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DIARY FOR DECEMBER.

1. Satur... Michaelmas Term ends. Clerk of every Municipality except Counties to return No. of resident ratepayers to Registrar General.
2. SUN.... *1st Sunday in Advent.*
3. Mon .... Last day for notice of trial for County Court.
8. Satur.. Conception of the Blessed Virgin Mary.
9. SUN ... *2nd Sunday in Advent.*
11. Tues.... Quarter Sessions and County Court Sittings in each County.
13. Thurs.. Last day for service for York and Peel. Last day for Collector to return Roll to Chancery.
16. SUN.... *3rd Sunday in Advent.*
17. Mon ... Recorder's Court sits
21. Friday. *St. Thomas.*
23. SUN.... *4th Sunday in Advent.*
24. Mon .... Declare for York and Peel.
25. Tues.... Christmas Day.
26. Wed..... *St Stephen.*
27. Thurs... *St. John the Evangelist.* Sittings of Court of Error and Appeal.
28. Friday. *Innocents.*
30. SUN.... *1st Sunday after Christmas*
31. Mon.... Last day on which remaining half of G. F. S. payable. End of Municipal year.

THE

Upper Canada Law Journal.

DECEMBER, 1866.

CHANCERY CHAMBERS REPORTS.

It is a fact which we do not attempt to deny, that the *Upper Canada Law Journal* has not hitherto been as useful to practitioners in the Court of Chancery as it has been to those practising in the Courts of Common Law, nor has it been as largely patronised by the former as the latter. It is unnecessary to search for reasons for this, but we accept the fact as to the past, and hope to remedy it in the future. Many original reports on points of practice decided both in full court and in Chambers have certainly been given, but not in such numbers as we could have wished, nor with regularity sufficient to command the support of many who otherwise wish us well.

Partly as a necessity arising from the very nature of equity jurisprudence, and partly from a combination of other causes, the practice of the Court of Chancery has not been hitherto as well settled or as well understood as that of the common law courts. One of these reasons has doubtless been the want of a sufficient judicial staff to grapple with the increasing business of the court. This state of things has, however, been altered greatly for the better by the appointment of a barrister, with the title of Judge's Secretary, to assist the judges in their Chamber work. This gentleman, well thought of whilst at the bar, is now proving himself thoroughly master of the situation in his *quasi* judicial capacity. The great mass of the Chamber business passes through his hands or comes under his observation, whilst on all new points, and in matters of difficulty and importance, before giving a decision, he consults the judges of the court as to their opinion. It is not, we think, unreasonable to suppose that under this state of facts greater uniformity in the practice will be secured.

With all this in view, we have made arrangements with several gentlemen thoroughly competent for the task, and having large practice in Chancery Chambers, for a regular supply of reports of recent cases deciding points of interest to the profession; and these reports will be the more useful and reliable, as the Judges' Secretary has kindly consented to revise them before publication.

This has been, as our readers will see by reference to the last and the present number, already commenced, and we doubt not we shall be able to continue, and we hope increase the usefulness of these reports.

A POINT OF PRACTICE.

It was a few days ago decided in Chambers, by Mr. Justice Adam Wilson, that where the same person is the Toronto agent for two principals, the service of papers by the clerk of the agent on behalf of one principal on the agent himself, as on behalf of the other, will not, if objected to by the latter, be recognised as a good or sufficient service.

This decision, if upheld, is one of considerable importance to practitioners, in various ways. The practice that was followed in the case referred to has been for some time past the almost universal practice in all the Toronto offices where a large agency business is done, and this case will more or less unsettle that practice. It will force practitioners (if other judges take the same view) to make some other arrangements in the premises. It is difficult to say, however, what such arrangement should be. The rule of court only seems to contemplate the appointment of one agent, and if so, an attorney cannot be compelled to appoint more than one; and if he appoint one, he may insist upon papers being served upon that one, and that they shall not be post-

ed up in the Crown office, which would suggest itself as one alternative; the other alternative would seem to be, that papers should be served at the office of the principal himself, wherever that might be. This would at once render abortive, in many cases, the beneficial effect of the rule which was made for the purpose of facilitating business; in fact, such a mode of procedure would be found to be most unsatisfactory, and yet this might be the result, unless principals *bind* themselves to abide by the practice which is now said to be incorrect and irregular (for a tacit consent to such practice does not seem sufficent), or else to make some other arrangement that will obviate any such difficulty; such, for example, as appointing a second or sub-agent to receive papers and act in cases where the regular agent is concerned on the other side, as was indeed suggested by the learned judge.

In the case referred to (which will be found reported in another place), it was urged very strongly that the fact of the principal, who then for the first time objected to this mode of service, having repeatedly permitted the practice and so consenting to it, was in itself a sufficient reason for upholding the service; but without further discussing whether the ruling of the learned judge was or was not warranted, under the particular state of facts in this case, or even under the practice which has been so generally followed and never before objected to, it cannot be denied that he is quite right in saying that the practice may be open to abuse, and might occasionally (though we are not aware that it ever has done so, and certainly did not in the case before us) lead, possibly to hard swearing, or unpleasant complications.

LAW SOCIETY, MICH. TERM, 1866.

NEW BENCHERS.

Messrs. John Roaf, Q.C., C. S. Patterson, and Angus Morrison, M.P.P., were during this term elected members of the Bench.

CALLS TO THE BAR.

The six following gentlemen, out of twelve who went up, having passed the necessary examinations, were called to the bar during the present term:

Archibald Bell, London (passed without any oral examination); A. L. Morden, Brockville; D. M. Dafoe, Toronto; Geo. Denmark, Belleville; John P. Thomas, Belleville; Michael Walsh, Toronto.

ADMISSIONS AS ATTORNEYS.

Thirteen gentlemen presented themselves or examination for admission, and all passed the examinations required:

Horace Thorne, Toronto; Robert C. Smyth, Brantford; William R. Bain, Toronto; J. R. Baudin, Kingston; John Mudie, Kingston; Michael Walsh, Ingersoll; J. R. Price, Kingston; J. R. H. P. Jackson, Simcoe; Robert R. Gage, Hamilton; John O'Donohoe, Toronto; Morgan Coldwell, London; Neil Ray, Lindsay; Henry Whateley, London.

The examination of Messrs. Thorne & Smyth was so creditable that they were not called upon to undergo the oral test.

SCHOLARSHIP EXAMINATIONS.

FOURTH YEAR.

Thomas Smith Kennedy, 269 marks.
249 marks necessary.

THIRD YEAR.

No Scholarship awarded.

SECOND YEAR.

Charles Moss, 280 marks
213 marks necessary.

FIRST YEAR.

S. R. Clarke,	311 marks.
W. J. Green,	298 marks.
D. Wade,	278 marks.
J. H. McDonald,	278 marks.
J. D. Ridout,	232 marks.
	213 marks necessary.

Although Mr. Clarke was therefore entitled to the scholarship for the first year, yet the other names were honorably mentioned under the order of convocation, the number of marks received by each being beyond the number necessary for the scholarship.

The maximum number of marks that could have been obtained was 320.

ENGLISH POLICEMEN.

It is rather the habit of people in the "old country" to speak disparagingly of everything connected with colonies and colonists—sometimes making comparisons where comparisons are absurd, and on every occasion glorifying themselves and their institutions at the expense of others, and very generally exposing their ignorance of us and our affairs in doing so. Our officials come in for their share of what is going; but for stolid and unutterable stupidity we will back a certain class of Eng-

lish officials against the world. We often come across newspaper items which astonish us, but any thing so painful in its consequences, in this connection, as the following, which we take from an English legal periodical, we do not at present remember:

"Had not the facts been given in evidence before a coroner by several witnesses, we could not have believed that such stupidity and inhumanity as the police seemed to have excercised at a recent fire in the Hampstead-road was possible. From the evidence we gather that at the time the fire was first discovered the master of the house was absent, having left his six children in bed in charge of two servants. As soon as the alarm was raised one of the servants ran into the street with the baby, which she handed to a bystander, and essayed to return to save the other children. It will scarcely be credited that notwithstanding, there was, as proved by the witnesses, plenty of time, the police absolutely and persistently refused to allow her to return and save those who had been left behind. Fortunately two other of the children were saved by the man who discovered the fire, but the police refused to re-admit him to save the rest, and as the result three of the children died of suffocation.

It is quite right that on the occasion of a fire the efforts of the police should be directed to the prevention of robbery and the saving of valuable property from promiscuous plunder, but surely their instructions to that intent do not extend to a disregard of human life. If the police were on this occasion only carrying out their instructions, so much the worse for their superiors; but if they were merely acting on a too rigid interpretation of a general rule, as is possible, the proper limits of their discretion should be more distinctly pointed out, so that when they first take charge of a burning building, before the arrival of engines and escape-ladders, they may satisfy themselves either that all the inmates have been removed, or that all possible efforts to save them have been made and failed. Who is the responsible person in this matter it may be difficult to determine. If the Chief Commissioner be to blame he should lose no time in altering the police regulations, so as to prevent the recurrence of so scandalous a sacrifice as has taken place; if, on the other hand the constables on duty have exceeded or misconceived their order, the coroner's jury will perhaps know how to deal with them."

Whether this was the result of stupidity or inhumanity, or both combined, we cannot say; but we scarcely like to disgrace human nature by supposing it to be the second of the three. Neither can we tell the number of officials who were necessary to preserve the dignity of the law during the celebration of this human sacrifice, but we have a shrewd notion that under like circumstances in this country, including a supply of these vigilant officers (and we consider ourselves sufficiently law abiding), it would have taken a much larger force to have secured the death of these unfortunate children.

SELECTIONS.

RECENT CASES ON INTERROGATORIES.

The cases on the admissibility of interrogatories that have arisen in the common law courts during the past year, and are reported in the 14 *Weekly Reporter*, though not numerous, are of some permanent interest. None of them lay down any new rules for guidance, but several of the decided cases, and the rules that have been, or might be supposed to follow from them, have been modified in a manner which seems to deserve more than a passing notice. Disposing first of the decisions which merely follow, without altering or adding to already decided cases, we notice the case of *Jourdain* v. *Palmer*, 14 W. R. 283, from which it appears that "to entitle a party to interrogatories, it is not enough that he is entitled to discovery in equity on some ground and for some purpose, it must be upon the same ground and for the same purpose for which the interrogatories are sought." This proposition might pass as a truism if the ground on which the party is entitled to discovery in equity, and that on which he seeks to adminster interrogatories are so distinct that they can be separated, which would rarely happen; but the case does not help us to determine the intermediate position where the two things are neither identical nor entirely separate. Another point arising in the same case will be considered below.

In *Hawkins* v. *Carr*, 14 W. R. 138, we find that "in allowing interrogatories under the Common Law Procedure Act, 1854, s. 51, the Court will follow the practice in chancery"—a proposition which, although it has been more than once contested, would not seem to have required a considered judgment to establish it.

Three questions of considerable importance have been discussed as to the admissibility of interrogatories in the following cases:—Where it is asserted that the answers would tend to criminate the party interrogated; where the defendant in an action of trover seeks to discover the title of the plaintiff; and where the defendant seeks to discover the amount of damages incurred by the plaintiff. We propose to consider these questions in connection with the cases in which they arise, and then to offer a few remarks on this subject.

The first of these questions were raised in *Bickford* v. *D'Arcy*, 14 W. R. 900, in which case *Baker* v. *Lane* was, as the reporter politely phrases it, "explained." In *Baker* v. *Lane*, the Court appears to have decided that questions tending to criminate ought not to be allowed, and we must allow that the considered, though brief, judgment of the Court, coupled with the elaborate argument on either side, seems to point to that conclusion. But this is now explained: "the true reason," says Pollock, C.B., "of our disallowing the interrogatories there was that the questions were not in our opinion put *bonâ fide*." It is to be regretted that the Court did not say so in giving judgment in *Baker* v. *Lane*, but at any rate it may be assumed till further explanation that the rule is re-established that the mere fact that answers to interrogatories would tend to criminate is not in itself a sufficient reason for disallowing them. In connection with this point is the case of *Atkinson* v. *Fosbrook*, p. 832, an action for slander, in which the Court of Queen's Bench allowed the plaintiff to administer interrogatories to the defendant in order to discover the exact words used. The case of *Stern* v. *Sevastopulo*, 11 W. R. 862, was quoted as an authority to the contrary effect, but the Court, while admitting the rule there laid down—that, in general, interrogatories will not be allowed in an action of slander—established as an exception the case in which a plaintiff, without the aid of interrogatories, would be unable to ascertain the exact words used where it appears *primâ facie* that some slanderous words have been used.

In *Finney* v. *Forward*, 14 W. R. 85, the defendant in an action of trover desired to exhibit interrogatories to the plaintiff for the purpose of ascertaining the plaintiff's title to the goods for which he was suing. The Court refused to allow them to be administered, though pressed with the case of *Hitcroft* v. *Fletcher*, 4 W. R. 263, and other cases in which, in ejectment, interrogatories as to the title of the plaintiff had been allowed. "It may be," said Pollock, C.B., in the course of the case, "that the reason why the Court in those cases allowed interrogatories to be exhibited to the plaintiff arose from the peculiar nature of an action of ejectment. The Court will not extend that rule to actions of trover." It is not easy to see any real distinction between the case of a person in possesion of land and one who has had possession of a chattel for a length of time. Indeed it seems almost as if the argument might be reversed and the peculiar nature of an action of ejectment with the intricacies of title and the facility for finding flaws adduced as a reason against the administration of interrogatories in ejectment. In the words of the same learned judge "the distinction which the law has at all times made between real property and personal property may in part have arisen from this; that if a man has land he is considered as holding it under a grant from the Crown; if he has personal property he holds it directly or indirectly by reason of some contract," and if this be so, permission to interrogate the plaintiff in an action of trover as to his title, could hardly be called an extension of the rule relating to ejectments. We may be permitted to doubt whether, on further consideration, this case too may not be explained and a restriction, of which the utility is doubtful, removed.

The case of *Jourdain* v. *Palmer*, p. 283, referred to above on a minor point, questions, if it does not overrule, *Wright* v. *Goodlake*, 13 W. R. 349 In *Wright* v. *Goodlake*, the Court of Exchequer allowed interrogatories to be put to a plaintiff to ascertain the true measure of the damages he had sustained, and so guide the defendant as to the amount he might fairly pay into court, at least, this is the deduction that is naturally drawn from the fact that the Court saw no reason why the interrogatories should not be administered. In *Jourdain* v. *Palmer*, however, the same Court "doubt whether *Wright* v. *Goodlake*, can be followed in all cases apparently similar to it," and since "equity would only grant a discovery for the purpose of taking the accounts and settling the whole matter between the plaintiff and defendant (but that is a thing which we have no power to do, and is a purpose wholly foreign to this action)," the Court refused to aid the defendant. These results may be thus briefly summed up: the rule on which the case of *Baker* v. *Lane* threw some doubt is re-established, that the mere fact that answers to interrogatories would tend to criminate is not in itself a sufficient reason for disallowing them. In actions for slander, the Court, as a rule, will not allow interrogation as to the words used, but this rule is not inflexible. The defendant in action of trover will not be allowed to interrogate the plaintiff as to his title, and a defendant, the case of *Wright* v. *Goodlake* notwithstanding, will not be permitted to discover, by interrogating the plaintiff, what amount of damage he has sustained. The section of the Common Law Procedure Act, allowing interrogatories to be administered on which the cases we have mentioned above arose has, without doubt, worked well whenever it has been allowed to work at all. The conflicting decisions and obscurity in which the subject is involved owe their origin to several causes, one of which we cannot help thinking is the common evil—the want of written judgments—and further, the brevity with which even in considered judgments the subject is treated, Where, after an elaborate argument, the Court allow or disallow interrogatories in so many words without explanation of the reasons that influence it, and without any limitation to the particular case (by reference, for instance, to its discretion), the conclusion is natural that the arguments of the counsel who has succeeded are correct, and a general rule is deduced on which the profession act until, perhaps, an opportunity for explanation shows that the Court decided on different or even opposite

grounds. Hence part of the confusion in which the subject is involved; but we think that there is an evil somewhat deeper than this, and that the action of the statute has been much more restricted in practice than was the intention of the original framers.

The section enacts that either party may, by leave of the Court or a judge, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and provides that a party omitting, without just cause, sufficiently to answer shall be deemed to have committed a contempt of court. There, is therefore, a discretion in every case as to allowing interrogatories, and this, while it accounts, to a certain extent, for the many conflicting cases, increases the difficulty of task of criticising the decisions on the subject: but in fact in this, as in so many the excercise of a discretion of to-day becomes the precedent of to-morrow, and in that guise fair subject for comment The course pursued with respect to interrogatories has, as it appears to us, rather cramped the action of the statute; for instance, it is made a ground, in a passage already partially quoted, for refusing to allow interrogatories to be administered that "it has been held with regard to equitable pleas, that they are not good unless they go completely to the root of the matter and finally dispose of the right of the parties, and in this case equity will only grant a discovery for the purpose of taking the accounts and settling the whole matter between the plaintiff and defendant. But that is a thing we have no power to do with, and is a purpose wholly foreign to this action." The analogy here suggested illustrates the objection we would raise. To simplify and facilitate the trial of an action at law a statute is passed, enabling that to be done which before could only be done in a court of equity, namely, to plead an equitable plea or to ask for discovery, and though it may be reasonable or even necessary that these new powers should follow the general practice adopted in similar cases in equity, it by no means follows their effect should be restricted by adopting all the rules of equity, whether applicable to the particular case or not. In an action the object is to obtain an adjustment of the particular claim; and an equitable plea or equitable right to discovery may achieve that object and carry out the wishes of the Legislature by saving time and diminishing cost, though under different circumstances, and in a suit in equity, they might, unaided, fail to secure the objects of that suit. With regard to equitable pleas the matter is now perhaps beyond the control of the judges, but in the matter of interrogatories it is still in their hands. We should rejoice to see in practice a more liberal construction put upon the very wide words of the statute, and interrogatories allowed to be administered in many cases in which they are not at present. More liberality in allowing interrogatories would, we believe, be followed by several beneficial results. One of these would be to cast on the person interrogated the responsibility of replying or not as he might be advised. The effect of raising the objection to the question being put, and not to its being answered, is, that the ingenuity of his advisers is taxed to find some means of escaping from questions to answer, or even not to answer, which might damage the case irrespective of its real merits. If the rule were to allow interrogatories in the first instance, the matter must go beyond the legal advisers and reach the party himself, and with the responsibility of not answering thrown on him, the objections to answer and, in consequence, the obstructions to the working of the statute, would be greatly diminished. In some cases this view has been adopted, as in *Osborn* v. *The London Dock Company*, 10 Ex. 698, and *Chester* v. *Wortley*, 17 C. P. 410, where interrogatories were allowed to be administered on the ground that the objection to answer should come from the party himself when he has been sworn.

Were interrogatories allowed wherever they would facilitate the bringing of an action to a close, and the discretion of the Court exercised "for the purpose only of seeing that the process of the Court is not abused," all *bonâ fide* objections to answering would be open to the party interrogated, and much more certainty would be introduced since an argument on the propriety of putting questions must, from the nature of the case, be more general than an argument on the propriety of answering them, as the latter will be referred much more closely to the particular case under discussion. We should thus avoid many of the conflicting decisions where a rule, adopted apparently to meet the substantial justice of a case, has to be modified to meet that of a subsequent case. It will be apparent that in a subject of so indefinite a nature and of such maginitude it would be impossible in our limits to do more than point out some of the most prominent advantages that would result from the change suggested. It certainly is a subject for regret that when the Legislature have been at the pains to offer the facilities for the disposal of actions, their efforts should in any cases, however few, be restricted or rendered nugatory by fanciful analogies and attempts to assimilate two dissimilar things.—*Solicitors' Journal.*

Lord Pembroke gave "nothing to Lord Say, which legacy I give him because I know he will bestow on the poor;" and then, after giving equally peculiar legacies, he finished with "Item, I give up the ghost."

Milton's will was nuncupative—that is, by word of mouth, he being blind at the time he made it. Shakspere's was made in regular form; so was Byron's.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q. C., *Reporter to the Court.*)

Chichester v. Gordon, Lacourse and Gallon.

Examination of judgment debtors—C. S. U. C. ch. 24, sec. 41—Form of order to commit.

An order to commit under Consol. Stat. U. C. ch. 24, sec. 41 must be absolute, not conditional.

A County Court judge being dissatisfied with answers of a judgment debtor on his examination, ordered that he should be committed for six months unless he should forthwith give a negotiable note for the debt, made by himself and endorsed by one C. *Held*, that the order was bad, as being conditional.

The deputy sheriff joined with the attorney for the defendant in a plea justifying under such order. *Held*, that the plea being bad as to the attorney, was bad as to both.

[Q. B., T. T., 30 Vic., 1866.]

Declaration for assault and false imprisonment, "whereby the plaintiff suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business, and was obliged to give to the defendants a promissory note for a large sum of money, and to procure his sister, Charlotte Chichester, to endorse the same, and incurred other expenses in obtaining his liberation from said custody and imprisonment."

Plea, by the defendant Gordon, that before the said alleged trespasses, to wit, on the 18th of June, 1861, he, the said Thomas Gordon, in the County Court of the united counties of Peterboro' and Victoria, by the judgment of the said court recovered against the said plaintiff, Arthur Chichester, the sum of £38 2s. 11d., and that afterwards, on the 18th of June, an execution was issued against the goods and chattels of the said Arthur Chichester thereon: that afterwards, to wit, on the 24th of March, 1863, an application was made on behalf of the said defendant, Thos Gordon, to R. M. Boucher, Esq, judge of the County Court of the county of Peterboro', being a judge having power to dispose of matters arising in the said court of the united counties of Peterboro' and Victoria, for a summons calling upon the said A. C, his attorney or agent, to shew cause why he, the said A. C., should not be examined before James Smith, Esq, judge of the county of Victoria, *viva voce*, upon oath, touching his estate and effects, and the manner and circumstances under which the said A. C. contracted the debt which was the subject matter of the action in which the said judgment was obtained against him, and as to the means and expectations he then had, and as to the property and means he at that time had, of discharging the debt, and as to the disposal he may have made of any of his property. And afterwards, to wit, on the 31st of March, 1863, the said R. M. Boucher, judge of the county of Peterboro', aforesaid, made an order for the examination of the said A. C., pursuant to the terms of the said summons, no cause being shewn against it. And the said A. C. was afterwards examined before James Smith, Esq., judge of the county of Victoria, and on the 15th of May, 1863, the said R. M. Boucher, judge of the said county of Peterboro', as aforesaid, after calling upon the said A. C. by a summons, dated on the 6th of May, 1863, and after hearing him by his attorney, did order that the defendant be committed to the common gaol of the county of Victoria for six calendar months, unless he then forthwith gave to the said Thomas Gordon a negotiable promissory note for the full amount of the debt, made by himself and endorsed by Charlotte Chichester, payable in six months from the 9th of May, 1863, upon the grounds that the said A. C did not at his examination referred to in the said summons make satisfactory answers touching his estate and effects; and under the said order the said A. C. was arrested—which are the alleged trespasses. And the defendant avers that the said order is still in full force and unrescinded

Plea by defendant Anthony Lacourse, in person, and James Gallon by Anthony Lacourse, his attorney, that defendant Gordon recovered judgment in the County Court of Peterboro', and Victoria (as in the first plea), and proceedings upon said judgment were pending at the time of the dissolution of the union of the said counties, and no change of venue was directed in the said action. And after the dissolution of the said union, the said Gordon applied to Robert Maul Boucher, Esq., judge of the County Court of the county of Peterboro', for an order that the said now plaintiff, who resided in the county of Victoria, should be orally examined upon oath before James Smith, Esq., judge of the County Court of the county of Victoria, touching his estate and effects, &c., (setting out the terms of the order applied for.) And the said first mentioned judge made the said order, and said now plaintiff, upon notice of the said order, attended before the said James Smith, Esq., in pursuance thereof, and was then and there duly examined touching the matters in the said order mentioned, and his examination was duly reduced to writing by the said James Smith, Esq., and was returned to the said first mentioned judge; and the said first mentioned judge afterwards, on the 7th of May, 1866, then, on the application of the said Gordon, and on reading the said examination, granted a summons calling on the said now plaintiff, his attorney or agent, to attend before him on the second day after service thereof, to shew cause why he should not be committed to the common gaol of the county of Victoria, or why a writ of *capias ad satisfaciendum* should not be issued against him, on the grounds that he did not at his said examination make satisfactory answers touching his estate and effects, and that it appeared by the said examination that he had made away with his property in order to defeat or defraud his creditors, and on the grounds that in contracting the said debt he was guilty of fraud in concealing the fact that he had executed a confession of judgment in favor of his sister, upon which execution had issued in another county than in which the said debt was contracted, without the knowledge of the said Gordon. And the said now plaintiff was on the said seventh day of May duly served with the said summons, and on the second day after service thereof he duly attended in pursuance thereof, by his attorney, before the said Robert Maul Boucher, judge, as aforesaid, and the said Gordon also attended by his said attorney, and the

said judge, upon hearing the said parties respectively by their said attorneys, was of opinion and decided that the said now plaintiff did not at his said examination make satisfactory answers touching his estate and effects, and decided to commit him for six calendar months to the common gaol of the county of Victoria, in which county the said now plaintiff then resided; and the said judge was about to make an order for such committal, when the said now plaintiff proposed to give forthwith to the said Gordon, in satisfaction of the said judgment, a negotiable promissory note for the full amount of the debt and costs in the said suit, made by the said now plaintiff and endorsed by Charlotte Chichester, payable in six months from the ninth day of the said month of May, and requested that the said order for committal should be made for such committal in default of his forthwith giving the said note, and the said Gordon consented thereto. And the said Robert Maul Boucher, Esq., as such judge, then, upon such request and consent, made an order that the said now plaintiff be committed to the common gaol of the county of Victoria for six calendar months, unless he should forthwith give to the said Gordon a negotiable promissory note for the full amount of the debt and costs in the said suit, made by himself, the said now plaintiff, and endorsed by Charlotte Chichester, payable in six months from the ninth day of May then instant, upon the grounds that the said now plaintiff did not at his said examination make satisfactory answers touching his estate and effects. And a reasonable time elapsed for the said now plaintiff to give the said note, and he did not give the same, wherefore the defendant Anthony Lacourse, being attorney for the said Gordon, did as such attorney and on behalf of said Gordon deliver the said order to the sheriff of the county of Victoria to be executed, and the defendant James Gallon was deputy sheriff of the county of Victoria, and did as such deputy sheriff, in obedience to the said order, and in execution thereof, gently lay hands on the said now plaintiff, and took him into custody, and imprisoned him in the common gaol of the said county of Victoria—which are the alleged trespasses.

Demurrer to the plea of the defendant Gordon, on the following grounds: 1. The plea does not shew that the now plaintiff, at the time of the order for his examination and commitment, resided within the county of Victoria.

2. The summons and order for the now plaintiff's oral examination, as granted, were not, nor was either of them, in the form or otherwise as prescribed by the statute in that behalf.

3. The order for the commitment of the now plaintiff was void, as it was conditional, and embracing a condition which the judge of the County Court had no power to make.

4. That the said order was not more than order *nisi;* that is, that a commitment of the now plaintiff should be made unless he gave the note in said plea mentioned, and it does not appear that the said plaintiff did not give such a note as is mentioned in said order; and the new plaintiff could not be legally arrested under said order until it was first shewn to the judge that he had not complied with the conditions thereof.

Demurrer to the plea of defendants Lacourse and Gallon on the same grounds, excepting the first.

K. McKenzie, Q. C., for the demurrer, cited *Ex parte Kinning*, 4 C. B. 507; *Abley* v. *Dale* 10 C. B. 61; *Baird* v. *Storey*, 23 U.C. Q. B. 624.

Gwynne, Q. C., for defendant Gordon, *C. S. Patterson*, for the other defendants contra, cited *Andrews* v. *Murris*, 14 Q. B. 17; 1 Wms. Saund 28; Ch. Plg., vol. I, p. 593.

Hagarty, J., delivered the judgment of the court.

Our judgment turns on one of the objections namely, that the order is conditional, and therefore the judge had no power to make it

This objection seems to us to be fatal. The statute in certain cases allows the commitment of the judgment debtor, but we are unable to find any authority for ordering a commitment unless the debtor will perform some specified act. The judge is not empowered to force the debtor to find security for the debt or any part thereof. On a review of the debtor's answers as to his estate, &c., the judge may commit or allow the issuing of a *ca. sa.* The committal must, we think, be absolute, and not to depend on the doing or the omitting to do any specific act.

Mr. Gwynne argued that the committal was absolute, and the debtor would be at once liable to arrest thereon, but that it was defensible on his giving the note endorsed as directed. We hardly see how this construction would much aid the plea. If arrested on this order, how was the debtor to avail himself of the privilege? The amount for which the note was given is not specified, except by reference to the debt and costs in the suit; no provision is made for his discharge if he gave the note, &c. &c. We do not however read the order in the sense suggested by counsel.

The case of *Abley* v. *Dale*, 10 C. B. 62, seems much in favor of the objection; and also *Ex parte Kinning*, 4 C. B. 507, and *Kinning* v. *Buchanan*, 8 C. B. 271

All these cases lead to the opinion that the order must be absolute: that if a debtor be ordered to pay at a future day or by instalments, he cannot be committed prospectively in default of his so paying; he must be again given the opportunity of being heard against the deprivation of his liberty. If this order had been for committal unless he gave the note within a certain number of days, it would be open to the same objections as a condition if he did not pay the debt within the same time. He may have a valid excuse for the omission, and is entitled to be heard. We cannot see how the order can be any better because it directs or provides for the note being given forthwith. We hold the pleas to be no defence.

The plea by Gallon, the deputy sheriff, is pleaded jointly with that of the defendant Lacourse. It differs materially from *Bullen* v. *Moodie et al.*, 13 U. C. C. P. 126. There the sheriff justified separately, shewing an order of commitment good on its face, and he was protected.

By the rules of pleading it seems that if the officer join with another defendant to whom his defence does not also apply, he loses his protection—1 Wms. Saund. 28, note 2. "If two or more join in a defence which is a sufficient justi-

fication for one, but not for the others, the plea is bad as to all; for the court cannot sever it." So in *Andrews* v. *Marris*, 1 Q. B. 17, Lord Denman, in giving judgment, speaking of a case in Willes 122, says: "In that case the officers of the court chose to join in pleading with the party, and set out the whole proceedings: having done that, unnecessarily for them, they were of course bound by the defects apparent on their plea," &c. So in *Phillips* v. *Biron*, 1 Strange, 509; *Smith* v. *Bouchier*, 3 Strange, 993. See also Chitty Pl. 7th ed., vol. I., p. 693.

Judgment for plaintiff on demurrer

Neill v. McMillan.

Action against J. P.—Notice of action—Proof of quashing conviction.

Where a magistrate acts clearly in excess of or without jurisdiction, he is nevertheless entitled to notice of action, unless the *bona fides* of his conduct be disproved, but the plaintiff may require that question to be left to the jury, and if they find that he did not honestly believe he was acting as a magistrate he has no claim to notice.

A notice describing the plaintiff's place of abode as "of the township of Garafraxa, in the county of Wellington, laborer," without giving the lot or concession, *Held*, sufficient.

To prove the quashing of a conviction on appeal to the Quarter Sessions, it is sufficient to prove an order of that court directing that the conviction shall be quashed, the conviction itself being in evidence, and the connection between it and the order shewn. It is not necessary to make up a formal record, for the Statute Consol Stat U. C. ch. 114, enables the Court of Q. S. to dispose of the conviction by order.

[Q. B., T. T., 1866.]

The declaration contained three counts

1. For assault and false imprisonment

2. That defendant being a J. P., falsely and maliciously, and without reasonable and probable cause, issued a warrant, by virtue of which he caused the plaintiff to be arrested and imprisoned.

3. That defendant being a J. P.; having caused the plaintiff to be brought in custody before him, as mentioned in the last count, did as such justice falsely and maliciously, and without reasonable or probable cause, convict the plaintiff of a charge then and there preferred against him, after the plaintiff had been legally acquitted of the same by a bench of magistrates then and there having jurisdiction in the premises, and afterwards falsely and maliciously, and without reasonable or probable cause, did as such justice issue his warrant, and caused the plaintiff to be arrested and imprisoned in the common gaol for twenty days.

Plea—Not guilty, by statute, Consol. Stat. U.C. ch. 126, secs. 1, 9, 10 & 11.

The case was tried at Guelph, in March, 1866, before *Richards*, C. J.

The notice of action was produced, and service of it was admitted. It was headed "To John Alexander McMillan, of the village of Fergus, in the county of Wellington, one of Her Majesty's justices of the peace in and for the said county of Wellington," and was signed "James Fletcher Cross, of Prince of Wales' Block, St. Andrew's Street in the village of Fergus, in the county of Wellington, attorney for the said James Neill, of the township of Garafraxa, in the county of Wellington, laborer."

Evidence was given that one James G. Allan had, on the 19th of June, 1865, made a complaint before defendant against the plaintiff, for having, while under hire to him as a servant for a term, ending on the 1st of January, 1867, on the 17th June left his employment and refused to return. On this the defendant issued a warrant to apprehend the plaintiff and bring him before defendant or some one or more of the justices of the peace for the said county. On this warrant the plaintiff was arrested on the following morning, and was brought before the defendant and three other justices of the peace, namely, Messrs. Cattanach, Cull, and Munger. Allan and a person named Smith gave evidence, the substance of which was written down by defendant. His written statements were produced. After hearing the evidence the justices consulted together, and the defendant further wrote as follows; "Ordered that the case be dismissed with costs; and on the vote being taken there were for the dismissal of the case

"James Cattanach, J. P., moves,

"George Munger, J. P., seconds,

"Henry Cull, J. P., voting for,

"John A. McMillan, J. J., dissenting."

The three former justices were called as witnesses, and all agreed that this was a true statement of what occurred. They also stated in effect that after this was so entered the defendant said he thought they had come to a wrong decision, and that if a similar case were brought under his consideration, and there were twenty magistrates sitting, he would take the matter in his own hands, and act upon his own opinion independent of their judgment. One or two of the justices, said to him. "If it is your intention to do so in future, you can do so at present," and defendant asked if they would give him their consent in writing to dispose of the case as he thought fit. They refused, one of them saying they had already disposed of it. The room had been cleared of all persons but the justices when they began to consult, and while this discussion was going on defendant was still waiting. The other persons were then called in, and defendant read over the decision which had been come to by the three, and then read further, as follows: "But after the matter had been further talked over, James Cattanach, J. P., and Henry Cull, J. P., gave their consent to allow John A. McMillan, the presiding magistrate in the case, liberty to decide in accordance with his own judgment in the matter *Allan in re Neill*; and it is thereby ordered that the defendant pay a fine of one dollar and the costs, amounting to six dollars, forthwith, or in default to be imprisoned in the common gaol at Guelph for the space of twenty days, and that he, the said James Neill, is still a servant of the complainant James Allan."

"(Signed) John A. McMillan, J. P."

The others on hearing this objected, saying that was not their decison: that the decision was that the case was dismissed. Defendant replied, "Too late," that the court was dismissed; and he picked up the minute book and the statutes, and left the room.

The constable said he had the plaintiff in charge on the first warrant until he got a second, dated the 20th of June, on which he arrested the plaintiff and took him to gaol. This second warrant was issued by defendant under his hand and seal. Defendant told the constable as he left the room after reading the decision that he gave the

plaintiff three hours to pay the money, and the constable was to keep him in charge.

It was proved that Garafraxa is one of the largest townships from east to west of any in Canada, being about twenty miles long and contains several villages.

It further appeared that on the 22nd of June the defendant was served with notice that the plaintiff appealed against this conviction, and an order under the seal of the Court of Quarter Sessions, and signed by the clerk of the peace, was produced. It was as follows:

"In the Court of General Quarter Sessions of the Peace for the County of Wellington. On the twelfth day of September, in the year A.D., 1865.

"James Gibbie Allan against James Neill. On the case being called, and notice of appeal proved and heard, it was ordered by the court that the conviction of James Neill be quashed, with costs.

"[Seal] (Signed) Thomas Saunders,
"*Clerk of the Peace.*

"Office of the Clerk of the Peace, Guelph, March 19, 1866.

The clerk of the peace also produced the minute book of entry of proceedings at the Court of Quarter Sessions on the 12th of September, 1865. The following is a copy:

"In the Court of Quarter Sessions for the county of Wellington, At a general Court of Quarter Sessions of the Peace for the county of Wellington, held at Guelph on Tuesday the 12th day of September, in the year of our Lord one thousand eight hundred and sixty-five, pursuant to statute.

"Present, Archibald McDonald, Esq. County Court Judge, chairman, James Hough, David Allan, John Beattie, James Leughrem, Esquires, justices of the peace for the county of Wellington

"The following appeal was entered: James Gibbie Allan against James Neill, Master and Servants Act. James Neill appellant.

"The service of notice of appeal was admitted. The order of court was, that the conviction of James Neill be quashed with costs.

"Thomas Saunders, *Clerk of the Peace.*"

Mr. Saunders stated there was no jury empanelled There was no trial on the merits.

The defendants counsel took several objections, which were afterwards renewed in this court

For the defence, Allan, the employer of the plaintiff, was called, and gave evidence, to sustain the conviction as actually made by the defendant, showing that Neill was under an agreement to serve him, and left against the will of Allan. He further said, that what made him force plaintiff was that plaintiff said Allan owed him $23, and Allan said he did not owe him; and that's what made Allan take plaintiff up Allan swore he believed it was defendants doing the warrant was issued in the first instance.

The learned judge told the jury that if they were satisfied that the defendant issued the warrant of commitment in good faith, intending to act as a magistrate, they should find in his favor on the first and second counts. If not satisfied that he was acting in good faith, to find for the plaintiff on the first count and for defendant on the second, and in that view the learned judge inclined to think they might also find for the plaintiff on the third count. As to this count, he told the jury that if the defendant issued the warrant of commitment after the other magistrates in his presence had declared that they had dismissed the complaint with costs, then he issued it without reasonable or probable cause, and they should find for the plaintiff if they thought the defendant acted maliciously. If on the third count they thought the plaintiff entitled to a verdict, they should say whether Neill committed the offence charged against him, and if so they might, according to the statute, limit the verdict to three cents.

The defendants counsel excepted to the charge

The jury found for the plaintiff, damages $100, and said they did not think the defendant honestly believed he was acting as a magistrate at the time. The plaintiff elected to take the verdict on the first count, and the verdict was so entered for him, and for the defendant on the second and third counts.

In Easter Term *M. C. Cameron*, Q. C., obtained a rule *nisi* for a nonsuit, or for a new trial, the verdict being contrary to law and evidence, and for misdirection, and the reception of improper evidence; the misdirection being in leaving it to the jury to say whether the defendant believed whether he was acting as a justice of the peace, when the evidence shewed, and the learned judge should have ruled, that he was so acting, and the plaintiff having failed to prove malice a nonsuit or verdict for the defendant should have been directed; and in ruling that the notice of action was sufficient, and that there was legal evidence of the quashing of the conviction under which the plaintiff was imprisoned; and in telling the jury that the plaintiff having been acquitted by three magistrates, the defendant had no right to convict the plaintiff, although no record of such acquittal was made; and in not telling the jury that no legal evidence of the acquittal against the record of conviction was given, and that the conviction was legal; and the reception of improper evidence being in admitting evidence of the minute book of the Quarter Sessions to shew the quashing of the conviction, without any formal record of the judgment or decision having been made up, and no legal or formal record of such proceedings being produced.

In this term *Robert A. Harrison* shewed cause, citing *Wedge* v. *Berkeley*, 6 A. & E. 663; *Osborn* v *Gough*, 3 B. & P. 551; *James* v. *Saunders*, 10 Bing 429; *McCance* v. *Bateman*, 12 C. P. 469 *Moran* v. *Palmer*, 13 C. P. 528; *Helliwell* v. *Taylor*, 16 U. C. Q. B. 279; *Connors* v. *Darling*, 23 U. C. Q. B. 541; *Rex* v. *Hains*, Comb, 337; Tay. Ev. 2nd ed., secs. 1390, 1391, 1408, Tidd. Prac. 28.

M. C Cameron, Q. C., shewed cause, citing *Rex* v. *Ward*, 6 C. & P. 366; *Rex* v. *Smith*, 8 B. & C. 341; *Rex* v. *Bellamy*, Ry. & Moo. 172; *Prestidge* v. *Woodman*, 1 B. & C. 12; *Hazeldine* v. *Grove*, 3 Q. B. 997; *Kirby* v. *Simpson*, 10 Ex. 358; *Weller* v. *Toke*, 9 East, 364.

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

The first question that arises regards the notice, whether under the facts appearing the defendant was entitled to it, and if so was the notice served defective.

When the act of a justice of the peace is either clearly in excess of jurisdiction or an act not within his jurisdiction, he will nevertheless be

entitled to notice, unless it be established to the satisfaction of a jury that he did not *bonâ fide* intend to act, or did not believe he was acting, within his jurisdiction. He may act professedly as a justice, using the forms of proceeding in that character, and yet do that which he is fully conscious he has neither power or authority to do, but which under the influence of sinister motives he is resolved to do.

Still, at the trial of an action brought for such an act he may set up a claim to notice and if it has not been proved may ask the judge to non-suit. We apprehend the judge will not assume that the defendant acted *bonâ fide*, and in a case coming within the letter of the second section of the act for the protection of justices (Consol. Stat. U. C. ch. 126) he would, as a matter of law, rule that the defendant was entitled to notice; but the plaintiff has the right to require that the question of *bonâ fides* should be submitted to the jury, and in *Wedge* v. *Berkeley*, 6 A. & E. 663, Lord Denman, C. J., said that if the jury found against the defendant on that point, he should say notice would be unnecessary. In this case that question has been submitted to the jury, and they have answered it adversely to the defendant.

In *Hazeldine* v. *Grove*, 3 Q B. 997, the plaintiff did not ask to have this question submitted to the jury, and in *Kirby* v. *Simpson*, 10 Ex. 358, the act was held to come within the first section of the statute, and then he is entitled to notice; and in *Prestidge* v. *Woodman*, 1 B. & C. 12, where the justice acted upon a subject matter of complaint over which he had no authority, but which arose out of his jurisdiction, he was also entitled to notice. But it is difficult to see upon what ground of reason or justice a magistrate who does a wrongful act, and who (as this jury have found) did not honestly believe he was acting at the time as a magistrate, can claim the protection which the legislature intended for justices of the peace acting in the execution of their duty. Although there are dicta in some cases, which are not wholly consistent with our conclusion, we have, on full consideration, adopted the opinion expressed by Lord Denman, that after the finding of the jury this defendant had no claim to notice of action.

But we have also considered the objection to the notice given, namely, that the discription of the place of abode of the plaintiff, as endorsed thereon, is not sufficiently particular. He is described as "of the township of Garafraxa, in the county of Wellington, laborer"

The nearest case to the present which we have seen, is that of *Osborn* v. *Gough* 3 B. & P. 551; where the description of the place of abode was A. B., "of Birmingham," and the court held it sufficient. We fully appreciate the distinction between the compactness of a town and the extended surface of a triangular township, perhaps twenty miles long, and on the side opposite the apex as much as twelve, and within which there are three or more villages, and yet we think it probable that Birmingham contained more houses, and a larger population, among which it would be as difficult to find an individual laborer as in Garafraxa; but this consideration does not in our mind outweigh the observation of Lord Alvanley, that if the place endorsed on the notice be the true place of the plaintiff's abode, it lies on the defendant to shew that such description has not afforded him the opportunity of taking advantage of the act, *i. e.*, by tendering amends. It is urged that the lot and concession should be added to shew the place of abode, but a mere laborer might, especially in harvest time, be changing from one lot to another, and when it is remembered that the attorney's place of abode or business is minutely given, and that the amends may be made to him, and that under sec. 50 of the Common Law Procedure Act of 1856, further information as to the plaintiff could be enforced from his attorney, there appears no good reason for so rigid a construction of the act as is contended for. We have no wish, and no right, to narrow the protection given by the statute in any particular, but its general provisions are so wide that we are not called upon to extend them by construing the words "place" of abode, we think we are taking the right course in holding that if there be a literal compliance, coupled, as in this case, with that which shews that the defendant could not have been prejudiced as to the opportunity of tendering amends, it is enough.

Then as to the evidence of the quashing of the conviction, ch. 114 of the Consol. Stat. U. C. exacts sec. 1, that an appeal shall lie in certain cases of summary convictions before justices to the Court of Quarter Sessions, "and such court shall at such sessions hear and determine the matter of such appeal, and make such order therein, with or without costs to either party, as to the court seems meet" Chapter 75 gives an appeal to the Quarter Sessions in a case such as was before the justices in this case.

It sufficiently appears that the conviction of the plaintiff on which the defendant relies, was returned to the Quarter Sessions. The clerk of the peace produced in evidence at the trial the information, conviction, and notice of appeal with affidavit of service. It was his duty to file the justice's return among the records of his office, and, as I have expressed my opinion in another case, when so filed, the conviction became one of such records.* The order above set out was produced under the seal of the court, as well as the original minute book. There were, as the clerk of the peace swore, no other documents filed in his office relating to this matter The defendant relied on the conviction as his protection, because it was not proved to be quashed

The case of *Regina* v. *Yeovley*, 8 A. & E. 806; appears to us to have a material bearing on this question. There the Court of Quarter Sessions had on appeal quashed an order of removal subject to the opinion of the Queen's Bench, and to prove that an order of removal was discharged on appeal at a previous sessions many years before, the original sessions book containing those proceedings was produced. No other record but that book was kept. The minutes of each session were headed with an entry containing the style and date of the sessions and the names of the justices in the usual form of a caption, and it contained a statement of the subject of the appeal and the order made on hearing it, and at the end of the proceedings of the session it was

* See *Graham* v. *McArthur*, 25 U. C. Q. B. 454, note *a*.

signed, "By the Court, J. C., Clerk of the Peace." The Court of Queen's Bench held this was proper evidence of that former order of sessions.

The evidence in our case was not so decisive in one particular, namely, that no other record was kept of the proceedings except the minute book, though there was no suggestion or pretence that there was any other; nor was there evidence of any practice in the Court of Quarter Sessions of receiving that book as evidence. And there is also a well settled distinction between proving the record of a different court from that in which the evidence is offered and a record of the same court. A court will look at its own minutes when sitting under the same commission, when another court would require more formal proof, and the plaintiff in this case has to prove the act or order of the Quarter Sessions.

It might be going to far to hold that the minute book of the Quarter Sessions produced at this trial was sufficient proof *per se* of the quashing this conviction, for it was not proved that no other or more formal record was kept although this entry had an apparently proper caption, and was signed by the clerk of the peace. A different rule would no doubt prevail as to indictments, verdicts, and judgments, in criminal matters at the Quarter Sessions, but this is a particular statutory jurisdiction conferred, and not referred to in the commission of the peace, nor existing at common law. We by no means wish to be understood as holding it to be sufficient, especially if the further proof were added that in practice no other record is kept or made up; but we do not feel compelled to rely upon it, for the statute authorizes the Court of Quarter Sessions to dispose of the appeal "by such order as to the court shall seem meet." There is independent proof of the conviction and of the appeal; the decision on the appeal is all that remains to be proved; and an order to the form of which as an order of court no exception has been taken, which is sealed with its seal and signed by its clerk, is produced, by which it is ordered that the conviction of the plaintiff be quashed with costs. We think this is sufficient.

The cases relied on for the defendant on this point are answered by Lord Denman in the judgment referred to, and *Williams*, J., said, "No instance has been adduced in which it has been held necessary to make up a formal record of the judgment of Quarter Sessions on an appeal. It is said that, if such an adjudication might be proved as it was here, a judgment of transportation might be proved in the same manner; but the indictment with a minute endorsed upon it would be no proof of a valid judgment, for reasons which do not apply to this case. And in the case of an indictment for perjury," (referring to *Rex* v. *Ward*, 6 C. & P. 366, which was cited by Mr. Cameron,) "the possibility of the offence having been committed would depend upon the court having had jurisdiction: consequently there must, in that instance, be such a record as would shew jurisdiction. But here the whole question was as to the order made at sessions."

In modern times the legislature have relaxed the strictness of the rules of evidence as to proof of judgments, convictions, &c. A certificate containing the substance and effect only of the indictment and conviction for a previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same, although the consequence to the offender would be a much severer punishment.—(Consol. Stat. C., ch. 99, sec 73.)

We do not think we should require a greater amount of proof than that of an order of sessions directing that the conviction in question should be quashed, the conviction itself being also in evidence, and the connection between it and the order being shewn, and in fact not disputed.

We think this rule should be discharged.

Rule discharged.

COMMON PLEAS.

Reported by S. J. Vankoughnet, Esq., M. A., *Barrister-at Law, Reporter to the Court.*)

Allen v. Parke.

*Execut r of executor—Consol. Stats. U. C. ch.*16, *s.*1

Held, affirming the judgment of the county court on demurrer to the replication set out below, that an executor of an executor represents the original testator, and is properly proceeded against on a claim against him. Under Consol. Stat. U. C. ch. 16, s. 1, the renunciation of probate by one of two or more executors is peremptory and cannot be recalled on the death of the acting executor or executors.

[C. P., T. T., 1866]

This was an appeal from the decision of the judge of the county court of the county of Frontenac.

The plantiff sued in the court below upon a writ requiring the defendant to appear and shew cause why the plantiff should not have execution against the defendant, as executor of the last will and testament of George Okill Stuart, deceased, of a judgment whereby the plantiff, on the 26th of December, 1862, in the said county court, recovered against Thomas W Robinson, as executor of the last will and testament of the said the Rev. George Okill Stuart, $257 65; and he alleged that Thomas W. Robinson departed this life on the 6th of May, 1866, and by his last will and testament appointed the now defendant his sole executor, who had accepted the said executorship and the executorship of the said George Okill Stuart, and prayed that *execution* of the said judgment might be adjudged to him against the defendant.

The defendant pleaded that the very reverend George Okill Stuart by his last will and testament did appoint his son, George Okill Stuart who still survived, and the said Thomas W. Robinson, his executors.

The plantiff replied that probate of the last will and testament of the very reverend George Oakill Stewart was granted to Thomas W. Robinson alone, the said other executor having previously renounced the executorship.

To this replication the defendant demurred, assigning for cause that the defendant could not

become the executor of the said George Okill Stuart, deceased.

The learned judge of the court below, after hearing the parties on the demurrer, was of the opinion that under the Consolidated Statues for Upper Canada, ch. 16, s. 1, the renunciation of the co-executor of Thomas W. Robinson made him as great a stranger to the will of the very reverend George Okill Stuart as any other person in no way named in or connected with the will. and he gave judgment accordingly for the plaintiff.

The grounds of appeal were covered by the last one stated, that although the defendant was executor of Thomas W. Robinson, one of the executors of the very reverend George Okill Stuart, yet he was not thereby the executor of the said George Okill Stuart.

In Trinity term last, *P. McGregor*, for the defendant the appellant:—

The defendant has no objection to act as executor under the will of the original testator, if he be the proper person in law to assume the office: he will act if it is determined he can act as such executor

In the case. *In the goods of Badenach, deceased*, 10 Jur, N. S. 521, four executors had been named, probate was granted to one, reserving right to grant probate to two of the others, the fourth having renounced. Before renunciation, however, that executor had intermeddled in the estate. He applied afterwards for probate and to have the renunciation declared invalid. It was stated that under the old practice the course would have been to apply for leave to retract the renunciation, but by the Imperial Act 20 & 21 Vic. ch. 77, s. 79, an executor who has once renounced can no longer retract such renunciation, and therefore it was necessary the renunciation should be declared an invalid act. The judge ordinary thought there was nothing in the statute to prevent his allowing a retraction according to the old practice; that the renunciation was invalid, because the party having intermeddled could not renounce. He, therefore, vacated his renunciation, and allowed him to take probate. He referred also to Williams on Executors, 5 Ed. 262; 2 Bl. Com. 506.

S Richards, Q.C., contra:—

Where there are two executors, and power has been reserved to one, who survives his co-executor, to come in and prove, if he do not appear to a citation, the grant will go as if his name had not appeared in the will, and the executors, if any, of the acting executor, will be the representatives of the original testator. *In the goods of Nodding*, 2 S. & T.15, is in effect this case, excepting that the renunciation of the co-executor in this case more particularly cast the burden on Parke, as executor of the acting executor of the original testator: *In re Lorimer*, 2 S. & T. 471. Parke, as proving Robinson's will, became in law the executor of the Rev. G. O. Stuart: *Wankford* v. *Wankford*, 1 Salk. 299; Williams on Executors, 222-4.

A Wilson, J., delivered the judgement of the court.

The statute referred to by the learned judge of the county court, which is an exact transcript of the Imperial Act before mentioned, is as follows:

"Where any person after the commencement of this act renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration to his effects shall and may without any further renunciation go, devolve and be commited, in like manner as if such person had not been appointed executor."

The renunciation by the co-executor of Thos. W. Robinson operated against him. therefore, "as if he had not been appointed executor," in which case Thos. W Robinson remained, as a consequence, as if he alone had been executor.

The pleadings show that Robinson proved the will of the original testator, and that Parke, the defendant, is Robinson's executor, and that he has accepted both the executorship of Robinson and the original testator. There is no longer room to doubt, in such a case, that Parke is in law the proper representative and executor of George Okill Stuart.

If Stuart's will had not been proved, Parke, as Robinson's executor, could not have proved it, and therefore he could not have been the *executor* of Stuart's will; but it was duly proved, and there is no difficulty of that kind in the way of his acting.

The former rule, that one of two or more executors renouncing was nevertheless entitled on the death of the executor who had proved, to retract his renunciation and to procure probate —*Rex* v. *Simpson*, 3 Bur. 1463; *House* v. *Lord Petre*, 1Salk. 311—is now by the new law entirely changed.

In Salk. 311 it is said, "But in another matter the common lawyers and the civilians disagreed. The common lawyers held, that where there are several executors, and one renounces before the ordinary, and the rest prove the will, by the common law he who renounced may at any time afterwards come in and administer, and, though he never act during the life of his companions, may come in and take on him the execution of the will after their death, and shall be preferred before any executors of his companions; but the civilians held that by the civil law a renunciation is peremptory."

The object of the late legislation was to adopt the more reasonable rule of the civil lawyers, and to make the renunciation peremptory.

The appeal will be dismissed with costs.

Mason (official assignee) v. Babington (administrator.)

Assets quando—Final judgment—Regularity and irregularity in writs against lands and goods—Suggestion without leave—Debt and damages—Practice.

The plaintiff, as official assignee, sued defendant, as administrator, on a promissory note payable to W. or bearer. Defendant pleaded *plene administravit præter* goods not sufficient to satisfy a judgment outstanding. Plaintiff replied, confessing the plea, and prayed judgment and his *damages*, &c. of assets *quando*. The pleadings were thus entered on the roll. together with a second prayer of judgment for plaintiff's *d-bt*, &c. Then followed the judgment as for *damages*, and a suggestion that intestate died seised of lands, &c. and a prayer that the amount recovered might be levied of the lands. A *fi. fa* against goods issued on 19th February, as for *damages* recovered, which was returned no goods, and on the 20th February a *fi. fa.* lands issued, which spoke merely of the *amount recovered*.

There had been no order of reference to the Master to ascertain the amount, nor any assessment by a jury, nor any *sci. fa.* to enquire as to goods:

Held, on application to set aside the judgments and writs, that the judgment was a final judgment, and that no reference or assessment was requisite.

Held, also, that the writ against goods on a judgment of assets *quando* was irregular, there having been no writ of *sci. fa.*, or revivor; but that notwithstanding the writ against lands was not irregular, as the record shewed there were no goods.

Held, also, that the proceedings on the suggestion were regular, without any leave to enter such suggestion or judgment thereon; and that the discrepancies between debt and damages were mere defects in form, and amendable.

Quære, whether any suggestion of lands at all was requisite?

[C. P., T. T., 1866.]

In Easter term last *F. Osler* obtained a rule calling on the plaintiff to shew cause—

1. Why the judgment herein entered on 19th of February, 1866, and the writs *fieri facias* against goods and against lands issued thereon should not be set aside with costs, for irregularity, on the following grounds:

Because the judgment was a final judgment in assumpsit and not in debt, and was not signed for default of plea, but after the filing and service of an admission of the defendant's plea and of a prayer of judgment for the plaintiff's damages; yet there was no order referring it to the Master to ascertain the amount of damages to which the plaintiff was entitled and for which the judgment was to be signed, nor were such damages assessed by a jury or ordered to be calculated by the Master; and it did not appear from the judgment, or from any papers or proceedings filed in this suit, how or by what authority the damages were ascertained, or judgment signed.

2. Why the *fieri facias* against goods and the sheriff's return thereto should not be set aside and quashed on the further ground, that the said writ was issued on a judgment of assets *quando acciderint* before any writ of revivor or *scire facias* had been issued on the judgment, and because the said writ did not follow the judgment.

3. Why the writ of *fieri facias* against lands of the intestate, Eli Gorham Irwin, deceased, in the hands of the sheriff of the united counties of York and Peel, should not be set aside on the further grounds, that no proper writ of *fieri facias* against goods was ever issued or returned herein to ground such *fi. fa.* against lands, and that the writ against lands did not follow the judgment on which it purported to be issued.

4. There was no award of judgment or execution on the roll of judgment, which warranted the writ of *fierie facias* against lands until the return of an execution regularly issued against goods, and that there was no award of judgment on the suggestion entered on the roll.

5. Why the said suggestion and all subsequent proceedings had thereon should not be set aside, as aforesaid, on the ground that the said suggestion was entered on the roll without the leave of the court or a judge, and that there was no award of judgment thereon.

In Trinity term last *Leith* shewed cause:

The judgment was a judgment by default, as for want of a plea displacing the right of action, and consequently was final, and no reference or assessment was requisite.—C. L. P. A. secs. 57, 147; Wms. Exrs. 5 Ed. 1794; *Sickles* v. *Asseltine*, 10 U. C. Q. B. 206, per *Draper*, C. J.

The discrepancies as between debt and damages are immaterial, since under the C. L. P. A. it need not appear either in the writ, the declaration, or the judgment, what is the form of action: secs. 9, 73, 76, 240; and although the form of execution given by the rule of court uselessly keeps up the distinction, it is not peremptory, and may be departed from.—*Lowe* v. *Steele*, 15 M. & W. 380.

The discrepancies are amendable as mere form. —*Emsley* v. *McKenzie*, 9 U. C. Q. B. 559; *Short* v. *Coffin*, 5 Burr. 2730; *Hall* v. *Thomson*, 9 U. C. C. P. 260.

Even though the *fi. fa.* goods be irregular, still the *fi. fa.* against lands is regular, and may well have issued without any prior writ against lands, as the record shews there were no goods, and so there was no necessity for any sheriff's return of no goods. To hold that a writ against goods must precede the writ against lands would be to preclude the plaintiff from all execution, since under the English practice no writ against goods can issue until a return to a *sci. fa.* that there are goods, and thus, if there never were goods, the plaintiff could never reach lands.—Wms. Exrs. 1807.

The suggestion was proper without leave of the court, and no judgment was required thereon—*Mein* v. *Short*, 9 U. C. C. P. 244, 11 U. C. C. P. 430; *Hogan* v. *Morrissey*, 14 U. C. C. P. 443.

No suggestion at all was required, lands being made subject to the same remedies and process for satisfaction of debts as goods, under 5 Geo. ch. 7, sec. 4, 27 Vic., ch. 15, and no suggestion is ever made or required in regard to goods. Such suggestion, if made, is not traversable—*Mein* v. *Short*, 9 U.C. C.P. 244, *per Draper*, C. J., and so no judgment is required thereon.

Osler, contra:—

The *fi. fa.* against goods here could not be rightly issued without a *sci. fa.*: *Goodtitle d. Murrell* v. *Badtitle*, 9 Dowl. 1009.

Forms of actions are not wholly dispensed with—*Kingan* v. *Hall*, 24 U. C. Q. B. 248; *Hunt* v. *McArthur*, 24 U. C. Q. B. 254.

The judgment here was only interlocutory, and an assessment or computation should have been had or made before final judgment could be entered—*Hayward* v. *Radcliffe*, 4 F. & F. 500; *Crooks* v. *Dickson*, 15 U. C. C. P. 523. The *fi. fa.* against the goods was irregular—C. L. P. Act, s. 310; Arch. Pr. 11th ed. 1122, 1132; 2 Saund. 219.

It is not contended that if the plaintiff could rightfully issue an execution against lands, it was necessary to issue one first against goods; perhaps, a *fi. fa.* against goods need not have been issued—27 Vic. ch. 15.

Judgment should have been signed here, as in *Gardiner* v. *Gardiner*, 2 O. S. 520; *Holton* v. *Macdonald*, 12 U. C. C. P. 246; *Hogan* v. *Morissey*, 14 U. C. C. P. 441.

The suggestion of lands could not be rightly made without the leave of the court or of a judge, and judgment should have been signed on the suggestion.—*Watson* v. *Quilter*, 11 M. & W. 760.

A. WILSON, J. delivered the judgment of the court.

The judgment roll shews that the plaintiff owed the defendant on a promissory note, made by the intestate, payable to T. B Wakefield or bearer, in the sum of $300 and interest, one year after its date; and that the insolvent was the bearer of the note at the time the attachment was issued against him.

The defendant pleaded *plene administravit præter*, and an outstanding judgment greater than the goods on hand.

The plaintiff confessed the truth of the plea, and prayed judgment and his damages of assets *quando* There is a subsequent prayer of judgment and his said debt, together with his damages by him sustained, as well on occasion of the detention thereof, as for his costs of suit to be adjudged to him, to be levied of the goods, &c., *quando*.

Then there is the entry of judgment, that the plaintiff do recover the sum of $404 54 for his damages, and $26 95 for his costs, to be levied of the goods, &c., *quando;* and then follows the suggestion that the intestate died seized of lands and tenements and entitled to the equity of redemption of lands and tenements; and a prayer that the amount so recovered be levied of the lands and tenements and equity of redemption of lands and tenements, of and to which the intestate died seized and entitled.

From the position of parties to the note, there was no privity of contract between the intestate, who was the maker, and the insolvent, who was not the payee, but the bearer of it merely; and it cannot be inferred in any way that there was such a privity between these parties as would entitle the insolvent to sue the intestate in debt; If an I. O. U. be produced, the person producing it is presumed to be the person to whom it is payable; but it may be shewn that the person producing it is not the one to whom it was given, but is only the assignee of it.—*Curtis* v. *Richards*, 1 M. & G. 46. Here it requires no extraneous evidence to shew that the insolvent and intestate were not parties in immediate privity; for it is apparent on the face of the instrument sued upon, and therefore *debt* in its technical form could not be brought by the insolvent against the intestate

By the C. L. P. Act, sec. 9, the form or cause of action need not be mentioned in the summons; and by sec. 55, judgment is final, on default of appearance to a specially endorsed writ.

Sec. 57 enacts, "If the cause of action in the declaration be for a claim which might have been specially endorsed, and in the event of no plea being filed and served, judgment shall be final, and execution may issue for an amount not exceeding the amount endorsed on the summons, with interest and costs, which costs shall not be more than if the plaintiff had made such special endorsement and signed judgment for non-appearance."

By sec. 146, "No rule or order to compute shall be issued."

By sec. 147, "In actions where the plaintiff seeks to recover a debt or liquidated demand in money, the true cause and amount of which have been stated in the special endorsement or in the declaration, judgment by default shall be final."

By sec 149, "No writ of enquiry shall issue to a sheriff in cases of judgment by default; but, except in cases where the judgment is final, the damages shall be assessed by a jury."

By sec. 161, "When the damages sought to be recovered are substantially a matter of calculation, the court or judge may direct the amount for which final judgment is to be signed, to be ascertained by the Clerk of the Crown and Pleas," &c.

In all cases, therefore, where debt could have been formerly brought and the judgment was final, and execution issued without computation or assessment, and in all cases where the plaintiff proceeds by special endorsement, or could have done so, and in the latter case the declaration shews a claim which could have been specially endorsed for, the judgment is now final, without regard to any form of action.

This is the substance of the above enactments, and it is stated to be the practice which is pursued upon them—Arch. Pr., 11th ed 975

Crooks v. *Dickson* has no application in this case, for that was a suit carried on against a defendant beyond the jurisdiction of the court, and the summons, therefore, was not and could not have been specially endorsed.

There is no question but that the plaintiff might have proceeded by a specially endorsed writ, and there is no question but that the cause of action in the declaration is for a claim which might have been specially endorsed for.

There has not in every sense been, in the words of the statute, "no plea filed and served;" but practically there is *no plea*, for the plaintiff has confessed the truth of the one pleaded, and seeks nothing in opposition to it, and he submits to acquit the defendant in respect of all assets to the present time, and to look to future assets only and to lands. There is nothing whatever now in issue: the demand not being denied is admitted by the defendant.

We think in such a case the plaintiff may take a final judgment.

The judgment, therefore, being final, there is no occasion for a reference for an assessment.

The plaintiff should not, however, have taken more costs "than if he had made a special endorsement, and had signed judgment for non-appearance." Perhaps he has not done so, and $26 95 may be the proper allowance in such a case. No question of this kind was raised, nor was it argued that the defendant was entitled to his costs, he having individually succeeded on the record.

The first ground of the rule we decide against the defendant.

The second ground, we think, is maintainable in form, because the present state of the record shews the plaintiff is excluded from suing out any writ against goods and chattels

The third ground we decide against the defendant, because the plaintiff is entitled to an execution against lands, as there are no goods to be levied upon. If it were not so, and if he had first to issue an execution against goods, which execution he cannot get, it would be an absolute and perpetual denial of justice to him, which we should correct, if the plaintiff were refused his writ by an inferior court, and which we should be especially careful to avoid ourselves.

The provision of law, that execution should not issue against lands until the return of an

execution against goods, has not been violated in spirit or substance; for both parties have agreed on the record that there are no goods attainable by the plaintiff The purpose of the act has therefore been fully answered.

Ubi jus ibi remedium is a maxim directly applicable in this case

The fourth and fifth objections are not sustainable. The suggestion has been entered on the roll in pursuance of much better considered mode of proceeding than formerly prevailed. The present Chief Justice of Upper Canada, in the case referred to, has distinctly established on the most satisfactory grounds, the reasonableness and propriety of this course, in place of replying lands, with which the representative has nothing to do, and which usually ended in the useless form of a judgment by default for want of a rejoinder to it; the effect of which, it might perhaps been argued, was equivalent to an abandonment of the plea of *plene administravit*; for judgment for default of rejoining is in many cases the same as a judgment for not pleading, and the pleas are thus got rid of.

The case has not arisen yet making it necessary to consider whether even a suggestion is required, and when it does, the person objecting to the want of it may find he will have very much to do to sustain his argument.

We do not think the judgment or writ against lands should be set aside for any mere formal default: the plaintiff should probably amend the roll, by striking out that part of it which awards judgment to him "for his debt and damages for the detention thereof," which is strictly an entry in a proceeding in debt technically, which this action is not, and by making his writ conform to the judgment and to the form provided by our rule of court. Sec. 240 does not apply to such a case as this, but only to cases where a debt technically is sued for.

We think the rule should be discharged with costs, excepting as to the second ground of objection, with the costs of such part of the rule to be paid by the plaintiff.

Rule accordingly.

COMMON LAW CHAMBERS.

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

The Queen v. Scott

Conviction for insolent behaviour to magistrate — Several convictions — How periods of imprisonment to run — Uncertainty.

A prisoner was convicted three several times the same day for insolent conduct to a magistrate on the bench, and detained in prison under three several warrants, all dated the same day, the periods of imprisonment in the two last commencing from the expiration of the one preceding it, but the first to be computed 'from the time of his arrival and delivery [by the bailiff] into your [the gaoler's] custody thenceforward"

Held, that the magistrate had a right to convict and to sentence for continuing periods, but that the periods of imprisonment, depending on the will of the officer, who was to deliver him to the gaoler, were uncertain, and prisoner was therefore entitled to his discharge.

[Chambers, 15th December, 1865.]

A writ of *habeas corpus* was issued to the keeper of the common gaol of the County of Waterloo, commanding him to have before the presiding judge in chambers the body of James Scott, detained, &c.

The gaoler accordingly returned that the prisoner was in custody under three several warrants of commitment, which were annexed to the return, and are as follows:

(1) "To the keeper of the common gaol, &c. Receive into your custody the body of James Scott herewith sent you by me, Alfred Boomer, Esquire, one of Her Majesty's Justices of the Peace in and for the said county, and convicted by me the said Justice with contempt and indecent behaviour, by insulting and obstructing me the said Justice in the due execution of my office as such Justice as aforesaid, and for saying in the presence and hearing of me the said Justice, whilst on the bench, that I the said Justice was a 'rascal and a dirty mean dog,' and using other words, and making efforts to prevent the due administration of justice; and him the said James Scott detain in your custody in the gaol aforesaid for the space of ten days, to be computed from the time of his arrival and delivery into your custody thenceforward, for his contempt aforesaid.

"Given under my hand and seal, at the village of Linwood, in the county aforesaid, the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and sixty-five.

(Signed) "A. Boomer, J P." [L S.]

(2) "To the keeper of the common gaol, &c Receive into your custody the body of James Scott, herewith sent you by me, Alfred Boomer, Esquire, one of Her Majesty's Justices of the Peace in and for the said county, and convicted by me, the said Justice, with contempt and indecent behaviour, by insulting and obstructing me the said Justice in the due execution of my office as such justice as aforesaid, and for saying, in the presence and hearing of me the said justice, whilst on the bench, and after being duly convicted by me the said justice of a former contempt, that I the said justice was 'a damned lousy scoundrel,' and similar opprobrious epithets, as well as endeavouring to prevent the due administration of justice, and him the said James Scott detain in your custody in the gaol aforesaid for the space of ten days, to be computed from the time of the expiration of a former warrant of commitment for a similar offence, and numbered one (1), thenceforward for such his contempt."

(*Same date.*)

(3) "To the keeper of the common gaol, &c. Receive into your custody the body of James Scott, herewith sent you by me, Alfred Boomer, Esquire, one of Her Majesty's Justices of the Peace in and for the said county, and convicted by me, the said justice, with contempt and indecent behaviour, by insulting and obstructing me the said justice in the due execution of my office as such justice as aforesaid, and for saying in the presence and hearing of me the said justice, whilst on the bench, and after being twice duly convicted by me the said justice of similar contempts, that I the said justice was 'a confounded dog,' and similar opprobrious epithets, as well as endeavouring to prevent the due administration of justice, and him the said James Scott detain in your custody in the gaol afore-

said for the space of ten days, to be computed from the time of the expiration of a former warrant of commitment for a similar contempt, and numbered two (2), thenceforward for such his contempt."

(*Same date.*)

The discharge of the prisoner was asked for, on the grounds that the magistrate had no authority to commit the prisoner for the offences charged, or to make the two last periods of imprisonment commence at the termination of the one preceding it, and that the time for which he was to be imprisoned was uncertain, and that therefore the conviction was bad.

J. Wilson, J.—There is no doubt the magistrate had power to commit for contempt under the circumstances stated in this commitment, and if the same violent conduct was continued he had the right to commit again and again as he did; so too it was lawful for him in his sentences, upon his second and third adjudications, to make the period of imprisonment for each of them begin at the termination of the former imprisonment. —4 Burr. 2577-8; 1 Leach, 536; Chitty Cr. Law, 718. By a well-known rule of law, every judicial act is supposed to happen at the first instant of the day it takes place: it follows that the imprisonment of this man would have been deemed to have commenced at the beginning of the day on which he was adjudged to be imprisoned, and he would have been entitled to his discharge, not at the same hour of the day he was brought to prison, but on the first opening of the prison on the day after his imprisonment expired. —9 Exch. 628-62. By another rule of law, the period of his imprisonment must be certain, not depending upon the will of the officer.—1 Chitty Cr. Law, 701; 3 Burr. 1962. Here he has been adjudged to be imprisoned ten days on the first judgment for contempt, from the hour at which the constable delivers him to the keeper of the gaol, and each of the two succeeding periods of ten days are to commence from the hour of the day at which the former period of imprisonment expires. Now when the constable could or might have taken him to prison is wholly contingent upon his action as regards the imprisonment on the first conviction, which is thereby made uncertain; and as the other periods of imprisonment depend upon the same contingency, they are also uncertain. The prisoner is, therefore, entitled to his discharge for want of certainty in the periods of imprisonment imposed upon him for these several offences.

He is accordingly discharged from custody.

In the matter of Hugh McKinnon, a Prisoner confined in close custody in the Common Gaol of the County of Wentworth.

Habeas corpus—When affidavits may be received—Substituted warrant—Conflicting warrants—Charge of assault and beating and conviction of aggravated assault—Admission to bail pending application for discharge.

It appeared on an application for a *habeas corpus* that the information laid before a police magistrate and warrant to apprehend were for an assaulting and beating, but it was disputed whether upon the examination and trial this was *all* the charge made, or whether he was not then charged with an aggravated assault; and whether, when he pleaded guilty, he did so to the former or the latter charge; numerous contradictory affidavits were filed. Four several warrants of commitment were in the gaoler's hands, upon one at least of which the prisoner was detained in custody. They were all for the same offence, one having been from time to time substituted for the other.

Quære, whether, or how far or for what purpose affidavits can be received against a conviction or warrant of commitment valid on the face of it.

A judge cannot enquire into the conclusions at which the magistrate arrived if he had jurisdiction over the offence charged and issued a proper warrant upon that charge, but may enquire into what that charge was, or whether there was a charge at all.

Con. Stat. Can., cap. 9, probably applies only to common assaults, &c.

A charge of assaulting and beating is not a *charge* of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, though, when the party is before the magistrate, the charge of aggravated assault may be made in writing and followed by a conviction therefor.

Under doubts as to the law, and on the disputed facts, the prisoner was admitted to bail, pending the application for his discharge, which was to be renewed in Term.

[Chambers, December, 1865.]

A summons was granted on the part of the prisoner, calling upon the Attorney General, his agent, and the committing magistrate, to shew cause before the presiding judge in Chambers, on the first day after service, why, upon the grounds disclosed in the affidavits and papers filed, a writ of *habeas corpus* should not issue in this matter out of the court of Queen's Bench for the prisoner.

The application was based on the following affidavits and documents:

1. The information and complaint of William Gillespy, taken on oath before Mr. James Cahill, Esq., police magistrate of the city of Hamilton, this 27th day of November, 1865. The said informant said, that on the 27th day of November inst., at Hamilton aforesaid, Hugh McKinnon did assault and beat deponent without cause.

2. Warrant in the first instance reciting the information that Hugh McKinnon, on the 27th day of November instant, at Hamilton aforesaid, did assault and beat Wm. Gillespy without cause, and directing McKinnon to be apprehended and brought before the police magistrate to answer unto the said information, and to be further dealt with according to law.

3. The commitment reciting the information "for that McKinnon did on the 27th day of Nov., 1865, in the city of Hamilton, assault and beat William Gillespy, contrary to the statute in such case made and provided, and was adjudged by me to be committed for the said offence to the common gaol of the county of Wentworth, at Hamilton, there to be kept for the space of six months, and pay the sum of one hundred dollars for fine; commanded the keeper of the gaol to secure the said Hugh McKinnon into your custody in the said jail, and him there safely keep for the space of six months, and until tthe aforesaid amounts shall be paid," dated the 27th of November, 1865.

4. The affidavit of David McKinnon, who said, that on the 4th of December inst., he attended for the prisoner at the police office in Hamilton, and demanded a copy of the information and of the warrant in the first instance, and that he obtained the copies before mentioned from the chief of police.

5. The affidavit of Wm. Mundie, keeper of the gaol, which stated that McKinnon was de-

livered into gaol on the 27th November last, and is still a prisoner, by virtue of a warrant of commitment, a copy of which is before mentioned.

6. The affidavit of Hugh McKinnon, the prisoner, wherein he swore that he was arrested on a charge of assault and battery, to which he pleaded guilty; and thereupon, to his astonishment, the said James Cahill sentenced him, as shewn by the warrant of commitment referred to. That he committed such assault in the heat of passion, and because Gillespy refused to retract certain language he had caused to be published in a certain public newspaper, of and concerning a brother of his, and which deponent, previous to such assault, told him was greatly incorrect. That upon his trial he did not plead guilty to, nor was he ever tried for or asked to plead to any other charge than that of assaulting and beating the said William Gillespie, upon the occasion aforesaid, and that had any other charge been preferred against him for the cause aforesaid, he should not have pleaded guilty thereto before the said James Cahill.

Robt. A. Harrison, for the Attorney general and the police magistrate, shewed cause; he handed in several new warrants, which had, since the first warrant, been issued by the police magistrate, and contended that a sufficient cause of detainer appeared in such new warrants, if the old one should be held to be defective, and that a judge in Chambers could not look behind or beyond the warrant, because he had not the means of procuring or enforcing the return of the necessary papers before him as the court had.

That the information stating an assault and beating, was not inconsistent with the fact of the compiaint being for an aggravated assault, and if so, the whole proceedings were regular.

That it must be presumed, as the police magistrate summarily disposed of the case, that he did so with the consent of the accused, and that all the requisites of the Consol. Stat. for Canada, ch. 105, s. 2, were duly complied with by him, but if not so, they are shewn to have been fully complied with by the police magistrate in the substituted warrants now produced.

That it must be presumed the police magistrate was sitting in open court under the 30 sec. of the statute, when he adjudicated upon the cases.

That the charge in the substituted warrants is stated in the very language of s. 1, sub-sec. 4 of the statute, that McKinnon did commit an aggravated assault in and upon William Gillespy, by unlawfully and maliciously inflicting upon him grievous bodily harm, and it is quite sufficient to follow the language of the statute.

That although the new warrants impose beyond the six months, the term of two months imprisonment in case the fine of $100 be not sooner paid, the police magistrate was justified in imposing it under s. 16 of the Act, without regard to any distress for the purpose of levying it

And it is not to be presumed that there were the means of satisfying a distress.

The warrants put in were to the following effect—there were four of them, marked respectively A, B, C, D,—Mr. Cahill states that A was lodged with the gaoler on the 28th of November, and C and D on the 7th of this present month.

Warrant C is the same as the copy of the one before mentioned, produced by the prisoner. Warrant A, after stating the charge as for an aggravated assault, &c., proceeds in this manner: "And the said Hugh McKinnon, after hearing the substance of the charge against him, and having consented to my deciding upon the charges summarily, and having pleaded guilty to such charge, he was then and there duly convicted of the said offence, and I did thereupon," &c.

The punishment awarded is stated to be six months imprisonment, $100 fine, and two months' imprisonment after the expiration of the six months, if the fine be not paid.

Warrant D would seem to be the last one, and the one in which it appears the magistrate rests the detainer. It is as follows, and where it differs from warrant B, is pointed out; the parts of it italicised are in D, but not in B.

Copy of warrant D:—

Canada. City of Hamilton, to wit: } *To all, or any of the Constables, &c. &c.*

Whereas, Hugh McKinnon, of Hamilton, aforesaid, was this day charged before me, James Cahill, Esq., Police Magistrate, in and for the City of Hamilton aforesaid, and ex-officio one of Her Majesty's Justices of the Peace, in and for the said City and County, on the oath of William Gillespy; for that the said Hugh McKinnon did, at Hamilton aforesaid, on the 27th day of November instant, commit an aggravated assault in and upon the said William Gillespy, by unlawfully and maliciously inflicting upon the said William Gillespy, grievous bodily harm; and whereas, I did, before the examination of witnesses for the prosecution, and before calling upon him the said Hugh McKinnon for any statement which he might wish to make, state to him the substance of the said charge, and did then ask him, the said Hugh McKinnon, "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial before a jury at the Recorder's Court at *Hamilton?*" And the said Hugh McKinnon having consented to my deciding the charge summarily, and having pleaded guilty to the said charge, I did, thereupon, on the day last aforesaid, at Hamilton aforesaid, upon his plea of guilty, and upon the oaths of the said William Gillespy, and others, convict him of the said offence; and I did adjudge him, the said Hugh McKinnon, for his said offence, to be imprisoned in the common gaol of the County of Wentworth, at Hamilton aforesaid, for the space of six months from the day aforesaid; and I did adjudge him, the said Hugh McKinnon, for his said offence, to pay the sum of one hundred dollars as fine, to be paid and applied, according to law; *and if the said sum of one hundred dollars were not paid forthwith, I ordered that the sum should be levied by distress and sale of the goods and chattels of the said Hugh McKinnon, and in default of a sufficient distress, I adjudged the said Hugh McKinnon* to be imprisoned in the said common gaol [in warrant B, "after the expiration of the said six months, for the further space of six months, unless," &c.,] for the space of six months, unless the said sum of one hundred dollars were sooner paid.

These are therefore to command you, and every of you, to take the said Hugh McKinnon, and him safely convey to the said common gaol at Hamilton aforesaid, and there deliver him to the keeper thereof, with this precept; and I do hereby command you, the said keeper of the said common gaol, to receive the said Hugh McKinnon into your custody, and there safely keep him for the space of six months *first above mentioned*.

[After *six months*, Warrant B proceeds:—"And also, after the expiration of the said six months, for the further space of six months, unless the said sum of one hundred dollars shall be sooner paid, and for so doing, this shall be your sufficient warrant."]

Given under my hand and seal, the twenty-seventh day of November, in the year of our Lord, 1865, at Hamilton, aforesaid.

(Signed) James Cahill.
Police Magistrate, Hamilton. [L.S.]

James Paterson for the prisoner.

The information states an assault and beating—nothing more. The charge was therefore laid under the Consol. Stat. C, ch. 91, secs 37, 38, and by that Act the maximum punishment is a fine of $20, including costs, and the maximum period of imprisonment is by s. 41, two months, in case the fine be not paid.

This is the statute under which the magistrate really proceeded when he took the information, and issued his warrant to apprehend, and this is the offence of and for which he was in fact convicted, as appears by his warrant of commitment first issued, although he attached to it the punishment affixed by ch. 105, for the offences therein specially provided for.

This latter statute confers enlarged powers over certain specified offences, and to confer jurisdiction, under the statute, the offence must be one really within it and must be actually so laid; the information should have stated, in the very words of the Act, if the offence justified it, and if the magistrate proposed to act under it, that the party had committed an aggravated assault, and it should have set out the means, nature and particulars of it, as required by the statute, by adding the statutable words, "by unlawfully and maliciously inflicting upon Gillespy some grievious bodily harm;" for an assault is not necessarily an aggravated assault, the latter is something more than an assault.

The prisoner pleaded guilty to the charge made against him, and that was an assault and beating merely; if more was meant than was charged, it was unfair to him not to explain it to him before pleading, for he did not mean to plead guilty to an aggravated assault. This was an excess of jurisdiction by the magistrate, and it may be shown by affidavit, *Reg* v. *Shaw*, 23 U C. Q B. 616, and *Reg*. v. *Munro*, 24 U. C Q B. 44.

The warrant should have stated that the magistrate stated to the prisoner the substance of the charge before the examination of witnesses, and before calling on him to make any statement to the charge, and that the magistrate should also have asked the prisoner whether he consented to be tried in that summary manner, according to sec 2 of the statute.

The warrant should also (to have shown complete jurisdiction in the magistrate) have set forth that the police magistrate had under the 30 sec. of the statute acted in *open* court. These words must mean something.

The charge of making an assault on and beating Wm Gillespy is not sufficiently certain. *Reg*. v. *Cruse*, 8 C. & P. 541.

The magistrate had no authority to impose the two additional months imprisonment without first attempting to levy the fine by distress. Consol. Stat. of Canada, ch. 103, s. 57, and following sections, and *Slater* v. *Wells*, 9 U. C. L. J.

[Since this argument the parties were heard again, in consequence of some papers which the police magistrate had handed to the judge, not having been given by him to the counsel, under the belief that they were only copies of some of the proceedings which the parties had before them.

When it was discovered that they were not copies, but new materials, the judge sent them to the agent of the Attorney general, and requested him to shew them to the prisoner's counsel, that they might be answered. They were accordingly answered, and a second argument was had in the case, upon these additional papers]

The papers submitted were to the following effect:

"The examination of W. Gillespy, of Hamilton, in the said county, labourer, taken on oath this 27th day of December, 1865, before Mr. James Cahill, police magistrate, in the presence and hearing of Hugh McKinnon, who is charged this day before me, the said justice; for that he, the said Hugh McKinnon, on the 27th day of December instant, at Hamilton aforesaid, did commit an aggravated assault, by unlawfully and maliciously inflicting upon him, the said Wm. Gillespy, grievous bodily harm. The defendant was asked by me,—

"Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the next Recorder's Court of the City of Hamilton? And the defendant requested that the matter should be disposed of by me, in a summary manner, and pleaded guilty to the charge. The defendant then made a statement, and the complainant thereupon requested to be sworn," and he was examined, all of which is set out, and W. Turnbull and James C. Egan were also examined as witnesses, and the examinations conclude, "fined $100, and six months in gaol." Wm. Gillespy then made affidavit that the prisoner "did plead guilty to having committed an aggravated assault upon me, as alleged in the papers hereunto attached, and did consent that the charge should be summarily disposed of by the police magistrate, after having had the charge read to him, and being asked if he was willing the same should be so disposed of"

Wm. H. Nicolls made affidavit to the same effect.

The police magistrate made affidavit "that the annexed is a true copy of the examination taken in this matter, on the 27th day of November last, before me.

"That I did before the trial and examination, read over to Hugh McKinnon the charge, and addressed to him the words exactly as they are mentioned in the paper annexed.

"That the said McKinnon did plead guilty to the aggravated assault, as stated and alleged in the paper annexed."

The affidavits in answer are as follows:—

Hugh McKinnon says,—

"It is not true that I was charged with or pleaded guilty to an aggravated assault; for had I been charged, I never would have consented to be tried by James Cahill, nor would I have pleaded guilty thereto.

"That the charge contained in the warrant on which I was arrested was read to me, and I was asked if I was guilty or not guilty of the offence so charged against me; that the charge so read to me was, that I had assaulted and beat Wm. Gillespy without just cause, and that such charge I consented should be tried by him, and to which I pleaded guilty."

Adam Wilson, J.—I assume that according to the practice in England, which we follow, a judge in Chambers has, at the Common Law, power to issue a writ of *habeas corpus* in cases which are not within the 31 Car. II.

That statute applies "to criminal or supposed criminal matters" only, except treason and felony, and it applies to the cases of persons confined before trial, or it may be also, as Mr. Justice Patterson said in 7 Q. B 1010, to the case of persons confined who have been tried.

If the writ be at Common Law, affidavits may perhaps be received (*Ib.*)—but not if under the statute of Charles, for that statute confers no power to receive them. Affidavits, may, perhaps, be received to shew that no such sentence has been passed as represented, but not to impeach the sentence.—(*Ib.*)

Affidavits may, perhaps, be received as to matter of fact, but not of law, *per* Wightman, J., p. 1012. A commitment by a magistrate, by way of punishment, is bad, if it be not for a time certain, *Rex.* v. *James*, 5 B. & Al. 894. Affidavits were received, in *Re Eggington*, 2 E. & B. 717, to show that the arrest was made on Sunday. So also, to show that the prisoner was privileged from arrest, *Ex parte Dakins*, 16 C. B. 77; see also, *The Queen* v. *The Board of Works of St. Olaves*, 8 E. & B. 529; *In re Bailey*, 3 E. & B. 607, the unreversed sentence of a court of competent jurisdiction must be presumed to be correct, otherwise we should in effect be sitting as a Court of Appeal without the power of reversing the judgment, *In re* ——————case, 10 Q. B. 502. When the proper remedy is by writ of error, a *habeas corpus* will not be granted, *In re Dunn*, 5 C. B. 215; *In re Reynolds*, 8 Jur. 192; 1 D. & L.; a *habeas corpus* was granted on a commitment, under an order of sessions, confirming a magistrate's conviction.

The warrant was assumed to be in accordance with the conviction, as no conviction was produced—(*Ib.*)

It would seem the conviction may be produced, *Rex* v. *Elwell*, 2 S. N. 794; *Rex* v. *Taylor*, 7 D & R. 622 In *Ex parte Cross*, 2 H. & N. 354. A substituted warrant, seventeen days after the making of the original warrant, which was defective, was allowed and held sufficient; the writ of *habeas corpus* was thereupon discharged, on the authority of *The Queen* v *Richards*, 5 Q. B. 926. It was said to be doubtful if affidavits could be used to show what did not appear on the proceedings. *In re Smith*, 3 H. & N. 227, was a similar case. In this last case, an affidavit was not allowed to be used to show that the offence had not been committed within the jurisdiction of the magistrate, "the decision of the magistrate for this purpose being final," though it might still be open to the party to raise the objection in an action against the magistrate; the statement that the amended warrant was delivered by the same magistrate who delivered the first, shews that it was in substitution of the first. In *Caron Wilson's* case, 7 Q. B. 984, affidavits were not admitted to show the court had decided against law; see also *Brevan's* case, 10 Q B. 492. *In the matter of Phipps*, 11 W. R. 730 Q B., the first warrant was defective, because not sealed. After the rule *nisi* was issued, an amended sealed warrant was put in the officer's hands, and upon this being shown, in answer, the rule was discharged; the court assumed the two warrants to be for the same offence, and that the latter was substituted for the former one. In *the Queen* v. *Bolton*, 1 Q B. 66, upon a return by magistrates to a certiorari, for the purpose of bringing up the proceedings taken by them in making an order, the information, summons and order were returned, with a statement of the evidence on which the order was made. It was laid down that when a matter is within the jurisdiction of magistrates, and their proceedings are regular, and according to law, the court will not interfere with their decision, although it should be unwise or unjust. But the court will enquire whether the case was within their jurisdiction or not.

Where the charge laid as stated in the information, does not amount in law to the offence over which he has jurisdiction, his finding the party guilty, by his conviction, in the very words of the statute, will not give him jurisdiction. The conviction would be bad on the face, all the proceedings being returned before us. Or if the charge being really insufficient, he had mistated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavit what the real charge was, and that appearing to be insufficient, we would quash the conviction; we cannot get at the want of jurisdiction but by affidavit, of necessity, we must receive them; we receive them, not to show that the magistrate has come to a wrong conclusion, but that he ought never to have begun the enquiry. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature, it is determinable at the commencement, not at the conclusion of the enquiry; we conclude, therefore, that the enquiry must be limited to this, whether the magistrate had jurisdiction to enquire and determine, supposing the facts alleged in the information to be true, *In re Wastbury Union*, 4 E. & B. 314; see also, *Reg.* v. *Grant*, 14 Q. B. 63; *Reg.* v. *Wilson*, 6 Q. B. 620; so in *Re Thompson*, 6 H. & N. 193, and rule to show cause why a *habeas corpus* should not issue.

The Chief Baron said,—

"When the jurisdiction of magistrates depends on certain facts being proved or not proved, and the magistrates have treated them as proved and adjudicated accordingly, their decision is final, and no court can enquire into their jurisdiction;

but where the nature of the charge is doubtful, and in the course of enquiry it turns out that it is not one over which they have jurisdiction, there is no authority for saying that the Superior Court of Law are precluded from examining the evidence and entertaining the question of jurisdiction. The information contains a charge of assaulting," &c.

Wilde, B., said,—

"We are entitled to look into the facts, and upon the affidavit filed in answer to the rule, the whole matter is before us." It was not at all disputed that the information and warrant to apprehend were for an assaulting and beating, but it is disputed whether upon the examination and trial this was *all* the charge that was made against the prisoner, or whether he was not then charged with an *aggravated* assault, &c., and pleaded guilty to it, and was convicted accordingly. The prisoner denies that any other charge was made than for assaulting and beating, and that it was to it alone he pleaded guilty; and he declares that he was convicted of and sentenced for another offence than he was ever charged with or confessed.

On the other hand, it is asserted that the examination and charge then investigated and made, related to an aggravated assault, and it was to such an assault the prisoner pleaded guilty, and upon which he was convicted.

I do not think I can enquire into the conclusion at which the magistrate has arrived if he had jurisdiction over the offence which was charged, and he has issued a proper warrant upon that charge; but I think I may enquire into what that charge was, or whether there was a charge at all.

If the magistrate had the authority to take an information for an assaulting and beating, and to take the examination upon and in respect of an *aggravated* assault, &c., and to convict and sentence for it, then everything that has been done here is quite regular, for this is what he has done.

The Statute of Canada, ch. 91, s 31, provides that "if any person unlawfully assaults or beats another, any justice, on complaint of the party aggrieved, praying him to proceed summarily under the Act, may hear and determine such offence; sec. 44 provides, that if the person against whom such complaint has been preferred for a *common* assault, battery, &c. It is probable then, that the provisions of the statute apply only to *common* assaults and battery, and s. 45 appears to confirm this, for it is there provided, that in case the justice finds the assault or battery complained of to have been accompanied by any attempt to commit a felony, or is of opinion that the same is from any other circumstance a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, &c. The punishment for which, upon conviction is, by s. 38, $20 fine, or by s. 41, imprisonment, not exceeding two months, if the fine be not sooner paid.

When, by c. 105, any person *is charged* before the police magistrate with having committed an aggravated assault, by unlawfully and maliciously inflicting upon any other person any grievous bodily harm, the police magistrate may hear and determine the same in a summary way.

Sec. 2 provides, whenever the police magistrate before whom any person is charged as aforesaid, proposes to dizpose of the case summarily under the Act, he shall, after ascertaining its nature and extent of the charge, but before the *formal* examination of the witnesses, &c., state to such person the substance of the charge against him, and if it is in the election of the person charged, shall then say to him, or to the like effect,—Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury, at the [*naming the court at which it could sooner be tried*]? and if the person consent to the charge being summarily tried and determined, the police magistrate shall reduce the *charge into writing*, and read the same to such person and shall then ask him whether he is guilty or not of such charge.

Sec. 3. If the person charged confesses the charge, the police magistrate shall then proceed to pass sentence; then, &c.

Sec. 5. Every such conviction may be in the form A, or to the like effect; or, by s. 10, according to the form C. The form A contains the words "consenting to my deciding upon the charge summarily." The form C. does not.

By s. 17, in cases under sub-sec 4, 5, 6 & 7, of s. 17 [which includes this case] the forms are to be altered "by omitting the words stating the consent of the party be tried before the recorder."

By s. 16, the punishment for this offence is for a time with or without hard labour, not exceeding six months, or a fine not exceeding $100, or to both fine and imprisonment not exceeding the said period and sum; and the fine may be levied by writ of distress, or the party convicted may be condemned, in addition to any other imprisonment, on the same conviction, to be committed to the common gaol for a further period not exceeding six months unless the fine be further paid.

By s. 29, no conviction, sentence, or proceeding under the Act shall be quashed for want of form; and no warrant or commitment upon a conviction shall be held bad by reason of any defect therein, if it be therein alleged that the offender has been convicted and there be a good and valid conviction to sustain the same.

By s. 26, the acts respecting the duties of justices of the peace out of session, in relation to summary convictions and orders, and respecting the duties of justices of the peace out of sessions in relation to persons charged with indictable offences, shall not be construed as applying to any proceeding under this Act.

And by s. 27, every conviction under the Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with forfeiture. The proceedings under this last Act are so entirely different in their character, form of procedure, punishment and effect for those which are taken under c. 91, that it should plainly appear whether the proceedings have been in fact taken under the one act or the other.

It rather appears that the police magistrate, when the party charged is once before him, may, before any *formal* examination of the witnesses, &c., ascertain the nature and extent of the charge and if the party consent to be tried summarily,

he shall "reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge," which looks like the magistrate *then* reducing the charge into writing and trying the party upon the charge then reduced into writing. If this be the meaning of the statute, it does not properly matter whether the original information and warrant to apprehend, did or did not state the charge in the precise language of the Act.

But it is quite plain that the police magistrate must either by the original information or by the charge which he makes, when the party is before him, have the charge *in writing*, and he must read the same to such person, and he must ask him whether he is or is not guilty of such charge.

If I am at liberty to refer to the information, and I think I am, *it* does not contain an offence under the Act c. 105; but the examination transmitted does state that the prisoner was charged on the 27th of December [for November, no doubt], with an offence, in the very words of the Act, and what purports to be the examination or a copy of the examination, is returned, which shows the charge to have been reduced into writing; and I will assume it was read over to the prisoner, as it is said he pleaded to it.

The objection to this examination is, that it sets out the same to have been taken on the 27th of December, which has not yet arrived—November was meant; and that it states the offence to have taken place on the 27th day of December, also, the warrants show what the day was, and also the nature of the charge. I am not now required to say, taking this proceeding called an examination and the warrants together, whether there is or is not a just cause of detainer from the mode in which I shall dispose of the case.

If it be as the prisoner represents, that no such charge was made against him as he has been convicted of, and that no such charge was in truth reduced to writing, and that he was not asked if he were willing that such a charge should be summarily tried by the police magistrate, nor whether he was guilty of it or not, and that while he pleaded guilty to a common assault, he has been punished for an aggravated assault, and that the examination and the substituted warrants have been got up since to defend all that he says has been illegally done, I cannot doubt but that a remedy must exist to meet such a complaint. It may be that a judge in Chambers, as he has the power to issue a *habeas corpus*, must have the power also finally to dispose of it, and if affidavits and papers can be received at all to show that the charge which was laid in the information, and which was the only charge in writing that was made, did not and does not warrant the sentence passed, or that the proceedings represented to have taken place did not in fact take place, or for any other purpose than to question the judgment, decision or discretion of the magistrate upon the facts of the case, over which he had jurisdiction, it may be that the judge in Chambers may receive them as well as the court; it may be that I should assume the responsibility of deciding the matter upon my own judgment, if I could not obtain the assistance of any of my brother judges, and give to the party his freedom, if I thought he was entitled to it, unless the sitting of the court would soon take place, and to which I would refer it, if I entertained any doubt myself. I should not be disposed to remand a person to custody for months, to await the sitting of the court, if I felt reasonably convinced that he was not legally detained. Here, I think, a charge of assaulting and beating is not a *charge* of an aggravated assault, &c., although a charge of assaulting and beating would be sustained by proof of an aggravated assault—the aggravation being merely matter of evidence, not raising the offence, but enhancing the punishment; but here the statute speaks of the person being *charged* with the aggravated assault and therefore on the complaint of an assault and beating a conviction cannot be made of an aggravated assault.

I am inclined to think, when the party was before the police magistrate, that the charge, as I have before stated, for an aggravated assault, could then have been made by the magistrate in writing, and a conviction therefor have properly been made.

But it is not quite clear, from the facts before me, that such a charge was in fact made, or that the party pleaded guilty to it. The information in the warrant to apprehend—the warrant of commitment, firstly delivered to the gaoler—the examination misdated as before mentioned, and the affidavits on behalf of the prisoner, and the intrinsic evidence, are much in favour of the view of the prisoner.

The gaoler has now four warrants in his hands.

1st. To detain the prisoner six months, and that the prisoner pay a fine of $100, and be imprisoned for two months, unless the $100 shall be sooner paid.

2nd. To detain the prisoner for six months, and after the space of the six months, for the further space of two months, unless the $100 be sooner paid.

3rd. To detain the prisoner for six months, and after the expiration of the six months, for the further space of six months, unless the $100 be sooner paid.

4. To detain the prisoner for six months,

Under which of these warrants the gaoler is to act, I do not know. I do not think the magistrate can withdraw the warrants, or any of them from the gaoler's hands, because they are for his protection; but the gaoler ought to know which is the operative warrant; at present he may not know whether he is to discharge the prisoner from custody at the end of the first six months or at the end of two months or six months further, if the fine be not sooner paid, still I can do nothing in such a case, if everything be regular, and there be any single warrant good in law in the keepers hands.

As the practice is not fully settled, whether affidavits can be received against a conviction or warrant of commitment valid on the face of it, even by the court; and as prisoners have in some instances been admitted to bail pending an application for their discharge, as in *Rex* v. *Reader*, Str. 531, and *In re Bailey*, 3 E. & B. 607. I shall admit him to bail himself in $500 and two sureties to the extent of $250 each, to prosecute the present application, or one of the same nature or effect by *hab. is corpus* or *certiorari* or otherwise, at the next ensuing term of either of

the Superior Courts of Common Law, and to abide the judgment of the court therein, and to appear before either of such courts, whenever notified to attend, such notice to be deemed a sufficient service by delivering the same, or a copy thereof, to the attorney of the prisoner, or if there be no attorney, by putting up a copy thereof in the office of the clerk and Crown and Pleas of the same court, for *twenty-four hours* before proceeding on the notice.

The recognizances to be approved of by the county attorney of Wentworth, on the production of such recognizances and approval, an order will be made for the discharge.*

Stewart v. Jarvis and Graham.

Costs—Full or County Court—Trespass qu. cl. fr.—Special plea of justification and other pleas.

Where, in an action of trespass *quare clausum fregit* and *de bonis asportavit*, defendants pleaded not guilty, that the goods were not the plaintiffs, and an entry by one of the defendants (who was a sheriff) under a *fi. fa.* goods in favour of the remaining defendant against a third party, and seized the goods, the same being the goods of such third party, and the jury found for plaintiff with $177 damages, *Held*, in the absence of a certificate, that plaintiff was entitled only to County Court costs.

[Chambers, September 28, 1866.]

Robert A Harrison obtained a summons to revise the taxation of the plaintiffs costs because full Superior Court costs had been taxed, without a certificate.

The action was in trespass for breaking and entering a close, and then and there seizing, taking and carrying away, the plaintiff's goods.

The defendant pleaded—

1 Not guilty

2. As to seizing, taking and carrying away, the goods: that they were not the plaintiff's goods

3. That defendant Jarvis (a sheriff) entered the close under a *fi fa.* against goods, in favour of the defendant, Graham, against one Samuel Stewart, and seized the goods, the same being the goods of Samuel Stewart.

Issue. Verdict for plaintiff, $177.

Robert A. Harrison supported the summons, and cited Con. Stat. U.C., c. 15, s. 17, sub-s. 1; s. 16, sub-s 1; *Latham* v. *Spedding*, 17 Q.B. 433; *Hamilton* v. *Clarke*, 2 U. C. Pr. R. 189.

S. B Harman showed cause, and cited *Bartholomew* v. *Carter*, 2 M. & G. 612; *Wright* v. *Peggin*, 2 Y. & J. 544; *Parnell* v. *Young*, 6 Dowl. P. C 554; *Pugh* v. *Roberts*, 6 Dowl. P. C. 561; *Lilly* v *Harvey*, 17 L. J. Q. B. 357; and Archd. Prac. 12 Ed. 481.

Adam Wilson, J.—The County Court has, by the County Courts' Act, jurisdiction in all personal actions where the debt or damages claimed do not exceed $200.

Subject to this, among other exceptions, they have not cognizance of any actions where the title to land is brought in question.

The 20th section of the act provides that no plea, replication, or other pleading, whereby the title to any land is brought in question, shall be received by any County Court without an affidavit thereto annexed that the same is not pleaded vexatiously, nor for the purpose of excluding the court from jurisdiction, but that the same does contain matter which the deponent believes to be necessary for the party pleading to enable him to go into the merits of the case.

It is not necessary to go back to the decisions under 43 Eliz chap. 6, and the 22nd and 23rd Car. I, chap. 29. Before the new rules of pleading, not guilty alone put the title in issue, and the judge had then to be governed by the evidence as to whether the title did or did not come chiefly in question. But it was held that the judge had no power to certify, and that the plaintiff in all cases was entitled to costs, when the defendant pleaded a justification as a license, which was found against him, and which did not raise any matter of title, because the judge could only certify where the question of title did or might arise; and it was said it could not arise at all on a plea of justification which admitted title, and therefore such cases were held to be out of the statute. This was giving, as Lord Kenyon, C. J., in *Peddle* v. *Kiddle*, 7 T. R. 659, said, a strict construction, but the practice was so undoubtedly settled that the Court felt obliged to follow it in *Wright* v. *Peggin*, 2 Y. & J. 547

In *Purcell* v. *Young*, 3 M & W. 288, a plea of not possessed was held to prevent the judge from certifying to deprive the plaintiff of costs.

In the County Courts in England, where there are no written pleadings, the mere assertion of title does not oust the court of jurisdiction The party must shew that it really and *bona fide* arises. *Lilley* v. *Harvey*, 12 Jur. 1026; *Latham* v. *Spedding*, 17 Q. B. 440.

In the latter case it was held that the plea of not possessed did not necessarily raise the question of title.

Now if such a plea does not necessarily raise it, it is quite manifest that the justification under the *fi. fa.* which admits title cannot raise it. It does not profess to raise title. It purposely admits title to be in the plaintiff.

It may be that the plea of not possessed under our County Court Act, although the pleadings are in writing, does not, any more than in England, necessarily make a case where the title to land is brought in question. It may be simply a question whether the plaintiff had *possession* of the land, and not a question of title to the land. The defendant may allege that the plaintiff was a mere servant, and not in possession at all, which would not, according to the case of *Latham* v. *Spedding*, raise a question of title *

In this case, however, there is no such plea, and while I see quite plainly that the title to land could not come in question, I do not think the plaintiff has made out that in this action he is entitled to sue in a Superior Court.

The former rule that the case was out of the statute when the defendant pleaded any special plea does not, I think, apply here, and was one which quite nullified the statute.

The order must be made for revision of costs.

Summons absolute †

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* In Trinity Term, 1866, a rule absolute to quash above conviction was discharged, and rule to set aside the prisoner's rule and all subsequent proceedings made absolute with costs, because no notice had been given to the magistrate of the *certiorari*. *The Queen* v. *Ellis*, 25 U. C. Q. B. 324. —*Eds. L. J.*

* See *Humberstone* v. *Henderson*, 3 U.C. Pr. 40.—Eds L. J.

† The order made in this case was moved against last Term.

Corbett v. Wallbridge.

Excessive endorsement on fi. fa. for expense of writ.

$10 is an excessive endorsement on a *fi. fa.* goods for the expense of the writ, and the moment a writ so endorsed is handed to a Sheriff the party aggrieved can apply to have a reference to the Master to reduce the amount, and make the attorney in default pay the costs, even though that attorney accepts a less amount, which the debtor tenders to him, as sufficient.

[Chambers, Nov. 14, 1866.]

It appeared from the affidavits in this case that the plaintiff's attorney had issued execution upon judgment recovered and signed in Toronto against the defendant, and had placed a writ against goods in the hands of the sheriff of the county of Prince Edward, where defendant resided, endorsed to levy $10 as the expenses of the writ: that the defendant had paid the sheriff the amount of the judgment, and the sheriff's fees, &c., and had paid $6 50 as the expenses of the writ, refusing to pay more on the ground of excess. The plaintiff's attorney then wrote to the sheriff, accepting the amount as sufficient. On the same day that letter was written, the defendant took out a summons to show cause why it should not be referred to the Master to tax the proper amount to be endorsed as the expenses of the writ, and why the excess, if any, paid should not be refunded, and why the plaintiff should not pay the costs of the application and reference.

Hagarty, J., made the summons absolute, saying that $10 was an excessive endorsement, and that the moment a writ was placed in the sheriff's hands, with such an endorsement, the party aggrieved, and whose goods were in jeopardy, could apply at once to have a reference to the Master to reduce the amount and make the attorney in default pay the costs.

Summons absolute, with costs.*

Ontario Bank v. Fisher.

Toronto agent for two principals—Service of papers.

A summons cannot be taken out by an agent for one attorney and served on himself as agent for another attorney.

[Chambers, Dec. 3, 1866.]

In this case the Toronto agent for A, an attorney, was also agent for B, another attorney. A summons was regularly taken out on behalf of A, as attorney for the plaintiff, and served by a clerk of the booked agent of A, on the agent himself, in his own office, as for a service on B, who was attorney for the defendant. The agent at once (in the forenoon of Saturday) notified B by telegraph of the service.

Curran, on behalf of B, under special instructions from him, opposed the summons on the ground that the service was under the circumstances insufficient. The telegraph was not received by B till twenty minutes to six on Saturday evening.

Osler, contra.—The practice which was followed in this case has been the constant practice in matters where these two principals have been concerned, and has never before been objected to by either of them, and it does not now lie in the mouth of B. to object; besides, this is the practice in all cases where one agent acts for two or more principals. B has been in no way prejudiced. There is no other way provided for making the service, and if this practice is irregular, some other provision should be made.

S Richards, Q.C., *amicus curiæ*.—The practice has been just as Mr. Osler states it. If this service is not upheld, it will lead to every paper under circumstances like this being put up in the crown office, and *quære* whether that would be good service, or every principal must have two agents. It is a matter of great importance to practitioners.

Adam Wilson, J.—I can make no order on this summons, as I cannot countenance any such practice. There is not the slightest reflection on the agent in this case, who has only followed the practice which has been permitted by his principals in other cases, but now that the objection has been made, I must sustain it. I cannot say what would be the proper practice under the circumstances, but this way of effecting service might lead to most injurious results.

The practice in former days was very general that each principal had an agent, and a sub-agent upon whom papers could be served in such cases.

CHANCERY CHAMBERS.

(*Reported by* Mr. Charles Moss, *Student-at-Law.*)

Ross v. Robertson.

Countermand of notice of motion—Costs.

A party upon whom a notice of motion has been served is not precluded from appearing on the return day and claiming his costs of an abandoned motion, notwithstanding notice of countermand served, unless the party serving the notice of countermand offers, at the time of service, to pay any costs the other may have incurred in preparing to answer the motion.

[Chambers, Oct. 29, 1866.]

The defendant served notice of motion to dismiss, and the next day served a countermand. The plaintiff nevertheless appeared on the return day named in the original motion and applied for his costs

The Judges' Secretary.—I can find nothing in the English Practice as to giving a countermand of a notice of motion. At law a plaintiff may countermand his notice of trial, but his doing so is specially provided for by a rule of court. In this court the practice of giving countermands has for a long time prevailed, and the practice seems recognized as allowable in *Richardson* v. *Moser*, Chan. Cham. R. 18.

It is, I think, exceedingly desirable that a solicitor who has served a notice of motion, which on further consideration he finds he cannot support, should be permitted to withdraw it before the costs of a hearing are incurred. He should, however, when giving the countermand, offer to pay any costs which may have already been incurred in preparing to meet the motion, and if such offer be not made, the opposite party will be justified in appearing and asking these costs. As I am not aware that this has been understood to be the practice, and it does not appear that the plaintiff in this case informed the defendant

* The costs of issuing a *fi. fa.* goods and placing the same in the hands of the sheriff were subsequently taxed in this case by the Master at $5.—Eds. L. J.

that he had incurred costs in preparing to answer the motion, and would appear to ask for these, I do not grant the costs in the present instance. But I conceive the practice to be as above stated and shall in future act upon the view I have taken of it.

Elliot v. Beard.

Service of office copy of bill—Insufficiency of.

To make the service of an office copy of the bill on a person other than the defendant good service on the defendant, when no order for substitutional service has been obtained, it is not sufficient to shew that the person served is a relative of the defendant, he must be actually residing with the defendant, and the service should be made at the defendant's place of abode.

[Chambers, Oct., 1866.]

The plaintiff applied for an order allowing substitutional service of a notice of motion to take the bill, *pro confesso*, under order 13, sec. 3 It appeared that service of the bill had been effected by delivering to and leaving it with a son of the defendant, at his place of business. No order for substitutional service of the bill had been obtained.

The Judges' Secretary.—This is not sufficient service. Service of an office copy of the bill is to be effected in the same manner that service of the subpœna to appear and answer was formerly effected. Order 9, sec 4. Now when the service of the writ of subpœna was not personal, it was necessary that the service should be at the place where the defendant actually resided, and the mere leaving the writ or a copy at a defendant's ordinary place of business, if he did not reside there, was not good service

The fact that the office copy was served on the defendant's son makes no difference. To make service, even at the dwelling house, on a relative of the defendant, good service, it was necessary that the relative so served should be actually a resident in the defendant's house, *Edgson* v. *Edgson*, 3 De G. & S. 629.

Order refused.

Manning v. Bireley.

Irregularity—Waiver—Practice.

The rule in this court is similar to that in the courts of Common Law, that a party to a cause who takes a fresh step in the cause after notice of an irregular proceeding on the part of his opponent, thereby waives the irregularity.

[Chambers, Nov. 7, 1866.]

The plaintiff filed a bill against three persons, praying specific performance of a contract for the sale to them of a particular lot of land. After the answers were filed, the plaintiff obtains, on *præcipe*, an order to amend without costs, and amended his bill under it by striking out the name of one of the defendants, substituting another parcel of land for the one originally described and praying specific performance of this lot to the two defendants.

Edgar, for one of the defendants remaining on the record, moved to be allowed the costs of his answer to the original bill, and of his affidavit on production, on the ground that the plaintiff had altered the record so as to make a new case, in a manner not warranted by an order of course.

Bain, for the plaintiff, opposed the motion, on the ground that the defendant having answered the amended bill, thereby waived his right to make any objection to the order to amend, or the amendments made thereunder.

The Judges' Secretary.—I think the plaintiff's contention is correct. A party may waive his right to discharge a proceeding for irregularity by acquiescence, or by omitting to object, and permitting the other party to proceed as if he did acquiesce, or by not coming at the first opportunity to complain of the irregularity, Smith's Prac. 235. At Common Law the practice seems the same, and in Chitty's Archibold, 1473, it is said—"if the party complaining of an irregularity takes a fresh step in the action after knowledge of it, he cannot apply to set aside the irregular proceeding or otherwise take advantage of it: so by pleading, the defendant waives an irregularity in the declaration" Here the defendant having answered the amended bill, I must hold that he has waived his right to object to the amendments, and must refuse the motion with costs.

ENGLISH REPORTS.

CHANCERY.

Colenso v. Gladstone.

Colony — Independent Legislature — Bishop — Coercive jurisdiction.

The colonial Churches, professing the doctrines and discipline of the Church of England, are not merely in communion with the Church of England, but are part thereof, and the bishops of such colonial Churches have no independent coercive jurisdiction, but can only enforce their orders by means of the civil tribunals of the colonies.

Colonial bishops appointed by letters patent of the Sovereign, though their authority is limited as above, are yet bishops in every sense of the term.

Position of the colonial Church, and *status* of the colonial bishops, considered.

Specific performance of a contract to pay a salary to a "bishop" in the colonies enforced, though the contributors to the salary may have intended to support a bishop with coercive jurisdiction over his clergy, and subject coercive jurisdiction of his metropolitan.

Long v. *Bishop of Capetown*, 1 Moo. P. C. N. S. 411; and *Re Bishop of Natal*, 13 W. R. 549, considered.

The facts stated in the bill and admitted by the answer may be shortly stated as follows :—

The bishops and archbishops of the United Church of England and Ireland signed a declaration in June, 1841, in consequence of an invitation from the Archbishop of Canterbury, declaring that it was their duty to take charge of a fund for the endowment of colonial bishopries and to see to the application thereof, and that in no case would they proceed without the concurrence of her Majesty's Government.

For this purpose large subscriptions were received and invested, and formed a fund called the "Colonial Bishopric Fund."

A council was nominated to superintend the administration of this fund, and by them treasurers were appointed, comprising Mr. Gladstone, Vice-Chancellor Wood, and others, the defendants in this suit, who were to hold the fund upon the trusts stated in declaration of June, 1841.

By the above-mentioned declaration the procurement of patents from the Crown was made a condition of the appointment of any bishops

for the colonies and of the payment of salaries out of the fund.

The method was, that when the funds admitted of the endowment of a new bishopric, the council applied to Government, and entered into a contract to settle certain income on the new see, and desiring the Archbishop of Canterbury to consecrate the bishop.

The letters patent constituting the bishopric of Capetown were granted in May, 1855, and those constituting the bishopric of Natal were granted in November, 1853, subjecting the Bishop of Natal to the authority of the Bishop of Capetown as his metropolitan, and re-appointing Dr. Gray as Bishop of Capetown with metropolitan authority, he having resigned for that purpose.

Previously to the appointment of the Bishop of Natal and the re-appointment of the Bishop of Capetown, the colonies of the Cape of Good Hope and Natal were placed on a self-governing footing, with an independent legislature.

In 1863 the Bishop of Capetown, in exercise of his metropolitan authority, delivered a judgment deposing the Bishop of Natal from his see.

In 1865, on appeal from this judgment, the Privy Council decided that the Bishop of Capetown had no coercive jurisdiction over the Bishop of Natal, and that his letters patent were invalid for the purpose of conferring such jurisdiction. *Re Bishop of Natal*, 13 W. R. 549.

In consequence of this decision the trustees of the Colonial Bishopric Fund determined on withholding the Bishop of Natal's salary, on the ground that if he was not subject to his metropolitan authority he was not a bishop in the sense contemplated by the contributors to the fund, and subsequently, on its being pointed out that the same reasons applied to the Bishop of Capetown as to the Bishop of Natal, they withheld the salaries of both until it should be declared by the decision in this suit what they were bound to do in the matter.

The present bill was filed by the Bishop of Natal to enforce the payment of his salary. The reason of the trustees' determination to withhold this salary, as given in their answer, was in effect that they were not bound to their declaration to pay a salary to any person not a bishop lawfully constituted, and they denied that the Bishop of Natal was so lawfully constituted, if the judgment of the Privy Council was correct. They also contended that the persons who contributed to the Colonial Bishopric Fund had done so on condition that he should be subject to a local coercive jurisdiction; and that as the judgment of the Privy Council in 1865 denied the existence of such coercive jurisdiction, the objects of the trust had not been obtained.

In support of this contention they produced extracts from the judgment of the Privy Council and a letter from Miss Burdett Coutts, one of the principal contributors to the fund, complaining of the unsettled state of affairs in the diocese of Natal. The Bill stated the facts and prayed for a declaration that out of the Colonial Bishopric Fund a sufficient part had been irrevocably appropriated to the endowment for all time of the Bishop of Natal for the time being; and that the annual income of £662 10s. ought to be duly and regularly paid to him out of that fund, and that Mr. Gladstone, Vice-Chancellor Wood, Archdeacon Hale, and Mr. Hubbard, M. P., might be declared trustees for the plaintiff of the half-yearly payments reserved and carried to a separate account and might be decreed to pay the same to the plaintiff with interest, and that the defendants other than the Attorney-General might be decreed to pay the costs of the suit.

W. M. James, Q.C., *Stephen*, *Charles*, and *Westlake*, for the plaintiff.—A trustee cannot plead against his *cestui que trust*, in justification of his breach of trust, that there are defects in the settlement. He must file a cross-bill to set aside or rectify the settlement. Where there is a litigation of rights under a deed, the validity of the deed cannot be impeached except by a cross suit. But colonial bishops are lawfully constituted bishops, and are recognised by statute. As to the intentions of the persons who subscribed the trust funds they are not admissible to explain the written documents than parol evidence would be admissible to explain the intention of a settlor. And the documents give no hint of any intention on the part of the trustees to make the subjection of the Bishop of Natal to the metropolitan jurisdiction of the Bishop of Capetown of the essence of their contract to pay the salary. The case of the Bishop of Malta shows that no coercive jurisdiction was contemplated in the foundation of bishoprics abroad, for it would be impossible to maintain coercive jurisdiction in the dominion of foreign powers. But the intention of the founders of the trust has been practically carried out; for though there is no coercive jurisdiction in South Africa, the bishop is not free from ecclesiastical jurisdiction, for by his contract he is bound to submit to the authority of the English Church. We admit that the letters patent did not legally constitute him bishop in the sense of giving him the power abroad which a bishop has in England; but we submit that they did legally constitute him bishop in the sense of making him subject to the supremacy of the Crown in England, and the assent of the Crown was thereby given to the voluntary association between the Bishop of Natal and such as chose to form themselves into a Church under him in the colony. For what is the legal constitution of the see of Natal? The bishops and archbishops of the Church in England, in concert with the Crown (for that is of the essence of the case), established a branch of the Church in Natal for all those who should chose to join themselves to it; and inasmuch as the Sovereign is "*supremum caput ecclesiæ*" (as is proved by Comyn's Digest, tit. Prerogative, and the bidding prayer, ordered by the 55th canon, which speaks of the King as "in all causes ecclesiastical, as well as civil, as supreme"), the bishop is removable on proceedings by Royal commission: Comyn's Digest, tit. Officer Forfeiture.

At the time of the creation of the see the trustees of the fund were evidently content with this ordinary jurisdiction, and cannot be heard to say that they required him to subject to an extraordinary control. The nature of this ordinary jurisdiction is shown by the case of *Long* v. *The Bishop of Capetown*, 11 W. R. 900, 1 Moo. P. C. N. S. 411, in which Mr. Long was summoned by the bishop to show cause why he should not be deprived for his disobedience to

the bishop's jurisdiction, and the Privy Council decided that the Bishop of Capetown has no real coercive jurisdiction, and refused to confirm the decision of the bishop. At any rate, so long as a charter exists, the Court must take the charter as it finds it, until it is altered by the proceedings by *scire facias*: *Robinson* v. *Governors of the London Hospital*, 10 Hare. 19. The trustees, when they entered into the contract and made the obtaining of the letters patent a condition of appointing and paying the colonial bishops, must be taken to have known the law, and to have been aware of the questions which were even then raised as to the legal validity of the patents. Even if these patents are void, the condition of obtaining them has been fulfilled, and the plaintiffs must perfrom their part of the contract. But we deny that the effect of the judgment was to declare the letters patent void *in toto*; it decided that they were void in part, viz., so far as they purported to give a special coercive jurisdiction to certain colonial bishops, but that letters patent may be good in part and bad in partis shown by *Sackville College case*, Raym. 178

(*To be Continued.*)

GENERAL CORRESPONDENCE.

Transcript of judgment from Division Court to County Court.

To the Editors of the Law Journal.

Gentlemen,—I should feel obliged by your opinion on the following points through the columns of your valuable journal. A. sues B. in the 7th Division Court, and obtains a judgment against him for $90. After the expiry of 30 days, usually given for the defendant to pay the amount, the plaintiff orders the clerk to issue execution. The Clerk of the 7th Division Court issues the same, and directs it to the Baillff of the 11th Division Court, who returns the same *nulla bona* to the Clerk of the 7th Division Court. The plaintiff then obtains a transcript, and makes it a judgment of the County Court, and places a writ of *fi. fa.* against the lands of the defendant in the hands of the sheriff. Had the Clerk of the 7th Division Court power to do so, or was the return made by the Bailiff of the 11th Division Court sufficient to make valid the said judgment of the County Court.

Respectfully, M.

Goderich, Nov. 9, 1866.

[A transcript, in our opinion, ought not to to have issued under the circumstances mentioned.

The clerk of a Division Court has no power to issue a writ of execution to the bailiff of another court. The 135th section requires that the clerk, "at the request of the party prosecuting the order" (for payment), "shall issue under the seal of the court a *fieri facias to one of the bailiffs of the court*, who by virtue thereof shall levy," &c.; and the whole tenor of the statute relating to this point is to the like effect.

The 142 section makes it a condition that the execution shall be returned *nulla bona*, and the transcript to be given must set forth *the* bailiff's return; that is, the return of the bailiff of the court from which the transcript issues.

The case before us suggests an amendment of the law, viz.: enabling a *fi. fa.* to be directed to any bailiff in the county.—Eds. L. J.]

Whether county attorney or clerk of peace custodian of papers from magistrates, &c. —Fees for copies.

To the Editors of the Law Journal.

Your view on the following questions will much oblige me. The County Crown Attorney of this County on receipt of informations, depositions, and other papers from Magistrates and Coroners on all criminal charges, immediately hands them to the Clerk of the Peace—the two offices not being held by the same person. On desiring the County Crown Attorney a few days ago to let me have copies of an information and search warrant on a charge of larceny on payment of his fees, he said he never kept such papers and referred me to the Clerk of the Peace. On going to that officer he refused to give me the copies required unless I first paid him $2 00, which I refused to do. Copies of the papers at ten cents per folio would come to about seventy cents.

Do you think the County Crown Attorney is the proper custodian of such papers, and if so, what fees is he entitled to for copies of them?

Is there any authority for the Clerk of the Peace filing such papers and charging for such filing?

Your's truly, Lex.

20th Nov. 1866.

[The county attorney would seem, under Con. Stat. U. C., cap. 106, sec. 9, to be the custodian of all informations, depositions, recognizances, "in every case where a person is committed for trial or bailed to answer to a

criminal charge;" and these papers should be, we think, in the custody of the county attorney, and they should remain in his hands until the case they concern is finally disposed of. At and after the trial the papers should remain on file with the clerk of the peace. We think that ten cents a folio is all that any officer could reasonably ask for copies of deposition, &c.; indeed we are under the impression that five cents a folio is all that can be legally demanded by the county attorney for copies.—Eds. L. J.]

REVIEWS.

The Municipal Manual for Upper Canada; containing the new Municipal and Assessment Acts, with Notes of all decided cases, and a full Index. By Robert A. Harrison, Esq., D.C.L., Barrister-at-law. Second Edition, 1866. Toronto: W. C. Chewett & Co.

Part I. of this valuable work has been just issued; and the other parts, we are informed by the publishers, will appear very shortly, probably before the great body of the Act comes into force, on the first of January next. That part of the Act which came into force on the first of November last is however embraced in the number of the Manual now before us, and this fact alone will render it of great service to that large portion of the community who take a part and an interest in our municipal elections.

It may be premature just now to speak of the book as a whole, with only the first instalment before us; but taking the former edition as a type of the present one, we may safely assume that the new Manual will be found as the old one has been, a reliable guide to the proper understanding of the law, and a safe counsellor to those acting under its provisions.

Mr. Harrison's Municipal Manual has indeed for the past eight years been, as it were, a household word amongst all classes, lawyers or laymen, who have been brought into contact with the working of our Municipal system; and, now that the law has been revised and amended by the legislature, the absence of such a work, embracing the changes which have been made, would be much felt by those who had been in the constant habit of referring to it whenever a doubt arose as to the meaning of any provision.

A great portion of the old law which had been found to work satisfactorily, has been re-enacted—a circumstance which gives an additional value to Mr. Harrison's present labors, inasmuch as many doubtful points have been settled by decisions of the courts within the past eight years, and these decisions have been all carefully collected and annotated in the present edition of the work, thus placing under the eye of both lawyers and laymen, information which the latter could not obtain except through the former, and which the former had to acquire at the cost of much labor and research.

Even our non professional readers are, for the most part, aware that the only safe interpretation of the law is to be found in the decisions of the Courts, and this being the case, the value of an accumulation of these desisions, extending over a series of years, on the clauses of a particular enactment, will be readily understood and appreciated—especially with reference to the law which governs the working of our Municipal Institutions—a law second in importance to none on our statute book, and affecting bodies which are in themselves minor parliaments possessing extensive but limited powers which it is of great importance to the community should be easily ascertained and correctly defined.

We feel that in making any allusion to Mr. Harrison's special fitness and ability to again undertake the task of annotating the Municipal and Assessment Laws, we are treading on rather delicate ground, inasmuch as that gentleman is one of the conductors of this journal, although his editorial duties do not come within this department of our labors, but the writer of this notice can, at least, say that his remarks on the same subject, written nearly eight years since for this journal have, he has reason to believe, been fully justified, namely: "that Mr. Harrison's well-known character as an annotater was, of itself, a guarantee that no labor had been spared in making the Manual a desideratum for every lawyer and member, or officer of a Municipal Council in the Province." The same remarks will certainly apply with even greater force to the present work, and as a corroboration of the writer's opinion on the subject, we may quote from the remarks of a learned County Court Judge of great experience, made on a recent occasion when addressing the grand jury of the County of Simcoe, shortly after the passing of the new Municipal Act, and published in the local papers, from which we quote. Referring to the announcement of a forthcoming new edition of Mr. Harrison's Municipal Manual, the learned judge said that "he (Mr. Harrison) had made the subject his own, and that from the Manual he had himself received most valuable aid in the discharge of his duties. He had reason to know that the work was found to be of the greatest possible assistance to Municipal officers in Upper Canada; that the able and carefully prepared notes it contained must have largely contributed to the safe working of the law; that since the issue of the first edition of the work many cases had been before his own courts upon the several provisions of the statutes, and many cases in England upon analagous enactments, all of which he had no doubt, would be referred to and turned to account in the new work." It is only necessary to glance through the book

before us to be satisfied that the opinion of Judge Gowan has been justified.

We shall probably have something more to say on the subject after the other parts of the work are issued.

W. D. A.

The American Law Review. Boston: Little, Brown & Co., 1866.

We gladly welcome the appearance of the first numbers of this review. It is evidently intended to be in the United States what the *Law Magazine and Law Review* is in England, that is to say, a first class quarterly journal of jurisprudence; and we have no hesitation in saying that the contents and general appearance of the number before us give good promise that it will be in that respect all that its Editors hope for, or its readers can desire.

We have already from across the border a "valuable legal monthly" (to use the words of a notice in the book before us) in the *American Law Register* of Philadelphia, our appreciation of which is best shown by the use we make of its contents. But though we expect much from such an ably conducted monthly, we naturally expect more in many ways from a quarterly, and in this respect also we are not disappointed.

After several well written and instructive articles on a variety of topics, we are given the reports of some important decisions in United States courts; which are followed by a digest of the English Law Reports, including all the cases from all these several volumes of reports since the beginning of the year 1866, when the present system was established. Then book notices—a list of law books published in England and America since Jan. 1, 1866—and then a sketchy summary of events of legal interest, intended to be of a general rather than a local character. It concludes with a come plete list of United States judges, and of the judges and law officers of Great Britain and Ireland, corrected to the present time. It may we think be said of this review, that it will to a great extent, if we may judge from the number before us, be almost as interesting to the profession in Upper Canada as to our brethren south of us.

The type and paper are excellent, and the price, five dollars, low.

The Canadian Almanac and Repository of Useful Knowledge for the year 1867.—W. C. Chewett, & Co., Toronto.

Containing, as the title page tells us, full and authentic commercial, statistical, astronomical, departmental, ecclesiastical, educational, financial and general information. A book which gives the greatest amount of information in the most complete form and at the lowest price of any published in the country. It has become almost a necessity to every business and office man in the province, and not only to them, but is invaluable to any one desirous of obtaining information on all the subjects about which it purports to give information. This year it is much fuller and more complete than formerly, and is supplemented by a neat map of the "Confederate Provinces of British North America" (which are to be).

The price is absurdly small, only 12½ cts., and 25 cts. if bound in neat muslin covers.

APPOINTMENTS TO OFFICE.

JUDGES.

SECKER BROUGH, of Osgoode Hall, Esquire, Q.C., to be Judge of the County Court of the United Counties of Huron and Bruce, in the room of Robt. Cooper, Esq., deceased. (Gazetted 17th November, 1866.)

JACOB FARRAND PRINGLE, of Osgoode Hall, Esquire, Barrister-at-Law, to be Junior Judge of the United Counties of Stormont, Dundas and Glengary. (Gazetted November 17th, 1866.)

JOHN JUCHEREAU KINGSMILL, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court in and for the County of Bruce. (Gazetted 24th November, 1866.)

SHERIFF.

WILLIAM SUTTON, Esquire, to be Sheriff in and for the County of Bruce. (Gazetted 24th November, 1866.)

COUNTY ATTORNEYS.

JAS. BETHUNE, of Osgoode Hall, Esq., Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney for the United Counties of Stormont, Dundas and Glengarry, in the room of Jacob F. Pringle. (Gazetted 17th November, 1866.)

DONALD WILSON ROSS, of Osgoode Hall, Esquire, Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney, in and for the County of Bruce. (Gazetted 24th November, 1866.)

COUNTY COURT CLERK.

WILLIAM GUNN, Esquire, to be Clerk of the County Court in and for the County of Bruce. (Gazetted 24th November, 1866.)

REGISTRARS.

The Honorable SIDNEY SMITH, of Peterborough, to be Inpector of Registry Offices in Upper Canada, under the Act 29 Vic. cap. 24. (Gazetted 17th November, 1866.

JAMES DICKSON, Esquire, to be Registrar of the County of Huron, in the room of John Galt, Esq., deceased. (Gazetted 17th November, 1866.)

THOMAS W. JOHNSON, Esquire, to be Registrar of the County of Lambton, in the room of Henry Glass, Esq., deceased. (Gazetted 17th November, 1866.)

NOTARIES PUBLIC.

TIMOTHY BLAIR PARDEE, of Sarnia, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted 24th November, 1866.)

JAMES S. HALLOWELL, of St. Thomas, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted 24th November, 1866.)

CORONERS.

HORATIO CHARLES BURRITT, of Morrisburg, Esquire, M.D., to be an Associate Coroner for the United Counties of Stormont, Dundas and Glengarry. (Gazetted 24th November, 1866.)

DAVID L. WALMSLEY, of Elmira, Esquire, M.D., to be an Associate Coroner for the County of Waterloo. (Gazetted 24th November, 1866.)

THOMAS R. McINNES, of Dresden, Esquire, M.D., to be an Associate Coroner for the County of Kent. (Gazetted 24th November, 1866.)

ADDISON WORTHINGTON, ALEXANDER THOMPSON, WILLIAM S. FRANCIS, DEWITT MARTYN, CHARLES HILL, WALTER THORPE and SOLOMON D SECORD, Esquires, to be Coroners in and for the County of Bruce. (Gazetted 24th November, 1866.)