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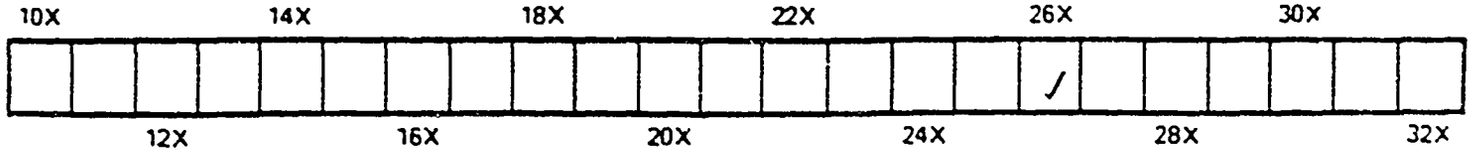

DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—*Subpœna before Arbitrators.*—The 5th sec. of the D. C. Act of 1853 enables either of the parties to a suit to obtain from the Clerk of a D. C. a summons requiring the attendance of witnesses before the arbitrators. We are asked to notice this provision and suggest how Clerks should act under it.

In looking at the clause the first point noticeable in respect to the Clerk's duties, is that an *Order of Reference* to arbitration must have been actually made, before the Clerk will be authorized to issue summons. It will not be sufficient that an actual reference has been made *by the parties*—a proceeding common in practice; but it must have been sanctioned by *an order of the Court*. The parties may obtain summons "from the Clerk of any Division Court." We take this to mean the Clerk of any D.C. in which the suit has been entered and the order made; the same words are used in the 48th sec. of the D.C. Act, and have always been considered to mean the Clerk of the Court in which the suit is entered; and this appears to be the view taken by the Commissioners as a reference to Forms 13 59 & 63 will shew.

By the provision in the clause (the 5th) parties making default may be punished in the manner provided in the 48th section, and under that section the proceeding, it is clear, would be in the Court where the suit was entered; see form 59. If any other Clerk than the one in whose Court the order of reference was made could issue the summons, there would be a difficulty in respect to acting without production of the order of Reference, and also as to the taxation of costs; on the whole we conclude that the meaning above given is what was intended by the terms *any* Clerk, &c.

The summons is to require the attendance *before* the arbitration—that is, at some particular place, on a day and hour named—this is to be ascertained by the arbitrator's appointment, which should be produced to the Clerk, and left with him or annexed to the summons; the more convenient way will be to insert the time and place of appearance *in* the summons. It will not be proper for the Clerk to issue the subpœna in blank; the authority he acts under is derivable solely from the statute; and sec. 40 of the D.C. Act requires that every summons shall be entirely filled up, and shall have no blank at the time of its delivery to the Bailiff, *or any other person*, to be executed.

The form of summons in such case may be as follows:—

In, &c.

Between, &c.

You are hereby required to attend before ———, the arbitrator (*or* arbitrators) to whom this cause stands referred, at the house of ———, in the Township of ———, on the ——— day of ———, A.D. 185—, at ——— of the clock in the *forenoon* of that day, being the place and time appointed by the said arbitrator for a meeting upon the said reference, to give evidence in the above cause on behalf of the above named ———, &c., (conclude as in form No. 13.

Or if the appointment be annexed to summons, and intended to be served with it on the witness, say:

——— To attend before ———, the arbitrator (*or* arbitrators) to whom this cause stands referred, *at the time and place mentioned in the annexed appointment, &c.*

We think, however, the first form preferable.

BAILIFFS.—In an action commenced against a Bailiff for seizing goods it may be open to him to sue out Interpleader under the 7th sec. of the D.C.E.Act, when the proceedings in the action will be stayed and the Judge of the D.C. will make such order on the Interpleader respecting the disposal of the goods seized and the costs, &c., as may appear to be just. But it will sometimes happen that a Bailiff neglects to avail himself of the ample protection this clause affords, and is put to his defence on the action against him.

The action will be in one of the Superior Courts or in a Division Court, according to the value of the goods seized. We do not purpose noticing, at present, actions in the Superior Court, but if the suit be in a D.C. and the Bailiff seeks to defend himself under the protection of the D. C. Act, he must give notice in the proper way and in due time; it is upon that point we have a word to say. Section 107 of the D. C. Act enacts that actions against any person for anything done in pursuance of the Act—and a Bailiff acting *bonâ fide* under an execution comes within that description—shall be, 1st, laid and tried in the County where the fact was committed;—2nd, shall be commenced within six calendar months after the fact was committed; 3rd, that at least one calendar month's notice of action in writing shall be given to the defendant before the commencement of suit:—(there is also provision for tender of amends, but of this hereafter.) If any one of these three defences exist, in order that the Bailiff may avail himself thereof, it becomes necessary to give notice to plt. under the 43rd sec. of the D.C. Act, which provides that the dft. may avail himself of any relief or discharge under any statute, on delivering a notice thereof in writing to the plt. or leaving it at his usual place of abode if within the Division, or if living without the Division to the Clerk of the Court, *at least six days before the trial or hearing*. As to the form of notice, the dft. is not held to the same particularity as in defences under other Statutes; for he is allowed to

give the special matter in evidence under the plea of general issue in the Superior Courts, and, by analogy, in the D. C. where written pleadings are not in use a general reference to the clause in question would no doubt be deemed sufficient; yet is always better to specify particularly the ground of defence.

We subjoin a general form for the assistance of Bailiffs:—

NOTICE OF DEFENCE UNDER STATUTE.

In the ——— *Division Court for the County of* ———

Between A. B., plaintiff,
and
C. D., defendant.

The plaintiff is required to take notice that upon the hearing of this cause the defendant intends to plead and to avail himself of all and every the provisions of the 107th section of the Upper Canada Division Courts Act; and especially that he intends to insist on the following grounds of defence, viz, that he is not guilty of the matter alleged in the plaintiff's claim against him: that no sufficient notice of this action was given him; (that this action was not commenced in due time: *and that* this action is not laid or brought in the County of ———, where the fact charged is alleged to have been committed.)

Dated this ———day of———. A.D. 185—

To A. B., plaintiff. C. D., defendant.

Care should be taken to have proof at the hearing of the due service of this notice.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 202.)

SUMMONS.—It is proper that the precise hour for the defendant's appearance should be fixed in the summons, but the defendant is bound not only to attend at the hour appointed, but to wait during all reasonable hours of the same day until the Justice or Justices are ready to hear the case.[1] The summons may be granted by one Justice even in cases where by the statute two or more are necessary to a hearing, but it should require the defendant to appear before one or more Justices according to the nature of the charge and the number of the Justices necessary to a valid conviction: moreover, as the Justice who issues the summons may be unable to attend at the hearing, it is proper to require the defendant to appear before *such two*, or more *Justices as shall be present* at the time and place appointed.[2]

In issuing a summons the time appointed for the defendant's appearance will generally depend on distance and other circumstances of each particular case; every semblance of improper hurry should be avoided; and the time between the service and hearing must be sufficient to enable a defendant to prepare his defence and for his journey, as well as to procure the attendance of any witness he may require.

The practice as to time of return varies in different places in Upper Canada. In Toronto, Hamilton, and Kingston, we are informed, it is customary, unless under very special circumstances, to allow twenty-four hours between the service and hearing; in the country generally from four to ten days is given. Whenever practicable, it is better to allow an interval of several days, that the defendant may have ample time to prepare himself, and that the necessity for an adjournment may be avoided—for if it should be made to appear to a Magistrate that the defendant had not time for that purpose, the hearing will be adjourned. No precise time can be named, as it will depend on the residence of the defendant and his witnesses, and other special circumstances in each particular case; but a man ought not to be required to lay aside all other business, and instantly answer to a supposed offence that may in the end prove to be groundless. Charges before a Magistrate are frequently made in moments of anger or sudden excitement, and it will be better to allow parties to cool down a little before the hearing; and no inconvenience can result from delay. In civil actions in other Courts a defendant is allowed from six to ten days to prepare for trial; and a charge before a Magistrate may more seriously affect a defendant than a civil suit, and may require fully as much time to answer.

On the whole we would recommend as the safe and more seemly practice, as a general rule, to allow six days in country cases, and full twenty-four hours in city cases, between the service and return of a summons extending the time by adjournment when necessary.

It may be taken as a general rule in summary proceedings before Magistrates as in the Superior Courts that appearance cures the defect and uncertainty either as to time or place,[3] so that if a defendant appears to the summons and enters into his defence, such objections fall to the ground. But a defendant may appear at the return of the summons, for the express purpose of objecting to the service, (it is the most prudent course when served too late) and request from the Justices further time to prepare his defence; in such case if the application appears to be in good faith it ought always to be granted by the Bench. If a Justice should wilfully proceed to convict without enlarging the time when required and necessary to the ends of justice, he would be guilty of a misdemeanor and leave himself open to an Indictment.[4] In case the

[1] Williams v. Frith, 1 Doug. Rep. 198.
[2] See 16 Vic., cap. 178, secs. 25 and 1.
[3] R. v. Johnston, 1 Str. 261. R. v. Stone, 1 East. 464.
[4] R. v. Venable, 2 Lord Raym. 1407. R. v. Simpson, 1 Str. 46.

defendant does not appear at the return of the summons, the particulars and sufficiency of the service should be enquired into, and if the time appear too short the hearing should be adjourned and a fresh summons issued.

Attention has already been drawn to the provisions of the recent statute precluding the defendant from taking any objection to the summons for any alleged defect therein in substance or in form, or for any variance between it and the evidence at the hearing, unless the variance should be considered likely to have deceived or misled him.[5]

ON THE DUTIES OF CORONERS.

(CONTINUED FROM PAGE 204.)

II.—PROCEEDINGS IN RELATION TO INQUESTS.

The Inquisition being signed the Coroner reads it over to the Jury, or states the purport of it thus:

"Gentlemen, hearken to your verdict as delivered by you, and as I have recorded it. You find that, &c., (using the words in the Inquisition.)

Power to Arrest.—If the Jury decide that the death was occasioned by violence, and reasonable suspicion attaches to any party, it is the duty of the Coroner to issue his warrant for the apprehension and committal of such person,[a] in order that he may take his trial at the next ensuing Assizes.

Warrant to Arrest.

County of———, } To the Constables of the Township of
To wit: } ———, in the County of———, and to all others Her Majesty's officers of the Peace in the County of ———.

Whereas by an Inquisition taken before me, A.B., one of Her Majesty's Coroners for the County of———, on view of the body of H. H. then and there lying dead, one C.C., late of———, in the said County, yeoman, stands charged with the wilful murder of the said H.H. these are, therefore, by virtue of my office, in Her Majesty's name to charge and command you, and every of you, that you or some one of you, without delay, do apprehend and bring before me, A.B., the said Coroner, or one of Her Majesty's Justices of the Peace of the said County, the body of the said C. C. of whom you shall have notice, that he may be dealt with according to law.

Given under my Hand and Seal, this——— day of———, A.D. 18—.

A. B., Coroner. [L.S.]

Upon the party named in the warrant being arrested and brought before the Coroner, he makes out the warrant of committal:—

Warrant of Committal.

County of——— } To the Constables of the Township of
To wit: } ———, in the County of———, and other Her Majesty's officers of the Peace for the said County, and to the keeper of Her Majesty's gaol at the Town (*or* City) of———, in said County of———.

Whereas by an Inquisition taken before me, A. B., one of Her Majesty's Coroners for the County of———, on the——— day of———, A.D. 18—, on view of the body of H.H. lying dead in the said Township of———, in the County aforesaid, C. C., late of the Township of———, in the said County, yeoman, stands charged with the wilful murder of the said H. H.; these are, therefore, by virtue of my office, in Her Majesty's name to charge and command you, the said Constables and others aforesaid, or any of you, forthwith safely to convey the body of the said C.C. to Her Majesty's gaol, at the Town (*or* City) of——— aforesaid, and safely to deliver him to the keeper of said gaol. And these are likewise by virtue of my said office, in Her Majesty's name, to will and require the said keeper, to receive the body of the said C. C. into your custody, and him safely to keep in said gaol, until he shall be thence discharged by due course of law; and for so doing this shall be your warrant.

Given under my Hand and Seal, this——— day of———, A. D. 18—

A. B., Coroner. [L.S.]

POWER TO BIND OVER WITNESSES.

The Stat. of 1 & 2, P. & M., c. 13, first gave power to the Coroner to bind over the witnesses to the next general gaol delivery, where any party arrested for murder or manslaughter, or *as accessory before* the offence committed, and that power is now confirmed by the Provincial Statute 4 & 5 Vic. ch. 24. Section IV provides that:—

IV.—Every Coroner, upon any Inquisition taken before him, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall, in presence of the party accused, if he can be apprehended, put in writing the evidence given to the Jury before him, or as much thereof as shall be material, giving the party accused full opportunity of cross-examination; and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next Court of Oyer and Terminer or Gaol Delivery, or other Court, at which the trial is to be, then and there to prosecute and give evidence against the party charged; and every such Coroner shall certify and subscribe the same evidence, and all such recognizance, and also the Inquisition before him taken, and shall deliver the same to the proper officer of the Court in which the trial is to be, before or at the opening of the Court.

The witnesses may be bound over to appear and give evidence in the following form:—

Recognizance.

County of——— } Be it remembered that T. D. of the Town
To wit: } ship of———, in the County of———, yeoman, R.B. of same place, yeoman, and F.L. of same place, yeoman, do severally acknowledge to owe to our Sovereign Lady the Queen the sum of Two Hundred Pounds each, of lawful money of Canada, to be levied on their several goods and chattels, lands and tenements, by way of recognizance, to Her Majesty's use, in case default shall happen to be made in the condition here under written.

The condition of this recognizance is such, that if the above bounden T.D., R.B. and F.L. do severally appear at the next general Gaol Delivery, to be holden in and for the County of———, and then and there give evidence upon a Bill of Indictment, to be then and there preferred

[5] See sec. 1, 16 Vic., cap. 176. [a] 1 Chit. Crim. 161.

to the Grand Jury, against C. C., late of the Township of———, in the County aforesaid, yeoman, for the wilful murder of H.H. late of the Township of———, in the said County of———; and in case the said bill of Indictment be found by the Grand Jury "a true bill." then if they, the said T. D., R. B. and F. L., do severally appear and give evidence to the Jury that shall pass on the trial of the said C.C., upon the said indictment: and in case the said bill of indictment shall be returned by the Grand Jury aforesaid "not found," then if they the said T.D., R B. and F. L., do severally appear at the said general Gaol Delivery, and then and there give evidence to the Jury that shall pass on the trial of the said C.C., upon an Inquisition taken before me, A.B., one of Her Majesty's Coroners for the said County, on the view of the body of the said H.H., and not depart the Court without leave, then this recognizance to be void, otherwise to remain in full force.

Taken and acknowledged this——— day of——— A.D. 18—, before me.

A. B.,
Coroner.

Where Married Woman bound over.—If a married woman is bound over to give evidence, and her husband not present to enter into a recognizance for her, she is not bound in a penalty, but "*on pain of imprisonment*," thus:—

"A. D. the wife of T. D. of the Township of———, in the County of———, yeoman, acknowledges herself to be bound to our Sovereign Lady the Queen on pain of imprisonment, in case she shall make default in the following condition."

The condition of this recognizance is such that if the said A. D., the wife of the said T.D., do and shall personally appear at the next general Gaol Delivery, &c., [*same as Form above given, only using the singular number throughout.*]

When Husband and Wife.—If the husband and wife are both present, the Coroner binds them over in one recognizance—the husband in a penalty, and the wife "on pain of imprisonment:"—

Recognizance by Husband and Wife.

County of——— } Be it remembered that T.D. of the Town-
To wit: } ship of———, in the County of———, yeoman, and A. D., his wife, severally acknowledged themselves to be bound by recognizance to our Sovereign Lady the Queen, as follows, that is to say,—the said T.D. in the sum of Two Hundred Pounds of lawful money of the Province of Canada, to be levied on his goods and chattels, lands and tenements, and the said A.D., his wife, on pain of imprisonment in case default shall be made in the condition following:—

The condition of this recognizance is such, that if the said A.D., the wife of the said T. D., do and shall personally appear at the next general Gaol Delivery, &c., [*nearly same as general Form.*]

This form will answer, also, where the witness is under age and the father becomes surety, and where the master is surety for the appearance of the apprentice who is under age.

CLOSING THE PROCEEDINGS.

The Inquisition being drawn up and signed, the witnesses bound over to appear at the next ensuing Court of Oyer and Terminer, and the party charged committed to gaol, the Coroner's duties in relation to the Inquest are at an end, and he directs the Constable to make proclamation as follows:—

"You good men of this Township who have been empanelled and sworn of the Jury to enquire for our Sovereign Lady the Queen, touching the death of H.H., and who have returned your verdict, may depart hence and take your ease.—GOD SAVE THE QUEEN."

As directed by the 4 & 5 Vic., ch. 24, sec. 4, the Coroner shall certify and subscribe the evidence and recognizances, and also the Inquisition, and deliver the same to the proper officer of the Court, but the course usually pursued is to forward them to the Clerk of the Peace; and when ulterior proceedings are to be taken, they are handed over by that officer to the Crown Counsel at the opening of the Assizes.

CERTIFYING WHEN REQUIRED.

When the Coroner has committed the party charged with the offence to gaol, and it is sought to bail him out, he is liable, at any time before trial, to be called upon to furnish certified copies of the information, examination, evidence, inquisition, and warrant of commitment. By the 5th section of the 4 & 5 Vic., chap. 24, it is enacted that:—

V.—When and so often as any person shall be committed for trial by any Justice or Justices, or Coroner, as aforesaid, it shall and may be lawful for such prisoner, his counsel, attorney, or agent, to notify the said committing Justice or Justices, or Coroner, that he will so soon as counsel can be heard, move Her Majesty's Court of Superior Jurisdiction for that part of the Province in which such person stands committed, or one of the Judges thereof, for an order to the Justices of the Peace, or Coroner for the District where such prisoner shall be confined, to admit such prisoner to bail, whereupon it shall be the duty of such committing Justice or Justices, or Coroner, with all convenient expedition, to transmit to the office of the Clerk of the Crown, close under the Hand and Seal of one of them, a certified copy of all informations, examinations, and other evidences, touching the offence wherewith such prisoner shall be charged, together with a copy of the warrant of commitment and inquest, if any such there be, and that the packet containing the same shall be handed to the person applying therefor, in order to such transmission, and it shall be certified on the outside thereof to contain the information touching the case in question.

(TO BE CONTINUED.)

U. C. REPORTS.

GENERAL LAW.

FRANCIS *v.* BROWN ET AL.

Attaching creditor in Division Court—Rights of, as against other creditors.

Goods in the hands of a Division Court clerk under an attachment, are not protected against an execution issuing from a superior court before the attaching creditor has obtained his judgment.

The sheriff, therefore, is justified in seizing such goods; but, *quære*, if the seizure were illegal, whether an action on the case would lie *at the suit of the attaching creditor* against the sheriff and the plaintiff in the execution.

[11 U. C. Q. B. Rep. 658.]

This was admitted to be an action of a novel nature, for which no authority could be found.

The plaintiff, on the 21st of October, had sued out an attachment against one Hutton, an absconding debtor from

one of the United Counties of Northnmberland and Durham, and soon afterwards obtained judgment and execution in the manner pointed out by the statute 13 & 14 Vic. ch. 53. His goods had been seized under the writ of attachment, and placed in the charge of the clerk of the Division Court; and before he had obtained his judgment in the Division Court, and while Hutton's goods were thus in the custody of the law, two of the defendants in this action, Brown and Harty, who had obtained a judgment in the Court of Queen's Bench against Hutton, sued out a writ of *Fi. Fa.* against his goods, and placed it in the hands of the other defendant, Ruttan, the sheriff of the said counties; and the plaintiff averred that the three defendants, well knowing the said goods of Hutton to be in the custody of the law under the said attachment, and that they were insufficient to satisfy this plaintiff's debt, and wrongfully intending to injure this plaintiff, wrongfully, unjustly, and injuriously caused the said goods to be seized and taken under colour of the said writ of *Fi. Fa.* out of the custody of the clerk of the Division Court, and to be sold under said writ of *Fi. Fa.*, by means whereof the plaintiff has been deprived of all the benefit and advantage of his judgment and execution in the said Division Court, and the same remains wholly unsatisfied.

The defendants demurred to the declaration. The causes of demurrer, and the statutes bearing upon the question, appear in the judgments.

Richards for the demurrer. *Eccles* contra.

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

The first question is—whether, if the goods were illegally taken by the sheriff under the circumstances, this kind of action could be maintained at the suit of the plaintiff in the attachment, for the consequential damage arising to him from his being deprived of the means of obtaining satisfaction of his judgment.

This plaintiff, it seems, could have no other remedy against the defendants; for the goods not being his, nor in his custody, he had not even a special property in them, and so could not have maintained trespass,—though I do not see why the clerk of the Division Court might not have brought such an action, as having a special property. Yet though this plaintiff could not bring trespass against these defendants, it was admitted in the argument that no instance had been found of a special action on the case having been brought, either in England or here, under similar circumstances, though there must have been frequently the same grounds for such an action. Whenever, for instance, several persons have separate executions against the goods of the same debtor, and one who is not entitled to priority procures the sheriff nevertheless to seize aud sell for his benefit, the others, whose writs have been improperly postponed, would have the same grounds for an action on the case against the sheriff and the plaintiff, whose writ had been executed, as the plaintiff has in this case. Still, though no precedent for such an action has been found, I am not prepared to say it would not lie; for though the clerk from whom the goods were taken might sue in trespass, yet the parties who really sustain the injury cannot compel him to sue; and if he should sue and recover damages, they would have a remedy against him, which would be a circuitous mode of obtaining redress. I do not at present see why, if the seizure in this case was illegal, the plaintiff, who is the person really injured, might not support such an action as the present for the consequential damage, unless it be that an action of this nature on the case will not, as a general principle, lie against a person who has merely been asserting his own supposed claim, any more than it will lie against a person for harassing another by a non-bailable action which turns out to be groundless.

It is, however, my opinion that the defendants are entitled to our judgment on the main ground—that the goods were legally seized by the sheriff, being at the time subject to the *Fi. Fa.* from this court, which was placed in the hands before judgment had been recovered in the Division Court on the attachment suit; though it would have been more satisfactory if the statute which gives the attachment from the Division Court had contained a clear provision on that point. In the first Absconding Debtors' Act, 2 Wm. IV., ch. 5, there is nothing which would expressly allow an execution creditor who had obtained judgment on a suit commenced in the ordinary manner to obtain satisfaction by levying upon goods of the debtor that had been attached under that Act at the suit of some other creditor. The general terms of the Act would lead us to suppose that the Legislature contemplated the goods after attachment continuing in the hands of the sheriff until the attaching creditor could obtain judgment and execution, yet the operation of that system would be so unjust, as regards creditors who had served their process and were proceeding in the ordinary course, that the Legislature, by their Act passed three years afterwards, 5 Wm. IV., ch. 5, sec. 4, declared that they had no such intention, and expressly enacted that the creditor who should obtain judgment after service of process, and sue out execution before the attaching creditor has obtained his execution, "shall be allowed the full advantage of his legal priority in the same manner as if the estate had not been attached and were remaining in the possession of the debtor."

It is true that the statute 13 & 14 Vic., ch. 53, secs. 64 to 71 inclusive, and sec. 102, contains no such enactment, but much of the goods remaining in the hands of the clerk of the court until the attaching creditor could obtain execution. Still, on the other hand, there is no express enactment that a plaintiff who has obtained his prior judgment and execution in the ordinary way shall lose his priority; and the former statute, 5 Wm. IV., ch. 5, sec. 4, being declaratory, is an expression of the intention of the Legislature that under such circumstances the advantage of priority should not be lost.

And there is also this strong circumstance to be considered—that under this late Act, 13 & 14 Vic., ch. 53, attachments may be taken out from the Division Court under circumstances and on grounds which would not allow a creditor having a large demand to sue out an attachment from any of the courts of record; so that he would be helpless, and must allow the whole advantage to rest with the suitors in the Division Court. The Legislature never could have intended this; the remedy of suitors obtaining judgment in the superior courts could not be so defeated without express provision to that effect; and I therefore think that the seizure by the sheriff was in this case legal, and that the defendants are on that ground entitled to judgment on this demurrer.

Draper, J.—The first attachment law (2 Wm. IV., ch. 5,) confined the remedy to the Court of Queen's Bench and the District Court, for an obvious reason. The object of the writ was to compel the absconding or concealed debtor to appear and give bail to the action; and this being done (see sec. 2) no further proceeding on the writ itself was had. If bail to the action was not put in, a bond might be given (see 3) having the same effect in entitling the debtor to the restoration of his effects. This remedy was, therefore, properly confined to the courts which had the power of issuing process against the person; and the surrender of the debtor on judgment being obtained would, of course, relieve the special bail, and would also relieve the obligor, who gave a bond under sec. 3.

This Act was amended by the 5 Wm. IV., c. 5, which (sec. 4,) enacted that the plaintiff, in any suit begun by the process therein being served upon the alleged absconding or concealed debtor, before the suing out an attachment against his estate, might continue his suit to judgment; and in case of his obtaining execution before any attaching creditor, he was allowed not merely the full benefit of his legal priorty, but he was entitled to any advantage to be derived from the bond (if there were one) taken under sec. 3 of the first Act—a provision in his favor going beyond what might have been looked for.

The principle on which those Acts were founded—viz., to compel appearance and special bail, or its equivalent, by the bond referred to, and not to hold the property attached if this end was attained—was either entirely overlooked or designedly departed from when the right to attach was extended to the division courts, which have no power of issuing process to hold to bail. The first act for this purpose was the 12th Vic., ch. 69 repealed by, but its provisions incorporated into, the 13th & 14th Vic., ch. 53, under which statute the question arises, which is now for our decision—whether goods attached under a warrant, authorized thereby, are protected from an execution issuing out of any of the superior courts, on a judgment obtained in an action commenced, or even carried to judgment, before the issuing of such warrant of attachment, such goods being in the custody of the clerk of the division court when the sheriff receives the writ and levies on them.

In order to a clear understanding of the question, the difference between the proceedings authorised in the *superior* courts and in the division court should be borne in mind. In the former there must be a judge's order; in order to obtain the warrant of attachment, and to procure this the creditor, his servant or agent, must first swear to the debt amounting to £5 or upwards, and further, to the belief that the debtor hath left Upper Canada, or is concealed therein, with intent and design to defraud such creditor, and other creditors (if any there be) of their just dues, or to avoid being arrested, or served with process; which departure or concealment shall also be proved by the affidavit of at least two credible witnesses. When the sheriff receives such a writ, he must publish notice of it in the *Gazette*, &c., and at any time within three calendar months after the first publication the debtor may get back all his property which has been seized by the sheriff, on giving a bond to the creditor suing out the attachment, with sufficient sureties in double the amount claimed, conditioned that the creditor shall not depart from Upper Canada without satisfying such claim, if judgment be recovered against him; or that the obligors will render such debtors to the custody of the sheriff to whom the attachment was directed, or that they will pay the creditor's claim, or the value of the property seized under the attachment. The property attached is only held on default of the debtor's giving such bond, and even if held, a creditor, having commenced a suit in the ordinary manner, and served his writ before the warrant of attachment is sued out, has his legal priority preserved him; and if the debtor fails to appear and procure his property to be restored to him, so that the creditor gets judgment against him by default, such creditor must prove his demand as if a plea denying it had been put in; and after verdict and judgment he cannot get execution without giving a bond with two sureties in double the sum to be levied, conditioned, if the debtor, within the time and in manner allowed by the Act (one year after judgment) shall succeed in reversing the creditor's recovery, to restore the amount levied with interest, and any further damage occasioned by the seizure and sale of the alleged debtor's property.

In the division courts, if a person, owing any sum not exceeding £25, nor less than 20s., on debt or contract, or on any judgment, *first* shall abscond from Canada, leaving personal property liable to seizure under execution for debt in any county in Upper Canada, (which words would include bank stock, or shares in the capital stock of other incorporated companies: *vide* 2 W. IV., ch. 6., and 12 Vic. ch. 23); or, *secondly*, shall attempt to remove his personal property of the description just mentioned, either *out of* Upper Canada, or from one county to another therein, or from Upper to Lower Canada (which would be out of Upper Canada); or, *thirdly*, shall keep concealed in any county in Upper Canada to avoid service of process—then any creditor, his servant or agent, may apply to the clerk of any division court of the county wherein the debtor was last domiciled or where the debt was contracted, or to the judge of the county court therein (what does "*therein*" refer to? I suppose "*wherein*" which precedes, must guide us to the sense) or to any justice of the peace in any county of Upper Canada, and upon making or producing an affidavit of the amount of the debt claimed and that the deponent hath good reason to believe and verily doth believe, that the debtor hath absconded from the province, and hath left personal property liable to seizure under execution for debt within the county of ——; or that the debtor is about to abscond from this province, or to leave the county of ——, with intent and design to defraud the creditor of the said debt, taking away personal estate liable to seizure under execution for debt; or that the debtor is concealed within the county of —— to avoid being served with process, with intent and design to defraud the creditor of his said debt; and negativing any vexatious or malicious motive—thereupon such clerk, judge, or justice, may issue a warrant to a bailiff of the court or constable of the county, commanding him to attach, &c., all the personal estate or effects of such debtor, of what nature and kind soever, liable to seizure under execution for debt within such county, or a sufficient portion to secure the debt with costs, under which the bailiff or constable is to seize. Proceedings in any case commenced by attachment may be conducted to judgment and execution in the division court of the division within which the attachment is issued. When proceedings are commenced before the issuing of an attachment, they may be continued to judgment and execution in the division court where commenced; *and the property seized upon any such attachment* shall be liable to seizure and sale under the execution to be issued on *such* judgment; or the proceeds, if the property be sold as perishable, shall be applied in satisfaction of such judgment. This latter provision, though not very distinctly expressed, means, I presume, that if a creditor commences a suit in the division court, and afterwards obtains an attachment, the suit may go on, and the property seized shall be appropriated in satisfaction of the judgment when obtained. A provision is made for the distribution of the property attached, in case there are several attaching creditors, according to the letter of which only that class of creditors can share in the distribution. All property seized under any attachment is to be forthwith handed over to the clerk of the division court of the division within which the attachment issued. If the debtor, or any person on his behalf, shall, before the recovery of judgment, tender to the attaching creditor a bond, with sufficient sureties, in double the amount claimed, conditioned that the debtor shall, if judgment be given for the claim, pay it, or the value of the property attached, to the creditors, *or produce such property*, whenever thereto required, to satisfy the judgment, then the property attached shall be restored. If within one month after seizure the debtor, or some one for him, do not appear and give such bond, then the creditor getting judgment may issue execution *immediately*, and the property attached, or enough thereof, may be sold to satisfy it, or enough of the proceeds may be so applied if the property has been sold as perishable.

It is plain that, so far as the letter of the statute is concerned, the attaching creditor is placed in a more favorable position under the Division Court Act, than if his attachment is sued out of any court of record. When once he can get his judgment and execution, his satisfaction is immediate, if the property attached will produce enough; and his recovery is final, though the debtor did not appear and defend, no period being allowed within which the judgment may be revised on a rehearing of the case; and if property is actually attached and delivered to the clerk of the division court, no creditors but such as take out attachment in the division court can come for a ratable satisfaction of their claims. And while the creditor who commences a suit in a division court is allowed to issue an attachment in aid of his suit, and has the advantage thereby secured to him of ensuring satisfaction, no allusion is made to the probability of a creditor having commenced a suit or recovered a judgment in the county court, or in one of

the superior courts, against the debtor, although an attachment may issue in the division court, according to the enacting clause of the statute, when the debtor is only removing his personal property from one county to another in Upper Canada. And again, the debtor whose property is attached can only get it restored upon condition, among other alternatives, of producing that self same property, if required, to satisfy the attaching creditor's execution.

This marked difference between the object and the proceedings under the Acts for issuing attachments in suits brought in courts of record, and the division courts; the striking distinction between attaching property with the primary object of compelling the debtor to submit his person to the jurisdiction of the court, and attaching it in order to subject it to execution as fast as judgment can be obtained in a court of summary jurisdiction; the absence of a provision in 2 Wm. IV, ch. 5, to protect plaintiffs in pending suits, followed by the enactments in 5 Wm. IV., ch. 5, supplying such enactments in a declaratory form; the regulation of the conflicting rights of creditors who sue out attachments in the division courts, while an entire silence is observed as to creditors having demands too large to be within the jurisdiction of the division courts, coupled with the prohibition on plaintiffs to split their demands with a view of obtaining attachments from the inferior tribunals, have (taken together) led me to think that had the Legislature intended by this statute to interfere with and supersede the remedies of creditors suing in the superior courts of record, or with the execution of process against the goods of their debtor against whom they have recovered judgment, they would have been careful to express that intention. I cannot presume that the Legislature intended to render nugatory the slower and more expensive proceedings in the superior courts, by the mere issue of a writ of attachment in a division court, or to deprive a creditor to a large amount of the power of recovering anything unless his debtor has lands, until creditors for sums not exceeding £25, who have not commenced their suits till after he had proceeded a long way with his, are satisfied. My opinion is, that it was intended to interpose no obstacle in the way of a creditor using the remedies given in courts of record. If, by the quicker proceeding in the division court, a creditor could obtain the first judgment and execution, he would thereby gain the prior satisfaction, and he might, under fitting circumstances, obtain the aid of an attachment to secure the property not being eloigned or wasted by the debtor or others. But if an execution from the superior court issues before he can obtain one, then I think the attachment in the court below will not, and in the absence of express provision to that effect ought not to deprive him of his legal priority of execution.

Burns, J.—I entertain no doubt the plaintiff cannot sustain the present action, If he could, it must be on the principle that when an attachment has issued against the effects of an absconding debtor, according to the provisions of and under the Division Court Act, the goods thereby seized become liable to the attaching creditor, to the exclusion of other creditors who by suits have obtained executions before the attaching creditor could obtain a judgment and execution. There is no expression of words in the Act of Parliament indicating that it was the will of the Legislature that the attaching creditor should have so much advantage over the non-attaching creditor; but the affirmative of the proposition depends upon the effect of the provisions respecting the duty of the bailiff, and then of the clerk who is made the depositee of the goods. The clerk is directed to take the property into his charge and keeping, and the same property is further declared to be liable to seizure and sale under the execution upon such judgment as the attaching creditor may obtain. In this general provision the Legislature must not be understood as dealing with the rights of parties other than the debtor and the attaching creditor. As between *them* the goods should be placed in the clerk's hands, and as between *them* the goods should be held liable to any execution that the creditor might obtain. In that sense the goods would be under the custody of the law in case the debtor did not avail himself of the provisions for obtaining a return of them upon giving security. If the debtor had obtained a return of the goods, there can, I think, be no question that in his hands they would be liable to be seized upon any execution which another creditor in the meantime should obtain, and if so it could not be pretended that in order to defeat the execution the goods were in the custody of the law. They are no more in the custody of the law because they happen to be deposited with the clerk, as respects other creditors, than if delivered back to the debtor upon security. The property and the right of property is not changed in any way by seizure upon attachment, but it is necessary that the attaching creditor should obtain an execution before the goods can be disposed of.

There are three classes of cases in which attachment may be issued: *First*—Where persons have absconded, leaving personal property liable to seizure under execution for debt. *Secondly*—Where persons attempt to remove property liable to seizure as before, out of Upper Canada, or from one county to another therein, or from Upper to Lower Canada. And *thirdly*—Where persons keep concealed in any county of Upper Canada to avoid service of process. The first and third class contemplate proceedings *in rem* to compel appearance within a month, and if no appearance then the proceedings of the suit go on; but the second class requires proceedings *in personam*, notwithstanding the attachment. It is consistent with both positions to hold the warrant of attachment to be process merely for the benefit of compelling a defence to a suit, and as between the debtor and attaching creditor property seized under it to be the means of securing it to answer any judgment that may be obtained, leaving the rights of all other parties undisturbed. It would be inconsistent with the proceedings of all other courts, and also inconsistent with the proceedings of suits in the division courts, as far as many plaintiffs might be concerned, to hold that in cases of attachments against goods there should be proceedings *in personam*, and still be a lien on the goods, by reason of the attachment, to the exclusion of all others.

An attaching creditor must proceed to judgment and execution, and if there be more than one attaching creditor, then they are specially provided for; but in the case of an attaching creditor and a non-attaching creditor, as both must proceed to judgment and execution, I apprehend the rule *qui prior est in tempore, potior est in jure*, as respects the execution, must prevail, and no lien or priority is gained merely by means of an attachment.

Judgment for defendant on demurrer.

Ferris v. Fox.

Division Courts—Suits by infants in—13 & 14 Vic. ch. 53, secs. 23, 27.

The 27th clause of 13 & 14 Vic. ch. 53, does not restrict infants from suing in the Division Courts for anything but wages, but was intended only to enable them to recover for their own labour, contrary to the principles of the common law.

[11 U. C. Q. B. Rep. 612.]

This was an action brought in the Division Court of the county of Middlesex, upon a claim for board and lodging of a third person, and for goods sold and delivered.

The plaintiff, it seemed, was a young woman, about seventeen years of age. The defendant was her stepfather, and she sued him for board furnished to his wife, the plaintiff's mother, and for some articles of dress supplied to her during the defendant's absence from home.

At the trial, it was objected that the plaintiff, being a minor, could not sustain an action upon a claim of this kind, for that there was but one case in which an infant could recover as plaintiff in the Division Court, and that was under a special provision made in the Statute 13 & 14 Vic. ch. 53, sec. 27:—"that it shall be lawful for any one under the age of 21 years

to prosecute any suit in any Division Court, under this Act, for any sum of money not exceeding £25, which may be due to him or her *for wages*, in the same manner as if he or she were of full age." The learned judge however gave judgment for the plaintiff to recover £10, no part of that sum being a demand for wages. This judgment was given in November last.

Wilson, Q.C., moved for a prohibition, on the ground that it was not competent to the Division Court to entertain a suit brought by an infant upon any demand exc[ept] for wages.

Cur. adv. vult.

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

These courts have by the 23rd clause of the Act jurisdiction "to hold plea of all claims and demands whatsoever, for or against any person or persons, bodies corporate or otherwise, of debt, account, or breach of contract or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed shall not exceed the sum of twenty-five pounds."

We do not in this case grant the application. The 27th clause of the Division Court Act does not appear to us to be by any means intended as a restriction upon the right of infants to sue in the Division Courts, but rather the contrary—the object being to enable an infant to sue for his labour, contrary to the principle of the common law, which would give his earnings to his father. The clause leaves the right of infants to sue upon other causes of action as it stood before, and no doubt an infant may well recover any demand that he may have for goods sold, money lent, &c.; his infancy being a protection to himself, not to his debtor. We have no authority to go into the merits in this case, and are bound to suppose that the judge, who had a general jurisdiction over demands of this nature, found a good cause of action proved against the defendant.

We find nothing in the statute respecting the mode in which infants may sue, no means given of appointing a next friend, nor any necessity imposed of doing so, or of giving security for costs. The defendant here, being found to be indebted, is not prejudiced by the plaintiff being an infant; he can have no claim for costs.

In a Superior Court, if an infant were to sue by attorney, it would not now be a ground of error, but the defendant must plead in abatement; and we apprehend his suing in person would not be a ground of error, but even if it would, that would not shew that the Division Court has not jurisdiction in any case of a demand by an infant.

Rule refused.

GRANT v. HAMILTON, SHERIFF.

Action in County Court—Plea in abatement—Certainty.

The pendency of a suit for the same cause, &c., in a County Court, may be pleaded in abatement to an action brought in this Court.

Such a plea setting forth that defendant was served with and appeared to a writ issued from the County Court, at the plaintiff's suit, in trespass (the action pleaded to being trespass) as appears by the record, and then alleging as a matter of fact to be tried *aliunde* that the causes of action are identical, is bad. It should aver that the identity of the two causes of action *appears by the record*.

The plea in this cause, as given in the report, was also held bad for uncertainty.

[3 U. C. C. P. Rep. 422.]

TRESPASS. *Declaration*—For that the defendant, on the 22nd day of July, in the year of our Lord 1852, to wit, at St. Thomas, in the county of Elgin, with force and arms, &c., seized and took certain goods and chattels of the plaintiff, to wit, one mare of the plaintiff of great value, to wit, of the value of £20, and kept and detained the same from the plaintiff for a long time, to wit, for the space of ten days then next following, and then carried away the same, and converted and disposed thereof to his own use, whereby the plaintiff for and during all that time lost and was deprived of divers great gains and profits, which might, and otherwise would, have arisen and accrued to him from the use of the said mare, and for the work and services of the said mare, and other wrongs to the said plaintiff then and there did, against the peace of our Lady the now Queen, and to the damage of the plaintiff of £30: and therefore he brings his suit, &c.

Plea—The defendant prays judgment of the said writ and declaration, because he says that before the issuing the writ in this action, or the plaintiff's declaring thereupon, to wit, on the 22nd day of November, in the year of our Lord 1852, the plaintiff issued a certain writ of summons out of the County Court of the United Counties of Middlesex and Elgin, within the jurisdiction of the said County Court, against and directed to the now defendant, as sheriff of the said United Counties of Middlesex and Elgin, and whereby our Lady the Queen commanded the said now defendant that within eight days after the service of the said writ on the defendant he should cause an appearance to be entered for him in the said County Court of the United Counties of Middlesex and Elgin, in an action of trespass, at the suit of the said plaintiff; and the said now defendant thereupon afterwards, to wit, on the 10th day of December in the year aforesaid, in due time and manner, did duly cause an appearance to be entered for him in the said court to the said writ, at the suit of the said plaintiff, in pursuance of and in obedience to the same writ, *as by the record and proceedings thereof remaining in the said County Court, at London, in the said United Counties, more fully appears.* And the defendant further saith, that the parties in this and the said former suit are the same, and not other or different persons, and that the said writ so issued on the said 22nd day of November, as aforesaid, was issued and prosecuted by the said plaintiff, *upon and for and in respect of the very same identical supposed trespasses in the said declaration in this present suit mentioned, and now pleaded to, the said supposed trespasses having been committed, and then and still being within the jurisdiction of the said County Court.* And the defendant further saith that the said plaintiff, after the said defendant had so appeared to the said writ so issued on the said 22nd day of November as aforesaid, and whilst the said County Court had full jurisdiction and authority in that behalf, and whilst the said suit was depending, to wit, on the 17th day of January, in the year of our Lord 1853, issued a *certain other writ of summons* out of the Court of Common Pleas of our said Lady the Queen, at Toronto, against and directed to the said defendant, as such sheriff as aforesaid, and whereby our said Lady the Queen commanded the said and now defendant that within eight days after the service of that writ on the defendant he should cause an appearance to be entered for him in the said Court of Common Pleas at Toronto, by filing his appearance in the office of the Deputy Clerk of the Crown of the said Court, in the United Counties of Middlesex and Elgin, in an action of trespass, at the suit of the said plaintiff, and the said defendant duly caused an appearance to be entered for him in the said court, to the said last mentioned writ in pursuance and obedience to the same, as aforesaid; and thereupon the plaintiff declared thereon, and upon and for and in respect of the same identical supposed trespasses, *as aforesaid.* And the said defendant further saith, that the said former writ and action so issued and prosecuted against him the said defendant by the plaintiff as aforesaid, is still depending in the said County Court of the United Counties of Middlesex and Elgin; and the supposed trespasses, in respect of which the *said former writ was issued*, then and still being and committed within the jurisdiction of the said County Court; and this the defendant is ready to verify: wherefore he prays judgment of the *said writ* in this suit, and the declaration thereon founded, now pleaded to, and that the same may be quashed.

Demurrer—Causes of demurrer: First, that the pendency of an action in an inferior court cannot be pleaded to an action in a superior court. Secondly, that if the defendant relies on

the inferior court being a Court of Record, he ought to have averred that it is a Court of Record. Thirdly, that it is not sufficient to plead that the matters are within the jurisdiction of an inferior court, but the nature of the jurisdiction ought to have been stated, and it ought to be stated also how such court was established, and how it obtained its jurisdiction, in order that the plaintiff might take a traverse thereon. Fourthly, that the superior courts cannot take judicial cognizance of there being such a court as the County Court of the United Counties of Middlesex and Elgin, and that the plea does not sufficiently inform the court of the legal existence of such a court as the said County Court. Fifthly, that it ought to be stated whether the said County Court is the court of our Lady the Queen, or whose court it is. Sixthly, that the action is still depending. Seventhly, that the defendant does not state that the plaintiff issued the said writ in the Court before the commencement of this suit, but merely before the issuing the writ in this action, or the plaintiff's declaring thereupon. Eightly, that it is not alleged that the plaintiff impleaded the defendant in the said County Court suit. And, ninthly, that the said plea is double and bad in this, that it sets forth the pendency of two actions other than the present one for the same causes, and is otherwise informal and bad.

Beecher, for the demurrer, contended the pendency of the action in the County Court was not pleadable to the action in this court—the County Court being an inferior court, though created by statute and presided over by a judge appointed by the Queen, under the great seal of Canada—Laughton v. Taylor, 6 M. & W. 696; Esdaile et al. v. Lund, 12 M & W. 607.

He relied on the several grounds of demurrer specially assigned, particularly duplicity, or ambiguity in the uncertainty on the face of the plea, whether defendant intended to plead the pendency of two other actions, one in the County Court and another in this court, in abatement of the present action, or only the former.

Richards, for plaintiff, submitted that the County Court was not an inferior court in that sense which precluded the defendant from pleading the pendency of a prior action in that court in abatement of an action for the same trespass to the plaintiff's goods in this court: that the County Court was a court of Her Majesty, created by statute, held by judges commissioned by the Queen, in which the proceedings were conducted in her name, and the jurisdiction of which was, up to a certain amount and in certain specified causes of action, concurrent with this court: that issues may be sent from this court to be tried there, and that the judge thereof has authority to do other acts in relation to suits instituted and pending in this court: that superior courts are said to be principal and less principal—Bac. Ab. "Courts" D; and that the County Court was of the latter description—at all events, not an inferior court, proceedings as it does by the course of the common law—a system of pleading similar to this court: and trial by jury, with right of appeal to this court upon any matter final, or interlocutory decided in the course of the cause: that the plea was not double—the writ stated to have issued in this court being the writ, &c., in this cause, as shewn by the words "*as aforesaid*," at the end of the allegation.

The following authorities were referred to:—Bac. Ab. "Courts" D., Ib "Abatement," K; Sparry's case, 5 Co. 61; Mitchell v. King, Barnardiston 143; Seers v. Turner, 2 Ld. Rayd. 1108; Brinsby v. Gold, 12 Mod. 204; Dudfield v. Warden, Fitz. 313; White v. Wilbis, 2 Wil. 87; Com. Dig. "Abatement," H. 24, No. 9; Rawlinson v. Oriet et al., Holt 1; Brook v. Smith, ib. 285; Moyle v. West et al., 1 Dyer, 92-3; Kerby v. Siggers et al., 2 Dow. P. C. 659; Bac. Ab. "Abatement" M; 3 Ch. Plg. Forms, note *a*; Rowland v. Veale et al., Cow. 18; Hixon v. Binns, 3 T. R. 185; Marsh v. Burns, 1 U. C. C. P. 334; Nash. v. Calder, 5 C. B. 513; Byrne v. Knipe, 5 D. & L. 659, 12 Jur. 1075, S. C.; Reg. v. The Mayor and Aldermen of London, 11 Jur. 867; Wilson v. Dunford, 12 Jur. 729; Levy v. Moylan et al., 10 C. B. 189; Owens v. Breese, 6 Ex. R. 916; Rees v. Williams, 7 Ib. 61; Peacock v. Bell et al., 1 Saund. 73; Brookman v. Wenham, 15 Jur. 219.

MACAULAY, C. J.—The plea appears to me bad—admitting that the pendency of the action in the County Court might be pleaded in abatement—on two grounds.

1st. It does not aver that the defendant was impleaded, or that the plaintiff has declared in the County Court, or that the identity of the two causes of action appears by the record. It merely alleges that the defendant was served with and appeared to a writ issued out of that court, at the plaintiff's suit in trespass, as appears by the record, and then alleges as a matter of fact to be tried *aliunde* that the causes of action are identical. Had the plea averred that the identity appeared by the record, and the plaintiff taken issue, the case of Mitchell v. King, 2 Barnardiston 113, is express that the defendant would fail upon the production merely of a writ in trespass generally. The case of Kerby v. Siggers et al., 2 Dow. P. C. 659, may conflict with this; but Sparry's case, 5 Co. 61, Dudfield v. Warden, Fitz. 313, and others referred to, seem to me to shew that the mere statement of a writ in trespass not shewn to be explained or amplified by a declaration is not sufficiently certain to support a plea in abatement of another action pending for the same identical trespass as that alleged in a declaration for trespass to a specific chattel. The general writ does not import it on the face of it. It cannot be inferred as a legal presumption of fact; nor is it susceptible of proof upon issue taken upon *nul tiel record*, nor do I see that it could be proved without more as a fact by evidence before a jury.

2nd. The plea is double or fatally ambiguous. In this respect it much resembles the case of March v. Burns, 1 U. C. C. P. 334, which is quite in point in support of the demurrer on this ground of exception. The words, "*as aforesaid*" do not cure the objections by reference to the antecedent. It rather refers to the same identical supposed trespasses for which the writ was issued in the County Court than to those mentioned in the declaration in this cause, as the subsequent use of the same words, '*as aforesaid*," a little further on in the plea, tend to shew,—at all events, they are fatally uncertain in a matter requiring unequivocal precision—Gore v. Lloyd, 12 M. & W. 464—See per Pollock B., in Bleakley v. Jay.

The plea is evidently framed upon the form in 3 Ch. Plg., 7 edn. p. 19, which in the note is shown to have been approved of in a case of Abbott & another v. Raphail & another, in June 1835. I can find no report of such a case, nor am I satisfied of the correctness of the plea as there given, nor do I find any resembling it in other books of precedents that I have had access to.

As respects the main question; if the plaintiff had declared in the County Court for a trespass to a mare of his, as he has done in this action, and that suit was still pending, I am not prepared to say the pendency of such suit might not be pleaded in abatement. The reasons in support of support of such a plea are very forcible; and I am more inclined to deem it admissible than to hold the County Courts (constituted as ours are, and possessing the jurisdiction and powers conferred upon them) inferior courts in that sense which would enable a plaintiff to bring a suit in this court after having proceeded to a declaration in that for the same identical cause of action, without previously discontinuing. All the arguments of co-ordinate jurisdiction *quoad* the subject matter, and of the harassing vexation of a second suit in a superior court pending such action, &c., apply with perhaps unanswerable force.

MCLEAN, J., concurred.

Per Cur.—Judgment for demurrer.

THE TRUSTEES OF SCHOOL SECTION No. 2, OF THE TOWNSHIP OF DUNWICH v. GEORGE McBEATH, EXECUTOR OF THOMAS TALBOT.

Exchequer—Corporation.

A resolution of the freeholders and householders of a school section, passed at their annual meeting, that the trustees should tax the property in such section to pay the teachers' salary, &c., followed in a resolution of the trustees of such school section directing a rate to be levied on the ratable property in said section to raise the sum required and the preparation of rate bills, &c., is sufficient to render a non-resident having real estate within such section liable for the sum rated by the school trustees of such section according to the assessed value of his real property, and that being so liable, defendant, as his executor and representing his estate is liable in an action of the same nature to which the testator might have been subjected.

A corporation aggregate is not bound to appear at the trial as witnesses, under a notice served on their attorney, under statute 16 Vic., ch. 19, sec. 2.

[1 C. C. P. Rep. 228.]

DEBT for £21 8s. Declaration states that after the provincial statute 13 & 14 Vic., ch. 18, it was decided upon by a majority of the freeholders and householders of the said school section, duly assembled at the annual school meeting of the said section, &c., that the salary of the teacher and the expenses for fuel for the common school of said section for the year 1851, the then current year, should be provided for by a tax upon the property in the said school section; and the majority of the said freeholders and householders, &c., thereupon desired the plaintiffs to tax the property in the said school section, and employ all lawful means to collect the sum required: that £100 was required. Whereupon *plaintiffs made a rate or tax* for the year 1851 of one penny and three-fifths of a penny per pound of the assessed value of taxable property in the said section as expressed in the assessor's or collector's roll of said township, which was necessary to raise the requisite sum; which said rate was due and payable on or before the 31st of December, 1851: that before and till his death the said Thomas Talbot was a *freeholder* in the said section and seized and possessed of real estate therein, and rated (quære, in what year) at £3,210, &c., and was rated *by plaintiffs* in £21 8s. in *respect thereof;* that the said £21 8s. was not paid when payable, though he had notice thereof, and it was demanded by the collector when payable: and that he resided out of the limits of said section; whereby an action hath accrued against the defendants as executors, &c.

Pleas—1st. Never indebted. 2nd. Testator never indebted. 3rd. That plaintiffs did not by a by-law under seal direct a rate *modo et forma*. 4th. That plaintiffs did not make *any* by-law. 5th. That plaintiffs did not make or impose said rate or tax. 6th. That testator as such freeholder was not liable to be rated in the said sum of £3,210. 7th. That he was not a freeholder.—All the pleas concluding to the country and issues.

At the trial, before the honourable the Chief Justice of the Court of Queen's Bench, Coyne, one of the school trustees, was received as a witness for plaintiffs, though objected to by defendant's counsel, and proved a resolution passed the 8th of January, 1851, at the annual meeting of the freeholders and householders as follows:

"TYRCONNEL, *January 8th*, 1851.

"At the annual school meeting held in the school house in school section No. 2 in the township of Dunwich, the meeting was organized by electing Archibald Hamilton chairman and John Ridden secretay.

"No. 2. Moved by Thomas G. Coyne, seconded by Thomas Dewitt,—That the trustees be required to tax the property in this section to pay the teacher's salary and the expenses of fuel for this school for the year ensuing.—Carried unanimously.

"Signed, A. HAMILTON, *Chairman.*
"[L.S.]" JOHN RIDDEN, *Secretary.*"

9th of January, 1851.

"At a trustees meeting, held this evening, on motion of John Ridden, seconded by John Pearce, Thomas G. Coyne was appointed treasurer for the ensuing year. On motion of John Pearce, seconded by John Ridden, it was resolved to employ Mr. Benson for the ensuing year at the rate of £50 per year."

Also a by-law, passed on the 10th of January, directing the rate of one penny and three-fifths of a penny in the pound to be levied on the ratable property in this section to raise £50, or so much thereof as is necessary to pay the teacher's salary for this year.

"By-Law No. 4.—It is hereby enacted by the trustees of school section No. 2 in the township of Dunwich, that the sum of £50 shall be assessed on the ratable property of this school section, or so much thereof as can be raised by an assessment of one penny and three-fifths of a penny in the pound, to pay the teacher's salary for the ensuing year.

"Passed January 10th, 1851.

"Signed, THOMAS G. COYNE.
"[L.S.] *Secretary and Treasurer.*"

He said it was sealed by the seal always used by plaintiffs, who had no other seal.

It was admitted that the testator was a freeholder of lands in that section, and usually resided in school section No. 1 of the same township. A rate bill for the £50 was produced, and testator rated at £3210 value of property, assessed at one penny and three-fifths of a penny, equal to £21 8s. for 1851, made up in November from the collector's roll of that year.

The amount was demanded of Mr. Beecher, his agent, in his lifetime, who answered in writing, refusing to pay &c.

On cross-examination, the witness said the by-law was sealed the day it passed, but though now entered in a book and sealed he could not be certain it was so entered the day of the date, or that it was sealed on that day, and could not explain an alteration in the date, nor state whether the by-law had been read over to all the trustees when passed.

The other trustees, Stafford and Pearce, were not present at the trial. The defendant's counsel objected—1st That the by-law was illegal on the face of it. 2nd. That there was no president or chairman's signature thereto. 3rd. That non-residents were not liable. 4th. That the executor (defendant) was not liable, only the heir or devizee of the testator as running with the land only, and not being personal debt.

These objections were overruled for the time. But the Chief Justice did not consider the proof of the by-law at all satisfactory, and seriously doubted its being made as stated, from the way the witness answered respecting it.

On the 17th September the defendant's attorney served a notice on the plaintiffs' attorney that upon the trial the defendant would require the plaintiffs to be *personally* present to be sworn and examined as witnesses on the part of the defendant, pursuant to the statute. The cause was tried the 1st of October. Pearce and Stafford did not appear, but the case was not taken *pro confesso* by the learned Chief Justice at Nisi Prius, and plaintiffs had a verdict for £21 8s.

In Michaelmas Term last, *Beecher* for defendant, obtained a rule on the plaintiffs to set aside such verdict without costs, as being contrary to law and evidence, and for misdirection, the plaintiffs' non-appearence at the trial, &c., or to arrest judgment on the ground that the declaration does not shew defendant's liability as executor, to this action, &c.

On the argument, he contended that the plaintiffs have admitted that a by-law was necessary, by setting it out in their declaration: that the plaintiffs were bound to appear and give evidence under the notice.

In arrest of judgment he contended—1st. That the by-law should be set out in the declaration.—Wilcox on Corporations, 173 sec. 425. 2nd. That it should have been averred in the declaration that defendant lived without the section.

Connor, Q.C., for plaintiffs.—That the case of Rex. v. Harrison, 3 Bur. 1322, shews the reason for the by-law not being set out; that the by-law was held sufficient by the judge at *Nisi Prius*; that the 13 & 14 Vic., ch. 48, sec. 12, shews how the money is to be raised, and that a by-law is not necessary; that it is not necessary that the by-law should be drawn up and signed at the meeting; that the corporation of three were not bound to attend as witnesses on notice; that the attendance of one was sufficient; that the case not having been allowed to have been taken *pro confesso* by the learned judge, his ruling cannot now be reviewed.

In arrest of judgment—That it was sufficient to aver that defendant's testator lived out of the section.—Adair v. Shaw, 1 G. & D. 264; Eton v. Echers, 1 Chan. C. 121; Williams on Exors. 1351, 1385; Stevens v. Lloyd, 1 W. B. 284; Henningham's case, Dyer 314; Williams on Exors., book 2, section I.

MACAULAY, C.J.—Upon reference to the provincial statutes, 13 & 14 Vic., ch. 48, sec. 6, No. 4, sec. 12, Nos. 2, 7, 8, 9, 11, and sec. 18, No. 1; also to ch. 67, secs. 1, 6, 22, 34, and 37; it appears to me that when lawfully assessed school rates become personal debts, recoverable by the summary proceedings provided in the statutes, or by action, and that as debts the right of action survives against the personal representatives of the person assessed. Such debts may also operate as a lien on the land in respect of which the rate is imposed, but the goods of the owner are likewise and primarily liable. The case of Stevens *v.* Evans (2 Bur. 1152) differs. That case seems to show there is no other remedy after the death of the principal, except against his executors or administrators.

As to what constitutes a declaring or assessing a rate, it is stated in Steven's Municipal Acts (p. 209), that a resolution formally adopted and followed by such steps as the statute prescribes, is sufficient; it may be tested by considering whether a distress to enforce such rate could be justified.

There appears to be a great deal of suspicion touching the by-law bearing date the 10th of January 1851, offered in evidence on the trial of this case; and if it depended upon the necessity for such a by-law, in addition to the other steps which were taken, it might be proper to grant a new trial; if antedated, it is, so far as it is of any validity, confirmatory of the rate. But I think a resolution of the freeholders and householders of the section, at the annual meeting on the 8th of January, 1851, followed by the resolution of the plaintiffs on the 9th of that month, and the preparation of the rate bill, as in evidence, were sufficient to render the testator in his life-time liable, as having been rated by the school trustees of the section, for his portion of the sum required to be raised for teacher's salary, &c., according to the assessed value of his real estate within such section. That as a non-resident, he became liable to be sued therefor as for a debt, and that the defendant, as his executor, and representing his estate since his death, is now liable in an action of the same nature, to which the testator might have been subjected.—See Brown on Actions, 347, that debt is the appropriate remedy; provincial statute 7 Wm. IV., ch. 3, sec. 11.

Then the question is, whether those allegations in the declaration which relate to the alleged by-law being rejected, the declaration would be sufficient after expunging them; rejecting those portions of the declaration, it would still appear on the face thereof that £100 was required to be raised, &c. whereupon the plaintiffs made a rate or tax for the year 1851, of one penny and three-fifths of a penny per pound of the assessed value of taxable property in the section, as expressed in the assessor's or collector's roll of the township, which was necessary to raise the requisite sum, and which said rate was due on or before the 31st of December, 1851; that before and until his death the testator was a freeholder in the said section, and seized and possessed of lands and real estate therein, and rated at £3,210, and was rated by the plaintiffs in £21 8s. in respect thereof; that the said sum of £21 8s. was not paid when payable, although the testator had notice thereof, and it was demanded by the collector after becoming payable, and that he resided out of the limits of the said section; then rejecting the statements respecting the by-law, and adopting the evidence given at the trial irrespective of that which related to such by-law, I think there appears a sufficient declaration sufficiently supported by proof. The third plea, however, denies that the plaintiffs by a by-law under seal directed a rate in manner and form alleged, which is an informal traverse of the by-law stated in the declaration. The fourth plea alleges that the plaintiffs did not make *any* by-law, &c., instead of traversing the one alleged, or demurring to the declaration, if not sufficiently stated. As respects these two issues, I look upon them as immaterial, because it was unnecessary for the plaintiffs to have made a by-law, or to have stated it in the declaration, in order legally to declare the rate. I think it was sufficiently declared independently, and that the necessary averments to show that are made and proved; and as the jury to whom the question seems to have been left have found that a by-law was made, and rendered a verdict for the plaintiffs on all the issues, and as I think the plaintiffs are entitled to maintain the action on the grounds above stated, I am not disposed to disturb the verdict.

As to the notice to the plaintiffs to attend at the trial as witnesses on behalf of the defendant, they, as a corporation, could only appear by attorney and counsel, which they did. The Chief Justice of Upper Canada, who presided at the trial, did not in his discretion decide that the case should be taken *pro confesso* against the plaintiffs for not otherwise attending, and I do not think a corporation aggregate within the meaning of the statute 16 Vic. ch. 19, sec. 2. The individual members of the plaintiffs' corporation might have been subpœnaed, if their personal attendance was required. This does not seem to have been the course adopted; and I do not consider that a notice under the statute addressed to the attorney of the plaintiffs suing in their corporate capacity, is a call upon the several members of such corporation to attend, or that it binds them to attend at the peril of the consequences declared in that act. As to that branch of the rule which seeks to arrest judgment, I think the defendant is liable in law, and that the declaration is sufficient after verdict, although possibly open to some objections, had they been made the ground of special demurrer.

MCLEAN, J.—It appears to me that the plaintiffs on the evidence are entitled to recover. It was sworn that a rate had been imposed; and the list of the names of all the persons rated by plaintiffs for the school purposes of their section, and the amount payable by each, together with a warrant for the collection, were produced under the 12th Vic., sec. 12, sub-sec. 8, and that list, taken according to the valuation of taxable property as expressed in the assessor's or collector's roll, and a warrant directed to the collector of the school section for the collection of the several sums mentioned in the list, afforded sufficient authority for the collection from all resident inhabitants without any by-law being previously passed. The raising money by a rate had previously been decided at a meeting of the school section. The property held by the testator was rated with the other property of the section, but as he was not resident in the township, and had not personal property therein, the amount could not be collected. Under the 11th sub-sec., of sec. 12, it is made the duty of school trustees to sue for and recover by their name of office the amount of school rates or subscriptions *due* from persons without the limits of their school section and making default of payment. The plaintiffs then had a right of action against the testator for the amount of school rate due by him, and as he died without satisfying the amount, it still remains due, and is payable by the defendant, as his executor, the same as any other money due by the testator at the time of his death.

No by-law being necessary, of course none need be set out in the declaration, and it was not necessary for plaintiffs to allege that the defendant was resident out of the limits of their school section. They were authorized by law to sue in case he did live out of the section, and that fact was proved so as to entitle them to recover.

It appears to me that no sufficient grounds have been shewn to interfere with the verdict or to arrest the judgment, and that the plaintiffs are entitled to the postea.

RICHARDS, J., concurred.

Rule discharged.

IN THE MATTER OF THE SCHOOL TRUSTEES OF THE TOWN OF PORT HOPE *v.* THE TOWN COUNCIL OF THE TOWN OF PORT HOPE.

School Trustees—Municipal Council.

The communication by a Board of School Trustees to the Municipal Council of the town of a resolution of the Board that the chairman do authorize the secretary of the Board to notify the Town Council to *furnish* the Board with a sum of money *immediately*, for the purpose of purchasing a site for a school house and erecting a school house thereon,—a copy of which resolution was sent to the Town Council,—is not such a compliance with the provisions of the statute 13 & 14 Vic. c. 48, as to render the Town Council liable to be compelled to pay the amount by mandamus.

[4 U. C. C. P. Rep. 418.]

Rule *nisi* for a mandamus. This was a rule upon the Town Council of Port Hope to shew cause why a mandamus should not issue, commanding them to levy by rate upon all the real and personal estate of the freeholders and householders of the said town the sum of £2500 and the costs of collecting the same, and to pay over the said sum of £2500 to the Board of School Trustees of the town of Port Hope, for the purpose of purchasing a school site and erecting a school house thereon, in compliance with the request of the said Board of School Trustees, upon the affidavit and papers filed, and why they should not pay the costs of the application.

The affidavit of W. Waller, secretary to the Board of School Trustees of the town of Port Hope, sworn the 15th of June, 1854—That a resolution, of which a copy was annexed, was passed by the said Board, and that in compliance therewith he did on the 15th of May, 1854, transmit a copy of the letter annexed containing copies of two resolutions passed by the said Board, and that such letter was laid before the Town Council of Port Hope, of which he is also clerk; and that the said Town Council have not furnished the said Board with the sum of £2,500 or any part thereof, but have neglected and refused so to do. The letter referred to is as follows:—

"TOWN HALL, Port Hope, 15th May, 1854.

"*To the Town Council of Port Hope:*

"GENTLEMEN,—I am directed by the Board of Common School Trustees to transmit you the following resolutions passed by the said Board on Saturday last, the 13th of May, 1854—namely:—'Moved by the Rev. J. Baird, seconded by Mr. Warren, that the chairman of this Board do order the Town Council to *furnish* this board with the sum of £2,500 *immediately*, for the following purposes—namely, £500 for purchasing a site for a central school, and £2,000 for the erection of a school house thereon.—Carried.'

"(Signed,) W. BURNHAM, *Chairman.*

"Moved by Mr. Gillett, seconded by Mr. Baird, that this Board will require from the Town Council the sum of £200, to meet the incidental expenses of this Board for the current year, and that the Town Council be notified of the same.—Carried.'

"(Signed) W. BURNHAM, *Chairman.*

"I have the honour to be, gentlemen,
"Your obedient servant,
"(Signed) W. WALLER, *Secretary.*"

Affidavit of W. Burnham, chairman of the Board of School Trustees of the town of Port Hope, sworn the 16th of June, 1854—That at a meeting held by the said School Trustees at the town of Port Hope, on the 13th of May, 1854, a resolution was passed to raise £2,500—namely, £500 for purchasing a site, and £2,000 for the erection of a school house thereon; that in pursuance thereof the said Town Council were requested to furnish the said Board with the said sum of £2,500 for the purpose aforesaid; that the said Town Council have neglected and refused to furnish the same, and that the said Board of School Trustees have contracted to purchase a site for the said school house, and have agreed to pay for the same the sum of £500.

Wilson, Q. C., shewed cause, referring to The School Trustees of Brockville *v.* The Town Council of Brockville, 9 U. C. Q. B. R. 302, which seemed to deny any discretion in the Municipal Council when properly called upon.

He contended—1st, That the application is to levy a rate, whereas it should have been to pass a by-law for that purpose, or to raise the money, if not in hand, as the Council might prefer.

2nd, That the demand was not to levy a rate or pass a by-law, but to furnish £2500 immediately: an unreasonable, if not an impracticable request; and at all events not that which the court is now called upon to enforce by mandamus: that one thing was demanded and another sought to be enforced.

3rd, That the demand should be of something specific and duly authorized—Regina *v.* The Bristol and Exeter Railway Company, 4 Q. B. 162; whereas there was nothing to shew the proposed school house necessary, nor any estimate prepared and laid before the Council, as the Act required—referring to 12 Vic. c. 81, sec. 177; Municipal Act of 1851, sec. 4; 13 & 14 Vic. c. 48, sec. 12 No. 12; sec. 18 No. 1; sec. 20, 21, 24, Nos. 3, 4, 6, and 9; and 16 Vic. c. 185, secs. 1 and 6;—that it was a mere arbitrary requisition for a large sum, without anything satisfactory to justify it.

4th. That the Trustees were bound to call a public meeting in like manner and under the same regulations as school trustees of township school sections—16 Vic. c. 185, sec. 5.

5th, That the Board of Trustees might impose a rate themselves, and having a remedy in their own hands, are not entitled to ask the aid of a mandamus.

He also read an affidavit in reply of Duncan McLeod, sworn the 26th of August, 1854—"That he is a member of the Town Council of Port Hope, and that no public or school meeting of the freeholders and householders and other taxable inhabitants of the said town or any ward therein was called by the said Board of School Trustees, nor was any notice given by them of any such meeting, nor did any such take place, to consider the question of the purchase of a site for a central school and for the erection of a school house thereon, at any time since the 24th of July, 1850, so far as he could recollect and inform himself; and that since the day and year aforesaid, so far as he can recollect and inform himself, no application has been made and no estimates have been laid before the said Town Council by the said Board of School Trustees on behalf of the majority of the freeholders, &c., of the said town, at any public meeting before then called for the purpose aforesaid;" and submitted that their proceedings were not regular or according to the statutes, and were too loose and general to support the present application.

Richards, in reply, relied on the 13 & 14 Vic., ch. 48, sec. 24, No. 6, as authorizing the steps taken: he denied that any more specific estimate was necessary, the amount resting in the discretion of the Board of Trustees, who must be supposed to have satisfied themselves of the propriety and expediency of the expenditure. He contended that no public meeting or vote was a necessary preliminary, and that the passing a by-law was involved in the levying a rate, which could not be done without it; wherefore, if material, the one was equivalent to the other, and that the council were to provide the money in the manner desired by the Board.

That the Trustees were not bound to levy a rate themselves, but were entitled to call upon the Municipal Council, whose duty it became to provide the amount; and if that was refused, a mandamus was the proper course, to compel performance of the duty declared by the statute, &c.—16 Vic., ch. 185, secs. 1 & 6.

MACAULAY, C. J.—The 13 & 14 Vic. c. 48, sec 21, No. 6, enacts that it shall be the duty of the Board of School Trustees, &c., among other things, to *prepare* from time to time and *lay before* the Municipal Council, &c., an estimate of the sum or sums which they shall judge expedient, &c., for the purchasing school premises and for building school houses, &c.; and that it shall be the duty of the Common Council to *provide* such sum or sums in such *manner* as shall be desired by the said Board of School Trustees.

I am disposed to think, that instead of this the Board of School Trustees may levy a rate for such purposes without reference to the Municipal Council of the town—16 Vic. c. 185, sec. 1, and sec. 6, 21.—But whether or not, I think that application may be made to, and that if properly made, it is the duty of, the Municipal Council to provide the monies in manner desired; and that if refused, a mandamus may be moved.

I do not think a vote of the ratepayers necessary in the case of cities and towns, &c., as it is within school sections of townships (16 Vic. c. 185, sec. 6), as was decided in the case of The School Trustees of Brockville v. The Town Council of Brockville (9 U. C. Q. B. R. 302; 13 & 14 Vic. c. 48; sec. 24, Nos. 1, 6, and Nos. 4, 6, sec. 18, No. 1, and sec. 12, No. 7.)

But on the present application, I do not think, first, That the proper estimate is shewn to have been *prepared* and *laid* before the Municipal Council; for I do not consider the communication of a resolution of the Board of Trustees that the chairman do order the secretary to notify the Town Council to *furnish* the Board with £2,500, *immediately*, for the following purposes—namely, £500 for purchasing a site for a central school house, and £2,000 for the erection of a school house thereon—such an estimate as the statute contemplates, and as the Town Council, when called upon to pay so large a sum out of the funds of the municipality, may reasonably expect, or that the courts are bound, as a matter of course, to enforce such a general demand. It is merely a peremptory requisition for a large sum of money; and if twice or ten times as much were right, the court might as well be moved to enforce the payment without any additional explanation to shew it a reasonable exercise of the very wide discretion and powers vested in the Board. Nor do I think a demand to furnish such a sum *immediately* reasonable, without showing that the municipality possessed funds ready to be so applied at a moment's notice.

We are not asked to compel performance of what the resolution required merely to compel the Municipal Council to furnish the £2,500 immediately, but to order them to levy a rate, &c.

To enforce the levy of a rate is not to compel that which the Board of Trustees demand. If we were moved to grant a mandamus to order the immediate furnishing of the amount according to the resolution of the Board of Trustees, I apprehend we would not be prepared to do so without more appearing than is shewn on this application;—then, in place thereof we are asked to direct that to be done which the Municipal Council was not asked to do; nor do I consider that which was asked was equivalent. It appears that the funds were already in hand, not that the process of a rate was required to be resorted to.

In exercising the large powers vested in the Board of Trustees when a direct taxation to so large an amount is to be imposed upon the inhabitants, not by the Board directly, but through the Municipal Council upon their requisition, we must see that the terms and substance of what the statutes and the law require have been correctly complied with. One thing required is the preparation of an estimate; another is, a distinct application to the council to do that which we are called upon to enforce. My impression is that the present proceedings are deficient in both these respects.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged without costs.

JOSEPH McKAY v. JAMES HALL.—JAMES CHARLES JOHNSTON ET AL. v. JAMES HALL.

A Judge of the County Court has power to grant a certificate for speedy execution.

[4 U. C. C. P. Rep. 145.]

These cases were brought down by writ of trial before the Judge of the County Court of the United Counties of York, Ontario and Peel, who certified on the same day that in his opinion execution ought to issue forthwith for the verdicts. In Michaelmas Term last *Eccles* obtained in each case respectively rules calling on the plaintiff to shew cause why the judgments entered and the executions issued thereon should not be set aside, on the grounds—That no formal returns had been made by the Judge upon the said writs of trial; that the writs of trial had not been first returned and filed in the Crown-office, or remained there for the space of six days; that the Judge of the County Court had no authority to grant such certificate as aforesaid.

Hagarty, Q.C, shewed cause, and contended that there is no reason why the judge of the County Court should not certify for immediate execution after a judge of the Superior Court has said the cause was a proper one to be tried by him; that the judge of the County Court is the only person who can certify for costs, because the act says it must be done by the judge who tried the cause; that the certificate of a judge, erroneously made up, may be amended.—3 & 4 Wm. IV ch. 42, sec. 10.

Eccles supported the rule.—That the Imperial statute 1 W. IV. applies to judges of the superior court, and the Act which authorizes the writ of trial was passed after; that the judge who tries the cause has the right to make certain amendments: that the Act of 1852 cannot be carried back and embodied in the Act of 1815: that no power can be given to judges of the County Court to grant certificates for immediate execution except by express enactments; that his being a judge of the County Court does not make him a judge under the Act with power to certify; that he is only delegated by the Act and writ to try the writ, and then his power ceases; that amendments are different from the granting certificates, because amendments are made during the course of the trial, but after the jury find their verdict he has no power except to endorse his verdict and make his return; that the 56th section of the statute 8 Vic. directs what is to be done, after the verdict, and that the judgment shall not be entered for six days; that the Act authorizing the writ of trial cannot be altered except by an Act with express enactments referring to the former Act; that the judge of the County Court has no authority to order a judgment to be entered in a superior court before the time for entering judgment regularly in that court.

MACAULAY, C.J., delivered the judgment of the Court. (a)

It seems clear that the Judges of the County Court are Judges within the statute 16 Vic. ch. 175, sec. 27, from the circumstance of their being spoken of as such in that section, which includes both the Superior and County Courts. I think the writ of trial is virtually a record, although not so termed, and that the certificate of the Judge of the County Court

(a) The following statutes show the powers conferred on the Judges of the County Court, and are applicable to this case:—8 Vic. ch. 13, 12 Vic. c. 63, 13 & 14 Vic. c. 52, Imp. stat. 1 Wm. IV. c. 7; 3 & 4. W. IV. c. 42.

thereon entitles the plaintiffs to speedy execution. I do not perceive that it deprives the defendant of any rights he might otherwise have exercised, and seems quite within the spirit, true intent, and meaning of the statutes.

The papers filed do not show that the judge's returns were informal or in any other respect improper, or that they were not returned and filed in the Crown-office before or at the time of the entry of the judgments. The opinion expressed upon the main objection determines that it is not necessary that they should have remained there six days before the plaintiffs acted thereon by entering judgment, having obtained sufficient certificate for speedy execution.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

JARED O. THATCHER v. THE GREAT WESTERN RAILROAD COMPANY.

Plaintiff being a passenger in one of defendants' cars, the axle of the tender broke, and the tender and car in which plaintiff was were thrown off the track, whereby plaintiff's arm was broken.

At the trial, the defendants called the engineer of the train, who proved that he examined the axle shortly before the accident, when it appeared in good order. The jury having found a verdict for plaintiff upon this evidence, and with a charge favourable to defendants, the court refused to set it aside, on the ground that it was for the jury, on the evidence, to determine whether there was negligence on the part of defendants or not.

[1 U. C. C. P. Rep. 513.]

CASE.—Declaration states that defendants were proprietors of a railway in Upper Canada for carrying of passengers, &c., and received plaintiff as a passenger, to be carried for reward from Windsor to Niagara Falls; that it became defendants' duty to use due diligence; yet defendants, not regarding, &c., did not use due care, &c., but conducted themselves so carelessly and improperly in that behalf that by reason thereof, and improper conduct of the defendants by their servants, the railway car in which plaintiff was such passenger was thrown off the track, and thereby his right arm broken, &c.

Second count charges defendants as common carriers for reward, &c.

Pleas—1st. Not guilty to the whole.

2nd. To first count—Did not receive plaintiff as a passenger.

3rd. The second count—Did not receive plaintiff as a passenger.

At the trial it was admitted that in June last the plaintiff was conveyed in defendants' cars as stated; that when near Chatham the axle of the tender car broke, and such tender, as well as the car in which the plaintiff was, was thrown off the track, whereby plaintiff's arm was broken, &c. The plaintiff gave no further proof of negligence in the defendants.

On the defence the defendants' counsel called the engineer, who had been on the defendants' road as engine driver from the first, and who had charge of the locomotive engine on the day the tender broke down. He stated that when they left Windsor he had examined the engine and tender, that nothing went wrong with the engine; that he last examined at Chatham, two and a half miles from the place where the accident afterwards happened; that he examined the axle afterwards and found no flaw in it; that it was a new break straight through, just inside the wheel, and could not account for the accident; that it was the proper size, and he thought of wrought iron, though it might be a bad kind of it, and that it had been running for some time and constantly in use for two months, and he had no reason to think anything wrong; that they were not going more than fifteen miles an hour at the time, on a smooth road; that he examined it as usual, saw no crack in it, and could see perfectly well that part of the axle, and for all he knew it was all right when he looked. That it (the engine and tender) was built at Manchester, in the state of New York; that there was nothing more than usual in the tender, nor more than a usual train.

The learned Chief Justice, who tried the cause, told the jury the defendants could only be held liable in case of negligence: that the axle breaking threw it on the defendants to shew that due care was taken to have proper carriages, and to ascertain from time to time that all was sound; and that they were to say whether they found any want of skill or care on this occasion, or that the iron was of bad quality, and therefore failed.

The plaintiff's counsel objected that there should have been evidence given of the sufficiency of the axle-tree, and as to the probable cause of the accident; but the learned Chief Justice left to the jury the evidence of the engineer as applying to those points, observing that he could not say it was no evidence, or that other or better evidence could, or should, as a matter of legal necessity, have been given.

Read, for plaintiff, shewed cause, and contended that the accident was *prima facie* evidence of negligence, and was not rebutted; that only one witness was called who did not prove any adequate cause to account for the injury reconcileably with the absence of any negligence or blameable insufficiency of the make on defendants' part. He cited Grote v. The Chester and Holyhead Railway Co., 2 Ex. R. 251; Christie v. Griggs, 2 Camp. 81; Carpue v. The London and Brighton Railway Co., 5 Q. B. 747; Curtis and Wife v. Drinkwater, 2 B. & Adol. 169; Grieve v. The Ontario Steamboat Co., 4 U. C. C. P. R. 387. That it was left to the jury as a question for their decision with observations favourable to the defendants, and they should abide by the result.

Galt, in reply, urged strongly that no culpability was justly imputable to the defendants; that to hold them liable is to declare them liable as of course, for every accidental breakage of any part of their works, whatever care or precautions they may have used, or however apparently secure and sufficient; that the rule of law was correctly laid down by *Alderson, J.*, in Sharp v. Greer, 9 Bing. 457; and if applied to the facts in this case, the defendants were entitled to a new trial—Witte v. Hague, 2 D. & R. 33.

MACAULAY, C. J.—I can only say that, according to the view expressed by me in the case of Grieve v. The Ontario Steamboat Company, and referring to the cases mentioned in disposing of that case a few terms ago, I think the present formed a question for the jury; that in the absence of any explanations satisfactorily accounting for the accident, but with a charge favourable to the defendants, the jury were not satisfied it was a pure accident entailing no liability on the defendant, but felt the more satisfactory conclusion to be that there was negligence on their part in relation to the premises; whether as in regard of insufficient materials, workmanship, want of vigilance, overloading, mismanagement, or how otherwise not being expressed by them. The accident having happened unaccountably and without any proximate or active cause to account for it, constituting as the cases say some evidence of negligence, it rested with the defendants to explain and reconcile it with perfect innocence on their parts; and having failed to do this to the satisfaction of the jury, I do not see sufficient ground for sending the case to a second trial when the same evidence and no more might be again submitted to another jury. If a jury must decide on this evidence, I cannot say there is not evidence for their consideration; I think it was for them to decide on the evidence, and do not see any reason for disturbing their decision. That the axle broke without any sudden cause or emergency that we see, and that the plaintiff was seriously injured in consequence, are undisputed facts; and the jury have come to the conclusion that the evidence did not exonerate the defendants from blame. The rule will therefore be discharged.

McLEAN, J., and RICHARDS, J., concurred.

Rule discharged.

Macdonald v. The Hamilton and Port Dover Plank Road Company.

Liability of Road Companies for accidents.

Road companies owning public highways and entitled to tolls for the use thereof, are liable for accidents arising from want of repair to the roads. They are liable to an individual sustaining special injury, as well as to the public, by indictment.

[3 U. C. C. P. Rep. 402.]

Case for injury to plaintiff's wife by the upsetting of a hired coach, in which the plaintiff and his family were travelling upon the defendants' road,—the accident having been occasioned by the bad and insufficient state of repair of such road. It was said to have been a government road, sold to the defendants under the provincial statute 12 Vic. ch. 5.

Plea—Not guilty.

The bad state of the road, and the injury in consequence, were proved.

It was objected by defendants' counsel at the trial:—

1st. That the state of the road should be proved by an engineer.

2nd. That the only remedy was by *indictment*, under sec. 35 of the provincial statute 12 Vic. ch. 81.

3rd. That defendants were entitled to notice of action.

Leave was reserved to move on these points, and the case was left to the jury, who found for the plaintiff £50 damages.

Freeman, for plaintiff, moved to set aside such verdict, and to enter a non-suit on the above grounds, and on the additional (4th) ground that the plaintiff's only remedy is against the coach proprietor, or at all events, that he alone could sue defendants.

The following cases were referred to—Russell et al. *v.* County of Devon, 2 T. R. 667; The Mayor, &c., of Lyme Regis *v.* Henley, 3 B. & Ad. 77; Crisp *v.* Bunbury, 8 Bing. 394; Butterfield *v.* Forrester, 11 East, 60; Bridge *v.* The Grand Junction Railway Company, 3 M. & W. 244-5; The Mayor, &c., of Lichfield *v.* Simpson, 8 Q. B. 65; as to double redress on statute and by action Stevens *v.* Leacocke et al., 11 Q. B. 731, distinguishes between common law rights infringed and those conferred by statute. Albon et al. *v.* Pyke, 4 M. & G. 421, S. P.; Clayards *v.* Detrick et al., 12 Q. B. 439; Marshall et al. *v.* Nichols, 21 L. J. Q. B. 343, 12 Am. Eng. 466, S. C.; Bigby *v.* Hewett, 5 Ex. R. 240-3; Thorogood *v.* Bryan, 8 C. B. 116; Booth *v.* Monmouth Railway Co., 17 *Law Times*, 154 Q. B.—If an act of parliament casts upon any persons the obligation to execute a public work, and the omission to execute that work inflicts an injury upon a private person, a person injured may maintain an action for the injury so sustained.

Macaulay, C. J.—The defendants, owning the road as a public highway, and the duty of repairing it being upon them, and being entitled to exact tolls for the use thereof, it appears to me that, upon the principles of the common law, they are liable in this action to an individual lawfully using the road and guilty of no fault on his own part, for a special injury received, in consequence of the defendants' permitting the road to remain out of repair, as proved in evidence. Such want of repair may have been also a public nuisance as respected the public at large, and the defendants may have incurred liability to indictment. But, independently of any such liability, they are also liable for special injury and damage sustained by a pr · individual, for the default and omission, amounting to a public nuisance. I perceive no reason to doubt their liability in this action and on the evidence, and there will be no rule.

McLean, J., concurred.

Per Cur.—Rule refused.

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THE LAW JOURNAL.

DECEMBER, 1855.

COURTS OF JUSTICE.

The recent investigations in New York, noticed in the public journals, have placed certain judicial functionaries in no enviable light before the public at large. We have no doubt that the individuals referred to are exceptions to the great body of learned and honourable men composing the New York judiciary: yet the wonder is, with the vicious system which regulates their appointment and tenure, that instances of corruption and depravity are not daily developed.

But beside fundamental defects, there are striking objections to the manner in which things are done and suffered in connection with the administration of the Law, and those who administer it. We have on several occasions witnessed the proceedings of the Courts in the United States, and were much struck with the contrast, in externals and in the mode of conducting business, between them and our own Courts. Nothing to distinguish the Judge or the Barrister from the medley of officers, Constables and Suitors present; the Judge treated not disrespectfully, it is true, but with an indecorous familiarity. The want of that quiet, orderly, dignified manner of proceeding, we have been familiar with here. Indeed, we have even heard of Judges leaving the Bench at mid-day, proceeding to a neighbouring hotel, and commonly discussing their dinners in company with suitors, constables and criers, and commenting freely upon the cases, tried or to be tried, before the Judge.

We have conversed with many educated persons, laymen and lawyers, on this subject: all regretted that the mode of administering justice, and that the position of its ministers could not be placed on the same footing as in England; but "difficulties in accomplishing it from their peculiar institutions" were said to stand in the way—the equality of citizenship would be disturbed, if the claims of the office were fully recognized.

Yet it is not the person of the Judge, nor even of the "Sovereign People" in the Judge, that is only disrespected: it is Justice herself that is treated with unclean familiarity.

It is not with a desire to disparage the administration of the Law elsewhere that we notice this subject; but may we not find in it a warning against laxity in the manner and order of administration in some of our own Courts? We have no apprehension respecting the Superior, nor indeed for our Inferior Courts, but the tendency in Inferior Tribunals is, for obvious reasons, downwards; and it requires all the vigilance of the Judges to maintain the *status* of our Division Courts, to follow out the good commencement made; there is no reason why these Courts should not exhibit the same decorum, the same decent formalities, or nearly so, as in the Superior Courts.

The dignity of Justice is not to be measured by the money value of the subject matter it is brought to bear upon. Let the Judges continue to respect themselves, and the public will remember "the respect to be had to their persons and office." Let them bear in mind that, however small their own emoluments—however rude their Court accomodations—however trifling the matter in dispute before them may be, that such labours, though humble, are not mean, for the principle of Justice stamps them with honour.

COMMITMENT UPON JUDGMENT SUMMONS.

(D. C. Act of 1850, secs. 91 & 92,)
Review of English Decisions bearing on.

(*Continued from page* 216.)

Re O'Neil, 1 C. C. C. 484, 1 L. M. & P. 737 (23rd Nov. 1850).—In this case it was held *not* necessary that the Warrant of Commitment of a dft. in default of payment of a debt recovered in the County Court, should be issued immediately after the date of the Judge's order for imprisonment.

Where the order of commitment in default was made on the 15th April, but the warrant for arrest and imprisonment was not issued till the 9th of October following.

Held, that-in the absence of any rule of practice limiting the period within which a warrant must issue, such lapse of time was not a sufficient ground for the discharge of a defaulting defendant who had been so arrested and imprisoned.

Under the *Division Court Act* the warrant is in force for three months only from date of order, the 55th Rule of Practice providing that warrants for commitment, whenever issued, shall bear date on the day on which the order for commitment was entered in the Procedure Book (i.e. the day on which order made), and shall continue in force for three calendar months from such date, *and no longer*.

In respect to successive commitments for non-payment of the same sum, there is an important case—*Re Boyce*, 21 L. T. 181; 22 L. J. Q. B. 393. The proceeding was under the 9 & 10 Vic. c. 95, ss 99 and 103, and it was held that the Judge of a County Court has power to commit a defendant who is summoned for non-payment of money pursuant to a Judgment of that Court, as soon as a new default is made, and therefore where a Judgment debtor has been once committed for seven days for non-payment, he may, at the expiration of that imprisonment, be again committed, if, having the means of paying he still refuses to pay, upon which the decision of the County Court is conclusive.

(TO BE CONTINUED.)

THE COUNTY COURTS.

It is rumoured that the County Courts Practice is to undergo a thorough change, and that a Bill has been actually drawn to effect that purpose. Organic changes in the mode of Trial and other particulars similar to the provisions of the English Common Law Procedure Act, as well as an enlargement of the subject matter of Jurisdiction, are also spoken of.

We admit the necessity for some improvement. The practice may be simplified very much, and some of the services now required may advantageously be dispensed with, but we hope that there is no intention of doing away with the formal Pleadings.

The measure, we trust, will be properly digested before it is given to the Legislature; and it is to be hoped that those most familiar with the subject will be consulted. Until, however, the measure is before the public it would be useless to indulge in conjecture or anticipatory remark, but our columns are open to those who wish to point out existing defects in the Law and Practice of the County Courts, if well considered suggestions for improvement are at the same time submitted.

JUSTICE AND MERCY.

The Judge dispenses justice, mercy is the prerogative of the Crown. The Judge pronounces the law's doom; it is the privilege of the Sovereign to modify and mitigate a sentence according to the circumstances of the case. The crime is not always the measure of guilt. A small crime may involve greater criminality than a great crime, a great crime may have less guilt in it than a small one, the law cannot measure this, at least our law does so but imperfectly. In France provision is made for such a frequent state of things by the power given to the Jury of finding a verdict of "guilty with extenuating circumstances. We do it rudely by the Jury's recommendation to mercy. But motives are often misrepresented and misunderstood out of Court, where the facts that call for mitigation are not known. The public look broadly at the crime and take no account of the circumstances of the criminal, and they exclaim against lenity, or against severity, ignorant of the causes that in either case determine the amount of criminality.—*Law Times.*

With this number the present volume ends; *the January number will be out in a few days.* So far we have been able to accomplish towards redeeming our promise. In this, our work has been lightened by the assistance of a gentleman who has lately united with the present Editors in conducting the *Journal.* He brings to our aid no small experience in the management of a public journal, and we are now able with increased confidence to guarantee punctuality in the future issues. We may add that the gentleman referred to is a member of the Law Society. The February number will appear early in the month, and thereafter it is designed to publish on the first day of each month.

We take the subjoined from a local paper, the *Cornwall Constitutional;* it is a statement obtained of a circuit by Judge Jarvis, and is advanced by the editor in proof of the correctness of his remarks, in a previous number, that County Judges were underpaid for their laborious duties.

In the question of remuneration, in our judgment, all County Judges should be placed on the same footing, seeing that the whole time of each is expected to be held available for the public necessities.

The office demands the ablest men the profession can supply, and the Country cannot have fit men as Judges unless inducements are held out to abandon the profits of their profession. The statement below gives probably a fair average view of the County Judges' work; indeed in the only locality we have personal knowledge of (the County of Simcoe) it even falls short of the number of miles travelled and number of cases disposed of by the Judge. *Ex uno disce omnes.*

On the 20th—he travelled to Williamstown, 15 miles, where he disposed of a Docket of 48 cases. 21st—Alexandria, 16 miles, 211 cases. 22nd—Lancaster, 16 miles. 108 cases; returned home that evening 16 miles. Monday 24th—Finch, 26 miles, 51 cases; broke his carriage, returned 16 miles to Osnabruck, and remained there Christmas Day, storm bound. Wednesday 26th—Williamsburgh, 16 miles, 177 cases. Thursday—Winchester, 18 miles, 77 cases. Friday—Mountain, 64 cases, 15 miles. Saturday—Matilda, 15 miles, 144 cases.—Monday, Osnabruck, 24 miles, 213 cases, and got home at a little before 10 o'clock, 12 miles.

The Circuit, therefore, caused the Judge to be absent eleven days from home, including Christmas Day, and one Sunday; he travelled 205 miles, and disposed of dockets numbering 1,093 cases. Of these 297 came to a hearing, and judgments were pronounced in them. He signed 328 orders for payment, and took besides affidavits of the execution of 208 confessions. After the close of the Court each evening he had to examine the accounts of the Fee Fund; the accounts of receipt and payment of suitors, money, and inspect the procedure books of the Clerk. If to this be added the fact, that these Circuits are performed six times in the year, one can form some opinion of the labour. But besides this, 12 sittings of the Division Court are held yearly in this Town, in which about 800 suits are brought. The Judge also holds four terms of the County Court, of six days each, and four Courts of Quarter Sessions of the Peace. He is frequently called upon to decide questions in the practice Court of the Superior Courts, as well as in the County Court, and the equity jurisdiction of the County Court is also under his charge. Out of the 297 hearings there were but three Jury cases. He had also to examine 13 persons brought up on judgment summonses and five more were ordered to be committed for not appearing.

We find by a late *Gazette* that Oliver Mowat, Esq., has been appointed a Queen's Counsel. We are glad to see this. It is always a matter of pleasure when moral worth and professional eminence meets an appropriate acknowledgment.

LIABILITIES AND DUTIES OF TRUSTEES.

(Practical points lately decided.*)

The practical importance to every professional man of the subject placed at the head of the present article, cannot be denied. We propose, therefore, adducing as concisely as we can the leading principles relating to this topic, together with the recent decisions thereon.

The general principle adopted by our courts with respect to the liabilities of executors and administrators, is thus laid down by Mr. Justice Vaughan Williams in his excellent "Treatise on the Law of Executors and Administrators." After stating, that where the will contains express directions what the executors are to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say, that though executor he is not clothed with any of these trusts, he proceeds as follows;—"The general rule adopted with respect to the liability of executor and administrator on this head, is founded upon two principles. First, that in order not to deter persons from undertaking these offices, the court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds. Secondly, that care must be taken to guard against any abuse of their trust."

As regards the liability of executors and administrators by their own acts, they may be guilty of a *devastavit,* not only

* From the *Law Times.*

by a direct abuse by them, as by converting to their own use the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint the claimants on the assets. If the executor, by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations this amounts to a *devastavit*. So also, if the executor or administr tor misapply the assets in undue expenses for the funeral, in the payment of debts out of their legal order to the prejudice of such as are superior, or by an assent to a payment of a legacy, when there is not a fund sufficient for creditors. If an executor releases a debt due to the testator, he is liable himself to be charged with the amount of it, and he is also guilty of a *devastavit* if he applies the assets in payment of a claim which he is not bound to satisfy. In an action brought against one of three executors on a covenant of the testator, it was held that the inventory taken before probate was evidence to charge him with the assets therein specified: (*Rowan* v. *Jebb*, 10 T. R. 216.)

In the case of *Stiles* v. *Guy*, 14 L. T. Rep. 305, it was held that by proving the will, the executors became responsible for getting in the estate of the testator, notwithstanding the usual indemnity clauses: so that an executor who by being merely passive enables his co-executor to withhold or misapply any part of the estate, becomes liable to make good any deficiency occasioned by his co-executor's breach of trust. By this case it was also determined that executors are liable for negligence or inattention to their duties, and that they cannot safely rely for their protection on the old cases on the subject.

In the following case the trustees of a marriage-settlement were made personally responsible for the consequences of their neglect to enforce a covenant contained therein. By the settlement in question it was covenanted and agreed that £5,000 Consols, part of the wife's property, should be transferred to trustees, upon certain trusts for the husband and wife and children. At the time of the settlement a sum of £4,946 was standing in the name of the wife: but the trustees took no steps to enforce a transfer, and it was sold out and misapplied by the husband. It was held that the trustees were personally responsible for the loss: (*Fenwick* v. *Greenwell*, 10 B. 412). In this case it was also held that the trustees were not relieved from their liability by the trustee indemnity clause, declaring that they should not be liable "for any casual or involuntary loss, without their wilful default; but for such moneys only as should actually come to their hands.

In a still later case, a trustee of certain estates received the proceeds, and paid them into a bank, where they were left for many years. A suit was instituted, and a receiver appointed of rents and interest. The bank having failed, it was held that the *cestui que trust*, who were infants, must not be prejudiced by the neglect of the trustee to place the fund in safety, and that the trustee was liable to refund the money lost: (*Drewer* v. *Maudesley*, 18 L. J. 273, C.)

The investment of the trust-fund upon proper and safe security is, of course, one of the foremost duties which devolves both upon executors and trustees. Where by negligence, or from whatever cause, they omit to take proper measures to obtain such a security for the trust-fund as the rules of law and equity sanction, and in consequence of such neglect or dereliction of duty the trust-fund suffers thereby, the trustees themselves are very justly held responsible to make good the loss so occasioned by their wrongful acts, or wilful neglect.

In the following case, the *cestui que trust* proposed to pay off a mortgage on the trust property, by raising the necessary funds at less expense and at a lower rate of interest than would be required by another mode of raising the moneys possessed by the solicitor of the trustees. The *cestui que trust*, without the concurrence of the trustees, carried out their proposal; and pending these transactions, one of the trustees of the settlement retired, and in his room a near relative of their solicitor was appointed a trustee, but without any communication on the subject with the *cestui que trust*. The trustees afterwards gave notice of their intention to sell the property under a power of sale and exchange, and defray out of the proceeds their costs, charges and expenses of negotiating the treaty for the loan which they had proposed to effect. The sale was prevented by injunction, and a bill filed by the *cestui que trust* against the trustees and their solicitor. It was held at the hearing, that the contemplated sale, if carried out, would have been a breach of trust, and that, under the circumstances, the trustees ought to be removed and new trustees appointed: (*Marshall* v *Sladden*, 19 L. J. 57, V.C.W.)

A *cestui que trust* discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognising the transaction, is not precluded from complaining of it merely on the ground that he abstained from making such complaint until long after he first knew of it. Therefore, where stock stood invested in trust for the mother for life, with remainder to her son and daughter and their children, and the daughter knew of an application by the son for a loan from the trustees of part of the trust-moneys upon his personal security, and that the trustees were willing to make the loan with the consent of her mother, the tenant for life, and that the loan was, in fact, afterwards made, and she objected to the loan in her communications with her mother, but did not otherwise oppose it, and had not any communication with the trustees on the subject; it was held that this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust in a suit instituted seven years after the transaction took place, It was held, also, that the daughter was not precluded from so charging the trustees, by the fact that she knew that the mother had (untruly) stated to her son that she (the daughter) had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees, or constituted any part of the sanction or authority under which they acted. An investment by trustees of £2,183 trust-funds, which they were empowered to lend on real security, in a mortgage of house property in a town, occupied for commercial purposes and valued at £2,800, a value also in some measure dependent on the performance of covenants, was held not to be justified. Where trustees having power to invest in government or real security, and to vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage which they were not justified in taking, it was held that the Court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to justify the trust by replacing the money, but that the whole must be treated as an unjustifiable transaction, and that the trustees must replace the stock. Where trustees lent the trust-moneys to one of the *cestui que trust*, upon a contract which constituted a breach of trust, the Court, in a suit by the trustees against all the *cestui que trust*, refused, as against the *cestui que trust* who had obtained the loan, to make a decree for the repayment of the money contrary to the terms of the contract: (*Phillipson* v. *Getty*, 7 Hare, 516; affirmed by L. C. 10th March, 1849.

Under a will, trustees of a fund for the plaintiff were empowered to invest on security of real estate in England or Wales, with her consent; and under a settlement on the marriage of the plaintiff, similar trusts were created, and the same trustees, with J., empowered to invest the fund on securities of real estate in Great Britain or Ireland, with the consent of the plaintiff and her husband. The trustees under the will invested, under Mr. Lynch's Act, on a mortgage of real estate in Ireland, but without the plaintiff's consent obtained in writing; and the trustees under the set-

tlement invested on security of real estates in England, which were heavily incumbered, but with the consent in writing of the husband and wife. Both securities proving insufficient, the trustees were ordered to replace the trust-funds, by investment in consols to the amount the trust-moneys would have produced at the time of the improvident investment: (*Norris* v. *Wright*, 42 L. J., 322, M. R.) In a marriage-settlement of stock, the trustees were empowered to invest in real security. Contemporaneously with the execution of the settlement, a memorandum was indorsed upon it, and signed by the intended husband and wife, requesting the trustees to advance the money, or any part of it, to the owners or lessees of V. gardens, upon mortgage, either as first, second or third mortgagees. B. (who was the settlor), G. and H. were then owners of this property, which at that time was subject to two mortgages. The trustees immediately advanced the money to B, G. and H., but no written security was taken until a year and a half after the advance, at which time B. had surrendered his interest in the property to G. and H., who then executed a mortgage on the property to the trustees, with the usual covenants for the repayment of the loan. The security proved wholly insufficient. It was held, that the trustees had committed a breach of trust, and were bound to make good the loss, and to bring the fund into court: (*Fowler* v. *Reynall*, 15 Jur. 1019, L.C.)

(TO BE CONTINUED.)

MONTHLY REPERTORY.

Notes of English Cases.

COMMON LAW.

C.B. FLETCHER *v.* TAYLEUR. *Nov.* 3.

Measure of damages in mercantile transactions.

The principle laid down in Hadley *v.* Baxendale, doubted by Jervis, C. J. and Willis, J., and suggested that the measure of such damages in such matters, should be the ordinary produce of money in mercantile transactions, as interest is the measure of damages in actions for money.

Q.B. JOHNSTON *v.* GANDY. *Nov.* 10.

Guarantee consideration entire.

"I promise to pay A. £35, by instalments, &c., in consideration of his supplying B. with goods to the amount of £35; and in default of payment of any one instalment, then the whole of the balance of £35 to become due and payable:"—

Held, that no cause of action arises, until A. has supplied goods to the whole amount of £35.

Q.B. DRURY *v.* MACNAMARA. *Nov.* 15.

Agreement for lease—Implied promise to give possession.

An instrument which only operates as an agreement for a lease for eight years, the tenancy to commence from 29th Sept. next, does not import any implied promise by the lessor to give possession on that day.

C.B. MCANDREW AND OTHERS *v* THE ELECTRIC TELEGRAPH COMPANY. *Nov.* 3, 4.

Liability of Telegraph Company.

The plaintiffs sent a message by the Electric Telegraph Company to the master of the ship *Foam*, of Exmouth Point, to proceed to Hull with a cargo of Oranges. The message delivered was, to proceed to Southampton. There being no market for oranges at Southampton, a loss was occasioned to the plaintiffs by the mistake.

The Company's Act, 16 & 17 Vic. c. 203, s. 66, enacts that the use of the telegraph shall, subject (*inter alia*) to such reasonable regulations as may be made by the Company, be open to the public.

Upon the back of the paper on which the message was written was endorsed a notice that the Company would not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they might arise.

Held, that such a regulation was a reasonable one, and that the Company were protected from liability, both under the Statute and at Common Law.

C.B. UPTON *v.* TOWNSEND, AND UPTON *v.* GREENLEES.

Landlord and Tenant—Eviction.

Eviction is something done by the landlord with the intention of depriving the tenant of the premises.

Whether the act done amount to an eviction is a question for the jury.

The respective defendants were sub-tenants of the plaintiff, of premises leased to him by the Goldsmith's Company.

These premises were burnt down, and afterwards were built up by the Goldsmith's Company, with the consent of the plaintiff, according to a different plan. In the case of Townsend, a portion of his premises was taken away: in the case of Greenlees, a greater space was enclosed. After they were built, the plaintiff let what had been occupied by Townsend to another person, and offered to let what had been occupied by Greenlees, saying that Greenlees should not rent any thing under him. He afterwards brought these actions to recover rent for a constructive occupation of the premises while the premises were being rebuilt. The rent sought to be recovered would have become due on the 24th of June, 1854, at which time the premises had been built according to the new plan.

Held, First—That manual expulsion from the premises is not necessary to constitute eviction by the landlord. But that any act done by the landlord, with the intention of preventing an enjoyment by the tenant of the thing demised is an eviction.

Secondly—That the plaintiff, having consented to the premises being built by the Company according to the new plan, must be identified with the Company, and that the fact of his having consented to their being so built, and of his having let the premises in the one case to another person, and having offered to let them in the other, taken together with an observation that the defendant in that case should not rent anything under him again, were sufficient to constitute an eviction.

CHANCERY.

V.C.W. BARROW *v.* METHOLD. *July* 27.

Will—Construction—Premium—Bonus—Evidence of intention.

A legacy was given to a wife by her husband's will of a premium of insurance on his life, to meet her immediate expenses. Just before the date of the will, a bonus had been declared:—

Held, that the bonus, and no more, passed. Evidence was offered of a verbal declaration of the testator that he intended to give the policy and bonus, but it was rejected, as inadmissible.

V.C.W. BENN *v.* GRIFFITHS. *July* 28.

Will—Construction—Condition against Public Policy—Husband and wife—Separation.

A married woman lived separate from her husband. Her uncle bequeathed £200 a-year to her so long as she lived separate, and he directed that if she again cohabited with her husband the annuity should be reduced to £100 a-year, for her separate use. The husband and wife again lived together, and she claimed the £200 a-year:—

Held, that she was so entitled, as the condition was void as being contrary to public policy.

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent of the several Division Courts in every County of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

COUNTY OF MIDDLESEX.

Judge of the County and Division Courts—JAMES E. SMALL, London, C.W.

First Division Court—Clerk, John Cooke Meredith, City of London P.O.; *Bailiffs*, Samuel Stimsfield and Jeremiah Harris, City of London P.O.; *Limits*—The City of London, the Township of London, the Township of West Nissouri, and all that part of the Township of North Dorchester lying north of the River Thames.

Second Division Court—Clerk, John Irvine, Lobo P.O.; *Bailiff*, John Stilson, Lobo P.O.; *Limits*—The Township of Lobo, and all that portion of the Township of Williams lying east of the Centre Road.

Third Division Court—Clerk, James Reilly, Junction, Westminster; *Bailiff*, W. Lancaster, Junction, Westminster; *Limits*—The Township of Westminster, and all that portion of the Township of North Dorchester lying south of the River Thames.

Fourth Division Court—Clerk, W. F. Bullen, Delaware P.O.; *Bailiff*, Benjamin Payne, Delaware P.O.; *Limits*—The Township of Delaware, and that portion of the Township of Caradoc lying south of the line between the eighth and ninth concessions, together with all that portion of the Township of Ekfrid lying south of the line between the second and third concessions north of the Longwood Road, and to the side-line between Lots Nos. twelve and thirteen in the said Township of Ekfrid.

Fifth Division Court—Clerk, Adam Hatelie, Wardsville P.O.; *Bailiff*, Thomas Neil, Wardsville P.O.; *Limits*—The Township of Mosa, and that part of the Township of Ekfrid lying westerly from the River Thames to the side-line between Lots Nos. twelve and thirteen, until it shall intersect the allowance for road between the second and third concessions north of the Longwood Road, and the remainder of the said Township north of the line between the second and third concessions before mentioned.

Sixth Division Court—Clerk, James Keefer, Strathroy P.O.; *Bailiff*, Abel Wilcox, Strathroy P.O.; *Limits*—That part of the Township of Caradoc not included in Division number Four, the Township of Metcalfe, the Township of Adelaide, and all that part of the Township of Williams lying west of the Centre Road.

APPOINTMENTS TO OFFICE, &c.

JUDGE OF THE COUNTY COURT.

GEORGE S. JARVIS, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court, for the United Counties of Stormont, Dundas and Glengary, in place of William Ross, Esquire, resigned.—[Gazetted 14th Dec. 1855.]

CLERK OF THE PEACE.

THOMAS H. AIKMAN, of Cayuga, Esquire, to be Clerk of the Peace, for the County of Haldimand, in place of J. W. Kerr Graham, Esquire, deceased.—[Gazetted 22nd Dec., 1855.]

NOTARIES PUBLIC IN U.C.

WORSHIP B. McLEAN, of Brockville, ROBERT A. HARRISON, of Toronto, RICHARD MARTIN, and EDWARD MARTIN, of Hamilton, Esquires, Barristers-at-Law, to be Notaries Public in U. C.—[Gazetted 1st December, 1855.]

HENRY McDERMOTT, of Goderich, and JAMES BEATY, junior, of Toronto, Esquires, Barristers-at-Law, to be Notaries Public in U.C.—[Gazetted 7th December, 1855.

HERMAN WITTROCK, of Toronto, Esquire, Attorney-at-Law, and CHAS. ALFRED DURAND, of Toronto, Esquire, Barrister-at-Law, to be Notaries Public in U.C.—[Gazetted 29th December, 1855.]

† *Vide* observations *ante* page 196, on the utility and necessity for this Directory.

ASSOCIATE CORONERS.

JAMES B. ROUNDS, Esquire, to be an Associate Coroner for the County of Oxford.—[Gazetted 7th December, 1855.]

CHARLES E. CASGRAIN, of Sandwich, Esquire, M.D., to be an Associate Coroner for the County of Essex.—[Gazetted 14th December, 1855.]

WILLIAM C. EASTWOOD, Esquire, M.D., to be an Associate Coroner for the County of Ontario. DANIEL WILSON, Esquire, M.D., to be an Associate Coroner for the County of Perth.—[Gazetted 22nd Dec., 1855.

LAW SOCIETY OF UPPER CANADA,

(OSGOODE HALL.)

Michaelmas Term, 19th Victoria, 1855.

On Monday the 19th November, in this Term, Robert Alexander Harrison Esquire, was called, *with honors*, to the degree of Barrister-at-Law.

On the same day, John Thomas Anderson, Esquire, was called to the degree of Barrister-at-Law.

On Tuesday the 20th November, in this Term, Frederick Kingston, Esquire, was called to the degree of Barrister-at-Law.

On Saturday the 24th November, in this Term, the Hon'ble Robert Baldwin was elected Treasurer of this Society.

On the same day the following Members of the Society, of the degree of Barrister-at-Law, were elected Masters of the Bench, viz.:

Lewis Wallbridge,	Esquire,	Alexander Campbell,	Esquire.
John Hawkins Hagarty,	"	Stephen Richards, Junior,	"
Richard Miller,	"	Thomas Gibbs,	"
George Alexander Phillpotts,	"	David Breakenridge Read,	"

George William Burton, Esquire.

On Tuesday the 27th November, in this Term, Edward Martin and Charles Ingersoll Carrall, Esquires, were called to the degree of Barrister-at-Law.

On the same day the following Gentlemen were admitted into the Society as Members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows, viz.:

UNIVERSITY CLASS.	Mr. William Henry Harrington Hume,
Mr. John Thompson Huggard, B.A.,	" Michael Driscoll,
SENIOR CLASS.	" William Nicholas Miller,
Mr. Marcellus Crombie.	" Richard Barrett Bernard,
JUNIOR CLASS.	" John Ban McLennan,
Mr. William Henry Wilkison,	" William Ferguson, Junior,
" James McCaulley,	" Charles Frederick Goodhue.

Ordered—That the examination for admission shall, until further notice, be in the following books respectively, that is to say—

For the Optime Class:

In the Phœnissæ of Euripides, the first twelve books of Homer's Iliad, Horace, Sallust, Euclid or Legendre's Geometrie, Hind's Algebra, Snowball's Trigonometry, Earnshaw's Statics and Dynamics, Herschell's Astronomy, Paley's Moral Philosophy, Locke's Essay on the Human Understanding, Whateley's Logic and Rhetoric, and such works in Ancient and Modern History and Geography as the candidates may have read.

For the University Class:

In Homer, first book of Iliad, Lucian (Charon Life or Dream of Lucian and Timon), Odes of Horace, in Mathematics or Metaphysics at the option of the candidate, according to the following courses respectively; Mathematics, (Euclid, 1st, 2nd, 3rd, 4th, and 6th books, or Legendre's Geometrie, 1st, 2nd, 3rd, and 4th books, Hind's Algebra to the end of Simultaneous Equations); Metaphysics—(Walker's and Whateley's Logic, and Locke's Essay on the Human Understanding); Herschell's Astronomy, chapters 1, 2, 4, and 5; and such works in Ancient and Modern Geography and History as the candidates may have read.

For the Senior Class.

In the same subjects and books as for the University Class.

For the Junior Class.

In the 1st and 3rd books of the Odes of Horace; Euclid, 1st, 2nd, and 3rd books, or Legendre, 1st and 2nd books; and such works in Modern History and Geography as the candidates may have read; and that this Order be published every Term, with the admissions of such Term.

Ordered—That the class or order of the examination passed by each candidate for admission be stated in his certificate of admission.

Ordered—That in future, Candidates for Call *with honors*, shall attend at Osgoode Hall, under the 4th Order of Hil. Term, 18 Vic., on the last Thursday and also on the last Friday of Vacation, and those for Call, merely, on the latter of such days.

NOTICE.—By a Rule of Hilary Term, 18th Victoria, students keeping Term are henceforth required to attend a course of Lectures, to be delivered each Term, at Osgoode Hall, and exhibit to the Secretary on the last day of Term, the Lecturer's certificate of such attendance.

Lecturers for the ensuing year.	Subjects.
H. Term—P. M. S. Vankoughnet, Esq.	*Real Property.*
E. Term—H. C. R. Becher, Esq.	*Evidence.*
T. Term—Henry Eccles, Esq.	*Pleading.*
M. Term—Secker Brough, Esq.	*Executors and Administrators.*

Hour of Lecture—From 9 o'clock to 10 o'clock, A.M.

ROBERT BALDWIN, *Treasurer.*

Michaelmas Term, 19th Victoria, 1855.

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