Johnson v. *Niagara District Insurance Co*.—Judgment for defendant on demurrer.

The Queen v. *Port Whitby Harbour Co.*—Rule discharged.

August 27th, 1863.

Ireson v. *Mason*.—Rule discharged.

Shaw v. *Stead*.—Appeal dismissed with costs.

In re Judson and Griffin.—Appeal allowed, and rule for new trial in court below, discharged with costs.

In re Davis and Williams.—Appeal allowed. Judgment of court below set aside and new trial, costs to abide the event.

CHANCERY.

August 25th, 1863.

Brown v. *Perry*—Appeal dismissed without costs.

Hannon v *Hannon*—Plaintiff to have full costs; case not one for County Court.

Commercial Bank v. *Cook*—Decree for Plaintiffs, with costs.

Bedson v. *Smith*—Plaintiff to be at liberty to redeem; or Bill dismissed with costs.

Brown v. *Davison*—Enquiry directed as to the indebtedness of father at time of the conveyance.

McCall v. *Fairthorn*—Bill dismissed with costs.

McLaren v. *Smith*—Appeal dismissed with costs.

Miller v. *McVaughton*—Reference back to Master. Further directions reserved.

Johns v. *McCarthy*—Reference back to Master. No costs to either party.

Moore v. *Gould*—Appeal of Plaintiff disallowed, with costs. Appeal of other parties allowed; no costs,

Moffatt v. *Nicholl*—Bill dismissed with costs.

Scott v. *Wright*—Decree to declare confession void. Money realized by Sheriff to be paid into Court. Costs up to hearing to be paid by Marshall.

Bartels v. *Benson*—Plaintiff to be enjoined from proceeding in ejectment, and to pay costs of application.

McDougall v. *Barron*—Enquiry directed. Costs reserved.

Lawson v. *Moffatt*.—Bill dismissed with costs.

August 27th, 1863.

Wallis v. *Andrews*.—Decree affirmed with costs.

McMahon v. *O'Neil*.—The Chancellor referred to judgment given by him on hearing on further directions. Mr. V. C. Spragge thought the bill should be dismissed with costs. Mr. V. C. Esten thought it should be dismissed without costs.

REMARKS ON THE ASSESSMENT AMENDMENT ACT OF 1861. *

The amendment Act of 1861 (22 Vic. chap. 38), respecting the assessment of property in Upper Canada, enacts as follows: "The following words shall be added to the 28th section of the said Act (Consolidated Statutes, chap. 55), and shall hereafter be read as part thereof, namely: Provided always that in assessing vacant ground or ground used as a farm, garden or nursery, and not in immediate demand for building purposes, in such cities towns, or villages, the value of such vacant or other ground shall be that at which sales of it it can be freely made. And where no sales can be reasonably expected during the current year, the assessors shall value such land as *though it was held for farming or gardening* purposes, with such percentage added thereto as the situation of the land may reasonably call for. And such vacant land, though surveyed into building lots, if unsold as such, may be entered on the assessment roll as so many acres of the original lot, describing the same by the number of the lot and concession of the township in which the same may have been situated."

The manifold intention of the Act is to alter the principle upon which vacant land in cities and towns has been assessed; any construction of it, therefore, which enables the assessors to assess practically upon the same principle must be erroneous. The assessment law, as it stood, dealt with all vacant land upon the same footing; section 28 applied to all real property, vacant or built upon: vacant land was to be assessed at its value. The clause above cited from the Amendment Act of 1861, divides vacant land into two classes; that is, it does so in effect, though not in form. One class consists of land of which sales can be reasonably expected during the current year. The other class, of land of which no sale can be reasonably expected during the current year. The first class is to be continued to be assessed upon the old principle, though the scale of value is somewhat differently stated in the two Acts. To the second class an entirely different principle of assessment is applied. The construction put upon the Amendment Act by the Court of Revision practically reduces the two classes into one, ignores the existence of a second class, and reduces to silence that part of the enactment which applies to it. This is a plain violation of the common rule of construction of Acts of Parliament, that the words are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity. (See 13 C. B. 763 and 8 Exch 860.) In fact, as construed by the Court of Revision, there is no alteration practically in the law at all; the Act of 1861 is construed out of the Statute book. The owner of vacant land is assessed upon the same principle and at the same rate. Before the Amendment Act, as well as after, the value has been taken to be the cash value.

What takes place before the Court of Revision illustrates this. The owner of vacant land claims to belong to what I have called the second class, and that his land should be valued *accordingly—he may make out the clearest case to bring* himself within the statute, but he is met with the question—what will your land sell for? It is useless for him to say, or to prove that "no sale can be reasonably be expected during the current year." It is pressed upon him that it will sell for something, and he is put upon his oath to say that he would not sell it for such a price, and upon that it is held by the Court that a sale at that price can be reasonably expected during the current year. This is plainly a mere evasion of the statute and a very absurd one, and its absurdity is the more apparent when it is remembered that, (every appellant being dealt with in the same way) the conclusion to which *the Court of Revision is necessarily driven* is that all the vacant land in the city can be reasonably expected to be sold during the current year: and the absurdity does not stop here, for the same course is repeated year after year, so that it must be assumed that it can be reasonably expected that all the vacant land in the city should change hands by sale every year. To such absurdities are men driven in putting a forced construction, according to their wishes, upon an Act of Parliament, and a still further absurdity is, that if they are consistent and deal with all alike, as I must assume they do, not one foot of the vacant land of the city is assessed upon the principle upon which the statute says a whole class of the vacant land of the city shall be assessed. Still further, suppose even that they were correct in principle, as they apply it to the whole vacant land of the city, the question should be—what would be the worth of the whole of it were it forced to sale during the current year? It is evident, that if it were it would not bring as many shillings as it is assessed at in pounds. This is a fair test, because they proceed upon the assumption as to all, that a sale can be reasonably expected during the current year.

* The foregoing remarks were written by a legal gentleman of high standing, and read to the county judge of York and Peel on the occasion of several appeals recently before him from the Court of Revision in the City of Toronto.

It is impossible that such a construction of the statute can be a sound one. It is open to at least three prominent objections.

It leaves the law in effect as it stood before, notwithstanding the declared purpose of the statute to amend it.

It is absurd in the particulars above pointed out.

It makes a dead letter of an important provision of the statute.

SELECTIONS.

VULGAR LEGAL ERRORS.

In 1838 the vulgar error that an innkeeper might detain the person of his guest until payment of his bill, was exploded by the case of *Sunbolf* v. *Alford*, 3 M. & W. 248.

In England it is a vulgar error, that a surgeon or butcher, from the barbarity of their business, may be challenged as jurors. By a statute of the fifth of Henry the Eighth, surgeons were exempted from attendance upon juries. Perhaps this exemption is the foundation of the error. An instance of this error may be found in a note to Rousseau's *Emile*, p. 137. Rousseau had in that work adduced it as evidence of the humanity of the English laws, that butchers are not received *as witnesses* in matters of life and death; but, in a note to the later editions, he adds, that the English translators of his work had corrected his mistake, and had mentioned the cause of it, viz., that butchers were not admitted *as jurors* in criminal cases!—Retrospective Review, vol. ix. p. 262.

There seems to have been, for a long time, a vulgar error, in supposing that a creditor has the power of preventing the burial of a corpse, by arresting the body for debt. Such a proceeding is not only revolting to the feelings of humanity, but is contrary to every principle of law; so much so, indeed, that any promise, extorted by fear of it from any one of the surviving relatives, is considered wholly invalid. For, in the forcible language of Lord Ellenborough, C. J., "It might as well be said that a promise in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror."—*Jones* v. *Ashburnham*, 4 East, 465.

A prosecution at common law, for this offence, was sustained in the Supreme Judicial Court of Massachusetts, before Chief Justice Parsons, at *nisi prius*, in which there was a conviction, and the parties punished by a fine.—*Commonwealth* v. *Snow*, in the County of Barnstable, cited in D. Davis's Justice, (Heard's Ed.) p. 712. The body of a man was arrested by a civil process, on its way to the burying-place; the party proceeding on a mistaken notion that he was entitled to the body of his debtor after death. By the General Statutes of Massachusetts, it is enacted that "If a sheriff, deputy sheriff, coroner, or constable, takes the body of any deceased person, on mesne process or execution, he shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the jail not exceeding six months."—Gen. Sts. ch. 165, sec. 36.

The following account of the outrage upon Sheridan's remains, will be read with interest:—Sheridaniana, p. 244.

"The remains of Sheridan were removed from Saville Row, to the residence of his kinsman, in Great George Street, Westminister. There they lay in state, to indulge the longing grief of the few friends who clung to his bleak and shattered fortunes. On the forenoon of the day fixed for their interment, a gentleman dressed in deep mourning entered the house, and requested of the attendant, who watched in the chamber of death, to allow him a last look of his departed friend. He professed to have known the deceased early in life, and to have undertaken a long journey in order to seize a parting glance of his pale features. The agony and earnestness with which the application was urged, lulled the suspicions of the serving-man—if any had arisen in his mind—and, after a slight hesitation, it was assented to. The lid of the coffin was removed, the body unshrouded, and the death-chilled frame revealed to view. The gentleman gazed for some minutes upon it, and then fumbling in his waistcoat pocket, produced a bailiff's "wand," with which he touched the face, and instantly declared, to the horror and alarm of the servant, that he had arrested the corpse in the King's name for a debt of £500. Before the requisite explanations had been gone through, the funeral group had assembled. The circumstance was instantly made known to Mr. Canning, who took Lord Sidmouth aside, and begged his advice and assistance. Lest the delay might mar the progress of the sorrowful train, they generously agreed to discharge the debt; and two checks for £250 each were given over to the bailiff, and accepted by him, Without their timely interference, the procession might have been detained for some hours; and, even in spite of their prompt sympathy and kindness, the multitudes who had congregated in the palace yard could not help murmuring when the stated hour was allowed to elapse so long without any apparent reason."

In Barrington's 'Observations on the more Ancient Statutes,' p. 474, there is the following amusing enumeration of vulgar legal errors:—

"It is difficult," says that very learned judge, "to account for many of the prevailing vulgar errors with regard to what is supposed to be law. Such are, that the body of a debtor may be taken in execution after his death; which, however, was practised in Prussia before this present king abolished it by the *Code Fréderique*. Other vulgar errors are, that the old statutes have prohibited the planting of vineyards, or the use of sawing-mills; which last notion I should conceive to have been occasioned by 5 & 6 Edw. VI. cap. xxii., forbidding what are called *gig-mills*, as they were supposed to be prejudicial to the woollen manufacture. There is likewise an act of 23 Eliz. cap. v. which prohibits any *iron mills* within two-and-twenty miles of London, to prevent the increasing dearness of wood for fuel. As for sawing-mills, I cannot find any statute which relates to them; they are, however, established in Scotland, to the very great advantage both of the proprietors and the country.

"It is supposed, likewise, to be penal to open a coal-mine, or to kill a crow within five miles of London; as also to shoot with a wind-gun, or to carry a dark-lanthorn. The first of these I take to arise from a statute of Henry the Seventh, prohibiting the use of a cross-bow; and the other from *Guy Fawkes's dark-lanthron* in the powder-plot. To these vulgar errors may be added the supposing that the king signs the death-warrant (as it is called) for the execution of a criminal; as also, that there is a statute which obliges the owners of asses to crop their ears, lest the length of them should frighten the horses which they meet on the road.

"To these vulgar errors may be perhaps added the notion that a woman's marrying a man under the gallows will save him from the execution. This probally arose from a wife having brought an appeal against the murderer of her husband who, afterwards, repenting the prosecution of her lover, not only forgave the offence, but was willing to marry the appellee. It is also a very prevailing error, that those who are born at sea belong to Stepney parish. I may likewise add to these, that any one may *be put into the Crown-office*, for no cause whatsoever, or the most trifling injury. An ingenious correspondent suggests two additional vulgar errors, 'When a man designs to marry a woman who is in debt, if he take her from the hands of the priest clothed only in her shift, it is supposed that he will not be liable to her engagements.' The second is, 'that there was no land-tax before the reign of William the Third.'"

A writer in *The Retrospective Review*,—Vol. ix. p. 263.—has collected the following list of vulgar errors:—That if a criminal has hung an hour and survives, he cannot afterwards be

executed—That a funeral passing over any place makes a public highway—That a husband has the power of divorcing his wife by selling her in open market with a halter round her neck--That second cousins may not marry, though first cousins may—That it is necessary, in some species of legal process against the king, to go through the fiction of arresting him, which is done by placing a ribbon across the road as if to impede his carriage—That the lord of a manor may shoot over all the lands within his manor—That pounds of butter may be of any number of ounces—That bull beef shall not be sold unless the bull has been baited previously to being killed —That leases are made for the term of 999 years, because a lease of 1000 years would create a freehold—That deeds executed on Sunday are void—That in order to disinherit an heir at law, it is necessary to give him a shilling by the will, for that otherwise he would be entitled to the whole property.—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 207).

BAILIFF'S ASSISTANTS.

As before observed, a Deputy is one who acts by the right and in the name of another, having the power to do any act that his principal might do; and although the general rule is that ministerial officers can make a deputy, the Division Court Bailiff does not appear to have any such power.

While the statute expressly authorises the appointment of a Deputy Clerk under certain circumstances and upon certain conditions, it is silent on this head as to Bailiffs, and the presumption is that the intention of the law is to disable them from passing their power to a deputy. And it is to be observed, that the office is one of considerable trust, is held during pleasure, and it must be presumed that the Judge in appointing trusted the Bailiff, and him alone, so that in the case of process directed to him by name or name of office, he alone can execute it. But the ordinary summons is addressed to the party, and it may be said that the reasons against appointing a deputy do not apply at least with the same force. On the other hand, the whole tenor of the statute goes to show that the legislature contemplated service by the Bailiff himself, and looking at the rules it would appear that the board of Judges so construed the law. Then due service lies at the foundation of the Judges' jurisdiction; and although the question, what is due proof of service, rests absolutely and entirely on the discretion of the judge, (*Davis* v. *Walton*, 16 Jur. 954.) the rule would be not to admit service unless by a Bailiff.

The judge *in his discretion* may hold service by a person other than the bailiff to be a good service, the object being to bring the summons to the notice of the defendants, but the bailiff has no *right* to appoint a deputy to effect service.

It is not unusual, in practice, for the Judge to appoint or sanction the appointment of some proper person to serve summonses in cases of emergency, but then the person so appointed is for the occasion and purposes named a bailiff of the Court.

But a Bailiff may have assistants when necessary, in doing the work of his office, under his directions; and in driving away or securing cattle or property seized there seems to be no objection to their employment. And in this sense such assistants are Deputy Bailiffs, that is they would be held in law to be the principal's deputy when doing any particular act under his direction, and it would appear that the word "Deputy," used in the 184th section if applied to Bailiffs, is employed in this sense. The language, however, of that section is "If any officer *or* Bailiff (or his deputy *or* assistant) be assaulted" &c., and "Deputy" would appear to apply to officers other than bailiffs.—"Assistants" to Bailiffs.

Assistant Bailiffs are also recognised in secs. 195, 196, and 197, as "persons acting by Bailiffs' order and in their aid."

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—Is it not legal and right for clerks of Division Courts to charge for searches, where parties have executions issued on suits over a year old? Say in 1860 A. obtains twenty judgments against twenty different parties, and allows them to lie uncollected. In 1863, A. goes to the clerk and orders out the twenty executions, and the clerk charges A. ten cents for each search. Can there be any doubt but the charge is allowable according to the tariff of fees? The work is performed, and is no part of the labour of issuing the execution. Your opinion will oblige,

Yours,

CLERK 6TH DIV. CT., CO. NORFOLK.

[The tariff expressly allows a fee of ten cents to be charged for "every search for a party to a suit when the proceedings are over a year old;" but we are inclined to think that this cannot be construed to mean as in the case put by our correspondent, that where a plaintiff, after the expiration of a year, orders out executions on his suits, the clerk may charge him with a search in each case. A plaintiff may be fully aware of the position of his suits, and not in need of any information respecting them. The clerk, in order to issue the executions, must, necessarily, refer to his books, and so long as the plain-

tiff asks no information to be derived from such reference, he cannot complain of any extra loss of time or extra work. The clerk is not compelled, then and there, to refer to the suits, and give the plaintiff any information about them, and again have recourse to his books when he wants to make out the executions; all he is required to do is to receive a list of the cases in which executions are to be issued, and to issue them, s usual, at the proper time. If the plaintiff, when ordering executions to issue, makes any enquiry as to the position of certain suits, in respect to which information is then and there given him, the search could, of course, be charged for, even if the clerk, without closing the book at once, issued the execution, and thereby saved himself the necessity of a second reference; but where the plaintiff merely orders execution in certain cases to issue, we do not think the clerk justified in charging for a search.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—Referring you to p. 36, vol. 4, of *Law Journal*, and on the presumption that you will read the paragraph commencing (at 13 lines from bottom of left hand column) with the words, "It is clear," and if, as there stated, one trip only may be charged for, I would beg to inquire if you consider the officer under *any necessity* to make a second trip, having essayed to serve and failed, and if he must go more than once, how many trips you think him bound to make, to satisfy a law that—under your view of it—allows him pay for one only?

Yours, obediently,

Paul Dunn.

Owen Sound, August 11th, 1863.

[It is clear, as we before stated, that a bailiff can only charge mileage where service has been effected; but it is not so clear as to the number of trips he is, in duty, bound to make for the purpose. We do not see how any strict rule could be laid down as a guide in such cases. He is bound to exercise due diligence, and use every reasonable exertion to effect a service. If on his first trip he cannot find the person to be served, he can usually ascertain whether the absence is for the purpose of avoiding service or not. He ought, at least, to try and find this out. In any case, he ought, if possible, without interfering with his other duties, to try a second time before the next sittings of the Court, for which suit entered. If he does not then succeed he may be able, having left the summons at defendant's house or place of abode, to make such an affidavit as may satisfy the Judge that the party is evading service, and that the summons had most probably come to his knowledge. A bailiff has generally to go into the same part of his division more than once between each sittings of the court, and can often make two or three attempts to effect a service without much inconvenience. He may, certainly, in some cases, have much more trouble than he can get paid for, but this cannot be avoided, and any mitigation of the rule allowing mileage only in case of service, would be a far greater evil. The same rule applies to services in the Superior Courts.—Eds. L. J.]

UPPER CANADA REPORTS.

COURT OF ERROR AND APPEAL.

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

[Before the Hon. Archibald McLean, Chief Justice; the Hon. P. M. Vankoughnet, Chancellor; the Hon. W. H. Draper, C. B. C. J. C. P.; the Hon. V. C. Esten; Hon. V. C. Spragge; Hon. Mr Justice Hagarty; * the Hon. Mr. Justice Morrison; and the Hon. Mr. Justice Connor. †]

HOLCOMB v. HAMILTON.

Bill of exchange—Joint action—Discharge of one of several defendants.

Held (affirming the judgment of the court below), that where the holder of a bill of exchange or promissory note sues, under the statute, the drawers, acceptors and endorsers, in one action, he may discharge the drawers or endorsers [or accommodation acceptors] after an arrest under a *capias ad satisfaciendum*, without losing his remedies against the other defendants liable in priority to those discharged

McLean and Draper, C. JJ., dissenting.

This was an appeal by the defendants from a judgment of the court below, in an action wherein Robert Jarvis Hamilton and Milton Davis were plaintiffs, and Samuel T. Holcomb was defendant. The facts of the case are sufficiently stated in the judgment of his Lordship the Chief Justice in disposing of this appeal, and in the report of the judgment in the court below, 8 U. C. L. J. 163.

From the judgment there reported, the present appeal was brought, on the grounds, that the judgment given by the court below on the demurrer by the defendant to the second replication to the third plea of the defendant is erroneous and should be reversed, because the action being upon a joint judgment against the defendant and John Macpherson and Samuel Crane, it was not competent to the plaintiffs in another action to set up in reply to the defendant's plea the position in which the said J. Macpherson, S. Crane and the defendant stood with regard to each other on the instrument upon which the judgment now sued upon was recovered; and also, that it is immaterial whether the plaintiffs have received any money or other property on account of the said judgment: the arrest of the said Macpherson, and his discharge by the consent of the plaintiffs operating in law as a discharge of all further remedies on the said judgment.

Galt, Q. C., and *Anderson*, for the appellant.

R. A. Harrison for the respondents.

The cases principally relied on appear in the judgments of their Lordships, and in the report of the case in the court below.

McLean, C. J.—This was an action on a judgment recovered on the 12th day of January, 1858, in the Court of Common Pleas, against the defendant and one John Macpherson and Samuel Crane, for 505*l.* 11*s.* 8*d.*, together with 19*l.* 7*s.* 6*d* costs of suit, amounting together to 525*l* 19*s.* 2*d.*; which said judgment, the plaintiffs allege, remains in full force, unreversed and unsatisfied; and the plaintiffs have not obtained any execution or satisfaction for or upon the said judgment; whereby an action hath accrued to the plaintiffs, to demand and have of and from the defendant the said sum of 525*l.* 19*s.* 2*d.*; yet the defendant hath not paid the same, or any part thereof, and the plaintiffs claim £800.

The third plea, which is demurred to, is as follows: "And for a third plea, the defendant says that before action brought, the judgment sued upon in this cause was satisfied in this, that the plaintiffs, after the recovery of the judgment in the declaration mentioned, on or about the first day of July, 1858, caused a writ of capias ad satisfaciendum to be issued out of this honorable court, directed to the sheriff of the United Counties of Frontenac, Lennox and Addington, whereby the said sheriff was commanded to take the body of the said John Macpherson in satisfaction of the said judgment; under and by virtue of which writ the said John Macpherson, one of the defendants in the judgment declared upon in this cause, was arrested and taken, and detained in close custody of the sheriff of the aforesaid United Counties of Frontenac, Lennox & Addington, in satisfaction of the said judgment, and was so detained in close custody of the said sheriff, or on the

* Was absent from the Province when judgment was pronounced.

† Died before judgment was pronounced.

limits of the said United Counties, until he was, by the order and authority of the plaintiffs, discharged from custody by the sheriff of the said United Counties, whereby the said judgment was satisfied.

Demurrer to the third plea, on the following grounds: that the mere arrest and subsequent discharge of one defendant on a writ of capias ad satisfaciendum, is not such a satisfaction and extinction of the judgment as to discharge another defendant from all liability thereon; that it is not shown that by the arrest and discharge of the said John Macpherson the now defendant lost any remedy over against him or any other party to the judgment; and that it does not appear that the said judgment was paid or satisfied as against the now defendant.

The plaintiffs take issue on the pleas of the defendant. And for a second replication to the third plea, the plaintiffs say that the judgment in the declaration mentioned was recovered by the plaintiffs on a bill of exchange drawn by the now defendant upon and accepted by the said John Macpherson and Samuel Crane for the accommodation of the now defendant, and not otherwise; and that the said John Macpherson and Samuel Crane did not, nor did either of them, ever receive any value or consideration whatever, and were in fact only sureties for the now defendant; and that the said debt, for which the said judgment was recovered, was and still is the debt of the now defendant. And the plaintiffs further say, that after the arrest of the said John Macpherson, under a writ of capias ad satisfaciendum, as in the said third plea mentioned, he applied for and obtained the benefit of the limits of the gaol of the said United Counties of Frontenac, Lennox & Addington; and that while he was on the limits of the gaol of the said United Counties thereunder, the plaintiffs consented to the discharge of the said John Macpherson from such limits, which is the discharge from custody referred to in the said plea: and the plaintiffs further say that they did not, nor did either of them, ever receive any money or other property; and that the same is not in any manner, either in whole or in part, paid, satisfied or discharged, as against the now defendant.

Demurrer to this replication, on the grounds: that the action being upon a joint judgment against the defendant and John Macpherson and Samuel Crane, it is not competent to the plaintiffs in this action to set up in reply to the defendant's plea the position in which the said John Macpherson and Samuel Crane and the defendant stood with regard to each other, on the instrument upon which the judgment now sued upon was recovered; and that it is immaterial whether the plaintiffs have ever received any money or other property on account of the said judgment: the arrest of the said Macpherson, and his discharge by the consent of the plaintiffs operating in law as a discharge of all further remedies on the said judgment.

This action, therefore, is brought to recover from the defendant the amount of a *joint* judgment, recovered against him and two others after one of the defendants has been arrested on a *ca. sa.*, and discharged from custody by the plaintiffs.

The defendant pleads the arrest and discharge of his co-defendant in bar of this action, and in the third plea alleges that thereby the plaintiffs' judgment was satisfied. The plaintiffs demur to such plea, on several grounds, the principal of which is that the arrest and subsequent discharge of one defendant is not such a satisfaction and extinction of the judgment as to discharge another defendant from all liability thereon.

The case of *King and another* v. *Hoare* (13 M. & W. 494) strongly supports the plea. It establishes that a judgment (without satisfaction) recovered against one of two *joint* debtors, is a bar to an action against the other, and is pleadable in bar and not in abatement. Then, if one of several joint debtors cannot even be sued after a recovery of judgment against another of such joint debtors, any act of the plaintiff by which, after judgment against all parties liable on a note or other obligation, one of such parties is released from his joint liability, operates in law as a release to all. In the case of *Clarke* v. *Clement and English* (6 T. R. 525) it was held that if a plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake him or take any of the others. In that case, the defendant English having been taken on a *capias ad satisfaciendum* issued against both the defendants, was set at liberty by the plaintiff on an undertaking by him to render himself on a given day if he did not in the meantime pay the debt; on which the defendant Clement moved that the writ of *ca. sa.* should be quashed, and satisfaction entered on the roll. In the argument it was contended that, allowing one defendant to go out of custody in execution on his promise to render himself again, is no satisfaction of plaintiff's debt; and though it might be doubtful that he could be retaken, yet that his being let out of custody was no reason why the other defendant should not be taken; and at all events, that there was no pretence for making the latter part of the rule, as to entering satisfaction on the roll, absolute. After the rule obtained by Clement was disposed of by an order that *he* should not be taken on the writ, the plaintiff sued out a separate execution against English, and arrested him again; on which a rule was obtained to show cause why he should not be discharged out of custody, and the *capias ad satisfaciendum* set aside, and satisfaction entered on the roll on an affidavit disclosing the facts, and also those which appeared on the former application. Cause was shown against that rule, and it was urged that the defendant English having given an undertaking to render himself before the return of the first *ca. sa.*, was estopped from making the objection. In supporting the rule, the cases of *Vigers* v. *Aldrich* (4 Bur. 2482), and *Jacques* v. *Withey* (1 T. R. 557), were cited. The court were of opinion that the plaintiff was wrong on both points, and made the rule absolute. In the last mentioned case, where a prisoner in execution was discharged by the consent of his creditor upon giving a fresh security to satisfy the judgment, which security is afterwards defeated on account of a mere informality, the judgment was considered satisfied, and could not be set off against a demand of the plaintiff.

In a subsequent case—(*Tanner* v. *Hague*, 7 T. R. 420)—the defendant, having been charged in execution at the suit of the plaintiff, was discharged, on his undertaking to pay the debt at a future day. On nonpayment at the day, plaintiff sued out a *fieri facias* against him. A rule was obtained to show cause why the *fi fa* and the proceedings on it should not be set aside; to which it was replied in argument that the release of the defendant was conditional, and that as the condition was not performed, the plaintiff had a right to sue out another writ of execution. The court held that several cases cited in support of the application proceeded on the ground that it was considered that the plaintiff received a satisfaction in law by having his debtor in custody in execution, and made the rule absolute.

A much more recent case—*Catlin* v. *Kernot*, (3 Com. B. N. S., 796)—is to the same effect as *Tanner* v. *Hague*. In that case, in which all the former cases were cited, the court held that the discharge of a defendant from custody under a *ca. sa.* operated in law as an absolute satisfaction of a judgment. In delivering judgment in this case, Williams, J., said that the only doubt he entertained was, whether it was compulsory on the court to enter satisfaction on the judgment roll:—"It may be taken, upon the affidavits, that Mr. Catlin consented to the discharge of Mr. Kernot upon an agreement that if he would so consent, Mr. Kernot would abstain from controverting the proceedings under the fiat against him in bankruptcy; and that, notwithstanding he made the agreement, Mr. Kernot did contest the fiat, and ultimately procured it to be superseded. The question is whether, under these circumstances, the discharge of Mr. Kernot from custody operated a satisfaction of the judgment debt? It seems to me to be impossible, upon the authorities, to entertain a doubt; and I think it is impossible to get over the case of *Lambert* v. *Parnel* (15 L. J. Q. B. 55. 10 Jur. 31), where the Court of Queen's Bench ordered satisfaction to be entered in a case precisely like this;—that undoubtedly is in accordance with all the authorities." The rule in that case was, for the plaintiff to show cause why a memorandum of satisfaction should not be entered as to the judgment signed in the case of *Catlin* v. *Kernot*, on the 21st January, 1847, for 546*l.* 16*s.* 1*d.*, and 5*l* 14*s.* costs, and registered pursuant to the statute 1 & 2 Vic. 110, charging the estate of the defendant, "the debt and costs having been satisfied."

In that case, though the defendant had violated an agreement on which his discharge from custody was obtained, after able argument and full consideration of the circumstances, the court made the rule to enter satisfaction absolute.

The only ground on which that application was made, was that "the debt and costs had been satisfied," though not in any way except by being discharged from the limits.

The facts admitted on the pleadings in this case are, that the judgment was recovered on a bill of exchange, drawn by the defendant on McPherson & Crane, and accepted by them, for the defendant's accommodation, against the defendant and McPherson & Crane; that a *ca. sa.* was sued out upon that judgment, on which Mr. McPherson was arrested; and that while he was a prisoner on the gaol limits, the plaintiff discharged him from custody; and that the plaintiffs have not received any money or other property in payment or satisfaction of their judgment. It appears to me from the cases cited that the arrest and discharge of one of the joint debtors operates in law as a satisfaction of the judgment, and that the plea setting forth the arrest and discharge is good, and the defendant entitled to judgment on the demurrer. I am not aware that there is anything peculiar to distinguish this case from other cases of joint judgments, in which after arrest and discharge from custody the courts have felt themselves bound to order satisfaction to be entered. The suit in which the plaintiffs' judgment was recovered was brought on a bill of exchange against the drawer and acceptors, under the 23rd section of the act of this Province, Con. Stat U C cap 42, which enacts, "that the holder of any bill of exchange or promissory note may, instead of bringing separate suits against the drawers, makers, endorsers and acceptors of such bill or note, include all or any of the parties thereto in one action, and proceed to judgment and execution in the same manner as though all the defendants were joint contractors." The plaintiffs have availed themselves of that act, and have sued all the parties to the bill of exchange in one action, as though they were joint contractors, though it was not compulsory upon them to do so. If they had brought several actions, as they would have been obliged to do before the passing of the act 13 & 14 Vic. cay. 59, they would have been entitled to disbursements only in one of the suits, and to full costs in the other; but the difference as to the amount of costs to which they would be entitled could not, in suing for so large an amount, have formed any consideration to induce the plaintiffs to adopt the mode of proceeding authorized by the statute. The act, I think, affords a facility in enabling all the parties to a bill or note to be sued in one action; and in that action a judgment against all may be obtained, either jointly, as in this case, or severally, as may be thought desirable by the plaintiff.

The judgment sued on is against all the defendants jointly, and I can discover nothing to distinguish it from all similar judgments, nor can I perceive any reason why it should not be discharged in the same manner. In the second replication to the third plea, the plaintiffs endeavour to show that because the bill on which the judgment is recovered was made by the defendant and accepted by the other defendants for his accommodation, therefore he is not entitled to be discharged by reason of McPherson having been discharged from custody. I do not see that the defendant's position in reference to the original cause of action can in any way affect his position as one of the defendants in a joint judgment. The plaintiffs might have urged the fact stated in their replication, if they had failed to give defendant, as the drawer of the bill notice of its dishonour after acceptance; but after the bill has become merged in the judgment, and all are jointly liable to pay the amount, they cannot, I think, go back and urge such an objection to a discharge from the judgment—a discharge which they, by their own act, have placed within his reach. In my opinion the defendant is entitled to judgment on the demurrer to this replication to the third plea.

The 26th section of chapter 42, Consolidated Statutes of Upper Canada, provides that the rights and responsibilities of the several parties to any bill or note, as between each other, shall remain as though that act had not been passed (saving only the rights of the plaintiff, so far as they may have been determined by the judgment). The rights of the plaintiffs as payees and holders of the bill have been determined by the judgment, and by that the defendants are jointly liable, and cannot be treated as if each could be held independently of the others for the payment of the whole amount.

I quite agree with the judgment of the learned Chief Justice of the Common Pleas, that the defendant is entitled to judgment on both the demurrers.

VANKOUGHNET, C.—I am in favor of affirming the judgment of the court below in this case. I think the Legislature did not intend to place the plaintiff, who proceeded by the course which they at least advised, and, so far as they could, by penalty enforced, in a worse position after judgment recovered against the several parties to a note, than he was in as to them before judgment; that is, that they did not in any way mean to alter his rights in regard to them. The record of the judgment itself shows the relative positions of the several parties to it, and that it was recovered under the statute permitting such form of procedure. No extrinsic evidence for this purpose is required; there is no going behind the record to ascertain it; it is spread out on the face of it, and the way in which a joint judgment and joint execution were obtained there appears; and it seems to me it is but effectuating the intention of the Legislature, and working out the spirit of the act, to hold that upon such a record the parties severally liable are to be treated as though several judgments had been recovered against them, but enforcable by one execution. The plaintiff may, under the act, make all or any of the parties to the note defendants in one suit. He is not, by abandoning several actions against all, compelled to treat all as joint contractors; he may select the maker and one endorser of a note, and sue them together, and bring separate actions against the remaining endorsers, subject only to the penalty of being deprived of costs, but without his rights in or subsequent to such action being affected by the action in which he has joined the others. The judgment is but the cord which binds together the sticks. The defendants are fixed by it so that they cannot dispute their joint liability to the plaintiff thereunder; but each is, as to the character in which he has been made and is so liable, as much an unit as is every stick in the bundle. Section 26 of the Consolidated Statute, chapter 42, which provides that the rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though the act had not been passed, saving only the rights of the plaintiff so far as they may have been determined by the judgment, means, I think, nothing more than this, that the several defendants shall have their recourse, the one against the other, according to their relative liabilities, as though they had been separately sued or called upon to pay, in their several capacities of endorser, drawer, accommodation acceptor, or as the case may be; but that, as regards the plaintiff, their liability to him, as determined by the judgment, shall not be disturbed—that it shall not be open to any of the parties against whom he has recovered judgment, and who may afterwards be compelled to pay, to allege that he became liable on the note only for the plaintiff's accommodation, or that in any other way the plaintiff is liable to him.

DRAPER, C.J., retains the opinion expressed in the court below.

ESTEN, V. C.—I have looked at all the cases that were cited, and have come to the conclusion that the judgment of the court below is right. I think the plaintiff is in the same position as if several judgments had been recovered. There is a merger, no doubt, but a several merger. The intention of the act of Parliament was, not to prejudice the plaintiff; only that there should be one action and one judgment, but not that the parties should stand in any different situation as amongst themselves. The replication here sets up, in effect, that the defendant who was discharged was only a surety, and the now defendant was the principal debtor.

SPRAGGE, V. C.—Upon reading the several clauses of the act which bear upon this question, one is impressed with the conviction that the one object of the Legislature was to enable the holders of bills and notes, and in a sense to compel them, to sue all parties liable to them upon the instrument in one action, without disturbing the rights of the parties as between one another. In the 26th clause, which creates the difficulty, this intention is manifested as strongly as in any other. In express terms it leaves the rights of all parties as they were under the old form of proceeding, with, as I read the clause, one exception expressed "saving only the rights of the plaintiff, so far as they may have

been determined by the judgment;" which I take to mean that the rights of the plaintiff, as determined by the judgment, are to stand as so determined.

One naturally inquires, with what object this "suing" was introduced. A reason may readily be suggested. The plaintiff might fail as to one or more defendants, or as to all. Suppose him to fail as to one, and to succeed as against the others, if the clause had stood "the rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though this act had not passed," and had stopped there, there might be room to contend that it enabled the plaintiff to proceed in another action against the defendant as against whom he had failed in the action in which he had joined him with other parties; and literally the words used would cover such a case, but for the provision which excepts the plaintiff's rights so far as they may be determined in the action under the statute. It is not necessary to say that a court would have so adjudicated; the Legislature may have added this provision to obviate a doubt. It is sufficient to show that under circumstances which might arise in working the act, a result might have followed (or the Legislature might have thought so) which it was deemed advisable to provide against.

MORRISON, J., thinks the judgment of the court below was right.

Per Cur.—Appeal dismissed, with costs.*

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court*)

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN, AND ROBERT MACARTNEY, ONE, &c.

Mandamus—County court—Order of Judge of—Application for mandamus to compel him to rescind.

A judge of a county court by order stayed the proceedings in a cause until the attorney or his client should give a proper idemnity to the plaintiff against any costs to which he might be liable in consequence of bringing the action in case the plaintiff bec ne nonsuit &c. The order was afterwards made a rule of court and judgme t entered thereon.

Upon a motion on behalf of the attorney to this court for a mandamas to compel the judge below to grant a summons or take other proceedings for rescinding the order.

Held, that the application could not be entertained, as it would be interfering with the jurisdiction of a competent tribunal.

Crombie, applic for a mandamas *nisi* directed to the judge of the County Court of Elgin to grant a summons or take the proceedings for rescinding an order made by him on the 10th November, 1862, in a cause in his court of John Ellison, plaintiff, and Freeman Ellison, defendant, by which the said judge ordered that the proceedings in the said cause be stayed until the attorney or his clients give a proper idemnity to the plaintiff against any costs to which he might be subjected, or be made liable for, in consequence of the bringing of that action, in case the plaintiff become nonsuit, &c., &c., and that if the indeminity were not given within ten days after the service of the order, the writ of summons in the cause was to be set aside with costs to be paid by the attorney to the plaintiff. The indemnity to be such as the plaintiff shall be satisfied with, or as the judge should approve of on a proper notice. On the 5th of January last the order was made a rule of the county court on an *ex parte* application, and afterwards judgment was signed on the order or rule, and execution issued and placed in the sheriff's hands.

DRAPER, C. J.—The leading facts disclosed on this application are that the plaintiff executed a deed of trust dated the 28th of May 1852, making Benjamin Drake and two other persons trustees of his estate. This deed of trust was produced before the judge before the above order was made. It was sworn that Benjamer Drake as one of the trustees, instructed the attorney to bring this action, for money paid by the trustees on account of the said estate to prevent a foreclosure of a mortgage given by the plaintiff and another person to the St. Thomas Building Society, for the purpose of securing the amount of a loan obtained from that society by the defendant, Drake was appointed by his co-trustees to demand and sue for all claims belonging to the said estate.

The deed of trust is not before us, and we do not know that by it the plaintiff gave the trustees authority to collect debts due to his estate. If not, the attorney could derive no authority from the employment by Drake to bind the plaintiff. If Drake and the others were trustees to collect and wind up the estate assigned to them, it does not readily occur to me on what ground the plaintiff could interfere with the action of the trustees, and still less, why the attorney employed by Drake should be deemed an officious intermeddler, and be subjected to the payment of costs to the plaintiff, nor why the trustees should be prevented collecting a debt due to the plaintiff's estate by the action of the plaintiff himself.

I abstain from expressing any opinion as to whether the order is or is not in accordance with law on the actual merits, because a perusal of the trust deed, or a disclosure of further circumstances might change any view I should adopt upon the facts now apparent, there were I should hope, other facts made apparent, to justify the order against which the attorney complains. I feel bound to assume this, as the order is of a different character from any which I have seen in any reported case, where the facts were of a similar character to those above stated.

This order, is, however, made in a cause over which the county court had jurisdiction. It may be as suggested, that it is in some points an excess of jurisdiction. But this application is wholly unprecedented, and is calling on the court to interfere in a cause pending before a competent jurisdiction. because a step has been taken which is possibly void or irregular, but which, whether void or irregular, cannot in this mode be brought in question.

Mandamus refused.

PRACTICE COURT.

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

MOODY v. DOUGALL.

Time for setting down demurrers—Renewing application in Practice Court.

A demurrer was set down by the plaintiff, before the opening of court on the first day of Michaelmas Term, for argument on the second paper day, and afterwards, about twelve on the same day, it was set down by the defendant for argument on the first paper day. During the same term, in Practice Court, a rule to strike out the demurrer entered by defendant was discharged on the ground that the plaintiff's entry was improperly made before the court had met. The court however heard the cause on the day for which it had been entered by the plaintiff, holding that he had a right to set it down before the opening of the court

A motion in Practice Court *in Easter following* to rescind the discharge of the previous application there, was refused as being contrary to established practice but without costs, as the learned judge who made the first order wished it to be moved against and if possible to be rescinded

(PRACTICE COURT, E. T., 1863.)

During Easter Term *Morphy* obtained a rule calling on the defendant to shew cause why the rule granted in the Practice Court in this cause on the 21st day of November last should not be rescinded, on the ground that the same was made through misapprehension of the practice of the court, in supposing that the court required demurrers to be set down for argument in court while the court was sitting, and that they could not be set down before the court opened, and why the demurrer books set down for argument by the defendant in this cause should not be struck off the paper, or why the terms of the rule should not be varied, so that defendant should be deprived of the costs of the said rule, and that the plaintiff should be allowed all costs in respect of the demurrer books so set down by him, on the further ground that the said demurrer books of the defendant were so set down for argument by him after the plaintiff had set down his demurrer books for argument.

On obtaining the rule the plaintiffs filed affidavits to the effect that on the first day of Michaelmas Term last the plaintiff after 10 o'clock, a. m., and before the court met, set the demurrers down for argument on the second paper day of the term: that about twelve o'clock, noon, the defendant set the demurrers down for argument on the first paper day of the term: that during the term the plaintiff obtained a rule calling on the defendant to shew cause why the demurrers set down for argument by him should not be struck out of the paper, because they were so set down after the same demurrers

* RICHARDS, J., who was present when judgment was pronounced, said he still retained the opinion expressed by him in the court below, but, not having been present on the argument of the appeal, gave no judgment.—EDS. L. J.

had been set down by the plaintiff· that that rule was discharged, with costs to be costs in the cause, by the learned judge who sat in the Practice Court, on the ground that the proper time to set down demurrers was while the court was actually sitting and not before; that the case was argued on the day for which the plaintiff had set the demurrers down to be heard, the court declining to hear the argument on the day for which the defendant had set them down.

The learned judge who sat in the Practice Court expressed a desire that the rule should be moved against and be rescinded as the full court and all the judges, after considering the matter, thought the plaintiff was regular, and had the right to set down the case before the court actually opened.

During the term *R. A. Harrison* shewed cause, and contended that although the full court might review the decision of a judge in Chambers, yet when the same judge was sitting in the Practice Court his judgment could not be reviewed by the full court, and if not, then it could not be reviewed by another judge sitting in the Practice Court. He referred to Consol. Stats U. C., ch. 10, sec. 9, as shewing that the decisions of the Practice Court had the same binding effect as those made by the full court; that though the court might during the term perhaps revise or alter a rule granted during the term, it could not do so after a term had elapsed, and the rule had issued. He also objected that even if the power of revision clearly existed, as in case of a judge's order, it would not be exercised, as the application had not been made in the next term after the order or rule complained of was made. He also contended that the materials on which the original rule was moved for ought to be produced on this application. He referred to *Meredith* v. *Gibbons*, 21 L. J. Q. B. 293, *Orchard* v. *Moxies*, 21 L. J. Ex. 79, note; *Collins et al* v. *Johnson*, 16 C. B. 588; Rule of Practice No. 15, Harrison's C. L. P. Act, 59 7 *Notman* v. *Rapelje*, 6 O. S. 560.

Morphy, contra, contended, as to the materials on which the original rule was moved not being produced, that it appeared by affidavit filed on moving this rule that search had been made in the proper office for these papers, and they could not be found; that the learned judge who sat in the Practice Court having himself expressed a desire that the rule should be rescinded, the court ought to exercise the power varying its own rules, particularly as it was in a matter in which costs alone were at stake. He referred to *Nickerson* v. *Shaw*, 7 U. C. Q. B. 541, as shewing that a judge in chambers has authority to alter his own decision, and *a fortiori* the court.

RICHARDS, J.—Without establishing a precedent that would, in my judgment, be very inconvenient, and contrary to the established practice of the courts in England for very many years, I do not think I can make this rule absolute.

The observations of Baron *Parke*, in *Dodson* v. *Scott*, (2 Ex. 458,) seems to me to apply to the case before us. He says, "The first objection is, is it competent for me to entertain this application at all, the objection being that it has been already disposed of in such a way as, according to the established practice of this court, to preclude any further enquiry. Several cases were cited to shew to what extent the courts have gone in laying down the rule, that after an application to them has been made, and has failed on account of defective materials, they will not allow any further enquiry. There is no doubt that such is the established practice of the Court of Queen's Bench, as appears from the cases which have been cited, and I presume it to be the practice of the other courts also. The practice appears not to have been first adopted, but sanctioned by a rule of the court Queen's Bench of Hilary Term, 3 Jac. I, by which it was made highly penal, if a matter had been disposed of in the presence of both parties, to agitate the same matter again, and that upon the principle that where there had been a judgment on the case, it was conducive to the due administration of justice that the matter should not again be agitated. Now there can be no doubt that the courts have gone beyond that part of the rule which requires the matter to have been disposed of in the presence of the counsel of both parties, because they have held a party equally bound when the rule which he has obtained was discharged, although he himself, the party obtaining the rule, was never heard." He then refers to several cases, and proceeds, "in all of which the rule was recognised that if there had been an application to the court, and the matter has been disposed of by the court, the parties will not be allowed to re agitate the same matter."

In *Leggo* v. *Young*, (17 C. B. 519,) the court adhered to the rule and in a note very many authorities are referred to.

In *Orchard* v. *Moxies* (2 E. & B. 206,) where a point in relation to costs was brought before a judge in chambers, he thought the matter in his discretion, and refused the costs. Subsequently the court of Common Pleas decided that the judge had no discretion, that decision being contrary to one made in the exchequer previously. The plaintiff then renewed his application for full costs, which came before the court. Coleridge, J. said, "You have taken the decision of a judge in chambers, and have let two terms pass without disturbing it." It was urged that the delay occurred under the belief that the judge in chambers, according to the decision of the Exchequer, had a discretion, but that it was since shewn that construction of the statute was disputed, Coleridge, J. added, "Suppose all that was done at chambers had been done here, we should not now hear you" Lord Campbel, C. J., observed "Could the unsuccessful parties in the two cases in the exchequer apply to that court now, or could the party who failed in the Common Pleas take that course, if we should agree in opinion with the court of Exchequer?"

Todd v. *Jeffery*, (7 A. & E. 519), is an authority on most of the points raised in this case. In Trinity Term, 1836, a rule was made absolute in the bail court, by Coleridge, J., to enter a nonsuit. After that term, the plaintiff applied to Coleridge, J., at chambers, for liberty to move the full court to revise his judgment given in the bail court. The learned judge, after taking time to consider, said that, under the circumstances, the plaintiff might have liberty to make such application, if the full court thought proper to entertain it. On arguing the rule *nisi*, Lord Denman, in giving judgment said, "The decisions in the bail court are like decisions here. The court will alter its own rules where there has been a plain misconception. But that is not so here. And where a judge sitting in the bail court has actually decided a case, even a doubt expressed by him cannot justify us in altering his decision after the term in which it was given." Patteson, J., said, "We must for the sake of all concerned in the administration of justice, consider a rule made in the bail court in the same light as if it were made here, and if the rule in question had been made here, we could not alter it after the term in which it was made, unless there had been some palpable mistake."

I do not understand that the misconception referred to by Lord Denman, or the *mistake* by Mr. Justice Patteson, means a misconception or mistaken view as to the law of the case, or of the practice of the court, but rather as to some fact in relation to the form of the rule, or the grounds upon which it was argued; as in one case, where it was made to appear that the facts, as stated in an affidavit on which the court acted, were false, and the party making the affidavit had been indicted for perjury, and had absconded.

I think on the authority of the decided cases and the reasoning applied to them, to which I assent, that I am precluded from interfering with the rule moved against from want of authority so to do particularly as this rule was moved against in Easter Term, and the one moved against was granted in Michaelmas Term last, and in time to have been moved against in the same term, last Michaelmas Term ending on the 29th of November last.

As, however, the learned judge who ordered the rule in the practice court wished this motion made, and desired if possible that the rule should be made absolute, and as the defendant has insisted on his strict legal right to have the rule discharged, I will discharge this rule without costs.

I do not think allowing the rule moved against to stand will after all be of much practical disadvantage to the plaintiff, as it merely discharges an application to strike out from the paper the demurrer books set down by the defendant. It does not necessarily imply that the master will allow the defendants the costs of setting down the case or of the demurrer books, particularly after the decision of the full court on the subject, and he will no doubt feel quite justified in considering the plaintiff's case as properly set down.

Rule discharged, without costs.

CHANCERY.

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

LAWRASON v. FITZGERALD.

Mortgage—County court—Costs.

The act given to county courts equitable jurisdiction, in relation to mortgages when the sum due does not exceed fifty pounds, does not apply when the defendant is resident out of the jurisdiction.

This was a motion for decree in a foreclosure suit.

Fitzgerald, for the plaintiff, asked that the usual decree might be drawn up.

S. Blake, for the defendants, objected to the decree giving the plaintiff his costs of the suit, as the sum due was shewn to be only £42, and the bill should therefore have been filed in the county court.

Fitzgerald—The act, (16 Vic., ch. 119; Con. Stat., U. C., ch. 15), restricts proceedings in that court to defendants resident within the jurisdiction, for the second section (Con. Stat. sec. 34) provides expressly that "any person seeking equitable relief may enter a claim against any person from which such relief is sought, with the clerk of the county court of the county *within which* such last named person resides." And the orders of this court for the regulation of the practice of the inferior courts do not provide any machinery whereby proceedings can be taken against a person resident out of the jurisdiction.

VANKOUGHNET, C.—Let the usual decree be drawn up; and let an enquiry be made whether a sale or foreclosure will be more beneficial for the infant defendants. And if it shall appear that a sale is proper, order a sale without requiring any deposit.

BELL v. MILLER.

Specific performance of award

The finding of an arbitrator when unimpeached is treated as *res judicata* between the parties to the submission.

This court, when the relief given by the award of an arbitrator is of a nature proper to be specifically performed, will decree that relief, and that too although the court cannot specifically preform some part of the award, which is for the benefit of the plaintiff, but which portion the plaintiff consents to forego.

This was a cause heard before V. C. Spragge, at sitting of the court at Barrie, in April, 1863. An *ex parte* injunction had been granted before the hearing, restraining the negotiation of the promissory notes mentioned in the judgment.

The facts material to the present report appear sufficiently in the judgment.

Fitzgerald for the plaintiff, and the defendant Robert Bell.

Strong, Q. C., and *Osler* for the defendant Miller.

Baker v. *Townsend*, 7 Taunt. 422, *Petch* v. *Coulan*, 7 Dowl. 426; *Lechmere* v. *Carlisle*, 3 P. W. 24; *Wilcox* v. *Wilcox*, 2 W. & Tud. 345; *Nickels* v. *Hancock*, 7 D. M. & G. 300; *Lewin* v. *Whitly*, 4 Russ. 423; Fry on Spec. Per. 415, Russell on Awards, 118, 483, were referred to by counsel.

SPRAGGE, V. C.—The bill is primarily for the specific performance of an award, and for such relief as necessarily grows out of that which is awarded; and the first point is, whether such relief is of a nature proper for specific performance. It seems to be so. It is to restrain the negotiation of promissory notes, and for security for the re-conveyance of land as awarded; or for a decree for the conveyance itself.

The award is objected to as unreasonable—as in excess of the power of the arbitrators—and as wanting in finality and certainty, and therefore as not proper for specific performance; but whether proper or not for specific performance it may still be material as a finding of facts between the parties, which they cannot afterwards controvert; and in that sense is *res judicata*. It is so treated in *Taylor* on Evidence, sec. 1565; and *Doe* v. *Rosser* 3 East, 15, is an authority for the position.

At the time of the submission to arbitration it was a matter in controversy who was entitled to the possession of certain lots in the village of Thornbury, David Miller had brought ejectment to recover possession, and the plaintiffs in this suit, together with a tenant of the younger Bell had filed their bill in this court to stay proceedings at law, upon substantially the same grounds as, apart from the award, are the grounds upon which relief is sought in his suit. The arbitrators awarded compensation to the younger Bell "for the loss of the use and rent of the buildings and lots" in Thornbury, and directed that Miller should pay the costs of the proceedings in ejectment and in this court, thereby adjudging in favour of Bell upon the question of right to the possession of the Thornbury lots, as far at least at is material to this suit. The establishment of that fact is material, upon the objection to the award, that the matter in controversy arose out of an agreement having for its object to defeat creditors, and so not proper for specific performance, being against public policy. If Bell was not to have possession of the lots, their conveyance to him, and the giving a mortage by the elder Bell as security for their re-conveyance, taken in connexion with Miller's indebtness at the time, would afford room for the presumption that it was a scheme to place the Thornbury lots beyond the reach of Miller's creditors; but if the younger Bell was to have the possession, for his own benefit for the ten years, or even for a shorter period, then the conveyance and mortgage and contemporaneous papers may have been only the mode which unskilful laymen adopted for carrying out their agreement; and certainly the elder Bell would be more likely to give a mortgage upon his own property where his son was beneficially interested, than gratuitously to enable a stranger to defraud his creditors. It should, I think, be quit clear, clearer certainly than it is in this case, that the object of the arrangement was to defeat creditors, before the court should oppose its maxim in relation to public policy, to the assertion of a party's equitable right.

It is next contended that the award is both unreasonable and uncertain in directing such security as it requires for the release of the mortgage. It is evidently put in the shape that it is in the award, because the mortgage is made to the son of David Miller, who is a minor, and no doubt at the instance of David Miller himself, so that the difficulty of releasing it is of his own creation, but this difficulty is obviated if the court can direct the actual release of the mortgage. By the evidence in the cause, documentary and otherwise, it is quite clear that the mortgage was given for no other purpose than to secure the re-conveyance of the Thornbury lots, or rather their conveyance to the infant defendant Robert Miller, the appointee of his father. The award directs the conveyance of these lots to the infants, and the plaintiffs submit so to convey them: the object of the mortgage will be answered upon such conveyance being made, and the court can properly decree a contemporaneous release of the mortgaged premises, and a release of the motgage or a vesting order. The father David Miller submits by his answer to join in a release of the Mortgage.

The direction in the award that the Thornbury lots should be conveyed to the infant and not to his father is also complained of; but that as I have said was the agreement, and was so, as I have no donbt, at the instance of the father.

I think there is nothing objectionable in my proceeding in part upon the award, and in part upon the evidence in the cause. The rule that the court will not specifically perform an award unless it can perform the whole of it, must be taken with this qualification, that the plaintiff is at liberty as in the case of any other agreemet, to forego any parts of it that are for his own benefit, a position established in effect in *Martin* v. *Pycroft*, (16 Jur. 1125.) and so plainly reasonable as not to need any case to establish it. He may in this case abandon that part of the award which directs security to be given for the future release of the mortgage; and prove independently that he is entitled to its present discharge.

I think it was within the competence of the arbitrators to award as they did in relation to the costs at law, and in this court; the matters in controversy in both were before them, and involved the question of which party, as being in the wrong, ought to pay the costs.

It seems doubtful whether it was competent to the arbitrators to award payment of the $48 mentioned in their award: I do not see that it was a matter in controversy, and the answer sets up that it had been a claim previously adjudged upon by a court of competent jurisdiction, a division court, adversely to the plaintiff. The award is so small as scarcely to justify a reference as to the facts. I think it will be proper for the plaintiff to abandon that part of the award.

I have abstained from considering whether the younger Bell was or was not entitled to the possession and use of the Thornbury lots—whether the £216 for which notes were given was the price of goods sold; or the price of goods sold, and of such possession and use of lots, because I hold that question adjudicated upon by the arbitators, and no longer open to controversy. I have proceeded upon that point, as established beforehand, in favour of the plaintiff, and I have not thought it proper to consider as a point for consideration whether the amount awarded for compensation for the loss of possession is a reasonable or proper sum or otherwise. The account must be taken upon the footing of that being a proper sum to be allowed against the notes. The plaintiffs are entitled to their costs up to the hearing. Further directions and costs to be reserved, the plaintiff to pay the infant defendant his costs, and to have them over with their own costs against David Miller. I do not see that any costs have been incurred by defendant Robert Bell, and I do not know why he was not made a co-plaintiff.

CHAMBERS.

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

McLEAN v. EVANS

Taxation of costs—Service of subpœnas—Witnesses paid by both sides—Witnesses not called.

Semble, that subpœnas being mesne process, under sec. 277 of the C. L. P. A., no fees can be allowed for mileage or service, if not made by the sheriff.

Where witnesses are subpœnaed and paid by both parties to a suit, the successful party is entitled to the costs of such witnesses from the other.

Where witnesses are subpœnaed but not called, the master should decide whether they are necessary or not, and allow or refuse their expenses accordingly.

[Chambers, June, 1863.]

This was an application to revise costs taxed by defendant, the grounds for revision being:

1. That the master has taxed the costs of services of subpœnas made by a person who is not the sheriff or deputy-sheriff or bailiff.

2. That some of the witnesses for the defendant were paid both by plaintiff and defendant, and that the defendant should be required to get his money back from the witnesses, and not be allowed to tax them against the plaintiff, and

3. That the fees of those witnesses who were not examined by the defendant at the trial should not have been taxed, and that the master refused to decide upon the materiality of the witnesses for whom the defendant was claiming an allowance.

ADAM WILSON, J.—I think section 277 of the C. L. P. Act determines the first point, because a subpœna is *mesne* process, as the following definition of it from Blackstone's Commentaries clearly shows: "*Mesne* process is such process as issues pending the suit upon some collateral matter, as to summon juries, witnesses, and the like, distinguished from original process which is founded on the writ. Mesne process is also sometimes put in contradistinction to *final process*, or process *of execution*, and then it signifies all such process as intervenes between the beginning and end of a suit." 3 Com. 279.

The section of the C. L. P. Act, applicable to this case, (sec. 277) enacts:—"In the taxation of costs no fees shall be allowed for the mileage or service of writs of summons or other *mesne process*, unless served and sworn in the affidavit of service to have been served by the sheriff, his deputy or bailiff, being a literate person, (or by a coroner, when the sheriff is a party to the suit,) nor unless a return of the sheriff or coroner (*as the case may be*) be endorsed thereon, except in cases as provided in the eighteenth section of this act."

The tariff of costs, which provides for the allowance *to the attorney* for service of writs, &c., when not done by the sheriff, and when taxable to the attorney, has relation to the 18th section of the C. L. P. Act, under which the attorney may, on the default of the sheriff for fifteen days, have service made for him by any literate person (Har. C. L. P. A. 730.)

If any of the services of subpœnas, therefore, were not made by the sheriff, his deputy or bailiff, or are not so sworn to in the affidavit of service, "*no fees*" (as the statute says) "shall be allowed for the mileage or service in the taxation of costs."

As to the second point, that the master has allowed to the defendant the expenses of *those* witnesses alleged to have been subpœnaed by both parties and paid by *both*, the rule appears to be that where the witness is subpœnaed by both parties and paid by both, that party is entitled to his expenses from the other who succeeds in the cause.—*Benson* v. *Schneider*, (7 Taunt. 337,) *Allen* v. *Foxall*, (1 C. & K. 315.)

As to the third objection, I think there should be a reference to the master, for the master should decide not only whether the judge rejected the witnesses or not, but whether they were necessary or not.

In *Galloway* v. *Kenyeath*, (15 C. B. 230.) Jervis, C. J., says, "Where the judge at *nisi prius* rejects a witness, right or wrong, the *master* never allows for his attendance." Again, "If the cause had been tried in the usual course, and the judge had rejected Armstrong's evidence, you could not have had the costs." To which Mr Atherton, the counsel, assented, saying, "No doubt that is so, whether the decision of the judge is right or wrong." Maule, J., says, "The court does not sit strictly as a Court of Appeal from the decision of the master. Costs of increase are allowed at the discretion of the court, but that discretion is, for convenience sake, exercised through the master. The court has still an original jurisdiction. You may now urge that the expense of the witness' attendance ought to have been allowed, on the ground that he was a material witness." All the judges then *seriatim* concur in this ruling as to the witness' fees, both when rejected by an arbitrator or by a judge.

But the expenses of witnesses will be allowed, though not called at the trial. Ch. Arch. Prac., 11th ed., 512. In *Miller* v. *Thomson*, (4 M. & G. 260,) where a plaintiff did not call a witness because the defendant failed in his plea, yet he was allowed the fees of the witness, and see also *Adamson* v. *Noel*, (2 Ch. 200,) where it is said the court will not review the master's taxation when he has allowed for witnesses who were not called; but this must mean where the master has entertained an objection to their allowance, and has decided that in his opinion they were material. See *Delisser* v. *Towne*, (1 Q. B. 333,) in which it was decided that where the plaintiff does not prove certain assignments of perjury set out in his declaration, he should not be allowed the costs of those witnesses who were summoned to answer a case which it was supposed the defendant would attempt to make out.

The order should then, in my opinion, go for a revision upon the first and third grounds of objection, but as the practice in the master's office has been to allow for such services as have been complained of in the first objection, it would not be right that I should unsettle the practice in this respect. It will be better, therefore, that the defendant should carry his objection to the full court, that it may be more maturely considered there and definitely settled, and I will grant the order only upon the third ground.

Order for revision on the third ground.

DENNISON v. KNOX.

Writ of Certiorari to County Court—Right of Plaintiff thereto—Mode of Compelling appearance.

Where plaintiff, having sued defendant in a County Court, and after joinder of issues in law, obtained a certiorari for the removal of the cause *into the Court* of Queen's Bench, had the writ returned; and the defendant, refusing to appear in the Queen's Bench, obtained a summons, calling on defendant to shew cause why he should not enter an appearance in the office of the Clerk of the Crown, or why the plaintiff should not have leave to enter an appearance for him; and on service of a notice upon defendant of having entered such appearance, why plaintiff should not have leave to proceed in the action by filing a declaration, and serving a copy of the same on defendant, his attorney, or agent; or why, in default of defendant entering an appearance, plaintiff should not be at liberty to proceed by filing a declaration, posting up a copy with notice, to plead in eight days, and in default of plea, be at liberty to sign judgment; or why, in default of such appearance, a writ of distringas should not issue to compel such appearance. The summons was discharged.

Quære—The right of a plaintiff, by writ of certiorari, to remove his own cause to a Superior Court, pending an issue in law, not determined.

[Chambers, July 11, 1863.]

This was a summons calling upon defendant to shew cause why he should not enter an appearance in the office of the Clerk of the Crown; or why plaintiff should not have leave to enter an appearance for him, and on service of a notice upon defendant of having entered such appearance, why plaintiff should not have leave to proceed in the action by filing a declaration, and serving a copy of the same on defendant, his attorney or agent; or why, in default of defendant entering an appearance, plaintiff should not be at liberty to proceed by filing a declaration, posting up a copy with notice to plead in eight days, and in default of a plea, be at liberty to

sign judgment: or why, in default of such appearance, a writ of distringas should not issue to compel such appearance.

From the affidavits and papers, it appeared:—

1. That on 2nd June, 1863, the plaintiff's attorney served the defendant's attorney with a notice entitled in the cause, and in the Queen's Bench, that the plaintiff having sued out of the Queen's Bench a writ of certiorari, directed to the Judge of the County Court of Huron and Bruce, for removing the cause from the County Court into the Queen's Bench, had filed the writ and return with the proper officer at Toronto, and that defendant was required to appear in the said action within ten days, otherwise judgment by default.

2. That this is an action of covenant brought for the recovery of $200 and interest—brought on a covenant in a mortgage made by defendant to plaintiff, in favour of one C. B., as the assignee of the mortgage, and carried on for C. B.'s benefit. That this action was commenced in the County Court of Huron and Bruce, and defendant pleaded a set-off due by plaintiff to defendant, to which plaintiff replied on equitable grounds, an assignment by the mortgagee, with notice to the mortgagor, and his assent thereto, to which replication defendant demurred. That judgment was given for defendant, with leave to plaintiff to amend. That plaintiff amended, and defendant again demurred. That plaintiff obtained a writ of certiorari for the removal of the cause from the County Court to the Queen's Bench, which the Judge returned. That after the return, plaintiff's attorney saw defendant's attorney, who promised that he would, in a few days, send an appearance to Toronto to be entered, but has not done so, and has since refused, and still refuses, and after such refusal he was served with the above notice.

3. Defendant's attorney denies any positive undertaking to appear, stating that after the certiorari issued, plaintiff's attorney proposed to him to let the pleadings stand as they were, to which he replied he would think it over, and let him know in a few days. Plaintiff's attorney then requested him to enter an appearance, and defendant's attorney replied, "he could send it at the same time as the pleadings." That defendant's attorney, on reflection, thought that as he had only been retained by defendant to defend the suit in the County Court, he would require his client's instructions before he entered a defence in this Court (Queen's Bench), and he shortly afterwards informed plaintiff's attorney that he declined entering into the proposed arrangement. That plaintiff's attorney threatened to bring ejectment against defendant on the same mortgage, unless an appearance was entered, and has brought such action.

R. A. Harrison, for summons.

T. Moss, contra.

DRAPER, C. J.—The removing by a plaintiff, by certiorari, of his own cause from the County Court, pending an issue in law not tried, (and possibly pending issues in fact, for the affidavits disclose only that a set-off is pleaded and replied to) is a novel proceeding, —so far as my experience goes—and no instance of a similar course has been brought under my notice.

Conceding (for the sake of argument only) the right of a plaintiff to remove his own cause by certiorari, at any stage, it appears to me to be a course open to grave objections, and to which I should afford no facilities.*

It certainly is not of right, that the plaintiff should obtain a Judge's order in effect to point out to him what course he must now take to get on with his action, or in effect to relieve him of the responsibility of taking a step by forcing the defendant to appear.

It is unusual for the Court or a Judge to compel an appearance, the result of which may expose defendant to loss and expense, when the defendant has no desire to litigate the matters with the plaintiff, but leaves him to pursue his remedy in such mode as the law authorizes.

I do not think the plaintiff makes out a case of an undertaking by defendant's attorney to appear. The request was not made until after the writ of certiorari had been sued out, and when, not improbably, the plaintiff's attorney felt in difficulty as to how he should get on, and the plaintiff's attorney neither took a step, nor forbore taking one in consequence of the alleged undertaking.

If the defendant appears to the certiorari, I do not perceive what remedy he has for his costs in the Court below; he could not, in any way that occurs to me, compel the plaintiff to proceed, though the plaintiff may obtain a procedendo, notwithstanding he issued the certiorari—at least, I see no obstacle to his doing so.

It is obvious that if this course is allowed, it may harrass defendants, and might be used as a mode of appealing from the opinion of a judge before judgment was actually given, instead of following the practice directed by the statute in regard to appeals.

I think no ground is shewn to make my granting the order prayed for as a matter of right; and as a matter of discretion, I feel very clear I ought not, in the absence of authority, to do it.

If the plaintiff's course of proceeding has the sanction of law, he must take whatever step he is advised to carry on his cause. If, by law, he cannot, without some special and discretionary interference of the Court, or a Judge, get the defendant into the Court of Queen's Bench, he must make a much stronger case than his affidavits shew, to entitle himself to this; and I confess I look upon this as an experiment to which I am not inclined to give any encouragement.

I refer to *Edwards* v. *Bowen*, 5 B. & C. 206. *Melsome* v. *Gardener*, Cowp. 116. *Hankey* v. *Grand Trunk Railway Company*, 17 U.C. Q. B. 472. *Kempe* v. *Balne*, 8 Jurist 619. *Gunn* v. *McHenry*, 1 Wills. 277.

Summons discharged with costs.

* See *Helps Lucas*, 8 U. C. L. J., 184.—EDS. L. J.

LYNCH ET AL v. WILSON ET AL.

Staying plaintiff's execution to enable defendants to institute an action and recover judgment against plaintiffs—Power so to do—Circumstances.

An application to delay a plaintiff's proceedings on an execution in order to enable the defendants to institute an action, and to acquire a position in which they may apply to set off a judgment to be recovered by them against plaintiff's judgment is one not founded upon a right given by law, but is an appeal to the equitable powers of the Court.

It is expedient therefore on every such application to consider all the circumstances, to determine whether or not the application rests on an equitable foundation.

Held, that the circumstances of this case did not disclose such an equitable foundation as to entitle defendants to the relief sought:

Quære, the power of the Court or a Judge to delay plaintiff's proceedings in an action, in order to enable defendants to institute an action, and to acquire a position in which they may apply to set off the judgment to be recovered by them against plaintiff's judgment.

Semble, there is no authority for such a position.

(Chambers, July 15, 1863.)

On the 24th June, 1863, a summons was granted by the Chief Justice of Upper Canada calling on plaintiffs to show cause why all proceedings in the cause, or the proceedings on the execution then in the sheriff's hands should not be stayed until after the next fall assizes, or until judgment for the sum of £120. 6*s*. 2*d*. costs, taxed for defendants against plaintiffs be obtained, or until such other time as the Judge in Chambers might order, on the ground that the defendants have a claim against plaintiffs for the said sum for costs taxed against them, and that the estate of the late Connal James Baldwin is insolvent, and unable to pay the debts against the estate in full, and on the ground that if the proceedings are not stayed until defendants obtain judgment and are able to set off this claim against the plaintiff's claim in this cause they are apprehensive they will lose the said claim, and on payment of so much of the judgment as is in excess of the said claim, or so much as the Judge in Chambers may direct.

It appeared from the affidavit filed on both sides,

1st. That the present action (in which judgment has been recovered, and a writ of *fi. fa.* against goods issued and placed in the sheriff's hands on 17th April, 1863,) was brought in the life-time of the intestate for negligence on the part of the defendants as attornies and solicitors of the intestate; that the action was carried on by the plaintiffs after the death of the intestate, and they recovered a verdict for $500; that the execution now in the sheriff's hands is for verdict and costs, amounting to $700 or thereabouts.

2nd. That the demand of the defendants arises out of the following circumstances. The intestate, some years before his death, sold some lands to one Duignan, and employed the defendants to draw a deed to Duignan and a mortgage to be given by Duignan to the intestate to secure £750, the balance of the purchase money, with interest. The deed and mortgage were drawn accordingly, and executed. Duignan without delay registered his deed, but the defendants delayed to register the mortgage for many months, and in the meantime Duignan gave another mortgage on the same lands for about £1500, which was registered, and thus defeated the

intestate's security, as Duignan had become insolvent. After this second mortgage was given, one of the defendants obtained from Duignan a mortgage to the intestate of other landed estate, which was then subject to two other mortgages. On the 12th November, 1857, the same defendant wrote to the intestate reserving an ulterior proposal in reply to a note of the intestate, and proceeding thus: "in the meantime, for the benefit of all concerned, "it would be well to take immediate steps against Duignan, which, "of course, will be without prejudice to our respective positions "or rights, as it will be a pity that Duignan should gain time "while we are endeavouring to settle our differences. Please to "advise with some professional person on this subject, and he will "see you do not risk your rights by acceding to this." To which the intestate replied through his solicitors on 20th November, 1857, stating that the solicitors "advise him to comply with the sugges- "tion contained in that letter—that immediate steps should be taken "against Duignan to enforce the payment of the mortgage, it "being distinctly understood that whatever steps may be taken "are not to prejudice the respective positions or rights as between "you and Mr. Baldwin." Upon the receipt of this letter a bill of complaint was filed, at the instance and in the name of the intestate, against Duignan, and eventually a final order of foreclosure was obtained. Communications passed between the intestate and his solicitors, and the present defendants during the progress of that suit, and the intestate made one or more affidavits for the purpose of the suit, but in no instance did he repudiate the authority given by him through his solicitors for the institution and maintenance thereof No beneficial result to the intestate attended the decree, and the property on which the second mortgage was taken, proved inadequate, as was asserted, to satisfy the previous incumbrances. It was for the costs of this suit in Equity, instituted under the foregoing circumstances, that defendants claimed the right and opportunity to set off.

On the 6th October, 1862, Morrison, J. made an order in the matter of the present defendants as attornies, that the bill or bills of costs, &c., delivered to the plaintiffs as administrators of the of the intestate Baldwin, should be referred to the proper taxing officer of the Court of Chancery to be taxed, and (among other things,) that the defendants in this cause should be restrained from commencing or prosecuting any action or suit touching their demand, pending such reference reserving the right to dispute the retainer of the defendants, and the liability of the intestate and of the plaintiffs as his administrators.

On the 15th June, 1863, the Master in Chancery certified that in pursuance of the order of Morrison, J. he was attended by the solicitors for the present plaintiffs and defendants, and the solicitors for the last named parties having brought in and laid before him a bill of their costs, charges, and disbursements, amounting to £131. 14*s.* 6*d.*, he had taxed the same at £116. 9*s.* 9*d.*, and the costs of taxation £3. 16*s.* 5*d.*, making together £120. 6*s.* 2*d.*, of which the defendants have received nothing

It was asserted on both sides that the estate of Connal James Baldwin is insolvent, and therefore the defendants represented that unless they could set off this demand against the judgment recovered against them, they will wholly lose it.

On the plaintiffs' side it was shewn that on the seventh January, 1863, they made a deed poll reciting that the estate of the intestate was indebted to Patterson & Harrison in divers large sums of money, and that plaintiffs as administrators had a claim against defendants which was then being prosecuted, and in consideration of such indebtedness they assigned to Paterson & Harrison the said claim, to the extent of Patterson & Harrison's claim for costs and professional services against the estate and the plaintiffs as administrators.

The defendants were notified of this assignment on the 21st January, 1863.

On the 15th June, 1863, Richards, J. made an order in a cause of the Edinburgh Life Assurance Company judgment creditors, and the now defendants, garnishees, that the garnishees should pay to the judgment creditors £25 of the debt due from them to the now plaintiffs.

It was sworn that the plaintiffs had incurred liabilities and expenses in their administration, and that there were no assets except the verdict recovered against the defendants to reimburse them their expenses or to idemnify them against such liabilities, and that the plaintiffs, if sued by the defendants for their bill of costs, intend to resist the claim.

The plaintiffs' attorney also swore that he delayed entering the judgment in this cause in consequence of a conversation with defendants' attorney, from which he was led to believe that the amount would be paid, and promised not to enter the judgment immediately, and that the plaintiff's attorney attended before Mr. Justice Richards when the garnishee order was made, when the now defendant's attorney in answer to a question put, said he supposed the money would have to be paid.

Robert A. Harrison showed cause. He contended that under ordinary circumstances there was no authority in favor of making the summons absolute, and argued that the dictum in 1 Chit. Arch. 9, Ed. 664, was not supported by the cases to which the author referred, *Masterman* v. *Malin*, 7 Bing. 435, *Taylor* v. *Young*, 201. Besides he distinguished those cases by showing that the former was an authority only for "a brief suspension" at the instance of a person whose action was pending and the latter an authority only for set off of costs in the same suit. But he also argued that in this case there were special circumstances, which would render it inequitable to make the summons absolute. First, the assignment by plaintiff of the verdict of which defendants had notice before application (*Miller* v. *Thompson*, 1 U. C Prn. R. 215; *Standeven* v. *Margatroyd*, 27 L. J. Ex. 425.) Secondly, the right of the administrators to apply assets in payment of personal expenses of administration, and distribution of the balance, if any, according to the priorities of creditors and nature of their claims. (*Gillen* v. *Smithers*, 2 Stark, 328; 2 Williams' Executors, 1683; *Chapman* v. *Derby*, 2 Vern. 117; *Rees* v. *Wallis*, 1 Jur. N. S. 657; *Lombard* v. *Alder*, 17 Beav. 542; *Wardell* v. *Thellusson*, 6 El. & B. 976.)

C. S. Patterson, contra, argued that there was ample authority under ordinary circumstances to support the summons, referring to *Masterman* v. *Malin*, 7 Bing. 435, to show that the application there failed because of the omission to show insolvency, which was not only shown but admitted in this case, and as to the special circumstances, argued that the assignment of verdict passed nothing, and that the administrators did not show judgments unsatisfied in answer to the application. He referred to *Phillipson et al* v. *Caldwell*, 6 Taunt. 176.

DRAPER, C. J.—This application to delay the plaintiff's proceedings on an execution in order to enable the defendants to institute an action and to acquire a position in which they may apply to set off a judgment to be recovered by them against the plaintiffs judgment, is one, not founded upon a right given by law, but is an appeal to the equitable powers of the Court. It is indispensable, therefore, to consider all the circumstances in order to determine whether the application rests upon an equitable foundation.

It does not appear when the defendants were first in a position to assert their claim, or whether they delayed so doing before the 6th October, 1862, when Morrison, J. referred their bill for taxation. From that date until 15th June, 1863, when the Master made his certificate, they could bring no action. This summons was issued on the 24th June. It is asserted, and not denied, that if the plaintiffs had applied to a judge in Equity, instead of to a Common Law Judge, to refer this bill, which is for proceedings in Chancery only, a trial of the fact of retainer by a jury would not have been necessary, and that the question would have been disposed of at once, or at least without the necessity of awaiting the assizes, and that the plaintiffs ought not therefore to be heard to complain against their proceedings being so long restrained, as it arose from a step taken by themselves. I incline to the defendant's view so far. If there was unnecessary delay on their parts before October last it is not shown.

It may be inferred, and I think fairly, from the case of *Masterman* v. *Malin*, 7 Bingh. 435, that the Court would grant "a brief suspension" of the proceedings on one side to enforce payment of costs, where the other side might, by the determination of a rule then pending, and which the Court expressed their readiness to proceed with at once, become entitled to costs. I find no case which has gone farther than this, and from the observations of counsel it would seem that unless in case of insolvency or other special circumstances even that relief could not be afforded. It is obvious that this is a long way from being an authority in support of the present application.

The language of Gibb, C. J. in *Phillipson* v. *Caldwell*, 6 Taunt. 176, is as far as it goes adverse to the defendants, though not any authority on the point at issue. Nor have I found any case which affords any direct guidance for a decision.

Looking then at the facts, it appears to me that the second mortgage would never have been taken from Duignan, but for the loss of the priority of the first mortgage given by him to the intestate. The jury have in this case determined that such priority was lost by the neglect of the defendants. It may be truly said that by taking this mortgage the intestate had a reasonable prospect of being secured in the payment of Duignan's debt to him, but it does not appear that the intestate was aware of the necessity of this step, nor that he sanctioned it before it was taken, and it is obvious that it was for the defendant's interest to obtain this security, since to whatever extent it proved available, they so far reduced their liability in damages to the plaintiffs for their neglect.

The necessity for the second mortgage arose from the defendants' omission in regard to the first. The necessity for the foreclosure suit arose from the same cause. The costs of that suit are what the defendants first of all seek to obtain judgment for against the intestate's estate, and then to set it off against the plaintiff's judgment for that negligent omission. The special circumstance relied on to support the application is the insolvency of the intestate's estate. It is urged, and if true, as appears to me with irresistible force, that the deficiency in the assets has arisen from defendants' conduct, and the total loss of the debt due by Duignan, that the retainer is fully open to question, that the verdict against the defendants is the only fund out of which the plaintiffs have to pay the expenses of administration for which they are personally liable, and that it would be unjust under the circumstances to relieve the defendants by a proceeding beyond any decided case, and which would occasion loss to innocent parties.

Without reference to the assignment, because I do not feel driven to rely upon it, but preferring the broad ground that the defendants' case is not one which entitles them to the equitable relief asked for. I discharge the summons with costs. See *Young* v. *Gye*, 10 Moore 198; *Johnson* v. *Lakeman*, 2 Dowl. P. C. 646; *Taylor* v. *Cook*, 1 Younge, 201; *O'Hare* v. *Reeves*, 13 Q. B. 659.

Summons discharged with costs.

WARD v. VANCE—THOMPSON, GARNISHEE.

Garnishee proceedings—Service of attaching order and summons to pay over—Death of garnishee before issue of order to pay over—Effect thereof—Amendment nunc pro tunc—Issue as to indebtedness.

Personal service of an attaching order, or summons to pay over issued thereon, is unnecessary, if it can be shewn or can be gathered from the materials before the court that the garnishee had a knowledge of the service.

Where the summons to pay over was argued on one day, and judgment deferred till the next day, when the summons was made absolute (the garnishee having died during the interim) on an application to set aside the order, on the ground that it was made after the proceedings had abated, by reason of the death of the garnishee, leave was given to the judgment creditor to amend his order *nunc pro tunc*, without costs, the delay being the delay of the judge and not of the party.

Quære, should not all orders as well as rules be in practice dated as of the day of argument, and not of the day of delivery of judgment?

The executor of the garnishee having sworn that there was no debt due at the time the order was made, and that there was collusion between the judgment creditor and judgment debtor, which neither of them denied, leave was given to take an issue on payment of costs. (Chambers, July 29, 1863.)

A summons was obtained by the executor of the garnishee, calling upon the judgment creditor and judgment debtor to shew cause why the order made in this matter on the 22nd June last, ordering the garnishee to pay over to the creditor the amount of his indebtedness to the debtor should not be rescinded.

1. Because the summons to shew cause upon which the order was mas made had not been personally served on the garnishee.

2. Because at the time of the making of the order the garnishee was dead.

3. Because nothing was due at the time.

And upon grounds disclosed in the affidavits and papers filed.

The affidavit made by Mr. Brunskill, and referred to in the summons, stated, among other things—that the garnishee died on the 25th June, 1863; that he, Mr. Brunskill, is one of the executors of the deceased; that for about five months before his death the garnishee was chiefly confined to his house, and too unwell to attend to his business, that for some time before the garnishee's death, the deponent resided chiefly at Bradford, and looked after the affairs of the garnishee, and he is well acquainted with the same; that an attaching order was taken out on the 14th April last; that a summons to pay over was taken out on the 16th June; that neither of them was personally served on the garnishee, and from statements made by him to the deponent, he (the deponent) believes the garnishee had no knowledge of the summons having been issued; that a copy of the attaching order was handed to the deponent, but he did not accept service for the garnishee; that the summons of the 16th June he believes was served on J. W. H. Wilson, an attorney, who had occasionally been retained to do business for the garnishee, but who had no authority to accept service of writs or papers requiring personal service; that he (the deponent) on the 22nd of June, having heard of the issue of the summons, and that the judgment creditor was pressing the judge in chambers for an order thereon, despatched a telegram to Messrs. Paterson & Harrison, his solicitors, to see Mr. O'Brien, the agent for the said J. W. H. Wilson, and to repudiate the service, which he believes was accordingly done, and a communication was made to the presiding judge in chambers by Messrs. Paterson & Harrison that the order and summons had never been personally served; that in order to set aside the summons and service on Wilson, an affidavit was drawn up to be sworn by the garnishee, stating that no service had been made upon him, but before the affidavit arrived at Bradford the garnishee was dead; that on the 26th of June the order on the garnishee to pay over was made; that he can say with confidence the garnishee's estate is not indebted to ance; that the judgment creditor and the judgment debtor are brothers-in-law, and he the deponent believed there was collusion between them.

Robert A. Harrison, for the summons, said he did not rely so much upon a want of personal service, as upon an utter want of service, both of the attaching order and summons to pay over and so contended that the order to pay ought to be rescinded (*Abbey* v. *Dale*, 14 Jur. 1070). This ground he urged as open to him as being a ground 'disclosed in affidavits and papers filed.' He also contended that under any circumstances the summons ought to be made absolute, because of the death of the garnishee, whereby the proceeding had abated at the time the order was made (Con. Stat. U. C., cap. 22, secs. 288, 289, 290). He admitted there was no direct authority in favor of this position, but argued that the order to pay upon which execution might issue was a quasi judgment, and so analogous to an ordinary judgment in an ordinary action, which, if obtained after the death of either plaintiff or defendant, was at common law void (Har. C. L. P. A. 374, note *k*). He argued that the statutes 17 Car. II, cap. 8, and 8 & 9 Will. III, cap. 11 sec. 6, providing for the continuance of proceedings in an action under certain circumstances to judgment, notwithstanding the death of plaintiff or defendant, are inapplicable to garnishee proceedings. Moreover, he submitted that as the garnishee, or rather his legal representative, now really disputed the debt, the order ought, upon that ground at all events, to be rescinded, and an issue directed (Con. Stat. U. C., cap. 22, sec. 291; *Wintle* v. *Williams*, 3 H. & N. 288; *Wise* v. *Birkenshaw*, 8 W. R. 420 S. C. 29 L. J. Ex. 240).

Tilt, contra, contended that the order was good as against the objections raised, and if not, submitted that, under the circumstances, he was entitled to have the order amended and made *nunc pro tunc* (*Miles* v. *Bough*, 3 D. & L. 105; *Lawrence* v. *Hodson*, 1 Y. & J. 368; *Bates* v. *Lockwood*, 1 T. R. 637; *Heathcote* v. *Wynn*, 25 L. T. Rep. 247; *Bryant* v. *Simmons*, 24 L. J. Q. B. 253; *Wright* v. *Mills*, 28 L. J. Ex. 223; *Moor* v. *Roberts*, 27 L. J. C. P. 161, *Lauman* v. *Audley*, 2 M. & W. 535; *Trueman* v. *French*, 21 L. J. C. P. 214; *Wilkins* v. *Canty*, 1 Dowl. N. S. 855; *Griffith* v. *Williams*, 1 C. & J. 47, 2 Saund. 72 *i*.

Harrison in reply contended that if the judgment creditor considered himself entitled to have his order amended *nunc pro tunc*, he should make a substantive application for the purpose, to which cause would be shewn; and that, without amendment, the application must prevail.

ADAM WILSON, J.—I do not think I ought to re-open the question of service, either of the attaching order, or of the summons on the garnishee to shew cause why he should not pay over, as I have already disposed of this point at some length, on the application being made for the final order;* besides, the present proceedings, in my opinion, show no reason why this matter should be renewed.

Ward v. *Vance—Thompson, Garnishee*, 9 U. C. L. J. 214.

Brunskill's affidavit shews that he himself—and while, it would seem, he was looking after the affairs of the garnishee, during the time the garnishee was confined to the house, and was too unwell to attend to his own business—was served with the attaching order, and, it may be assumed, some short time after its issue on the 16th of April; but he does not say whether he ever informed the garnishee of the fact, although, in the nature of things, it must be assumed he did do so, and more particularly as he does not deny that the garnishee had knowledge of the order and of its service as before stated, while he does say that, from statements made to him by the garnishee, and from his knowledge of the garnishee's affairs, he does believe the garnishee had no knowledge of the summons. And it can scarcely be assumed the deponent, while looking after the affairs of the garnishee, could or would have neglected so serious an affair as the one in question. At any rate he is the one who can the best explain whether he did communicate the receipt of the order or not, and as he does not allege to the contrary, the inference irresistibly is, that he did do what he ought to have done —inform his principal of the receipt of the important paper; or, if he had not done it that he would have disclosed the fact of such non-communication to the garnishee.

The knowledge by the garnishee of these proceedings having been initiated is of some consequence, for a less strict service or authority is required in the future proceedings or services, as would appear from the case of *Bayley* v. *Buckland*, 1 Exch. 6.

Here it is not at all certain but that the garnishee had full and actual knowledge of the fact of there having been a summons upon him to shew cause why he should not pay over, or that, at any rate, he should be presumed to have had such knowledge.

It is true that Brunskill says from his knowledge of the garnishee's affairs, and also from statements made by the garnishee, he believes the garnishee had no knowledge "of the summons having been issued," which is rather an equivocal expression. But it appears that Brunskill, from what he says, heard on the 22nd of June of the issuing of the summons. Now, from whom did he hear this? Was it from the garnishee? It is rather to be presumed it was, because Brunskill telegraphed on that day to Messrs. Paterson & Harrison, his own solicitors, to get them to have the service of the summons repudiated by Mr. Wilson's agent, and it can scarcely be assumed that he did this without the authority of the garnishee. In fact, the very act of Brunskill is made the foundation upon which the present application to set aside the service of the summons rests.

I am not inclined, therefore, to lay much stress upon the idea of there being new facts submitted in the new affidavits at all serviceable to the applicant. On the contrary, I rather think the service of the attaching order is strengthened by Mr. Brunskill's affidavit; for while before I thought the service of that order sustainable chiefly by the latter proceedings then had upon it, I now think it sustainable from the circumstances connected with the present proceedings. Nor have I altered my opinion as to the effect of the appearance of an attorney to except to a service claimed to have been made upon his client.

The first objection, therefore, I do not entertain, rather than overrule it.

The second objection is one which may, perhaps, be entitled to prevail, unless relief can be given; for the order being drawn up after the garnishee's death, can be of no efficacy in such a shape.

It is said the garnishee died after he had been called upon to shew cause why he should not pay the debt, and after the case had been argued and stood for judgment, and that the delay was the act of the judge and not of the party claiming the benefit of the order; that such delay should not prejudice the party but that such relation should be given to the order as it would have had if the delay in question had not occurred. It does seem reasonable that the order should be sustained, if it properly can be so, when the occasian of its not being earlier made was certainly the act of the judge, who required time for consideration as to the judgment to be pronounced, than that all that has been done towards it should be defeated by an objection which *per se* has no special merit in it.

The order of a judge is to be considered, while it stands, as the order of the court, and may be modified and dealt with by the judge precisely as a rule may be dealt with by the court. And I think it is quite clear that upon the particular day when an order is moved for, if the judge is not prepared to give his judgment, and takes time to consider it, if he afterwards grant the order, the order may be drawn up (and, perhaps, in strictness should always be drawn up) as of the day on which it was made (*Egan* v. *Rowley*, 8 Dowl. P. C. 145) This would be to make the order according to the actual fact, and is quite a different thing from giving it a special operation and relation as was sought to be done in *Wilkins* v. *Cauty*, 1 Dowl. N. S. 855.

I do not, therefore, think this order is erroneous or void as made after the death of the garnishee; but it is rather to be considered as wrongly dated, and so amendable according to the truth of the case.

Upon the third ground I have no hesitation in granting relief, and permitting the executors of the deceased garnishee to contest the alleged indebtedness to the judgment debtor, considering all the circumstances, and the very strong fact that it is the judgment debtor who is distinctly charged with carrying on these proceedings, and between whom and the plaintiff collusion is attributed, which neither of them has denied.

My opinion then is that I should amend the order as to its date, and that I should discharge the summons so far as relates to the first and second grounds, and that I should make it absolute, if the applicant desire it, upon the third ground upon payment of costs.*

COUNTY COURT.

(In the County Court of the County of Elgin, before His Honor Judge Hughes.)

Ellison v. Ellison.

Action in name of plaintiff without authority—Stay till indemnity given to him.

Where an attorney without the knowledge or consent of plaintiff brought an action in his name, relying upon an assignment of choses in actions from plaintiff to the person for whom the attorney really was acting and the right of the attorney under the assignment to use plaintiff's name for the purposes of the action was very doubtful, an order was made for the stay of the proceedings until the attorney or his client should give a proper indemnity to the plaintiff against any costs that he might be subjected to or become or be made liable for in consequence of the bringing of the action in case the plaintiff should become nonsuit, or the suit be discontinued, or a verdict be entered for defendant.

(Chambers, 3rd November, 1863.)

This was an action for money paid to defendant's use, as set forth in special endorsement on summons:

"To paid St. Thomas Building Society, for you at your request, £31; interest, £14 8s. 2d.; total, £45 8s. 2d."

Defendant appeared by attorney, and afterwards demanded security for costs from the plaintiffs attorney, which was not given, nor was the demand followed up by any application.

The plaintiff, however, made affidavit that the action was brought without his knowledge, consent or concurrence, and that he never authorised the plaintiff's attorney, nor any other person, to bring the action, nor had he ever been requested by any person to allow an action to be brought in his name against the defendant.

Upon that affidavit a summons was issued calling upon the plaintiff's attorney to shew cause why the writ of summons issued and served in this cause should not be set aside with costs to be paid by him, or why the beneficial plaintiff, whoever he might be, should not pay the costs of that application and give security to the plaintiff against all costs that might by possibility be recovered against or recoverable against the plaintiff, &c., or why further proceedings should not be stayed until the costs of the application be paid and the security given to the plaintiff; because,

1st. The plaintiff never authorised the bringing of the action.

2nd. That the plaintiff had no interest in the action.

Upon the return of that summons *Stanton* shewed cause, and produced a trust deed from plaintiff, and one S. H. Ellison to one Haight, Drake and Duncombe, executed upwards of ten years ago, conveying all the estate of T. & S. H. Ellison, together with their debts then existing, and containing a power of attorney authorising the trustees to collect the debts for the benefit of the estate; he also read the affidavit of B. Drake, one of the trustees, setting forth, 1st That he, Duncombe, and Haight, by a deed executed 28th May, 1852, were made trustees of the estate of the plaintiff and Samuel Hubbard Ellison. 2nd. That the trust deed had never been revoked. 3rd. That the debt sued for was for

* Applicant declined to take the order upon the terms of payment of costs, and so the summons was afterwards discharged with costs.—Eds. L. J.

money paid by the trustees on account of the estate to the St Thomas Building Society, and was so paid by them in their capacity of trustees of the said estate, and was necessarily paid by them to the said society to save the estate from loss—on account of a mortgage executed previously to the trust deed by the plaintiff and S H. Ellison to the said society to secure a loan obtained from them by the defendant, and that he, Drake, was appointed by the other trustees to act as collector for the estate, with authority from them to demand and sue for all claims belonging to the estate. He also read an affidavit of the plaintiff's attorney that about the 4th Oct., 1862, and before the issuing of the writ of summons in this cause, he was instructed by B. Drake, one of the trustees, to commence an action in the name of the plaintiff against the defendant, and upon argument contended that there was no precedent for the application, and that the trust deed showed sufficient authority for Mr. Macartney, the attorney, to bring the action when authorised by the acting trustee, even in the name of this plaintiff, without using the name of S. H. Ellison, the other party who executed the trust deed.

Horton, contra, contended that a debt due to this plaintiff and S. H. Ellison, jointly, was the only one which was authorised by the trust deed, even by the shewing on the other side—because it was sworn that the mortgage to the Building Society was executed by this plaintiff and S. H. Ellison, jointly, and at all events if the money was paid by the trustees in their capacity as such they were the persons who should sue for it and not J. Ellison, who was no party to the transaction; and that by their own shewing the suit was unauthorised; and as the trustees were no parties to the suit, the attorney was the only person who could be called upon to answer this application. Besides this, the Messrs Ellison only transferred debts existing at the date of the deed, 28th May, 1852, whereas this suit was brought for money alleged to have been paid by the trustees for the use of the defendant long since the date of the deed.

HUGHES, Co. J.—The cases of *Smith* v. *Turnbull*, 1 Prac. Rep 88; *Hubart* v. *Phillips*, 13 M. & W. 702; *Doe Davis* v. *Eyton*, 3 B. & Ad. 785; *Doe Hammek* v. *Fillis*, 2 Chit. 170; *Doe Shepherd* v. *Roe*, 2 Chit. 171; *Peckford* v. *Ewington*, 4 Dow. 453; *Shaw* v *Ormiston*, 2nd Prac. Rep. 152; *Doe Baker* v. *Roe*, 3 Dow. 496; *Newton* v. *Matthews*, 4 Dow. 237, *Coleman* v. *Beidman*, 7 C. B. 872; *Re Henderson* v. *McMahon*, 12 U. C., Q. B., 288; *Hoskens* v. *Phillips*, 16 L. J, Q B, 339; *Laws* v. *Bott*, 16 M & W. 300; *Whitehead* v. *Haight*, 2 Dow. 258, are authorities for this application; some of these shew that the application may be made by plaintiff and some by the defendant.

The only question which remains is, whether or not the debt sued for here is one embraced within the deed of trust produced and assigned to Messrs. Drake, Haight and Duncombe, and whether or not sufficient authority to Mr. Macartney for bringing the action in the name of the plaintiff has been shewn.

It is not shewn by the deed itself, for the assignment is a general one of all their existing debts due the co-partnership estate of J. & S. H. Ellison as partners, or to either of them individually.

The affidavit of Mr. Macartney sets forth, that he was instructed by B Drake, one of the trustees, to commence an action in the name of the plaintiff against the defendant; it would have been explicit if the affidavit had shewn that he was authorised to bring this action for the causes set forth in the special endorsement on the writ. Then Mr. Drake's affidavit does not shew that the debt sued for existed at the time of the assignment, or was assigned or embraced within the general terms of the deed of trust; it sets forth that the suit is for money paid by the trustees on account of the estate to the St. Thomas Building Society, and paid by them in their capacity of trustees; while the special endorsement sets forth a claim for money paid to the St. Thomas Building Society for the Defendant at his request, and it is to be inferred by the plaintiff.

If it were sworn that the debt was clearly one of those assigned I should say the authority for bringing this suit had been made out; as it is, the payment of money by trustees out of the joint estate of the plaintiff and of one S. H. Ellison, by reason of a mortgage made by them for the benefit of the defendant, would not give the plaintiff a chose in action against the defendant, it would be in the trustees themselves if anywhere; at all events it is so doubtful as to make it right that the proceedings should be stayed until Mr. Macartney, or his client, give a proper indemnity to the plaintiff against any costs that he may be subjected to or become, or be made liable for, in consequence of the bringing of this action, in case the plaintiff becomes nonsuit, or the suit be discontinued, or a verdict be entered for the defendant, or otherwise during the course of the cause; because I think the bringing of this suit is unauthorised in so far as the plaintiff is concerned.

The plaintiff would have no claim for an indemnity in any case clearly within the meaning of and covered by the deed of assignment, because he had the opportunity of protecting himself and providing for that at the time the deed was executed; but in a case where the authority is denied on the one hand and made more than doubtful on the other, as in this case, I think he has a right to the indemnity.

If the indemnity be not given in ten days the summons must be made absolute in the first alternative with costs. If the indemnity be given it must be such as the plaintiff will be satisfied with or as I shall, upon its being submitted to me, approve of, upon a proper notice to the plaintiff or his attorney of its being about to be submitted to me. Order accordingly.

QUARTER SESSIONS.

(In the Quarter Sessions of the County of Elgin; His Honor Judge HUGHES, Chairman.)

MILLS, Appellant, v. BROWN, Respondent.

Conviction for selling intoxicating liquors after 7 o'clock on Saturday night, and before 8 o'clock on the Monday morning following, contrary to Con. Stat. U. C., cap. 54, sec. 254.

Held, 1st, that a conviction which did not negative that the persons to whom the sale was made were travellers or ordinary boarders lodging at the place where the liquor was sold, or a requisition for medical purposes, was void.

Held, 2nd, that where the proof must negative the circumstances of exception, the allegations in the instrument of conviction ought to do the same.

(9th June, 1863.)

The conviction set forth, that the appellant "did keep a bar-room open, by an inside door, and dealt out and disposed of intoxicating liquors to sundry persons, to wit, to D. P. and S. D., in a bar-room in the house of the said John Mills, in the village of Iona, in the said county, &c. (being a place where intoxicating liquors are allowed to be sold), on the Sabbath day, and also after the hour of seven o'clock on Saturday night previous to the said Sabbath day, contrary to the form of the statute in such case made and provided."

E. Horton, for the appellant, took exception to the conviction in that it did not show that the parties to whom it is alleged the liquor was sold were not travellers residing at the appellant's inn, or ordinary boarders residing there, or that there was no requisition for medical purposes either from a licensed medical practitioner or a justice of the peace; that a sale to either of these, or under certain circumstances, might be legal; and the conviction ought to have negatived all these circumstances, either of which would have justified the selling; and cited *Shaw* v. *Hespeler*, 16 U. C. Q B 104; Blac. Com. 134, 9 Lon. Ed.; and *King* v. *Jukes*, 8 T. R. 542.

Stanton, for respondent, contended that *Shaw* v. *Hespeler* bore out the conviction, and that the words in the conviction, "contrary to the form of the statute," &c., cured the defect, if any there were; and that it was to be inferred that the persons to whom the liquor was sold, contrary to the statute, were not persons in whose favor the statute makes exceptions; and referred to Con. Stat. U. C., cap. 103, secs. 57 to 62.

HUGHES, Co J.—The case of *Rex* v. *Duman*, 1 Chit. 147, in which a conviction under the Imperial statute 5 Geo. III, cap. 14, for taking fish without the owner's consent, was brought in question, the conviction was held bad, for not stating, as well in the information as in the evidence, that it was without the owner's consent, although there were no words in the statute requiring such consent to be negatived.

In *Seth Turner's* case (9 Q. B. 80), in which a summary conviction under the Imperial Master and Servants Act was adjudicated upon, it was held that the mere allegation that the defendant (a servant employed by the prosecutor under an agreement to serve

as a miner for eleven months) "did absent himself from his master's service, and did thereby neglect to fulfil the conditions of the hiring, contrary to the form of the statute," was insufficient for not negativing a lawful excuse, and it was held bad, because the fact as charged might be consistent with the innocence of the accused, although the statute did not use the words "without lawful excuse," or words of that import.

The case of *King* v *Jukes*, cited in argument, was quite analagous to the present case. It was a conviction under the Imperial statute 36 Geo. III, cap. 69, secs. 3 & 4; and it was held there that a summary conviction for any offence created by statute must negative every exception contained in the clause creating the offence, and a defect in omitting to do so is not aided by a proviso in the statute that "no conviction for any offence in the act shall be set aside for want of form, or through the mistake of any fact or circumstance, or other matter, provided the material facts alleged were proved;" for it is a material fact that the defendant did not come within any exception in the enacting clause. Lord Kenyon, C. J., said: "This is not an objection of form, but of substance; and the reason is well given in Hawkins (2 Hawk., c. 25, sec. 113), why a conviction should negative all the exceptions in the enacting clause—because the party cannot plead to such a conviction, and can have no remedy against it, but from an exception to some defect appearing on the face of it, and all the proceedings are in a summary manner. Therefore the conviction itself should show that the party accused had not the defence which the act gives to him, if true. The good sense of the thing is in favor of what is said by Hawkins; for being a summary proceeding, and conclusive on the defendant, it ought to have the greatest certainty, on the face of it."

The exception in the Con. Stat. U. C, cap. 54, sec. 254, is in the enacting clause, and the conviction should have set forth that the sale was to persons named therein, they not being then travellers or ordinary boarders lodging at the appellant's inn, or at the place where the liquors are alleged to have been sold; and should also have negatived that the sale was on a requisition for medicinal purposes, signed by a licensed medical practitioner, or by a justice of the peace, produced by the vendee or his agent; and the same rule would apply in making a conviction for permitting or allowing liquors to be drunk in any such place, because the same exceptions apply. Where the proof must negative the circumstances of exception, the allegations in the instrument of conviction ought to do the same. This seems to be the principle established by all the cases to which I have referred.

It was urged in argument by the counsel for the respondent, that the use of the words "contrary to the statute," &c., cures the defect; but it has been decided by the courts in England, in analagous cases, that the statement "contrary to the form of the statute," &c., will not aid, nor would the word "unlawfully." *Fletcher* v. *Calthorp* (6 Q. B. 880) is in point, and was a case wherein a conviction under the Imperial statute 9 Geo. IV, cap 69, sec. 1, came in question, which statute gives authority for a summary conviction, "if any person shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun, &c., for the purpose or taking or destroying game." The conviction set forth that C. D. "did by night unlawfully enter certain enclosed land, with a net, for the purpose of taking game, to wit, partridges and pheasants, contrary to the form of the statute," &c. It was held bad for not stating the intent to be to take game there, and the court laid down the broad principles applicable to this case:

First, that when a certain act is made punishable by summary conviction, which may be lawful if performed under certain circumstances, these circumstances ought to be negatived in the conviction; and, secondly, that proceedings of this nature, which permit a man to be convicted summarily without trial by his peers, are always construed strictly, and never supplied by intendment of matters which do not appear on the face of them.

It is therefore ordered that the conviction be quashed, with costs.

Per Cur.—Order accordingly.*

* In a case of —— appellent, and ——, respondent. the Court of Quarter Sessions for York and Peel, Hon. S. B. Harrison presiding, quashed a conviction had under Con. Stat. U. C., cap. 54, sec. 254, upon the same grounds as those held fatal to the conviction in the foregoing case.—Eds. L. J.

PARLIAMENTARY ELECTION CASES.

(*Reported by* THOMAS HODGINS, Esq., M. A., LL.B., *Barrister-at-law.*)

ESSEX ELECTION.

(Committee—The Hon. Oliver Mowat, Q. C., M. P., for South Ontario, *Chairman*; Lewis Wallbridge, Esq., Q. C., M. P., for South Hastings; Geo. H. Simard, Esq., M. P. for Quebec Centre; Theodore Robitaille, Esq., M. P. for Bonaventure; and Joseph Rymal, Esq., M. P. for South Wentworth.)

Held, that, to entitle a minority candidate to the seat, without a scrutiny, notice of the disqualification of the sitting member must be brought home to every elector who voted for the sitting member, by proving that notice was given to each voter individually, or by proving that the notice was up at every polling booth before and during the polling. Evidence indicating general notoriety of disqualification is not sufficient.

Where the whole vote for the sitting member is not attacked, but a scrutiny is demanded, a vote given after notice to the voter of the disqualification of his candidate is struck from the list, as in the case of any other illegal vote.

Quebec, 2nd Session, 7th Parl., 1863.

Mr. Rankin and Mr. O'Connor were the candidates at the last general election for the county of Essex, and Mr. Rankin was returned, having the majority of votes. Mr. O'Connor petitioned against this return, on the ground that Mr. Rankin had not the necessary property qualification, and he claimed to be entitled to the seat without going into a scrutiny. The allegation in the petition as to notice was in these words: That the electors "were duly informed and notified and were otherwise well aware" of the said A. R.'s disqualification, &c., "*inasmuch as the said electors were, and each of them was, duly notified and informed, and they and each of them well knew*," &c., "whereof the votes of the said electors which were recorded for the said A. R., were and each of them was useless, of no effect, and void, and were thrown away, &c. The evidence showed that at meetings of electors, notice was given that Mr. Rankin could not qualify—that the same statement was made at the hustings, and that two hand bills were distributed.

Mr. Rankin objected that Mr. O'Connor was not himself a duly-qualified candidate, and evidence to this effect was gone into, and the committee decided the point in favor of Mr. O'Connor.

The property on which Mr. Rankin had qualified, was land conveyed to his wife, her heirs and assigns, to her and their sole use forever; and it was argued that both under these words as well as by the operation of the statute respecting married women, Mr. Rankin did not acquire such an interest in the property conveyed as the law required for his qualification. The committee, after full argument, decided in favor of this view; but the point being one of general law, it has not been thought necessary to report the grounds of the decision at length.

There were also some points of practice decided by the committee, which we may report hereafter.

The question was whether, under the circumstances, the minority candidate was entitled to the seat, or whether there should be a new election, was then argued.

The petitioner in person. The law as applicable to this part of the case is laid down in Clerk on Elections, 268; Rogers on Election Law, 224. He cited *Reg. ex rel Richmond* v. *Tegart*, 7 U.C. L. J., 128; *Reg. ex rel Clark* v. *McMullin*, 9 U. C. Q. B., 467, *Reg. ex rel Horney* v. *Scott*, 2 U. C. Chamb. R. 88, cited in 7 U. C. L. J., 128, Warren on Election Law, 257, 259, *Tavistock* case, 2 P. R. & D. 5.

Hodgins (of the Upper Canada bar) for the sitting member. The *Tavistock* case is strongly against the petitioner, as it was there held that notoriety was not sufficient. The cases in favor of notoriety were boroughs or very small constituencies, as *Southwark* (borough) Cliff. 135; *Kirkcudbright*, 1 Lud. 72; *Flintshire*, 1 Peck 526 (only 92 votes polled); *Abingdon*, 1 Doug. 419, &c. The cases in favour of notice to voters were numerous and of great authority, as being the latest decisions. *Newcastle-under-Lyne* (borough), B. & A. 569; *Tavistock* (borough), 2 P. R. & D. 5; *Canterbury* (borough), Cliff. 359; *Leominster* (borough), C. & D. 1; *Fife*, 1 Lud. 455; *Clitheroe*, 2 P. R. & D. 281, borough); *Belfast* (borough), F. & F. 601; *Cork*, K. & O. 392; *Drogheda*, K. & O. 214, see p. 234; *Leominster*, Rog. App. 302; *Wakefield*, B. & A. 273; also see *Penryn*, C. & D. 55; *Cheltenham*, 1 P. R. & D. 236; *St. Albans*, 1 P. R. & D. 277; *2nd Clitheroe*, 2 P. R. & D. 276; *1st Clitheroe*, 2 P. R. & D 281; *Beverley*, 1 W. & D. In the *1st Stadacona*, M. S. Leg., Council Canada, it was proved that Mr. Huot's disqualification, as member of the Legislative Assembly for a portion of the Division, was known to nine-tenths of the electors, yet a new election was ordered.

The committee deliberated and on a subsequent day the following judgment was read by the learned chairman:

THE CHAIRMAN.—Having decided that Mr. Rankin, the sitting member, did not possess the necessary property qualification, and that Mr. O'Connor, the petitioner, did possess it, the question which remains for us to determine, is in effect, whether there should be a new election, or whether Mr. O'Connor should have the seat though he had a minority of votes?

The rule is clear that if those who vote for a disqualified candidate, do so without having received any notice of the disqualification before giving their votes, or without having received such notice of it as the law applicable to the subject requires, there must be a new election. But if all who voted are proved to have had the necessary notice, all are held to have thrown away their votes, and the candidate of the minority is entitled to the seat without a scrutiny. If some only of those who voted for the disqualified candidate received, or can be proved to have received, the required notice, these votes are upon a scrutiny struck off, like other illegal votes; and if the result of the whole scrutiny is then to place the qualified candidate in a majority, he gets the seat, otherwise a new election takes place. This rule has been recognized and acted upon where the objection was, as here, to the sitting member's want of the property necessary to qualify him. We refer to the *Tavistock* case, 2 P. R. & D. 5 (1853); *Belfast* case, F. & F. 601 (1838); *Cork* case, K. & O., 391 (1835), and the *Drogheda* case, ib. 213 (1835). There is indeed one class of cases in which neither the decisions nor the text-books agree with one another, as to whether any formal notice is necessary or not. This is where the disqualification is already well known to all the electors, before and at the time they give their votes. The case which a learned judge has suggested of votes in favour of a woman for an office, to which by law a woman is not eligible (vide *Gosling* v. *Veley*, 7 Q. B., 439, per Lord Denman), and the case of votes for a minor, well known to be such, (a case which has actually occurred,) may be referred to as illustrations of this class of cases. But whether in this class of cases, notice of the objection is held to be absolutely essential or not, the practice of modern times at least, appears from the books to be, to give the notice and to rely, not on the notoriety of the disqualification, but on express notice being given of it to the electors before they vote. The *Radnorshire* case, 1 Peck., 494 and notes; the *Drogheda* case (1835) K. & O.211; the 2nd *Horsham* case, (1848) P. R. & D., 240; and the borough of *Peterborough* case (1853) 2. P. R. & D. 287, are amongst the cases which strikingly illustrate this practice.

With reference to the want of uniformity in the decisions of committees and in the statements of text-writers on the point, it is to be observed that, for obvious reasons, the decisions of Election committees on questionable matters are less uniform than those of courts; and the decision of one Election committee in England has not the authority with other Election committees which the decision of one court has with other courts of co-ordinate jurisdiction, especially when there is a right of appeal. Another difficulty in determining points of Election Law arises from the fact that election committees have not ussually stated the reasons on which their judgments were based, and it is not always easy to gather with anything like certainty, from the reported facts and arguments of counsel, what the reasons were which influenced the committee. But having given our best attention to all we have met with on the point referred to, we are inclined to think upon the whole, that the weight of Parliamentary authority is in favour of the necessity of notice in most even of the cases in which the fact that creates the disqualification may be notorious without the formal notice. See, amongst other cases, those already mentioned: and also, *Abingdon* 1 Douglas, 429; *Leominster*, 1 Cor. & Dan. 1, and note 12; Heywood on County Elections, 537; Simeon on Elections, 472; Rogers on Elections (9th ed., 1859) 226 note; Clerk on Elections, 267, 268; also 2nd *Clitheroe* case, 2 P. R. & D., 285; *Regina* v. *Councillors of Derby*, 7 A. & E., 419: *Regina* v. *Hiorns*, 7 A. & E. 962; and the 1st *Stadacona* case in Legislative Council (Canada) 1862, MS. The reason for thus requiring notice to be given of a disqualification which is already notorious, is probably in order that the attention of voters may be formally as well as distinctly called to the fact and to its consequences; and that mere inattention or oversight on their part, may not be visited with a penalty designed only for wanton perversity.

This class of cases was referred to in the argument before us as having some bearing on the point we have to decide; and it was urged that the case on which we are adjudicating belongs itself to this class. But where the disqualification is, as in the present case, for want of property, notice of the objection is clearly necessary where the opposing candidate means to claim the seat on the ground of the disqualification. Indeed it is seldom (if ever) possible that a candidate's want of property can be positively known to the electors in the same way as they may positively know, for example, that he holds some disqualifying office, or has been convicted of some disqualifying crime. For he may have no property in one county but he may have property in another. Executions in the hands of one sheriff against him may be returned no goods and no lands: but he may have both goods and lands elsewhere. If not qualified in this respect when he issues his address, or even at the nomination, he may in good faith procure what is necessary before the polling, or even afterwards. Hence notice of this objection has always been held to be indispensible, whatever question there may have been as to its necessity under certain circumstances in other cases.

As to the kind and nature of the notice required, the utmost strictness appears now to be exacted, the giving of a seat to a candidate who had but a minority of the votes, being justly deemed too grave a matter to be done lightly. The best way of giving the notice is laid down to be by serving express notice on every elector individually, before he gives his vote. This it is said may be done, either when he goes to the poll or by delivering to him previously a written or printed statement of the objection.

Another method which some of the text-writers say is sufficient in law, but which is elsewhere spoken of more hesitatingly, and merely as appearing to be sufficient, is by putting up placards at every polling place and at the doors of the polling booths; so that every elector must see the notice when he comes up to vote; and this seems to be regarded as equivalent to personal notice to every individual voter.

The last work we have had access to which treats of the subject is Rogers on Elections. In the 9th edition of that work (1859) the rule is thus stated, p. 226: "Express notice of the disqualification must in all cases be given and strictly proved." On the following page the kind of notice necessary is stated more fully: "Notice of a candidate's disqualification need not be served personally upon every voter in order to render his vote useless, though that is the safest and most desirable course to adopt when it is practicable. It would appear to be sufficient if such notice be affixed in conspicuous places, near the polling place so as to be visible to every elector on coming to vote." In Clerk on Elections (Ed. of 1857) p.167, after giving a form of notice, the author adds the following note: "A notice in this form should be printed on placards and handed to all the electors generally before the poll." At page 225 of the same book there is, however, the following passage: "This disqualification is usually made known by handing to the electors personally and before they come to the poll, a statement regarding it, or by publishing placards and notices upon the walls of the place and the doors of the polling booths.

Mr. Warren, in his work on elections, page 234, refers to three cases in the reports as indicative of the notice required. These cases are the *Cork County* case, K. & O., 406 (1835) where notices apparently written or printed were served on 700 electors in addition to the objection being made known by speeches and hand bills, the *Wakefield* case, B. & A., 319 (1843) in which there was a scrutiny, and not only was public notice of the disqualification given at the hustings and by handbills distributed setting it forth, but a written notice was also given to the individual electors whose votes were successfully objected to; and the *Belfast* case, F. & F. 603, (1838) where before the votes objected to were given, placards had been issued containing notice of the disqualification and posted on the walls of the town and on the Court house where the votes were taken. In all these cases, as Mr. Warren remarks, the notice was held sufficient, and the successful candidate was unseated.

It thus appears that the legal sufficiency of notice by placards posted at all the polling places before and during the election, instead of express notice to every voter individually, is suggested, with greater or less confidence, by the text-writers, and has been maintained by at all events one express decision (*Belfast* case, F. & F. 601 (1838). But it is remarkable that the point does not seem to

be regarded in England as free from doubt; and the practice there appears still to be to give express notice to every individual voter, besides posting notices at the polling places and elsewhere. We may refer to a few cases as illustrative of this practice, since the petitioner here contends that something short even of this kind of notice is sufficient to entitle him to the seat. For example, in the 2nd *Newcastle under Lyne* case (1842) B. & A., 572, a written protest setting forth the objection was given to the returning officer at the election, in the presence and hearing of the candidates; and copies of the protest were posted at the polling booths before and during the polling; yet the petitioner did not rely on the notice thus given, but served several electors with copies of the protest before the polling began; nor did he afterwards attempt to do more before the committee than to get the names of the voters so personally served, struck off on a scrutiny; and it was not until so many were thus struck off as placed the petitioner in a majority, that the committee reported in his favour. So in the case of the *Borough of St. Albans*, 1 P. R. & D. 276 (1851) it appears that, besides delivering a formal written notice to the returning officer, and to the candidate himself, and putting up placards in front of the hustings and on the walls of the buildings immediately adjacent thereto, a similar notice was publicly delivered to each voter as he came to the poll, by persons placed at the entrance of each polling place for this purpose. Again, in the *Tavistock* case (2 P. R. & D. 5), 1853, besides posting on each side of the door of the polling place as well as at other conspicuous places in the borough, notice was given to every elector as he came up to vote, until this course was discontinued by an agreement between the candidates that the notice should not be repeated to each, but that the same should be understood to be given to each elector throughout the election; and even under these strong circumstances, so far does the rule appear to be from being conclusively settled, that counsel thought it worth while to argue (though unsuccessfully) that for want of the express notice to each, the votes were not thrown away.

In the present case it is not contended upon the evidence that express notice was given to every individual voter, nor even that placards setting forth the alleged disqualification were posted at every polling place. But what the petitioner affirms is in effect that notice was given to each and every of the electors; and what the petitioner contends is, that he was not bound to adopt either of the methods of giving notice which we find recommended in the books; that it appears upon the evidence that, through the means which he actually took and otherwise, the fact of his objecting to Mr. Rankin's qualification became generally notorious in the county; and that there is authority for holding the general notoriety of it to be equivalent to proof of express notice to every voter, for the purpose of entitling a minority candidate to the seat without a scrutiny.

Mr. O'Connor certainly did take considerable pains to make his objection notorious; whether his object in this was to entitle himself to the seat in case he should be in a minority, or merely to damp the energies of Mr. Rankin's supporters, is not apparent. Mr. O'Connor and others, in the course of their speeches at the nomination, and at meetings held in every municipality before the election, referred to Mr. Rankin's alleged inability to qualify. They also circulated handbills, in which Mr. Rankin's disqualification was pressed on the attention of the electors; and copies of these handbills were published in a local newspaper. The form of the notices thus given certainly differs greatly from the form which the books recommend a candidate to adopt when his object is to claim the seat should he happen to have but a minority of the votes. Vide Warren on Election Committees (1857) 466; Rogers on Elections (1859) App. 277; Clerk on Elections (1857) App 167.

There were in fact two printed notices made use of. One was contained in a somewhat vituperative election handbill, which embraces several topics besides Mr. Rankin's inability to qualify. The other notice contained a copy of a written demand which had been made on Mr. Rankin, with a short address to the electors added. It is in these terms: "Rankin's qualification—Again demanded but not put in—The following demand has been made—To Arthur Rankin, Esq.:

"Sir,—As an elector of the county of Essex I demand that your "qualification as a candidate at the present election be deposited in "the hands of the sheriff (the returning officer) before a vote is "polled. I am aware that you cannot comply with this demand, "but I desire that the electors should not be deceived; and that "they should not lose their votes upon false pretences.

I am, Sir, your obedient servant,

(Signed) R. A. Whyte.

"Electors, be not deceived, Rankin cannot qualify. He dare not "take the necessary oath with the certainty of a prosecution for "perjury staring him in the face. He will run his chance of going "to Parliament without qualification, and risk another contested "election Essex does not desire another contested election and "its evil consequences. Rankin's practical joke is nearly played "out."

"July 8th, 1861."

Another contested election is thus stated to be the penalty of voting for Rankin; yet this is the very thing against which Mr. O'Connor is now contending, and which he puts this notice in evidence to prevent. This notice therefore, instead of informing the electors, was evidently calculated to mislead them as to the effect of voting for Rankin; and if the case had depended on the sufficiency of a notice which so entirely departs from every approved form, and is at the same time fitted by the terms in which it is expressed to mislead voters, it would be extremely difficult to maintain its sufficiency, and upon the strength of it to pronounce the virtual disfranchisement of the electors for this Parliament. But assuming the terms of the notice to be sufficient, is the notoriety created by its circulation, and by the other means adopted for this purpose, sufficient to entitle the candidate of the minority to the seat? That is what Mr. O'Connor had to make out.

Notoriety, as a learned writer on this subject observes, is a vague word for practical purposes: and no case in other than election matters was mentioned to us, in which English law allows a notoriety to be created and offered in evidence, as a substitute for the express notice that would otherwise be required. The general rule of law is certainly against admitting notoriety as evidence of notice or of anything else, except in cases of supposed necessity; (Vide Taylor on Evidence, sec. 507, et seq., sec. 1478. Roscoe's Law of Evidence, 26 d. &c.) In fact the word seldom occurs in any book on evidence. It is seldom found in the index of any work on law. Whatever is said of it in English books is commonly to be seen under the head of hearsay. Lord Ellenborough in *Weeks* v. *Sparke* 1 M. & S 686, said the admission of notoriety or reputation as evidence for any purpose "is somewhat of an anomaly and forms "an exception to the general rules of evidence." Again, "I con-"fess myself unable to understand upon what principle, even in "matters of public right, reputation was ever deemed admissible" Sir John Romilly, the Master of the Rolls, in *Greenslade* v. *Dare*, 1 Jurist N. S. 294, 20 Beavan 290, stated the rule in civil cases in these terms. "Evidence of general reputation is not admissible to prove a fact unless it be such a matter as the boundary of a manor or the like. To admit evidence of general reputation, to fix a defendant with knowledge of a single fact, while that evidence would not be admissible to prove the fact itself, appears to me to be a violation of the first principles which regulate the reception of evidence and the administration of justice."

The tendency, again, of modern legislation, certainly seems rather against than in favour of such general notices as placards even at the polling places would afford. See for example, the Carriers Act (Imperial) 1 Wm. IV. c. 68, s. 74, and the Railway and Canal Traffic Act (Imperial) 17 & 18 Vict. c. 31. sec. 7.

On the other hand, the latest reported case on the very point before us, is distinctly against the sufficiency of this method of giving notice of an alleged want of the necessary property qualification. We refer to the *Beverley* case, decided in 1857 (1 W. & D. 22.) Beverley was an English borough, and it is obvious that an attack on a popular candidate's qualification would naturally become notorious among the electors of a borough more quickly and more easily than in a large and not very densely populated county like Essex. The evidence in the Beverley case showed that Mr. Glover, whose return was petitioned against, had stood for the borough five years before; that, on that occasion he had left £700 of debts unpaid; that a subscription had been got up in the borough to discharge these debts; that at the election now in question he had received a written demand for his qualification; that he had addressed the electors with this written demand in his hand; that

a placard questioning his qualification and reflecting on his moral character had been sent through the post office to a number of the electors, that the receipt of this paper created a considerable sensation in the borough; that a meeting was called for the express purpose of giving Mr. Glover an opportunity of refuting the charges made against him; that Mr. Glover appeared at this meeting and defended himself; that the author of the placard went down to Beverley very shortly after publishing the handbill, with the intention of substantiating the charges contained in it, that he commenced addressing the crowd on the subject; that before he had said many words, the crowd became so irritated that he was alarmed, and we presume did not proceed with his proofs; and that so much excitement had been occasioned by the publication of the placard, that some witnesses considered it would have been unsafe and have caused a riot, either to serve notice of the disqualification on the individual electors, or to affix the notice publicly at or near the polling booths, unless this was done during the night.

A stronger case of notoriety could not be established than thus existed in the Beverley case, but the committee declined to seat the minority candidate, and there was a new election.

No opposite decision of an election committee was cited to us by the petitioner, Mr. O'Connor; and from our own reading we think it improbable there has been any such for at least forty years and upwards. Had there been adverse decisions, the latest decision would naturally, and in the absence of strong reasons to the contrary, carry with it the greatest weight: and in estimating the value of old decisions even on points not touched by decisions of subsequent date it is always our duty to remember, in reference to any which were given before 1770, when the Grenville act was passed, that at that time, in the words of a standard writer on the subject, "controverted elections were undoubtedly and confessedly decided by the whole House of Commons, as mere party questions calculated to test the strength of contending factions." It is further to be borne in mind, that, though that act led to a great improvement, as compared with what Lord Grenville called "the abominable prostitution of the House of Commons" in elections, which previously existed, still, in the words of the author already quoted, "partiality and incompetence were very generally complained of in the constitution of committees appointed under the act"; that the evils of the system were still universally recognized and deplored until 1839, when an act was passed establishing a new system; that changes were still found necessary and were made in the years 1841, 1844, and 1848; that it was not until the last of these years that the law was placed on its present footing; and that since that time the constitution of election committees is thought in England to be as satisfactory as any statutory enactments are likely to make it.

It is to be observed then, on the one hand, that since the period of the improvement instituted in 1839, or, indeed for many years before, no single instance has been found in which a committee of the English House of Commons seated a minority candidate without either express notice to the voters individually, or at the least by placards at all the polling places before and during the polling; not a single instance in which a minority candidate was seated on the mere ground of general "notoriety" having been given by him and his friends to the fact that the property qualification of his opponent was objected to; while, on the other hand, the Beverley case, which negatives the sufficiency of such a notice, was decided under what is confessedly the best constitution of Parliamentary Election Committees which has yet been contrived.

We have not yet alluded to the case of the *Queen ex rel. Metcalf* v. *Smart*, 10 U. C., Q. B. 89 (1852) which Mr. O'Connor cited to us in his reply. But that case, if held applicable at all, would prove far more than he contended for, and far more than probably any counsel ever contended for in modern times before an election committee. The case, it is to be observed, was one of a municipal and not a Parliamentary election; and there are many considerations which forbid a decision on the Municipal Law of Upper Canada from being held conclusive in reference to a Parliamentary election (*Vide Belford case*, F. & F. 436, 3 Lud. 465; *Chippenham case*, Glanville, 59, 60, &c.) Decisions in such cases do not profess to be based on a review of the decisions of election committees. Indeed the latter, though of weight here, are not regarded as of any authority in municipal or like cases in courts of law, and are seldom if ever cited in such courts. Besides, it is one thing to seat a minority candidate for part of one year in a local council with its limited jurisdiction, and quite another thing to give a minority candidate a seat for perhaps three or four years in the Parliament of the Nation or Province. The case in the Court of Queen's Bench is a sufficient illustration of this difference. That case had reference to an election in the town of Port Hope. By the Municipal Law (as every one knows) a candidate must be assessed in the municipality for a certain amount of real estate: and Mr. Smart, whose election was impeached, was not so assessed. This was mentioned at the election, and the matter was discussed before the polling began, in the hearing of such electors as happened to be present. These circumstances were held notice sufficient to seat one of the minority candidates. The fact that Mr. Smart was not assessed for the necessary amount of real estate, does not appear to have been disputed; and if it had been, any elector could in a few minutes have ascertained the truth by examining the assessment roll, which is by law a public document and open to public inspection. Under all the circumstances, then, the rule laid down by the court of Queen's Bench, as to this notice, may be a sound rule (though we have found no like decision on the Municipal Law of England,) and may be necessary for enforcing the Municipal Law as to the property qualification of a town councillor, and may create little hardship or injustice in such a case. But it is perfectly certain that verbal notice at the nomination is not sufficient in the case of a Parliamentary election. The whole current of Parliamentary practice and authority is against any such notior.

We may add that there seems a disposition on the part of election committees of England, to limit rather than extend the cases in which a minority candidate is seated for want of qualification on the part of a more popular opponent. Thus, in the 2nd *Clitheroe* case, 2 P. R. & D. 286 (1853) the committee unanimously adopted the view—in almost confessed opposition to what they regarded as the Common Law doctrine, as well as to some precedents of cases before election committees—that even where a notice is given in strict accordance with the requirements of the law, still to entitle a minority candidate to the seat, the disqualification must be founded on "some positive and definite fact, existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors, in voting for the disqualified person." The committee concluded their resolution in these terms: they "think it is right to point out that under the administration of the present law, as sanctioned by some precedents, not only may injustice be done to constituencies by being represented by persons whom the majority of electors have deliberately rejected, but also that each individual voter may be placed in a position of hardship and difficulty, if upon the mere assertion of an opposing party that a disqualification exists, the truth or falsehood of which he may have no means of ascertaining, he is to exercise his franchise at the risk of his vote being thrown away, in case, on subsequent investigation, the existence of that disqualification should be established." The disqualification in the case in which these remarks were made, was for bribery and treating at a previous election. But a learned commentator on the case (who argues against the rule it supports) observes with much force, that if the committee took a correct view of the law, "it ought to be applied not only to cases where acts of bribery and treating are alleged as the cause of disqualification, but also in cases where the incapacity is created by want of a sufficient property qualification. Indeed, as the case stands, there is perhaps greater reason for adopting the rule referred in such cases than in many others." As we have already intimated, it it seems sufficient if the candidate has the necessary amount of property before he is elected, or before the proclamation is made by the returning officer at the close of the election. Vide Union act sec. 28; Consolidated Statutes 22 Vic., ch. 6, secs. 36 & 37 (English version) *Bristol* case, Simeon, 51; *Lecominster*, 1 C. & D. 1; *Bath*, P. & K. 23; *Bath*, K. & O. 27.

It is impossible not to feel with the committee in the 2nd *Clitheroe* case, that the rule respecting the seating of a minority candidate sometimes bears hard and even unjustly upon electors. The principle on which it proceeds, is, that the electors on receiving notice of the disqualification, may start another candidate: *Burke's* case, 1 Doug. 241, *The Queen* v. *Horne*, 7 A. & E. 962, *Hawkins* v. *Rex*, 2 Dow's Parl. R. 148; yet no machinery is provided for enabling the electors, in many cases, to ascertain before the election, whether the

objection is well founded or not, and whether therefore it is necessary to start another and less acceptable candidate; and besides, the law gives effect to the objection as to all who vote after having notice of it, though it may then be too late to start another candidate with any possibility of success; and even then most of the electors may have voted and returned to their homes before the objection is disclosed. We certainly can perceive no ground on which we could justify extending such a rule beyond the limits within which it appears to us to be confined to England. Had there been a reasonable doubt as to the true result of the more modern authorities on such a point, (which we do not think there is) our duty as an election committee would seem to be, to lean in favor rather of the rights of electors than of the privileges of those who fail to secure a majority of their votes.

On the whole, therefore, four members of the committee have come to the conclusion, that the petitioner has not shown enough upon the evidence to entitle him to the seat, and that all we can do is to declare the election void. Mr. Robitaille dissents from this decision.

As to costs, the petitioner has succeeded in unseating Mr. Rankin, but has failed, in our judgment, to establish a case entitling us to give the seat to the petitioner. He has thus succeeded in part and failed in part. In such a case we appear, under the statute and the decided cases, to be under the necessity of choosing between making one party pay the whole costs on both sides, or leaving each party to pay his own costs. We think the latter course, under the circumstances of the present case, to be more proper than the former, and we will therefore report that neither the petition nor the opposition to it, has been frivolous or vexatious.

GENERAL CORRESPONDENCE.

Eng. C.L.P.A.—U.C.C.L.P.A.—Schedule B.—Variance—Accidental

KINCARDINE, 31st July, 1863.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—In Harrison's C. L. P. Acts, page 547, it is stated in plea No. 33, "It would be objectionable to use 'did not warrant,' 'did not agree,' or any other appropriate denials." So likewise is it stated in Upper Canada Consolidated Statutes, cap. 22, schd. B, page 272; and in U. C. Statute, 19 Vic. cap. 43, schd. B, page 202. But it would seem that the word "objectionable" is "*un*objectionable" in the English Act from which this is taken. See Bullen & Leake's Prects. 2nd ed. page 587; and Stephen's on Pleading 145 (the only authorities at hand). Can you inform me if it is an intentional alteration, or merely an inadvertent omission or clerical error, and oblige,

Yours truly, W.

[The discrepancy between the words of the schedule of our C. L. P. A. and the schedule of the English C. L. P. A., of which it professes to be a copy, is very remarkable. We cannot think it was designed. We incline rather to the opinion that the variance is accidental. In fact the reading of the very words to which our correspondent adverts, to our mind, establishes the position that the variance was not intended. Thus, "It would be objectionable to use 'did not warrant,' 'did not agree,' or any other *appropriate* denial." If the denials instanced are appropriate, in what respect can it be said they are objectionable? The word "objectionable" should, we are convinced, be read "*un*objectionable," and so the language of our C. L. P. A. schedule be not only consistent with itself, but with the schedule of the English C. L. P. A., of which it is supposed and intended to be a copy. (See Eng. Stat. 15 & 16 Vic. cap. 76, sch. B, No. 37; Finl. C. L. P. A. 320).]—EDS. L. J.

New mode of suppressing tipplers and habitual drunkards.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I send, herewith, a copy of a notice served upon the Inspector of Taverns and Tavern Licenses of this village, which, in its way, is rather a curiosity—not so much on account of its difficult construction and grammar—as that it appears to outstrip the bounds of common sense in an unusual way—and I would ask you to give your opinion as to whether or not it is libellous.

According to this document the trangressors of the By-law are told that "they *will be fined*;" but it is, by no means, promised that they shall receive a trial, either by their peers or otherwise, or that there will be any notice given to them when the fine "*will be*" imposed. It would be a curiosity to see the By-law. If it contains a clause forbidding people to allow others "to be *treated*," does it mean well-treated or ill-treated? You know all the law in the land, and do tell us, Messrs. Editors, if you can explain this, the most extrordinary of all the By-laws, of the different municipal corporations in Upper Canada.

Yours,

Vienna, 1st August, 1863. A SUBSCIBER.

[COPY.]

Reeve's Office,
Vienna, 14th March, 1863.

Mr. George Chute, License Inspector for the village of Vienna:

SIR,—You are hereby authorized to notify the different tavern keepers in the village that if they furnish liquor to any of the parties named in this notice, that they will be fined according to that clause in the By-law forbidding the giving or furnishing, or allowing any other person to give or furnish; or to allow them to be treated by any person, liquor to tiplers or habitual drunkards.

(Here follow the names, in full, of nine residents of Vienna.)

Yours, &c.,

GEORGE SUFFEL, Reeve.

[The above notice has the merit of novelty. We do not remember ever before to have seen or heard of such a proceeding. We omit the names of the individuals whose welfare seems to be so much an object of concern to the Reeve of Vienna, because we think the notice, however well intended, is a libel. All writings which tend to render men ridiculous or contemptible in the relations of private life are libellous. We should hope that more wisdom and learning have been displayed in the framing of the by-law than of the notice; for if not, it must be a sorry piece of municipal legislation.—EDS. L. J.

Law School—Rules—Information to Students.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I noticed in a late issue of the Journal a list of the books to be read for the *Law Scholarships*, and being anxious to compete for the honors, I beg leave to ask the following questions:

1st. Is it necessary for a student to attend the first year, in order to compete for the second, third or fourth years?

2nd. If he does not attend the first year, is he liable to be examined in the course for that year, in addition to those he presents for?

3rd. Where can I find the rules of the Law School?

By answering the above questions you will oblige a number of the law students in this vicinity, who are anxious to understand the working of the Law School, which, I am informed, is yet in its infancy.

Yours truly,

London, Aug. 12, 1863. LAW STUDENT.

[Having consulted two of the Benchers of the Law Society, we are enabled to answer our correspondent as follows:

1st. It is not necessary for a student to attend the first year in order to compete for the second, third and fourth years.

2nd. If he do not attend the first year, he is not liable to be examined in the course for that year, in addition to those for which he presents himself.

3rd. The rules of the Law School have never been published, and are known only to the Benchers.

Our correspondent will please notice that in the list of books published in the June number of the *Law Journal*, Williams on *Personal* Property, and not Williams on *Real* Property, is the work for students in the first year. The error was corrected in the July number of the Journal.]—EDS. L. J.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet Street, London.

The quarterly number of this able and welcome periodical for August is just received. We have examined it with much interest. It opens with an elaborate and well-written article on the Law of Libel as applied to Public Discussions. This article covers no less than 98 pages of the number. The writer ably reviews the leading cases bearing upon the momentous subject about which he writes, and argues that the ruling in the well-known case of *Campbell* v. *Spottiswoode*, to the effect that the motives of a public writer are not to be questioned, is alike opposed to the current of authority and to the spirit of the law. We look upon this article as a valuable repertory of the law on the vexed topic about which it treats. The second article is a continuation of former articles on the Rights, Disabilities, and Usages of the Ancient English Peasantry. The writer, in this number, treats of the Parliamentary regulation of labour in the fourteenth and fifteenth centuries. In the third article we have some opportune remarks about the proposed amendment of the law relating to the trial of issues involving the consideration of Scientific evidence and the evidence of Experts. The fourth is a learned paper written to show the legal right of any of the United States to secede from the Union, and we must say that several of the positions of the writer are worthy of serious consideration. We should like to see them assailed by some of our American cotemporaries whose interest it is to maintain the contrary and whose aim it is to enforce their views at the point of the bayonet. We cannot help thinking that the whole question is one of pure law and might have been determined without recourse to brute force. If the right to secede exists, there is no rebellion in the assertion of that right. The pity is, that it was deemed necessary to assert the right, supposing it to exist, by violence, and also deemed necessary to resist the assertion of the right in like manner. The solution of the question, whatever may be the result, it is certain will entail upon both parties a fearful bill of costs. The fifth article contains suggestions for the amendment of criminal procedure in several particulars. The writer advocates the appointment of public prosecutors, whose duty it will be not merely to see that the guilty are punished but that the innocent are protected. So far as his views are thus directed the writer has our hearty concurrence and earnest hope that his views ere long will be widely entertained and assume a practical form. In Upper Canada, owing to the appointment of county crown attorneys, we have taken the lead of the mother country in this as well as other measures of law reform. The sixth article is a review of the "Principles of Conveyancing explained and illustrated by concise precedents, by Herbert Lewis, B.A." The review is short, but favorable to the work reviewed. The author appears to be a strong advocate for brevity in legal forms, and we fancy he is not alone in his advocacy. The seventh and last article is the endless topic of Convict Discipline.

TWENTIETH ANNUAL REPORT OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW. London: McCorquodale & Co., 18 Cardington Street, London, 1863.

This Report shows real progress during the present year. Fourteen general meetings—eleven papers upon subjects of great importance, all of which have been printed and circulated—two reports carefully prepared by committees specially appointed, one of which after careful discussion was adopted by the Society—twenty-seven new members enrolled since the last annual meeting, &c. Lord Brougham is the President of the Society, and among the Vice-Presidents we find the names of the Lord Chancellor, the Lord Chief Justice, the Judge of the High Court of Admiralty, Vice-Chancellor Wood, Mr. Justice Keating, and others of distinction in the legal circles of the mother country. Why not have some such association in Upper Canada? Is it because our legal men are behind those of the mother country in all that pertains to the welfare of our country? We cannot think so. It is because there is not among us one man of sufficient standing disposed to take the lead in the work. Were any good man to lead there would be many followers. We purpose shortly to explain in detail the objects of the Society for promoting the amendment of the Law, and to publish its rules, in the hope that some legal man will be sufficiently alive to the interests of Upper Canada, and sufficiently courageous to take the initiative in forming a similar association among us.

APPOINTMENTS TO OFFICE, &C.

SHERIFFS.

JOSEPH MAUGHAN, Esquire, to be Sheriff of the County of Grey, in the room and stead of George Snider, Esquire, resigned (Gazetted August 8, 1863.)

NOTARIES PUBLIC.

WILLIAM MCPHERSON, of Moore, Esquire, to be a Notary Public in Upper Canada. (Gazetted August 1, 1863.)

JAMES ANDREWS MILLER, of St. Catharines, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 8, 1863.)

CORONERS.

JOSEPH M. TWEEDALE, Esquire, to be Associate Coroner for the County of Middlesex. (Gazetted August 1, 1863.)

NIVEN AGNEW, Esquire, M.D., to be Associate Coroner for the County of Ontario. (Gazetted August 8, 1863.)

TO CORRESPONDENTS.

W.—A SUBSCRIBER—LAW STUDENT.—Under head "General Correspondence."

CLERK 6th DIV. CT. CO. NORFOLK—PAUL DUNN.—Under head "Division Courts."

G. M.—Thanks. You see we have availed ourselves of your services.