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DIVISION COURTS.

BAILIFFS.

REPORT OF A MEETING OF THE BAILIFFS OF THE SEVERAL DIVISION COURTS, HELD AT HAMILTON, ON THE 20TH MAY, 1857.

On motion, it was carried that Mr. William Austin Smith, of the First Division Court, Wentworth, should take the chair, and that Mr. William Henry Serpell, of the Fourth Division Court, Brant, should act as Secretary.

The following resolutions were then put and carried:

1st. That the sum of 6d. per mile be allowed for all services of process issued out of the office of the Division Court.

2nd. That the sum requiring personal service be extended to ten pounds.

3rd. That one shilling be allowed for all summonses requiring personal service on the defendant, and nine-pence for non-personal.

4th. That the sum of sixpence be allowed for attending to swear and making affidavit of service of summons within the Division.

5th. That for enforcing Executions under ten pounds there be allowed the sum of two shillings and six-pence, and for all over that sum, that there be allowed the sum of five shillings.

6th. That the Bailiff be allowed mileage on all writs, whether money made or not.

7th. That the sum of three-pence be allowed for every case called in open Court.

8th. That five per cent be allowed on all monies collected under writ of Execution.

9th. That a proper remuneration be allowed where the Bailiff has to remove property seized under Execution or Attachment.

10th. That for advertising each sale the Bailiff be allowed the sum of two shillings and six-pence.

It was then Resolved, That Messrs. W. A. Smith, R. M. Cope, and W. L. Serpell, should be a Committee to draft a respectful Petition to the Legislature.

(Signed) W. A. SMITH, Chairman,
W. H. SERPELL, Secretary.

The Bailiffs of the County of Brant held their meeting at the Kerby House at Brantford on the 12th of May, when the following resolutions were read and adopted:

1st. That the sum of six-pence per mile be allowed on all process issued out of the office of the Division Court.

2nd. That the sum requiring personal service be extended to £10.

3rd. That there be allowed the sum of one shilling on all personal services, and nine-pence for non-personal.

4th. That there be allowed for every affidavit of service within the Division the sum of three-pence.

5th. That the Fee for enforcing all writs of Execution or Attachment be at the uniform rate of 3s. 9d.

6th. That mileage be allowed on all writs returned *nulla bona*, and to be paid by the plaintiff at the time of issuing the Execution.

7th. That the Bailiff be allowed the sum of one pound for his services on the day of Court.

8th. That the Bailiff be allowed 5 per cent on all monies collected by writ of Execution.

9th. That a proper remuneration be allowed for time and expenses incurred in removing or securing property when seized under writ of Execution or Attachment.

(Signed) W. YOUNG, Chairman.
W. H. SERPELL, Sec'y.

I have examined the above resolutions and approve of the same with the exception of the 2nd and 6th. I think the sum requiring personal service might be extended to £5. I do not think mileage should be allowed on any Execution where no money is made. On the whole I think the Tariff of Fees for services rendered by Bailiffs, as it stands at present, is far too low.

(Signed) S. J. JONES,
County Judge, Co. Brant.

The above resolutions have been sent to us for publication, and very willingly we insert them. On the main point we entirely agree, viz., that the remuneration to Bailiffs is at present quite insufficient, and we are quite prepared to advocate an increase in these fees. We do not intend in this number to enter fully on the question for two reasons, first, because the matter communicated encroaches too much on the assigned limits to leave sufficient space at our disposal "to have our say," but, mainly, because we desire to consider the subject maturely.

Such influence as we possess arises from the fact that all we say has been well considered, and that our advocacy is only given where it is deserved. The matter now in hand we believe deserving of more than a passing remark.

In the meantime we give some remarks of an officer necessarily familiar with the question, who is only known to us by his correspondence as an educated and very intelligent person:

BURFORD, May 25, 1857.

"I herewith enclose you the Report of a Meeting of Bailiffs who were delegated from their several counties to meet at the Court House in the city of Hamilton on the 20th instant, for the purpose of deciding on a Tariff of Fees and of drafting a Petition to the Legislature, praying that they would take the same into consideration with the view of increasing the remuneration to the said officers of the Division Courts. I presume, you are aware, that previous to the enormous increase in price of all kinds of produce, the Bailiffs were scarcely compensated for their services; and now that we have to pay about two or three times what the former prices were for every article required for the use of ourselves and families, we find it very difficult to support ourselves, *are we asking too much?* I think, Sir, that every candid, unprejudiced mind, will join us in saying that we are poorly remunerated for the arduous duties required of us.

There are, I am aware, one or two of the Resolutions that seem to clash with the practice of the Superior Courts; but when the extreme difficulty is considered, which is in the experience of every officer, to effect services on the small sums requiring personal service, and the frequency with which the party to be served will effectually evade the service of the summons; I think it will appear plain that the sum requiring *personal service* should be very much extended. I would ask if for the sum of two pounds, a service is good if served

on the person found *on the premises*, being a literate person, an inmate, &c., why cannot it be equally good for six times that amount, or for any other greater sum? Our neighbors of the universal Yankee nation act in a far more rational manner in such matters.

The resolution asking for remuneration or mileage in all writs returned *nulla bona* is intended to meet the numerous cases where parties, who on being *summoned after judgment* have been found on examination to have property or to have endeavored to put out of reach of the creditor and officer who is entrusted with the execution of the writ: and moreover, *who ought to know as well as the plaintiff himself*, whether or not the *defendant has goods or not*. The Clerk gets paid for issuing the writ *in all cases*: should not the Bailiff, who has frequently to travel many miles and then fails to realize anything, get some remuneration for disbursements and travel?

We also ask for remuneration on the day of *holding Court*, which ought by all means to be granted, as it is certainly one of the most irksome duties connected with the office. Why the public should be entitled to our services *gratis*, I am at a loss to know.

I would also state, for the information of those who may be curious to know what Bailiffs do realize in the fees of the Court and its duties, that for the year 1855, when the prices of all kinds of produce were reasonable compared to what it now is, that for that year my fees amounted to the sum of £90 5s. which should now be reduced one-third to arrive at its real value. I am unable correctly to state the amount of fees realized on Executions, which may have been in my hands, but it would probably amount to say £35 or £40, making the whole not exceed £100, out of this we have to support our families, keep a horse or horses, and do all the drudgery of a Division Court.

I hope to live to see a better state of things; the officers of the Courts should be men of principle and integrity; but the Government must give respectable wages to secure the services of the right class of men.

The claims of the *Law Journal* were not lost sight of at the meeting at Hamilton. I was surprised to find so many there who knew so little of the valuable aid rendered as by your ably conducted paper: it was well and justly remarked at the meeting that if the agricultural and commercial classes found it to their advantage to make use of the press to advocate their interests, why not the officers of the Division Courts?"

OFFICERS AND SUITORS.

CLERKS.—*Protection of Court Books and Court Papers.*

We have received several communications on this subject, and agree in the main that some allowance should be made to Clerks for Office Rent and Stationery. In another branch of the public service, the Post Office department, if we are rightly informed, such an allowance is made, and why not in the case of Division Court Clerks. These officers are certainly as necessary as Postmasters, and their duties are more important. Large sums of money pass through their hands, and the public have occasion to resort to a Clerk's office in the proportion of at least ten to one as compared to a Postmaster's office. We speak generally of the Division Court Clerks and Postmasters through the country; for of course in cities and other populous places, the Post Office is the most resorted to, but such is not the case in Towns and Townships. On an average there are not more than eight Division Court Clerks in each County, while there are, we may venture to say, not less than sixty Postmasters in the same localities, so that on the score of expense a comparatively small outlay would be necessary to provide the required accommodation. We are inclined to think that if a reasonable sum were allowed yearly for office rent, the great majority of Division Court Clerks would at their own expense erect suitable offices with vaults, or otherwise secured from accident by fire. And this is a most important object, knowing, as we do, the vast amount of property, evidences of debt, that Division Court Clerks have in charge. We are acquainted with several Divisions wherein from four to six hundred suits are entered every Court, many of them on promissory notes, constituting the sole evidence of debt between the parties. In many Courts there are unsatisfied judgments, amounting in the aggregate to more than five thousand pounds, and which would probably be entirely lost if the Clerk's books and papers were consumed by fire.

Now there are considerations of enormous magnitude to the Public, and especially in this Country, where the credit system is so general. Again, entries in the Clerk's books commonly constituting the sole evidence of payment of a demand by a defendant, the safekeeping of the books and papers are scarcely less important to defendants than to plaintiffs.

To guard against the contingencies to which we have referred, we feel convinced suitors would not object to a small percentage to cover an allowance for office accommodation with its attendant security, but we think they should not be called upon to submit to it. The general revenue of the country is expended in the erection of proper accommodations for the Superior Courts; why not for all Courts? The principle that would justify the expenditure in one case would justify it in another. Our remarks are necessarily general, for we are not in possession of sufficient data to go into the subject minutely. The particulars must be furnished to us by those familiar with the matter. For instance, there are many Clerks who are also Postmasters, and thence able to state the rule in that branch of the public service. An accurate statement of the amount of business passing yearly through a Court, the amount of notes and claims put in for suit, the unsatisfied judgments, &c., would also be desirable, as would any specific information tending to show the important business done in Division Courts, and other matters in proof of the positions we have laid down and the suggestions we have made. Those who are acquainted with these subjects in all their details, are the proper parties to supply this information, and by so doing they will serve themselves and the public by the same act. Clerks will bear

in mind that the advocacy in this journal of just claims, and its suggestions for improvements in the Local Courts, have already led to favorable results—and will do so again, for truth is powerful, if proper material is furnished on which to base an opinion; but neither the Government nor the Legislature can be expected to act if a proper case for interference is not made out. We do not know that a portion of our paper could be better employed for months than upon this very subject, and if all who are competent will act (and those who will not put their own shoulders to the wheel, need not expect others to do so for them) will send us brief communications in point, we shall be able to accumulate such a mass of evidence in favour of the proposition, that no man who has a proper regard for the interests of the pulic or the masses, who resort to Division Courts, will hesitate to give it effect.

But to accomplish anything in Upper Canada or elsewhere, it is necessary to "hammer away" at a subject for some time, to heap up facts upon facts, argument upon argument—never, in a word, to give up till justice is done. Let Clerks do what they can to inform in their own localities, but let them also use their own organ, the *Law Journal*, for a like purpose—and look with confidence for a favourable result.

SUITORS.

Breach of Warranty, (*continued from page* 83.)

Warranty, when given.—The warranty must be made during the treaty or at the time of sale, or at least before the performance of its main terms; a warranty after the sale is complete, or the contract performed will not be binding for want of consideration.

Proof of Breach of Warranty.—The plaintiff in bringing his action must be prepared to prove not only the warranty of the animal or thing purchased, but also that such warranty was a deceit, in other words, that the subject matter of the warranty did not sustain it—for example, a horse warranted sound, that he was in fact broken winded, and therefore unsound. The evidence must be of a positive kind, and of course varied with the nature of the transaction. It is not necessary to prove that the plaintiff offered to return the goods previously to an action for the breach of the warranty, or at any other time, nor is there any necessity to give notice or to complain of the breach to the seller, but the absence of it raises a presumption against the purchaser.

If it can be proved that the defendant *actually knew* of the defect or bad quality of the goods sold at the time of sale it will be prudent for the plaintiff to bring evidence to that effect, but it is not absolutely *necessary* to prove the defendant's knowledge of the defect, &c., as he is answerable whether he knew of it or not on his warranty, and should the plaintiff fail in making out a case of express warranty, direct proof of *deceit* on the part of the defendant will in some cases entitle the plaintiff to a judgment of the Court, and knowledge of the defect, &c. before the sale would be evidence of the deceit.

Damages.—If the animal or thing sold has been returned, the plaintiff will be entitled to recover the whole price—if kept, the difference between the real value and the price paid in the first instance. The usual course is to resell the article, but this should be done promptly; if so, the plaintiff may recover the difference between the price realized at the re-sale, after deducting the costs and expenses of the re-sale, and the price they would have fetched had they answered the warranty.

In the case of animals, if the purchaser, as soon as he has discovered a breach of the warranty, as in the case of unsoundness, tenders back the animal to the seller, he may recover the expenses of the keep during the time that he is preparing to sell the animal to the best advantage. If *special damages* have been sustained by the purchaser, they may be recovered by the seller. Thus where the plaintiff having bought of the defendant a horse warranted sound, re-sold the horse with a like warranty, and was sued for a breach thereof by the second purchaser, and the plaintiff then gave the defendant notice of the action and offered him the option of defending it, but the defendant gave no answer, and the plaintiff failed in the action, and had to pay damages and a large sum for costs, it was held that he was entitled to recover these costs in addition to the damages he had been compelled to pay to his immediate purchaser.

MANUAL, ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—By V.)

CONTINUED FROM PAGE 81.

At any time before actual sale the party against whose goods the execution has been issued can pay the amount of claim, costs and fees, to the Clerk or Bailiff; such payment supersedes the execution and entitles the party to have his goods restored to him. Where the money is paid to the Clerk he will issue the necessary order in writing to the Bailiff to release and restore the goods. There is also a provision in the Act enabling the Judge to suspend an execution, which need not be referred to particularly, as it is scarcely ever acted

on; when it is, the Judge's order will be the Bailiff's authority to withdraw from the seizure.

At the expiration of the time fixed for keeping the goods the Bailiff may sell them by public auction to the highest bidder. The sale should be at the place mentioned in the notices of sale, and should not be at an earlier hour than that named therein. If there be no bidders the Bailiff may sell the goods privately to the execution creditor or any other person, provided he obtains reasonable prices, but he cannot deliver the goods seized to the execution creditor—they must be *sold* to him for their real value.

No officer charged with the execution of a precept can in any way become a purchaser of goods sold by him thereunder; the enactment (D. C. Act, section 61) is as follows: No Bailiff, *or any other officer* of any Division Court shall directly or indirectly purchase any goods or chattels at any sale made by him under execution, and every purchase made in contravention of this enactment shall be absolutely *void*. It may be doubted whether Clerks are within the terms of this clause—but purchases by Clerks are open to serious objections, and the practice is very much to be condemned. Indeed the perseverance in such or in any other practice calculated to engender suspicion or collusion between Clerk and Bailiff would form proper ground for the removal of any Clerk offending in this particular. In selling, the Bailiff should have a book made out in which could be set down a list of all the articles intended to be sold, with the blank columns for the names of the purchasers and prices. A copy of the notice of sale should precede this list, as well as a memorandum that the goods were sold at the day named to the undermentioned parties, and at the prices specified. As each article is sold the name of purchaser and price at which it is bid off to be entered by the Bailiff. Care should be taken not to sell more than is sufficient to satisfy the execution, and the Bailiff, if he sells more than is necessary will be liable in trover for the excess. [1]

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

ORSER v. GAMBLE.

(Reported by C. Robinson, Esq., Barrister-at-Law.)

(Mich. Term, 20 Vic.)

Special agreement—Right to recover on common counts.

In November, 1853, plaintiff agreed to clear and fence twenty acres of defendant's farm, to be cleared fit for seed by the 10th of September, and all to be completed by the 20th, £30 to be paid in advance, and £30 on the 15th of October. In the following spring a fire occurred on the land occupied by defendant, and ran over a part which plaintiff had chopped: he told defendant that this would probably prevent him from finishing the job in time, and wished to give it up, but the defendant persuaded him to continue, and he went on until the autumn, when he left off altogether, alleging as a reason that he had heard defendant intended to claim damages from him for not having finished in time. About 15 acres were then cleared, which *defendant had put in crop.*

Held, that the plaintiff was not entitled to recover upon the common counts for the work performed.

(14 Q. B. R., 876.)

ASSUMPSIT on common counts for work and labour.

Pleas—Non-assumpsit and payment.

On the 25th of November, 1853, the parties entered into the following written agreement:—

"Articles of agreement, &c.—The said Gilbert Orser doth agree to chop, clear and fence twenty acres of land for the said Warren Gamble, on lot No. 1, in the 9th concession of Cartwright; the fence is to be staked, rydered, eight rails: the land is to be cleared fit for the seed by the 10th of September next, and the fencing and all to be completed by the 20th of September next.

"For which the said Warren Gamble is to pay the said Gilbert Orser sixty pounds; thirty pounds in advance, and thirty pounds on the 15th of October, 1855."

The plaintiff went on with the chopping till the Spring of 1854, when the defendant was clearing a small patch for potatoes on another part of the farm, and having set fire to his log heaps the fire ran over upon about seven acres of the land which the plaintiff had chopped, and made it more difficult for him to clear. He expressed his doubt to the defendant whether he would be able to finish the twenty acres in consequence by the time agreed upon, and wished to give up the job, but the defendant persuaded him to go on with it, said he was sorry for the accident, and took some blame to himself for it, promising that he would give the defendant some assistance in going on with the work. In the fall of 1854, however, the plaintiff quitted the job, giving as a reason that he heard the defendant had said he meant to claim damages from him, because he had not finished in time. At that time the plaintiff had cleared about fifteen acres, and the defendant had sown it with grain. In the next spring, however, the plaintiff went on logging a small piece which he had chopped, and the defendant put a spring crop on it. That, however, only made about sixteen acres, and instead of fencing the whole the plaintiff only put up about sixty rods of fence on one side, and that was not staked or rydered as agreed upon. After that the plaintiff did no more.

At the trial at Whitby, before *Robinson, C. J.*, it was objected by the defendant that it was not competent to the plaintiff to abandon the job at his pleasure, and then sue for what he had done. The learned Chief Justice held the objection to be well founded, seeing that nothing that should take this case out of the general rule, that a man cannot break off in the middle of a work which he had engaged to perform, or deliver only a portion of such goods as he has contracted to deliver, and then claim to be paid *pro tanto*. It appeared to him that the defendant saying that he would not be particular as to time, and urging the plaintiff to go on, and promising to help him, were no reasons why the plaintiff should hold himself relieved from the obligation to finish the job at any time, or at least to offer to finish it, and to persist till he was prevented. He could not either in reason say to the defendant, "I have been told that you threaten me with an action for not finishing my work in time, I will therefore not finish it at all, and will appeal to a jury to give me for my work what they may think it to be worth."

It was urged that the fact of the defendant's having put in crop the land that had been cleared was sufficient to throw upon him the obligation to pay for it at once; but the learned Chief Justice saw nothing in that circumstance that should have the effect. He remarked that the agreement stipulated that the land should be fit for seed on the 10th of September, 1854, though half of the £60 was not to be paid till the year following: that there was no restriction against the defendant using the land as soon as it should be cleared: that it appeared probable from some of the testimony given, that the price

[1] Aldred v. Constable, 6 Q. B. 270.

which had been agreed upon in 1853, for clearing and fencing the twenty acres was considerably less than the present price, and lower probably than the price generally paid then; but on the other hand, half the money for the job was to be paid in advance: that it might be that the plaintiff imagined that by abandoning the agreement and disabling himself from suing upon it, he would probably recover more upon a *quantum meruit*, but people should be faithful in their engagements;—and he held that the plaintiff must finish what he had undertaken to do, or at least shew a readiness to do so, before he was in a condition to claim payment for his partial performance.

The defendant accepted a non-suit with liberty to move against it.

Crooks obtained a rule nisi accordingly, citing 2 Sm. L. C. 20; Farnsworth v. Garrard, 1 Camp. 38; Read v. Rann, 10 B. & C. 440; Roberts v. Havelock, 3 B. & Ad. 404.

Dempsey shewed cause.

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

The non-suit was proper in our opinion. We have looked at the authorities to which Mr. Crooks referred us, but find nothing in them to support the plaintaiff's case. The whole doctride is extensively treated in 2 Smith's Leading Cases, in the notes to *Cutter v. Powell;* and we consider this case to fall clearly within that class where the plaintiff has entered into a contract indivisible in its nature, from which he has not been discharged by any failure on the part of the defendant to fulfil his part, or by any refusal to allow the plaintiff to complete what he had engaged to do. In such case the contract is still open. The plaintiff could not rescind it at his pleasure, or treat it as being rescinded through his own delay in performing it. Sixty pounds were to be paid for clearing and fencing twenty acres, half the money to be paid in advance, and the remainder on a certain day, a year after the work was to have been completed. In such a case the plaintiff must finish the work for which the remaining payment was to be made. The one of *Sinclair v. Bowles* (9 B. & C. 92), is in principle like the present; and it is important that the principles which bind people to the fulfilment of their engagements should be maintained, otherwise, whenever a man has taken a job at a low price, or when prices have risen greatly after he took it, he would feel himself a liberty to abandon his special contract, break off from his work, and sue on the common counts for what he has chosen to perform.

Rule discharged.

CHARLES v. DULMAGE.

(Reported by C. Robinson, Esq., Barrister-at-Law.)

(Mich. Term, 20 Vic.)

Land described for patent—Sale of for taxes—Patent afterwards issued.

Where land was returned under 59 Geo. III., ch. 7, sec. 12, as described for patent, it was liable for taxes, and having been regularly sold therefor, *Held*, that the sheriff's deed must prevail against a patent subsequently issued to the original nominee.

(14 Q. B. R. 585.)

EJECTMENT for lot 31, 8th concession of Brighton (formerly Murray).

At the trial at Cobourg, before *Robinson, C. J.*, a verdict was by consent found by the plaintiff, and one shilling damages, subject to the opinion of the court upon the following

CASE:

The plaintiff claims title under a patent to herself as only child and heiress-at-law of John Griffith, deceased, bearing date April 8th, A.D., 1839, issued under a decree of the Heir and Devisee Commissioners, and bearing the following memorandum: "O 122nd Claim Commissioners, report H 2 in July, 1837, admn. Sir Francis Bond Head, K. C. H., privileged M. C. John Griffith, original nominee, settlement duty performed."

The defendant claims under the following circumstances:—

The lot was first included in the return under 59 Geo. III., ch. 7, sec. 12, made to the treasurer of the Newcastle district, under date the 24th of June, 1820, as described for a patent to Captain John Griffith, which return stated correctly the facts contained in it.

On the 19th of February, 1830, 18 acres of the south-east angle of the lot was sold for taxes to William Steele, and a sheriff's deed given, dated 10th July, 1834, and registered on the 14th of July, 1834.

On the 9th July, 1839, the remaining one hundred and fifty-two acres were sold to the same William Steele for taxes, and a sheriff's deed given, dated 20th November, 1840, and registered on the 30th November, 1840.

It is admitted there was no distress on the land, and that so far as the sheriff's proceedings are concerned, the sales were regular.

The defendant claims the east half, to which the defence is limited, under conveyances from William Steele.

The question for the court is, whether the plaintiff is entitled to succeed for all or any of the east half of the lot—that is to say, whether both or either of the sheriff's deeds can prevail against the plaintiff's title under the patent, and it is agreed that the verdict be entered according to the finding of the court.

Patterson for the plaintiff.

F. Boulton for defendant.

ROBINSON, C. J.—We think that the defence was entitled to prevail for both parcels of land sold by the sheriff for taxes. There is not the slightest room for doubt upon the provisions of the several statutes relating to land assessments, and the sale of land for taxes, that the rates were authorised to be imposed from the time that the lands were returned to the treasurer of the county by the surveyor-general as having been *described* for patent, although no patent had yet been issued. The words of the first statute are plain upon that point, and we have repeatedly held that they admit of no doubt; and the legislature, no doubt, meant that, for otherwise the intended grantee of the land, fully secure that the crown would not disturb him, might delay suing out his patent merely to avoid the taxes.

Then it is equally plain, that if the land was liable to the tax it was made liable to be sold in case of non-payment; and it is admitted that in point of form all was regularly done by the county officers.

That being so, we are clear that the crown, by issuing the patent afterwards to the person who had neglected to pay the taxes, could not render nugatory and void all that had been done under the express provisions of the acts of parliament, for that would be setting up the authority of the crown against that of the Legislature.

MCLEAN, J.—By the 12th section of 59 Geo. III., ch. 7, the surveyor-general was required, on or before the first day of July, 1820, to furnish the treasurers of the several districts with a list or schedule of the lots in every town or township within their respective districts, as the same is designated by numbers and concessions, or otherwise, upon the original plan thereof, in which list it must be specified, in columns opposite to each lot, to whom the said lot, or any, and what part thereof has *been described* as granted by His Majesty, and whether any part remains ungranted, and also what lots are reserved as Crown or Clergy Reserves, or for other public purposes, and to whom such reserves or any part have been leased; and a similar return was to be transmitted annually thereafter on or before the 1st day of July in each year.

Then by the 13th section of the same act, all lands *described in the said schedule* as having been granted or let to lease by His Majesty, are from the time they are so returned made subject to be assessed and charged to the payment of

the rates or taxes imposed by the act; and the same section authorises the collection of such rates and taxes by distress when any can be found upon the land. By the 14th section it is made the duty of treasurers to keep an account against each lot or parcel of land "*according to the list or schedule furnished* by the surveyor-general," enumerating every lot and describing the same as in the schedule; and by the 15th section an accumulation of rates is imposed if suffered to remain in arrear beyond a certain period.

Under that statute, all lands specified in they surveyor-general's schedule as having been granted or let to lease, are made liable to the payment of rates; but as these rates could not be collected except when there was *distress* on the land sufficient to cover the amount, the act 6 Geo. IV., ch. 7, was passed to authorise the sale of the land, or a portion of it, for the satisfaction of the taxes in arrear. The mode of proceeding prescribed by that act is admitted to have been pursued in the sale of the lot now in controversy, and it was not redeemed within the time allowed by the statute. If then it was liable to be rated and sold, the party who purchased and obtained the sheriff's deed must have acquired a good title in law, though in fact the patent from the crown may not have been issued at the time. It was returned on the surveyor-general's schedule and described therein as having been granted by His Majesty. Being so returned it became liable under the act to be rated as the property of the individual mentioned in the schedule as the grantee.

The rates not being paid, it was subject to the same remedies as all other lots for their collection, and by the 18th section of Geo. IV., ch. 7—the sheriff was authorised to give a deed *in fee simple* to the purchaser—the lot when sold not being redeemed. That deed *in fee simple* must have the effect of superseding any other title, whether in the crown or in an individual, otherwise the statute must be inoperative. The Court of Common Pleas, in a recent case (*a*) have taken this view of the effect of the law, and I think there is no doubt that it is the correct view, and that the defendant is entitled to judgment in this case.

BURNS, J., concurred.

Judgment for defendant.

THE QUEEN v. MADDEN.

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

(Mich. Term. 20 Vic.)

On an indictment for bigamy the first wife is not admissible as a witness to prove that her marriage with the prisoner was invalid.

The prisoner was convicted before *Richards, J.*, at Woodstock, of the crime of bigamy.

The counsel for the prisoner proposed to call the first wife to shew that her name was not Mary Murphy at the time of her marriage, as mentioned in the indictment, but Mary Darlington. He also proposed to prove by her, that the prisoner at the time of his marriage with her was delirious from disease, and incapable of contracting a valid marriage: that whatever marriage was then solemnized was only one "*de facto*," and not "*de jure*:" that in fact she and the prisoner never considered themselves as man and wife.

The learned judge refused to admit her as a witness to prove these facts.

The prisoner was found guilty, and sentenced to two years' imprisonment at hard labour in the provincial penitentiary, but the execution of the sentence was delayed until the opinion of this Court should be taken as to the admissibility of the witness tendered to give such evidence.

R. A. Harrison for the crown.

Blevins, contra, cited Regina v. Gooding, 1 Car. & Marsh, 297; Peat's Case, 1 Lew. C. C. 111, 288; Wells v. Fletcher, 5 C. & P. 12.

(a) Ryckman v. VanVelkenburgh, not yet reported.

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

We are of opinion that the first wife was properly rejected, though it is evident that the question of her competency or incompetency affords ground for much ingenious argument on both sides. In treatises on Criminal Law, from *Lord Hall* downwards, it is stated as a clear proposition that on a trial for bigamy the first wife cannot be a witness either for or against her husband, but that the second wife (so to call her,) can, for she is not legally the wife of the defendant, though the ceremony of marriage may have passed between them. It is very obvious to remark that both these propositions assume that the first marriage was a valid marriage, but that if the fact were otherwise, then the foundation for applying the principle fails, for in that case the first woman, not being the wife of the party, may be called as a witness for or against him, while the second woman being in law his wife (if there was nothing irregular in the marriage solemnized with her,) must be really the legal wife of the defendant, and so inadmissible as a witness for or against him. It would seem at first to be most unlikely that the question presented in this case could have remained for any length of time unsettled, but upon reflection it is not surprising, because the prosecution for bigamy is generally instituted by the first wife or her friends, and it is not likely therefore that she would be offered as a witness for the defendant; still it might occasionally happen, as it has happened here.

We find nothing expressly in point, where the point has been raised on a trial for bigamy, except in Peat's case referred to in the argument, and reported in the 2nd vol. of Lewin's Crown Cases, page 111. The note of the case is short. The question was, as the reporter tells us, whether the reputed first wiff of the prisoner was a competent witness to prove that her marriage with the prisoner was illegal, and that she was not his wife. *Alderson*, Baron, who presided at the trial, held that she was not competent. That would seem to settle the question before us so far as the opinion of the individual judge could settle it, but in a subsequent page, 288, the reporter returns to the case, and tells us that what the prisoner wished to prove by calling his reputed first wife was that his marriage with her was void, because she had a husband by a previous marriage living at the time.

This placed the learned baron at the time precisely in the position in which the learned judge was placed in this case. He had to determine a point which he might consider as one of the first impression. The reporter tells us that Baron *Alderson* was at first induced to think that she might be examined simply to the fact of her being the wife or not of the prisoner, but after conferring with *Williams, J.*, (who no doubt was holding the civil court at Liverpool, where the point arose,) he determined not to receive her evidence, but to reserve the point in the event of a conviction for the decision of the judges. The prisoner was acquitted, however, and so the case was not afterwards heard of. The reporter has a note to the case, whether the judgment was not given upon the wrong issue; and he intimates that it should have been considered proper to ask the witness upon her *voir dire* whether she was the legal wife of the prisoner, and to examine her upon that collateral issue, and if it should appear on her evidence so taken that she was not the legal wife of the prisoner, then her competency to be examined as a witness upon the merits of the case would be established. That opinion, or rather suggestion, does not, we fear, derive any great weight from the mere authority of the reporter. The first impression of Baron *Alderson*, however hastily formed, would be considered entitled to much authority from his long experience, and his acknowledged eminence as a criminal judge, but his second thought upon the point, after deliberation and conference with his brother judge, can more safely be relied upon. After all, however, it is not that kind of decision that could be allowed to prevail if it stood opposed to any judgment that had been given upon the point by the judges after a solemn argument;

but we have found no such judgment, nor any judicial authority against what Baron *Alderson* held after consultation with his brother judge, and in reason and upon principle we think their view was the correct one. Where a man is upon his trial for larceny, or any offence other than bigamy, or where an issue is being tried in a civil case, and the reputed wife has been called as a witness for her husband, the question has in several cases arisen, whether she could not be allowed to prove on her *voir dire* in the first place that she was really not his wife, and then be received as a witness in the case. The decisions under such circumstances have been rather contradictory (*a*), but they could not govern, we think, upon a trial for bigamy. The question put to the reputed first wife then, if put upon their *voir dire*, could not reasonably be looked upon as put upon the trial of a collateral issue, or in the case of a preliminary investigation, for if she should give the answer which the prisoner expects from her—namely, that she was not legally married to him—the whole case falls at once to the ground; there is an end of the prosecution for bigamy, and she can have nothing further to speak to. Her evidence in answer to such question goes at once to the prisoner's acquittal.

As we have already stated, there is room for much argument, rather ingenious than solid, but authority, so far as it goes, is against the admission of the witness, and that we think is the case also upon reason and principle.

Our opinion is that the conviction was proper.

Conviction affirmed.

CHAMBER REPORTS.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by T. Moore Benson, Esquire.*)*

Comstock v. Edwards.

Practice—Commission to examine witnesses—Costs.

Where an action has been brought in one of the Superior Courts for an amount within the jurisdiction of an inferior Court, because of the necessity of issuing a commission for the examination of witnesses, Superior Court costs will be allowed.

(Feb. 3, 1857.)

This was an *ex parte* application on the part of plaintiff for an order directing the allowance of County Court costs, on the ground that it had been necessary to issue a commisssion for the examination of witnesses.

The suit had been brought in the inferior jurisdiction of one of the Superior Courts, and judgment having been recovered for a sum within the jurisdiction of the Division Courts, the Master refused to tax the costs.

Burns, J., granted the order.(*b*)

Dickie et al v. Elmslie.

Appearance—Costs—Practice.

Where an appearance filed by defendant was by mistake endorsed with the letters C. C., who was also Clerk of the County Court, which misled the Dy. C. C. and caused him to file it among his County Court papers, and the plaintiff, finding no appearance, signed judgment, the judgment was set aside upon payment of costs by defendant.

(Feb. 5, 1857.)

This was an application to set aside a judgment for non-appearance, and the execution thereon issued, and all subsequent proceedings, for irregularity, with costs, on the ground that the judgment was signed after an appearance for defendants had been duly filed in the proper office; or on the ground that the judgment was signed too soon, and before the time for appearing had expired; or to set the judgment aside on the merits.

The defendant's attorney, through his agent at Hamilton, filed an appearance for defendants within the proper time; but upon the appearance paper he, through mistake, endorsed the letters "C. C." which led the Deputy Clerk of the Crown to suppose that it was in a County Court suit; and he accordingly filed it away among his County Court papers. There was no Appearance Book kept in the office before the 1st of June, 1857; hence plaintiffs' attorney found no appearance among the Queen's Bench papers, and therefore signed judgment.

M. C. Cameron moved the summons.

Jackson showed cause.

Burns, J.—I will set the judgment aside, but it must be on payment of costs by defendants, because the whole difficulty has arisen out of a mistake on their part in endorsing the letters "C.C." on the appearance.

Order absolute accordingly.

Cleaver v. Fraser, (an absconding debtor.)

Practice—Absconding debtor—C.L.P. Act, 1856, sec. 53.

An order authorizing a Sheriff to sue for debts due to an absconding debtor, to satisfy an attaching creditors' execution, under the 53rd section of C. L. P. Act 1856, will be granted *ex parte*, upon affidavit showing clearly plaintiff's right to make the application.

(Feb. 6, 1857.)

J. Macdonald, for plaintiff, applied *ex parte* for an order authorizing the Sheriff of the county of Halton to sue persons indebted to defendant, under the 53rd sec. of C.L.P. Act, 1856.

The affidavits on which the application was made were that of the Sheriff, stating that the real and personal property and effects of defendant were and are insufficient to satisfy plaintiff's judgment,—and that of plaintiff stating the issuing of the writ of attachment, the recovery of judgment, that it is still partially unsatisfied, that all the real and personal property of defendant has been exhausted, and was insufficient to satisfy his judgment, and that several persons within the jurisdiction of the Court are indebted to defendant.

Burns., J., granted the order.

Bell v. White.

Practice—Injunction—C. L. P. Act, 1856, sec. 196.

An injunction will be granted *ex parte* to restrain defendant from cutting and removing timbers, pending the action of ejectment.

This was an *ex parte* application by *Bell*, plaintiff's attorney, for an order for an Injunction, under the 126th sec. of the C. L. P. Act, to restrain defendant from cutting and removing timber from off a lot of land which was the subject of the present action of Ejectment, until the suit should be determined.

Burns, J., granted the order.(*a*)

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by Charles Way, Esquire.*)*

Lyman et al v. Smith.

Absconding debtor.

Leave granted to serve absconding defendant with writ of summons by mailing it to his address.

(Jan. 13, 1857.)

In this case defendant absconded, and no appearance entered for him. Plaintiff's attorney having reason to believe that defendant was residing in the United States of America,

(*a*) See Bentley v. Cooke, 3 Dougl. 423; Regina v. Young, 5 Cox. C. C. 296.
(*b*) See recent County Courts Amendment Act.

(*a*) It is now the practice to grant only a summons in the first instance. See Harrison's C. L. P. Act, note *d* to section 286.

applied for leave to serve writ of Summons through the post in lieu of personal service. An affidavit filed by plaintiff's attorney stated that after diligent enquiry he was informed and believed that defendant was then residing at Lewiston in the United States.

Burns, J., granted the order for leave to post writ of summons as service thereof.

GALLUSIA v. BUTLER.

Writ of Revivor set aside for irreg[illegible]. The reason for such writ being necessary not being stated in the writ. The statute must be strictly complied with.

(Feb. 9, 1857.)

Paterson, for defendant, moved summons absolute to set aside a writ of Revivor served on him by plaintiff's attorney.

Burns, J., granted an order on the ground that the writ of Reviver did not comply with sec. 205 of C. L. P. Act, 1856, which requires the reason why such writ has become necessary to be set forth by way of recital in the writ. Leave was granted by consent of defendant's attorney to amend on payment of costs.

KERR ET AL v. SMITH ET AL.

Defendants absconded—Order for leave to proceed.

Leave given to serve papers at the last place of abode of an absconding debtor.

In this case defendants having absconded, plaintiff applied for an order for leave to proceed under C. L. P. Act, sec. 45.

The affidavits showed that a writ of Attachment was issued on 21st November. That the Books containing the debts due to defendants were placed by them in the hands of the plaintiffs, and that they promised to give plaintiffs a power of attorney to collect same. That defendants had no connections in this Province, and that they formerly carried on business in the village of Berlin in the county of Waterloo. That efforts had been made by the Sheriff's bailiff to effect personal service of the writ of Attachment, and that after diligent enquiry he had been unable to ascertain to what place defendants had fled and he was unable to effect personal service of the writ.

Burns, J., granted an order that plaintiffs be allowed to proceed by filing declaration and subsequent papers in the office of the Deputy Clerk of the Crown in the county of Waterloo, and by serving such declaration and papers by leaving the same at the last place of abode of defendants in this Province.

WRIGHT ET AL v. HULL.

Prisoner in custody on *mesne* process cannot obtain his discharge by applying under sec. 300 of C. L. P. Act, 1856.

(Feb. 12, 1857.)

Defendant in close custody applied for his discharge under sec. 300 of the C. L. P. Act, 1856. By his affidavit he alleges that he was a prisoner in execution of a debt in this cause at suit of plaintiffs. That he had given plaintiff notice of his intention to apply for a discharge. That at the time of notice being served on plaintiff, defendant had been in close custody in execution for three successive calendar months in this cause. That he was not worth £5 exclusive of wearing apparel, &c., and that the beds and ordinary utensils of his family did not exceed £10. That he had not been served with interrogatories. Plaintiff filed an affidavit alleging that defendant was not in custody in execution, but on *mesne* process issued in this cause.

Burns, J., decided that a prisoner on *mesne* process cannot be discharged under sec. 300 of the C. L. P. Act, 1856, and discharged the summons.

Summons discharged.

NUGENT v. CHAMBERS.

Order for writ of Certiorari to remove cause from Division Court into Queen's Bench.

A writ of *Certiorari* to remove a cause from a Division Court under sec. 85, of 13 & 14 Vic., cap. 53, in a case where defendant resided in a part of the Province far distant from the division in which the suit was commenced, and also on account of difficult question of law that might probably arise on the trial of the case.

(Feb. 13, 1857.)

Summons issued out of Second Division Court of the united counties of Frontenac, Lenox and Addington, against defendant, for a claim of £24 18s. 7d. and 12s. costs. The claim was for goods furnished to defendant. From plaintiffs affidavit it appeared he had formerly resided at Fredericksbourg with his wife and family, that about the year 1839 his said wife Mary Chambers left his house, and he had not seen her since, and supposed her to be dead until the last few months, when it was reported to him that said Mary Chambers was living at Fredericksbourg, and that she was running heavy bills against defendant in the stores in that neighborhood. That defendant had resided for 17 years past in the township of Caledon a distance of 150 miles from the place where plaintiff resides. That plaintiff had reasons to believe that other tradesmen were waiting the result of this action before bringing actions against defendant for goods furnished to the said Mary Chambers.

Fitzgerald, for plaintiff, applied for an order for writ of *Certiorari* to remove the said cause into the Court of Queen's Bench under Division Court Act, 1850, sec. 85.

Burns, J., granted an order on the ground that defendant resided in the neighborhood of Toronto, and a great distance from Ernestown, and also on account of the length of time that had elapsed since defendant's seperation from his wife.

BOUCHIER ET AL v. PATTON ET AL.

Summons for revision of taxation.

There can be no revision of costs taxed in a cause not in Court.

(Feb. 14, 1857.)

A summons was obtained by defendant's attorney calling on plaintiff to show cause why the taxation of costs in this cause should not be revised.

Burns, for plaintiffs, opposed the summons.

Burns, J., discharged the summons with costs, on the ground of there being at the time the summons was obtained no cause in the Court, and that it had been settled by the parties.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by C. E. ENGLISH, Esquire, B.A.)

MELLISH ET AL v. THE BUFFALO, BRANTFORD AND GODERICH RAILWAY COMPANY.

Money paid into Court—Garnishee.

A judge in Chambers cannot order money paid into Court by a garnishee, *without authority*, to be paid to the judgment creditor, but will order it to be returned to the garnishee.

(March 11, 1857.)

The facts sufficiently appear in the judgment:

ROBINSON, C.J.—Whatever difficulty or question there may be in this case arises from the garnishee clauses in the C. L. P. Act not having been acted upon according to the letter nor in the manner contemplated by the Legislature. The parties

seem to have considered themselves obliged to deviate from the common course by the circumstance of Mr. Zimmerman's indebtedness to the Company being solely upon negotiable paper. He would continue to be their debtor only so long as they held the bills; and whether he would have anything to pay to them, would depend upon whether they had or had not endorsed away his acceptances before the garnishee order was served; and as they were not yet due, and were still in the widest sense negotiable, it would depend also upon what the Company might do with the bills at any time afterwards.

This peculiarity in the nature of Zimmerman's debt to the judgment debtors, and what has happened in consequence of it suggests a doubt whether the garnishee clauses are certainly applicable and this gives rise to the question, what is to be done with the surplus?

As I infer from the statement of facts Morland was no party to the agreement under which Zimmerman took up his bills. If so he has done nothing to compromise his rights under the attachment order which he had served before the Company parted with the bills.

By requesting to have the money paid into Court the garnishee and the Company (the first judgment creditors) have thrown upon the Court, or intended to do so, the exercise of a jurisdiction not given to them by the Acts, of determining in a summary manner the claims to the surplus.

If no such claims were advanced as that on behalf of Peter Reid, which seems a perfectly just one, and that on behalf of the Company themselves, or rather of certain individual directors of the Company on account of advances made by them for the Company, the course would be clear. The regular step, I conceive, would in that case have been to hand back the surplus to Zimmerman, who having been already made liable to Morland for the amount of his judgment, would thus have had the means of relieving himself from that charge, and the residue, if there was any, he would have had to pay over to the Company unless in the meantime he had been garnisheed by some other judgment creditors of theirs.

That he would be the debtor to the Company for such residue till he had in one way or the other acquitted himself is plain; for having got up from them his acceptances, he would be looked upon as holding the surplus for their use. But though taking this course would in the simplest manner have been complying with the statute, and perhaps in the only regular manner; the risk might no doubt have been incurred (though in the present case there would have been no risk) of the garnishee making some other use of the money—and leaving Morland and the Company to bear the loss.

I do not feel that that would form a sufficient reason for urging upon me to assume a jurisdiction which the statute does not give me, of deciding summarily between the claimants to the surplus. Mr. Zimmerman having taken up his bills is not urging, so far as I understand, any objection to the Court doing what they think right with the surplus, in other words to my determining whether Morland has not an absolute right to be paid, whatever becomes of Reid's claim, and of the other claim spoken of.

I have no objection to say, that I think at present Morland has a right under his order that must prevail for anything that is shown to me, over the mere verbal assurances of the Company to Reid that he would be paid out of the debt due by Zimmerman, and also over what may have been nothing more than a tacit understanding, or merely an expectation of certain directors that their advances would be made good out of the same money when received.

Its receipt by the Company has been intercepted, as it seems to me, by Morland's attachment order, for I see nothing that can be held to have created a legal lien upon the expected proceeds of the bills except the attachment.

This is my opinion, but at the same time I repeat that the parties have no right under the Act to place me in a position to decide that point summarily; and I do not consider that I can properly take upon me to do so, because Morland, as I mentioned before, has taken no part in the arrangement, and merely stands upon his rights under the order.

Since the money has been paid into Court I have no objections to leave it there till Term, when it can be seen what view the Court will take of the question.

I suppose the best course would have been, if it had occurred to the parties, for Zimmerman to have paid the amount of Mellish & Co.'s judgment, taking care to have it endorsed upon the bills, and then when Morland obtained his order for payment to have proceeded in the same manner with that unless that would have engrossed the whole of the residue in which case he would have got up his bills.

If the bills be yet in existence, that course might yet be taken by returning the bills to the Company, with the payment in part endorsed, and it would then be left to Mr. Zimmerman to decide as he is advised between the claims of Morland under his order, and any other claims that might be advanced. If this arrangement cannot now be made, and I am pressed to make an order, I do not see that there is any order that I have a right to make unless that the residue should be returned to Zimmerman. What would no doubt leave the Company subject to the possibility of loss from having parted with the bills without receiving directly or indirectly payment in full.

So if I should take upon me to direct the money to be paid to the Company, I might be finally depriving Morland of his remedy under the order, unless he could force Zimmerman to pay him notwithstanding, which would be unjust.

The only other order I could make would be to direct Morland's judgment to be paid out of the money in Court, which I would not the less do on account of his having, as it is stated, a registered judgment binding upon the real property of the Company, or at least making himself secure under the arrangement between the old and new Railway Companies which are mentioned in the statement. But I decline to do that, because I have no right to make a disposition of the money by any order.

It was Zimmerman's money paid into Court without authority, and the surplus I think (if no understanding is come to out of Court) I must direct to be returned to Mr. Zimmerman who will then be debtor to the Company in that amount, and will have to act as he is advised with respect to Morland's garnishee order.

ROSS ET AL v. BROOKES AND JONES.

Bail—Insolvent—Order of Protection.

An Interim Order of protection under the Insolvent Debtors Act does not prevent Bail from surrendering their principal, nor does the final certificate discharge them from liability of the bail he previously fixed.

(March 25, 1857.)

The facts sufficiently appear in the judgment.

ROBINSON, C.J.—A summons was granted 25th March, 1857, on the plaintiff to show cause why an *Exoneretur* should not be entered on the bail piece filed in this cause, upon the arrest of defendant Brookes, and why all proceedings upon the bail piece should not be permanently stayed.

On the grounds stated in affidavit, a suit was commenced in May, 1856, against Jones by non-bailable process, and against Brookes by *Capias*, on which he was arrested. The defendant Jones and one Gamble became bail for Brooks.

The cause was tried in October, 1856; when a verdict was rendered for Jones, and against the other defendant Brooks for £490.

Judgment against Brooks was entered in December, 1856, and a *Ca. Sa.* taken out, and given to the Sheriff of York and Peel, returnable 7th January, 1857, which writ was returned *"non est inventus."*

February 11, 1857, process by summons, at the suit of the plaintiffs, issued against Jones as one of the bail of Brookes upon the Recognizance, and copy was served 17th February, to which Jones appeared.

Before such service upon him (Jones) Brookes, the debtor, applied for protection under the Insolvent Debtors Act, and on 16th February the Judge of the County Court of York and Peel made an Interim order for protection, which (it is alleged) prevented Jones from surrendering Brookes in his discharge.

Jones swears that he makes this application for own relief, and without collusion with Brookes or any other person.

On the 16th March, 1857, the Judge of the County Court granted a final certificate of protection to Brookes.

It does not appear in the papers before me on what day the *Ca. Sa.* against Brookes was returned *"non est inventus,"* but I suppose it was some time before the action was commenced against the bail.

The interim order for the protection of Brookes, as a debtor petitioning under the Insolvent Act, was made 16th February, but that was only a protection against creditors—it did not prevent his bail from surrendering him, nor did it prevent even his arrest on civil process under a Judge's order.

Nothing but the final order would entitle the debtor to an absolute exemption from arrest on civil process; and it is not necessary to consider whether the bail could not even after the final order have surrendered him, leaving him to apply to the Court for his discharge—because long before the 17th March, when the final order for protection was made, the bail had been fixed; at least, so I infer from the statements before me, for the process against the bail had been served a month before.

The application for the *Exoneretur* is not rested on the final order, and could not have been under the circumstances; and nothing is said about the final order in the affidavit on which the application is founded. It is produced however by consent, I suppose, and appears to have been issued on the 17th March, long before which time the bail were called upon to surrender their principal, if they could have done so, which they certainly might, notwithstanding the interim order.

If the final order had the effect of discharging Brookes from the debt for which he was arrested, it would seem unreasonable that the bail should be liable; but whether it would have that effect or not cannot be seen from anything before me, for it does not appear whether that debt was set down in the schedule or not.

And if he were in fact discharged from the debt, that has been repeatedly held not to operate in relief of the bail if they were fixed before, which they were in this case.

The summons is therefore discharged with costs.(*a*)

KERR ET AL v. BOWIE.

Judgment by default—Execution thereon.

The eight days from the last day for appearing mentioned in section 60 C. L. P. Act, 1856, is exclusive of such last day for entering appearance.

(March 28, 1857.)

The facts sufficiently appear in the judgment:

ROBINSON, C. J.—*McLean J.* granted a summons on the plaintiff to show cause why the writ of *Fi. Fa.* issued in this cause should not be set aside as being irregular and void, with costs; because the writ was issued before eight days had expired after the entry of the judgment under the C. L. P. Act in a case where the summons had been specially endorsed, and the defendant had not appeared; and because the *Fi. Fa.* was altered in material part after it was issued by changing the date of the issuing thereof after the same had been issued by the Deputy Clerk of the Crown, the writ having been issued (and marked as so issued) on 17th January, 1857, and the date being altered to 19th January after the issuing of the writ from the office.

The summons (first process) was served 31st Dec., 1856, and the last day for appearance would be on 9th January.

Judgment by default signed for non-appearance of defendant 12th January, 1857.

Præcipe for *Fi. Fa.* against goods filed 17th January, and the *Fi. Fa.* actually issued on that day, and delivered the same day to the sheriff.

The writ, on examining it, appears to have been altered by obliterating the 7 in 17, and writing 9 in place of it. Goods have been seized under the *Fi. Fa.* and are now in possession of the sheriff.

The Deputy Clerk of the Crown swears that he issued the writ on the 17th January; that the præcipe was filed on that day, and the writ dated on that day and taken out of his office by the plaintiffs' attorney on the same 17th January.

That about 10th of March, when a motion was about to be made to set the writ aside, the plaintiffs' attorney came to his office and searched the books there, and told the deponent that he had made a mistake in entering the writ in his books as taken out on 17th January, for that it was on the 19th, and should have been so entered; and requested the deponent to alter his entries in his books to the 19th January; that the

(*a*) See *Nordheimer et al v. Groves*, 3 U. C. L. J. 74.

deponent then looked at his books and the papers in the cause, and found them all under the date of 17th January, and also the præcipe for the writ and his entry in his cash book; that he thereupon told the plaintiffs' attorney that he had made no mistake in the date, when the attorney stated that he (the D. C. C.) had already altered the date of the writ.

The deponent then asked to see the writ, and the attorney, later in the day, brought it to him: when the deponent found that the writ had been dated 17th January, 1857, in his hand writing, but that the 7 had been erased and 9 written over it.

He swears that the alteration was not in his hand writing, but as he believes, in the hand writing of the plaintiffs' attorney; and that he returned the writ to the attorney telling him that the alteration had not been made by him (the deponent); and declining to make any alteration in the entries in his books, or in the day of filing the præcipe; and he swears positively that the writ was not altered by him or with his knowledge, approbation, or privity.

On the part of the plaintiffs, their attorney swears that he took the præcipe for *Fi. Fa.* to the house of the Deputy Clerk of the Crown, on Saturday evening 17th January, intending to procure the *Fi. Fa.* on the next Monday morning; that he believes the D. C. C. filled up the *Fi. Fa.* and dated it on the 17th January, contrary to deponent's intention; that on Monday 19th January he called at the Deputy Clerk's office for the *Fi. Fa.* and finding it dated on the 17th caused it to be dated on 19th January, as he intended it should be, and then issued it, to wit on 19th and not before; that it was not altered after it was issued; that after defendant's goods were seized he asked for an extension of time, which deponent declined to grant; that no steps were taken towards executing the writ till after 20th January; that defendant is in embarrassed circumstances, and the debt is likely to be lost if he has an opportunity to put the goods out of his hands: that long before this application the defendant paid the sheriff £11 on the execution; and since this application was made, the sheriff informed deponent that he had received £26 more.

The attorneys' clerk swears that the *Fi. Fa.* did not issue till 19th January, and that he believes it was not altered after it issued.

And the attorney makes a second affidavit, in which he swears to a statement not altogether clear and intelligible, but to the effect that he took the writ to the sheriff's office by mistake on 17th March, and having discovered his mistake immediately took the writ out of the sheriff's office again, and on the 19th had it altered, as already stated, of which the Deputy Clerk of the Crown had due notice, and as he believes was aware that on 19th January he took the *Fi. Fa.* to the sheriff's office: that the date of the præcipe for *Fi. Fa.* was left blank, to be filled up when the *Fi. Fa.* issued, and has been filled up as of 17th since this application was made.

In opposition to this the deputy sheriff Pollock makes oath that the *Fi. Fa.* was placed in his hands by plaintiffs' attorney on 17th Jan., with instructions to levy the amount endorsed; that this was in the forenoon of that day.

That in the afternoon of the same day plaintiffs' attorney asked him to lend him the writ, saying he had forgotten to make an entry of it in his book; that he took it away with him and did not return it till the 19th.

He annexed a copy of the entry in his books of the receipt of the writ on the 17th of January, and swears that the writ appears to have been altered in its date, (in the manner already described) which alteration was not made by the deponent, nor does he know how it took place.

The two affidavits of the plaintiffs' attorney do not compare well together, I think, nor do I consider the last by any means a satisfactory statement; I can have no doubt after reading the affidavits of the Deputy C. C., the Deputy Sheriff, and Mr. Cameron's last affidavit, that the Execution was in fact taken out on the 17th, which was clearly before the eight days had elapsed, which are required to intervene (C.L.P. Act, sec. 60) by the statute between the last day for entering appearance, and the entry of the judgment; it was therefore irregular, and must be set aside with costs, and the goods restored to the defendant.

This is without any reference to the alleged illegal alteration of the writ, to which point and the statements upon it I shall feel it necessary to call the attention of the Court in Term.

The summons was served on the 31st December, and by it the defendant was told that he must cause an appearance to be entered for him *within ten* days after the service of the writ *inclusive of the day of service;* we must therefore count the 31st December as one of the ten days, and besides that day the defendant had the first nine days in January to enter his appearance. It would be impossible to hold that he had had the ten days, if he were obliged to enter his appearance on the 8th January at latest; having therefore the 9th January as his tenth day, he has all that day on which to enter appearance, and judgment could not legally be signed on that day.

Then the 9th of January being the last day for *entering appearance* Execution could not, according to the 60th sec., be issued until eight days *had* elapsed *from that day,* which is in other words *after that day,* and the 17th January being the last of the eight days from and after the 9th, execution could not go until the 17th January had expired, whereas it was taken out and given to the Sheriff in the forenoon of that day.

NEDLEY v. BUFFALO, BRANTFORD & GODERICH R. R. Co.

Practice. Attachment, 199th clause, C. L. P. Act.

In general, when there are opposite claims between the parties, only the balance can be attached by a judgment creditor.

(March 30, 1857.)

The facts sufficiently appear in the judgement.

ROBINSON, C. J.—A summons granted by *McLean, J.,* served 30th March, 1857, on garnishee James Wilkes; why he should not pay over to the Judgment creditor the debt due by him to the Judgment debtor, or so much thereof as will discharge plaintiff's Judgment.

It is shewn by the garnishee that he having endorsed notes for the defendants in the early part of 1855, obtained from them second mortgage bonds of the defendants (the company,) for £4,400 sterling, to secure him for such endorsements.

That afterwards, the defendents being in difficulty and unable to continue using their Railway unless they could find

funds to pay their laborers and other creditors, the garnishee assumed a number of their debts. That up to September, 1856, the garnishee had paid as endorser of the defendants' notes, which they had failed to take up, £1,315 10s. 11d., and since that has been obliged to pay other debts for the defendants assumed by him to the amount of £3,090 18s. 3d.

That the defendants not having repaid the garnishee, he sent their bonds above mentioned to England (apparently without any consent of theirs) and sold them there in September and October, 1856, for £4,910 2s. 6d., Provincial Currency, which money he applied in reimbursing himself what he had paid out for the defendants, and this left an excess in his hands £504 3s. 4d. This he offered to pay over to the Company, but they refused to accept it, alleging that the garnishee had no right to sell their bonds left in his hands for security only.

On the 11th October, Wilkes was served with a garnishee order, (*i.e.*, an attachment order simply at the suit of Morell & Co.) and on the 3rd January, 1857, with another garnishee order of the same description ats. Orr.

The order in the present case ats. Hedley was granted 17th March, 1857, and includes a summons to shew cause why Wilkes should not pay to the plaintiffs his debt to the defendants, against which the above facts as cause.

The garnishee swears also that no action has been brought against him by the company, (the defendants,) but that he had been informed by their secretary that an action will be commenced.

So far as regards the balance which Mr. Wilkes acknowledges he has in his hands for the company, there is no reason why the order to pay should not go, leaving it to the garnishee to take care that he keeps enough in hand to pay the two former attachment orders, for he is fixed as to the amount of these. Whether both or either of these prior orders will absorb the £300 remaining in the garnishee's hands I have no information, and therefore can make no allowance for them otherwise than by what I have stated as to the proceeds of the bonds which the garnishee has applied to pay his own debts as he states. I cannot assume that he owes that to the company, and in such a form that he could not set off against any action by them the debt of equal amount which he contends he has or had against them for monies advanced on their account.

I think it is not clear on the garnishee's statement whether he remains to be protected against any of his endorsements, or whether the notes not taken up by him have been since been taken up by the company.

This appears to me to be a case in which, under the 197th clause, I might make an order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling on him to shew cause why there should not be execution against him; but that is not pressed, and I see no ground for withholding the order so far as relates to the £500 and upwards. The order for payment will be made, it being understood by both parties that this is not to be treated as an order to pay anything more than the excess above the demands of the garnishee against the company.

FRASER v. ROBINS.

Ejectment—Waste—Order to restrain.

Under 286th sec. C. L. P. Act, a Judge will grant a temporary Injunction to restrain waste during the pendency of an action of Ejectment.

(March 30, 1857.)

This was an action of Ejectment, and an appearance was entered in the cause.

On 10th March, 1857, the plaintiff moved for an Injunction on the defendants, not to cut timber on the land in question, or to remove any of the wood and hay now piled and stacked upon the land. The defendant contended that the sections of C. L. P. Act respecting injunctions did not apply to actions of Ejectment or Replevin.

ROBINSON, C.J.—The 283rd clause, which makes provision for Injunctions being claimed in the action, gives the remedy in all cases of breach of contract, or other injury; and it enacts that the plaintiff may in like case and manner as is provided in respect to *mandamus* (275th clause) claim a writ of injunction. It is suggested that the words "in like case," as used in 283rd clause, mean in actions *of the same description;* and as the 275th clause, which gives the remedy by *mandamus*, gives it in any action "except Replevin or Ejectment," that the same two kinds of actions must be held to be excepted in applying the 283rd clause respecting injunctions.

Whether that was clearly intended by the legislature or not, there would be nothing inconvenient or unreasonable in the restriction which would except those two forms of action from the operation of the 283rd clause,—because as to Replevin there is no room for the remedy by Injunction, the property being itself in the hands of the plaintiff, and the defendant being secured in its return by the Replevin bonds in case he shall be successful; and as to Ejectments, there would be no sense in applying the 283rd clause to them, because the judgment in the plaintiff's favour would give him actual possession of the land, and he would require no injunction to be in force from that time.

But it is the 286th clause which we have to consider in reference to injunctions moved for, as this was to restrain waste or destruction *while the action is pending*. There is nothing in that clause expressly limiting its application to such cases only as those in which the plaintiff may claim an injunction in his pleading as one of the objects of the action—and the provision will be much less beneficial than it must, as I think, have been intended to be, if it must be so limited; in other words, if no temporary injunction can be obtained by a plaintiff in Ejectment, under any circumstances, to stay waste while the action is pending.

There may be cases strongly calling for it, as, for instance, when a mere trespasser has gone upon land, or an overholding tenant refuses to go out, and puts his landlord to an action. In either case the defendant may not be in circumstances to make compensation in damages for any destruction he may commit; and it does sometimes happen that such persons, while the action is going on, either for the purpose of making an unjust gain or from a malicious feeling, commit injuries of a very provoking kind, while they are holding an unlawful possession which they know must soon cease. The case of *The Attorney General v. Hallett*, 16 M. & W. 569, and the cases referred

to in it show that a Court of Equity would in a strong case of the kind I have supposed grant a temporary injunction to restrain waste, while the action in which the right is to be tried is yet undetermined. I do not think it unreasonable to suppose that the Legislature meant by the 286th clause to give the same remedy in a convenient manner applicable to the case, without leaving the plaintiff to seek it, by a more expensive proceeding in another Court.

It was indeed my impression that, in actions of Ejectment, this remedy by temporary injunction would be more beneficial than in any other, and having heard that this provision had in other cases in Chambers been taken to apply to Ejectment, I granted it, without a doubt occurring to me as to the legality of the proceeding.

The affidavit on which the writ was granted being strong, and being reluctant to consider that the statute does not give the power to issue a temporary injunction in plain cases of this kind. I allow it to stand, at least till the trial.

Greene et al v. Wood.

Practice—Attachment.

An attachment for disobeying a Judge's order for examination, under sec. 193. C. L. P. Act, will not be granted by a Judge in vacation.

(March 30, 1857.)

The facts sufficiently appear in the judgment.

Robinson, C.J.—*Mr. Justice McLean* had granted a summons on the defendant, to show cause why an order should not be made for an attachment to issue against him for not attending for his examination respecting debts due to him as directed by a Judge's order made 26th December, 1856.

An appointment had been made by the Judge of the County Court before whom he was to have been examined, which was endorsed on the order, and the order to be examined had been made a Rule of the Court of Common Pleas.

The doubt I have is whether an attachment for contempt of such an order can be issued in vacation. The statute (section 193) does not authorise it.

In sections 285 and 286, which give the remedy by Injunction, the Legislature has expressly allowed an attachment for disobedience of the Injunction to be made by a Judge in vacation.

I do not find that express permission to sue out an attachment in vacation given in any other instance by the C. L. P. Act. The reason for giving it then is obvious—for otherwise the whole object of the Injunction might be lost.

The present order is not one of that obviously unjust kind; but yet it may be of great consequence to the plaintiff to get the information without delay—for otherwise he may lose the object of his application, by some person who has been later in applying—but whom the defendant is more willing to favor, obtaining the information before him.

It is probable that if it had been discussed in the Legislature whether obedience might not be enforced in such a case as this by attachment to be issued in vacation it would have been directed by the Act; but since the Legislature has made no such provision in regard to these orders, although they have in other cases, I think we are left to proceed as at Common Law when a Rule of Court has been disobeyed; and certainly the general rule is that such a process can only be awarded by the Court in term time, although there are exceptions under provisions that have been made in particular statutes, as in the two clauses I have just refused to, and in our statute respecting the disobeying by a Sheriff of a rule to return a writ.

Patton v. Provincial Insurance Company of Toronto.

Practice—Declaration—Superfluous matter.

A judge will not order superfluous matter to be struck out of a Declaration, but will refer it to the master of the Court to do so, with costs.

(April 1, 1857.)

The action was on a Policy of Insurance against fire.

The summons taken out called on the plaintiff to show cause why the recitals of the policy of insurance declared on, after the statement of the insurance, and down to and including the specific averments of the performance of the conditions of the policy; and such other parts of the declaration as may be thought superfluous should not be struck out of the declaration with costs; and why in the meantime all further proceedings should not be stayed.

The declaration was in the form hitherto in general use, setting out all the conditions and terms of the Policy, with averments that the plaintiff had done none of those things respectively which would have avoided the policy, as if the pleader were unmindful of the provisions in the C. L. P. Act, (secs. 98, 101, 106,) which make it safe to omit many things now which could not prudently have been omitted before.

Robinson, C.J.—I do not see in the Act any direction or authority to move to strike out superfluous averments in the declaration—which the defendant has moved in this case; but as the effect of the recent changes which I have referred to, is to enable the plaintiff to confine himself with more confidence than he could before have done, to such statements as are essential to showing a good cause of action, we may with so much less hesitation take the course, which it has been considered, the Courts were at liberty to take at the Common Law. I refer to the cases of *Dundas v. Lord Weymouth*, Cowper's Rept. 665; *Price v. Fletcher*, Ibid 727; and also to *Fanner v. Champneys*, 1 Co. M. & K. 369.

I will therefore in this case refer it to the Master to strike out the superfluous matter in the declaration in this case (with costs), as was done in *Price v. Fletcher*, Cowper 727.

The Municipality of Sandwich v. Drouillard.

Practice—Pleading several pleas—C. L. P. Act, 1856, secs. 125, 129, 130.

Where the general issue traverses the statements in the different counts of the declaration, the defendant will not be allowed at the same time to put in pleas denying these statements respectively.

(April 1, 1857.)

The facts sufficiently appear in the judgment.

Robinson, C.J.—The defendant has moved to be allowed to plead, besides the plea of "not guilty," two special pleas, and also to demur to the declaration.

The declaration alleges in the first count that the defendant had erected a fence across and upon a highway in the township of Sandwich, being the line of road between the 2nd and 3rd concessions; and that the plaintiffs by authority of the statute in that behalf, proceeded to open the said highway and to remove the said fence, but that the defendant hindered

and prevented them from opening the said highway. And also that the defendant erected a fence upon the said highway, so that the same could not be used as a highway, and still maintains the fence so erected, and prevents the highway from being so used, to plaintiffs' damage of £50.

The defendant desires to demur to the declaration; and also to plead—1st. Not guilty: 2nd. To the first count, that he has not erected a fence across or upon the said highway, nor did he prevent the plaintiffs from opening the said highway, as in that count alleged. 3rd. To 2nd count, that defendant did not erect a fence upon the said highway so that the same could not be used as a highway, nor does he maintain or keep the same so erected as alleged.

The defendant's attorney has made an affidavit that he believes that the defendant has just ground to traverse the several matters proposed to be traversed, and that the same and the matter sought to be pleaded by way of confession and avoidance, are true in substance and in fact.

I can imagine no necessity for either of the pleas specially traversing the statements in the respective counts, when "not guilty" is pleaded to the whole—because that surely puts in issue the very things traversed in these two pleas—*i.e.*, commission of the acts charged; they are not what are called pleas in confession and avoidance.

I disallow these pleas therefore, unless the plaintiff prefers retaining them, without the general issue.

I think the demurrer in this case should be allowed—but as the action is an experimental one, and seems open to question on several grounds, I think it clearly a case in which the demurrer should be determined before the issue is taken down to trial, and so order.

STAFFORD v. TRUEMAN.

Judgment nunc pro tunc—Time of entering.

A party will not be allowed to enter judgment *nunc pro tunc* when the delay has been that of the party and not of the Court.

(April 2, 1857.)

The facts sufficiently appear in the judgment.

ROBINSON, C. J.—The defendant applies to be allowed to enter judgment *nunc pro tunc* as of the 25th June, 1856, on which day the Court gave judgment discharging Rule for new trial.

It was an action for dower, commenced in 1855 and tried in January 1856, when a verdict was given for the tenant; in the term following the plaintiff obtained a rule *nisi* for new trial upon the evidence and on affidavits, which was served on 12th February, 1856.

The premises were in the county of Peel, and the demandant resided in the county of Huron, and could not, it is stated, obtain affidavits in answer to those filed by the plaintiff in time to show cause against the rule in Hilary Term, and it was enlarged on that account till Easter Term, 1856.

In Easter Term the rule *nisi* was argued, and judgment was given on the judgment day after that Term (25th June) discharging the rule.

It is sworn by the attornies for the tenant that he was delayed for some time in entering judgment in consequence of being unable to procure the subpœnas for his witnesses from the person who had served them, and also a statement of the sums paid to the several witnesses for their attendance.

That about the 24th of August, 1856, the tenant came to Toronto to his attorney, and gave him some information respecting the witnesses, and was to return in a short time with full information, but he died suddenly as he was leaving Toronto on his way home.

That the difficulty in procuring the necessary affidavit of disbursements was increased by the death of the tenant, and has not yet been removed, and the judgment has, in consequence, not yet been entered up.

The demandant has lately brought an action for dower against the heirs of the late tenant.

I should have been glad to have acceded to this application if it had appeared to me that it was warranted by authority, for I do not see that it could do injustice to the demandant, as her right to dower was fairly tried in the former action, and the verdict in favour of the tenant was sustained by the Court; and the heir of the tenant, who is now sued, if he could set up that judgment in bar, would be placed only in a just position; and this case would, not improbably, arrive, without the expense and delay of a trial, at the same result as it will after a trial. But on the other hand, we are to consider that the effect of the judgment, if allowed now to be so entered as to make it legal, notwithstanding the statute 17 Car. II., would be that the widow would be thereby finally barred as to her right to the estate which she claims; and that being so, the Court, and more especially a single Judge out of Court, should not do what will have that effect, if the propriety of it be at all questioned.

I find nothing in the case cited by *Mr. Gamble*, of *Evans v. Rees*, 12 Ad. & Ell. 167, that appears to go by any means the length of supporting this application. *Blewett v. Tregonning*, 4 Ad. & Ell. 1002, cannot be treated as authority for it. It was determined without taking time to consider, and without any authorities cited or reasons given by the Court for their judgment; and besides there was this difference between that case and the present, that the party against whom the verdict was, died within two terms after the delay which had been occasioned by the pending rule ceased. Here two full terms elapsed after the Court had disposed of the rule, and after the death of the party. It is not till about 9 months after the judgment given, and 7 months from the death of the party that this application was made.

The case of *Evans v. Rees*, is a deliberate decision of the Court of Queen's Bench, which seems strongly to support this application, but it stands so strongly opposed to many decisions both before and after it that have been made in all the Courts; that I should not feel warranted in following it, even if the facts were not stronger in favour of the party applying in that case than they are in this. But in fact the delay then was much less; the trial took place in the spring of 1839, and the defendant, who obtained a verdict, died on 3rd April before the ensuing term in which a rule for new trial was moved, which the Court discharged on 8th May, 1839. Judgment was entered on 24th June, 12 days only after the end of Trinity Term, which was the second Term after the verdict. There is a vast difference between that case and the present,

and it appears to me that I could not make the order moved for here without disregarding wholly the authority of many cases in all the Courts. I cite in the Exchequer: *Lawrence v. Hodgson*, 17 L. J. 368; *Lanman v. Lord Audley*, 2 M. & W., 535.

In the Queen's Bench: *Doe dem Taylor v. Crisp*, 7 Dowl. 589; *Miles v. Bough*, 3 D. & L. 105; and *Miles v. Williams* 9 Q. B. 47.

In the Common Pleas: *Fishmonger v. Robertson*, 3 C. B. 970; *Vaughan v. Wilson*, 4 Bing. N. C. 116; and *Freeman v. Franch*, 12 C. B. 407.

I discharge the summons, but not with costs.

DAVIES v. MUCKLE.

Practice—Declaration—Common Counts.

Plaintiff need not allege the amount claimed under each of the common counts if he makes a general claim under all of them at the end of his declaration.

(April 2, 1857.)

Plaintiff declared in his first count thus: "Robert Davies, by ———, his attorney, sues David Muckle, who has been summoned," &c., (stating the process as usual); "for money payable by the defendant to the plaintiff, for goods bargained and sold by the plaintiff to the defendant,"—adding a second count on an account stated, and concluding, "and the plaintiff claims £125."

To the first count defendant demurred, and gave this note of his objections: that it was not stated that the goods were sold by the plaintiff to the defendant at his request; nor that the defendant was indebted to the plaintiff—nor in what amount; nor that the defendant owed the plaintiff anything for the said goods and chattels.

The plaintiff moved to set aside this demurrer as frivolous, and because no substantial ground of demurrer is stated in the margin as required by the Rules of Court; and that the plaintiff should have leave to sign judgment or leave to amend without costs.

ROBINSON, C. J.—I take this declaration to be clearly sufficient, under secs. 108 & 140 of the C. L. P. Act, and schedule B., and the demurrer must be set aside as frivolous, with costs, and the plaintiff be at liberty to sign judgment as to the first count, unless the defendant plead issuably thereto within twenty-four hours.

GRISWOLD v. BUFFALO, BRANTFORD & GODERICH R. R. Co. TAYLOR & KIRBY, Garnishees.

Practice—Attachment.

The penalty of a Bond is not a debt within the meaning of sec. 194 C. L. P. Act, and cannot be attached.

(April 2, 1857.)

The facts sufficiently appear in the judgment.

ROBINSON, C. J.—On 25th March last the plaintiff obtained an attachment order under the garnishee clause 194, sec. C. L. P. Act, on Taylor & Kirby, with summons on them to shew cause why they should not pay over to the plaintiff the debt due by them to the defendants.

The garnishees shew for cause that one Stakeweather some time in 1855 or early in 1856 was station master at Paris on the defendants' Railway, and after having been some time in their service was charged by them with having feloniously taken and applied to his own use monies belonging to the defendants and received by him as Station Master, and he was brought before a magistrate and examined.

That the garnishees and Stakeweather then executed a bond (28th Dec., 1855) to these defendants, in which they severally bound themselves in a penalty of £100 each, with condition as follows: "Whereas the said Stakeweather has heretofore been appointed by the said Buffalo, Brantford and Goderich Railway Compay, Station Master at Paris, in the line of the said Company's railway, and the said W. K. Kirby and John Taylor have at his request consented to become his sureties. Now the condition of this obligation is such that if the said R. K. Stakeweather before the 1st March next do and shall well and truly forward and pay over to the Superintendent of the said Company all monies received by him as Station Master aforesaid for the said Company, either in specie or in the notes of some solvent Bank or Banks, issued or to be issued in any of the United States of America or in Canada, at their current value, at the city of Buffalo or at Brantford respectively, and not in any promissory note, bill of exchange, order ticket or other evidence of debt whatsoever, if upon or against the said Company, then this obligation to be void": and one of the garnishees swears that he is informed that Stakeweather immediately afterwards absconded, not having received any money for the defendants after that bond was executed; that he is advised and believes that he is not liable to the defendants for any of the monies feloniously taken by Stakeweather before the giving of the bond, and that he is no otherwise indebted to the Company than through this bond.

This transaction has a singular appearance, and may give rise to several questions between the garnishees and the Company as to the consideration and effect of the bond—its illegality as being taken for the purpose of compounding a felony, and perhaps there may be imputation of fraud in taking it professedly for one purpose, but with a view to enforce it for another.

Independently however of such considerations, which, it may be said, can be as well entertained and disposed of in a proceeding between the plaintiff and the garnishees under the 197th clause as in an action between the garnishees and the Company; it appears to me that the liability of the garnishees as security for Stakeweather under that bond cannot be called a debt within the meaning of the 194th section. If the garnishees were suing the Company for a debt due by them, the Company could not in such an action set off any claim which they might allege they had against the garnishees under this bond by reason of Stakeweather's default; and when that is the case it is held that the liability which could not be set off as a debt, cannot be attached as a debt under the provisions of the statute.

See the cases of *Crawford et al v. Stirling*, 4 Esp. —— 207; *Morley v. Inglis*, 4 Bing. N. C. 58; and *Johnson v. Diamond*, 11 Ex. Rep. 73.

But however clear this case may be, it is, I suppose, for the consideration of the plaintiff, whether he will persevere in his attempt to attach this claim as a debt. If he do, he will proceed as the Act points out, and the Court will determine the

question as was done in *Johnson v. Diamond*. The only doubt I have is, whether in such a case, where the cause shown by the garnishees is not denied by the judgment plaintiff, and it appears to the judge that the debt is not one within the meaning of the clause, he ought not simply to refuse the order to pay rather than give the party liberty to proceed under the 197th clause—which latter seems to have been the course in *Johnson v. Diamond*, although that may have been because the order was not opposed, or because the facts did not appear upon the application. Considering the nature of the alleged debt, I think I must discharge the summons with costs, and not allow the proceedings to continue further.

Summons discharged with costs.

RUSSELL v. GREAT WESTERN RAILWAY COMPANY.

Practice—Commissions.

The rules of practice which allow evidence to be taken under commission are not to be extended where the object was to procure mere scientific testimony—that is to say, the testimony of *experts* the application was refused.

(May 9, 1857.)

This action was brought by the representatives of the late Mr. Russell for damages on account of his death caused by the accident at the Desjardins Canal Bridge on the Great Western Railway.

McMichael applied on behalf of the Company for commissions to issue to different parts of the United States for the purpose of examining engineers, &c., as to the structure and sufficiency of this Bridge. It was admitted that the object of these commissions is to obtain scientific evidence and to examine parties not personally cognizant of the facts of this case.

Jackson showed cause on affidavits by the plaintiff's solicitors that in his opinion this application is only made to throw the case over the Brantford Assizes, which are fixed for a day only two days from the date of the present application. He also contended that the defendants could readily procure the attendance of as many engineers as they desire; that they had such evidence in abundance at the Inquest. *Mr. Jackson* subjoined a list of a great many eminent engineers in Upper and Lower Canada.

HAGARTY, J.—On the best consideration I can give this application, I have come to the conclusion that I should refuse this order for a commission. I think as a general rule any party to a suit desiring to avail himself of the opinions of scientific men not personally cognizant of the facts of the case, as to questions arising in the evidence of those who depose to such facts should be reasonably required to produce such testimony at the trial in the ordinary way.

Evidence by commissions is almost always unsatisfactory. It is impossible in numerous cases to dispense with it, but I for one always regret to see a man deprived of his estate or subjected to ruinous liabilities, except on testimony of those who are brought before him, and whose demeanor and manner of testifying can be seen and appreciated. Admitting the absolute necessity that exists of allowing commissions in many cases, I cannot be a party to extending the rule to such cases as the present. I do not desire to lay down any rule as to scientific evidence in general. Some countries may from their circumstances be almost destitute of certain classes of scientific men of a high order of mechanical knowledge. Evidence may often be required of foreign laws or local customs, in which commissions may be absolutely necessary, on a mere question of railway working, a construction of locomotives or bridges. I cannot consider Canada so deficient in scientific evidence. I think that those who desire the opinions of persons beyond the compulsory process of her Courts, may take the trouble, expense, and responsibility of procuring their personal attendance.

I refer to *Mair v. Anderson*, 11 U. C. R. 160, and the cases there cited as the discretion of Courts and Judges in granting or refusing orders for commissions.

Application refused.

ROWE v. COLTON.

Practice—Arbitration—Agreement.

Under a reference to arbitration to be held "in the usual manner," a judge will not, in case of disagreement as to third arbitrator between two arbitrators chosen by each party, appoint a third arbitrator in the first instance before the two arbitrators have proceeded to settle the matters in dispute themselves.

(May 9, 1857.)

The circumstances of this case are as follows: By an agreement under seal Rowe agreed among other things to take certain stock in the Whitby Harbour Company from Colton at a valuation to be determined "by arbitration in the usual manner."

Under this clause each party appointed an arbitrator and notified the other.

These two arbitrators, without attempting to settle the valuation, made several attempts to agree upon an umpire, and failed so to do.

Rowe then served notice, under the 92d clause C. L. P. Act, on both arbitrators to appoint a third, and they not having done so he now applies, under 94th sec. C. L. P. Act, to a Judge in Chambers to make the appoitment for them.

HAGARTY, J.—I do not think you are yet in a position to make this application. In my opinion arbitration, in the usual manner mentioned in an agreement which also speaks of "said arbitration or umpirage," most probably means that each party was to appoint his arbitrator, and then for these two arbitrators to proceed in the first instance to settle, or at least to attempt to settle, the matters in dispute.

The case is new to me, but I think the arbitrators already named should try to proceed with the arbitration. If either decline to act, or practically will not act on reasonable notice and request, then I think you can apply to have another arbitrator named instead of such recusant party. Probably if that course be adopted two men can be found willing to proceed with the reference. I think that as the case stands at present I cannot interfere.

Application refused.

TO READERS AND CORRESPONDENTS.

All Communications on Editorial matters to be addressed to

"The Editors of the Law Journal,"
Barrie, U. C.

Remittences and Letters on business matt to rsebe addressed (*prepaid*) to

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Whatever is intended for publication must be authenticated by the name and address of the writer, not necessarily for publication, but as a guarantee of his good faith.

Matters for publication should be in the Editors' hands three weeks prior to the publication of the number for which they are intended.

NOTICE.

The *Upper Canada Law Journal* is not liable to postage. The Terms are 20s. *per annum*, if paid before the 1st of March in each year—if paid after that period 25s. The Scale of Charges for

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THE UPPER CANADA LAW JOURNAL is published at the *Barrie Herald* Office, Dunlop-Street, Barrie.

THE LAW JOURNAL.

JUNE, 1857.

TO OUR READERS.

We have delayed the issue of this number for a few days in order to be able to communicate to our readers the result of pending arrangements in connection with the *Law Journal*.

We have now much satisfaction in informing our subscribers and others that we have succeeded in securing the assistance in our labors of ROBERT A. HARRISON, Esquire, B.C.L., well and favourably known to the profession through the several legal publications he has produced, and who will henceforth be associated with us in the conduct of this Journal.

Mr. Harrison's editorial duties commence with the next number, and as he brings to our aid not merely ability but practical knowledge of subjects hitherto but partially treated of in our pages, it is but reasonable to expect a considerable increase in our subscribers, especially amongst the profession.

There will be no change in the principles of the *Law Journal*, though the range of subjects will be enlarged.

We have now been nearly three years before the public, and, with no trifling difficulties to contend with in a new undertaking, have gone on steadily advancing in favor, as our subscription list proves.

The writer is impressed with the conviction that the *Journal* will be much increased in value by the additional assistance in the editorial department, and will become more completely the organ of those connected with the administration of the Law in Upper Canada, whose just interests it will be ever prompt to advocate and guard.

For himself the writer desires to say that he will not relax his exertions on behalf of those who have supported the undertaking from the first, and his new co-adjutor, he is assured, will leave no reasonable expectation of the profession unfulfilled.

Publishing in the country has been attended with several drawbacks, such as difficulties respecting printing and publishing conveniences, not necessary to detail; and there seems to be a somewhat general feeling that the *Journal* ought to be published at Toronto, the seat of the Courts. We have determined, therefore, (probably after the next number) to publish in Toronto.

We may say then that simultaneously with the addition to the editorial management will be the issue of the *Law Journal* from its future place of publication.

Our new publishers, the best established firm in Upper Canada, will have means and appliances which could not be expected in a country printing office, and the delays we have had so often helplessly to deplore will not occur for the future. We will be able with confidence to assure our friends of punctuality in our monthly issues.

We contemplate other improvements, which will be noticed hereafter.

LOCAL CROWN PROSECUTORS.

The readers of the *Law Journal* will remember that from almost the commencement of the journal, the institution of County Attornies was advocated; and it is satisfactory to find that the arguments we urged had weight, and that our suggestions have been acted on.

On the 1st of January next "An Act for the appointment of County Attornies, and for other purposes in relation to the local administration of justice in Upper Canada," comes into force.

We shall take occasion at an early day to lay before our readers an ample review of the provisions of this Statute, which cannot fail to prove highly beneficial to the public, if acted on with ability and discretion. No doubt much, very much, will depend on the description of men appointed to the office; none should be named who are not sound lawyers—men of experience, men above the

reach of suspicion of being influenced by improper motives in the discharge of their duties. The appointment of a violent party man, of any side, would scarcely secure proper confidence in such an officer. We hold that the County Attorney should be selected from that class of persons from whom the local judiciary should be supplied, and that as the Attorney Generalship is considered a step towards the bench, so should the County Attorneyship be regarded as an approach to a County Judgeship, if the officer have performed the duty of the minor office with ability and fidelity.

The legal qualification for the office is—being a barrister of not less than three years standing at the bar of Upper Canada—but a barrister who is also Clerk of the Peace may be appointed for his own County, whatever may be his standing at the Bar.

We are not enabled to say how many Clerks of the Peace are Barristers; but looking at the Act and remembering the observations respecting the measure when it was before the Legisture, there seems to be good ground to conclude that these officers (clerks of the peace) will be appointed county attorneys, if possessed of the professional knowledge and fitness necessary to enable them to fulfil the duties with advantage to the County.—There is nothing however to tie down the Executive to the appointment of a Clerk of the Peace when not so qualified; and the absence of such a qualification, we take it, would be a bar to their nomination.

The nature and extent of the knowledge required will be seen by reference to the 5th section of the Act, under which the duties of the County Attorney are set down; these duties are partly as an attorney and partly as counsel; those mentioned under the second, fifth and sixth subdivisions appear to be the most important.

The office is new in Upper Canada, and it will depend in a great measure upon the manner its duties are discharged for the next three or four years whether the office of County Attorney will be numbered amongst the settled institutions of the country. We sincerely trust that professional standing and moral fitness will be the sole test in determining who shall fill these most important offices in the administration of justice.

NEW JURISDICTION TO COUNTY COURT JUDGES.

The 21st section of the Act to amend the C. L. P. Act gives jurisdiction to County Judges over certain matters in suits instituted in the Superior Courts—namely, to issue summonses and orders—for copy or inspection of documents—particulars of demand or set off—security for costs and time to plead—with same effect and authority, as if issued by the Judges of the Superior Courts.

This jurisdiction however is specially limited to cases "where the attorneys of both plaintiff and defendant reside in the same county." The delegation of this authority will be a matter of convenience to the country practitioners and a saving of expense to suitors, and to the extent to which it goes may be considered a safe provision; but with all our predilections in favor of local administration we are not prepared to say it would be wise to enable County Judges to perform all the Chamber business in suits in the Superior Courts as some of the profession urge. We have adopted an entirely new system of procedure; it has yet to be settled, and until adjusted by decisions of the Courts above, it might, in our judgment, lead to much difficulty; it would certainly produce dissimilarity of practice throughout the country. Besides, the County Judges have abundant work in their own Courts, which demands the greater part of their time to do as it ought to be done, and a large increase might compel them to neglect certain portions entirely, or to do all in a superficial manner. After some years portions of the Chamber business of the Superior Courts may gradually be given over to the County Courts; but at present we think the Legislature have reached the bounds of safety.

CONFESSIONS OF JUDGMENT.

We would draw the attention of practitioners to the provisions in the Act of last session, chapter 57, with respect to confessions. It is important that the practitioner should bear in mind that confessions of judgment given before the 18th June, 1857, will be valid to support a judgment or writ of execution, unless the same or a sworn copy thereof be filed in the proper office of the Court in the county in which the person giving it shall reside within four months from the 10th June; and that all con-

fessions taken after that day must in like manner be filed of record within a month. We cannot close our eyes to the fact that a very great deal of fraud has been practised on creditors in this country by means of secret (often fraudulent) confessions, which enabled a particular creditor to come in at any moment and sweep away the whole of a debtor's means in fraud of his creditors generally. An individual might, to all appearances, be possessed of good means, be carrying on a large business, and thus be enabled to obtain an extensive credit, and be in fact an insolvent or liable to have all he possessed (including property he might be enabled to get from others, on the strength of his apparent credit) seized by the Sheriff under execution issued upon a judgment entered up on a secret cognovit, suspended for months over the debtor's head.

Nor had the public any means of finding out whether such confessions were in existence, and the whole credit system of the country was thus based on an unstable foundation. In England the Bankrupt laws and special provision respecting confessions of judgment kept the use of them from degenerating into abuse. The provisions of the Act to which we have referred have this object in view. A book is required to kept in the offices of the Courts in which the debtor resides, wherein must be entered "the names of the plaintiff and defendant in every such confession or cognovit, the amount of the true debt or arrangement thereby secured, the time when judgment may be entered and execution issued thereon, and the time when such confession, or cognovit, or copy thereof is filed in the said office."

This book, called the "Cognovit Book," any one may inspect during office hours on payment of a shilling.

BOOK NOTICE.

THE MANUAL OF COSTS IN COUNTY COURTS, *containing the new Tariff, together with forms of taxed bills and general points of practice. By* ROBERT A. HARRISON, Esq., B.C.L., *Barrister-at-Law. Maclear & Co., Toronto, Publishers.*

This timely little work is deserving of unmixed praise. It has been produced with great despatch, and is yet a reliable "*vade mecum*" for officers and practitioners.

In addition to the Tariff framed for the County Courts by the Judges, Mr. Harrison has given *in extenso* seventeen distinct bills of costs to serve as guides in respect to the various proceedings connected with an action at law. These bills are "copied from originals now in the Courts at Osgoode Hall, and have been chosen by the Editor and approved by the Taxing Officers of the Courts as being suitable and reliable examples of what bills ought to be when correctly prepared." The table of costs for the County Courts being framed on the same principles as that issued for the Superior Courts in 1856, these models will of course serve for both. The Manual concludes with about 15 pages of observations on general points of practice in relation to taxation of costs under a number of appropriate heads, with very numerous references to authorities.

The whole work is well calculated to facilitate a uniform practice in taxation, which was much to be desired, and thereby effect amongst other things a saving of time both to the profession and the taxing officers, to whom it will indeed be of immense value, and Mr. Harrison is entitled to great credit for so useful and so accurate a publication.

The price (2s. 6d.) is absurdly low. The book is worth $2 to every Clerk of the Courts, and to every practitioner in respectable practice.

MONTHLY REPERTORY.

COMMON LAW.

C.P. EX PARTE BEADELL. *June* 1.

Railway and Canal Traffic Regulation Act, (17 & 18 *Vic., cap.* 31)—*Admission of hackney carriages into station of railway company.*

A Railway Company under an arrangement which they made with one proprietor of hackney carriages, gave him the privilege of bringing his cabs into their station for the purpose of plying for hire among the passengers arriving by the trains to the exclusion of other cab proprietors. It not being shown that the arrangement was not advantageous to the public, as well as the railway company, the Court refused a rule on the application of a hackney carriage proprietor who was excluded from plying for hire in the station, calling on the company to show cause why a writ of Injunction should not issue to admit his carriages or a writ to exclude the carriages of the proprietor with whom the company had made the above arrangement.

Q.B. EX PARTE J. H. MARSHALL (gentleman, one of, &c.) RE J. S. WOOLER. *May* 25.

Taxation of costs, receipt of amount of allocatur—Professional remuneration.

An attorney ought not always to be paid by the folio, but is entitled to proper remuneration for care and skill.

The acceptance of money under an allocatur prevents an attorney for moving to review the master's taxation.

C.C.R. REG. v. EVANS. *May* 30.

*Felony—County Court acting under pretence of process of—*9 & 10 *Vic., chapter* 95, *section* 57—*Letter threatening proceedings.*

Upon an indictment under 9 & 10 Vic., cap. 95, sec. 57, for acting and professing to act under a false colour and pretence of County Court process, it was proved that the prisoner being a creditor of R. sent him a nonsensical letter, headed with the Royal Arms, and purporting to be signed by the Clerk of a County Court, threatening County Court proceedings. He subsequently told R.'s wife that he had ordered the County Court to send the letter, upon which she paid the debt; and whilst making out receipt he made a demand of her for the County Court expenses.

Held, (BRAMWELL, B., *dissentiente*) that these facts constituted an offence within the meaning of the section, and that the conviction must be supported.

Semble, that the letter taken by itself was not "false colour and pretence of process" within the section.

Held, (per BRAMWELL, B.) that the section was directed against forgeries of the process of the court and pretences made whilst acting under genuine process, and that the facts above did not constitute an offence.

EX. PIDGEON v. LEGGE. *May* 25.

Trespass — Master and servant — Responsibility of master for act of servant in excess of demand.

A person who requests another, his servant in that behalf, to remove one making a disturbance in his house, is not responsible for excess of force or violence in carrying out his command.

Semble, that he may be answerable for a negligent performance of his order.

Q.B. SUMMERS v. SOLOMON. *June* 5.

Principal and Agent—Authority to purchase goods on credit—Locality.

The defendant's shopman had on various occasions ordered goods on credit for the shop, and then orders had been satisfied by the defendant; but on every occasion the goods had been ordered by the shopman at the shop, and had also been delivered there.

Held, that this afforded evidence of authority in the shopman to purchase goods on credit from the shopman at another place and to carry them away himself.

Q.B. RE AN ATTORNEY. *May* 23.

Practice—Service of rule—Enlargement of.

Application was granted on motion for the enlargement of a rule in this case in order to effect service, and also for leave to make such service on the London agent of an attorney and on his last place of abode, it being sworn on affidavit that the attorney had gone out of the way to avoid service.

EX. EX PARTE WILLIAM BAKER. *June* 1, 2.

Master and servant—Absenting from service—Second conviction—Punishment—Power to inquire by affidavits into jurisdiction of justice—Statutes 6 *Geo.* 3, *cap.* 25, *sec.* 4; 4 *Geo.* 4, *cap.* 34, *sec.* 3.

B., a working potter, was convicted before a magistrate of having unlawfully absented himself from his master's service, and was sentenced to be imprisoned for one month. *Held*, (per POLLOCK, C.B., MARTIN, B., and BRAMWELL, B.) that the conviction was bad for not awarding as to the abatement of B.'s wages during his imprisonment, as required by 4 Geo. 4, cap. 34, sec. 3, which authorizes a justice of the peace in such a case "to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportional part of his or her wages for and during such period as he or she shall be so confined."

Per WATSON, B., *dissentiente*, that the 6 Geo. 3, cap. 26, sec. 4, empowering the magistrate to sentence to imprisonment *simpliciter*, was not repealed by 4 Geo. 4, and that the conviction was good under the earlier statute.

A warrant of commitment recited that complaint upon oath had been made that W. B. did agree to serve as a potter under a written agreement for a certain time, and having entered upon and worked under such agreement, and the term of his agreement being unexpired, he did unlawfully misdemean himself in his service by absenting himself from his service, &c.; the magistrate did adjudge the said complaint to be true, it appearing to him, as well upon the examination on oath of J. S. in the presence of the said W. B. as otherwise, that the said W. B. having contracted to serve as a potter, and the term of his contract being unexpired, did, on, &c., misdemean and misconduct himself in his said service by neglecting and absenting himself, &c. *Held*, first, that the facts of the contract being made, the service entered upon, and W. B. having absented himself, were sufficiently stated. Secondly, that the warrant was not open to the objection that evidence not on oath or not in the presence of the prisoner had been received, as it must be presumed that the words "as otherwise" referred to other legal evidence.

A servant or artificer, within 4 Geo. 4, cap. 34, sec. 3, who absents himself a second time from his service under the same contract, may be punished by virtue of that statute for such second absenting, notwithstanding he was committed to prison for the prior absenting; and a neglect and refusal to return to his work after the expiration of the period of imprisonment, if the time during which he contracted to serve has not then expired, is a fresh absenting. *Dissentiente*, POLLOCK, C. B. And per POLLOCK, C. B., and MARTIN, B., that if such servant or artificer absent himself under a claim of right to treat the contract as at an end, and with an avowed determination of never again to return to his service, and is punished by imprisonment for such absenting, the contract can no longer be treated as subsisting so as to subject the workman to punishment for neglecting to return to his employment at the expiration of his sentence.

The Court may, on an application for a *habeas corpus*, inquire by affidavit into facts which were necessary to give the magistrate jurisdiction. *Dissentiente*, BRAMWELL, B.; *dubitante*, MARTIN, B.

Q.B. WOODLAND v. FEAR. *Jan.* 26, *April* 27.

Money had and received—Cheque of one branch of a banking company cashed at another branch, upon credit of presenter and not of the customer.

H., having an account at the G. branch of a banking company, drew a cheque upon such branch, which he paid to F., who presented it at another branch of the same company where F. was known, and the cheque was paid to F., but on being sent directly to the G. branch payment was refused, H. having then no effects in the bank, though he had when the cheque was paid. It was proved that the business of each branch was kept quite distinct.

Held, that the cheque was drawn upon the branch at G., and that the payment of the other branch was upon the credit of F., and therefore they were entitled to recover back the amount of the cheque.

EX. HIGGINS v. BURTON. *May* 26.

Goods—Title to goods—Liability of auctioneer who sells goods obtained by a false pretence.

Goods obtained by means of a false pretence that D. was agent of F. were delivered to an auctioneer for sale by D., and were sold by the auctioneer, and the proceeds of the sale handed over to D.:

Held, that trover was maintainable against the auctioneer at the suit of the true owner.

C.P. PATTEN v. REA. *May* 25.

Negligence—Master and servant—Collision.

If a servant be possessed of a horse and gig of his own, and while using them on his master's business, with his master's acquiescence, cause a collision and damage by his negligent driving, the master is liable for the damage.