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DIARY FOR AUGUST.

1. Monday.....Paper Day, Q. B. Last day for notice of Trial County Court.
2. Tuesday..... Paper Day, C. P. Chancery Ex Term Toronto commences.
3. Wednesday...Paper Day, Q. B. Last day for notice for Sandwich & Whitby.
4. Thursday .....Paper Day, C P.
6. Saturday..... TRINITY TERM ends.
7. SUNDAY.....12*th Sunday after Trinity.*
9. Tuesday.....Quar. Sess. & Co. Ct. Sitt. in each Co. Last day for notice Ch.
14. SUNDAY .....13*th Sunday after Trinity.* [Ex Chat. and Cobourg.
16. Tuesday .....Chan. Ex. Term Sandwich & Whitby commences Last day for
21. SUNDAY.....14*th Sunday after Trinity* [ser of Writ for York & Peel As.
23. Tuesday.....Chan. Ex. Term Chatham and Cobourg com. Last day for notice
26. Friday.....Declare for York and Peel Assizes. [London and Belleville.
28. SUNDAY.....15*th Sunday after Trinity.*
30. Tuesday.....Last day for notice for Chan. Ex. Brantford and Kingston.

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

SEPTEMBER, 1862.

FEES TO PUBLIC OFFICERS CONCERNED IN THE ADMINISTRATION OF JUSTICE.

It is a general principle that every fee to a public officer must have a legal origin.

It is an express provision of the Statute of Westminster (3 Ed. I. cap. 26), that no sheriff or other the king's officer shall take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth shall yield twice as much, and shall be punished at the king's pleasure.

Lord Coke, in his commentary on this statute, says that under the words "other king's officer" are classed escheaters, coroners, bailiffs, gaolers, and other inferior ministers and officers of the king, whose offices in any way concern the administration or execution of justice, or the common good of the subject, and that they can none of them take any reward for any matter touching their offices, but of the king.

The meaning of this commentary is that, unless when an Act of Parliament gives to the public officers indicated a right to look for a recompense in any other quarter, they can take nothing for any service rendered by them in their office, except of the king.

It is a general rule, when a duty is cast upon any one by Act of Parliament, and no remuneration is provided for the doing of it, that the party is to perform the duty without remuneration. (*Askin* v. *The London District Council*, 1 U. C. Q. B. 292.)

On 29th March, 1845, an act was passed by the Legislature of Canada, entitled "An Act to regulate the fees of certain district officers in that part of this Province called Upper Canada." (8 Vic. cap. 38.) It recited that certain officers connected with the administration of justice in the several districts of Upper Canada were required to perform many services for which no fees were fixed by law, and that it was only necessary and proper to establish reasonable fees and allowances for the same, and to provide for the payment thereof.

It thereupon enacted that it should be the duty of the several justices of the peace of the several districts of Upper Canada, in the General Quarter Sessions of the Peace to be holden in July, 1845, to frame a table of fees for all services then rendered in the administration of justice, and for other district purposes, by any sheriff, coroner, clerk of the peace, constable and crier, which services were not remunerated by any law then in force, and that the several clerks of the peace should forthwith transmit such table to the Clerk of the Crown in Toronto, to be by him laid before the Judges of the Court of Queen's Bench at Toronto; and that it should be lawful for the judges, in term time, by any rule or rules to be by them made from ti. e to time, as occasion might require, to appoint the fee which should be taken by and received by such sheriff, coroner, clerk of the peace, constable or crier, for such services. (s. 1).

It also enacted, that if at any time any such officer should wilfully and knowingly demand or receive any other or greater fee or allowance than the fee and allowance established by that act, for any or all the services performed by them respectively, the offender should for every such offence forfeit and pay the sum of ten pounds to any person who should sue for the same by action of debt, bill, plaint or information, in any court having competent jurisdiction to hear and determine the same. (s. 4, Con. Stat. U. C. cap. 119, s. 8.)

It made it the duty of the treasurer of every district to pay the amount of such fees, which are payable out of district funds, when duly allowed by the Magistrates in Quarter Sessions assembled. (s. 5, Con. Stat. U. C., cap. 119, s. 7.)

On 15th November, 1845, the Judges of the Queen's Bench, under the powers conferred by the statute, made and promulgated a tariff of fees to be taken and received by sheriffs, coroners, clerks of the peace, constables and criers.

Up to this time most of the fees payable to sheriffs and other subordinate officers connected with the administration or execution of justice were paid by the local district municipalities, through local taxation.

On 9th June, 1846, the legislature passed an act "For defraying the expenses of the administration of justice in criminal matters, in that part of the Province of Canada formerly Upper Canada." (9 Vic. cap. 18, Con. Stat. U. C, cap. 120.)

It recited that it was expedient to provide that the expenses of the administration of criminal justice in Upper Canada, then paid by local taxation, should in time to come be paid out of the public funds of the Province; and after making special provision for the years 1846 and 1847, declared "that for and during each year thereafter, the whole of the expenses of the administration of criminal justice in Upper Canada should be paid out of the consolidated revenue fund of the Province." It, in a schedule annexed to the act, gave several heads of expense which, together with all other charges relating to criminal justice payable to the officers mentioned specially authorised by an act of the legislature and theretofore payable out of district funds, should be deemed expenses of the administration of criminal justice within the meaning of the act.

As the law now stands, there are some fees still payable to officers connected with the administration of justice out of municipal funds, while all connected with the administration of criminal justice in Upper Canada ought to be defrayed out of the consolidated revenue fund. We say *ought*, because it is notorious that successive Canadian governments have given to the 9 Vic. cap. 58 (Con. Stat. U. C, cap. 120), the most niggard interpretation; and, instead of advancing the object of the act by transferring *all* expenses connected with the administration of criminal justice to the provincial revenue, endeavour to throw as much as possible upon the local municipalities. This is a course alike disgraceful to the government guilty of it and injurious to the municipalities affected by it. It is moreover opposed to the act of parliament itself and the construction which the courts of law have put upon it.

The law officers of the Crown read the schedule appended to the 9 Vic. cap. 58, as containing all the items of expenditure for the administration of criminal justice chargeable to the Province. They ignore the concluding sentence of the schedule, "Together with all other charges relating to criminal justice payable to the foregoing officers, specially authorised by an act of the legislature and heretofore payable out of district funds." They ignore the enacting part of the act, which is that "the *whole* of the said expenses" shall be paid out of the consolidated revenue fund.

The President of the Court of Appeal, when Chief Justice of Upper Canada, referring to this statute, is reported to have said "I do not think that the schedule appended to chapter 120 was intended by the legislature to embrace all the expenses of criminal justice that were to be charged against the government, but only to point out that all the charges specified in it were to be deemed within the act, and thus to remove all doubt as to such charges. (*Corporation of Lambton* v. *Poussett*, 21 U. C. Q. B. 485.)

We are informed that, notwithstanding this exposition of the act by the highest legal authority in Upper Canada, the government officials pursue their old course and refuse to pay respect to a solemn decision pronounced by one of the superior courts of law in Upper Canada. We are grieved to receive such information. We would feign distrust it. The government should pay respect to the laws as administered and interpreted by the lawfully constituted tribunals of the country. The example is pernicious. We cannot think that the present Attorney General has had his attention directed to the matter. It is more than likely that the decision of such matters is left to subordinates, who are not professional men. If so, the sooner a change takes place the better.

It has been made a question whether fees which come within the Con. Stat. Can. cap 120, are to be paid out of county funds in the first instance, to be afterwards included in a general account against the government, or whether the County Council can refuse to entertain such charges, and refer the officer to the government, as the party from whom he is to receive compensation.

Some suppose that a middle course ought to be taken, that is, that the officer should make out his account of fees for services connected with the administration of criminal justice against the county; which account with vouchers and report should be sent to the government to await audit and payment by the government to the municipality.

It would seem very inconvenient if the county were to pay the accounts before audit by the government auditors and final allowance by the government, for then occasions might be constantly arising for reclaiming from the officers any sums that the government County Auditors or the Inspector General may have rejected.

In any case the intention and effect of the statute is that the counties shall be paid or reimbursed by the government all such expenses as come within the statute and have been audited by the proper auditors, according to the regulations of the government, and not that the several officers are to make out their accounts against the government for such services (per Robinson, C. J., in *Corporation of Lambton* v. *Poussett*, 21 U. C. Q. B. 485).

If the County Council pay charges on the expectation that they will be reimbursed by the government, and if such charges be rejected, then a question will arise whether the Council having paid them under the sanction of their own auditors, and upon their own judgment, can sue to

recover them back because the government has declined to reimburse them.

If reclaimed not as illegal charges and if not in fact illegal charges, but reclaimed because not in the opinion of the government chargeable against the provincial revenue, then it is apprehended that no action could be supported by the county against the officer to recover them back, whether in point of law the Inspector General or the Government Auditors have or have not erred. The question would seem to be one to be settled between the county and the government, and not between the county and the officer. (*Ib*)

The right of a municipality under any circumstances to recover from a public officer fees which he has received from the municipality by virtue of his office, and for which there is no legal sanction, is involved in some doubt. Most of the public officers of which we have made mention are remunerated by fees In that case, if services be required of the officer for which no fees are allowed him by law, and which he is not bound to render under any statute or as necessarily belonging to his office, he is no more bound than a stranger to render the services. If he do render them at the call of the justices in session, or in compliance with the request of the municipality or of the county auditors, he has at least an equitable claim to receive a fair compensation for the act done. Though he may not be able to sustain an action at law for compensation for the particular services, yet when the justices or the County Council have audited and allowed the charges which are paid under no misunderstanding of facts—under no misrepresentation of the officer—the municipality would seem not to have any legal right of action to sue for them back. It is not like the case of a public officer concerned in the administration of justice demanding a fee from an individual for a service rendered in the course of the administration of justice, or charging against and receiving from the government or municipality fees for services not rendered, or for which charges were made not conforming to those authorised by law. (*Ib.*)

It must however be borne in mind that Con. Stat. U. C. cap. 119, s 8, makes it a penal offence in the public officers affected by it, to receive any other or greater fee or allowance for any of the services performed by them than such as should be (and were) established under the authority contained in that act, unless such fees as might be allowed by some other act of parliament for other services. That clause does not apply to services rendered by the officer which services do not properly belong to this office. Where the statute applies the penalty is not all that the officer is subject to. He must refund the illegal fee or allowance. Fees received contrary to the express provisions of that clause are moneys which the officer cannot be said either in equity or good conscience to be entitled to hold (per Robinson, C. J., in *Corporation of Lambton* v. *Poussett*, 21 U.C.Q.B. 491; see also *Corporation of Haldimand* v. *Martin*, 19 U. C. Q. B. 178).

FALL ASSIZES, 1862.

EASTERN CIRCUIT.

Hon Mr. JUSTICE HAGARTY.

OTTAWA	Tuesday	30th September.
L'ORIGNAL	Monday	6th October.
CORNWALL	Friday	10th "
BROCKVILLE	Thursday	16th "
PERTH	Thursday	23rd "

MIDLAND CIRCUIT

Hon. Mr. CHIEF JUSTICE DRAPER, C.B.

KINGSTON	Monday	29th September.
PICTON	Thursday	9th October
BELLEVILLE	Monday	13th "
WHITBY	Thursday	23rd "
COBOURG	Tuesday	28th "
PETERBOROUGH	Thursday	6th November

HOME CIRCUIT

Hon. Mr. JUSTICE BURNS.

OWEN'S SOUND	Tuesday	30th September.
MILTON	Monday	6th October.
BARRIE	Thursday	9th "
WELLAND	Wednesday	15th "
NIAGARA	Monday	20th "
HAMILTON	Monday	27th "

OXFORD CIRCUIT.

Hon Mr. JUSTICE RICHARDS.

BRANTFORD	Tuesday	30th September.
CAYUGA	Wednesday	8th October.
SIMCOE	Tuesday	14th "
WOODSTOCK	Tuesday	21st "
BERLIN	Monday	27th "
STRATFORD	Thursday	30th "
GUELPH	Tuesday	4th November

WESTERN CIRCUIT.

Hon. the CHIEF JUSTICE OF UPPER CANADA.

SARNIA	Wednesday	1st October.
LONDON	Tuesday	7th "
ST. THOMAS	Thursday	16th "
CHATHAM	Tuesday	21st "
SANDWICH	Monday	27th "
GODERICH	Tuesday	4th November.

Hon. Mr. JUSTICE MORRISON

CITY OF TORONTO	Tuesdy	30th September.
YORK AND PEEL	Monday	13th October.

SELECTIONS.

THE FRENCH SYSTEM OF CRIMINAL PROCEDURE.

In France, a criminal trial is nothing else than the last stage of an elaborate public enquiry, carried on by an organized public department, of which the tribunal which ultimately tries the prisoner is in some degree the head. The general principle upon which the system rests is embodied in the first article of the Code d' Instruction Criminelle. Its terms are, "L'action

pour l' application des peines n' appartient qu' aux functionnaires auxquels elle est confiée par la loi" the nature of the machinery provided for the purpose of discovering and punishing crimes is as follows:—There are in France twenty seven Cour Impériales. At each of these there is a Procureur Général, who has various deputies and substitutes. In every arrondissement there is a Juge d' Instruction (chosen for three years, from the Judges of the Civil Tribunal), and in every Tribunal de premiere instance there is a Procureur de l' Empereur. The commissaries of police, the agents of police, the gendarmerie, and other inferior officers, are under the orders of these authorities, who form, as the French phrase is, a "hierarchy," extending from the gendarmes to the Procureur Général. The Procureur Général himself is a sort of judge advocate, being so far a member of the Cour Impériale that he is on the bench during trials, and interferes *ex officio* on many occasions in the course of them. The functions of these various officers (who constantly correspond with each other, and stand in the closest official relation) are almost entirely inquisitorial. They receive and collect evidence of every kind in reference to any crime that has been committed, and constantly interrogate the accused upon every point of the charge, and confront him from time to time with the witnesses. They have it in their power to place the accused in solitary confinement (au secret), and constantly exercise it, the object being to prevent him from communicating with his friends, and from forming any systematic defence. They keep him in ignorance of the depositions which may have been made for and against him, and then question him on the facts to which they refer. By comparing together these various sources of information, they gradually elaborate a theory on the subject, which, in complicated cases, has often innumerable ramifications, and is supported not only by arguments of a most refined character, but also by considerations drawn from the manner in which the witnesses give their evidence, the degree of frankness shown by the accused in his answers, and many other circumstances. This is called "instructing the process;" and the final results of the "instruction" are embodied in an acte d' accusation,—a document which not only recapitulates all the grounds from which the Ministére Public infers the guilt of the accused, but also frequently states and refutes by anticipation the arguments for the defence. An intimate connection exists between the officers who "instruct" the process, and the Cour Impériale, which finally tries the case. A committee of that body, consisting of three judges, form a sort of grand jury, called the Chambre des Mises en Accusation. This body, after hearing the Procureur Général, determine whether or not there is ground enough to put the accused person on his trial, and they may if they please cause additional evidence to be collected, on the same terms as the inferior magistrates. The Cours Imperiales have also the right of instituting proceedings in the first instance. When the question of the mise en accusation is under accusation, the person accused, or the party civile (*i. e.*, any one who seeks to recover damages for injury done him by the crime), may lay mémoires before the judges, who must hear them read before they decide. If, to use our own phrase, the chamber finds a true bill, the affair is sent before the Cour d' Assises of the department, a sort of circuit court, in which one of the judges of the Cour Impériale sits as President; or if the department be that in which the Cour Impériale itself is situated, the case is tried before a committee of that body, sitting as a Cour d' Assizes. After the opening of the assises, the prisoner is interrogated in private by the President. The witnesses are cited by the Procureur Général or the prisoner, and the President has a discretionary power of calling in any additional witnesses whom he thinks it desirable to hear. The trial begins by the reading of the acte d' accusation; the Procureur Général then presses the case against the prisoner, speaking generally with far more warmth, and expressing a much more decided opinion than would be thought becoming in this country. The President then interrogates first the accused, and then the witnesses, the Procureur Général deciding on the order in which they are to be called. There are no rules of evidence; and in the first instance the witnesses tell their own story in their own words, and without any interruption whatever, the effect of which often is that they make long speeches not very material to the question. After the deposition is completed, the President cross-examines; and after his cross examination is over, the counsel for the prisoner may put any further questions if he pleases, but he can only do so through the President. This privilege is hardly ever exercised, and this in itself forms a broad distinction between a French and an English trial; for in the latter the cross-examination of witnesses is one of the most important and most characteristic parts of the proceedings. After the examination of the witnesses, the advocate for the partie civile, the Procureur Général, and finaly the advocate for the prisoner, address the jury; lastly, the President sums up. But this part of the proceedings has less importance in France than in England, and the resumé is as often as not confined almost entirely to a recapitulation of the arguments of the counsel.

It is obvious from this short sketch of French procedure, that hardly any discretion or independent action is allowed to the prisoner from the very first. He cannot manage his defence in his own way, but on the contrary the Ministére Public manages it for him, counterchecking it as the proceedings go on, and too often concluding in favor of his guilt from any confusion or falsehood on the part of witnesses favourable to him. The issue of the trial is virtually almost decided before it begins, because it is only the last act of a continuous process; and thus it is hardly an exaggeration to say that the jury in a French court is an anomalous excrescence. As its introduction into France is no older than the Revolution, and as the greater part of the Code Napoleon is a mere recast of laws which existed long before that time, it may very probably be the case that the whole scheme of French criminal procedure may have been adapted to the ancient system, in which the object was to convince the minds of the court; and it must always be remembered that the Tribunaux Correctionnels, which can imprison for ten years, and deprive men of civil rights, and before which nearly nineteen-twentieths of the French criminal trials take place, try causes without juries.

In order to understand the difference between the English and French systems of procedure, and the character of the French system, we must suppose the attorney for the prosecution, the committing magistrate, and the counsel for the crown, to stand to each other in the relation of official superiors and inferiors, and we must further suppose the counsel for the crown to be a sort of assessor to the judges of assize. To complete the system we must substitute for the fifteen judges a much more numerous body, scattered over the country in threes and fours, each group having under their official authority all the committing magistrates and all the prosecuting counsel and attorneys within a wide district, and discharging themselves the functions of grand jurymen. We must also suppose the procedure to be secret until the day of trial, and the accused to be liable to close confinement, varied only by as many interrogatories and private confrontations with witnesses as the judge "instructing the process" might think advisable. If a prosecution is to be considered as a public investigation, it is obvious that those who are to conduct it must stand in some relation of this sort to each other. A system in which the prosecuting attorney who collects the evidence; the committing magistrate, who weighs it; the grand jury, who keep a sort of nominal check upon it; the counsel for the crown, who exercises an absolute discretion, not only as to the order in which the witnesses are produced, but as to their being called or not, and as to the questions which shall be put to them; and finally, the judge and jury, who decide the case, are all absolutely independent of each other, is fitted only for the purpose

of ascertaining, by a series of successive tests, the weight of the prosecutor's assertion that the prisoner is guilty. The result of the French system, on the contrary, is the gradual elaboration of a theory on the subject of the crime, supported by a mass of evidence which has been collected and arranged by a set of public functionaries intimately connected together, and bound by all the ties of official espirit de corps and personal vanity, to maintain the accuracy of the conclusions at which they have arived.

It is difficult by mere generalities to convey an adequate notion of the differences of the English and French systems of procedure. In order to show how the French system works, we will proceed to examine with some minuteness a case which excited great interest in France some years back—the trial of the monk Leotade, for rape and murder.

The case, told as an English or an American lawyer would tell it, is as follows:—On the 16th of April, 1847, at half-past six o'clock in the morning, the body of a girl of fourteen, called Cecile Combettes, was found in the corner of a cemetery, at Toulouse, close to the wall of the garden of a monastry, and rather further from another wall which separated the cemetery from a street called the Rue Riquet. The body rested on its knees, toes, and elbows, and the left cheek and temple were on the ground and were covered with mud. The ground was wet, but there were no footsteps upon it. A patch of moss, with the earth to which it adhered, had been detached from the convent wall, and some fragments of it were found in the hair of the body. This moss appeared to have been loosened by the rubbing of certain branches of cypress which overhung the wall of the Rue Riquet, and reached that of the monastery. On the top of the monastery wall were several broken plants, and especially a geranium, which had lost all its petals. A petal of geranium and some sprigs of cypress were found in the hair of the body. On the garden side of the monastry wall there were also one or two plants which had been disturbed. There was found in the garden itself a piece of cord, and in the hair of the body a thread of tow. There were also some footsteps in the garden, and marks of the feet of a ladder. Of several ladders found in the monastery, one corresponded to the marks in width, but not in the form of the extremity—but there had been rain in the night, which would alter the shape of the marks. On the other hand, there was a lamp in the Rue Riquet itself, which threw its light on the wall of the cemetery, and a sentinel was stationed further up the street. From these circumstances it was suggested that the body must have been, in some manner or other, dropped over the monastery wall into the place where it was found.

The last time when the deceased was seen alive was on the morning of the 15th of April, soon after nine, when she went with her master, a bookbinder named Conte, to the convent. He went up stairs to the director on business, leaving her with orders to wait for him to bring back some empty baskets. He also gave her his umbrella to hold. When he came back she was gone, and the umbrella was leaning against the wall. From the testimony of several witnesses, it was proved that she had left the passage where her master had stationed her within a few minutes after his departure, and by about a quarter-past nine. Suspicion fell in the first instance on Conte, who was arrested. When under arrest, he said that he had seen Leotade and another monk, called Jubrien, talking together in the passage when he entered it; and to a certain extent he was corroborated as to Jubrien by Jubrien's own statement. Leotade slept, on the night after the murder, in a room from which he could have reached the garden by the help of a key found in his possession; and on the day after the murder, on hearing that a girl in Conte's service had been found dead in the cemetery, but before the cause or the circumstances of her death were known, he used expressions which certainly might be construed into an imputation on Conte. The deceased, on a medical examination, appeared to have died of a blow on the head which broke the skull, and had obviously been subjected before her death to great violence of another kind. From the state of the contents of the stomach it was proved that her death must have taken place within a short time after her last meal, and consequently not long after she was last seen alive. A feather, some grains of corn, and stalks of hay were found on the body, in a position which, to a certain degree, indicated that they had been brought from the scene of the crime; and in the monastery garden, near the corner formed by the two walls, were several barns, in one of which was a heap of corn, and in another some hay, but there was no evidence that they bore any marks of disturbance. To these buildings Leotade's occupation in the convent gave him access, and in one of them he kept rabbits and pigeons.

This was the whole case against Leotade, as it would have stood according to our rules of evidence. No one would maintain that, upon that evidence alone, it would have been desirable to convict him. Since, however, he was convicted, it will furnish some light on the expediency of our rules of evidence, to see what in this case was the character of the testimony which they would have excluded, and which did, in fact, produce a conviction. It consists of two great divisions—the prisoner's own answers when interrogated, and the detection, or supposed detection, of efforts made by the other monks to suppress evidence and to suborn false witnesses. The arrests of Conte, of Leotade, and of Jubrien (who was at one time suspected), took place in April, 1847, and the trial began on the 7th and lasted till the 26th of February, 1848. It was then broken off on account of the Revolution, and was begun again on the 16th of March and ended on the 4th of April, the seventeenth day of the inquiry. During great part of the time that the prisoners were in confinement, they were constantly interrogated. Conte, whose imprisonment was comparatively short, had to repeat no less than thirty times the statement he made as to having seen Leotade and Jubrien together. Leotade himself was examined and re-examined continually about the way in which he had passed his time on the day in question. He was questioned, for example, on the 18th, 23rd, and the 26th of April, on the 3rd and 6th of May, and on the 17th of December; and on his trial he was taxed with all the inconsistencies which could be discovered between his statements on these different occasions, and with any discrepancies which existed between any of them and his statement in court. By these means a good deal of confusion was detected, or said to be detected, on several points, the most important of which were, first, that in his earlier statements, he did not mention his having passed part of the morning on which the crime was committed in writing his compte de conscience, whereas at his trial, and on one preceding occasion, he did; and secondly, that he failed to give a satisfactory account of the shirt which he had worn on the day in question. All the convent linen was used in common, each monk having a clean shirt supplied to him from the common stock every Saturday. Certain marks were found on one of the dirty shirts which had been worn during the week in question which seemed to indicate that it had been worn by the murderer, though the indications were far from being conclusive. There were about one hundred and eighty monks, some of whom—and amongst them Leotade—belonged to the "Pensionnat," and others to the "Novicial." The shirts of the two classes were differently marked, though they were occasionally mixed. The shirt in question belonged to the "Noviciat," so that it was unlikely, though possible, that Leotade might have worn it. There was not a shadow of evidence that he had actually worn it, except the fact that he maintained that he had not changed his shirt on the Saturday after the murder, and that the reason which he gave for not having done so was apparently false. It was also stated, in the acte d' accusation, that all the rest of the monks had accounted for their shirts, and that none of them owned to have

worn the shirt in question; but no independent evidence of this vital assertion was given to the jury.

The second division of the evidence is infinitely more voluminous than the first, and consists almost entirely of what, under the English system of procedure, would have been the cross examination of the prisoner's witnesses. The principal objects of the defence, as we should have them arranged, were, in the first place, to prove that the deceased left the convent alive; and secondly, to establish an alibi on behalf of the prisoner. To this the prosecution replied by charging all the witnesses on both points with systematic perjury and subornation of perjury. It would be wearisome to enter into a minute examination of the merits of these conflicting statements. It is sufficient to say that the general nature of the argument, founded on this part of the evidence, was, that Leotade must be guilty, inasmuch as much false testimony was given on his behalf; and that in order to make out that the testimony was false, such a mass of collateral matter was gone into, as to what various people said to each other, as to the letters which they wrote, and as to the expressions which they had dropped in casual conversation, that it is hardly possible to understand or to follow the discussion. The most trifling gossip was not excluded. One man, for example, was permitted to inform the court that he had told somebody else, on hearing of the news, that he felt sure that if the girl had entered the convent she would never leave it alive; and the President told him, with great gravity, that if the fact was so, his remark was "une appréciation quelque peu prophétique." Still more singular is the observation of the acte d' accusation itself, that the place in which the crime was conjectured to have been committed "semble predestiné pour une crime." But the strangest of all these supplementary articles of evidence was supplied by the Judge d' Instruction himself, who said that, on one occasion during the course of his examination of Leotade, he thought from his manner that he was about to confess, and though he had certainly explicity denied the crime, still "s' il faut dire tout ma pensee j' ai cru et je crois encore que Leotade a été au moment de me faire un aveu." Moreover, continued the magistrate, "en interrogeant Leotade pour la premiére fois son trouble était extrême et comme à la fin on lui disait retirez vous, il manifesta une joie *qui pour moi trahit la possibilitié de sa culpabilitié*, et sans l'intervention de M. le Procureur Général je le mettais immediatement an arrestation." Such is the kind of evidence which, in a case of this importance, is admitted under the French system. That it is admitted at all, is a consequence of the whole character of the proceedings, *which far more resemble the proceedings before English Commissioners of Inquiry* than the proceedings before an English Court of Criminal Law. The members of the Cour Imperiale, including the Procureur-Général, the Juge d' ...struction, and the Procureurs du Roi, jointly and severally devote all their energies to the collection of every sort of information or suggestion in any way bearing on the case in hand. The mass of matter thus collected is enough to bewilder any jury, and must virtually make them almost entirely dependent on the direction of the Court.

The manner in which the evidence is laid before the jury is not less illustrative of the principle of the whole trial than the character of the evidence itself. As has been already observed, the "Instruction" does not leave, or even permit, the prisoner to frame his own defence in his own way, but takes that business out of his hands, and draws unfavourable conclusions from the shortcomings of his witnesses. If an alibi is relied upon in England, the prisoner's attorney sees the witnesses, prepares the proofs, and instructs his counsel of their character, and it is at the trial that they are for the first time judicially considered. In France, the prisoner is interrogated as to where he went, what he did, and whom he saw, from the very first; and any person whom he mentions is immediately called before the Juge d' Instruction, and examined upon the subject, apart from the prisoner. That a prosecutor, public or private, wishes to convict the prisoner upon the same principle which makes a sportsman desirous to bag his game, is a matter of perfect notoriety, the consequence is, that this system, which, at first sight, appears so humane, in reality has a constant tendency to resolve itself into duels between the authorities, the prisoner, and his witnesses. In Leotade's trial more than sixty witnesses were called, and the trial occupied nearly three weeks, to say nothing of the *instruction*, which was spread over seven or eight months. More than half of these witnesses were called literally for the sake of contradicting each other. Thus, for example, an old women, called Sabatier, said that she had seen the murdered girl under circumstances which would show that she had left the monastery alive. No less than ten witnesses were called to refute her, yet her evidence upon the subject was given, and its falsehood proved, months before the trial; and the whole matter might, therefore, have been safely laid out of account. In an English court she would, of course, have been called, if at all for the prisoner; and if his advisers had seen reason to distrust her—as they probably would, for she was a mere foolish gossip—she would not have been called at all. Another illustration of the same thing occurred in respect of the evidence of the different monks. The acte d' accusation is divided into two parts, of which the first is occupied by arguments to show that the crime was committed in the monastery, and the second by arguments to show that it was committed by Leotade. According to our principles, the first of these questions would be utterly immaterial except in so far as it bore upon the second; but the French court so managed matters as to make the question of Leotade's guilt almost subordinate to the question of the guilt of some one member of the convent. Four-fifths of the evidence given at the trial consists of refutations by the prosecution of rumors circulated, or supposed to have been circulated, on behalf of the monks, and of exposures of the falsehoods told upon various isolated parts of the case by other monks not shown to have been connected with the prisoner. A single illustration will show the endless confusion which such a mode of proceeding is calculated to produce. Evidence, says the acte d' accusation, which would give a different turn to the procedure, had been announced by the newspapers. It was said by the lad Vidal (who was in the parloir when the girl entered the passage), had seen the girl leave the monastery. The Juge d' Instruction "prepared to receive this evidence, and, at the same time, took measures to check it" (de la contrôler). After much enquiry he found out Vidal was in communication with the *principal members of the monastery; and the lad himself gave* his evidence with many qualifications, and much hesitation. In consequence of these inquiries, the acte d' accusation expressly declares that "la cour n'a-t-elle pas hésité à déclarer que la déposition de Vidal ne meritait pas la confiance de la justice." Notwithstanding this, he was one of the principal witnesses against the prisoner, for he stated that he had been present at a sort of meeting in which various influential members of the monastery took part, and at which they concocted evidence tending to prove that the girl had left their establishment. Upon this subject many witnesses were examined, and a great deal of contradictory assertion and very violent language passed between all parties. It does not seem to have occurred to any one that the whole debate was quite beside the question. That Vidal could not prove that the girl had gone out alive, was ad... ed by himself in his very answer; and if that point failed it was perfectly immaterial to show that any amount of perjury and subornation of perjury had been employed to establish it. That such a state of things should exist would, no doubt, be very discreditable to a religious establishment, but it is absurd to say that it would tend to prove Leotade's guilt. If he personally had suborned false witnesses it would have been very different, but as he was in close custody, that was out of the question; and it was surely most unjust to make him respon-

sible for what, at most, was the criminal conduct of most unwise partizans.

Perhaps the most curious feature in French procedure is the narrowness of the sphere within which the functions of the jury are confined. They are frequently obliged to take for granted, on the authority of the court, the most important part of the evidence. In the case of Leotade, the strongest facts against him were the imperfect and conflicting accounts which he gave of the employment of his time on the day in question. The fact that this was so, was proved solely by the procès verbaux taken at the different interrogations. Although Leotade urged repeatedly that he had been so tormented by questions, so intimidated and brow-beaten, that he was quite confused, and did not know what he said, no evidence appears to have been produced to disprove his assertion. It seems to have been assumed that official acts were not to be questioned, and that official assertions must be true. It is a slight but significent illustration of this temper, that when a brigadier of gendarme and a monk differed, the President told the latter that the former had a right to the confidence of justice both as a witness and a "functionary." Nothing is more common than to hear English judges warn the jury to be very careful about believing too easily the evidence of policemen, or skilled witnesses. An even stronger illustration is to be found in the fact, that the jury who tried Leotade were each supplied with a copy of the acte d' accusation,—a document which closely resembles, in its style, length, and objects, the opening speech of an English prosecuting counsel. As the evidence swelled to a size altogether unmanageable, this was almost equivalent to prejudging the case.—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

SPLITTING THE PLAINTIFF'S DEMAND.

(*Continued from page 203.*)

The point expressly decided in *Grimbley* v. *Aykroyd*, was that a tradesman's bill cannot be split for the purpose of bringing it within the jurisdiction of the County Court, the demand forming but one cause of action.

This principle was again affirmed in *Wood* v. *Perry* (18 L. J. 161; 12 Jur. 129; 3 Ex. 442). The plaintiff, a tailor, dwelt and carried on business within the District of Court *C.*, and within 20 miles of the defendant, who lived in the District of Court *B.* The action was on a bill which consisted of 21 items. All the work had been done at the plaintiff's residence, the orders for the different items were given at different places, and the goods were delivered at different times and places, but one bill sent in for the whole. The question as to the right to divide the cause of action came up on motion to enter a suggestion to deprive plaintiff of his costs, and the Court held that there was no concurrent jurisdiction in the Superior Court to entertain the suit under the 128th section of the English Act, and that the different items were so connected together as to form but one cause of action, and therefore that the plaintiff, who sued in the Division Court, was not entitled to the costs of the suit.

The case of *Bousy* v. *Wordsworth* (25 L. J. 205; 18 C. B. 325) is to the same effect, one part of the plaintiff's claim being for butcher's meat supplied at various times.

But in illustration of the principle that demands distinct in their nature need not be joined in the same action *Wickham* v. *Lee* (18 L. J. 628; 12 Q. B. 521; Cox & Macrea, 119) is a leading case. This question was reduced to this—there were two actions against the defendant,—one for £19 8s. 4d. rent in arrear, the other for £9 14s. 2d. for double value for holding over after notice to quit under Stat. 4 Geo. II. cap. 68, sec. 1, and it was held that these were distinct causes of action within the meaning of the terms in the act, and might be made the subject o separate suits in the County Court.

In support of the rule for prohibition, it was argued that the principle of the decision in *Grimbley* v. *Aykroyd* applies to all arrears of a running account, and therefore to arrears of rent; that the action for double value was not a distinct cause of action; that a count for double value might be always joined with a count for use and occupation: to which Coleridge, J., said (*interloc.*) "an action for double value does not admit a tenancy; on the contrary, the landlord, having given notice to determine the tenancy, may bring ejectment concurrently with an action for double value, and it may be maintained after judgment recovered in ejectment." In deciding for the plaintiff, Patterson, J., said, "it is true that a count for double value may be joined with a count for debt for use and occupation, but I do not understand the Court of Exchequer has gone the length of saying that whenever causes of action *may* be joined they *must* be joined; to me it seems that this is quite a different cause of action."

Erle, J., said, "I collect from the decision of the Court of Exchequer that the plaintiff is not open to the objection of splitting his demand, if in an action in the Superior Courts two counts would have been indispensable. If they must have had two counts, they may have two plaints in the County Court."

In *Kimpton* v *Willey* (19 L. J., C. P.; 1 Cox & Macrea, 350), the plaintiff entered two actions in the County Court, one was for money lent and advanced, the other was for work and labor and goods. Some of the items in the two actions were contemporaneous, but there were no items in any way connected. The defendant objected that the subject of the two actions formed but one cause of action, and applied to the Court of Common Pleas for a prohibition.

The Court held that the particulars of the two actions did not form one cause of action within 9 & 10 Vic. cap. 95, sec 63, and that this was not a case of splitting demands. Wilde, J., said, "The demand is for money lent. We are told that it must be considered as part of the larger demand, —and why? The larger demand is for work and labor, for certain services, and for goods sold and delivered; and it is said these two demands must be considered as forming one entire demand. Why? Has any account ever been delivered, in which the plaintiff put together the two in the form of one. Have the parties ever treated them as one demand. Of that there is no evidence. Are the sums lent at all connected with the sums claimed in the other plaint? The question is this; whether you can say, in the absence of all evidence, that the parties have ever treated these sums as forming one entire demand; in the absence of all circumstances which can tend to show that they ever intended that they should constitute one demand. We know there is a demand for money lent; we know there is a demand for work and labor; but there are no circumstances to show that they were ever intended to be treated as one account."

Williams, J., said, "I am of opinion that a prohibition ought not to go in this case, unless it clearly appears that the Court below has acted without jurisdiction. The onus of showing this lies on the applicant. With respect to the application, so far as it is founded on a supposed division of the cause of action, it is enough for me to say that I am not at all satisfied that the subject of the two claims constituted 'one cause of action' in any reasonable construction of that expression in the Act of Parliament." And Talfourd, J., added, "I am entirely of the same opinion. With regard to the main question, namely, whether the two demands constitute one entire claim, the case is essentially different from *Crimbley* v. *Aykroyd*. There is nothing to connect the various parts together, nothing in them of a common character, except that they may be recovered in the same declaration in the same form of action; whereas in *Grimbley* v. *Aykroyd*, the defendant carried on the business of a shopkeeper, where he was in the habit of paying his workmen, and there was one entire system of dealing; at all events there was a demand arising out of one state of things which does not appear in the present case; therefore that case does not decide this."

CORRESPONDENCE.

(*To the Editors of the Law Journal.*)

GENTLEMEN,—There are three questions upon which I beg to ask your opinion in the next number of your *Journal* for the information of those interested in the Division Courts.

1. A contracts a debt with B amounting to a sum within the jurisdiction of the Division Courts; then removes to the United States. Can B. bring his action in the Division Court, the Division Court Law making no provision for service out of the jurisdiction?

2. Can the Judge of a Division Court swear both parties to a suit *on their own behalf* where the amount in dispute exceeds eight dollars? (See sect. 102 Con. Stats., U. C., page 153.)

3. Can a clerk of the Division Court charge any fees except those mentioned in the Tariff?

I ask the last question from the fact that, the clerk of the First Division Court of this county, having a rather poetical turn of mind, renders his accounts, containing many charges for *imaginary* services. For example, in a suit brought in his Court in which the plaintiff recovered a verdict for $100—a new trial being granted to the defendant and the case removed by *certiorari*—the clerk insisted upon the plaintiff paying the following items in addition to the ordinary costs in the suit, before the case was finally decided, which I think he had no right to do, as they are not allowed by the tariff; but if so, they should have been paid by the defendant in the first instance:—

"Costs on application for new trial	$0 50
Service of summons	0 20
Affidavit	0 20
Making out (clerk's) account	0 25
	$1 15 "

I do not give this instance for the purpose of exposing our clerk, but do so believing that a little castigation and notoriety will make him more cautious about his charges, and more obliging and civil to those who come in contact with him in an official capacity.

Your obedient servant,

Sarnia, 4th August, 1862. S. P. Y.

[1. If the action be brought in the Division in which the debt was contracted, and the summons be personally served; the Court has jurisdiction. Or, if the defendant has absconded to parts unknown, a proceeding by attachment will enable substitution service in the suit to follow attachment, and thus give the Court power to deal with the case.

2. He can; but the power should be sparingly exercised by the Judge, so long as the policy of the law affirms the general rule that parties are not admissible on their own behalf.

3. We do not see why the costs specified should have been charged against the plaintiff, unless expressly ordered in the rule for new trial. We have not the particulars of the services before us, and therefore cannot say whether or not the charges made are allowable: but on the other hand, we cannot say they are unauthorised, for an order or judgment, and entering same is chargeable in applications for new trial; and the service of summons, *or other proceeding*, (which would include the papers necessary to be served on applications for new trial and affidavits,) are expressly mentioned in the tariff of fees. The last item we see no authority for.

As to the indirect charge of want of civility, &c., in the officer, we have only to say: that civility is an article that costs nothing and should be freely accorded by all whose official position brings them in contact with the profession or the public. Men habitually uncivil or disobliging are unfit for the office of clerk; but our correspondent may expect more suavity of manner than the ordinary run of men in "this Canada of ours" (as a worthy Judge, now a northern light, delighted to call the country) can boast of possessing.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH—PRACTICE CASES.

Reported by C. Robinson, Esq., *Barrister-at-Law, Reporter to the Court.*

McClenigan v. McLeod.

Judgment of non pros.—Penal action.

A judgment of *non pros.* regularly signed in an action by a common informer for a penalty will not be set aside.

Adam Crooks obtained a rule on the defendant to shew cause why the judgment of *non pros.* signed for want of a replication should not be set aside, and all subsequent proceedings, on the ground that the plaintiff had a good cause of action, on such terms as the court might think fit.

The plaintiff's attorney swore that the plaintiff had a good cause of action, as he was instructed and believed. This application was made in the Practice Court, and referred to the full court. It was admitted on the plaintiff's part that the judgment was regularly signed, and not by any sharp practice in the defendant, and he asked only to be allowed to proceed in his action on the footing of indulgence, and on the terms of paying costs, if the court should think it right to insist upon it.

The defendant resisted his application only on the ground that the plaintiff was suing for a penalty as a common informer, and that it was against the general practice to facilitate his proceedings by such an indulgence.

The action was brought on the statute 20 Vic., ch. 22, sec. 5, for a penalty for sitting in the Legislative Assembly, being a person disqualified from sitting or voting by reason of his alleged interest in a contract with the government.

Prince shewed cause, and cited *Bennet qui tam* v. *Smith*, 1 Burr. 401; S. C., 2 Ld. Kenyon's Rep. 82.

Crooks, contra, cited Ch. Arch. Prac. 1411; *Cortessos* v. *Hume*, 2 Dowl. 134; *Wood* v. *Cleveland*, 2 Salk. 518; *Messiter* v. *Rose*, 13 C. B. 162

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

We do not find that the case of *Bennet qui tam* v. *Smith* (1 Burr. 401, S C. 2 Ld Kenyon's Rep. 82,) has been overruled, and we think we are bound by it to decline to relieve the plaintiff from a judgment of *non pros.* regularly signed against him, and not obtained by any sharp practice.

Rule discharged.

Cumberland and Storm v. Ridout et al., Executors of Radenhurst.

Verdict by consent—Certificate for costs—Rule of Court, No. 155.

Where an action was brought in an open account, and a verdict entered by consent for the amount claimed, which was within the jurisdiction of the county court: *Held* (dissenting from *Bonter* v. *Pretty*, 9 C. P 273), that it was a case in which, under the rule of court, No. 155, a judge in chambers could make an order for full costs.

Action on common counts, for services as architects.

Pleas —Never indebted, and payment. Verdict for the plaintiffs £70 10s. 6d.

The plaintiffs' attorney made an application to a judge in chambers for an order under our rule of court to tax Queen's Bench costs, notwithstanding the amount of the verdict was within the jurisdiction of the county court. He stated in his affidavit that the action was brought for the plaintiffs' services as architects in preparing plans and specifications and superintending a building, and that the sum claimed was a sum beyond the jurisdiction of the county court: (the sum claimed was just what was allowed, £70 10s. 6d., it included £5 10s. 6d. for interest:) that the plaintiffs delayed the trial of the cause to give the defendants an opportunity of settling it: that at length, when the plaintiffs' attorney was about to call on the case, one of the defendants (the acting executor) came to him in court, and being told by him that the case was coming on signed a consent that a verdict might be entered for the amount claimed; that a certificate was not applied for, from the fact that the case could not be brought in the inferior court: that the demand was upon an open account for services, and not liquidated or ascertained by the signature of the defendants. The plaintiffs both made affidavits to the same effect.

The particulars delivered were a charge of 5 per cent. commission on a contract for £1,300, £65, and the interest added.

The motion being refused in chambers, *Harman* moved in full court on the same affidavits.

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

The question is whether this is a case in which the court or a judge could make an order for full costs under our rule of court, No. 155, as being "an action of the proper competence of the county court, in which final judgment was obtained without a trial."

In our opinion it does come within the intention and spirit of that provision, for there was no trial, no evidence received, nothing said or done that could give the judge who signed the verdict any more means of knowing whether it was proper to bring the action in the higher court than if he had never heard of the cause.

A judge in chambers c. veniently receive affidavits and make an order, and it would be most in. avenient to compel a judge at *nisi prius* to receive evidence for no other cause than to entitle the plaintiff to a certificate.

The Court of Common Pleas in *Bonter* v. *Pretty* (9 C. P. 273) have, however, decided otherwise.

McGee v. Baird and Cunningham.

Judgment—Consols. Stats. U. C, chap. 26, sec. 17.

A judgment obtained contrary to the Consol. Stats. U. C, chap. 26, sec. 17, was, upon the application of other judgment creditors of the debtor, postponed to their judgment.

Hellicell obtained a rule on the plaintiff to shew cause why the judgment in this cause, and the confession on which it was founded, should not be set aside with costs; or why the execution, with all proceedings upon it, should not be set aside with costs; or why the execution should not be postponed, as to the satisfaction thereof, by the sheriff of the county of Carlton, till after the other executions had been satisfied, which had issued against the goods of the same defendants, at the respective suits of Andrew Watrous, and of Thomas Hunter, and William Hunter: on the ground that the said confession (in this suit) was void as against creditors of the defendants, under the Consolidated Statutes of Upper Canada, ch. 26, sec. 17. He cited *Armour* v. *Carruthers*, (2 P. R. 217;) *Brent* v. *Perry*, (5 U. C. Q. B. 538.)

C. S. Patterson shewed cause, and cited *Young* v. *Christie*, (7 Grant Chy. Rep. 312;) *McMaster* v. *Clare*, (Ib. 550;) *Loader* v. *Hiscock*, (1 F. & F. 132.)

The Court held that the affidavits shewed the case to be within the statute both in regard to the defendants being insolvent at the time they gave the confession of judgment to McGee, and to the purpose and intent with which they gave it; and that it was competent to the other judgment creditors of the defendants to move in this case to set the judgment and other proceedings aside; and they directed the rule to issue according to the second alternative, for *postponing* merely, and not setting it totally aside, thus leaving the execution still in force as between the parties to that suit.

Ashton v. McMillan.

Replevin—Costs—Certificate.

A certificate is necessary to obtain full costs in replevin as in other actions, though the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts.

The plaintiff replevied a quantity of timber, which he claimed to be his, and which was in defendant's possession. He swore that it was worth £52 10s. in the affidavit made when he took out the writ. In the declaration he complained of a wrongful taking as well as detention. It was not upon any distress that had been made. The action was brought to determine the right to the property.

The plaintiff obtained a verdict, which, as usual, was for 20s.

No certificate for costs was obtained or moved for at the trial. Judgment was entered in the county, and the deputy clerk of the Crown who taxed the costs taxed Queen's Bench costs. On application to the master he confirmed the taxation.

The learned Chief Justice of this court was applied to in chambers for an order to revise taxation, and referred the parties, as it was a question of practice, often arising, to the full court.

A rule was accordingly obtained by *Eccles, Q. C.*, against which *Hector Cameron* shewed cause in the first instance.

For the plaintiff, it was contended that the verdict being for 20s. signified nothing, since that was well known to be a mere nominal verdict, having no reference to the value of the goods in litigation, and that the affidavit of value and the replevin bond should govern, which in this case shewed that the case could only be brought in one of the superior courts.

For the defendant, it was argued that the plaintiff could not be allowed by his own affidavit to fix the value of the goods in dispute, and that the bond merely conformed to the affidavit: that at the trial it often turned out that the plaintiff limited his claim to part of the property replevied, or gave no evidence of right to a large portion of the goods, and in such cases it would have appeared to the judge that there was no pretence for suing in a higher court: that the judge at the trial had almost invariably the means of forming a judgment of the real value that was in contest, and that the plaintiff could always shew it if he pleased, so that the judge could as well certify in these cases as in others; and by that means only could it be known to the master whether full costs should be allowed or not.

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

In point of practice there is no doubt that in replevin certificates for costs are often applied for at the trial and granted.

In this case it is stated that the timber replevied was not worth more than £35.

As there was a trial in this case, the rule of court is not available to the plaintiff, which provides for the judge receiving an application for full costs on affidavit in all cases where judgment has been obtained without a trial.

We have spoken with the judges of the other court on this point of practice, and we are of opinion that full costs should not be *taxed without a certificate in cases of replevin* more than in other cases where, for all that the verdict or the determination shews the action might as well have been brought in the lower court as in the higher.

We therefore make the order for revising taxation, with a view to confine the costs to those of the county court.

Rule absolute.

CARRALL, SHERIFF OF THE COUNTY OF OXFORD, v. POTTER.

Money paid into court—Plea.

No percentage can be claimed upon money paid into court except under a plea. Where money was paid in under a judge's order, to abide the result of another suit, *held*, that the only charge allowable to the clerk was 20s., under the tariff of costs.

R. A. Harrison obtained a rule *nisi* on the clerk of this court, to shew cause why he should not re-fund to the defendant £7 15s., the amount of per-centage paid to him on paying money into court under an order made by the Chief Justice of this court in this cause, or so much thereof as the court might think fit; and why he should not pay the costs of this application; on the ground that the statute only applies to payment of money into court under a plea; and on the ground that the tariff of costs established by the courts covers all that should be charged either under the statute or otherwise.

On the 26th of April, 1860, the Chief Justice of this court made an order in chambers that upon payment by defendant into court within ten days of the amount of the judgment debt and costs in this action execution should be stayed till the determination of a cause in which the defendant was plaintiff and the now plaintiff was defendant, then pending in error and appeal, the amount so to be paid into court to abide the event of the last mentioned cause, and to be then dealt with as should be directed by this court.

Under that order the defendant's attorney paid into court $3068 68c.

The clerk of the court charged one per cent. on the amount so under the statute, and £1 under the table of costs, in all £8 15s., considering that he was bound to exact that on account of the fee fund, and he refused to receive the money without.

The defendant's attorney questioned his right to charge more than the £1, but paid it under protest, and now reclaimed it, having given notice to the clerk at the time that he would do so

Hodgins shewed cause, and cited 2 Geo. IV., chap 2, secs. 25, 26; Consol. Stats. U. C., chap. 22, secs. 99, 100; Consol Stats. U. C, chap. 10, sec. 29; In re *Willman*, 4 Dea. & Ch. 810; *Ex parte Allen*, 3 McN. & G. 360; *Bloor* v. *Huston*, 1 Jur. N. S. 256.

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

No fee can be exacted for anything done in the course of administering justice which is not expressly given by law. We see no allowance made of a per-centage on money paid into court by any existing law, except under the 99th and 100th sections of the Common Law Procedure Act, Consol. Stats. U. C, chap 22, and that only relates to money paid into court in a cause by way of amends, or as so much acknowledged to be due, which is not exactly this case, and so that provision does not apply; and besides this, there is our tariff of costs, which allows 20s. on all sums paid into court not under £100. This we think is all that can be claimed, and that can be claimed because this allowance is not restricted to money paid in upon a plea.

COMMON PLEAS.

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

READ v. INGLIS ET AL.

Assault—Right of a stranger to use a church—Member of a congregation—Disturbance by—Pleading—Imp. stat. 1 Wm. & M., ch. 18—Con. stat of Can, ch. 92.

Action for assault and battery against fourteen defendants. Two of them, W. W. and R G, pleaded, 1st not guilty. 2ndly. As to the seizing, laying hold of and dragging and pulling plaintiff about, that plaintiff had been informed that a certain pew in a church which he had previously occupied had been allocated to another person, and that he would be allowed to occupy another which would be shewn to him, when he should attend; and that just before the committing, &c., the plaintiff came into the church, and being shewn another pew refused to occupy it, *but insisted upon sitting* in the aisle on a camp-stool during the service, and disturbed the congregation thereby, whereupon three others of the defendants A S., R H. and W. D., being deacons of the church, requested plaintiff to desist and occupy a pew, which he refused, and the said deacons, with the said W. W. and R G. being constables in aid of the said deacons, and at their request, and for preserving due decorum, &c., *molliter manus.*

Eleven others pleaded, 1st, not guilty,

2ndly. As to seizing and assaulting plaintiff, that S and H (two of the defendants) were lawfully possessed of certain lands and tenements in Hamilton, whereon stood a building called the McNab Street Presbyterian Church, and being so possessed, plaintiff just before the time when, &c., was unlawfully in the said church, misbehaving himself, without the license of the said S and H., whereupon the defendants requested plaintiff to behave and go out of the church, which plaintiff refused to do, whereupon said S. & H. and the other defendants at their request, *molliter manus.*

3rd S. and H pleaded that they were office-bearers in the said church, and as such it was their duty to allocate the seats, and to preserve order during divine service; that service was intended to be held on a certain Sunday at a certain hour; that just before the time appointed for the commencement of service the plaintiff on that day came into the church, bringing with him a camp-stool, with the intention of occupying it, &c., whereupon the defendants shewed plaintiff a seat in one of the pews, and requested him to sit therein and forbad him to sit in the aisle, but plaintiff refused and insisted on occupying the seat previously allocated (to other persons) against their will, or of sitting in the aisle, whereupon to prevent disturbance, and to preserve order, *molliter manus*, &c. The 2nd & 3rd pleas were all demurred to.

Held, that the demurrer to the 2nd plea of W. W. and R G admitted that the plaintiff committed a disturbance in the church, and that three of the defendants requested him to desist, which he refused, and he was therefore offending against the statute 1 Wm & M., ch. 18, and our Statute of Can., ch. 92, the former of which is in force in this province, and not superseded by the latter, and therefore the congregation, or its authorised agents, might put out the offender, and that the plea admitting him (indirectly) to be a member of the congregation, shews a wrongful disturbance under the statutes above referred to, which the plaintiff cannot justify, and therefore the three defendants under whom W. W and R. G. justify, had authority to move him, this plea was therefore good.

Held, that the 2nd plea of the other eleven defendants was good

Held, that the third plea admitted the plaintiffs right to be in the church during divine service, and to occupy some seat or pew and it not being shewn that the plaintiff committed any disturbance, or committed any breach, or violated any regulation of the church, or that he was requested or refused to go out, and was therefore bad.

The declaration charged the fourteen defendants with a violent assault and battery, *per quod*, &c.

David Inglis, William West, and Robert Graham, by *Burton*, their attorney, pleaded—1st. Not guilty.

2nd William West and Robert Graham, also, as to the seizing and laying hold of the plaintiff, and pulling and dragging him about, say that before the committing, &c, plaintiff had been

informed that a particular pew in a certain church which plaintiff had previously occupied, had been allocated to another person, and that he would not be allowed to occupy it, but that the authorities of the church would find some other pew for him whenever he should attend; and that just before the said time when, &c., the plaintiff with such notice came into the said church carrying with him a camp-stool and a heavy stick, while the congregation were sitting in the church waiting for the celebration of divine worship, and insisted on obtruding himself into the said pew, or sitting in the aisle upon the said camp-stool during the service, although he was shewn other pews which were unoccupied, and told he might occupy any of them, and plaintiff then committed a disturbance in the church, and disturbed the congregation thereby, wrongfully endeavouring to force his way along the aisle, and seating himself upon the camp-stool, and otherwise conducting himself in an irreverent manner, whereupon three other of the defendants, A. S, R. H., and W. D., then being deacons of the church, for preserving due decorum in the church, and preventing the disturbance of the congregation during divine service, requested plaintiff to desist, and to occupy one of the pews pointed out, which plaintiff refused, and continued in the church, disturbing the same and preventing the commencement of servic, whereupon the said deacons, and the said West and Graham being constables, in aid of the said deacons, and at their request, and for preserving due decorum, &c, and preventing the said interruption and disturbances, and because they could not otherwise preserve decorum and prevent interruption, *molliter manus*, &c.

Andrew Skinner, Robert Hopkins, William Davidson, George Morrison, James Dingwall, Daniel McIntosh, Maitland Young, William Chisholm, Peter Bridge, William Mowat, and Angus Sutherland, by *McDonald*, their attorney, pleaded—1st. Not guilty.

2nd. As to the assaulting, seizing, and laying hold of and pulling and dragging plaintiff about, these eleven defendants say, that Skinner and Hopkins were lawfully possessed of certain lands and tenements in the city of Hamilton, being composed of, &c., whereon stood a building called McNab Street Presbyterian Church, and being so possessed, plaintiff just before the time when, &c, was unlawfully in the church misbehaving himself without the license of the said Skinner and Hopkins, and thereupon defendants requested plaintiff to conduct himself properly, and go out of the church, which plaintiff refused to do, whereupon defendants Skinner and Hopkins in defence of their possession, and the other defendants, at the request of S. & H., *molliter manus*, &c.

3rd. The last named defendants pleaded, that immediately before the committing the trespasses, they were office-bearers of the congregation of the said church, and members of the congregation; that as such office-bearers it was their duty to allocate the seats, and to preserve order during divine service; that service was intended to be held in said church on Sunday, the 6th of May, 1861, commencing at 11 a m; that defendants had reason to believe that plaintiff would on that day enter the church with a camp-stool in his hand, and would insist on occupying a certain pew which had been allocated to other persons, members of the congregation, or sitting in the aisle on the camp-stool during divine service, unless permitted to enter such pew; that plaintiff (in consequence of previous conduct) had been notified by defendants that he would not be permitted to sit in the aisle during divine service, but would be permitted to sit in a pew to which he should be shewn by defendants: that just before the time appointed for the commencement of divine service, the plaintiff, on that day, came into the church bringing with him a camp-stool with the intention of occupying the said seat, which, &c., (as before,) or sitting in the aisle, &c, (as before,) whereupon defendants shewed plaintiff a seat in one of the pews, and requested him to sit therein and forbad him to sit in the aisle, but plaintiff refused, and insisted on occupying the seat previously allocated to F. L. and W. M., against their will, or of sitting in the aisle upon the camp-stool, and the time for service having arrived, and the congregation having a long time awaited the commencement, defendants, in order that it might be commenced, and to preserve order and decorum, *molliter manus*, &c.

Plaintiff demurred to the second plea of West and Graham and to the second and third pleas of the other defendants.

Read, Q.C., for the demurrer, cited *Worth* v. *Terrington*, 13 M. & W. 781; Con. Stat. of Can., ch. 92, sec 18; *Timothy* v *Simpson* 1 C. M. & R. 767; *Seymour* v *Maddox*, 16 Jur. 724; *Wright* v. *Court*, 4 B. & C. 596; *Ingle* v. *Bell*, 1 M. & W 516; 3 Vic., ch 74, Church Temp. Act; *Hartley* v. *Cooke*, 9 Bing. 735; *Williams* v. *Glenister*, 2 B. & C. 699.

Burton, contra, cited *Reynolds* v. *Monkton*, 2 Moody & Robin, 384, *Burton* v *Henson*, 10 M. & W 105; *Howell* v. *Jackson*, 6 C. & P. 723; *Bosanquet* v. *Heath*, 3. L. T. N. S. 290.

DRAPER, C. J.—A great many of the objections taken on these demurrers are very trifling, and could be no more than grounds of special demurrer, if sustainable even for that purpose.

The real question raised on each plea is, whether the facts stated justify the defendants who plead them, either as office-bearers, or as acting under the authority of office bearers, or as simply members of a congregation assembled for the celebration of public worship, to put the plaintiff out of the church.

The plaintiff, *possibly*, has no more right to enter this church than any person who casually coming to the door of a church which is open on a Sunday for divine service, and just at or before the time such service is about to commence, would have to enter, I assume that no person entering a church under such circumstances and for the purpose of joining in public worship, could be deemed a tresspasser, and probably would not be liable to be expelled so long as he acted with decorum, and in compliance with whatever regulations he found in use and practice therein.

The first plea is pleaded by two defendants who state themselves to be constables. It shews that the congregation were assembled in the church in question waiting the commencement of divine service; that the plaintiff "committed a disturbance in the said church, and disturbed the congregation by then wrongfully endeavouring to force his way along the aisle," and seating himself upon a camp-stool which he had brought with him, and by otherwise behaving in an indecent, irreverent and unbecoming manner, whereupon three others of the defendants, Skinner, Hopkins, and Davidson, "then being deacons of the said church," to preserve decorum and to prevent the disturbance of the congregation during service, *requested plaintiff to desist*, and to occupy a pew shewn to him, which he refused, and continued in the church while the congregation were waiting the commencement of divine service, disturbing the same, whereupon the deacons, and these two defendants, in their aid, and at their request, and because they could not otherwise preserve decorum, or prevent interruption, removed plaintiff.

The statute 1 W & M., ch. 18, sec. 18, enacts that if any person shall wilfully, maliciously, and contemptuously, come into any cathedral or parish church, chapel or other congregation, by this act permitted, and disquiet or disturb the same, he shall find two sureties in the sum of £50 each, and in default thereof shall be committed to prison till the next general or quarter sessions, and on conviction thereat shall suffer the penalty of £20.

The Consol. Stat. of Canada, ch. 92, sec. 18, enacts that any person who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship by profane discourse, by rude or indecent behaviour, &c., shall, upon a conviction before a justice of the peace on the oath of one or more more credible witnesses, forfeit and pay such sum of money not exceeding $20, as the justice may think fit, and costs.

I see no reason for holding that the former of these enactments is not in force in Upper Canada, or that it has been superseded by the latter, so that a person who wilfully disturbed a congregation lawfully assembled for religious worship might not be indicted.

The demurrer admits that the plaintiff committed a disturbance in the church; that three of the defendants requested him to desist, and to occupy a pew, which he refused, and continued in the church, while the congregation was waiting the commencement of service, so disturbing the same and preventing the commencement of the service. He was therefore offending against either or both of the statutes above mentioned, and it is clear to me, the congregation or its authorised officers might put out a person so offending.

If the plea simply shewed a trespass on plaintiff's part as a mere stranger who having come into the church, and being asked to

retire, refused to go, the defendants would, I think, have been under a necessity of shewing strictly a right in those under whose command they attempt to justify to expel him; but they assert a wrongful act of *disturbance* committed by the plaintiff against the provisions of both these statutes. This the plaintiff cannot justify, even though he were a member of the congregation, as, I incline to think, the plea indirectly admits him to be.

Still the defendants justify exclusively on an authority derived from the "deacons." It is not averred that the deacons had the possession, or the care and management of the church: or that they were officers whose duty it was to preserve order; nor can the court judicially take notice of their powers. From the manner in which the term "authorities of the church" is used in the earlier part of the plea, the deacons may only be subordinate officers to those authorities. The plea does not assert that the three defendants were deacons either of this church or of the congregation, or had any authority or any duty. They are not, as "deacons," shewn to be connected with the McNab Street Church; nor is it averred by what denomination of professing Christians that church was occupied.

It is the want of any such averment that creates a difficulty in regard to this plea, and it is not without hesitation and doubt that I have brought myself to the conclusion that the three defendants, Skinner, Hopkins, and Davidson were members of the congregation there assembled. I mean persons belonging to that church, gathered together for divine worship, and that being so, they had a legal right to remove or direct the removal of any person creating a disturbance, as the plea charges the defendant with doing. The difficulty is in the former part of the proposition. A good deal is stated that encumbers, but does help; being matter of evidence, but not of the essence of the defence, which resolves itself into two propositions, first, that plaintiff was disturbing the congregation, and preventing the commencement of divine service; second, that the person under whose command the two defendants, West and Graham, justify, had lawful authority to remove the plaintiff.

The plaintiff's counsel did not press the demurrer to the second plea of the other eleven defendants, and, so far as I can judge, the plea is good.

In my opinion the last plea is bad. It apparently admits, for it does not in any way question or deny that the plaintiff had a right to be in the church during the time of public worship, and to have a seat in some pew, and if so, he was not a trespasser by entering the church, though he did so with the wish and intention, if not hindered, of sitting in a particular pew; or if hindered, of sitting in the aisle, on a camp-stool. It is not averred that he made any disturbance, or prevented the commencing of divine service; nor that, if he had sat on a camp-stool in the aisle it would have infringed any rule, or would have disturbed the solemnity of the proceedings, or have necessarily distracted the minds of the congregation. All that is asserted is, that he insisted but no specific act is stated, as sitting in a particular pew, or on a camp-stool in the aisle. To sit thus in the aisle, when he might have sat in a pew, appears a very absurd thing in itself, but it would be very easy to suppose a case in which it would be neither unreasonable or absurd, and taken simply by itself, it does not appear to me to justify the expulsion from the church, by force, a person whose right to enter and remain in the church during the celebration of the service is thus admitted. Before the expulsion could be justified, under these circumstances, I think it must be made to appear that the plaintiff insisted on doing something either prohibited by regulations in force, or which was of a character to disturb or prevent, and would have disturbed or prevented public worship; that he was requested to desist or to go out, and refusing to do either, it became necessary to expel him. There are allegations in the plea, which no doubt have reference to matters well understood by both parties, but of which the court knew nothing. We can deal only with the question whether the matters pleaded justify the assault stated in the declaration and in the introductory part of the plea, and in my opinion they do not.

I think, therefore, the judgment of the court should be for the plaintiff on the last plea, and for the defendants on the other two.

Per cur.—Judgment accordingly.

RYLAND v. KING ET AL.

Replevin—School site—Trustees—Arbitration—Award—Blanks filled in after execution—Rendered invalid thereby.

Replevin—Two defendants avowed; the third pleaded the convening of a special meeting of the freeholders and householders of a certain school section to procure a school site, when it was agreed to procure a certain piece of ground and erect a school house thereon, which was done That plaintiff was a resident freeholder when the meeting was held and when his goods were seized, and was assessed $80 for building said school-house, &c.

The plaintiff pleaded that the meeting above set forth was null and void, because, before the said meeting another meeting had been convened according to law, when a difference of opinion existed between a majority of the freeholders and householders as to choosing a school site, and arbitrators were appointed, who decided upon a certain site, which decision remains in force, and the defendants in contravention thereof wrongfully purchased the site mentioned in their plea, and wrongfully destrained, &c.

Upon demurrer, *held*, that the second meeting pleaded by the defendants was a violation of the provisions of the statute, and that the plaintiff was entitled to judgment.

The arbitrators to whom a reference in this cause was made under the school act executed an award, the description of the lot not being fully inserted, but a blank being left therefor, which was afterwards filled in and the word lot altered into gore.

Held, that the award was insufficient. *Held*, also, that school trustees who executed a warrant as such trustees under the seal of the trustee corporation were not personally responsible.

REPLEVIN for a horse and mare.

The defendants Smith and Richards avowed and the defendant King acknowledged the taking, pleading in effect as follows: that on the 30th of October, 1858, a special meeting of freeholders and householders of school section No 1, township of Hallowell, was convened according to law for the purpose of procuring a school site, and erecting a school thereon, and it was agreed then by the inhabitant freeholders and householders and a majority of the trustees to procure as a school site a certain piece of land, (described,) and to erect a school house thereon; that such school site was procured and school house erected thereon. That plaintiff was a resident freeholder when his goods were seized, and when the said meeting was held and was assessed for procuring the school site and building the school-house $80. The defendants Richards and Smith avowed as school trustees, and King cognized as collector under a warrant from the avowants to levy by way of distress $80 To this the plaintiff pleaded that the meeting above stated to have been held was null and void, because, on the 3rd of July, 1858, and before the said meeting, a special meeting of the freeholders and householders of the said section No. 1, was called and held according to law for the purpose of choosing a school site for the said school section, at which last-mentioned meeting a majority of the school trustees differed from a majority of the freeholders and householders with regard to choosing the site, and in consequence the said freeholders and householders appointed James Cavan an arbitrator on their behalf, and the trustees appointed Wm. A. Gilbert an arbitrator on their behalf, and the local superintendent apointed Absalom Greely an arbitrator on his behalf, to decide the question in difference, and they finally decided that the site for the school-house should be on, &c., (describing the place,) which decision remains in force and is final and conclusive. That defendants Smith and Richards in contravention of the said decision wrongfully purchased the site stated in the avowry and wrongfully distrained, &c.

The defendants demurred to the plea—1st, because the reference and award would not render the subsequent meeting stated in the avowry illegal, or the proceedings at such meeting void. 2nd, because it is not shewn what interval took place between the two meetings, or that the arbitrators acted within a reasonable time. 3rd, because it is not shewn when the award was made. 4th, because the description of the premises in the award is so uncertain and vague that the award is null and void. They replied also *nul tiel agard*, which replication was demurred to because the question having been duly referred to arbitration according to law, there could not legally be any such proceedings as those relied upon in the avowry and cognizance. Exceptions were also taken to the avowry and cognizance. 1st, that it was not shewn that Smith and Richards were trustees of the school section and had authority to issue a warrant to distrain, or 2nd, that the school house was erected on the site chosen by the meeting, or where that site was. 3rd. That it alleged only that the collector was authorised by the warrant to levy, &c., from the plaintiff, and not from all liable to pay the tax imposed and in arrear. 4th,

that it did not distinguish the amount required to buy the site, or that required to build the school-house. 5th, that it did not allege plaintiff's property was distrained within the school-section. 6th, that it did not shew the rate was legally imposed or established prior to issuing the warrant. 7th, that it did not shew that King, the cognizor, was collector of the rate for section No. 1.

Richards, Q. C, supported the demurrer to the plea to the avowry. He argued that the disagreement stated in the plea is about the choosing a school site—not about the choice. He cited 16 Vic, ch. 185, section 6; *Beaver* v *the Mayor, &c. of Manchester*, 8 E. & B. 44.

C. S Patterson supported the plea. He contended that the trustees were bound to shew everything to justify taking plaintiff's property; *Haacke* v. *Marr*, U. C. 8 C. P. 441; *Orr* v. *Rumney*, 12 U. C. Q B. 377.

The issues in fact were tried at the Picton fall assizes, 1860, before *Burns*, J.

It appeared that during the year 1857, there was much discussion and difference of opinion between the inhabitants of the school section as to the site of the school house, and meetings were held and an award was made, though for some reason or other it was not acted upon. The same difference existed among the people in 1858, and the three school trustees were not unanimous. On the 29th of March, 1858, the defendants Smith and Richards, two of the trustees, obtained a conveyance of half an acre, being part of the west part of No. 15, in the township of Hallowell, for a school site On the 29th of May, 1858, a meeting was held at which the inhabitants named arbitrators, and an award was made, but the inhabitants were not yet satisfied, and then a meeting was called and held on the 3rd of July, 1858, when the two trustees, Smith and Richards, desired to establish the site on the land conveyed by the deed of the 29th of March, 1858, from which a majority of the freeholders and householders then present dissented, and the arbitrators named in the plaintiff's plea to the avowry were appointed to settle the dispute. Pending these discussions the foundation of the school house was actually laid on the land conveyed, and about a quarter of a mile from the exact centre of the school section. The arbitrators personally examined the ground they meant to select and put stakes at a place which they designated for the site, which differed from the land mentioned in the deed. This was done on the 4th of September, 1858, on which day they made the following award:

"Know all men by these presents that we, W. H Gilbert, James Cavan and A. Greely, having been appointed arbitrators to decide on a school site in school section No 1, in the township of Hallowell, in the county of Prince Edward, and having heard the statements of the trustees and also of the opposing parties, and having taken upon ourselves the burden of the said matter, do determine that the school-house site in said section shall be a part *of the gore lying between sixteen and seventeen*, now in the tenure of John Landon, situated on the south west of the road, and on the westerly limit of the said *gore*. In testimony," &c.

The words, "the gore lying between sixteen and seventeen, were not in the award as signed by the arbitrators on the 4th of September, but there was a blank space left which remained until May, 1859, and the word "gore" at the end was originally "lot," and so remained until the blank was filled up. It seemed generally known what piece of ground the arbitrators had looked at, and had determined to designate in the award, but still the inhabitants were dissatisfied. Many would have agreed, if the school-house could have been built by subscription, but that fell through. Another meeting was held on the 8th of October, though not regularly called, and then it was resolved to go on and build on the land mentioned, in the deed, if it could be done by subscription. That also failed.

On the 22nd of October, 1858, the two trustees (defendants) regularly called a meeting for the 30th October, for the purpose, as the notice expressed, of settling finally on a site whereon to build a school-house The meeting was held, not more than half the electors of the section attending The resolution adopted by the majority of the meeting agreed with the opinion of the majority of the trustees, fixing upon the land mentioned in the deed, as the school-house site.

After this meeting the trustees contracted for the erection of the school-house, and it was built. The defendants Smith and Richards were trustees for 1859, and a different person from the former dissenting trustee was elected as a third, on the 25th of April, 1859. The defendants Smith and Richards met for the purpose of assessing the section for the cost of the school-house. The third trustee was then out of the province, and did not return until the fall of the year. Smith and Richards verbally resolved what the assessment should be, and the clerk inserted in the roll at once the proper amounts, and the roll with a warrant signed by Smith and Richards, and under the corporate seal, dated the 25th of April, 1859, was delivered to the defendant King, to collect the amounts from the several persons named in the roll, among whom was the plaintiff assessed for $80. The clerk stated that he copied into the minute book of the trustees a resolution to correspond with what had been determined by Smith and Richards on the 25th of April. Under this warrant defendant King seized plaintiff's horse and mare. Then reference was made to the award of the 4th of September, 1858; it was still in blank. Two of the arbitrators met, and one with the consent of the other filled in the words, "gore lying between sixteen and seventeen," but it could not be ascertained who altered the word "lot" into "gore," or when it was done. The arbitrators stated that the reason why the blank was left in the award, was that they did not know the precise description of Landon's land, but it was understood among them, that when that was ascertained the blank should be filled up.

It was proved that the gore between lots Nos. 16 and 17 contained 200 acres, and the road divided it into nearly equal parts, and the westerly limit of the gore south-west of the road, would be a point down on the water's edge of the bay of Quinte, a distance of between 60 and 80 rods from the road.

Upon these facts the following questions were raised:

On the part of the defendants, 1st. That Smith and Richards were not liable to this action in their individual capacities, for the warrant they gave was under the seal of the trustee corporation, and the corporation thereof was alone liable.

2nd. The award pleaded was not proved, and was bad on the face of it, for it was incomplete when signed by the arbitrators on the 4th of September, 1858, and was no award then, and did not become an award afterwards, for two of the arbitrators had no authority in the absence of the third to complete it by filling up the blank, and, that if the award was otherwise good, the altering it by substituting the word "gore" for "lot," would avoid it. 3rd. That if the award could be filled up after it was signed, the description of the site was partial and imperfect, and left it uncertain what part of the gore, and how much of it was intended for the school site.

For the plaintiff, it was objected, that the defendants had not made a good rate to support the warrant; that a rate could not be verbally imposed or levied, as was proved to have been attempted here

The learned judge directed a verdict to be entered for the plaintiff, with leave to the defendants to move to enter the verdict for them, in order to settle the questions raised.

In Michaelmas Term, *S. Richards*, Q. C, obtained a rule *nisi* to enter a nonsuit, or a verdict for the defendants Smith and Richards, pursuant to leave reserved; or for a new trial on the ground that the verdict was against law and evidence, and for misdirection.

In Hilary Term *C. S. Patterson* shewed cause.

Judgment on demurrer delivered by.

DRAPER, C. J.—By Consolidated Stat. U. C, ch. 64, sec. 30, it is enacted that no steps shall be taken by the trustees of any school section for procuring a school site on which to erect a new school house, or for changing the site of an established school-house without calling a special meeting of the freeholders and householders of their section to consider the matter, and in case of a difference as to the site of a school-house between the majority of the trustees and the majority of the freeholders and householders at such meeting, each party shall choose an arbitrator, and the local superintendent, or in case of his inability to attend, any person appointed by him to act on his behalf shall be a third arbitrator, and such three arbitrators, or a majority of them, shall finally decide the matter.

Upon the general question I need do little more than refer to the

judgment of this court in *Williams* v. *The Trustees of School Section No. 8, of Plympton*, (7 U. C. C. P. 559). If I understand these pleadings, they allege that the school trustees of section No. 1, of the township of Hallowell, or two out of the three trustees, differed from a majority of the freeholders and householders of that section assembled at a special meeting duly convened for the particular purpose as to the site of a school house, which it was proposed to procure, and thereupon the question was referred to arbitration pursuant to the statute, and the arbitrators decided the matter; notwithstanding which the trustees, or two of them, between three and four months after such meeting and reference, and during the same year, called another meeting, ignoring all the previous proceedings, and made a different determination of the very question referred to arbitration, levied a rate in pursuance thereof, and have distrained the plaintiff's property to satisfy the portion of the rate imposed on him. On this state of facts I consider the second meeting and every thing done under colour of its authority to be in flagrant violation of the plain letter and equally plain spirit of the act The plea demurred to expressly asserts that the purchase of the school site and the erection of the school house was in contravention of the award A reference under the statute is previously stated, and that an award alleged to be still in full force had been made. Unless, therefore, the submission had been revoked, I do not understand how the avowry can be good A different question would have been raised if the defendants had replied that after the reference and before the making of the award a majority of the freeholders and householders had revoked the submission; whether that would have sustained the avowry I am not called upon to decide, though I think the difference between an ordinary reference by two individuals of matters in dispute relative to their own affairs, and a reference, which is the creature of the statute, of a *quasi* public question, and which is authorised for the settlement of a question of a *quasi* public character, is sufficiently obvious. The power and the will to refer are inherent in the individuals, but in this case the power is conferred by the statute, and the reference, *i.e.*, the exercise of the power is commanded, if the difference between the trustees and the majority of the householders and freeholders arises.

This opinion disposes of the first objection to the plaintiff's plea. The second is, that it is not shewn what interval of time elapsed between the meeting stated in the plea, and the meeting stated in the avowry, nor that the award was made within a reasonable time. But it cannot be necessary for the plaintiff's case to shew what was the interval between the two meetings. He says that the proceedings on which the avowants rely are alleged to have taken place at a special school meeting of this school section, but he also says those proceedings are void, for the question as to the site of the school house had been finally decided or referred to arbitrators for final decision at a meeting held before this meeting, which defendants set up as conferring authority for their acts, and having been thus disposed of at the first meeting all proceedings with regard to it at the second were inoperative. The avowants by their demurrer admit the reference, and the decision of this question as pleaded. If they mean to rely on *ex post facto* matter to avoid this decision, or on any want of finality in those proceedings, they should have replied it. I think the third objection equally untenable. If there ever was an award finally deciding the question, the defendants must, if they can, avoid it by new matter. The plaintiff shews a complete *primâ facie* answer to their avowry. The fourth objection was not sustained in argument, nor do I see that it amounts to any thing when the plea is examined. The objection as to time, is I think, of no weight. Both parties assert their respective meetings to have taken place in the same year, *i.e.*, 1858, and so the court must, upon these pleadings, assume, and the plaintiff asserts that the meeting referred to by him was prior to that set up by them. If the avowants meant to deny this, the allegation of a different time should have come from them. And as to the objection that the plaintiff's plea states the difference to have been about the choosing the site, and not about the choice, I am not prepared to construe the word "choosing a site" to mean whether they should choose or no. It might certainly have been more accurately expressed, but the difference was not about *procuring* the site. The language fairly excludes that. They could not well have differed about the choosing until they had resolved to procure, and then to choose is to exercise the power of choice, and so this verbal criticism is answered.

The defendants have also replied to this plea that there is on such award, and the plaintiff has demurred. This replication admits the previous parts of the plea, viz, that there was a meeting duly convened, and held on the 3rd of July, 1858, to dispose of the question of purchasing a new school site, at which meeting the question was referred to arbitrators. Now unless the fact that up to the 30th October, 1858, no award had been made revokes the reference and prevents the referees from deciding the question, this replication does not answer the plea. The statute limits no time within which the award shall be made, and does not apparently contemplate a revocation of the reference. There is nothing to shew that the arbitrators have not taken on themselves the burden of deciding the question, though they had not at the time this action was brought made an award. If the reference continued in force when the second meeting was held the plea is not answered, though an award was not then made.

As I consider the plea good, it is not necessary to consider the objections to the avowry. So far as the plaintiff or collector is concerned, excepting the traverse of the avowry and cognizance by the general replication *de injuria*, his defence is passed over without notice. The plaintiff has to get rid of whatever difficulty, if any, may arise from this.

Per cur.—Judgment for plaintiff on the demurrer, with leave to defendants to apply within one month to a judge in Chambers to amend.

(*Judgment on the rule Nisi.*)

DRAPER, C. J.—Whatever opinion I might have formed as to the liability of the trustees, under the circumstances. to have a verdict found against them on the plea of *non ceperunt*, I think when, in order to commence at *nisi prius*, they admitted a *primâ facie* right in the plaintiff to recover, they must be taken to have admitted they took the goods, and meant to rely on the avowry, and agree therefore that this plea is for the purposes of this application out of question. As to the permitting pleas so inconsistent as *non cepit*, and an avowry, which not only admits, but asserts the taking, and claims for the defendants a return of the goods taken and replevied by the plaintiff, with (possibly) damages, and costs at all events, I need not now say any thing more than that I think it open to grave doubt.

I entertained some doubt whether the defendants should not have given further evidence to establish the plaintiff's legal liability to pay the sum at which he was rated; and I am not even now quite clear whether, when the trustees are avowing, they should not shew a title, and that it is not enough merely to shew a compliance with the School Act, Consol. Stat. U. C., ch. 64, sec. 27, which by sub-sec. 11, makes it the duty of the trustees "to make out a list of the names of all persons rated by them for the school purposes of such section, and the amount payable by each, and to annex to such list a warrant directed to the collector of the school section for the collection of the several sums;" or whether they should not have proved the plaintiff's liability by reason of the valuation of his taxable property, under the 12th sub-section of the same section. My brothers, I believe, entertain no doubt on this point, and the opinion of the court is in favour of the sufficiency of the evidence to that extent. It is true that in the avowry it is stated that the plaintiff was at the times when, &c., duly assessed on the assessor's or collector's roll for the township of Hallowell, and that according to the valuation of his taxable property as assessed on that roll, he was legally liable to pay for procuring the school site and erecting the school house the sum of $80, but this is traversed by the general answer, *de injuriâ*.

We have already determined the second plea to the avowry to be good, in accordance with the previous judgment of this court in *Williams* v. *the School Trustees of Plympton*, (7 U. C. C. P. 559.) but the award pleaded by the plaintiff is put in issue by the defendants' replication.

On this particular question the defendants are entitled to a verdict; the award was not duly made and executed. No answer is, however, given to the residue of the plea. The previous meeting of the 3rd of July, 1858, the difference of opinion be-

tween a majority of the school trustees, and of the inhabitants, and the reference of that difference to arbitration, according to the statute, are not denied. But it seems on the 22nd of October, 1858, the same trustees called another meeting, at which they succeeded in obtaining the consent of a majority of the inhabitant freeholders and householders in favour of their own views, upon which they had in fact previously acted, by laying the foundation stone of the school house on a spot not then approved by the inhabitants, and not then or since sanctioned by an award under the reference.

I adhere to the opinion expressed in *Williams* v. *the School Trustees of Plympton*, though it is to be observed in that case an award had been given to which no legal exception had been taken. Here the meeting in October, 1858, was called in reality to revoke the submission to arbitration legally made in the month of July preceding. Conceding that no award had *then* been made, the power of the arbitrators to make one was in existence, and I cannot think it right so to construe the statute as to enable trustees who have a point to carry, to call successive school meetings, to defeat a previous reference which they may learn is likely to decide against them, or by the casual non-attendance of those opposing their view; or even by trick, as seemed to be the case in *Williams* v. *the School Trustees of Plympton*; or by wearying out their opponents by repeated meetings, finally to obtain an apparent majority, when of course they will take care to have no subsequent meeting to review the vote. For these opinions I am alone responsible.

The proper conclusion in this case in the judgment of the court is, that the rule to enter a verdict for the defendants, Smith and Richards, should be made absolute, but that the plaintiff should have leave to take out a rule *nisi* for judgment *non obstante veredicto*. This course appears warranted by what was done in *Merry* v. *Chapman*, (10 A. & E. 324.)

Per cur.—Rule accordingly.

Dollery v. Whaley et al.

Division court—Trespass—Notice of action—Venue—Writ of prohibition—Con. Stats. of Can., ch. 19, secs. 192, 193.

Held, that a plaintiff in a division court suit who, on an attachment against the goods of A., indemnified the bailiff for seizing and subsequently on an execution in the same suit, for selling the goods of B., was not entitled to claim the protection of the statute (Con. Stat. Can., ch. 19, secs, 192,and 193) in an action of trespass, either as to venue or notice of action, and that he was not entitled to a writ of prohibition.

(H. T., 25 Vic.)

Read, Q.C., obtained a rule *nisi* for a writ of prohibition to prohibit the county court from further proceedings in this cause.

It appeared that this was an action of trespass brought by the plaintiff against the clerk and bailiff of a division court in the county of Perth, and an execution creditor, in a suit in the same division court, against one Isaac Dollery, which suit was commenced by the issuing an attachment out of the division court, and the thrashing machine, the subject of this county court suit, was seized under that attachment in the county of Perth, and placed in the hands of the clerk of the division court, and afterwards sold on an execution out of the same court.

The record of the proceedings in the county court shewed that the declaration contained two counts, one in trespass, and the other in trover, for this thrashing machine. The defendant, Whaley, (the clerk,) pleaded, 1st, not guilty by statute, referring to Consol. Stat, U. C., ch. 19, secs. 193-4-5, and ch. 126, secs. 10, 11, & 20; and 2nd, that the thrashing machine was not plaintiff's property. The defendant, Moss, (the bailiff,) pleaded two similar pleas. The defendant Somerville, (the plaintiff in the division court suit,) pleaded not guilty, and not possessed.

By an affidavit it appeared that upon the seizure of this property by the bailiff, he was notified of the plaintiff's claim, and that Somerville indemnified him. That at the trial of this cause in the county court, there was a verdict for the plaintiff against Somerville, and a nonsuit as to the clerk and bailiff. The nonsuit was taken in consequence of the judge ruling that as to the clerk and bailiff the action was local under the statutes. Leave was reserved to the defendant Somerville to move to enter a nonsuit as to him, on the ground that he was entitled to notice of action, and that the venue as to him was local. The application was made but in order to obtain the opinion of this court the parties agreed that this motion should be made on behalf of the defendant Somerville to prevent any further proceedings being taken in the county court against him.

Durand, shewing cause, citing *Staight* v. *Gee*, 2 Stark, N. P. C., 445; *Hopkins* v. *Crowe*, 4 A. & E. 774.

Read, Q. C., referred to *Brown* v. *Shea*, 5 U. C., Q. B., 141; *Shatwell* v. *Hall*, 10 M. & W., 522; *Mellor* v. *Leather*, 1 E. & B., 619.

Draper, C. J.—It does not appear to us that the plaintiff in a division court suit, who on an attachment against the goods of A., indemnifies the bailiff for seizing, and afterwards on execution in the same suit, for selling the goods of B., can claim in an action of trespass the protection of the statute, (Consol. Stat. U. C., ch. 19, secs. 192 and 193) either as to venue or notice of action; and that as to the action proceeding against him, there should be no prohibition. The plaintiff, for all we see in the present state of the record, is entitled to recover.

Per cur.—Rule refused.

Smith v. Spencer.

Railway—Misnomer—Stock-book—Shareholder—Scrip—Evidence—Nonsuit—Fi. fa.—Director—Sheriff becoming one after issue of fi fa, but before its return—Amendment—Statutes 16 Vic., 241—18 Vic, 36.

Held that the subscription to a stock-book of a railway company was sufficient evidence of the party subscribing being a shareholder under the definition of that term in the Railway Clauses Consolidation Act, and that it was not necessary that scrip should be issued for the stock to constitute such subscriber a shareholder.

2. That the Port Hope, Lindsay, and Beaverton Railway Company is an established corporation, it being recognised as such by the statutes 16 Vic., ch. 241, and 18 Vic, ch. 36.

3. A party having signed his name in a stock-book of a railway company, the number of shares subscribed for being filled in by another person, who, being called as a witness, swore that he did it with the sanction of the subscriber, and the jury upon the evidence having found the subscription sufficient, *held*, that it was a point for their decision, (the jury's,) and could not be made a ground of nonsuit afterwards.

4. That a writ of *fi. fa.* against a railway company, which was directed to a sheriff, before he became a director in the company, was properly directed and returnable by him, and his becoming a director before the return of the writ did not invalidate it.

5. That the naming of a railway, "railroad," at the heading of the page of a stock-book did not vitiate the subscription.

6. A stock-book for a railway company having been opened and signed and a new one substituted therefor, with a provision that any subscriber to the old one might withdraw by giving notice to the president of the company, *held*, that a subscriber who omitted to avail himself of the provision by giving such notice, was not relieved of his responsibility upon the original subscription.

The defendant having moved in arrest of judgment on the ground that the declaration claimed the amount of the judgment against a railway company, instead of the amount of stock subscribed by the defendant, the court in the exercise of its discretion allowed the plaintiff to amend.

The declaration stated that on the 28th of May, 1861, the plaintiff recovered judgment against the Port Hope, Lindsay, and Beaverton Railway Company, for £3763 9s. 3d. damages, and £25 16s. 7d. costs, and thereupon sued out a *fi. fa*, to the sheriff of Northumberland and Durham, commanding him &c, to which the said sheriff returned *nulla bona*. Averment, that the judgment is still unsatisfied: that before the judgment, an act was passed to incorporate the Peterboro' and Port Hope Railway Company, in which company defendant became a shareholder of fifteen shares, of £10 each. Several statutes were stated by which the name of the Peterboro' and Port Hope Railway Company was changed, and it was styled the Port Hope, Lindsay, and Beaverton Railway Company. Averment, that defendant has not paid up his stock, or any part thereof, or the interest payable thereon, although defendant is still a shareholder, and that the whole amount of the stock and interest thereon is due, whereby an action hath accrued to plaintiff to demand and have from defendant the amount due on the said execution, and plaintiff claimed £4500.

Pleas.—1st. Never indebted. 2nd. That defendant did not become nor is he a shareholder in the said company as alleged.

The trial took place at the winter assizes, at Toronto, in January, 1862. An exemplification of the judgment against the company was put in, on which were issued two writs of *fi. fa.* one directed to the sheriff of Northumberland and Durham, issued the 28th of May, 1861, the other to the sheriff of Victoria, issued the 16th of August, 1861. The first writ was received by the sheriff on the

28th of May, 1861, and was returned on the 16th of August following, *nulla bona*. The second was received on the 17th of August, 1861, was returned on the 19th of the same month, *nulla bona*. This action was commenced on the 31st August, 1861 The sheriff of Northumberland and Durham became a director of thie company in June, 1861. Evidence was given that in 1859 all the chattel property of the company had been sold upon writs of *fi. fa.*

William Millard was examined, and swore that in 1847 and 1848 he was secretary of the company. He proved the stock-book in which the defendant's name was entered as a subscriber fo. fifteen shares; this witness stated that the word "fifteen" was in his own hand writing, but that he would not have put it there but by defendant's authority. The signature of the defendant following the word "fifteen," in the same line of the book, was sworn to distinctly. The defendant never made any payment on his stock, and Millard swore that scrip was only issued to parties who paid calls.

A nonsuit was moved for on the following grounds:

1st. That the stock-book was only one side of the contract, and that it should be proved that scrip was granted or payement made, or something done on defendant's part.

2nd That it was not shewn the company had complied with the terms of their first charter, so as to bring them into legal existence.

3rd. The filling up of the word "fifteen" should be positively shown to be defendant's act.

4th The sheriff was a director at the date of the return of the *fi. fa.*, and therefore there was no proper return to it.

5th. The heading of the page of the stock-book whereon defendant's signature appeared, was for stock in the Peterboro' and Port Hope "Railroad Company," the incorporation was of the "Railway Company."

6th. A subscriber under the first act should be shewn to have adopted the undertaking after the other acts, in order to render him liable.

The learned judge over-ruled all the objections, reserving leave to the defendant to move for a nonsuit upon them.

The defendant then went into evidence to show that a new stock-book was opened after the later acts, amending the act of incorporation, were passed That the directors and officers of the company treated as shareholders only those whose names appeared in the new book, giving them notices to attend general meetings, elections of directors, &c. That defendant's name did not appear in the new book, or in any list of shareholders entitled to vote, and no notices were addressed to him. It did not however appear that defendant had given any notice of withdrawal or abandonment of his subscription for stock as others were proved to have done. The plaintiff had been president of the company, he loaned certain municipal bonds to the company for three months, and the directors pledged to him £4000 in harbour bonds, which it was expected would be saleable, and then plaintiff would have been paid. Plaintiff still holds the harbour bonds and has recovered this judgment for the debt thus arising. In reply the defendant was examined. He admitted his signature to the stock-book, stating that he had no recollection of authorising Millard or any one to put down the word "fifteen." He said he was not aware of any provision of law by which he could have been released from his original subscription until the day of the trial, and therefore he had given no notice availing himself of it; that he received no notices, attended no meetings, never paid any thing, and was never asked to pay, and never supposed he was a shareholder until sued in this cause.

The learned judge left it to the jury to say whether defendant authorised Millard or any one to write the word "fifteen" opposite his name. If so he directed a verdict for the plaintiff, as all other questions that arose were matters for the court.

The defendant's counsel objected, that it should be left *at large* to the jury to find whether defendant was a shareholder or not.

The jury found for the plaintiff

In Hilary Term *Spencer* obtained a rule *nisi* to enter a nonsuit on the leave reserved, on the following grounds:

1st. That defendant was not shewn to be a stock-holder, the books only containing an agreement to take stock.

2nd. That the company was not shewn to be legally established.

3rd. The alteration in the stock-book was not sufficiently or satisfactorily explained.

4th. That the sheriff, by whom the writ of *fi. fa.* against the company was returned, was a director at the time of the return, that the return was insufficient, the writ should have been addressed to the coroner.

5th. The defendant did not subscribe to the company in question, but to a Ra. oad Company, and the company was not properly named in the stock-book.

6th. That as a subscriber under the old act he was not liable under the new act without some act done by him. Or for a new trial for misdirection, in not ruling that the fact of defendant being a stockholder should be strictly proved, and that this question should have been left at large to the jury on the evidence, and not restricted to this, that if he signed the stock-book, and authorised the insertion of the number of shares put opposite his name, he should be deemed a stockholder. Or to arrest the judgment because, at the conclusion of the declaration, the plaintiff asserts a right to recover against the defendant the amount of his execution against the company, and not the amount of stock subscribed for by the defendant.

In Easter Term, *R. A. Harrison* shewed cause, citing Birmingham, &c., *Ry. Co.* v. *Locke*, 1 Q. B. 256; *Moore* v. *Murphy*, 11 U. C. C. P. 447; *Doe* v. *Catomore*, 16 Q. B. 745; *Moore* v. *Kirkland*, 5 U. C. C. P. 457; *Henderson* v. *Royal British Bank*, 7 E. & B. 356; *Danell* v. *Royal British Bank*, 1 H. & N. 681; *Powis* v. *Harding*, 1 C. B. N. S. 533; *Toronto & Lake Huron Ry. Co.* v. *Crookshank*, 4 Q. B. U. C. 309, 316; *Wilkinson* v. *Sharland*, 11 Exch. 88; *Parsons* v. *Alexander*, 5 E. & B. 263; *Jordan* v. *Marr*, 4 U. C. Q. B. 53; *Thomas* v. *Hilmer*, 4 U. C. Q. B. 527; *Duppa* v. *Mayo*, 1 Saund. 285, n 5.

C. S Patterson and *Spencer*, *contra*, cited *Columbine* v. *Chichester*, 2 Phil. 27; *Duke* v. *Andrews* 2 Exch 290; *Wontner* v. *Shairp*, 4 C. B. 404; *Oriental Inland Steam Co.* v. *Briggs*, 8 Jur. N. S. 201; *New Brunswick Ry. Co.* v. *Muggeridge*, 4 H. & N. 160, and in Error 580; *Ness* v. *Angas*, 3 Exch. 805; *Ness* v. *Armstrong*, 4 Exch. 21.

DRAPER, C. J.—The rule asks to enter a nonsuit on leave reserved, for a new trial, and to arrest the judgment.

As to the first objection, I think there was sufficient evidence to shew that defendant was a shareholder, according to the definition of that term contained in the Railway Clauses Consolidation Act, which is incorporated with one of the acts constituting the charter of this company. The very first act under which the defendant became a subscriber incorporates certain named persons and all such others as shall become stockholders Nothing more than subscribing stock seems to have been requisite, as the calls could only be made by the directors, and they had to be elected by the stockholders. The first call was limited to five per cent. on each share which they or any of them might respectively *subscribe* for. The directors were required to hold 25 shares as a qualification, and there seems to have been no other mode of obtaining such qualification but by subscribing. The numerous cases cited as to the necessity of a contract binding on both sides in order to constitute a party a shareholder are easily distinguishable. In many the company was only projected, not incorporated, in some the charter or act of incorporation expressly required certain acts or formalities, but in none that I have seen are the circumstances like, or even analogous to this case.

The second objection is, I think, clearly untenable. The 16 Vic., ch. 241, and the 18 Vic., ch. 36, recognise the company as an existing corporation.

As to the third objection, that which was called an alteration in the insertion of the word "fifteen," opposite to the defendant's name, designating the number of shares for which he subscribed, there was evidence of his authority to insert this word—it was left to the jury, and they have found it an act directly sanctioned by defendant. After this, it affords no ground for a nonsuit.

The fourth objection also fails in my opinion, when the *fi. fa.* was issued and delivered to the sheriff, it did not appear that he was connected with this company. If he was not, the writ was properly directed to him and could not have been directed to the coroner. Having received the writ the sheriff was bound to return it. It is not pretended the return was untrue, and I do not pe-

ceive why, because a sheriff may be a member of a corporation, he cannot perform ministerial acts, for or against it, in his official character. Mr. Patterson fairly said he could cite no authority to sustain the objection.

The fifth objection loses all its weight when the stock-book is examined. The heading on the first page is correct, and so is the heading on some other pages. On that on which defendant subscribed for shares, the word "Railroad" is used instead of "Railway," and the same variance exists in the heading of several other pages. There are many authorities which show that a greater variance than this in the name of a corporation is insufficient to defeat a grant to them, or to avoid acts done by or to them.

The statute 16 Vic., ch. 241, sec. 4, contains an answer to the sixth objection. By providing that no subscriber to the stock-book under the original act shall be held to be a stockholder, or be responsible as such under the act passed in the same year amending the same, *if* within a limited time he signified in writing to the president of the company *his intention to withdraw therefrom*. The inference is obvious that if he does not signify such intention he remains a stockholder.

I conclude therefore that none of the objections taken are sufficient to entitle the defendant to a judgment of nonsuit.

Then as to the new trial, I do not perhaps understand what is meant by leaving a question "at large" to a jury. I should think the absence of a specific direction much more likely to furnish a ground for complaint against a charge, than the pointing out specifically what fact or facts, if found, would legally entitle one or other party to succeed. In the present case the only question was, whether defendant was a subscriber. He admitted his handwriting on oath, and the sole doubt was if the word "fifte " was written by his direction and authority. If it was, then whether that signature and subscription constituted him a shareholder was a question of law, and certainly not one to be left "at large" to a jury. I think the learned judge exercised a sound discretion in the mode in which he left the matter to the jury, and that the application for a new trial must fail also.

As to the arrest of judgment, it is met by an application to amend. Without referring to other authorities I think the case of *Parsons* v. *Alexander*, (See *Webb* v. *Ross*, 5 Jur. N. S. 126,) justifies the amendment, while the note to 1 Saund. 285, points out its necessity. It does not affect the merits of the dispute between the parties, nor alter the application of either the law or the facts of the case. We can see, from what is before us, that if the amendment had been applied for and granted either before or at the trial, it would not have varied the defence, or altered the evidence which the plaintiff was under the necessity of giving in order to entitle him to recover. I think, therefore, the application to amend should be granted upon the payment of twenty-five shillings costs. It certainly cannot be considered to affect the costs of the trial, nor yet the costs of the proceedings, since the trial was upon points wholly unconnected with the objection in arrest of judgment, and as the master might find an apportionment almost impossible, we think it better ourselves to fix the sum.

Per cur.—Rule discharged.

THE TRUSTEES OF SCHOOL SECTION NO. 3, OF THE TOWNSHIP OF CALEDON, v. THE CORPORATION OF THE TOWNSHIP OF CALEDON.

School Trustees—Money collected for.

Held, that a demand or order from a majority of the school trustees of a school section is necessary to sustain an action for money collected under a by-law passed under the authority of sec. 34 of Consol. Stat. U. C. ch. 64.

Declaration for money payable by the defendats to the plaintiffs; for money received by the defendants for the use of the plaintiffs.

The defendants pleaded that the plaintiffs heretofore made application to the township council of the township of Caledon for the leviyng and collecting by rate according to the valuation of taxable property as expressed on the assessment roll of the said township for the year 1861, certain moneys required by the plaintiffs for the erection of a school house in school section number three, in the said township, the said moneys to be collected according to law from the freeholders and householders of such section; that thereupon the council of the said township, as the plaintiffs well knew, passed by law which provided, among other things, that there be raised, levied, and collected on all the ratable property in said school section number three of the township of Caledon the said moneys, that the same when collected should be paid to the treasurer of the said township, and that the said treasurer should pay the said moneys to the order of a majority of the trustees of said school section number three in said township, and the defendants aver that before action the said moneys, which are the identical moneys in the declaration mentioned, were in the hands of the said township treasurer, who was at all times and still is ready and willing to pay to the order of the trustees of said school section, or a majority of them, as the plaintiffs well knew, yet that no such order or demand of any kind was ever made upon the said treasurer for payment thereof.

To which the plaintiffs demurred on the ground that the plea confessed the plaintiff's cause of action without showing any good or sufficient matter of avoidance, and that the want of a demand or order by the plaintiffs is no answer in law.

Eccles, Q. C., supported the demurrer.

Harrison, contra, referred to Municipal Act, ch. 54, Con. Stat. U.C., secs 1-4-6; *Smith* v. *The Corporation of Collingwood*, 19 U. C. Q. B. 259; *Munson* v. *The Municipality of Collingwood*, 9 U. C. C. P. 497; *Topham* v. *Braddick*, 1 Taunt 572.

MORRISON, J.—This case comes before us on demurrer, and the only question to be determined is whether a demand was necessary before bringing the action. This is not like an ordinary case of debtor and creditor to which we can apply the principle of the general rule, that it is the legal duty of the one to find out and pay the other; nor is it a case of misapplication, or wrongful withholding by the defendants of the moneys in question.

The money sought to be recovered in this action was collected in the exercise of a duty imposed upon the defendants by the legislature, and in obedience to an application of the plaintiffs, made under the authority of the 34th clause of the Common School Act, Con. Stat. U. C, ch. 64. The statute is silent as to the mode of levying the assessment, and to whom and when and in what manner the moneys are to be paid over. Under the 187th section of the Municipal Act, Con. Stat. U. C. ch. 54, the defendants are required, when not otherwise authorised or provided, to exercise their powers by by-law. The defendants passed a by-law for the levying of the assessment, and they provided by it that the moneys when collected should be paid to the treasurer of the township, and that the treasurer should pay them to the order of a majority of the trustees, the plaintiffs in this suit, and it is averred that the plaintiffs had notice of the by-law, and that the moneys were in the hands of the treasurer, and that the treasurer was ever ready and willing to pay the moneys to the order of the trustees, the plaintiffs, or a majority of them, but that no order or demand was ever made on the treasurer for payment thereof. The 160th clause of the Municipal Act defines the duty of the treasurer to be, to pay all moneys to such persons and in such manner as the lawful by-laws or resolutions of the council direct. It is contended that the defendants had no authority to make any such provision as this by-law contains; but in the absence of any legislative enactment directing in what manner these moneys when collected, are to be paid to the plaintiffs, and considering that the defendants are a municipal corporation, and that the school trustees individually, as well as their officer are likely to be changed, I take it that the township council, upon the levying the assessment is cast, have an implied right, and were exercising a wise discretion in providing by their by-law for the securing of the due payment of the moneys into the hands of the proper persons as well as for a discharge to themselves and their officer. I cannot say that the mode adopted is unwarranted, nor do I think it is unreasonable. The giving of an order signed by any two of the trustees cannot be said to entail trouble on them, or to impede them or to interfere in the exercise of their duties, nor is it inconsistent with any thing in the statute.

It appears to me that the by-law was rather framed in the interest of, and for the protection of, the rights of the plaintiffs, and the reasonable presumption is that they acquiesced in it. Upon this view of the case I am of opinion that before the defendants could be rendered liable as for money had and received, that the presentation of an order or demand upon the treasurer of the defendants was necessary.

I cannot agree with Mr. Eccles, the plaintiffs counsel, that the only demand necessary was the issuing of a writ, or what in the old books is termed a demand in law, which probably originated from the writ being formerly held not to be the commencement of the action, and when it was also held that the cause of the action might accrue after the issuing of the writ and before the filing of the declaration.

I have looked into many of the reported cases of moneys had and received, but I have found none except cases against sheriffs in which the question of a demand arose. The particular circumstances of each case avoiding or implying a formal demand, but in several cases I could see from the statements reported that a demand was made before commencing proceedings. I confess that after a good deal of investigation, I have failed to discover satisfactory authority to guide me one way or the other, and I can only account for the absence of decisions, that when money was in the hands of a gratuitous holder, as in this case, it would seldom happen that so vexatious a proceeding would be had as the beginning of an action without a request or demand of payment, or to use the expression of a learned judge, "without trying to obtain the object in the way in which men acting with each other ought first to ask their rights."

The nearest class of cases is that against sheriffs for the non-payment of moneys levied under writs of execution, and after a return of money made. In such cases it has been held that this form of action will lie without any previous demand, but I think there is a wide distinction. The sheriff receives the money in the performance of a duty for which he is paid, and the very exigency of the writ requires the sheriff as said by *Bayley*, J., in Morland v. Pellatt, 8 B. & C. 772, to bring the money into court on the return day, to be paid to the execution creditor; and although *Littledale*, J., in the same case says, "I am disposed to go still further and to say that the sheriff was liable to an action for money had and received at the suit of the creditor, as soon as it was paid and before the return of the writ;" yet I do not understand that learned judge's observation to mean, without a previous demand, for during the argument when Dale v. Birch, 3 Camp. 764, was cited as a general authority that the action lay upon the receipt of the money, he remarked in reference to that case—"that was after a return was made," and *Parke*, J., in the same case, doubted whether an action would lie before the return day of the writ, and Mr. Chitty, in his first vol. of Pleading, 365, in referring to *Littledale's* dictum in the case of Morland v. Pellatt, as to a recovery before a return of the writ, adds, but the action should not be brought until after a demand of the money has been made; so I am inclined to think that those decisions rested upon the return of the writ, involving the immediate payment of the money, and avoiding the necessity of a demand.

The bearing of the courts against the hardship of bringing an action without a prior demand is shown in the case of Jeffries v. Sheppard 3 B. & Al. 696 There the sheriff had been ruled to return the *fi. fa*, and upon its return was sued for the amount, and he applied to stay the action on payment of the amount of the levy without costs, upon an affidavit that he had been always ready to pay the money, and that the action had been commenced without any demand, and the court, *Abbott*, C. J., presiding, made the rule absolute upon the ground that the action had been commenced without any previous demand. Lord *Mansfield*, in a case in Douglass, 138. says "great benefit arises from a liberal extension of the action for money had and received, because the charge and the defence in this kind of action are both governed by the true equity and conscience of the case," and he then says, "if the present action had been brought without notice of the nature of the demand, I should have thought it could not have been supported" And in another case (Cowper, 807) he says, "an action for money had and received is governed by the most liberal equity, neither party is allowed to entrap the other in form." Considering that this case may arise any day between the same kind of corporations, the question naturally presents itself, at what period and under what circumstances does money levied, as in this case, become money had and received in the hands of the township council? Is it upon the occasion of every pound as it gets into the hands of the collector or the treasurer, or is it when the amount required is collected?

There must be a time, and I cannot satisfactorily determine the time or under what circumstances otherwise than after a demand and a wrongful refusal or neglect. Under the 27th clause, sec. 12, of the Common School Act, the plaintiffs could of their own authority and by their own officer and without the intervention of the defendants have levied these moneys. It would be a very hard case indeed where a duty such as this is cast upon a town-council to levy assessments for the benefit and convenience of school trustees, if without any wrongful act on their part or misapplication of the funds, the trustees could bring an action against the council and mulct the municipality in costs without any previous demand or notice whatever. If the plaintiffs had applied for a mandamus to enforce payment of these school moneys the application would not be entertained without showing a demand.

Per cur.—Judgment for the defendants on the demurrer.

CHANCERY.

(*Reported by* THOMAS HODGINS, ESQ., LL.B., *Barrister-at-Law*).

PROUDFOOT v. LOUNT.

Judgment—Registration—Misnomer—Seal of court.

A judgment was recovered against "*Charles Westley Lount*" which was the correct name of the defendant. The registration was of a judgment against "*Charles Wesley Lount*" *Held*, sufficient.

The certificate of registration of a judgment given by the clerk of the Queen's Bench, expressed it to be under "my hand and seal," and it being objected that it should have been expressed to be under the seal of the court, leave was given to the judgment creditor to produce an affidavit to shew what seal was really affixed to the certificate.

This was a motion for a decree by the assignees of a judgment recovered against the defendant.

The points involved appear in the judgment.

McBride for the plaintiffs.

Blake, for defendant.

SPRAGGE, V. C.—The question raised is whether there has been an effectual registration of the judgment recovered by the plaintiffs in the name of *Edward Dudley McMahon*, against the defendant.

The defendants alleges that the certificates for registration are defective. It is a registration and a re-registration. It is pointed out as a defect in the original certificate that the style of the court is, "In the Queen's Bench," instead of "In the Court of Queen's Bench." The words in the statute are, "In the court of ——." Another alleged defect is, the omission of the words, "in a plea of," stating the form of action. The words in the statute being "In a plea of ——." But these points had been raised before my brother *Esten*, in another cause; and we have since considered them together, and have come to the conclusion that the certificate is, notwithstanding, sufficient within the statute. There is but one thing to which the words "In the Queen's Bench" can apply, that is, the court of Queen's bench, and it is the ordinary style by which the court is designated in its pleadings and proceedings. It is not indeed the full statutory style of the court, but neither is the style given in the form of certificate given by the statute; the full style being, "Her Majesty's Court of Queen's Bench for Upper Canada," but it is a correct designation and describes the Court of Queen's Bench, and that only, as much as if the words "Court of were introduced. Those words are probably inserted in the statute only to shew, that it was some court that was to be designated.

I think it must have been through inadvertance that the words "In a plea of ——," find a place in the form of certificate given by the statute, since the passing of the Common Law Procedure Act. The certificate is the act of a ministerial officer of the court; and he can only certify what appears by the records of his office. Before the passing of that act, he saw upon the face of the roll what the form of action was; it was stated in so many words, "In a plea of debt," or "in a plea of trespass on the case upon premises," or otherwise as the case might be; but since the passing of the act this has ceased to be the case; and if he fills up the blank after the words, "in a plea of," he must do it by finding

out in some way, what the form of action would be if expressed, or would have been but for the passing of the act. The attorney entering the judgment, on asking for the certificate, may tell him, but he could not certify for information so obtained; and as a ministerial officer he has no right to certify from conclusions formed in his own mind. In short, that is implied which in the certificates of the registrar of this court is expressed "as by my books appear;" or upon the statutory certificate, "as by the roll of the said judgment appears."

A further objection is taken to the original certificate, that it does not give the correct name of the defendant; the error pointed out is the omission of a letter in the second name; the name in the certificate being *Charles Wesley Lount*, the name in the judgment, *Charles Westley Lount*, and that being the correct name.

The object of the statute being, as Lord *St. Leonards* says of the act of William & Mary, to enable purchasers to discover judgments by the names of the persons against whom they are entered; if the name of a defendant were falsely entered, his lordship continues, as *Compton* for *Crompton*, the judgment will be void against purchasers.

It cannot be contended, I think, that the certificate must be accurate to the very letter. In the case referred to the true name was *Crompton*; if it had been spelt with two *n*'s instead of one, that would not I apprehend, render the judgment void, but as it was, it was calculated to mislead. Suppose an index containing a number of names and the name of *Crompton* the one searched for, the person searching would not commence certainly before "*Cr*," or probably "*Cro*," and would not meet with the name *Compton* at all; or suppose the name *Compton* searched for, the person making the search would naturally leave of after getting to the end of names beginning with "*Com*," so that to hold a purchaser bound by judgments against the one name, as affecting the lands of the other would be manifestly dangerous and unjust.

But the question, it appears to me is, how is a purchaser bound, and why; I apprehend it is because he is affected with notice. If so that which would convey notice to a person of ordinary intelligence would, I think, be sufficient; either that must be the principle, or the slightest deviation in the spelling of any one of the several names which the judgment debtor may have will avoid the registration. There is no such strictness in any other civil proceeding. I may instance cases where parties have been held to bail, and where if the names are *idem sonantia*, the defendant is not discharged, and the courts have been by no means rigid in seeing that the names sound exactly alike. In ——— v. *Rennolls*, (*a*) the affidavit to hold to bail called the defendant Rennolls; in the suit he was called Rennoll; his discharge was moved for, but the court refused it, saying that the mistake of a letter in spelling the name, was not a ground for discharging the defendant. So *Benditto* and *Benedetto* (*b*) were held *idem sonantia*, on an application to discharge a defendant from arrest.

In the case before me the surname is strictly correct, so is the christian name; the intermediate name is spelt *Wesley*, instead of *Westley*. It would require more than ordinarily distinct pronunciation, and a very critical ear to distinguish any difference; the mistake certainly would not entitle a defendant to be discharged from arrest—ought it to avoid a registration of judgment?—the register's index would direct a person searching to the right surname; but there might be judgments against several of the same surname; the christian and the second name, if any, are points of identity Suppose the person searching to be making his searches on behalf of a person proposing to purchase from *Charles Westley Lount*, finding a judgment registered against *Charles Wesley Lount*, he would surely be wilfully blind, if he had his eyes, to the probable fact, amounting almost to certainty, that they were one and the same person; there would at least be enough to put him upon enquiry, and the judgment roll would at once prove the identity.

If the principle be that of notice, as I think it must be, I am satisfied it is a good certificate. Suppose the case of a mortgage given by this defendant, and an intending purchaser notified by letter from a proper quarter that *Charles Wesley Lount*, had given such mortgage, it could not be doubted, I think, that he would be affected with notice.

(*a*) 1 Ch. Rep 650. a (*b*) 2 Taunt. 401.

The judgment in question appears to have been registered in three offices, Simcoe, York, and the city of Toronto. The error has occurred only in the registration for York; there is no question as to the registration in Simcoe and Toronto, but I think it is good also in the county of York. In this case it is the judgment debtor himself who makes the objection, not an incumbrancer or purchaser. It is objected that it does not lie with him to make it. Certainly the reasons for accuracy in his name do not apply to him; but inasmuch as registration is, or rather was, required to make the judgment a charge, I suppose it is necessary to shew against him that there is a valid registration.

There has, however, been a re-registration, and if that is sufficient it is not material as against the defendant to shew the sufficiency of the former. Against this second registration it is objected (in addition to the objections common to both) that the seal affixed to the certificate is not that of the court, but of the Clerk of the Crown and Pleas; the attestation being, "In witness whereof I have hereunto set my hand and seal this," &c.

The form of certificate given by the statute contains no attestation; that is gratuitous on the part of the officer; and if it misdescribes the seal really affixed, it will not, I think, avoid the certificate. I think an opportunity should be afforded to ascertain the fact, which can be done either by an inspection of the certificate, or by an affidavit as to the identity of the seal. Probably there may be no real question as to the fact. If there is, the register, or a clerk in the Crown office can make affidavit as to its identity.

If it should appear that it is the seal of the court that is affixed to the certificate, the plaintiffs will be entitled to their decree in respect of their judgment as well as their mortgage.

WARREN V. TAYLOR.—ROSS V. TAYLOR.

Mortgage—Judgment creditor—Registration and re-registration of judgment—foreclosure

A party foreclosing subject to a prior mortgage cannot call the common mortgagor if he has the equity of redemption, to give evidence as to the amount due upon the prior mortgage

A second mortgagee, as such, cannot impeach a prior registered mortgage as fraudulent and void against creditors, but a judgment creditor, having accepted a mortgage, does not lose his rights as a judgment creditor.

Where the usual affidavit proving a mortgage debt is made, the onus of reducing the amount lies upon the opposite party.

A judgment creditor omitted to re-register within three years, *held*, that he thereby lost his lien as to persons purchasing or becoming incumbrancers after that time, and before a re-registration was effected.

These actions were consolidated upon the hearing. The facts are set out in the judgment of his Honor Vice-Chancellor *Esten*, upon the appeal from the Master's report.

The cause was originally heard before his Honor Vice-Chancellor *Spragge*; upon the enquiry there directed, the accounts between the parties were taken, and the finding of the Master thereon gave rise to the appeal.

Proudfoot, for the plaintiff, Warren.

Crickmore and *M. Vankoughnet*, for defendant, Baldwin.

McDonald, for Ross, Mitchell & Co.

SPRAGGE, V. C.—I think the most proper order to make at the present stage of the cause is simply to direct an enquiry as to the amount due upon the mortgage to Merrick; the master to enquire whether it was given in whole or in part for moneys then due; or in whole or in part to cover future advances.

I think that the evidence of Taylor is not admissible upon the question of the amount due upon the mortgage; the equity of redemption is in him, and if his evidence could be received to cut down the amount due on Merrick's mortgage, it would diminish *pro tanto* the amount to be ultimately paid by himself, whatever the priority might be as between Warren, the present holder of the mortgage, and Ross, Mitchell, & Fisken, and other incumbrancers. It was suggested that his evidence might be received as between Warren and other incumbrancers, leaving what was due upon the mortgage to Merrick, as between himself and Warren, to rest upon other evidence. He is called upon two points, one to shew that there was no consideration for the mortgage, but that, being in embarrassed circumstances, it was given to hinder and delay creditors, and so is void under the 13th Elizabeth; the other, to

shew that if any amount was due it was a much smaller sum than the amount of the mortgage. The latter would properly be matter of account, but still would have its bearing upon the first point; upon the mere matter of account it is not receivable here, or indeed at all. Taylor's interest upon the first point, it appears to me, is to shew the conveyance not fraudulent, but to reduce the amount due upon it; for this latter purpose his evidence is not receivable. The question is, whether it is for the former, as between himself and the holder of the mortgage, what must be the decree if shewn to be fraudulent, and what if not shewn to be fraudulent? In the latter case he will have a right to redeem upon payment of what may really appear to be due. In the former, he would have no right to redeem at all.

But here the question is between an innocent purchaser for value of this mortgage, for such I think, upon the evidence, Warren appears to be, and a subsequent incumbrancer. The assignee of the mortgage takes it of course subject to the state of the account as between mortgagor and mortgagee; but suppose there to have been really a mortgage debt, whether for the whole amount of the mortgage, or for less, will the fraudulent purpose for which the mortgage was made affect an innocent assignee? If it could not, then Taylor's evidence cannot be received, for it is not receivable upon the question of amount, and as between Warren and subsequent incumbrancers the fraudulent purpose of Taylor and Merrick is immaterial. If upon further directions counsel desire to raise that question against Warren, it will be competent to them to do so. Merrick's evidence is not objected to, but I think is not to be relied upon implicitly. According to his account Taylor's indebtedness to him was of a very large amount. The mortgage was for $3500, and that he says was only for a portion of it, he says a portion of the contract price, whatever that may mean; but he adds: "I having received $700 from the railway company," and in his assignment to Warren he covenants that the whole $3500 was then due; that it is clear therefore that he claimed the two sums, so that according to his account, on the 28th of May, 1854, $420 was due to him beside a portion of the item in paper O. Then came the amount appearing in paper O., £220, which supposing it to be in New York currency, would be $550 more, making in all $4750. Now even his own evidence bears out nothing, even approaching that amount: Fynn and Christian assisted at the work; their evidence would bring the amount still lower, especially that of Fynn, but I thought he exhibited a desire to reduce it as low as possible

I think it desirable, however, to say no more at present upon the question of account.

ESTEN, V. C.—The plaintiff Warren filed his bill for the foreclosure of a mortgage for $3500, made by the defendant Taylor to one Merrick, and transferred by him to Warren, making the defendants Ross, Mitchell, & Fisken parties as subsequent incumbrancers, by judgment and mortgage, who set up as a defence, that the plaintiff's mortgage was made to defraud creditors and claiming priority over it by reason of its alleged defective registration, and in the meantime filed their bill to establish their own priority, alleging the same facts as they had stated in their answers to the other bill. Evidence was entered into on both sides, and by the decree pronounced at the hearing of both causes, which were consolidated, the validity and priority of the plaintiff Warren's mortgage was established; and it was referred to the master to take an account of what was due under it, and to enquire what the consideration for it was. The master received further evidence, and reported only £104 due on Warren's mortgage for principal and interest. Both parties have excepted to this report. Warren, because the whole amount mentioned in the mortgage was not allowed; Ross, Mitchell, & Fisken, because the master ought to have reported nothing due the defendants Warren and Merrick to the bill of Ross, Mitchell, & Fisken, having alleged a different consideration for that mortgage from the one proved, and not having proved the one alleged.

The facts of the case are, that Taylor was the owner and master of a vessel called the "Matilda," which was wrecked in the fall of 1850, in Lake Ontario, off the defendant Merrick's farm, laden with 250 tons of railway iron for the Cleveland and Pittsburg Railway Company. She sank and lay in about 10 feet water, on a sandy and gravelly bottom, about half a mile from the shore, and about two miles and a half from the place where the cargo could be landed. Taylor returned to Canada, having given authority to Merrick to watch the vessel, which remained in the state I have described until the following spring, when Taylor returned to the place, and in the character of agent of the railway company entered into a written contract with Merrick to remove and land the cargo of the vessel. This contract is produced and proved. It provides that if Merrick should succeed in removing the water from the vessel he should receive for the work to be performed the sum of $1200; if not, that he should receive a larger sum. Taylor was advised, he says and he thought that as master of the vessel he could bind the company by this contract. Merrick performed the contract on his part, and landed the whole cargo, but did not succeed in removing the water that was in the vessel, and was obliged to employ grapnels, and he became therefore entitled to the larger sum mentioned in the contract. The company repudiated the contract, and refused to pay more than $700, which they did pay to Merrick, who however held the iron as long as he could, in the endeavour to compel the company to pay a larger sum, but finally was obliged to relinquish it, and be content with the $700. Taylor then made the mortgage in question to secure to Merrick the balance of the sum he had contracted to pay him for raising and landing the cargo. The mortgage was taken by Taylor to Canada for the purpose of registration, and was there executed or acknowledged in the presence of one Kelly, on whose oath it was registered. It remained in the registry office apparently until May, 1852, when Merrick and Taylor being at the registry office, were attended at their request by Mr. Woods, to whom the mortgage was delivered by Merrick in the presence of Taylor; and Merrick also gave him instructions with respect to it, and Mr. Woods took a power of attorney from Merrick to place himself, as he says, in a proper position in the matter. The mortgage remained in Mr. Woods' possession until the year 1858, without any communication between him and Merrick with respect to it. The principal sum secured by it fell due in May, 1857; the interest, however, was payable in the meantime. In the year 1857 Merrick sold this mortgage to Warren, and visited Canada for the purpose of making a search for it, which he made in the registry office without success, appearing to have forgotten that he had left it in the possession of Mr. Woods. However, he procured a certificate of its registration, which satisfied Warren, and the transfer was completed. The mortgage itself was supposed to be lost, but in 1858 a Mr. Keating advised Merrick to enquire for it of Mr. Woods, and immediately that application was made to him produced it, and returned it to Merrick. The present suit of Warren was then instituted for the foreclosure of this mortgage.

I may remark that Messrs. Ross, Mitchell, & Fisken, the objection of defective registration having been overruled, could not, as mortgagees, impeach the plaintiff Warren's mortgage as fraudulent and void against creditors. As judgment creditors, however, they could take that ground; and of course their acceptance of a mortgage did not prejudice or affect their rights as judgment creditors. The decree, however, established, that, whatever the mortgage held by Warren, may have been as between Taylor and Merrick, in the hands of Warren, who was a *bonâ fide* purchaser without notice, it was good for whatever had been actually advanced upon it, and referred it to the master to ascertain what amount had been advanced upon it, and what remained due in respect of it, and what the consideration for it was.

Upon this enquiry, the mortgage having been produced, and the plaintiff having made affidavit in the usual manner, claiming the whole amount secured by it, with interest, I think the onus lay upon the defendants, Ross, Mitchell, & Fisken, to reduce it.

Looking to the evidence which was adduced before the hearing, and in the master's office, I do not think enough is shewn to overcome the legal effect of the mortgage deed. Even supposing the contract upon which it was founded to have named, as it is supposed to have done, the sum of $3000 as the additional sum to be paid in case the water could not be removed from the vessel, I should think, looking both to the express evidence and the nature of the transaction, that enough had not been shewn to qualify or impair the legal effect of the mortgage, and that the account should be taken according to its legal import as it stands. The master thinks that it was a device either to defraud creditors, or extort

from the railway company the price not only of saving the cargo, but of raising and refitting the vessel. The former hypothesis is excluded by the decree; and the latter would not affect the plaintiff's claim, for if the services stipulated for were rendered, Taylor would be equally bound by the mortgage to its full extent, whether an intention existed to defraud the company or not. I do not see, however, the ground of this latter supposition.

I presume the only or the main chance of raising the vessel lay in removing the water from her hold, in which case she could have been raised and refitted. But in this event only the smaller sum of $1200 would become payable, to which probably no objection would be made. The larger sum would become payable only in the event of the water being irremovable, in which case it was certainly much less probable, perhaps very improbable, that the vessel would be raised, or could be refitted. It is a remarkable circumstance, however, and appears to have escaped the notice of the solicitors on both sides, although I doubt not well known to the parties, or to some of them, that the contract names as the larger sum to be paid in case it should be found impossible to remove the water from the vessel, not three *thousand* dollars, as was supposed, but three *hundred* dollars. The word is too plain to admit of doubt.

I shall refer the case back to the master to review his report with reference to the foregoing directions, without costs, and with liberty to both parties to adduce further evidence.

As to the appeal of Baldwin, whose claim has been disallowed by the master on account of his neglect to re-register his judgment, I am inclined to agree with the master, and to think his construction of the act correct; but I do not see that it is necessary to decide the point, inasmuch as the plaintiff Warren can have no objection, but must rather desire to retain Baldwin as a party; and the question between Ross, Mitchell, & Co. and Baldwin can be only one of priority, and so long as priority is accorded to them, they cannot complain. No doubt can be entertained that the defendants, Ross, Mitchell, & Fisken, must be entitled to priority, inasmuch as their title accrued more than three years after the registration of Baldwin's judgment; and even according to the construction which has been adopted in England, their priority would be incontestable. The only person entitled to require the entire exclusion of Baldwin is the mortgagor Taylor, who makes no complaint; and if he did, I think I should grant to Baldwin an opportunity of re-registering his mortgage, if he desired it. If only a question of priority has arisen, I think Messrs. Ross, Mitchell, & Fisken, must have their costs of this appeal; but if their priority is conceded, and they are pressing for the entire exclusion of Baldwin, I think it should be without costs.

McDonald v. Rodger.

Registration—Judgment creditor—Misnomer—Practice—Appeal from master.

A confession of judgment was executed in the name of "*Matthew Rodger.*" The certificate for registration was of a judgment against "*Matthew Rodgers.*" *Held*, the mistake vitiated the registration.

Semble, that in a certificate of judgment it is sufficient to state the amount of the true debt.

Where an encumbrancer who objected to the order of priority in which he was placed, appealed from the finding of the master, the court considered this the more convenient course to adopt, although it was open to him to have moved to discharge the master's order.

This was an appeal from the master's report made in a foreclosure suit, on the grounds stated in the judgment of his Honor Vice-Chancellor *Esten*, before whom the appeal was argued.

Roaf, for the judgment creditor, who appealed, cited amongst other cases *Beavan* v. *Oxford*, (1 Jur. N. S. 154); *Brandling* v. *Plummer*, (3 Jur. N. S. 40; S. C. 26 L. J. N.S.; Ch. 326.

Blake, contra, cited *Underwood* v. *Lord Courtown*, (2 Sch. & L. 64-5.) *The Queen* v. *Registrar of Middlesex*, (15 Q. B 976); *Sale* v. *Compton*, (1 Wils. 61); *McQuestion* v. *Campbell*.

Esten, V. C.—The facts of the case are, that a judgment was entered on a confession against the defendant by the appellant *Smith*, on the 22nd of June, in the year 1854, for the sum of £200 damages, and £3 12s. 8d. costs. This judgment was registered on or about the same day, in the registry of the county of Huron, where the lands comprised in the mortgage in question in this suit are situated. The judgment was re-registered on or about the 18th of May, 1858, in the same registry. The heading of both certificates is, "In the Queen's Bench," neither of them mentions the form of action; in both the defendant is called "*Matthew Rodgers*" In the year 1856 the mortgage in question was executed by the defendant *Rodger* to the plaintiff *McDonald*, and registered in the same year in the proper registry. The master has placed *Smith* after the plaintiff in point of priority; and *Smith* has preferred this appeal against that decision. *Smith* might have applied to discharge the master's order, but the course he has taken was, I think, open to him, and it was more convenient than the other. The master considered the registration of the judgment, in 1854, invalid. The grounds of his judgment do not appear. The re-registration is impugned on the ground that the words, "Court of," are omitted from the heading of the certificate; that the form of action is not mentioned; that the name is misspelled; and that the true debt is mentioned, and not the amount for which judgment is nominally entered. The two first defects have been decided in this court to be insufficient to vitiate the registration.

With regard to the true debt being mentioned, supposing the question to be untouched by decision, I should doubt whether the registration would be void on that account. It would be extremely mischievous to allow an incorrect and deceptive registration. Truth should be the character of a registry, as the object of its institution is to inform the public of the exact state of the title, so that they may purchase and deal with safety and confidence. At the same time it can hardly be said that a registration according to the tenor of the judgment would be wrong. In truth I think it would be highly proper for the clerks to deviate slightly from the form prescribed by the act in such cases, and mention both the nominal amount of the judgment and the true debt.

If the master has deemed the registration in this instance void on account of the nominal amount of the judgment not being mentioned, I should not differ from him. I think, however, this registration was void on account of the mistake in the name. It is true that the close resemblance between the two names would excite the strongest suspicion in the mind of a purchaser; but it is impossible to draw the line between different sorts of mistakes, and it is much better to require a strict adherence to fact. According to the case of *Sale* v. *Compton*, the mistake of "*Compton*" for "*Crompton*" seems to have vitiated the judgment. I must intend the cognovit to have been signed with the true name, and then I think the mistake which has occurred in the present case would vitiate the registration. It might totally mislead intending purchasers. I also think that the registration effected in 1854 became void after the lapse of three years, and that the lien of the judgment thereupon totally ceased as to the debtor and all other persons, and that thereby the plaintiff's mortgage became accelerated.

It is clear also, I think, that with regard to the Francis town lots, the plaintiff would be entitled to priority as to the purchase money, and the sum of £300 agreed to be advanced; but as to future advances I do not see on what ground he could claim priority. Upon all the grounds I think the appeal should be dismissed with costs.

U. S. REPORTS.

SUPREME COURT.

Sutter et al. v. The Trustees of the "First Reformed Dutch Church."

Same v. Same.

A majority of a religious congregation have power to dissolve their connection or union with a denomination with which they had connected themselves after their organization.

Appeal from the Common Pleas of Philadelphia. Dissenting opinion of

Thompson, J.—I cannot agree to a judgment of affirmation in either of the above cases, and it is due to the profession as well

as to myself, that the reasons for my dissent from the judgment of the majority of my brethren should be stated. The case presents some delicate and very nice points in civil jurisprudence. Indeed, I am greatly impressed with the idea that the boundary of mere civil jurisdiction has been transcended in arriving at conclusions below and here.

In order to a satisfactory understanding of what may be said, however, it will be necessary to present the facts, and state the main points of controversy as clearly, but briefly as possible. Dissenting opinions must be self-sustaining, as the facts are not entitled to be officially presented by an authorized reporter, and ordinary readers would hardly be likely to hunt them up for themselves, and hence the necessity for a statement of them in this opinion.

The complainants claim to be pew-holders or renters in the "First Reformed Dutch Church of the City and vicinity of Philadelphia," and bring their bills of complaint against the trustees of the church to restore them, as appears by the second bill.

1. From dissolving the union formed in 1813 between this church in its corporative name and capacity, of the "Evangelical Congregation of the City and vicinity of Philadelphia," and the New Brunswick classis, an inferior church, indicatory of the Dutch Reformed Church in the United States, and that it may be decreed to be unlawful for the trustees of the said church to supply the pulpit of the church with a pastor, or to interfere with the exercise of that power by the consistory of the church.

2. In the first bill, which for convenience I notice as the second, the prayer is to enjoin the trustees from applying the income, property and effects of the church in the inculcation or teaching of any other doctrine, faith or practice, than those contained in the Heidelburg Catechism, as expounded in its *Calvinistic interpretation*, being that given by the ecclesiastical assembly known as the Synod of Dort, which assembled at Dordrecht, in Holland, in the year 1618 or 1619, and from establishing in the pulpit of the said church as its pastor or teacher, any clergyman who is not of "sound doctrine" with reference to this standard of faith, and who is not regularly ordained as required by the *charter and fundamental articles* of said corporation, "and especially from installing in the pastorate of the said church the Rev. George W. Smiley, or applying the income or effects of said corporation for his maintenance, support or salary as the minister of said church," &c.

These I think are the material matters embraced in the plaintiffs' two bills. Many things seem to be set forth in them by way of inducement, but being denied in the answers, and not proved by the complainants, consequently go for nothing. Such, for instance, as that the said "First Reformed Dutch Church of the City and vicinity of Philadelphia was originally organized in 1809;" that it was the *design* and *purpose* of the fundamental law of the church that the pastors should be *Calvinistic* and not *Arminian* in doctrine, and should be ordained by Christian denominations so holding. That illegal votes had been given in the passage of the resolution for dissolving the union with the classis, and the like.

These things were mostly unsustained by proof, and where there was any testimony well disproved, the complainants' case gathers no strength from such allegations.

The learned judge of the Common Pleas overruled many points in the plaintiffs' bill as insufficient in law to entitle them to relief, but on certain other grounds to be noticed, decreed in both cases in their favour, and hence these appeals by the trustees.

The members of the association which constituted this congregation and church, originally belonged to a congregation known as the "German Reformed Congregation in the City of Philadelphia," which was and still is in ecclesiastical connection and is a part of the German Reformed Church of the United States. Its declared standard of faith with the Bible is the Heidelburg Catechism. The withdrawal from the church took place in 1809, and all the testimony accords in proving that the separation was not schismatic, but only because the seceding members wished to have church service in English instead of German, as more profitable and suitable to the education and tastes of the youths belonging to them. Not being able to secure this in the old church, they accordingly withdrew and associated themselves as a congregation at first under the name of the "Second Reformed Association," certainly regarding the church they left as the same in faith, and to be considered the *first* German Reformed Church. They soon purchased a burying ground, procured a place to hold public worship, and organized formally as a congregation by the name of the "Evangelical Reformed Congregation of the City and vicinity of Philadelphia." By this name they were incorporated by the court in 1810, and to the trustees duly appointed under the charter, the title to the burying ground and the church lot was conveyed in trust for the congregation. Fundamental articles for the government and declaratory of a standard of the faith of the congregation were adopted, and remain unchanged until this hour, excepting only in the names. The temporalities of the church were committed to the trustees, and upon them also devolved the duty of calling or inviting candidates for the ministry when there was a vacancy, the eventual employment of whom depended on a vote of the congregation. By the Fundamental Articles the pastor was required to be of the "Reformed or Presbyterian denomination, regularly ordained, of sound doctrine, and unblemished character." And "he must preach the word of *God*, and doctrines of *Jesus Christ*, according to the Prophets and the Apostles, and the precepts contained in the Heidelburg Catechism." Rub's and Reg. art. 1.

"The spiritual affairs of the congregation," according to art. IV., "shall be under the government of the minister and seven elders, who shall form a session."

By Art. IX. of the charter it is declared, it shall not be construed to prevent the congregation from "uniting with *any* other Christian denomination *whenever* it shall appear to a majority of the members of said congregation to be for their advantage."

Under this charter and these fundamental articles the congregation remained for several years. It was their desire, and they made efforts, to procure a minister of the German Reformed denomination to preach to them in English, but were unsuccessful. They procured a Clergyman of the Presbyterian, and after him, one or more ministers in succession of the Dutch Reformed denomination, to preach in English. The question was often agitated about an union with some other church judicatory, but never settled until in 1813, during the pastorate of the Rev. Dr Brodhead, of the Reformed Dutch Church, when an union or connection was formed with the classis of the Reformed Church of New Brunswick, New Jersey. This was brought about doubtless by the influence of this reverend gentleman, for before his time the project of union had always failed. In the provisional resolutions of the congregation, a declaration is made which indicates the presence of a very partial advocate for that peculiar church, for the act is put upon the ground that "from religious education and habits we (the congregation) are more closely connected with the Low Dutch Reformed Church than any other denomination." It is difficult to believe that this declaration was intended by the congregation to mean so much as is attributed to it now. This is to say, an expression of preference for the faith and practice of a church in which the members had not been trained and brought up, over one in which from infancy they had been accustomed to worship, as had their fathers before them. I utterly discard this as evidence of a preference for the doctrines of the Heidelburg Catechism, as now claimed to have been understood by the congregation, although, perhaps, it might have been by the penman so designed. It must not be allowed the weight of a feather against the solemn declaration in the fundamental articles, and the known faith and practice of those who adopted them. They were German Reformed in sentiment, and their standard of faith was the Heidelburg Catechism, which it is proved, from many sources, is not essentially Calvinistic, and tolerates a diversity of belief on a subject which is a dogma of the Dutch Reformed Church, namely, the doctrine of limited atonement.

In 1815 this first step was followed by another. The name of the church was changed from the name by which it was originally incorporated to the "First Reformed Dutch Church of the City and vicinity of Philadelphia." But, as already said, no change was attempted in the Fundamental Articles. They remained as originally declared, and I may as well say here that by them the identity in faith and practice of the church is to be ascertained for the purpose of giving the proper direction to the trusts in its favour. Some incongruity in the forms of government took place

after the connection, arising from an admixture of those belonging to the Dutch Church with those provided for in the articles of incorporation of the church in question. Such as a change in the form of calling a minister, and the establishment of a consistory to take the place of the church session. These were acquiesced in, but they were sheer interpolations, for the articles of union did not provide for a single change in the machinery of government provided by the congregation for its own government. Indeed it is not claimed that the original articles were altered or modified in the least. Hence it is not improper to say that a government and practice not authorized, was usurpation; of course, therefore, these things furnish no proof of the faith of the church, but rather of a disposition to assent in silence to what was deemed immaterial in points of difference.

From 1815 until 1860 we hear of no difficulty in the church About the last mentioned period a new church edifice was erected by the congregation, which had increased in strength and importance. A pastor was wanted, and was called by the trustees, in conformity with the articles on that subject, and elected by the congregation, and so recorded on the books of the consistory. The classis of the Dutch Church, in some way not disclosed, claimed the right to supervise the action of the trustees and congregation in these matters They assembled, appointed a committee to call on the pastor to declare his faith, and to submit to an examination by the classis. The minister elect declared his adherence to the standard of the congregation, but denied the dogma of the Dutch Church on the subject of a limited atonement as promulgated in the canons of the Synod of Dort, and refused to submit to discipline on this point by the classis. Whereupon the committee recommended the passage of a resolution by the classis, "that as the election was null and void on account of unsoundness of doctrines, that the consistory proceed to call a pastor in accordance with the rules and constitution of the Reformed Dutch Church as though no call had been made upon the Rev. George W Smiley." This resolution was unanimously adopted by the classis After this action of the classis, the trustees called a congregational meeting of the church, to consider the question of dissolving the existing connection with that body. Immediate action thereon was prevented by an application for an injunction to restrain the action in this matter The special injunction, however, being refused, the congregation reassembled pursuant to adjournment, and on the 7th of February, 1861, did by a vote of seventy-five to sixty, declare their union with the classis of the Dutch Church dissolved and at an end.

The complainants now contend that this vote was ineffectual to dissolve the connection. That the whole number of the congregation entitled to vote was one hundred and sixty, and that a majority of that number, viz: eighty-one in the affirmative was necessary to effectual action. On the other hand, it is insisted that it was a constitutional vote, there being a majority of the whole body present, and a clear majority of that number voting in the affirmative. The learned judge concurred in the views of the plaintiffs, and on the final hearing granted the injunction prayed, namely, to restrain the trustees of the congregation from interfering with the authority of the consistory "in the discharge of their offices and duties, which by the faith and practice of the Reformed Dutch denomination of Christians, or by the usage and practice of the First Reformed Dutch Church of the City and vicinity of Philadelphia, pertained to the consistory of said church, and especially in the office and duty of providing preachers," &c., and they be required to keep open the church and its pulpit for such clergyman as may be selected by the *consistory of said church* In short, the decree covered the whole ground—determined against the dissolution of the connection—the right of the trustees to call a minister, and the elligibility of a minister so called and elected by the congregation.

The decree rests solely on the insufficiency of the vote of the congregation thus taken to dissolve the union The rights by a constitutional vote to dissolve the union was admitted by the learned judge. I am at a loss to comprehend how it could be denied indeed. I do not understand that it is by the plaintiff's counsel. The union to be formed by the act of competent parties. Each admitted the other to be so, by entering into and consummating the arrangement. The effect of the union did not *ipso facto* extinguish the distinct existence of either They were separate bodies in union, for an agreed purpose It was the compact that held them in union, and that dissolved each remained as before The article in the charter quoted, expresses this idea, by declaring it to be the right of the congregation to unite with *any* Christian denomination *whenever* it shall appear to be to their advantage It regards them in union or otherwise, to be what the charter made them, a distinct corporate body The argument that assimilates the exercise of this right to the execution of a power which becomes *functus* by execution, confounds plain distinctions. It was a declared right inhering in the corporation to be exercised like any other. Such right as exigencies or chance should require. No other limits are put upon it It is utterly unlike the thing to which it is compared The very nature of a power ordinarily, is to enable one to do something for another. When the act is performed the power is exhausted, and the agent has no further authority. But the right of a corporation to act according to its discretion *whenever* its interests justifies, action is a general right, and is not in the nature of a power It is part and parcel of the franchise But I need not elaborate this for the following cases, all recognize the right of dissolving ecclesiastical connections like this; *Com* v *Green*, 4 R 531; *Johnson* v *The Presbyterian Cong.* 1 W & S 9; *Miller* v. *Galle*, 2 Dumo, 533.

The right to dissolve being established, the remaining inquiry is whether it was constitutionally effective in this case. On this point, I think the learned judge erred.

There is a common law rule for the ascertainment of the sense of public bodies where no written rules exist. Where a deliberative body is composed of independent members, text writers and judicial authority unite in stating the rule to be, that the majority of those who attend after notice can effectually act; Angell & Ames on Corp., 501, 502, 505; Wills on Municipal Corp., 66 To this effect is *Rex* v. *Whittaker*, 9 B & C. 648 In *Gosling* v *Veley*, 7 Act & L 438; a parish vote was to be held by church wardens, and the parishoners in vestry assembled; it was held that the church wardens could legally act on the premises if the parishoners did not attend, and if they did attend the majority would control. A congregation is a public body, composed of indefinite numbers, as much so as a municipal corporation, and should be governed by the same rules.

But even if it be claimed with corporations with definite numbers of shareholders, the rule is also clear; there the *majority of the whole* being assembled, the majority of the assembly is the controlling power. The maxim is "*ubi major pars, ibi totum*," the absent being supposed to take sides and be included in the greater part; Grant on Corp., 68, 69, 70, and 155; Angell & Ames, 499; *Reg* v *Bailiffs of Ipswich*, 3 South 155 In the case of St. Mary's Church, 7 S & R, Gibson, J, said that "where no special provision is made by the charter, the whole are bound by the decision of the majority of the corporators present So in substance is *Johnson* v *Green*, and this was the rule of the Roman law: "*reperturs ad universi quod publice fit per majorem partem*"

The rule is one of necessity, and needs no authority to support it. The vote in this case was by a majority of the whole number assembled This expressed the will of that assemblage as fully in law as if every member had voted in its favor, if there was no express rule requiring a different number. Was there any such rule?

When we return to the charter, and the rules and regulations for the government of the congregation in search for such rule, no such rule is to be found And it is a significant fact, that whenever a greater number than a majority is required, in other cases it is provided for, and the occasion stated. Rules in the election of a minister, he must be chosen by "a majority of the votes of the qualified voters." On the dismissal of a minister, "*two-thirds* of the whole number" of the congregation must agree. To alter any fundamental article, "two-thirds of the members present must coincide in the same"

Here we have three different rules applicable to three different occasions which may arise, but to no other, they are all special, none of them touch this vote therefore, the rule of the common law must apply, for none other is provided, and whether the meeting be considered as of indefinite numbers, or that of a close corporation, the rule of the majority of the aspects above stated controls.

Art. IX. of the charter declares that the congregation has the power of uniting with any denomination of Christians *whenever* it shall appear to a majority of the members to be for their advantage. Supposing this to be a rule regulating the number necessary to vote *for* a union, it goes no further. It does not establish a rule on the question of dissolution. It was wise to limit the power to carry the congregation out of its normal conditions, for otherwise its faith might be subverted, and the church and the trust destroyed; and it was equally wise to allow a greater facility of return to its original status as authorized and fixed by its fundamental laws. That condition would be presumed to be lawful, which the condition in a union might be doubtful. These were the reasons, I think, for leaving the rule special, applicable only to action in one direction.

It is clear, therefore, that no rule existed to require a greater vote to effect a constitutional dissolution of the connection between this congregation and the classis of the Dutch Church, than that which was given on the 7th February, 1861. It was a majority of the whole number present, who were a majority of the *whole* members of the congregation, a lawful quorum. The court erred, therefore, in my opinion, in disregarding the common law rule when no other rule existed to govern the case, and in decreeing the act of dissolution of the date mentioned as unconstitutional.

2. The decree in this, the first of these bills, will now be noticed. It enjoins the respondents from employing or applying the resources of the church to the support of any minister who shall teach any other doctrines of faith than is inculcated by the "Heidelburg Catechism, as the same is expounded in its *Calvinistic* interpretation, being the interpretation given to the same by the Synod of Dort," or any clergyman "not of sound doctrine with reference to said standard," and not regularly ordained as required by the charter and fundamental articles of the congregation, and especially from employing as pastor the Rev. George W. Smiley.

The faith of a religious body can only be passed upon by the civil courts, where incidental to a question of property. When a society or church has acquired property, the law maintains the trust of it for the uses and purposes designed by the founders. To ascertain whether the trust is properly administered in accordance with this design, it often becomes necessary to inquire into the faith and practice of those claiming to be beneficiaries It is only in this aspect that temporal courts have jurisdiction to have doctrinal points in theology discussed at all. It is only for the purpose of ascertaining the identity of the present use with the original dedication, that it is allowed; *Attorney General* v. *Pearson* 3 Mer. 352; *Miller* v *Gales*, 2 Denio, 492; *Presbyterian Church* v. *Johnston*, 1 W. & S. 9; St. Mary's Church, 7 S. & R. 517.

This line of authority brings systematically before us, it is supposed, a certain point of this logical doctrine in the case in hand. The trust property here is held for the use of a congregation, whom fundamental articles require that its ministers "must preach the word of *God*, and the doctrines of *Jesus Christ*, according to the Prophets and Apostles, and to the principles contained in the Heidelburg Catechism."

Now I think it obvious, that what is meant by this declaration is, that the teaching must be the *general* doctrines of the standard; those which harmonize with the views of Protestant and Reformed denominations of the *general* doctrines of the Christian Church. The dedication is in a general sense, and if peculiar dogmas not *generally* received as elements in all Reformed Churches were intended, they should have expressed or necessarily to be implied, or they cannot be recognized, for there is no rule by which to prove they were included in the laws, and these fundamental articles were for an independent church, and union with any of different faith was not contemplated This being so, a subsequent union would not change the objects of the trust. I grant a different rule would hold had the trust been created with a view to the support of religion or doctrines in connection with some specified denomination. There the rule seems to be that the trust will be administered to the tenets of the latter But this was not the case here Neither was the dogma declared to be essential in the original articles, nor was the connection necessarily to be with a church which held it; and here this rule of administration of the trust does not apply.

There was no such designation, and the congregation might have remained independent indefinitely, and then its tenets would be determinable only by its fundamental principles, as declared in its written testimonies and practices. Did its voluntary union with a judicatory of a distinct church organization change these fundamental principles? I think not, and I think the object of this connection was for the purpose of christian association, advice and intervention, in case of congregational dissensions in spiritual or doctrinal matters only. Government was abdicated by the independent church, and by not one written line nor word was it conceded to the Dutch church. But even if that point were conceded, and government allowed to the classis what was to be the power and principles of the government? I candidly answer, I think they were to be those established by the written articles of the church, and the practice growing out of the faith of its members. It cannot be seriously contended, that it lost its distinctive character by the union. To hold this would be to assert that union was absorption, and that by the act the church which I denominate as the expellants, became a *part* of the Dutch church. As this is not claimed then, I hold that if all its characteristics were not changed by the union, none were. They were all equally vital, and by all overwhelmed and absorbed, I repeat none can be claimed to have been. There was no written consent or protocol even to that effect. The original fundamental articles remained unchanged—the change of name however for whatever object designed had no effect on the principles of the congregation. These must stand, and this controversy turns on them.

According to the rule already stated, we inquire what were the principles of this congregation in its creation and incorporation? By these the question must be determined whether there has been any, or there is about to be any diversion of the trust property in the employment of a minister performing the faith, and called according to the fundamental articles of the church as has been the Rev. Mr. Smiley? Let who will determine this question, the synod or classis of the Dutch church, the court below, or this court, it must be by the tenets of the church when founded, or by showing a clear change of fundamental principles.

On this point we may notice the fact before referred to, that the founders of this church were a portion of a German Reformed congregation, whose standard of faith was the Heidelburg catechism. To whom had been preached its doctrines, independently of and against the dogmas of "limited atonement," as held by the Dutch church. The testimony of Rev. Dr. Helfenstein, now eighty-six years old, and the pastor of the German Reformed church at the time of the succession, proves this; so does Henry Jordan, one of the founders and original contributors to the church out of which this controversy has arisen; so also do Mr. Offerman and Mr. Benser. These ancient witnesses all belonged to the present church, and three of them assisted in founding the new. These witnesses prove the faith and practice of the present church That in the Heidelburg Catechism was taught the doctrines of free grace and unlimited atonement. Not one word of testimony was given by the complainants to disprove this. I have already said, and the proof shows it, that the separation was not about any difference in doctrine, but only because those who left wanted the doctrines of their church taught in English for the benefit of their children.

That the new congregation had no intention of changing its former doctrines of faith, is also apparent in the fact, that the name they assumed before complete organization as a church, was the "*Second* Reformed Association:" second to what? Certainly to the parent church which they deferred to as first in that series in Philadelphia. Again, when incorporated, they adopted as their corporation name, "The Evangelical Reformed Congregation of the City and vicinity of Philadelphia." This name was consistent with an agreement in doctrine with the parent stock; of itself, however, this only amounts to a negative of any idea of a departure in doctrine. But what is more to the point and decisive, I think, is the question of present consistency of the church with the doctrines of the church as founded, are the fundamental articles of the church originally adopted and never altered.

These adopt the Heidelburg Catechism as a true exposition of Scripture, and as the standard of faith to be taught by their ministers, and to be subscribed to by the elders, who with the minister,

have the spiritual concern of the congregation in charge as a church session. Witnesses, writers, and judicial decisions concur in saying, that in this form, and without the doctrine of a limited atonement being considered an element, is the Heidelburg Catechism accepted as the standard of faith of the German Reformed Church. Testimony of Rev. Albert Helfenstein, sermon of Rev Dr. Bomberger, of German Reformed Church, in Race Street, 1860 (The Old Paths, by J. F. Berg, 1845.) *Miller* v *Galle*, 2 Den 492 Errors and Appeal, New York; Marcusley Rec. Vol. 4, p. 179.

This catechism, it thus appears, admits diversity of belief on minor points of faith. "The main design of framing it," says Dr. J F. Berg, (The Old Paths, 1845,) "was to present the *great truths* of the Christian faith in such a manner that *all really evangelical minds* might harmonize in the statement. It is believed that it can be rejected by none, excepting those who repudiate the *essentials* of Christianity" This is a truthful presentation I think, and may stand for the substance of what numberless preachers and writers have said in regard to it. Now it is evident that if a purely German Reformed Church had by fundamental articles declared the Heidelburg Catechism as their standard of faith, that the dogma in question would not have thereby been necessarily or essentially any portion of the standard. Reasonable minds, in view of the practice of that church, will concede this. Who were they that founded this church in question, and declared this standard? They were members of a German Reformed Church, brought up in its faith and practice, and although they separated from the parent church, they did not separate from its faith. We are to find the objects of a trust in the faith and principles of the society for which it was created, say *Attorney General* v. *Pearson* and *The Presbyterian Church* v. *Johnston*, (sup.) We have it proved and ascertained here as clearly as a fact was ever proved, that the members of the original association and congregation were German Reformed. We must desert settled law, else interpret the language of the fundamental articles in the light of the faith of those establishing them, and that was in the German Reformed view of the standards If that, then, was its origin, it is no diversion of the trust funds to continue the propagation of the faith of its founders. The presumption that they founded their church in their own faith and practice, and that their language means that nothing but the clearest evidence of renunciation or alteration should be allowed to overthrow it. It requires clear and unambiguous words, and by a man clearly competent to make a will, before we can believe that he means to disinherit those for whom he ever laboured and well loved. So in matters of faith, conscientious men adhere as firmly to tenets believed to be truths, as they do to their natural affinities. The evidence must be clear to induce a belief of an entire change in either case.

The Vice-Chancellor, Hoffman, whose opinion was affirmed in the court of Errors and Appeals, in *Miller* v. *Galle*, (Sup) agrees with our case exactly. He says, "here, then, is the only standard, (the Heidelburg Catechism) to which the doctrines of the church is referred—by which the adherence of a pastor and a congregation is to be judged; and I find all the pastors, whose admission is considered an intrusion, teaching this catechism. If they teach it with an Arminian construction, I cannot interfere. It is not established that the property was to be held for *those otherwise interpreting it.*" Neither in the faith nor practice of the founder of this church, nor in the words which they use to declare its standard, is there a syllable fairly construed which proves the position of the complainants, that the dogma of the Synod of Dort was to control the interpretation of the catechism. Inherently it does not The catechism itself, history informs us, was the work of divines holding divers views in regard to the atonement. Frederick III., Elector of the Lower Protectorate, caused it to be written, and its principal contributors were Zacharius Ursinius, a disciple, we believe, of Melancthon and Caspar Oliveanus, of Calvin; while the Elector himself was known as a Philipist. Dr. Mayer in his History of Religious Denominations in the United States, 344, points to this fact, as the reason why the doctrine of a limited atonement as taught by Calvin, and forty-four years after the promulgation of the catechism was announced as a canon of the Low Dutch Reformed Church of the Synod of Dort, is not considered an essential element of faith, by those whose standard is the Heidelburg Catechism. This being the proof by the witnesses, writers, and historians, we are to regard it as clear, that the Heidelburg Catechism is a standard of faith for those of the German Reformed denomination, or any others who adopt it generally, and without qualification—without obligation to believe in the Calvinistic or Arminian view of this mysterious and utterly unsolvable question by human capacity I therefore adopt the conclusion of the Vice-Chancellor in *Miller* v. *Galle*: "I find it, (the catechism,) susceptible of our Arminian construction. If it never receives such construction, I am not able to say that the will and intents of the founders are thereby violated," and I can cordially agree in sentiment with Gardiner, President of the Court of Errors and Appeals, in the same case, that if any class of Christians believe that spiritual blessings flow only in a particular channel, they should clearly and explicitly make this appear, before others shall be compelled to accord in that belief; if not, conscience and right of conscience, may be infringed upon, and rights of property be abandoned. The majority of this congregation will be in this category, if this decree be affirmed. They must either sit under the teachings of a doctrine not agreeable, as they think, to their Christian standard of faith, or go hence and seek a more congenial association elsewhere. They ask only that on this point, that the Calvinistic intrepretation of the catechism be omitted. That its more enlarged and benificent doctrines of salvation be taught, leaving individuals the freedom of conscience on peculiar dogmas untrammelled. I say peculiar because the doctrine in question is very far from being unchallenged in the Christian church in its largest sense, or in its Reformed and Protestant sense. I am in no wise competent to express any opinion of its Scriptural character, and as a judge of civil judicatory it does not become me to do so, but I may say that in the present age of the world, it is not, I think, a fundamental article of faith in anything like a majority of the Protestant churches. It is therefore, the more improbable that the church here intended it should be an article of faith with them. It is a settled principle that the doctrine of the founders of a religous trust will control it. When that principle is to be yielded, if it is to be, then it will become more common than ever hitherto, to divert trusts, and carry off bodily congregations and churches from their original faith. A fraternal connection for the purpose of Christian association and advice between distinct but not altogether incongruous bodies, an assimilation in name, but in nothing else, may be sufficient as a general rule for such purpose, but when the wrong is disclosed, it will be no less a wrong because it may have been accomplished by very gentle means. I think the controlling majority of this church will belong to this predicate, if these decrees stand. It will be a vain effort to procure a dissolution of the connection, if it must be accomplished as required by the decision below. New members, absentees, and those otherwise opposed, will pretty certainly defeat the required majority.

I am of opinion, therefore, that the classis have no jurisdiction to declare the election of Rev. George W. Smiley null and void, and direct the consistory to call a pastor in accordance with the rules and constitution of the Reformed Dutch Church, as though no call had been made upon Rev. George W Smiley.—*Res. of Classis. Because* the Rev. George W. Smiley had been, and was called and elected by the church, in accordance with its fundamental articles, which have never been changed or altered. And *because* the Rev. George W. Smiley did believe in, and proposed to teach, the Heidelburg Catechism, which was the standard of faith declared by the church. And further *because* it was not attempted to be proved that he proposed to teach it in a sectarian, or in any but its general Christian sense; the only proof being that he refused to teach it in accordance with the canons of the Synod of Dort. He was, I think, exactly within the only standard of the church which called him, in all these particulars. This decree of the court below affirms the action of the classis, and thus, in my judgment, is the trust completely diverted from its original purpose. It has not been shown that the fundamental articles of this church have been abrogated, altered, or have ceased in faith and practice to be the exponents of the sentiments of the congregation: if this be not so, then why are not proceedings in accordance therewith constitutional, and if constitutional where is the authority to overrule them? Having no constitutional authority do it, the exercise is essentially despotic. These articles not only provide for

a call by the trustees, and an election by the congregation of a minister, but for his dismissal by an act of the congregation; I cannot comprehend, therefore, the right or necessity for interference by the court, unless it were clearly shown that the minister employed was so employed in direct violation of the church rules so employing him, which has not been done here.

The willingness on the part of the minister elect in this case to teach the Heidelburg Catechism in its general sense, (and there is neither complaint nor proof to the contrary, except his refusal to deliver it in a Calvinistic sense, which does not prove a determination to preach it in an unscriptural sense,) is exactly the sense in which we as judges are to judge of it. Its general Christian sense. In *The King* v *Woolston*, 2 St. 837, which was an indictment for blasphemy, (in denying the miracles of our Saviour,) there the court would not suffer it to be doubted, whether to write against Christianity *in general* was not an indictable offence and punishable in the temporal courts. But "they desired, however, that it might be taken notice that they laid the stress on the word *general* and did not include disputes among learned men upon controverted points" Lord C J. RAYMOND, in Fitzgibbon's Rep of the same case, p 64, said, "we do not meddle with any difference of opinion, and we interfere only when the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme. The New Testament and the whole relation of the life and miracles of *Christ* being denied" ;

I think this should be our rule otherwise we are thrown with the contests of the schoolmen as to what doctrines are or are not explained in a prepared system It is out of supposed implied doctrines, the controversy here arises. It is not expressed in the catechism, nor in the fundamental articles which expound the trust, and it is not among a large portion of the Christian world a doctrine of the Bible It is a disputed point, and we should not say that is an essential element in the faith of this church when it is not so expressed, and standing as it has ever stood, and will ever stand, a rock in the ocean of polemics, far above and beyond the reach of man to comprehend—to prove or disprove.

I would for these and many other reasons themselves apparent, reverse the decrees in both these cases.

MONTHLY REPERTORY.

COMMON LAW.

EX SINGLETON v. WILLIAMSON.

Trespass—Cattle damage feasant—*Closes unfenced.*

It is a general principle that legal remedy by act of the party cannot apply to an injury, the natural consequence of the act, or default, of the party injured. And this principle applies to the right of distraining *damage feasant*, the cattle of the owner of adjoining land Therefore if cattle of one owner get into the land of the other, through the neglect of that other to keep up a fence dividing the lands of the parties, and then stray into another close of his, he cannot distrain them *damage feasant* and is liable to action for so doing.

EX. BRAMWALL v. FELLS.

Practice—Motion for new trial—Affidavits—Exhibits.

On motion for a new trial on the ground of surprise, material documents on which the surprise suggested turns, should be annexed to the affidavits, and if not they cannot afterwards be supplied.

EX. BLAKE AND OTHERS v. DONE.

Ejectment—Practice—Trial—Amendment—Adding names of parties as plaintiffs.

In ejectment the judge has power, at the trial, to amend the writ by adding the names of parties as plaintiffs, in whom the legal estate appears to be vested (if they consent to be added) even although it appears that the party who originally sued had no right of action, (so that there is in effect a substitution of plaintiff, provided the real question in controversy between the parties, that is, the title to be tried, remaining in substance the same, as in the case of *cestui que trusts* suing by mistake in his own name instead of the trustees

C. P. WALLIS v. LITTELL.

Evidence, parol, to vary written agreement.

Where by a written agreement, the defendant agreed to assign to the plaintiff a farm with immediate possession, upon the same terms as he held of his landlord; but at the time of the making of such agreement, an *oral* agreement was entered into between the plaintiff and defendant that the written agreement should be void if the landlord refused to assign.

Held, in an action for non-assignment that the *oral* agreement was admissible, as it is in analogy with the delivery of a deed as an escrow, and neither varies nor contradicts the writing, but suspends the commencement of the obligation.

EX. CALLOW v. KELSON.

Insurance broker—Authority to receive money

A broker having effected an insurance in his own name on behalf of his principal had the policy left in his hands for the purpose of his receiving the proceeds; and having upon advice of the loss pledged the policy with another broker, obtained an advance thereon, received as on account of the loss.

Held, that the latter might retain the amount so advanced, and that the principal could not recover it from him, but must resort to his own broker for it.

C. P. GARRARD v. GIUBELEI.

Amendment at nisi prius—Common Law Procedure Act—Husband and wife—Non joinder of wife.

Where a defendant is sued for goods supplied to the wife before marriage, the record cannot be amended at the trial under the Common law procedure act by the insertion of the wife as a co-defendant.

EX. BUTLER v. HUNTER.

Negligence—Contractor—Pulling down houses—Liability of employer.

Where a person employs a builder to take down his house, the builder and not the employer is liable for the consequences of a neglect of any ordinary precaution, such as shoring scaffolding or the like

EX MCCANCE v. THE L. & N. W. RAILWAY CO.

New Trial—Damage—Evidence—Estoppel.

A person sending horses by railway, having signed a document declaring that their value was not above £10 each, and also agreeing that they should be carried at his risk, and he having sued them for injuries to the horses caused by defects in the carriages, not mentioning the document in his declaration, to which they only pleaded payment into court

Held, that the declaration of value was not part of the contract, so that the jury or the court, in their place might look at it as limiting the damages recoverable.

And *semble*, that the proviso added, even if part of the contract, did not qualify it as a condition, so as to require a denial of the contract to enable the defendants to shew it, and, therefore, that it might be looked at even under the plea of payment into court.

CHANCERY.

M. R. IN RE CAREW'S ESTATE ACT.

Judgment—Consideration services rendered—Distinction between professional and non professional persons.

Where a non-professional person claimed a benefit under a judgment confessed and given to him by another, upon the ground of services rendered by him to the latter, the court held that the

burden of proof as to the consideration, lay on the former, and that as he had failed to prove the consideration for the judgment, his claim must be disallowed.

V. C. S. RHODES v WROXLAY.

Mortgagor and Mortgagee—Dividend of insolvent estate—Rule where security insufficient.

Where in an administration the personal estate is insufficient to pay the debt in full, an equitable mortgagee, who is also a simple contract creditor in respect of the same debt and whose security is also insufficient, is entitled to prove for and take a dividend upon the entire debt for the time being actually unpaid, notwithstanding that the security has been realised by order of the court, and the proceeds have been carried on to a separate account to meet the mortgage claim. But such creditor must not, ultimately receive more than twenty shillings in the pound from all sources.

V. C. S. RE GREENWOOD TRUSTS.

Will—Period of ascertaining class—Next of kin. "according to statute of distributions"—Joint tenancy.

Bequest after the termination of a life estate to "such persons as shall happen to be my next of kin, according to the statute of distributions of intestate's effects.

Held, that these persons took who were next of kin at testator's death, and did so as joint tenants.

V. C. W. BUCHANAN v. HARRISON.

Will—Devise of legal fee to Trustees—Equitable reversion on failure of gift for remoteness—Descent not broken.

Residuary gift—Word "property" does not pass reversionary interest in realty—Possessio fratres.

A testator devised real estate to three trustees, one of whom was his heir at-law, and he directs that during the lives of his wife, his daughters, and their husbands, the income should be applied for the benefit of those persons and their children, and when those persons should be dead, the estate should be sold and the proceeds divided amongst his grand-children. The devise of the *corpus* had been held to fail for remoteness.

It was now held that assuming the legal fee to have passed to the trustees, the descent was not broken so as to create a new reversion, but that the heir-at-law took the old estate; and further that the character of this equitable reversion was not affected by the devise of the legal fee to the heir as trustee.

The heir-at-law, "as to all the rest, residue, and remainder of his personal estate and property whatsoever and wheresoever," after payment of debts, &c., gave and bequeathed the same, &c.

It was held that the reversion which he inherited from the first testator does not pass by this residuary gift

It being alleged that the heir-at law had so dealt with the property as to create a new reversion in himself, so that his sisters of the whole blood would inherit in preference to his brother of the half blood, an enquiry was directed whether there had been such dealing as would amount to a *possessio fratres*.

V. C W. CRESSWELL v HAINES.

Vendor and purchaser—Difficulty caused by unsoundness of mind of vendor—Suit for specific performance—Costs

Several owners of shares in a copy-hold estate agreed to sell it, the purchase money was made payable by instalments, and the surrender of the premises by the vendors was, by arrangement, delayed until the whole should have been paid. Before the last instalment was payable, one of the vendors became of unsound mind, but was not found lunatic by inquisition. Thereupon a bill for specific performance of the contract became necessary.

It was held that, as the delay of the surrender had been for the convenience of both parties, there ought to be no costs given on either side, up to the hearing.

V. C. S. JAUNCEY v. THE ATTORNEY GENERAL.

Will—Construction—"Herein" in will extending to Codicil—Residuary "property" cut down to "pure personalty."

Testator, after giving legacies to charities and individuals, directed that the residue of monies to arise by sale and conversion of his real and personal estate after payment of debts and the legacies "herein" mentioned, should be divided between certain charities, and that such part of his estate as charities could not take, should be first applied in payment of legacies "herein mentioned" not given to charities.

By a Codicil he revoked the residuary bequest and varied the amounts of charitable legacies and after payment of funeral, &c., expenses, and legacies might subsequently make, gave the residue of his property to charities

Held, that in the construction of will and codicil as one instrument, the direction in the will extended to the codicil, and that "property" must be cut down to "pure personalty."

L. C. THE ORIENTAL INLAND S N. CO v. BRIGGS.

Specific performance—Public company—Application for shares—Qualified acceptance—Demurrer—Practice—Jurisdiction.

The court will not enforce the specific performance of a contract constituted by a proposal on one side and an acceptance on the other, unless that proposal is unqualified and unconditional. Accordingly, when B had written to the directors of a company, applying for an allotment of certain shares, and undertaking to sign the articles of association, and the secretary of the company, in reply, had informed him by letter that the directors had allotted him the shares, adding that the articles of association must be signed, or, in default thereof, that the shares would be forfeited, and a bill was filed by the company against B., who had declined to sign the articles of association, stating the alleged contract and praying that B might be compelled to sign the said articles, and such acceptance of the shares as the court might think necessary. A demurrer to the bill was allowed

In allowing such a demurrer, although according to the present practice the court could not give leave to amend the bill, yet in order that the allowance of the demurrer might not affect the right of the plaintiffs to maintain another bill alleging a sufficient contract, the order was without prejudice to any new bill that the plaintiffs might file.

Semble, the court would have jurisdiction to enforce a contract of this description if it were in other respects a binding contract.

REVIEW.

THE LAW OF MERGER AS IT AFFECTS ESTATES IN LAND AND ALSO CHARGES UPON LAND, by Charles J. Mayhew, of the Inner Temple, Barrister-at-Law, June 1861.

This is the title of a small but useful volume published by the well-known law booksellers and publishers, V and R. Stevens Sons and Haynes, 26 Bell Yard, Lincoln's Inn, London, 1861. The name of that eminent firm is almost in itself a guarantee that the work bearing the impress of the firm is all that it professes to be. Much circumspection appears to be used before the firm undertakes the publication of any work either small or great. Such has, at all events, been our experience. The book before us is no exception to the rule.

The author, in his preface truly remarks that the legal doctrine of merger is one of the most curious and subtle in our system of Jurisprudence. The doctrine applies as well to estates in land which merge by their union in the same person as to pecuniary charges which may be either lost or kept on foot according to the mode adopted in transferring or dealing with them. The author deals with both branches of the subject in a succinct and able manner.

He states that the chief object of the work is to present a re-arrangement, in a concise form, of the materials compiled by Mr. Preston. It must, however, be borne in mind, that

since the publication of Mr. Preston's able work, many important alterations have been made in the law of real property, rendering necessary corresponding alterations in the views expressed by Preston—these Mr. Mayhew has not failed to notice. His work is not only more recent than Preston's work, but because it is more recent is more reliable than that work.

The work is divided into two parts. Part I. is on Merger as it affects estates in land. The following are its contents: On the objects and origin of Merger—Estates in fee—Estates tail—Estates for life—Estates for years. Part II. is on Merger of charges upon land. The following are its contents: As to tenants in fee—As to tenants in tail—As to tenants for life.

The volume is small; its execution is neat; it is carefully written. We can safely recommend it to the patronage of our readers.—EDS. L. J.

Messrs. Rollo & Adams are the agents in Toronto for the sale of the work.

THE NORTH BRITISH REVIEW—THE EDINBURGH, THE WESTMINSTER, AND THE LONDON QUARTERLIES.—The last numbers of these several standard reviews are received from the enterprising publishers, Leonard, Scott & Co., of New York. The first paper in the North British, "History and Philsophy," deals with Mr. Goldwin Smith, Regius Professor of Modern History in the University of Oxford, in no measured terms. His writings are reviewed and his talents weighed in a fearless and we think truthful manner. This gentleman, who is constantly writing on something, and of late has written a good deal about Canada, will not feel flattered by the paper. He is one of the "busy bodies" who recently have done so much towards destroying the good feeling hitherto existing between the mother country and Canada. We cannot therefore do better than give an extract from the paper before us in regard to him. Speaking of his lectures on modern history, the Reviewer says—

Three of those discourses, specially on the "Study of History," are devoted to an exposition of the theoretical views of the writer on the mode of investigating historical questions, and on the manner in which historical inquiries ought to be conducted. These lectures, which should have contained at least a tolerably satisfactory discussion of the various aspects of which the question essentially consists, are deficient alike in close analytical skill, and in that comprehensive handling which one might naturally have expected from so high an authority as an Oxford professor. But to do these discourses justice, they are written in a most engaging style. They are often brilliant, always luminous, frequently energetic. The argument is conducted usually with wonderful force, often rising into eloquence, and with a power and beauty which almost atones—if anything could atone—for the absence of those more recondite qualities in which they are conspicuously deficient. The writer is obviously a man of a vigorous and cultivated mind, a lively imagination, and an enthusiasm and fervour of spirit which oftentimes hurries him into eloquence. But there is false eloquence as well as true. When he gets hold of a sound argument, he sends it home admirably; but when a false one comes in his way, he bestrides his mock-Pegasus like a veritable rhetorician, and caracoles it out in as jaunty a manner as the most veritable village orator. His mode of putting a thing is so exceedingly clear as sometimes to be chargeable with apparent shallowness, where no such accusation can legitimately be made against him. Depth and clearness are not contraries. He often invalidates his reasoning by starting with a false assumption, or by allowing some lurking error quietly to take the place of truth in the progress towards the conclusion. This arises, in many cases, from defective observational power. He can depict a grand scene much better than a simple one, where more heed is required. To tell a simple story simply, needs very peculiar gifts. He is not a profound reasoner, though a very vigorous one. Admirable little bits of writing occasionally turn up in those lectures; but they are too frequently marred by too much rhetoric, by too great an anxiety to say something impressive, when nothing really impressive can be said. They are exceedingly rash besides. Were it not for the elegance of his mind, and the obvious delicacy and moral beauty which he throws into almost every picture which he draws, we should be inclined to describe him as a wild bull let loose among a field of diligent cricket-players. He runs right amuck at Comte, who deserves a goring; he trips up Mr. Mill; he is in the neck of Mr. Mansel; he sneers contemptuously at poor Buckle, and has a thrust at Mr. Darwin,—always annonymously and in nearly as many words as we have occupied in the telling of it. He slashes the men of science, and pities the moral philosophers; he denounces the necessitarians, and triumphs over the "positivists." Now, even though all those acts were quite legitimate and praiseworthy, Mr. Goldwin Smith has gone about the matter in so reckless a way, that we fear that he has brought a nest of hornets about his ears, that are likely to do more than buzz. Yet he has many excellences.

Mr. Smith says much on the philosophy of moral conduct and character; much also on a more sacred subject—theology, which, with all due respect for the Professor, had much better not have been said. The fervid excited way in which he plunges and flounders about in the bottomless spaces of those tracts of knowledge is more amusing than edifying. After belabouring the ethical philosophers soundly, he asks them the question, "Is it not rather in *character* than in *action* that morality lies?" and we hope that he will get a decisive answer to his question, though probably not one quite to his mind. Would it not have been as well if Mr. G. Smith had taken the trouble of acquainting himself with what ethical speculators had written, before he began to malign them for an omission which turns out to be no omission at all? He should recollect that no man can make any progress in moral inquiry who is always looking into "society" for his examples of moral life. Unless he has the power of silently taking to pieces the fibres of his own heart, he never will be able to go into a crowd to gather up illustrations or modifications of his pre-established theories. Morality is like anatomy; there is no progress to be made in it, in the first instance, by mingling night and day with crowds of human beings, seeing them in all manner of postures, and in all sorts of moods: but let either one or the other of those inquirers get into the inside of a man for a time, after he comes out—armed with his knowledge of bone and muscle, of blood-vessel and nerve-centre, of brain and limb and hand, or of justice and unfairness, of joy and sorrow, of excitement and equanimity—take him into a crowd and see then what he can make of it. But patient observation, we remarked a little ago, is not one of Mr. Smith's best qualities. Where "essence of morality" lies, he confesses at last, "history must wait to be taught by ethical science."

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

GEORGE SUDLOW PAPPS, of the City of Hamilton, Esquire, to be a Notary Public in Upper Canada. (Gazetted August 23rd, 1862.)

JAMES ROBB, of the City of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 23rd, 1862.)

ALEXANDER FORBES, of Brighton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 23rd, 1862.)

THE HONORABLE DAVID REESOR, of the Village of Markham, to be a Notary Public for Upper Canada. (Gazetted August 30th, 1862.)

ASSOCIATE CORONERS.

WALTER R GEIKIE, of the Village of Aurora, Esquire, M D., to be an Associate Coroner for the United Counties of York and Peel. (Gazetted August 30th, 1862.)

TO CORRESPONDENTS.

S. P. G.—Under "Division Courts."