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THE

UPPER CANADA LAW JOURNAL,

AND

MUNICIPAL AND LOCAL COURTS' GAZETTE;

VOLUME X.

FROM JANUARY TO DECEMBER, 1864.

EDITED BY
W. D. ARDAGH, ESQ., AND ROBERT A. HARRISON, ESQ., B.C.L.,
BARRISTERS-AT-LAW.

TORONTO:
PRINTED AND PUBLISHED AT 17 & 19 KING STREET, BY W. C. CHEWETT & CO.
1864.

PRINTED AT THE STEAM PRESS ESTABLISHMENT OF W. C. CHEWETT & CO.,
17 & 19 KING STREET EAST, TORONTO

GENERAL INDEX.

TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

DIARY FOR JANUARY.

1. Friday .....*Circumcision.* Taxes to be computed from this day.
3. SUNDAY.....*2nd Sunday after Christmas.*
4. Monday .....Heir and Devisee Sittings commence. County Court and Surrogate Court Term begin. Municipal Elections.
6. Wednesday...*Epiphany.*
7. Thursday .. York and Peel Winter Assizes commence.
9. Saturday.....County Court and Surrogate Court Term ends.
10. SUNDAY.....*1st Sunday after Epiphany*
11. Monday .....Election of Police Trustees in Police Villages.
13. Wednesday...Election of School Trustees.
15. Friday..... .Treas. and Chairmen of Muns. to make return to Board of Audit.
16. Saturday ...Articles, &c., to be left with Secretary of Law Society.
17. SUNDAY.....*2nd Sunday after Epiphany.*
18. Monday .....Members of Municipal Councils (except Counties) and Trustees of Police Villages to hold first meeting.
19. Tuesday.....Heir and Devisee Sittings end.
20 SUNDAY.....*Septuagesima.*
25. Monday .....*Conversion of St. Paul.*
26. Tuesday .....Members of Council to hold 1st Meeting.
30. Saturday .....Last day for Cities and Counties to make Petitions to Government. Grammar Schools Trustees to retire.
31. SUNDAY.....*Sexagesima.*

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

JANUARY, 1864.

TO SUBSCRIBERS.

The Sheet Almanac for 1864 accompanies this number. Circumstances over which we have no control, have prevented our issuing the Table of Cases and Index of Subjects contained in volume nine with this number. We hope, however, to be able to mail them to subscribers with our February issue.

OVERHOLDING TENANTS.

Tenants overholding wrongfully are a difficult class to legislate against, and coercion, so far as they are concerned, is only a little more difficult and troublesome, under the present law, than persuasion. They have little property besides their household stuff, which is easily removed and of little value. They generally occupy small tenements, the rent of which is proportionately small; but there is the same trouble in collecting this rent as there would be if it were ten-fold the amount.

The situation of the landlord of this class of tenants, when they remove themselves and their goods to parts unknown, without paying their rent, is sufficiently unfortunate; but even that would seem in many cases, and for various reasons, to be better for the landlord than their continuance on his premises. The long-suffering landlord, desirous of getting a tenant that will pay his rent promptly, and will not damage his property, would probably forgive all arrears of rent, if it would have the effect of inducing the refractory tenant to leave. But the tenant does not choose to be thus tempted, and either defies his landlord to turn him out, or quietly remains in possession. Thus matters by degrees become serious, and something must be done. The orthodox Irish mode of procedure would be to take the roof off the house. But to say nothing of the other disadvantages of this course, it would be considered barbarous in this country. The landlord has a right, certainly, to take possession of the premises overholden, if he can do so without a breach of the peace (*Boulton* v. *Murphy et al.*, Easter Term, 2 Vic., R. & H. Digest, 264). But it is not likely that he will be permitted to take this very reasonable course. A lawyer is evidently his only resource, and to him he goes for advice, paying a fee, of course, as a preliminary proceeding. But the worst is not yet come. He is then told that two modes of obtaining possession of his premises are open to him, *i. e.*, either by an ordinary action of ejectment, or else by proceedings to be taken under the sections of the Ejectment Act which refer to overholding tenants (Con. Stat. U. C. cap. 27, ss. 63, &c. originally enacted in 4 Wm. IV. cap. 1, ss. 53, &c.)

The first mode has many disadvantages. If a defence is made to the action, for the purpose of gaining time or otherwise, the costs become heavy and much time is lost in obtaining possession of the premises sought to be recovered, unless the action happens to be brought just at the necessary period of time before the Assizes commence. If the tenant does not appear to defend the action, the plaintiff cannot, according to the better opinion, *in such action* recover his costs of suit. (See *Hall* v. *Fuill et al*, 2 U. C. Prac. R. 242; *White* v. *Cochlin*, do. 249, and other cases collected in H. & O'B.'s Digest, Title EJECTMENT II. (1) 37, &c., page 290.)

The legislature, being aware of and desiring to remedy the evils of the then existing law—or to use the words of the recital to the statute "And whereas the wrong committed by tenants in holding over vexatiously and without color of right, after their term has expired, requires a more speedy and less expensive remedy"—provided by the above-mentioned statute of 4 Wm. IV., for a course of proceeding which, it was hoped, would have the desired effect.

We propose now to consider briefly the provisions of this act, and, so far as the cases go, the decisions of the courts relating to it.

In the first place, it is necessary to state that its operation has been much limited by the interpretation put by

several cases upon the following words of section 53: "In case a tenant after the expiration of his term (whether the same was created by writing or by parol) wrongfully refuses upon demand made in writing to go out of possession of the land demised to him."

The case of *Adnerant* v. *Shriver* (Trinity Term, 6 & 7, Wm. IV., R. & H. Digest, 263) decides that the statute applies only to tenants overholding after their term has expired, and not to a tenancy at will. It was also decided in *McNab* v. *Dunlop*, 3 U. C. Q. B. 135, that the same statute only applies to tenants overholding after the expiration of their terms by lapse of time, and not to those who forfeited their terms by breach of covenant. Following in the wake of these decisions, and still further tending to confine the operation of the statute, it was held by the late Sir John B. Robinson, that a tenant remaining in possession after the expiration of his term, and paying two months' rent, could not in the middle of the third month be treated by his landlord as an overholding tenant (*Adams* v. *Bains*, 4 U.C.Q.B. 157). In giving judgment the Chief Justice said:—"A monthly tenancy had been created, and the landlord could not terminate it abruptly by demanding of the tenant, in the middle of the month, to quit immediately. If the landlord had given him notice (one month's notice) to quit, and he had not done so, then upon a notice given afterwards, under the statute, the landlord might have applied for this proceeding, and the court would have considered whether the case was one within the act; for I am not aware that it has yet been determined that the statute clearly applies, except in the plain case of a certain term expressly created by the contract of the parties."

The doubt expressed in this case was taken advantage of in the late case of *Patton* v. *Evans*, 9 U. C. L. J. 320; 22 U. C. Q. B. 606. Chief Justice Draper, in delivering the judgment of the court, clearly shews that "the proper construction of the act is to confine its operation to cases where the tenant holds over after the expiration of his term, and becomes a trespasser, and liable to be ejected without notice or demand."

The act, therefore, does not apply to a monthly tenancy, nor, it would seem, for similar reasons, to a tenancy from year to year, determinable by half-yearly notice to quit.

When it is considered that the large majority of lettings are of one or other of these descriptions, it will be seen in what a few cases practically the mode of proceeding under discussion can be made available.

In a case of *Bonser* v. *Boice*, 9 U. C. L. J. 213, A became purchaser at a sheriff's sale of B's interest in a term of years, held under a third party at a time when B was in possession. A afterwards (upon B's request) allowed him, B, to remain in possession for five days. HAGARTY, J., *held* that there was no privity between the parties, and that the case clearly did not come within the statute.

With reference to the person who is entitled to apply under the statute, it was decided by ADAM WILSON J., that if a receiver be appointed by the Court of Chancery, to whom the tenant has attorned, or if the interest of the original landlord has been sold, in either case the original landlord is not the proper person to take proceedings, but rather the receiver or the vendee, as the case may be (*In re Babcock and Brooks*, 9 U. C. L. J. 185).

Where, on the expiration of a tenancy, crops remain to be valued, this should be done, and the amount tendered before applying under this act (*In re Boyle*, 2 U. C. Prac. R. 134).

It has also been decided that a landlord cannot, under this act, recover mesne profits against his tenant (*Allan* v. *Rogers*, 13 U. C. Q. B. 166) which is another disadvantage in this mode of proceeding.

The 63rd section of chapter 27 of Con. Stat. U. C., after stating in what cases the provisions of this and the following sections are applicable, goes on to regulate the course of procedure to be adopted. In the first place, a demand in writing must be made on the tenant to go out of possession. Upon shewing to one of the Superior Courts of Common Law in term, or to a judge thereof in vacation, by affidavit, the terms of the demise, if by parol, and annexing a copy of the instrument containing such demise, if in writing, and also a copy of the demand made for the delivery up of possession, and stating the refusal of tenant to go out of possession, and the reasons for such refusal (if any) and any explanation of the grounds of the refusal as the truth of the case may require, the court or a judge, if satisfied that the tenant wrongfully holds over without color of right, may order a writ to issue, directed to a commissioner, and which was ordered by the judges, under the powers given to them by the 70th section, hereafter referred to, to be in the following form:

UPPER CANADA. } VICTORIA, by the Grace of GOD, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith.

To ——

WHEREAS we have been informed on behalf of —— that —— was tenant of him, the said —— of ——, for a term which has expired, and wrongfully refuses to go out of possession, having no right, or color of right, to continue in possession: Wherefore the said —— hath humbly besought us to provide him a remedy in this behalf, pursuant to the statute in such case made and provided; We therefore command you, that upon the receipt of this our writ, you issue your precept to the Sheriff of the —— County —— for the summoning of a jury of twelve good and lawful men, to come before you, at a day and place by you to be named, to inquire by the oath of good and lawful men, and by all other lawful ways and

means, by which they can or may the better know, and to say upon their oath whether the said —— was tenant to the said —— as aforesaid, for a term which has expired; and whether he does wrongfully refuse to go out of possession, having no right or color of right to continue in possession; or how otherwise. We further command you, that before you act in the swearing of the jury, or holding the inquisition hereby authorized, you take the oath prescribed by the statute aforesaid, and hereupon endorsed, before some one of the justices of the peace in and for the said county; also, that before entering upon the said inquiry, you administer to each of the jurors aforesaid, the juryman's oath hereupon also endorsed; and that you administer to each witness to be examined before the said inquest the witnesses oath hereupon likewise endorsed. And we further command you, that whensoever t. our writ shall be duly executed, you send to any one of our justices of our Court of —— at Toronto, the finding of the said jury, under their hands (with or without their seals) endorsed upon the back of this writ, or upon a paper to be by you attached hereto; and that you also certify and return all the evidence given before the said jury together with this our writ.

WITNESS, the Honorable —— at Toronto, this —— day of —— in the —— year of our reign.

From the use of the words "without color of right," it is evident that the Legislature intended that this act should only apply in very plain cases; and that if the reasons given by the tenant why he should not go out of possession would raise any difficult question of law or of fact, recourse should be had to proceedings by action of ejectment. (See the remarks of ROBINSON, C. J., *In re Woodbury and Marshall*, 19 U. C. Q. B. 597).

Upon receipt of the writ it becomes the duty of the commissioner to issue his precept to the sheriff commanding him to summon a jury to try the questions in dispute; which precept shall be as follows:

COUNTY OF ——
TO WIT: } BY VIRTUE of Her Majesty's writ to me directed, commanding me, upon receipt thereof to issue my precept to you, for summoning a jury of twelve men, to come before me, at a day and place by me to be named, to say upon their oath, whether —— in the said writ named, was tenant to —— in the said writ also named, for a term which has expired of and in certain premises in the said writ mentioned; and whether he wrongfully refuses to go out of possession, or how otherwise. I do hereby charge and command you, that you summon and warn to come before me, on the —— day of —— at the hour of —— o'clock in the —— noon, at the —— situate and being in the Town —— of —— in your County, twelve good and lawful men, of your County, by whom the truth of the matters aforesaid, and in the said writ mentioned, may be inquired of; and that you have then and there the names of the jurors whom you shall so summon and warn, and this Precept.—Herein fail not at your peril.

Given under my hand and seal, at —— this—— day of ——18

Upon the precept the sheriff is to endorse, when executed, his return, giving a schedule containing the names of the jurors, their residences and additions.

The following is the form of the Sheriff's Summons of Jurors:

COUNTY OF ——
TO WIT: } BY VIRTUE of a precept, under the hand and seal of —— Esquire, her Majesty's Commissioner in that behalf, you are hereby summoned personally to be and appear before him as a juryman, on the —— day of —— at —— o'clock in the —— noon, precisely, at the —— of —— in the Town —— of —— in this County, then and there to enquire whether one —— was tenant to one —— for a term which has expired, of certain premises in the Town —— and whether he wrongfully refuses to go out of possession, having no right or color of right to continue in possession, or how otherwise; and to do and execute such other matters and things as shall be then and there given you in charge, and not to depart without leave.—Herein fail not at your peril.

Dated the —— day of —— 18 —.

Yours, &c., —— *Sheriff.*

To Mr. —— of the Town of ——.

Under section 64, notice must be given, in writing, "of the time and place of holding the inquisition." The following is the form of this notice:

TAKE NOTICE, that an Inquisition will be holden at —— on the —— day of —— at —— o'clock in the —— noon, before —— her Majesty's Commissioner in this behalf, and twelve good and lawful men, according to the statute in such case made and provided, to inquire whether you were my tenant —— for a term which has expired, of and in —— and wrongfully refuse to go out of possession, having no right or color of right to continue in possession or how otherwise.

Dated the —— day of —— 18 —.

Yours, &c.,

To Mr. —— *Tenant.*

Upon this notice is to be endorsed an affidavit of service, which explains the manner of serving such notice.

IN THE ——

—— of the —— of —— in the —— County of —— maketh oath and saith, he did on the —— day of —— serve the within notice upon —— to whom it is addressed, by delivering a true copy thereof to the said —— and at the same time exhibiting the original (or by leaving a true copy thereof at his residence, with the wife of the said A B or with C D, a grown up son or daughter, or servant residing with the said A B; the said A B not being at home at the time of such serving) and necessarily travelled —— miles to make such service.

Sworn before me at —— in the —— *County*, this —— day of —— 18 —.

A Commissioner for taking Affidavits in the ——

Section 71 gives power to the commissioner to notify witnesses to attend before him; and states the punishment on their default; and the following is the form given for a subpœna:

COUNTY OF ——
TO WIT: } To ——

WHEREAS, by her Majesty's writ to me directed, I am commanded to inquire, by an inquest of twelve good and lawful men, whether —— was tenant of —— of certain premises in the said writ mentioned: and whereas I, the said —— have issued my precept to the sheriff of the said County, commanding

him to summon a jury to appear before me, at —— situate in the Town —— of —— on the —— day of —— at the hour of —— o'clock —— noon, to enquire of the matters aforesaid: Now I do hereby command you and every of you, that you and every of you be and appear, in your proper persons, before me and the jurors aforesaid, at the time and place aforesaid, then and there to testify the truth, according to your knowledge, touching the premises aforesaid.—Herein fail not at your peril.

Given under my hand and seal at —— this —— day of —— 18 —

Before taking any inquisition the commissioner shall take the following oath before a justice of the peace for the county, who shall endorse the same upon the writ and sign it.

I, A B, do solemnly swear, that I will impartially and to the best of my judgment, discharge my duty as commissioner under this writ.—So help me God.

It is the duty of the commissioner, under section 66, to administer the following oaths to the jurymen and witnesses respectively:

OATH OF JURYMEN—THREE AT A TIME.

You and each of you shall diligently inquire whether —— in this writ mentioned [exhibiting the writ] was tenant to —— in the said writ also mentioned, for a term which has expired; and whether he does wrongfully refuse to go out of possession, having no right or color of right to continue in possession, or how otherwise; and a true verdict give according to the evidence.—So help you God.

WITNESS' OATH.

The evidence which you shall give to to the commissioner and jurors sworn upon this inquest, touching the matter in question, shall be the truth, the whole truth and nothing but the truth.

Section 67 directs that the jurors shall endorse their finding upon the back of the writ, or return the same upon a piece of paper attached thereto by the commissioner. The judges have also given a "Form of Inquisition," which is to be signed by the commissioner and the jurors; also forms of the finding or verdict of the "twelve honest and lawful men," to be used as the facts of the case may require.

COUNTY OF —— } AN INQUISITION, taken at the Town —— of
TO WIT: } —— in the said County, on the —— day of —— in the year of our Lord one thousand eight hundred and —— before —— her Majesty's Commissioner in this behalf, by virtue of a writ of our Lady the Queen, to the said —— directed, and hereto annexed, to enquire of certain matters in the said writ specified, by the oath of —— honest and lawful men of the said County, who upon their oath say, that —— in the said writ named (Was tenant to the said E F of and in the premises in the said writ mentioned, for a term which has expired, and does wrongfully refuse to go out of possession, having no right or color of right to continue in possession: *or*, was not tenant to the said E F of and in the premises in the said writ mentioned: *or*, is tenant to the said E F of and in the premises in the said writ mentioned, for a term which has not expired: *or* was tenant to the said E F of and in the premises in the said writ mentioned, for a term which has expired, but that that the said C D is entitled to six months' notice to quit; *or*, that the said C D has color of right to continue in possession: *or*, that the said C D was tenant, &c.; but that the said C D has already gone out of possession, having left the same on —— [as the case may be]).

In witness whereof, as well the said —— as commissioner as aforesaid, as the said jurors, have respectively set their hands —— to this inquisition, the day and year above written.

—— *Commissioner.*

It was objected in the case of *Woodbury and Marshall*, 19 U.C.Q.B. 597, that the inquisition was bad, because the first jury that were summoned having disagreed, the commissioner had acted illegally in issuing a second precept, under which a second jury were impanelled, and who found against the party making the objection. But the inquisition was upheld, the court not thinking "that the proceeding necessarily fell through because the first jury could not agree, but that the commissioner could legally summon another jury, and hold an effectual inquisition, just as if one of the jury, on the first occasion, had become incompetent to act from sudden illness."

This decision was followed in the case of *Babcock* v. *Brooks*, 9 U.C.L.J. 185, it being also considered that the fact of the jury being discharged by consent of parties did not prevent the writ being still proceeded with.

Under section 68 the writ, when executed, and all the evidence must be certified and returned by the commissioner, to be filed in the proper office, with this return endorsed—"The return of this writ appears in the inquisition hereunto annexed."

If the court or a judge is satisfied that the case is one clearly coming within the 63rd section of the act the landlord is entitled to a precept to the sheriff, commanding the latter to put him in possession of the premises in question.

It is on the application for this precept that any questions of law or of fact, as disclosed by the evidence, and all objections to the regularity of the landlord's proceedings come up for decision. And although the jury may find a verdict in favor of the claimant, a precept to the sheriff to deliver possession to him under this section will be refused, if the court or a judge do not consider that the evidence shews a state of facts that brings the case within the meaning of the 63rd section: (*Bonser* v. *Boice*, 9 U.C.L.J. 213).

Section 69 provides for the revision by the court of any precept made by a judge in chambers under the last section and the restoring of the possession to the tenant, if necessary.

In *Wright* v. *Johnson*, 2 U.C.Q.B. 273, the court refused to set aside a writ of possession, issued on a finding in favor of the landlord, and restore the tenant to possession, on the ground that the agent of the landlord had received a month's rent after the finding of the jury.

With reference to the conduct of the commissioner the court would not entertain a motion to quash the inquisition for misconduct on his part, but considered that they had power to hold him amenable on an application independent of the proceedings between the landlord and tenant: (*Allan* v. *Rogers*, 13 U. C. Q. B. 166).

Section 70 gives power to the judges of the Superior Courts of Common Law to make and alter the form of the writ, inquisition and return and precepts referred to in the preceding sections; and to make such orders as to costs and as to levying the same as should be proper and necessary.

The powers here given have been sparingly, but, as we have seen, sufficiently used, by the promulgation of the forms and directions embodied in this article, and of the tariff of fees which may be found in Draper's Rules, p. 26; and though no further rules have been made on this subject, there is no practical difficulty that we are aware of in the working of the act so far as it goes.

Practically, however, landlords seldom avail themselves of the provisions of this act, even in cases where it *does* apply: partly, perhaps, because of the fact that practitioners are not familiar with the statute, and the mode of proceeding and the forms under it. But principally, we think, because of the expense necessarily attending it. The costs of a suit of this kind generally average from $45 to $55, besides witness fees, and this is rather too large a sum to spend upon a refractory tenant, when the whole value of the tenement may not be worth much more than twice or thrice that sum.

A step has been made somewhat in the right direction, by the act giving county courts jurisdiction in actions of ejectment in certain cases (23 Vic. cap. 43). This act seems to have especial reference to the case of landlord and tenant, and is applicable in the two following cases (the yearly value or rent of premises not exceeding $200) viz., (1) When the term and interest of the tenant shall have expired, *or been determined by the landlord or the tenant by a legal notice to quit*; and (2) When the rent shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

The difficulty that arose in *Patton* v. *Evans* and similar cases cannot arise in proceedings taken under the last mentioned act. But still it is not free from the objections of expense and delay, to which we have already alluded, and these objections, though lessened in degree, still exist in a greater degree than is palatable to landlords.

Further legislation will be necessary before this branch of the law of landlord and tenant can be considered to be in a satisfactory position. Some more expeditious and less costly means of putting a landlord in possession of premises wrongfully overholden must be devised.

THE MODERN REPEALERS.

Our readers need not be apprehensive from the caption of this article that we are about to depart from a fundamental rule laid down when the *Law Journal* was established as an exclusively legal publication—"That the conductors could have, editorially, no politics."

We are not, therefore, about to speak of repealers in the Green Isle of Beauty, of repealers in the Sunny South, or of others who seek to dissolve a political union. Nor have we reference to the High Court of Parliament or any individual member thereof who may be one of many repealers in a certain sense.

We have in view a very limited number of *repealers*, who, no doubt, prompted by good nature, indulge their feelings, we venture to say, by a violation of duty, failing to perceive that such doings are not reconcilable to the rules of ethics, and savor somewhat of an approval of that most pernicious principle—that the end justifies the means.

We have it on reliable evidence that three or four judges acting in the division courts take upon themselves to ignore the provisions of certain statutes of this Province, which seem to them inequitable in their provisions. We publish elsewhere one of many letters we have received on the subject, with some omissions, for we do not desire unnecessarily to enter into details. We have always felt that the bench should be treated with deference and forbearance, and that the profession is bound to give all the weight of its support to the judges of the local courts as well as of the superior courts acting within their province. But we owe something to the order to which we belong, and, above all, deference is due to the principles of truth and justice.

The law ceases to be a science when it depends upon the feelings or private opinions of any judge as to what character it should assume.

In respect to matters of fact the judge in the division court stands in the place of a jury, and criticisms on that head find no favor with us; but on questions of law the subject presents a different aspect.

In many particulars it is true the law vests a discretion in the judge, and wisely so; not, however, a capricious discretion, but a discretion governed and guided by established rules and precedents.

If a judge in a division court can say, "The Statute of Limitations is not in force in this court," may not another judge say the same thing of the Statute of Frauds, the Bill of Sales act, or any other statute avoiding a contract or directing that no action shall be brought upon it or the like. The law is, or ought to be, the same in all courts, and where such is not the case, business men, who regulate their dealings by the light of existing law, and professional

men who are called upon to advise respecting them are without rule or guide. Each court would have a law of its own, and the system of administration in the division courts would become a trap and a snare, and in the end be abolished as a nuisance. In saying this we but echo the sentiments of the profession and of business men who well know that the value of rights depends in no small degree on the law respecting them being duly administered, and on the ease and certainty by which they can be enforced and maintained.

The plain duty of judges is to administer the law as they find it, and not to set themselves above law. They are bound "truly and faithfully to execute the office of judge," and, if, contrary to the express provisions of a statute, they, in the words of a quaint writer, presuming *on their own wits alone*, proceed according to their own wills, the law is *not* "truly and faithfully" administered.

But perhaps we may be told that in the division court the judge is to determine cases in a manner "agreeable to equity and good conscience." Very true, and a valuable provision this is; but nothing can be consonant to equity that contravenes the law, and there is surely some meaning in the requirement that the judge shall determine "all questions of law" in relation to the particular action before him.

It may be very convenient, and a cover for ignorance or indolence, to disregard positive enactments or judicial decisions, and to substitute the judge's individual notions of what is morally right or wrong as the sole standard in each particular case; but the judge has no such power, and to exercise it is to usurp authority. True, where the moral right of a party is clear and strong, the judge who is asked to defeat or postpone it on any merely legal or technical ground may well demand that such ground be sustained beyond all doubt. And where no rule of law exists applicable to a question before him he may fairly apply the rules of *common sense* to resolve it. But where positive enactments interfere, considerations of expediency should not be adverted to. If the judge will condescend to draw his equity "from his books instead of from his brains" he will find little difficulty in squaring his decisions with good conscience *and* law.

In respect to the plea of the Statute of Limitations, it has the sanction of law. The Statute rests on the probability of payment—death of witnesses—destruction of papers—loss of receipts, &c. The Division Courts Act expressly mentions it, and amongst the forms prepared by the Board of County Judges and approved by the judges of the superior courts is a notice of defence under the Statute of Limitations. Courts of equity always act *in obedience* to it, and it is as operative there as it is at law. And yet, if our correspondents are correct, some judges treat the statute with contempt.

When we hear ignorant suitors exclaim, when a suit goes against them, "Well, that may be law, but 'taint equity," we can make all proper allowance, but when a lawyer and a judge acts out the cuckoo cry, and deals out what he terms equity as if law and equity were incongruous and antagonistic things, we feel sorely tempted to use the language of *Buckroyd Washington*, the most eminent *nisi prius* judge that ever graced the Bench in the United States. In the Supreme Court he had an associate, a shallow lawyer, of confined views and very loose notions of equity, looking upon it as a matter of abstract justice. There was a case presented to the court in which the law laid down by Judge Washington bore hardly upon the defendant. The associate judge was overheard to say "that may be law, but I am sure it is not equity.—"Equity," so said his learned brother, "what is equity? d—n equity."—This was believed to have been the only occasion on which Judge Washington shewed undue excitement in Court, and we are very sure every lawyer will think his irritation excusable under the circumstances.

The Highlanders, in Lord Chancellor Hardwicke's time, are said to have evaded the "trews law" by carrying a pair of breeches suspended on a stick over their shoulders. If all that is reported to us be true there is not even a semblance of evasion—*that at least might look decent.* No! these few *modern repealers* dispense with statutes in the most off-hand way. What a *Draper*, a *Richards*, or a *Vankoughnet* could not and would not do, these gentlemen, with a comical hardihood, adventure upon, and, as equity, palm off their crude notions of abstract justice with all the solemnity of a Solon, and something of the self-satisfied feeling of the Saint. In doing so, they reflect upon the laws they are entrusted to administer; they injure the order from which they were taken; and, above all, they familiarize the minds of those who resort to their courts with the pernicious idea that some laws may with a good conscience be trodden under foot.

TO LAW STUDENTS.

Law students interested in the Law School will observe, by reference to our advertising columns, that for the fourth year "Smith on Real and Personal Property" has been substituted for "Burton on Real Property." The change should be noted by students.

COMMERCIAL BANK v. GREAT WESTERN RAILWAY CO.

This important case was argued before the Court of Error and Appeal at its present sittings. The judgment of the court will be looked for with interest.

HONOR TO WHOM HONOR, &c.

Articles are sometimes taken bodily from the pages of the *Upper Canada Law Journal* without the slightest acknowledgment. This is not always the case, and when it occurs it may be owing to inadvertence. But we deem it our duty to draw attention to the fact in order to prevent a repetition of such inadvertences.

The *New York Daily Transcript*, in its issue of 26th November last, copied our article on "Associations for the Amendment of the Law" without acknowledgment of any kind. We believe the omission to credit us with it was not designed, and shall be glad to learn that we are correct in the belief which we now express.

The *Transcript* is conducted with much ability. It is entirely devoted to Law and Law Reform. Often do we find in its pages strong advocacy for much needed reforms.

THE TARDINESS OF JUDGES.

A writer in the *New York Transcript* makes the following sensible remarks:—

"Business is more brisk and active in winter than it is in summer, and another incontrovertible fact is, that the day is short during that season of the year. Lawyers generally arrange and systematize their engagements ahead, those doing a good business having as many as three and four, and sometimes more in the same day, for we all know that the great bulk of the business is done in winter. If, in the first place, we have a motion at the Chambers, we have oftentimes to wait over an hour for the Judge. So it is at the Special Term for the trial of issues of law and of fact, and more especially is it so at General Term. The morning hours, to a practising lawyer, is the most valuable part of the day, and should not be wasted by the Courts. It works an irreparable injury to the lawyer, as well as an injustice to the rights of his client, for oftentimes, in order to keep a more important engagement, he will postpone to, perhaps, an indefinite period a motion which, on the day fixed, should have been argued and determined. It also tends to disgust the client, it interferes with all the appointments that have been made, throws those that have to be compulsorily put over to another day that may be already filled, and irritates and annoys to a degree which none can imagine, except those who have the misfortune to experience such obstacles."

We are glad to say that in Upper Canada the evil against which the foregoing remarks are directed is not so general as to call for remarks of the kind here. We could mention at least one judge who is as distinguished for punctuality as he is for high legal attainments, and might mention others who, influenced by his example, if not encouraged by his precept, are all that can be desired.

It is a pleasure to appear before judges who know the value of time, and who consequently respect the engagements of others. One knows when to appear before them, and when to leave. They despatch business in a dignified and even manner. Everything is smoothly and satisfactorily done before them. Contrast this with the conduct of judges who are always behind time, and then endeavour to force through business to make up for lost time. Want of temper is often conjoined with want of time, and the result is anything but good feeling between such judges and those practising before them.

We believe in the maxim that time is money, and cannot see what right judges have to keep members of the profession waiting either an hour or half an hour behind the time appointed. To do so is in effect to steal that much of the time of those who are obliged to wait upon them. It is as easy to be punctual as the reverse; and none who really determine to be punctual fail in punctuality. Want of punctuality may become a habit, and when the habit of a judge, is as hurtful as it is inexcusable.

NEW LAW BOOKS.

It will be seen by reference to our advertising columns that Mr. Snelling, now so favourably known as the annotator of the Chancery orders, announces a new work in the press, viz., a Treatise on the Law and Practice in Ejectment.

If Mr. Snelling display as much industry and ability in the new work as he has already done in his Chancery orders the work now announced will be a valuable one in the profession. It will be a companion volume to Mr. Draper's Law of Dower, reviewed in our last number.

The issue from our press of works of such utility speaks well for the progress of Canada.

Attention is also directed to four advertisements in other columns, announcing four new law books in course of preparation. The first, "The second volume of Blackstone's Commentaries, adapted to the present state of the Law in Upper Canada, with comments on the Provincial Statutes affecting Real Property," by Alexander Leith, Esq., Barrister-at-Law. The second, "A practical work on the office and duties of Coroners, adapted to the Canadian law, with a full appendix of forms and schedule of fees," by William Boys, LL.B., Barrister-at-Law. The third, "A Handy Book of Commercial Law for Upper Canada," by Robert Sullivan, Esq., M.A., Barrister-at-Law. The fourth, "Division Courts Acts, Rules and Forms, with Notes, practical and explanatory," by Henry O'Brien, Esq., Barrister-at-Law.

We have no doubt that these learned gentlemen will creditably acquit themselves. Mr. Leith is well known to students as a lecturer on Real Property law in connection with the lectures given at Osgoode Hall, under the auspices of the Law Society. Mr. Boys promises that the portions of his intended work treating of poisons, *post mortem* examinations, and matters connected with chemical analysis, will be prepared under the supervision

of Professor Croft, the distinguished professor of chemistry in University College, Toronto. Mr. Sullivan is a young man of great promise. Mr. O'Brien is already well known as having been a joint compiler of Harrison & O'Brien's Digest.

UNITED STATES CONSCRIPTION ACT.

Chief Justice Lowrie, of the Supreme Court of Pennsylvania, in a case of *Kneedler* v. *Lane* and others has decided that the Conscription Act passed by Congress on 3rd March, 1863—so odious to many—and the enforcement of which caused the riots in New York—is unconstitutional.

The learned Chief Justice concluded his judgment, too long for insertion in our columns, with these words:

"What I have written I have written under a very deep sense of the responsibility imposed upon me by my position, and with an earnest desire to be guided only by the Constitution. Very many will be dissatisfied with my conclusions, but I submit to the judgment of God, and also that of my fellow citizens, when the present troubles shall have passed away and are felt no more."

Mr. Justice Thompson, a puisne judge of the same court, concluded his judgment as follows:

"Standing recently on the gentle slopes at Runnymede, memory sent a thrill to my heart in admiration of those old Barons who stood up there and demanded from a tyrannical sovereign that the lines between power and right should be then and there distinctly marked, and all my feelings at the same mo. nt paid an involuntary tribute of regard to the fidelity with which their descendants have maintained what they then demanded and obtained, although often overshadowed by insurrection and war. Our forefathers marked these lines in the Federal Constitution. I must adhere to them. I cannot help it, and while I live I trust to Heaven that I may have the strength to say that I will ever do so."

The excitement consequent on the decision is great. The Courts and the Government are in direct conflict upon the interpretation of the Constitution and many who believe the Act to be necessary for the effectual prosecution of the war bewail the existence of a written Constitution.

VACANCY ON THE ENGLISH BENCH.

Mr. Justice Wightman died of apoplexy on the 11th December last. He died at York, while holding the assizes there. He was raised to the bench in 1841, and was eighty years of age at the time of his death. His reputation as a lawyer was good, and his services as a judge were great. Sergeant Shee has been appointed to the vacant judgeship. The new judge is of Irish descent. His appointment is well received by all classes of the profession. It is said that long since he would have received a judicial appointment were it not that in religion he is a Roman Catholic. The present Lord Chancellor has very properly refused to be influenced by any such consideration.

JUDGMENTS.

QUEEN'S BENCH.

Present: DRAPER, C. J.; HAGARTY, J.; MORRISON, J.

December 14, 1863.

Talbot v. *Rossin.*—Appeal from the decision of the Judge of the County Court of York and Peel allowed; but leave given to amend by pleading *de novo* upon such terms as the county judge may see fit to impose.

Robinson and the Corporation of Stratford.—*Held*, that incorporated villages have power to impose statute labor on residents as well as non-residents, and that no by-law is necessary unless for the purpose of reducing or increasing the amount of commutation for statute labor. Non-suit entered.

Barwick v. *Webster.*—Rule *nisi* for new trial discharged.

Hawkins v. *Patterson.*—Judgment for plaintiff on demurrer to defendant's plea. Leave given to apply to amend within a fortnight.

McAnany v. *Tickell.*—Judgment for defendant on demurrer.

Davis v. *Hurd.*—*Held*, that the goods distrained for rent were not exempt from distress.

Bank of Upper Canada v. *Cook.*—Rule absolute.

London B. S. v. *Glass.*—Judgment for plaintiffs on demurrer.

Bryant v. *Hill.*—*Held*, that a sheriff had no power to execute a deed of land sold for taxes after the act authorising the sale had been repealed. Postea to defendant.

Monsell v. *Mitchell* —Judgment for plaintiff on demurrer.

Joseph v. *Todd.*—Rule discharged.

Allan v. *Hamilton.*—Rule discharged.

Wilson v. *Scarlett.*—Stands to enable parties to agree on a proper submission.

Young v. *Moore.*—Question as to sufficiency of acknowledgment to take case out of Statute of Limitations. Rule absolute to enter non-suit.

Cook v. *Phillips.*—Action for dower. Rule absolute for new trial.

Muir v. *Munro.*—Postea to plaintiff.

Regina v. *Tweedy.*—Judgment for Crown.

Breeze v. *Sails.*—Judgment for defendant on demurrer.

Coulson v. *McPherson.*—Judgment for defendant on demurrer.

McDonald v. *Robillard.*—Rule *nisi* discharged.

Snure v. *Gilchrist.*—Rule *nisi* discharged.

Stewart v. *Mathieson.*—Rule absolute for new trial, unless defendant will consent to increase of verdict.

Livingston v. *Gartshore.*—Rule absolute for new trial. Costs to abide the event.

Thayer v. *Fuller and Street.*—Rule absolute to enter non-suit.

Livingston v. *Massey.*—Rule absolute to enter non-suit. HAGARTY, J., dissenting.

White v. *Grimshawe.*—Rule absolute to set aside assessment as irregular, with costs. Leave to parties to apply to amend their pleadings.

Smith v. *Crooker.*—Judgment for defendan. on demurrer.

Kennedy v. *Freeth.*—Rule *nisi* discharged.

Bell v. *McKindsey.*—Rule *nisi* to set aside non-suit and for new trial discharged.

Agnew v. *Street Railway Co.*—Appeal from county court allowed.

Watt v. *VanEvery.*—Rule *nisi* for prohibition granted.

Present: DRAPER, C. J.; HAGARTY, J.; MORRISON, J.

December 19, 1863.

In re Bowlby.—No judgment, as Legislature, by Act of Parliament, have abolished the South Riding of Waterloo, and so deprived both parties of the right to the register books.

McLennan v. *McMonies.*—Appeal from county court dismissed with costs.

Gibb v. *Davidson.*—Appeal from county court dismissed with costs.

Johnson v. *McDonald.*—Rule *nisi* discharged.

Robinson v. *Gordon.*—Question as to sufficiency of facts to make an acceptance under the Statute of Frauds. Rule *nisi* discharged. Leave given to appeal.

The Queen v. *Miller.*—Leave to appeal refused after a delay of three years.

Nichols v. *Nichols.*—Rule *nisi* discharged.

The Queen v. *Moffatt.*—Rule absolute to quash conviction.

In the matter of the Board of School Trustees of the City of Toronto and the Corporation of the City of Toronto.—Rule absolute for *mandamus nisi*, to enable the city to read on the return the facts upon which the city relies as an answer to the application.

COMMON PLEAS.

Present: RICHARDS, C. J.; A. WILSON, J.; J. WILSON, J.

December 14, 1863.

Hart v. *Reynolds.*—Rule for new trial absolute without costs.

Prouse v. *Glenny et al.*—Rule *nisi* for new trial absolute on payment of costs.

The Queen v. *Corporation of Louth.*—Judgment entered for defendants.

Commercial Bank v. *Woodruff.*—Verdict to be entered for defendants, with leave to plaintiff to take judgment for assets *quando.*

Hamilton v. *Woodruff.*—Special case. Verdict to be entered for the defendants, pursuant to the agreement at the trial.

Sheriff v. *Holcomb.*—Special case. Judgment for defendant.

Heniker v. *Insurance Co.*—Judgment for plaintiff on demurrer, and rule for new trial discharged.

Roe v. *United Counties of Leeds and Grenville.*—Judgment for plaintiff.

O'Hearne v. *Donnelly.*—Rule *nisi* discharged. Postea to plaintiff.

Park v. *Humphries.*—Appeal allowed. Non-suit to be entered in the court below.

Mosier v. *Kergan.*—Rule absolute for new trial without costs.

Morun v *Palmer.*—Rule to set aside non-suit discharged.

Sweetman v. *Lemon et al.*—Rule for new trial discharged.

Totten v. *Halligan.*—Rule *nisi* discharged.

Mein v. *Hall.*—Rule absolute for new trial upon payment of costs.

McPherson v. *Bell.*—Rule absolute for new trial.

Rowe v. *Jarvis.*—Postea to plaintiff.

The Queen v. *Steel.*—Judgment for the Crown.

The Queen v. *Carter.*—Judgment for the Crown.

Turley v. *Williamson.*—Rule *nisi* refused.

McKie v. *Woodruff.*—Rule *nisi* discharged.

Gates v. *Smith.*—Rule absolute for new trial without costs, unless the plaintiffs elect to reduce their verdict to $100 and full costs.

Herrington v. *Marvin et al.*—Rule absolute for new trial. Costs to abide the event.

Lavis v. *Baker.*—Rule absolute to set aside assessment of damages, on payment of costs by the attaching creditor, Thomas McIntosh, to the plaintiff.

Present: RICHARDS, C. J.; A. WILSON, J.; J. WILSON, J.

December 19, 1863.

Kehoe v. *Brown.*—*Held*, 1. That a plaintiff having, by transcript, removed a cause from a division court to a county court, may examine his judgment debtor as to his estate and effects. *Held*, 2. That the county judge may, under sec. 41 of Con. Stat. U. C. cap. 24, order a *ca. sa.* to issue, though the debt be under $100. *Per cur.*—Judgment for defendant on demurrer.

Crawford v. *Beard.*—Stands.

Pennett v. *Covert.*—Appeal allowed. Rule in court below to be absolute for a new trial. Costs to abide the event. No costs of this appeal to be allowed to either party.

Dewar v. *Carrique.*—Stands. A difference of opinion among the judges.

Low v. *Sparks.*—Judgment for plaintiff.

Couse v. *Haunon et al.*—Judgment for defendants on demurrer.

Johnston v. *Graham.*—Judgment for defendant, with leave to plaintiff to apply to a judge in Chambers to amend within three weeks.

The Queen v. *Bartells.*—Judgment for defendant.

Williamson v. *The Niagara District Mutual Insurance Company.*—Judgment for plaintiff on demurrer to fifth and sixth pleas.

McPherson v. *Bell.*—New trial on payment of costs, with leave to defendant to amend his pleadings.

Kingsmill v. *Bank of Upper Canada.*—*Held*, 1. That sheriff may sue for price of goods sold by him as Sheriff. 2. That in such an action defendant cannot set-off a private debt of the sheriff to defendant. Judgment for plaintiff on demurrer.

Carnegie v. *Tuer.*—Rule *nisi* granted.

Rogers v. *Lawrence* (*two cases*).—Stand.

Johnston v. *Robinson.*—Stands.

SELECTIONS.

ON THE TRIAL OF ISSUES INVOLVING THE CONSIDERATION OF SCIENTIFIC EVIDENCE AND THE EVIDENCE OF EXPERTS.

(*A Paper by Mr. Robert Stuart, read at a General Meeting of the Society, for Promoting the Amendment of the Law, held on Monday, 22nd June, 1863, and ordered to be printed.*)

Although this subject so recently occupied our attention, I cannot help feeling that neither the Society nor any individual member of it can require from me an apology for the continued discussion of so important a question as that which relates to the true position of science and skill in the administration of justice. Much less can I allow myself to believe that the Society could deprecate the use of its time in endeavouring to discover how the different departments of human knowledge may be made subservient to the practical efficiency among the people of the principles of our system of jurisprudence.

And in truth, this serious question, notwithstanding all the debate and controversy we have had about it, has not yet received its solution. Nor, when we attentively consider the objections that have been made to proposed changes in the existing procedure, can we wonder at the hesitation, so plainly manifested by our profession, to interfere with the present mode of trial which does not exempt skilled knowledge from the ordinary conditions of sworn testimony.

It is, indeed, well that it should be so, and that a right and discriminating conclusion should not be arrived at, on so large and difficult a subject, without reiterated and anxious consideration, and without hastily setting aside a practice like the present, which, whatever its intrinsic defects, has contrived not only to maintain itself without disrepute, but to have attracted to its support a great and learned experience. Its very detractors (if I may be allowed to use an expression that may appear harsh to the minds of some) have been its disciples; and our learned and able colleague, Mr. Webster, will, I feel assured, not refuse to admit the claims of a procedure in the service of which he has himself accumulated that learning and forensic ability which have made him one of our chief authorities in this delicate branch of legal administration.

But undoubtedly an amendment of the law is here required. What form that amendment may assume, and what may be the weak spot it may discover, I fear we are scarcely yet able to show. Is it that our present mode of trial overlays too much the witness's scientific mind, or the generic quality of the expert's skill, and that *nisi prius* does not treat these aids to its justice with becoming respect? Or is it that juries take too low a measure of the claims of science, regarding them simply as helps and contributors of those particulars which are inductively to lead to their verdict? Or is it that the breast of the judge requires to be scientifically instructed and expanded, and that the mind and conscience of the Court itself are judicially wanting in this one great element of its constitution? Or is it that the scientific man should not be a witness at all but a juror, or it may be a judge? These and such like are among the considerations which must be taken into account. Clear it is that this matter of science, if it be, indeed a reproach and embarrassment to the Courts, is not too large or difficult for the law; nor was the Roman lawyer mistaken when, with lofty ideas of his calling, he defined jurisprudence to be "divinarum atque humanarum rerum notitia, justi atque injusti scientia."

Perhaps the most useful manner in which, at this period of the controversy, I can re-open the subject is by briefly reviewing the discussion that has already taken place, and of which we have reliable reports in duly accredited publications. But I beg to be allowed a few preliminary remarks.

When this subject was last before the Society, it appeared to me that it had not been sufficiently considered, more especially with reference to its strictly legal bearings. So far as I could understand, a great deal was said about science, and scientific evidence, and scientific assessors, and a number of speculations were offered, having as it appeared to me, a mere regard to these particulars. But I could not see how, what was said on these subjects was intended to qualify the one great question, viz., the proper form and order of the trial. I say the trial, for, with great deference, what we have chiefly to consider is not a mere matter of science or of scientific evidence; it is a question as to how we are to deal, not only with science strictly so called, but with all kinds of peculiar knowledge and skill when we require their aid for the purpose of determining right and justice between litigants; in other words it is a question as to how we are to make the knowledge and skill of persons in particular departments of life available in the administration of the law. Science and scientific men, no doubt, come largely and perhaps chiefly under this category, but there are others in the same situation. The evidence of skilled tradesmen, of foreign lawyers, of doctors and surgeons, and, in short, of all who, by profession or calling, or by the accumulation of particular knowledge and experience in any recognised business, have established for themselves a certain reputation, are as much experts as the strictest and the most gifted of scientific men, and entitled to as much consideration. In fact, skilled evidence, that is, the evidence of skilled opinion, whether taken as matter of fact, as in the case of foreign law, or of mere opinion, must, as it appears to me, be all taken in the same way; and what we want, therefore, is not so much to hedge round science and its votaries with any protective device, but such a procedure at the trial as will best, most justly, and most completely, give effect to the evidence which the parties have adduced, whether that evidence be purely scientific or skilled testimony, or be mixed with other evidence relating to the facts in dispute. This was, I think, the real question for our consideration, and it is a question rather for the legal than for the scientific man.

But now to the former discussion referred to. As the Society is aware, that discussion arose in consequence of the conflicting medical evidence that was given at the trial of Dr. Smethurst for murder, in the autumn of 1859; and it was at first conducted with the greatest violence and acrimony, the newspapers of the day being inundated with letters all more or less distinguished by these ungenial qualities; "*Medicus*," "*Justitia*," "*Lex*" "*Veritas*," "*Scientia*," and various other *nommes de plume*, being the signatures under which the vituperative missives were published. But it does not appear that the lawyers were much excited; they rather seem to have considered that the quarrel having been made by the doctors, these gentlemen had better settle it among themselves. And here I must observe, that, if the matter of *procedure*, on which the discussion is now brought to bear, had been left to be considered with reference to the trial in question, nothing could have been more unjust or more unreasonable than to have preferred any complaint on that score; for, whatever may have been thought of the verdict, the trial itself was, from beginning to end, and with reference to all the evidence, and all the witnesses, a perfectly fair one.

I have heard it said that medical men in general make bad witnesses, and that they generally contrast unfavourably in this respect with soldiers—a remark that may be quite intelligible without any necessary disparagement of our medical friends in the estimation at least of those who are acquainted with their professional idiosyncrasy—an idiosyncrasy which, however intellectual and philosophical, and medical, is just of the kind which, in the interest of the public, is, perhaps all the better for that gentle and particular restraint which legal procedure now and then imposes upon it. The doctors were allowed, however, full play in the newspapers; and if they gradually got less excited, they became more serious and prolix, and the medical periodicals became very learned on the subject of medical and scientific evidence. Whether much light was thus thrown on what we lawyers call *evidence*, I do not suggest; but unquestionably a very great deal of cleverness and ingenuity was exhibited. Of course there was no difficulty, in removing the stage of the question from Smethurst's trial to the general platform of science at large; and one of the most conspicuous essays of the kind to which I have alluded, was a paper read before various learned bodies, and in particular before the Society of Arts, on the 18th January, 1860, Vice-Chancellor Wood being in the chair, by Dr. R. Angus Smith, F.R.S., entitled, "Science in our Courts of Law." The paper was published in the number of the Journal of the Society of Arts, for January, 1860, along with a report of the discussions that followed upon it, and it is a very long one. It is divided into numerous heads; and it would be idle for me to attempt to give anything like a *resumé*, however brief, of its actual contents. Nor is it necessary, for, while it suggests a number of important considerations, I cannot say, after a most careful perusal, that it assists us much in discussing the subject of my present remarks; while its more dogmatic statements could be easily proved to be erroneous, even if its peculiar style of composition was more favourable than it is to the communication of dogmatic truth. It is extremely metaphysical—and I had almost said eccentric.

The Society will pardon me if I give one or two illustrations of Dr. Smith's misconception of the subject. He observes:

"We see science moving with irresistible force, gradually seizing more and more of the rights and properties of every subject, and of every government, whilst the scientific man, the expounder of science, has no recognised place, but is allowed to give his evidence as a necessity, and frequently in a manner that might be shown to be as illegal as it is for the time unavoidable."

What the Doctor means, in this very hazy sentence, about "evidence as a necessity," and yet "illegal," albeit "unavoidable," I cannot surmise; but we all know that medical and scientific evidence, which is always highly paid for, must be a necessity where it is judicially required; and that if it is not legal, it is not evidence at all. The doctor proceeds to observe.

"That physical science is the ultimate referee in cases where it can give a clear answer, and that suitable arrangements should be made for obtaining the unprejudiced opinion of those who have studied it.

"That in all differences of opinion, whether in social or physical law, and in all difficult cases, the instincts of man, in a free country, will take the lead (right or wrong)."

The first of these points of course contains the abstract truth; but the obvious comment is that, as science is impersonal and cannot speak under the circumstances supposed, we must do our best in the witness-box with its human professors; and that in order to obtain that "clear answer," which it, that is science itself, if we could only subpœna it, could give, we must investigate by examination and cross-examination, these professors' opinions. The Doctor himself seems to have had something of the same kind of misgiving in his mind, because he shortly afterwards admits that, "science is liable to be expounded by its teachers pedantically and imperfectly," and he further on declares that "the public must expect a great deal of opposition among scientists." The second point I have quoted above, is, I confess, to me not quite intelligible; for what he means by "the instinct of man in a free country taking the lead (right or wrong)," I do not see, unless, "by the instinct of man in a free country," we are to understand him to refer to the jury, "and by taking the lead (right or wrong)," to the verdict, whether it be correct, or one that "serves him right," which, of course is generally wrong.

Again, Dr. Smith remarks:

"Even supposing a witness to insist, as some will do, on giving all his fullest evidence, it is scarcely possible to avoid having it distorted by the examining party. One trifling remark may be so examined, and so much questioning may be spent upon it, that it takes the place with the jury and the public of an important point. On the other hand, a most important remark is passed over in silence. Now this destroys the due proportions given to the evidence in the mind of the scientist."

The fallacy in this quotation is transparent. The importance of the witnesses' remarks is, of course, not to be viewed with reference to the matter of science in hand, but with reference to the issue in fact under trial, and to the true answer to which the scientific evidence is intended to lead; and it is only evidence so far as it is introduced by the interrogatories in Court. As to the "due proportion given to the evidence in the mind of the scientist being destroyed," it really matters not whether it be so—the mind of the scientist has nothing to do with the question—it is the mind of justice, and of the law in relation to the question of right before the Court, which is the real consideration.

These and many other illustrations of the same kind, which I could give from this very singular paper, show that Dr. Smith misconceived the nature of evidence, and the legal position of a witness in a court of justice.

His general position appears to be this, that a scientific witness, or a scientific man, or a scientist, as he delights to call him, is not to be controlled by counsel at all; in fact is not to be examined by them, at least in the first instance. He, as a scientific man, would ignore the Bar, and hold converse only with the judge, speaking what he likes and when he likes—a mode of proceeding, however, which I fear would make trials, involving the consideration of scientific evidence, very unedifying indeed.

The whole paper, although, as I have said, very clever, very elaborate, and probably very subtle, is, in my humble judgment, a most unsatisfactory exposition, even if its peculiar and rather dreamy phraseology were of a more palpable character than it is. The best part of it is where, towards the end Dr. Smith speaks of the remedy he proposes: the first point of which relates to the appointment of an assessor, and the second, to the mode in which a scientific witness ought to be examined; but the third is, I think deserving of serious consideration. It is as follows:

"That scientific men giving evidence on scientific points shall be allowed to deliver their examinations in writing. The reading and elucidation to be controlled by the judge; examination and cross-examination by the barrister to follow."

This proposal was thought so much of by the Rev. Vernon Harcourt (a gentleman who appears to have taken great interest in this subject), that he introduced it into a proposed Parliamentary Bill, which he drew up on the regulation of scientific evidence. He appears to have borrowed the idea from the examination of medical witnesses in Scotch criminal courts. But as I can attest from my own personal experience in these courts, that proceeding is not always attended with complete success. I have a very distinct recollection of being present at an Assize Court in Scotland, when one of the most distinguished surgeons of the present day was examined in the manner explained. He came, of course, with his report on the *Corpus delicti*. It was a precise and distinct document; and, although he read it very badly, it made a great impression on the Court. Unfortunately, however, for the learned and distinguished professor (for he was a professor), the prisoner's counsel availed himself of the privilege of cross-examining him on his report; and I am really concerned to inform the Society that he succeeded too well in utterly destroying the weight of the professor's evidence, by the contradiction and general mess in which he involved him, and of which, in a spirit of great disrespect, he fully availed himself in the very unreserved observations he afterwards addressed to the jury on the painful subject. I am very much afraid that if the distinguished professor, who is also a very learned and able author, had sat down, immediately after the forensic exhibition I have described, to write an essay on Medical Evidence, he would have written even more sternly and indignantly than Dr. Angus Smith has done. The incident I have related, however, shows the danger of allowing such examinations and cross-examinations without due regulation; and on this subject I shall, before I conclude this paper, make a suggestion as to the control under which *nisi prius* and Old Bailey advocacy should be placed in any amendment of procedure that may be adopted.

In the discussion which followed the reading of this paper by Dr. Smith, some very interesting and useful remarks appear to have been made by our learned colleague, Mr. Thos. Webster, Dr. Taylor, and others present. Dr. Taylor mentioned a circumstance of great importance, and which it is hoped may kept in view in any reform which may take place hereafter. He stated:

"That the differences amongst scientific men were rather those of opinion than of fact, and from his own experience, which had been considerable, he knew that facts were often laid before them in such a manner that they had not a half even—if they had quarter—of the truth of the case. It had occurred to himself upon many trials, both in cases of patent rights, and of murder, involving questions of the greatest importance to society, that for the first time, he heard in the court facts which would have materially altered his opinion; so that scientific men were entirely at the mercy of those who instructed."

The Chairman, Vice-Chancellor Wood, summed up the discussion, observing that the great difficulty in such evidence was the evidence of opinion, and, in illustration of this he mentioned,

"That, in a case which came before him, six of the most eminent members of the Scottish Bar gave evidence upon a question of Scottish law—three on one side and three on the other. The question referred to a matter connected with the Free Kirk, and diametrically opposite opinions were given as to what the Scotch law was; the opinion in each case coinciding with the particular religious views of the witness; and yet in this case perfectly honest opinions had been given."

Dr. Smith's paper had, previously to its having been read before the Society of Arts, been communicated to this Society,

and I find that at our meeting of the 28th November, 1859, a committee was appointed to consider the subject, and on the 20th February, 1860, the committee's report was read. It will be found on page lx. of the *Law Amendment Journal*. This report in substance recommends that there should be no change in the existing procedure. The committee are against "any change in the existing mode of taking evidence, at least until some plan had been proposed of which the advantages would be clear, and which should work harmoniously with the rest of our legal system;" and they express their opinion that to none of the suggestions by scientific men that had been laid before them did this character apply. Some of these suggestions, they observe, were entirely nugatory, and others opposed to the whole spirit of our jurisprudence, or would introduce an element of confusion, of which it would be impossible to calculate the result. The report is also against requiring scientific evidence being given in writing, and also against scientific assessors; and the committee wind up by stating they see no reason for making any distinction between civil and criminal cases. As a whole, the report, which appears to have been the last serious expression of opinion by the Society, is distinguished by a candour and lawyerlike discrimination most creditable to its authors; and it is impossible to read it without a feeling of respect for the good sense and sound judgment which evidently guided its preparation; and, for myself, I must say that I very much sympathize with it.

The other medical and scientific gentlemen who have discussed this subject are Professor Christison, of Edinburgh, Dr. Letheby, and the reverned gentleman I have before referred to, the Rev. Vernon Harcourt.

Mr. Webster's paper, read here on the 18th of last month, again brought up the subject before us; and in a leading article of *Newton's London Journal of Arts and Sciences*, published on the first of this month, Mr. Webster's views are enforced.

I believe I correctly describe the discussion which has thus taken place by stating that, as it at present stands, it limits the consideration of any change to the proposal to appoint scientific assessors, and, in certain cases, to the modification of the trial by jury. But the controversy so stated involves other elements of consideration, and I shall now submit to the Society the outlines of such a reform as, in my judgment, would meet any difficulty or inconvenience experienced under the existing system of taking this kind of evidence.

We must take care, however, to regard the subject from the true point of view. We shall not do so if we look at it as a mere question of *evidence*, or even of evidence in relation to *science and skill*. The real and great question is, *how shall the issue be tried?*—for after the evidence has been given, over and above it, there is the matter, the paramount matter, of right and justice, and how shall that be determined? The question, then, I say, is, *how shall the issue be tried* Now this is a lawyer's question, and a lawyer's question exclusiveiy; one to which Doctors of Medicine, and scientists as they are called, and experts in general, have nothing to say. After the discussion we have had, and under all the circumstances in which the question has been raised, it must be held to go to the very constitution of the existing tribunals themselves, and even to exclude the capacity of its highest officials. Are then our judges and juries of the present day, according to the theory of their qualifications, equal to this kind of business? If they are not, then either they themselves individually or the law and practice of their courts are at fault. But if they are, then scientific men and experts must not, in the capacity of assessors or jurors, invade the bench or jury-box, but must be content to assist the Court by their evidence.

I had occasion to consider the subject many years ago, in Scotland, chiefly with reference to a proposal to have science in such cases represented in the constitution of the jury; but, in my opinion, there is no substantial difference between the cases of jurors and assessors; and the argument equally applies for or against the two positions. The whole question was I recollect, very anxiously considered, and I explained my views in a statement I communicated to one of the legal publications of the day, on the complaints that were then made in Scotland against the system of trial by jury in civil causes; and among which complaints the system of pleading and the method of deriving and settling issues, held a principal place. As the opinions expressed in the paper referred to are still held by me, perhaps the Society will allow me here to read a few sentences from it:

"The complaints, however that are sometimes heard in Scotland on this subject, do not argue a clear idea of the juror's office, which they confound with that of the witness. Evidence, especially where it is progessive and in detail, is one thing; the juror's understanding to which that evidence is addressed, and by which the whole is to be brought to one general result in the suit, is another. Herein lies the error of those who object to juries, not because they are generally uninformed, but in consequence of their wanting in particular cases that artificial kind of knowledge which skill in a trade or profession can give. Now we think this is not only to take a wrong view of the jury's province, but to prevent the evidence from being fairly or impartially considered. We must give the jury all legal and relevant aids; and if a scientific or artistic point arises, we must, by the testimony of scientific men and artists, throw all the light we can on the issue; but that issue it is the sole duty of the unprejudiced jury to satisfy. The jury are to take cognizance of all the evidence: of scientific and technical evidence as well as evidence of the fact: they are to entertain everything which the law allows; and by allowing, requires them to know that they may form a true judgment on the disputed right. *Ad questionem facti respondent juratores, ad questionem juris respondent judices.* Between these two provinces there is no middle authority, the jury are to try the fact, the judge to lay down the law: but the fact is to be considered with reference to the right or interest in issue. Keeping these principles in view, we discern the real nature of the jury's social and judicial constitution. A jury should be in all respects quite indifferent. The juror is a judge, not a witness, and he is to decide on information afforded by competent persons, and not from any independent views of his own. That is to say, he is to decide on evidence; evidence external to his own intuitive knowledge. And anything that interferes with this constitutional relation, whether it be an influence emanating from inherent qualities in the juror individually, or in some other way, by which a bias is created in his mind, so far deranges proper judicial order. In short, the true ideal of a jury is, that they are to proceed to their duty without any presumptive impression as regards one side or the other."

A Scotch case, involving a good deal of the evidence of the kind in question had occurred, and it was complained that,

"Not one coalmaster or mining engineer was on the jury. But this is no good objection. The kind of information which such classes of persons were fitted to supply was purely matter of evidence, and the witness box, and not the jury-box was their true place. Their professional skill was not substantially and *per se* in issue, but was merely collateral, and receivable in evidence in order to instruct the minds of the jury on the fact, as that relates to the interest, the right or the wrong in litigation. And if it is necessary to know about coal driving, and mining, and engineering, by all means let the jury be duly indoctrinated therewith. Put the collier, and the miner, and the engineer into the box; examine them well and thoroughly; try and search the depths of their scientific and professional minds, and then dismiss them with thanks for their information; but do not allow them to interfere further with the case, else the collier may make it too black, the miner may take too much out of it, and the engineer may blow it up altogether! There is a general conclusion to which, among other particulars, the scientific evidence is merely inductive; and although colliers, and miners, and engineers may know a great deal about, and be most useful men in their respective crafts and trades, they may not be the most competent persons for the protection of an interest, the vindication of a right, or the redress of a wrong."

I still entertain these opinions very strongly, and as I have suggested, the argument applies as well to assessors as to jurors; perhaps indeed more forcibly in the case of the former, for, with the notorious bias and jealousy that prevail among scientific persons and persons of skill, from the mere mechanic or skilled artisan up to the Prince-engineer, to have two such assessors sitting with the judge would, I think, involve a hazardous experiment, not only in relation to the authority and dignity of the judicial office, but also with respect to that feeling of confidence in the impartiality and indifference of the judge, which in this country is associated in the mind of the public and the Bar with the efficiency and integrity of the Bench, and which feeling of confidence it would be dangerous to disturb. I therefore entirely concur in the report of this Society, to which I have referred wherein it is stated:

"According to that scheme, assessors should be appointed who should sit with the judge, and should be bound to give their opinion in public, as well as the reasons on which that opinion was formed, the judge, however, not to be bound by the opinion so given. It must be supposed that the assessors would be persons of competent skill, and it is difficult to understand how the judge would not be morally, if not legally, bound by their opinion, or that any verdict could be supported which went against such opinion. Nor can it be doubted that, if any difference of opinion arose between the judge and the assessors on a matter which the jury must ultimately determine, the latter would be placed in a position of considerable embarrassment. In trials before the Admiralty Court, where the judge is assisted by Masters of the Trinity House, there is no jury; and after carefully considering the working of the system adopted in that court, we are of opinion that it is altogether inapplicable to the ordinary mode of trial by jury."

The plan of assessors is further objectionable, inasmuch as it would introduce a lay quality into the judicial element that would hamper the judge, interfere with his discretion, and cause confusion in the trial.

It has also an aspect suggestive of something unconstitutional, by neutralizing or tending to neutralize that undivided responsibility in the judge which is one of the chief safeguards which our legal system affords to the nation.

In every view this proposal for assessors appears to me most objectionable. It is in my judgment, so inconsiderate and wrong, that it is a satisfaction to me to reflect that it was originated by medical, scientific, and other persons who, from their position and calling, are unacquainted with the delicate character of the conditions of legal procedure, and not from our own profession. Indeed, I say it with all respect and deference, that the proposal is unlawyerlike, because it appears to me to take a low and unworthy estimate of the comprehensive nature of the principles of jurisprudence—the greatest and grandest of all sciences; and I sincerely trust that the impression which it appears to have made on some of the lawyers of this Society may be but transient—that it may speedily pass away altogether and give place to sounder and juster, and, I may add, more manly notions of legal investigation. I therefore hope and trust that the Society will adhere to its former opinion on this subject, and negative this scheme of assessors.

But, while I am so strongly opposed to scientific assessors and scientific jurors, I am not insensible—it is impossible to be insensible—to the inconvenience that has been experienced in taking scientific evidence, and which will probably continue to be experienced unless some well considered change is made in this respect.

I cannot help thinking however that if trials, especially trials at law, were conducted with a little more consideration and reserve—I had almost said reticence—on the part of counsel, and with less of that demonstrative anxiety and burly dogmatism of tone and manner by which advocacy, in its more unscrupulous development, is too often disagreeably distinguished in our courts,—I say, if there were a better condition of things at *nisi prius* and the Old Bailey, and if such trials as I have referred to were a little more gentlemanlike, and a little more scholarlike, we should hear less than we do of the evils and drawbacks of the existing system.

But, making every allowance, I still think there is room for improvement, although I trust that the Society will not for one instant admit Dr. Smith's claim that the scientific witness shall occupy at the trial an "independent position," as he calls it. That would never do. The scientific man or the expert when called on to assist in the administration of right and justice, to use the words of the great charter, must do so as a *witness*, and a witness only—a witness in the ordinary sense of the term. But his services might be considerably enhanced by one or two regulations, to be applied with a due regard to the special nature of the case to be tried. It has been complained, as one cause of the dissatisfaction with this kind of evidence, that the scientific witness often gives it without adequate information respecting the facts in dispute; and it had been suggested that, for the purpose of such evidence at least, the facts should be previously communicated to the witness *in writing*. The answer to this, however, is a forcible one, namely that many important facts to which the scientific witness may have to speak cannot be known until they are disclosed orally at the trial. Yet I think, the suggestion made is worthy of the best consideration, and it might be regulated so as to be used with advantage in particular cases. On the subject I venture to propose as follows:—

1st. That rules be adopted by which both parties should be bound, by the form of their pleadings, and other matter of record, fully to disclose the case they are respectively to make at the trial.

2nd. That a written statement, taken from the pleadings, and other matter as may be agreed on, and expressed in as popular language as possible, should, previous to the trial, be adjusted and settled in the presence of both parties, before the judge himself, or his principal registrar, or some other proper officer.

3rd. That an office copy of this statement be furnished to each scientific witness or expert, at a certain time before the trial, and that at the trial the scientific witness or expert should be required to give his evidence with reference to such statement. This would, however, not exclude any relevant amplification at the hands of counsel, care at the same time being taken that the material facts stated are neither added to nor contradicted, the object being that, whatever may transpire at the trial, the evidence of the expert or scientific witness shall still run in the channel indicated by the statement of the facts.

4th. I propose that in certain cases, to be discriminated and regulated, the scientific witness or expert should, so instructed as to the facts, be allowed to give his evidence *in writing*; care being taken by, if necessary, a strict preliminary examination, that the written evidence he puts in expresses fully and conscientiously his mind on the subject. In this written evidence, I would allow the witness to be further examined and cross-examined orally at the trial, but only in the way of explanation, and not so as to effect the witness's credibility.

5th. Where, notwithstanding all these precautions (and others that might perhaps be adopted) there still remains a serious conflict of opinion between or among scientific witnesses and experts, if there are more than two, it might be expedient to adjourn the trial, and that, in the meantime, these witnesses should exchange each others written evidence meet together and confer together; and, when the trial is resumed, that they should respectively state to the Court whether, and in what respects, their former evidence has been affected or qualified. I would not then allow any further examination or cross-examination, excepting with the express leave of the Court, on cause shewn; and,

6th. I propose that no new trial should be allowed on the ground of the verdict being against the weight of the scientific

or the skilled evidence, nor on any ground involving a rehearing of such evidence; and it might be convenient, in particular cases, that a power should be reserved to the Court to order the scientific or skilled evidence, or the material parts of it, to be entered as facts on the *postea* at law, or in the return of the verdict in equity.

Other rules and regulations might be made with a view of making this kind of evidence more conducive to the ends of justice in our courts than it is considered to be at present. But the above proposals are the result of the most anxious consideration on my part, and I respectfully submit them to the Society.

It will have been observed that I have made no distinction between the cases where the evidence is purely and exclusively scientific, and where it is of a mixed nature. I was at one time disposed to think that the regulations in the former case might be different from those to be adopted in the latter; but on further consideration I think it better that the rules should be the same in the one case as in the other.

In either case the result must be the determination of a question of fact or of right, which is best left to the verdict of a jury.

LIABILITY OF OWNERS OF ANIMALS FOR DAMAGES DONE BY THEM.

Singular questions sometimes arise upon the liability of the owners of animals for injuries done by them, and the reasons given by the judges for their decisions are often still more singular, and savour more of sophistry than common sense.

With regard to wild animals, such as lions or bears, the owner is liable to any injury done by them while in his keeping, without any proof of their ferocity, because he must be taken to have known it. (*Rex* v. *Huggins*, 2 Ld. Raym. 1853).

According to the Roman law, if a wild beast escaped, the person who kept him would not be liable for any damage he might do after his escape, because such person had ceased to be the owner. "Si ursus fugit et sic nocuit, non potest quondam dominus convenire: quia desinit dominus esse, ubi fera evasit." (Dig, lib. 9, tit. 1, s. 10). By the English law, however, according to Lord Hale, the owner of such wild beast would be liable for any injury done by it, "as was adjudged in Andrew Baker's case, whose child was bit by a monkey that broke his chain, and got loose." (1 Hale's P. C. 430, part 1, c. 23).

There is, however, a marked distinction between wild beasts, and animals which are domesticated—mansuetæ naturæ. In the case of a dog, bull, ox, ram, and such like animals, if they do an injury to any one, the owner will not be answerable for it in an action for damages, unless it be shewn that he was aware of their vicious propensities. Thus, if a bull passing along a highway gores a man, the onus of shewing that the owner knew the dangerous character of the animal lies on the injured party; and if he does not prove such knowledge, he will be unable to recover any damages. (*Hudson* v. *Roberts*, 6 Exch. 697). So, if a dog injures a man or sheep by biting them, the owner will not be liable, unless it be shewn that he knew the dog's propensity for biting. (*Mason* v. *Keeling*, 1 Ld. Raym. 606.). Where, however, it is proved that the owner was aware of the savage description of the animal he kept, it cannot be objected, that it escaped and went at large without any default on the part of the owner, because he is bound to keep it secure at all events. (*May* v. *Burdett*, 9 Q. B. 113; *Smith* v. *Pelah*, 2 Str. 1264).

The law with regard to horses appears to be the same. In the recent case of *Cox* v. *Burbidge* (9 Jur., N. S., part 1, p. 970), a horse strayed on the high road, where he kicked a child who was lawfully upon the highway; it was held by the Court of Common Pleas, that even assuming the horse was a trespasser, no action would lie against the owner, even although the horse strayed through his negligence, unless it was proved that the horse was likely to commit such act. The principle upon which the judgment proceeds is, that the owner of the horse was liable only for such acts as a straying horse was likely to commit. Hence, the learned Chief Justice in giving judgment, says, "The owner of a horse is bound to know, and must in all cases be taken to know, that a horse is by nature likely to stray, if not carefully confined, and to walk into a pasture consume the grass. For this, *therefore*, the owner is held liable." "But," adds his Lordship, "if a horse does an act, which it is not in the ordinary nature of a horse to do, and which no owner would, therefore, without knowing his peculiarly vicious nature, have any reason to calculate on his doing, then he has the same protection as the owner of a dog. It is not in the ordinary course of the nature of a horse to kick a child, and, *therefore*, the owner is not liable, unless he is proved to be aware of the tendency of the horse to commit acts of that kind."

Now, we should have thought, before reading his Lordship's judgment, that the reason why the owner of a horse is liable for the damage occasioned by its consuming the grass of his neighbour, is, that such owner is liable for the acts of the horse by which he derives a benefit.

With respect to the point actually decided by the Court, we can readily conceive, that if the child had been a trespasser, and had gone into the field where the horse was kept, the owner ought not, according to previous decisions, to have been liable for the injury occasioned to the child. But we think that his Lordship goes rather too far when he assumes that a horse that strays on a public road is not likely to commit acts endangering the public safety.

The case does not appear materially to differ from *Lynch* v. *Nurdin* (1 Q. B. 29; 5 Jur. 797) and *Illidge* v. *Goodwin* (5 Car. & P. 190), in each of which cases the owner of a horse and cart, who negligently left them unattended in the street, was held liable for the injury done thereby. In those cases, indeed, negligence was proved; in the case now under discussion no such proof was given, but the learned Judge in his judgment assumed it to be capable of proof, or proved. Now, if we assume that a horse and cart, left in a road negligently, are likely to be dangerous, and that therefore the owner is liable for the injury that may be occasioned by such cart and horse, why are we not to arrive at the same conclusion with regard to a horse unattached to a cart allowed negligently to stray upon a public road?

Whether the necessity of proving the mischievous propensity of domesticated animals, as a condition precedent to obtaining damages for acts done by them, proceeds upon a correct principle, may well be doubted. The proof in most cases is difficult, even where the owner may have been himself well aware of the vicious character of the animal.

Notwithstanding, therefore, the decisions upon this subject have laid down the distinction so clearly between the liability of the owner of wild and domesticated animals for any injury done by them, we think the rule would be much more just if in the case of all animals, without distinction as to their character, and without the necessity in the case of domesticated animals of any proof that their ferocity was known, that the owner should be liable for all injuries caused by their own acts, provided that they were not occasioned by any fault on the part of the person injured.

Legislation seems to be tending this way; for, by an act of last session, the 26 & 27 Vict. c. 100 (which, however, extends to Scotland only), it is enacted, that in any action brought against the owner of a dog for damages, in consequence of injury done by such dog to any sheep or cattle, *it shall not be necessary for the pursuer to prove a previous propensity in such dog to injure sheep or cattle.*

If this act is right in principle (and we conceive that it is so), there is no reason why it should be limited to dogs, or that its operation should be confined to Scotland.

Make the owner of all domesticated animals liable for the consequences of their vicious acts, without its being necessary to prove that he was aware of their propensity to commit them, and we shall soon find that the number of accidents caused by such animals will be considerably diminished; and when they do occur, the injured party will receive that compensation to which he is justly entitled.—*The Jurist.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

CORRESPONDENCE.

To the Editors of the Law Journal.

——— 16th December, 1863.

Gentlemen,—I should be glad to have your opinion upon the following—

An account against me extending over a number of years was put in suit in the Division Court. I was advised that the claim could not be collected, as it was more than six years due. As I was unable from the lapse of time to prove the settlement of some of the items, and the incorrectness of others, I gave the necessary notice of defence under the Statute of Limitations. At the trial the plaintiff gave some indefinite evidence of a promise made by me to pay the account within the six years. It is immaterial, as far as I know, to consider now the circumstances under which this supposed promise was made. But, at all events, the promise was not even pretended to be in writing.

I was under the impression, and have been since advised, that a promise *not* in writing does not prevent the operation of the Statute. The judge, however, gave judgment against me, on the ground that I had promised to pay the amount within the six years. In point of fact he, in effect, decided and as much as said that the Statute of Limitations was not in force in his Court.

Surely this cannot be the case, and before I think so I should like to have your views on the subject.

I remain yours, &c., B. B.

[See the article headed "The Modern Repealers," on page 5.—Eds. L. J.]

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* Robt. A. Harrison, Esq., *Barrister at-Law*)

In re Westervelt.

Partition—Con. Stat. U. C. cap. 86 sec. 32—Sale of part only of property offered for sale by real representative—Rule confirming.

(Michaelmas Term, 1863.)

This was a proceeding for the partition of certain property under the provisions of cap. 86 of Con. Stat. U. C.

A sale had been ordered by the Court in a previous term under which the real representative divided the property into five lots, and offered the same for sale. Four of these lots were sold; but there being no bidders for the remaining one at what the real representative considered a reasonable price, he withdrew it.

During this term *O'Brien*, under the 32nd section of the above act, moved for a rule approving and confirming the sale of the lots that had been sold, and directing the real representative to execute deeds pursuant to such sales.

The court suggested, on the application, that it might be better to wait till the rest of the property was sold; but, after consideration, granted the rule.

COMMON PLEAS.

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

Alexander R. Doran v. William Reid.

Ejectment—Married woman—Conveyance by when under age—Estate of husband passed thereby—That of wife not—Guardian in socage.

Ejectment—The plaintiff claimed title through one Gilchrist, who was the grantee of James Van Norman and Catharine his wife, and Alexander R Doran and Mary Anne his wife, the said Catharine V. and Mary Ann D. having been the patentees of the Crown before marriage. The defendant claimed under a lease made by William Earnest, the father of the patentees, while they were under age and before marriage, as their guardians. On the trial, the plaintiff proved the patent and deeds down to himself, the patentees' deed describing them as Catharine and Mary Ann Earnest, and being properly certified to by two magistrates as to the execution to pass the estate of married woman.

A verdict was rendered for the plaintiff with leave to defendant to move against the same on any grounds Upon motion to set aside the verdict,

Held. 1st. That if the patentees' father was guardian in socage of the daughter under the age of 21 years, (as contended by defendant,) that guardianship ceased upon her attaining the age of 14, which being the case when the right of action accrued, the objection failed.

2nd. That the deed from the patentees describing them as such, and naming them by their maiden names, together with the certificate of the magistrates endorsed, and the production of the patent, was a sufficient identity in this action.

3rd. That a deed executed by a man and his wife (she owning the estate) under Con Stat. U. C., ch 85, while the wife was under the age of 21, was good and valid, independently of the statute, to pass the husband's interest in the land although not sufficient to bar the wife's.

Summons in ejectment issued the 8th of July, 1862, to recover possession of the north-westerly half of the easterly half of lot No. 29, in the 5th concession of the township of Nassagaweya, in the county of Halton. On the 29th of September, 1862, William Reid appeared and defended for the whole of the land mentioned.

The trial of the cause was by a judge's order directed to take place at the assizes for the city of Toronto.

The plaintiff in his notice of title stated that he claimed title to the premises mentioned by letters patent from the Crown to Catharine Earnest and Mary Ann Earnest; an indenture of bargain and sale by James VanNorman and Catharine VanNorman, Alexander R. Doran and Mary Ann Doran to Dougall Gilchrist, and an indenture of bargain and sale by Dougall Gilchrist to Alexander R. Doran.

The defendant, besides denying the title of the claimant asserted title in himself by lease from William Earnest to the defendant, and by a further notice, and by leave of a judge permitting it, the defendant defended the action as tenant in common with the plaintiff of the property mentioned in the writ, and admitted plaintiff's right to one undivided moiety or half part, the whole into two equal moieties to be divided, of and in the said property, but the defendant denied any actual ouster of the plaintiff from the property.

The cause was taken down for trial at the assizes for the city of Toronto, held in the month of March last.

The plaintiff put in the government patent, dated the 4th of January, 1851, to Catharine Earnest and Mary Ann Earnest, coheiresses of their mother Mary Ann Earnest, their heirs and assigns for ever of the easterly half of Lot No. 29, in the 5th concession of Nassagaweya, in the county of Halton.

Second.—A deed of bargain and sale in fee of the same land dated the 7th of May, 1862, from James VanNorman yeoman, Catharine VanNorman his wife, formerly Catharine Earnest, and Alexander Robert Doran, and Mary Ann Doran, his wife, formerly Mary Ann Earnest, to Dougall Gilchrist, consideration £200. The proper certificates of the due execution of the deeds by the married women in presence of two magistrates and the examination apart from their husbands appear on the back of the deeds.

Third.—Deed from Dougall Gilchrist to Alexander Robert Doran dated the 7th of May, 1862, of the north-westerly half of the easterly half of lot No 29, in the 5th concession of Nassagaweya, in the county of Halton consideration £100.

Demand of possession served on the 3rd of July, on defendant, admitted and filed. The deeds were also admitted.

The defendant then objected to the identity of the parties executing the deed, and that they should have been shewn to have been the patentees of the Crown, and their marriage should have been shewn

The defendant produced a lease made the 2nd of July, 1856, from William Earnest, described as guardian and father of the patentees to the defendant of the whole of the land in the patent for seven years from the date. Execution admitted, but the fact of guardianship was denied. Evidence was given to show that Mary Ann Earnest was born on the 4th of November, 1843—that she was married to Alexander Doran. That Mary Ann lived with her father William Earnest, who clothed her and sent her to school. There was also a letter put in from William Earnest to the plaintiff, dated the 2nd of July, 1856, referring to the fact of his having given defendant a lease of the 100 acres of land for seven years from date. nd certifying that defendant was entitled to the possession of t e lot, and had full power to dispossess any person that might con e on the land to cut timber or otherwise.

The learned judge directed a verdict for the plaintiff with leave reserved to defendant to move to enter a nonsuit on any objection he might raise, the court to be in the place of a jury to examine the whole of the evidence.

In Easter Term *Greene*, pursuant to leave reserved, obtained a rule *nisi* returnable in Trinity Term to set aside the verdict and enter a nonsuit, or to enter a verdict for the defendant, or for a new trial, the verdict being contrary to law and evidence, and for misdirection of the learned judge who tried the cause. In this,

First.—That Mary Ann Doran, one of the grantees of the Crown, being an infant and a married woman when the conveyance to Gilchrist was made, her moiety did not pass by that conveyance, so that plaintiff did not trace title to more than one moiety.

Second —That William Earnest the father was guardian of Catharine at the time of the execution of the lease by him. That the lease was not void but voidable only as to her moiety when she should attain the age of twenty-one, and not having been avoided the defendant was entitled to six months' notice to quit before action brought, and that there was no demand of possession or notice to quit by the plaintiff, the notice to quit of Mr. and Mrs. VanNorman and of Mr. and Mrs. Doran having been dated and acted upon after the execution of the deed by which plaintiff claimed.

Third —That defendant is a termor of Mary Ann's moiety for a time which is not yet expired. And as to misdirection, that the ruling of the learned judge, that the admission by defendant, or proof of the execution of the conveyance to Gilchrist, was evidence against the defendant of the character (viz , as wives of the other grantors) in which Catharine and Mary Ann executed the conveyance was wrong, and he ought to have ruled that the character in which William Earnest, as father and guardian, executed the lease was proved by the admission or by proof of the execution of the lease. And on grounds disclosed in the papers and affidavits filed

During Trinity Term, *Eccles Q. C.* shewed cause, and contended the defendant having set up a claim under the guardian of plaintiff's wife, he could not deny that she was entitled to the property, and as her title was shown to be a tenancy in common with her sister, and any right defendant had to the possession having been terminated by the demand of possession signed by the patentees, and their husbands, plaintiff could bring ejectment for the whole He referred to Woodfall's Landlord and Tenant, p. 19.

Greene, contra, contended that the plaintiff could only claim under the deeds set up in his notice of title and not as husband of one of the grantees of the Crown, and that as Mary Ann Earnest was a minor when she and her husband the plaintiff conveyed to Gilchrist, nothing passed by that deed, and therefore plaintiff must fail. That the defendant only claimed the undivided half of the land claimed by the plaintiff as tenant in common with him, and therefore as no ouster was proven plaintiff could not maintain this action against him. That the lease of the guardian in socage was not void, but only voidable, and as that lease had not been avoided defendant could not be ejected.

RICHARDS, C. J.—In *Reg.* v. *Sutton*, 3 A. & E. 597, a good deal of law in reference to the guardianship in socage is collected, and referred to at page 608 Mr Justice Littledale says, If the infant were above fourteen or took by purchase, there would be no guardian in socage, and Hargrave Co. Litt., 87 *b.* note 1, is referred to as authority for this doctrine. In McPherson on Infants at p 36, it is stated the power of the guardian in socage was expressly restricted by the court in the case of *Wade* v. *Baker*, 1 Lord Raymond, 131, (recognised in the recent case *Regina* v. *Sutton*,) to granting leases till the infant's age of fourteen. And in *Roe Parry* v. *Hodgson*, 2 Wilson 129, it was laid down by the Court of Common Pleas, that the offices of testamentary guardian up to twenty-one, and of guardian in socage up to fourteen are the same, and that a lease for years by a testamentary guardian is absolutely void when the heir attains twenty-one. It follows, therefore, that a lease for years by a guardian in socage must be absolutely void when the heir attains the age of fourteen years." Assuming, then, for the mere purposes of this suit, that William Earnest could be properly considered in this matter the guardian in socage of his daughters, or that a question of guardianship in socage would be likely to arise in this province—and I may add that as to either question, I do not at all incline to the view presented by the defendant—yet the authorities seem to show that his lease would be void after the heirs became of the age of fourteen, and plaintiff's wife being above fourteen when his right of action accrued, the point raised by the defendant fails.

The next question for consideration is as to plaintiff's right to recover under the conveyances and grant from the Crown. There is no doubt that the estate vested in Catharine Earnest and Mary Ann Earnest under the grant from the Crown on the 4th of June, 1851, as tenants in common. There can be no doubt that as to Catharine's undivided half that the deed from her and her husband James VanNorman was properly executed to pass her interest to Gilchrist. It was suggested there was not sufficient evidence of identity, but the deed itself describes her as Catharine VanNorman wife of James VanNorman, formerly Catharine Earnest. And in the same deed plaintiff's name and that of his wife are mentioned as Alexander Robert Doran, and Mary Ann Doran, his wife, formerly Mary Ann Earnest.

The certificates by the justices recognise them as the wives of the male grantors respectively. These facts taken in connection with the possession of the original government patent and the admission by the defendant of the due execution of the deed, and the statement of the witness that Mary Ann was married to Alexander Doran seem to me sufficiently to establish the identity of the grantees of the Crown with the females executing the deed.

Then, as to the undivided half which was vested in the plaintiff's wife, it is contended that that did not pass to Gilchrist, because she was not twenty-one years of age when she executed the conveyance. Can the deed operate then as the conveyance of the interest which the plaintiff had in the land as her husband in right of his wife. If the deed had been executed by the plaintiff alone and purported to be his deed, *Allan* v. *Levesconte*, 15 U. C. Q. B. 9, is an authority sustained by *Robertson* v. *Morris*, 11 Q. B. 916, that it would pass a freehold interest during the joint lives of himself and wife in his wife's estate in the land in question.

The Provincial Statutes, 43 Geo. III., ch 5, and 59 Geo. III., ch. 3, provided that any married woman might convey real estate whereof she was seised in Upper Canada, to such uses as to her and her husband might seem meet, which conveyance should be as valid and effectual in law as if she were sole and unmarried. There was then a further provision that nothing in such deed should have any force or effect to bar such married woman, or her said husband, or her heirs, during the continuance of her coverture or after the dissolution thereof, or should have any force or effect whatsoever unless such married woman should appear before a judge, &c., if resident in Upper Canada, or a mayor, chief magistrate, judge, &c, in Great Britain, or any colony belonging to the Crown, and be examined touching her consent to alien or depart with her real estate, and should freely and voluntarily and without coercion, give her consent before such mayor, chief magistrate, judge, &c, to alien and depart with such estate, that in case it should appear that the married woman gave such consent freely and voluntarily and without coercion, then he should cause a certificate to be endorsed on the deed, &c.

Provincial Statute, 1 W. IV., ch. 2, further extended the provision of the previous acts so as to enable deeds to be executed before judges of the district court, &c., and two magistrates, and authorised the conveyance by married women being above the age

of twenty-one years, by deeds executed jointly with their husbands of their estates, "provided that such deed shall not be valid or have any effect," unless such married woman shall execute the same in presence of certain judges, &c., or two justices of the peace, and unless such judge or two justices should examine such married woman apart from her husband respecting her free and voluntary consent to alien and depart with her estate as mentioned in the deed, and should endorse on the back of the deed a certificate to the effect given in the statute that the married woman had appeared before him or them, and being examined by him or them apart from her husband, did appear to give her consent to depart with her estate freely and voluntarily, &c.

Under these statutes, construed in *pari materia*, the absence of the proper certificate or examination of the wife was held to make the deed wholly void as to her and her husband, though he may have executed the deed.—*Doe Wilson* v. *Wessels*, 5 O. S. 282; *Doe Dibble* v. *Ten Eyck*, 7 U. C. Q. B. 600.

The Con. Stat. of U. C., ch. 85, sec. 1, provides that the married woman seized or entitled to real estate in Upper Canada, and being of the full age may, subject to the provisions thereinafter contained, convey the same by deed so to be executed by her jointly with her husband to such uses as to her and her husband might seem meet.

Sec. 2 then provides for the execution of such deed by a married woman resident in Upper Canada in presence of a judge, or of two justices of the peace, and such judge or justices are to examine her apart from her husband as to her consent to convey the land; and if she gives her consent the judge or justices shall certify on the back of the deed that it was executed by the wife, and being examined apart from her husband, she appeared to give her consent to convey her estate in the lands in the deed voluntarily and without coercion or fear of coercion, &c.

Secs. 3 and 4 provide for the execution of deeds in Great Britain and foreign states with a similar examination and certificate.

Then sec. 7 provides, "If any such deed of any such married woman be not executed, acknowledged, and certified as aforesaid, the same shall not be valid or have any effect."

The deed under discussion having been executed since the Consolidated Statutes of Canada came in force, must be governed by it. I am not prepared to say that this deed is not operative so far as the husband is concerned, though under our statute it cannot bind the wife as she was not of the age of twenty-one years when it was executed. This point has not been decided that I am aware of under the previous statutes, and I can see no reason why it should not be held to be the valid deed of the husband, though it may not be of the wife. The deed is *executed*, acknowledged, and certified, according to the form prescribed by the statute.—If it lacked any of these formalities it might be held to be invalid and of no effect, even as regards the husband, though the change in the phraseology by the Consolidated Statutes from the language of prior acts may make that doubtful. The objection is, that the statute does not authorise the execution of such a deed at all, and therefore it cannot be said to come within its provisions. Independent of the statute it is a valid deed to pass the freehold of the husband to Gilchrist, and therefore the conveyance from Gilchrist to the plaintiff would convey such an interest as would enable the plaintiff to maintain ejectment for the whole of the land he claims, and in the manner he claims it.

If the deed of the plaintiff and wife to Gilchrist be considered wholly inoperative as far as they are both concerned, then plaintiff has such an estate in right of his wife as would enable him to maintain ejectment in his own name; and he could only fail to maintain his action in this view, because in his formal notice of claim he does not set up his title as derived by marriage with one of the grantees of the Crown.

How far ch. 73, of Con. Stats. of U. Canada may operate to prevent a husband from conveying the interest which he has in the real property of his wife, I am not at present prepared to say, for we are not informed whether the marriage between plaintiff and his wife was with or without a marriage contract, nor are we certain that this disposition of her property is without her consent. It seems rather to be with it, if she could give any consent, being under age. It may also be questionable whether any person but the wife, or some one claiming under her or for her benefit, can under that act raise the question how far the disposition of the property was without the consent of his wife.

As to the demand of possession, it was served after plaintiff acquired his right under Gilchrist's deed, the latter being dated the 7th of May and the notice the 2nd of June, and served on the 4th of July, 1862, before this action was commenced, and seems regular enough.

On the whole I think the defendant's rule must be discharged.

See also *Stayner* v. *Applegate*, 8 U. C. C. P. 451; *Doe McDonald* v. *Twigg* 5 U. C. Q. B. 167.

Per Cur.—Rule discharged.

CHANCERY.

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

BANK OF MONTREAL v. HOPKINS.

Mortgagor and mortgagee—Trustee and cestui que trust.

C. H. being the owner of the equity of redemption in three distinct tenements, sold and conveyed one of them to J. T. K. by a deed in fee, with absolute covenants for quiet enjoyment, freedom from incumbrances, &c., taking from the purchaser a bond by which he covenanted to pay £241 of the money owing on the outstanding mortgage; the purchaser afterwards went to the holders of the mortgage, concealed from them the existence of his bond, produced the deed to himself, and agreed with the holders of the mortgage for the release of his portion of the property, and a release was accordingly, for a valuable consideration, executed by them. J. T. K., having become insolvent, absconded from the province, and a suit to foreclose having been instituted against C. H., he sought to charge the plaintiffs, the mortgagees, with the amount payable by J. T. K. under his bond, but the court, acting on the rule established in *Ford* v. *Chandler*, reported ante, volume viii, page 85, considered the plaintiffs warranted in treating the absolute covenant executed by the defendant (C. H.) as an undertaking by him to pay off the whole sum remaining due upon the mortgage, and, therefore, charged the portions still vested in him therewith.—[ESTEN, V. C., *dissenting*.]

This was a bill filed by the Bank of Montreal against Caleb Hopkins, seeking to foreclose a mortgage on certain freehold property in the city of Toronto.

The defendant resisted the suit so far as it was sought to make him liable for the whole amount due on the mortgage, on the ground that the plaintiffs had released a portion of the mortgage premises to Joseph T. Kerby, to whom defendant had conveyed it by a deed in fee, and which contained absolute covenants for title; freedom from incumbrances, &c.

James McCutchon, the agent of the bank in the transaction with Korby, was examined as a witness in the cause, and in his evidence he swore as follows:

"I was the agent of the mortgagee in this matter. I know the mortgaged premises, and sold them. I remember executing a release to Mr. Patrick; he had then, I think, made two payments, that is, paid two instalments with interest, thereupon I executed a release to him. I don't know that Mr. Kerby made any payment; he asked me to give him a release. He shewed me a deed from Mr. Hopkins. I found no mortgage on the registry, which I searched, from Kerby to Hopkins. I first heard of an agreement between them about paying the mortgage when Mr. Hopkins came to pay me some money long after the release. Mr. Patrick is Mr. Hopkins' son-in-law; Mr. Hopkins knew of the release to Patrick; he never made any objection to me on the ground of it. I think Hopkins knew of the release to Patrick when he came to pay me £25, which must have been in 1858; he afterwards made a payment in 1859; he then spoke of the bond he had from Kerby. I received the money generally from the parties, and gave the receipt as for money coming from Morphy (the original purchaser.) I think there was a house at the time of the release on Kerby's portion, built or building, but I am not sure. I understood he wanted to borrow money to complete his building. He said he had paid Mr. Hopkins in full, and he showed me the deed. I did not tell Kerby that there was any amount due or unpaid on the mortgage when I gave the release to Kerby. I did not stipulate for any other sum than £20, and he did not agree to pay any more. Mr. Hopkins made a payment of £46, and £40, and he may have paid £132 altogether, but I cannot say. I have had no correspondence with Kerby about this matter. I cannot say whether at the time of the release Kerby was building on the part released. I think Mr. Patrick paid in one instalment for Mr. Hopkins. I have received one instalment and £40 and interest from Mr. Hop-

kins The rest I received from Mr. Patrick, but whose money it was I cannot tell."

At the hearing

Robert A Harrison, for the plaintiffs.

Crickmore, for defendant.

The point in issue appears in the head-note and judgment of

ESTEN, V C —I apprehend that when a mortgagor alienates the equity of redemption in part of the lands, the rights and obligations of the mortgagor and purchaser in regard to the discharge of the mortgage debt as between themselves depend entirely on the terms of the agreement between them When the mortgagor undertakes to discharge the mortgage wholly as between themselves, the mortgage debt is thrown upon the remainder of the estate retained by him, and any one purchasing part of such remainder must purchase it subject to this burden It is only in this case that the doctrine enunciated in 5 Johnston (C C. 241.) is true, and it is only to such a case that the learned Chancellor intended to apply it. Where it is part of the agreement of purchase that the purchaser shall discharge a certain portion of the mortgage as between him and the mortgagor, this portion is thrown on the part of the estate purchased, and the rest of the estate becomes a surety for its discharge. When the existence of the mortgage is known, but the facts and evidence utterly fail to furnish any clue to the actual terms of the agreement, I apprehend that the court will intend that the purchaser is to pay a proportionate part of the mortgage debt as between him and the mortgagor. A A mortgagee of an estate is of course a mere trustee, beyond securing his principal, interest and costs, and I apprehend that a trustee is in no case justified in dealing with the trust estate without the knowledge of the *cestui que trust*.

The Court of Appeal did not, I apprehend, intend to contravene this doctrine in the case of *Ford* v *Chandler*: they considered that the *cestui que trust* had there misled the trustee by having signed a writing which was shown to the trustee, who drew a wrong conclusion from it. I should think it a safe rule to establish that the trustee should not, whatever he may see, however strong appearances may be, take upon himself to deal with the trust estate without communication with his *cestui que trust*, when such communication is possible. The safety derived from placing property in the hands of trustees will be in a great measure destroyed if a contrary doctrine should prevail.

The Court of Appeal thought in the case of *Ford* v. *Chandler* that the trustee was justified under the circumstances in acting upon the writing that was shewn to him without previous communication with his *cestui que trust*, which perhaps may not have been in his power I do not recollect how the fact was in that respect When the *cestui que trust* is within reach, nothing can be more easy than for the trustee to inform him that he is requested by a third party to make some disposition of the trust estate, and that he has seen documents which appear to authorize it, but to ask whether it is right that he should accede to the demand. Surely it is better for the trustee before he disposes of property which is not his own, but belongs to another, to perform such a simple act, rather than take upon himself without inquiry to decide what is proper for him to do, whereby, through drawing a wrong conclusion from the facts which appear, property placed in his hands for safe custody may be taken from those whose interests had been so anxiously guarded by the author of the trust The utmost caution should, I think, be exacted from a trustee in dealing with the trust estate. It is not merely that it is not his estate, but that of another, but that it has been placed in his hands for safe custody, and entrusted to his care. In the present case, as I understand, the agreement between Hopkins and Kerby was, that Kerby should pay £241 of the mortgage debt; this obligation in fact formed part of of the consideration of the purchase, and this portion of the mortgage debt formed a part of Kerby's purchase money Undoubtedly as between him and Hopkins his part of the estate became *quoad* this part of the debt, the principal debtor, and bound to indemnify the residue of the estate retained by Hopkins: in other words, Kerby might have redeemed the whole estate from the plaintiffs, but he must have conveyed to Hopkins the part not sold to himself, on receiving from Hopkins the balance of the debt after deducting the £241. The plaintiffs, by releasing the part of the estate sold to Kerby, from the mortgage, have deprived Hopkins of his rights, that is, being subject to this mortgage, trustees, they have dealt with the trust estate without the sanction of their *cestui que trust* Of the part of the estate sold to Kerby, the plaintiffs were, beyond the mortgage, trustees for Kerby, subject to the right of Hopkins to redeem the whole estate, and hold this portion of it until paid the £241. This estate of Hopkins they have disposed of without his sanction They must be deemed to have known that by the general law if any particular agreement were made between Hopkins and Kerby concerning the discharge of the mortgage, certain rights would accrue to either according to the circumstances of the case, subject to their own security; they were bound to respect and preserve those rights, and, before they ventured to deal with the estate, to ascertain what they were. It is said that the absolute conveyance to Kerby, with receipts in the body of the deed, and on the back, for the purchase money, and a covenant that the estate was free from incumbrances, misled the plaintiffs. But they were misled because they did not choose to enquire. I think nothing of the receipts in the body of and endorsed on the deed It is well known that in half the cases that occur, especially in this country, they are contrary to the fact, and are wholly unreliable. In England the receipt is seldom or never endorsed unless the purchase money is paid; in this country, I believe, it is nearly as much a matter of course as the receipt in the body of the deed; I think neither of them should have deceived the plaintiffs Then the covenants might appear at first sight to indicate that Kerby was to hold the estate he had purchased free from the mortgage. But in this respect also it is well known that deeds are not accurately framed. If any agreement existed as to the discharge of the mortgage, the effect of it would not be precluded by a covenant that the estate was free from incumbrances in equity, and if an action were commenced at law on that ground, it would be restrained in equity. The plaintiffs therefore were not justified in considering the form of the deed as conclusive, or in determining for Mr. Hopkins the extent of his rights. Enquiry was easy, and should have been made, and I think it was gross negligence not to make it. It is contended that Mr. Hopkins should have made known to the plaintiffs the terms of the agreement he had made with Kerby, and no doubt it would have been an act of prudence to have done so, but he was under no obligation of duty to take that step; he knew that the plaintiffs ought not to deal with his estate without his sanction. Upon the plaintiffs an obligation of duty rested to enquire of their *cestui que trust* before they dealt with his estate, and Mr. Hopkins to make known his right to the plaintiffs, was an unnecessary, although, doubtless, a prudent act. It is true that if the *cestui que trust* does anything to mislead his trustee, and the trustee exercises reasonable diligence, he is discharged from responsibility for any disposition of the estate as to which he has been ensnared by the act of the *cestui que trust*. But in this case the mere form of the deed was not a safe ground on which to proceed, and enquiry was so easy that its omission was inconsistent with reasonable diligence.

I think the just order to make is to declare that so much of the mortgage debt as Kerby was bound by the terms of the agreement with Hopkins to pay has been discharged; but Hopkins must transfer to the plaintiffs all his rights as against Kerby for the recovery of the purchase money. It may be that he has a lien on the estate to compel the payment of this £241, and that this lien may not have been prejudiced by the release, but I think it must be at the expense and peril of the plaintiffs to enforce any such rights that may exist.

From this decision of his Honor the plaintiffs appealed by way of re-hearing before the full court.

Roaf, for plaintiffs.

Strong, *Q C*, and *Crickmore*, for defendant.

The judgment of the court was delivered by

VANKOUGHNET, C —After the most careful consideration I can give to this case I have formed an opinion opposed to that expressed by my brother Esten on the hearing before him The deed from Hopkins to Kerby is now produced, and it contains absolute covenants for title, and a covenant for further assurance in the usual form It was executed while the bank were holders of the mortgage now sued upon, and was produced to them when Kerby applied for the release of the portion of land covered by the

mortgage This, Hopkins, by his covenant for further assurance, undertook to procure for him. I think the bank on seeing this deed were justified in assuming that Hopkins had assigned to Kerby all his interest in the land covered by it, and were under no obligation to ask Hopkins if his deed really meant what it expressed, or if there was any secret trust by which he was still to have a lien on the land. I think a person holding the position of Hopkins has no right to give another such a document, enabling him to use it, and then when it is used and acted upon by his trustee, turn round and tell the latter that he should not have believed it, but should have sought for information behind it. I think he must be held bound by his own act, and abide the consequences of it. He chose to part with his estate in the land trusting to the personal responsibility of the debtor, and if he meant that the latter should not deal as the owner of the equity of redemption with the mortgagee, it was at least his duty to have notified the mortgagee accordingly. A *cestui que trust* has duties and responsibilities as well as the trustee, and he cannot by his own act mislead the latter, and then turn round and hold him responsible. I think this case is governed by *Chandler* v. *Ford*, (in appeal) and that in principle it is identical with it.

ESTEN, V. C., remained of the opinion expressed by him on the original hearing.

Per Curiam —Defendant to pay amount remaining due on the mortgage together with costs.—[ESTEN, V. C , dissenting]*

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, ESQ., *Barrister-at-Law*)

IN RE LAVERNE BEEBE.

Habeas Corpus—Warrant of commitment—Sufficiency.

1. *Held*, that a warrant of commitment which omits to state the place where the alleged crime was committed is defective
2 *Held* also, that in favor of liberty, it is the duty of a judge on an habeas corpus, when doubting the sufficiency of a warrant of commitment, to discharge the prisoner. (Chambers, December 2, 1863)

On 25th November last application was made, in Chambers, to Mr. Justice John Wilson, on the part of Laverne Beebe, then a prisoner in the common gaol of the county of Lincoln, for a writ of *habeas corpus*.

The application was made upon an affidavit of the prisoner, to which was annexed a copy of the warrant, under which, it was said, he was detained in custody.

The writ of *habeas corpus* was granted, and on the same day issued, directed to the Sheriff of the county of Lincoln, and to the keeper of the common gaol of that county.

The following is a copy of the writ:

CANADA, to wit: } VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of the County of Lincoln, and the Keeper of the Common Gaol for the said County of Lincoln.

We command you that you have the body of Laverne Beebe, detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken, by whatsoever name he may be called in the same, before the Honorable the Chief Justice of our Court of Queen's Bench, or other Judge of one of Her Majesty's Superior Courts at Chambers, in Osgoode Hall, in the City of Toronto, immediately after the receipt of this writ, to do and receive all and singular those things which our said Chief Justice or other Judge shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honorable William Henry Draper, C B , Chief Justice of our said Court of Queen's Bench, at Toronto, the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-three C. C. SMALL.

Issued from the Office of the Clerk of the Crown and Pleas, in the Court of Queen's Bench, in and for the United Counties of York and Peel. C. C. SMALL.

Per statutum tricesimo primo Caroli Secundi Regis

JOHN WILSON, J

On 27th November last the writ was returned by the gaoler, and to the return was annexed the original warrant of commitment.

The following is a copy of the warrant of commitment.

PROVINCE OF CANADA, County of Lincoln, to wit. } To all or any of the Constables or other Peace Officers in the County of Lincoln, and to the Keeper of the Common Gaol in and for the said County, at Niagara.

Whereas, Laverne Beebe was this day charged before me, William McGiverin, one of her Majesty's Justices of the Peace in and for the said County of Lincoln, on the oath of Thomas Oswald, and others, that he the said Laverne Beebe, did, on the sixth day of November instant, feloniously and unlawfully discharge a certain pistol, then loaded with gunpowder and divers leaden balls, at and against one Thomas Oswald, with intent thereby then feloniously, wilfully, and of his malice aforethought the said Thomas Oswald to kill and murder.

These are, therefore, to command you, the said Constables or Peace Officers, or any one of you, to take the said Laverne Beebe and him safely convey to the Common Gaol at Niagara aforesaid, and there deliver him to the keeper thereof, together with this precept.

And I do hereby command you, the said Keeper of the said Common Gaol, to receive the said Laverne Beebe into your custody in the said Common Gaol, and there safely to keep him until he shall be discharged by due course of law.

Given under my hand and seal this seventh day of November, in the year of our Lord 1863, at St. Catharines, in the said County of Lincoln. W. MCGIVERIN, *Mayor*.

Robert A. Harrison, on the part of the prisoner, moved to be allowed to file the writ and return. He then, upon reading the writ and return, moved for the discharge of the prisoner, upon the ground that the warrant of commitment was defective, in this that it did not shew the place where the alleged crime was committed, and so, he contended, shewed no jurisdiction.

S. Richards, Q.C, for the Crown, argued that the warrant, being one for commitment in case of crime, did not require the same particularity as a magistrate's warrant in the case of the exercise of summary jurisdiction, and contended that the warrant was sufficient He referred to Burn's Justice, title *Habeas Corpus*.

Robert A. Harrison, in reply, argued that in the case of a warrant of commitment, issued by a magistrate acting ministerially, it is as much necessary to shew jurisdiction as in the case of a warrant issued by a magistrate acting judicially, and contended that the warrant in this matter did not shew jurisdiction, because it did not shew the locality of the crime. He referred to Hurd on *Habeas Corpus* 367; Con. Stat. Can. cap. 102 sch. B.

HAGARTY, J.—I doubt the sufficiency of this warrant as against the objection taken, and, in favor of liberty, shall give the prisoner the benefit of the doubt, and order his discharge from custody. Magistrates should not omit any part of a prescribed form of commitment, lest the part omitted be material, and render the warrant invalid. I am inclined to think that the omission to state in this warrant the place where the crime was committed is a fatal objection to the warrant.

Order for discharge of prisoner.

IN RE LAVERNE BEEBE.

Habeas Corpus—Ashburton Treaty—Can. Stat. Canada, cap 99—24 Vic. cap. 6—Form of Warrant

Held that burglary is not an offence within the meaning of the Ashburton Treaty or the Statutes of Canada passed to give effect to the treaty.

(December 8, 1863)

Robert A. Harrison, on 4th December last, made application to Mr. Justice Hagarty for a second writ of Habeas Corpus to bring up the body of Laverne Beebe, alleged to be in illegal custody.

No sooner had the order been made for his discharge from custody, under the warrant mentioned in the previous case, than a second warrant authorising his imprisonment for a different offence was placed in the hands of the gaoler.

It was contended that the second warrant was also defective; and the learned Judge to whom the application was made, upon perusing a verified copy of it, ordered the issue of the writ.

* This case was appealed, and is now standing for judgment in the Court of Error and Appeal —EDS. L J.

The writ was in the usual form under the Statute of Charles, and was directed to the Sheriff of the County of Lincoln, and to the gaoler of that county.

The gaoler, on 8th December, attended Chambers with Laverne Beebe in his custody, and duly made return to the writ according to its command.

Annexed to the return was the original warrant under which the prisoner was detained in custody.

It was as follows:

PROVINCE OF CANADA, County of Lincoln, to wit: } To all or any of the Constables or other Peace Officers of the County of Lincoln, and to the Keeper of the Common Gaol in and for the said County, at Niagara.

Whereas Laverne E. Bebee was this day charged before me, John M. Lawder, Esq., one of her Majesty's Justices of the Peace in and for the said County of Lincoln, on the oath of James L Filkins and others, under the provisions of the Consolidated Statutes of Canada, chapter 89, and the said Laverne E. Bebee being brought before me, in his presence and hearing, it was proved and made to appear before me that the said Laverne E Bebee was a party duly charged with two crimes committed in the State of New York, one of the United States of America, being within the articles contained in said statute, as follows, that an indictment was in due form of law found by the Grand Jury of the County of Oneida, in the said State, in September term, 1861, against the said Laverne E. Bebee, for burglary in the first degree, and that another indictment was found against the said Laverne E. Bebee, by the Grand Jury of the said County of Oneida, for burglary in the third degree, in June term, 1863, both said indictments, it being made to appear to me on oath, being found by courts of said State of competent jurisdiction, duly certified to be in full force and virtue, on which said indictments warrants were issued in due form of law for the arrest of the said Laverne E. Bebee, and it being further made to appear to me on oath on the said examination, had and held before me in the said town of Niagara, in the said county, that the said Laverne E. Bebee was and is the party named in the said indictments, and that the said indictments were and are still in full force. and the said James L Filkins having produced before me on the said examination the said warrants, and having clearly proved that the said Laverne E. Bebee is the party named in the said indictments and warrants on such examination, and the said Laverne E. Bebee having offered no defence or evidence on the said examination, and I, thinking the charges preferred against the said Laverne E. Bebee and the evidence of criminality adduced against him sufficient according to the laws of this province, have certified all proceedings taken against the said Laverne E. Bebee, together with a copy of all testimony taken before me, to the Governor General of the Province of Canada, so that such action may be taken thereon as is enjoined by the statute of Canada aforesaid, and have issued thereon this my warrant according to the said statute.

These are therefore to command you the said Constables or Peace Officers, or any of you, to take the said Laverne E. Bebee, and him safely convey to the Common Gaol at Niagara aforesaid, and there deliver him to the Keeper thereof, together with this precept.

And I do hereby command you, the said Keeper of the said Common Gaol, to receive the said Laverne E. Bebee into your custody in the said Common Gaol, and there safely to keep him until he shall be discharged by due course of law.

Given under my hand and seal, this eighteenth day of November, in the year of our Lord one thousand eight hundred and sixty-three, at Niagara, in the said County of Lincoln.

JNO. M. LAWDER, *J. P. Lincoln.*

Mr. Harrison, having had the writ and return filed, moved for the discharge of the prisoner from custody on the following grounds:

1. That the warrant disclosed no offence within the meaning of the Ashburton Treaty or the statute passed to give it effect in Canada (Con Stat. Can. cap. 89).

2. That since the passing of statute 24 Vic. cap 6, the sections of Con. Stat. Can. cap. 89, authorising a justice of the peace to act in matters of extradition, have been repealed, and so the warrant signed by a justice of the peace was void.

3. That whether signed by a proper officer or not, it was not in proper form, because it commanded the gaoler to keep the prisoner "until he should be discharged by due course of law," instead of "until surrendered according to the stipulation of the said treaty, *or* until discharged according to law" (Stat. 24 Vic. cap. 6, s. 2; *Ex parte Bessett*, 6 Q. B. 481; *In re Anderson*, 11 U.C.C.P. 54, 64).

S. Richards, Q. C., shewed cause.

MORRISON, J.—I am satisfied this warrant cannot be supported. In my opinion, the first objection raised by Mr. Harrison must prevail. It is needless therefore for me to consider either the second or the third. I direct the discharge of the prisoner.

Order accordingly.

QUARTER SESSIONS.

(In the Court of Quarter Sessions for the United Counties of York and Peel before Hon. S. B. MORRISON, and others his associates.)

IN THE MATTER OF THE APPEAL BETWEEN JAMES SMITH, Appellant, AND JAMES STOKES, Respondent.

Appeal from magistrate's conviction—Dismissal for want of prosecution—Restoration to list—Terms.

Held, 1. That an appeal dismissed for want of prosecution may, at the instance of the appellant satisfactorily accounting for his non-appearance, be reinstated.

Held, 2. That the justices in sessions may, if they see fit, alter their judgment in a matter of appeal, at any time during the continuance of the sessions.

(December 12, 1863.)

On 29th October last the appellant was convicted of having "on Sunday, the eighteenth day of October last, at his tavern, in the county of York, illegally sold *or* otherwise disposed of spirituous and intoxicating liquors—to wit, a quantity of whiskey;" not stating to whom, and not negativing the exception in the statute in favor of travellers, &c. A fine of $20, and costs $3 80, were imposed.

The conviction was signed by four magistrates—viz., Robert Hunter, John Terry, George Stokes (father of informant) and John Reid, Esquires.

On 31st October last Smith, the party convicted, caused a notice of his intention to appeal to be served on Robert Hunter, one of the committing magistrates.

He on the same day entered into a recognizance to appear and prosecute at the sittings of the Court of Quarter Sessions, which commenced on Tuesday, 8th December last.

On that day, the respondent having appeared, had the appeal entered, and on the day following had it dismissed with costs, for want of prosecution.

Robert A. Harrison, on Friday, 11th December, on behalf of the appellant, made application to have the appeal reinstated.

He filed an affidavit of the appellant, who resides in the township of East Gwillimbury, stating that he had employed an attorney (naming him) to prosecute the appeal; that on the day preceding the opening of the court, he was told by his attorney not to come to Toronto till telegraphed for; that he awaited a telegram on Tuesday and Wednesday, but received none; that on Thursday, feeling anxious about the appeal, he, without having received a telegram, came to Toronto; that he then, for the first time, ascertained that on the preceding day his appeal, in the absence of his attorney, had been dismissed with costs for want of prosecution.

John McNab shewed cause, and contended that as the court had given judgment dismissing the appeal, it was not competent to the court to restore the appeal to the list, or to give any judgment other than that already pronounced.

Robert A. Harrison, in reply, argued that it was in the discretion of the court to reinstate the appeal (*Rex* v. *Justices of West Riding*, 10 W. R. 757) and, if necessary, to alter the judgment pronounced in the case at any time during the continuance of the sessions (*Rex* v. *Justices of Leicestershire*, 1 M & S. 442). He also referred to Paley on Convictions, 4th edn. p. 327.

Hon. S. B. Harrison, Chairman —I entertain no doubt as to the power of the court, in its discretion, to order the appeal to be reinstated; and I think this is a proper case for the exercise of that discretion. Let the appeal be reinstated, upon payment of the costs of respondent's witnesses and of this application.

Order accordingly.*

UNITED STATES REPORTS.

The County of Beaver v. Armstrong.

The coupons of railroad bonds are negotiable instruments and may be sued on by the holder separate from the bonds: and interest from date of demand and refusal of payment may be recovered.

Error to Common Pleas of Beaver County.

The opinion of the Court was delivered at Philadelphia Jan. 5, 1863, by

Read, J —The first, second and third specifications of error turn upon the legality of the exercise of the power conferred by the 17th section of the act of the 7th April, 1853, on the county commissioners of Beaver county to subscribe to the capital stock of the Cleaveland and Pittsburgh Railroad Company, and to issue bonds in payment of such subscription. The learned judge in the court below held that the subscription was made, and the bonds, with coupons attached, were issued in strict conformity to law, and the reasons he has assigned in this charge, and the numerous decisions of this court clearly show, that he was right in coming to this conclusion. Contenting ourselves, therefore, with the reasoning of the court below, we assume that the bonds and coupons were legally binding on the county of Beaver, and this brings us to the fourth specification of error, which was the real point argued before us.

The suit was brought on coupons, of five bonds of the county of Beaver, to the railroad company or bearer for the payment of one thousand dollars each, thirty years after date, with semi-annual interest at the rate of six per centum per annum from the date. The bonds were dated 15th September, 1853, and the principal and interest were payable at the office of the Ohio Life Insurance and Trust Company, in the city of New York. The coupons were numbered from eight to fourteen, inclusive, for the payment of $30 interest from the 15th of September, 1857, to the 15th of September, 1860, inclusive. The bonds stipulated that the interest was payable upon the delivery of the coupons severally at the said office in New York. It appeared that these coupons were left unpaid, and that no provision was made for the payment in New York or elsewhere, and that the county disputed the legal obligation of the bonds and coupons, and declined payment. Having therefore decided that the plaintiff could recover on the coupons, the next question was whether he was entitled to interest on them. This question the court decided in the affirmative, at the same time making a very learned argument to show that they were wrong. This forms the subject of the fourth specification of error, and brings us to the consideration of whether such coupons are recoverable without interest, no matter what may be the delays interposed by the corporation or individuals issuing such bonds and coupons, which pass from hand to hand by delivery merely.

Before proceeding to the determination of this question, it will be proper to state clearly in what light these coupons settled in this case to be legally issued, and to be held by a person against whom there is neither legal nor equitable defence to the recovery of the demand on their face, are to be considered. In *Gorgier* v. *Mieville*, 3 B. & Cress. 45, Ld. Ch. Justice Abbott, in 1824, in speaking of bonds issued by the King of Prussia, said; "This instrument, in its form, is an acknowledgment by the King of Prussia that the sum mentioned in the bond is due to every person who shall, for the time being, be the holder of it. And the principal and interest is payable in a certain mode, and at certain periods, mentioned in the bond. It is therefore in its nature, precisely analogous to a bank-note payable to bearer, or to a bill of exchange endorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law that whoever is the holder of it has power to give title to any person honestly acquiring it. It is distinguishable from the case of *Glyn* v *Baker*, because there it did not appear that India bonds were negotiable, and no other person could have sued on those but the obligee. Here, on the contrary, the bond is payable *to the bearer*, and it was proved at the trial that bonds of this description were negotiated like exchequer bills."

This case was preceded four years, by *Wookey* v. *Pole*, 4 Barn. and Alderson, 1, where it was held that exchequer bills were negotiable, and were of the same nature as notes and bills of exchange. The opinions of the judges examine all the early cases, and are very instructive as to the principles upon which instruments for the payment of money assume the character and qualities of negotiable paper. Lord Chief Justice Abbott, speaking of the exchequer bill which was the subject of the suit, says: "But, abstracted from authority, I think this instrument is of the same nature as notes and bills of exchange. Like them it is neither valuable nor useful in itself as goods and chattles, such as a horse, a book, a picture or a pipe of wine are, it is valuable only as entitling the holder to receive at some future time, a certain sum of money, which is a value precisely of the same nature as the value of a note or bill —Notes and bills have been distinguished from goods in regard to their transfer, for the convenience of trade and commerce, and in regard to their being mercantile and commercial instruments, and by law negotiable. It may be true that exchequer bills are not so frequently negotiated, in fact, as some other bills or notes, but I think we are to regard the negotiability of the instrument, and not the frequency of actual negotiation. Exchequer bills are not made for every small sums and on that account alone they would not become the subject of frequent actual negotiation. A bank-note for £5000 passes through very few hands, a bank-note for £5 usually passes through a great number. Many country bank-notes have no ordinary circulation beyond a very narrow district. Bills of exchange usually pass through very few hands, but the character of these instruments is in no degree affected by these circumstances. In the case of *Grant* v. *Vaughan*, 3 Burr, 1526, which arose upon a draft on a banker, payable to the ship Fortune or bearer, the court held it ought not to have been left to the jury to say whether such drafts were, in fact and practice, negotiable, for that the question whether a bill or note be negotiable or not, is a question of law. And upon such a question of law regarding an exchequer bill, I should, looking at the form of the instrument, and observing that the money is to be payable to the bearer, answer that it is, by law, negotiable."

"For these reasons, I am of opinion that exchequer bills are negotiable, and may be transferred in the same manner as bills of exchange, and that in those bills, as in bills of exchange, the property passes with the possession, by every mode of transfer, fraud and collusion apart.

Best, J., said "The question which the court is called on to decide is, whether exchequer bills are to be considered as goods or as the representatives of money, and such, subject to the same rules, as to the transfer of property in them, as are applicable to money. The delivery of goods by a person who is not the owner (except in the manner authorized by the owner,) does not transfer the right to such goods; but it as long been settled, that the right to money is inseperable from the possession of it I conceive that the representative of money, which is made transferable by delivery only, must be subject to the same rules as the money which it represents."

"It cannot be disputed but that this exchequer bill was made to represent money, as much as a bank-note or bill of exchange. It was given for debt due from Government, it is payable (the blank not being filled up) to bearer, and transferable by delivery, and is, on its face, made current, and to pass in any public revenues, or at the receipt of the Exchequer." "The receiver never inquires from whom they come, further than to satisfy himself that they are genuine bills, Indeed, when they are in blank, he has no means of ascertaining from whom they come."

And the same doctrine was held to be applicable to bonds issued by the Russian, Danish and Dutch Governments, *Attorney General* v. *Bouwens*, 4 Meeson and Welsby, 171 The same principles were enunciated two years afterwards by Chancellor Walworth, in the *State of Illinois* v. *Delafield*, 8 Paige, 527, and affirmed by the Court

* The costs were afterwards paid, the appeal heard, and the conviction, upon the authority of *Miles* v. *Brown*, 9 U. C. L. J. 246, quashed, with costs for defects apparent on its face See also *McLean* v. *McLean*, 9 U. C. L. J. 217, where a similar decision was given.—Eds. L. J.

of Error, *Delafield* v. *State of Illinois*, 2 Hill, 159. Mr. Webster, in his argument before the Chancellor, p. 531, says: "The bonds are instruments transferable by delivery, and the State is bound in honor to pay them to a *bona fide* holder. A subsequent purchaser in good faith would not be required to know that their original transfer had been authorized or illegal." And the Chancellor said, page 533: "If these securities, therefore, pass into the hands of *bona fide* holders who have no notice of any irregularity, or want of authority on the part of the officers or agents of the State, who put them in circulation, the complainant is both legally and equitably bound to pay them to such holders." Mr. Justice Bronson, delivering the opinion of the Court of Errors, says, p. 177: "The bonds are negotiable instruments the title to which will pass by mere delivery, and although void in the hands of the appellant, they will be valid securities in the hands of a *bona fide* holder."

The same doctrine was applied by the Chancellor in *Stoney* v. *American Life Insurance Company*, 11 Paige, 635, to certificates of deposit. "The company," said he, page 637, "was bound to pay its certificates to the holders thereof; for such certificates are legal on their face, and *bona fide* holders who have bought them without knowing that they were not in fact issued at Baltimore, and upon actual deposits in trust, can recover on them even if they were issued in this State in violation of our restraining laws."

In the *Mechanic's Bank* v. *The New York and New Haven Railroad Co.*, 3 Kernan 597, Mr Justice Comstock, delivering the opinion of the Court of Appeals, says, page 627: "They," that is, shares of bank stock, "are not like exchequer bills and Government securities, which are made negotiable either for circulation or to find a market. Nor are they like corporation bonds which are issued in negotiable form for sale, and as a means for raising money for corporate uses; the distinction between all these and corporate stocks is marked and striking. They are all in some form the representative of money, and may be satisfied by payment in money at a time specified." At page 625, he distinctly affirms the principles laid down in the cases cited above from 11 Paige, 635, & 2 Hill, 159, and also the case of *The Morris Canal and Banking Company* v. *Fisher* since reported in 1 Stockton's New Jersey Chancery Reports, 667. Of this last he says: "The question was whether the bonds of a railroad corporation, payable to bearer, issued for the purpose of raising money, with interest coupons annexed, also payable to bearer, were negotiable in such sense that a purchaser for value took them free from any equities between the company and the seller. The decision was in favor of the purchaser, and I fully concur in the doctrine."

And in *Hubbard* v. *The New York & Harlem Railroad Company*, 36 Barbour, 286, decided in Feburary last, where a railroad bond was payable to————or assigns, it was held it could be sued upon by any holder, and the court said: "There are numerous authorities holding that the bond of a corporation, payable to an individual or *bearer*, is a negotiable instrument."

A similar decision on a bond in blank has been made by the Supreme Court of Massachusetts, in *Chapin* v. *Vermont and Massachusetts Railroad Company*, 8 Gray, 575, and also by the Supreme Court of the United States in *White* v. *same company*, 21 Howard, 575, and Mr. Justice Nelson, delivering the opinion of the court, says, page 577: "Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day would be impaired. Within the last few years, large masses of them have gone into general circulation, and in which capitalists have invested their money, and it is not too much to say that a great share of the confidence they have acquired as a desirable security for investment, is attributable to this negotiable quality as well on account of the facility of passing from hand to hand, as the protection afforded to the *bona fide* holder."

In the commissioners of *Knox Co.*, v. *Aspinwall*, 21 Howard, 539, Mr. Justice Nelson, at the same term delivering the opinion of the court upheld the bonds of Knox county, and also a recovery on the coupons for interest, without producing the bonds to which they had been annexed. "A question," said he, p. 546, "was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been annexed. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form, and made for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each instalment of interest, and at the same time to furnish complete evidence of the payment of the interest." A mandamus was subsequently issued to enforce the payment of this judgment, 24 Howard, 376. The opinion that railroad bonds are negotiable securities, is re-asserted in *Zabriskie* v. *Cleveland, Columbus and Cincinnati Railroad Co.*, 23 Howard, 400.

It is only necessary to refer to the cases of *Amey* v. *Mayor, Alderman and citizens of Alleghaney City*, 24 Howard, 364; *Curtis* v. *County Butler*, id. 435, and *Wood* v. *Lawrence County*, 1 Black 386, and our own case of *Commonwealth* ex. rel *Burd's Executor* v. *Select and Common Councils of City of Pittsburgh*, decided at Pittsburgh on the 24th day of November last, 10 *Pittsburgh Legal Journal*, 171.

There is, however, one other case to which I will refer, because it was the case of a bond payable to bearer, issued by a municipa corporation, and involved questions relating to the law of this State, as well as that of Mississippi, was most thoroughly and exhaustingly argued, and very ably decided. I mean the case of *Craig* v. *The City of Vicksburgh*, 31 Mississippi Reports, 219, decided in April, 1856. The court say, p. 251: "It is worthy of observation, that the bond in this case is made by a corporation. It is in that form in which securities intended to circulate freely in the market are always drawn. It is for the payment of money —is payable indefinitely to the bearer, and is under the seal of the corporation, and it may not be improperly considered as a money security of higher dignity than the note or bond of a mere individual. From its nature and form it would come to the hands of the holder *as a representative of money*, and he might well conclude that it was put into the market for that purpose. These considerations appear to us to go far to make it in all respects analogous to the case of of the Prussian bond and to give great force and applicability to that case."

If this was true then, how much stronger is the case now, when in all our transactions we are dealing only with the representatives of money?

It is clear, then, upon reason and authority, that the *coupons* which form the subject matter of this suit, and the bonds to which they were attached having been regularly issued by the county of Beaver, or on the footing of negotiable paper, and pass from hand to hand by delivery as the representatives of money. They may circulate together or separately, and suits on the coupons are sustained entirely independently of the bonds to which they were originally annexed. It is therefore of very little consequence whether they are promissory notes, bills, drafts or checks, for they have same quality of negotiability as either of those instruments, and the holder sues upon them and recovers in his own name.

Upon a bond payable as these are, thirty years after date, in 1883, its great value as an investment depends upon the punctual payment of the semi-annual interest, evidenced by sixty coupons. The owner of a coupon, whether the holder of a bond or not expects payment of it on its presentment at the place designated in it, and if the argument of the plaintiff in error is correct, the individual or corporation issuing it may wholly refuse to meet their engagement, because, at the close of a long litigation, they can only be obliged to pay the face of the coupon. If this be the law, who would purchase such securities?

The objection to the claim of interest on the coupons after demand and refusal is, that it is usurious. Not so; it may amount to compound interest, but that is neither usurious nor illegal; 2 Parsons on Bills and Notes, p. 423; Kelly on Usury, p. 48, 49, and cases cited 75 Law Library. "As to *personal contracts*, it" (meaning compound interest,) says the latter writer, "may be matter of agreement or mercantile usage." In *Tarleton* v. *Backhouse*, *Cooper's Chan. Cases*, p. 231, where bonds for the amount of purchase-money were given, payable in instalments were composed of principal and interest, it was contended as the bonds themselves carried interest, this was interest upon interest and usury. But the Lord chancellor (Eldon) was of opinion "that as Backhouse might at the end of every year have brought an action, and have had judgment for the principal and interest then due on the bond, in equity the bonds could not be affected with usury, as the same might be considered as having been called in and the instalments paid." And he also

thought "that the defendant ought to pay the principal and interest due into court." The same result was arrived at where promissory notes were given for each instalment, including interest, in *Beete* v. *Bidgood*, 7 Barn & Cress. 453, although Lord Tenterden gave a more restricted reason for his decision.

In executors of *Pawling* v. *Administrators of Pawling*, 4 Yeates, 220, a bond was conditioned for the payment of £740 in seven years, with lawful interest yearly. By an agreement endorsed thereon, before the first year's interest fell due, the obligor agreed if any part of the interest should remain unpaid for the space of three months, to allow the obligee lawful interest for the same from the end of the three months until paid. It was held by the court that the agreement might be enforced, and that it was not usurious. Judge Smith said, p. 230; Upon the whole, as this is not a case of a mortgage, even supposing the law of Pennsylvania relative to mortgages were similar to the law of England, which cannot be admitted; as we find that in many instances interest is now allowed, where it was formerly held that it could not be recovered; as there is no rule of law, equity or justice, against the recovery, according to the contract is not for more than six per cent. per annum interest, to be paid after that interest becomes due, as there is not only nothing immoral in the contract, but as it was made with the purest good faith on both sides, and for the accommodation of Henery Pawling, without stipulating for a cent more than the law allows, I feel myself not only warranted, but compelled by the pure principles of law rightly understood and applied to the beneficial interest of mankind, to declare that the said covenant is not prohibited by law, but is good and valid." This opinion is called a very able one, by Judge Baldwin, in *Banbridge* v. *Wilcocks*, 1 Baldwin, p. 540, and the case is cited by Chancellor Walworth *Morry* v. *Bishop*, 5 Paige, p. 101 2 who, in stating the New York rule, that such an agreement cannot be enforced, although it does not render the agreement usurious, assigns a reason for it totally inapplicable to the present case, that is merely adopted as a rule of public policy to prevent an accumulation of compound interest in favour of negligent creditors who do not call for the payment of the interest as it falls due.

"Many cases," says he, "are found in the court of our sister states, which have sanctioned the practice of reserving interest, to be paid annually upon loans of the principal sum for a longer time; and in several of these cases, the lender has been permitted to recover interest upon interest from the time it became due. See *Pierce* v. *Rowe*, 1 N. Ham. Rep. 179; *Kennon* v. *Dickens*, Camp. & Nor. Rep. 357, *Greenleaf* v. *Kellogg*, 2 Mass. Rep. 563."

"And I agree," says the Chancellor, in a subsequent part of his opinion, p. 102, "with the judge of the Supreme Court if North Carolina, in the case of *Kennon* v. *Dickens*, before referred to, that when the payment of the interest at stated periods forms a part of the contract, and the papment of the principal sum is postponed to a distant period, upon the faith of the agreement for a regular and punctual discharge of the interest at the time agreed upon, equity and good conscience at least require that the debtor should fulfill his engagement, or render unto his creditor the nsual equivatent for the non payment of the periodical interest at the times agreed upon."

In a case four years later, *Wilcox* v. *Howland*, 23 Pickering, is, 167, Chief Justice Shaw says: "The result of the decisions on this subject seems to be, that a contract to pay compound interest p not usurious or void, that an agreement to pay interest annually or semi-annually is valid, and may be enforced by action; that a claim for interest on such interest as an equitable claim; but that the interest will not be allowed on interest from the time it fell due because it would savor of usury; and because the holder of the note, by failing to call for his interest when it became due, shall be deemed to have waived his right to have the interest converted into capital." I am perfectly aware, that although an action lies in Massachusetts for the interest, if payable annually, although the principal of the note is not due, yet that was decided in *Ferry* v. *Ferry*, 2 Cushing, 97, that "where there has been no payment, demand or adjustment"—"that in ascertaining the amount due on a note made payable with interest annually, simple interest is only to be computed" But in the same case it is also said, "this principle gives the creditor the benefit of compound interest, where payments from time to time have been made, or where, after the interess becomes due, he obtains security for it or resorts to an action to enforce payment of it."

It may be observed that New York has always had a very stringent usury law, (3 Revised Statutes New York 5 ed. page 72,) and that the rate of interest is seven per cent, and one not quite so penal exists in Massachusetts, where the legal rate of interest is six per cent (Revised Statutes of Massachusetts, 1860, p. 292,) The sixth section of chapter (53, id. p 293,) is in these words: "Bonds and other obligations under seal for the payment of money purporting to be payable to the bearer, or payable to order, issued by any corporation or joint stock company, shall be negotiable in the same manner, and to the same extent, as promissory notes." This provision is incorporated from St. 1852, c. 76 (8 Gray, 577.) Russell, in his sixth edition of Chitty, Jun., on Contracts, p. 612, speaking of the statutes modifying the former ones against usury remarks. "This enactment was originally intended to be in force only until the 1st of January, 1842, but it was continued by subsequent enactments until the 1st of January, 1856. Before that time, however, the 17th and 18th Vic. c. 60 (10th August, 1854,) was passed, and by that statute all existing laws against usury were repealed, but with a proviso that such repeal should not diminish or alter the liabilities of any person in respect of any act done previously to the passing of that act.

"The result of this has been, as to all future contracts, entirely to do away with the question of usury. But still inasmuch as by virtue of the above proviso, contracts made before the passing of the act, may still be objected to, on the ground of usury, it is necessary to state how the law on this subject stood before the passing of the act."

Our old act of 1 .23 was not for the time of its enactment a harsh one, although not suited to the views of a more commercial and business age. By an act of 26th July, 1842, sec. 11, where a railroad or canal company has borrowed money and given to the holder thereof a bond or other evidence of indebteness in a larger sum than the amount received, such transactions were not to be deemed usurious, which was explained by the fi .t section of the Act of 25th Febuary, 1856, (B. Purdon, 1182,) to mean that in all cases where any such company had issued or should thereafter issue any such bonds, &c., and has or should dispose of them at less than the par value, such transactions should not be deemed usurions.

Similar authority had been given to the Dinville Railroad Com. pany by the 13th section of the Act of 19th April, 1853, (P. L. p. 589) and by an act of 21st May, 1857, (Purd. 1236,) commission merchants were authorized in certain cases to pay and receive seven per cent. per annum, and finally, by an act of the 28th May, 1858, the act of 1723 was repealed, and the rate of interest established at six per cent, where no less rate was expressly agreed upon. Where a high rate is contracted for, the debtor is not obliged to pay the excess above the legal rate, but where he has paid the whole debt and interest, he cannot recover back the excess unless the action is commenced within six months after the date of such payment. Since the passage of this act, a railroad company has been authorized to issue bonds with coupons attached at an interest not exceeding seven per cent. (P. L. 1862, p. 560,) and a navigation company to issue bonds at a rate of interest not exceeding eight per cent. (id. p. 504.)

But it is certain, that in the United States generally, there has always been greater liberality in the allowance of interest than in England, growing out of fact that we were a young and vigorous nation, where money commanded a high rate of interest, and where the welfare of the community demanded that it should be breeding. In Pennsylvania, where a judgment is revived by *scire facias*, the amount of principal and interest then due constitutes a new principal, and the plaintiff has a right to charge interest on the aggregate amount of principal and interest due at the time of rendering judgment on each *scire facias*. In *Obermeyer* v. *Nichols*, 6 Binney, 159, it was held that rent carries interest from the time it is due, and in *Buck* v. *Fisher*, 4 Wharton, 158-9, it was conceded that interest was payable on ground rent for the several times at which it fell due; and I know that this course is universally followed in Philadelphia in actions for arrears of ground rent, and has never been disputed. The same doctrine was enunciated three years before, by Judge Baldwin, in the case of *Newman* v. *Keffer*, in which I was engaged as counsel for unsuccessful party. In his charge to the jury, Judge Baldwin said, (9 Cassey, 499.) "In *Obermeyer* v. *Nichols*, the Supreme Court held that interest was payable on rent, on the same principal as other liquidated demands

and was recoverable in an action of covenant as matter of law, unless, under special circumstances As to ground rent, they recognize the principle, that when there was a clause of re-entry, interest ought to be paid, because equity would relieve only on payment of the rent and interest, and consider them on the same ground as other rents. Purchase-money, from the time it becomes due, bears interest, though no demand is made; Binney, 435; 5 Rawle, 262-3. So an action of covenant lies for a ground rent as it is due, without a demand; 3 Penn'a R 464-5. On a recognizance in the Orphans' Court for securing a widow the interest on her third part of the money at which an estate is valued, the act of 1794 makes it recoverable as rent—the Supreme Court hold the widow's interest to be in the character of annuity, of interest or money, and a rent charge, and that if the interest be not punctually paid, the widow shall recover interest from the time it became due, 2 Watts, 203. There cannot be a stronger case, for as a widow's annuity partakes of the character of a rent charge, a rent charge partakes of the character of the annuity, and it is so considered by the court, who put it on the same footing as to bearing interest. The reason is the same in both cases, the annuity is in the nature of maintenance income and bears interest if not paid punctually, because it is in lieu of the widow's share of the profits of the land, and all that is reserved to the widow; the rule is the same as to ground rent, as it is the same nature. But a court never inquires into the fact whether the annuity of the rent is neccessary for the support of the widow or the ground landlord, the rule is the same whether they are rich or poor, being founded in the nature of the debt, and the manifest justice of the interest being paid, as a compensation for witholding payment; 2 Watts, 203. See *Snyder* v. *Snyder*, 3 Watts & S 43. In *Addams* v. *Heffernan*, 9 Watts, 529, it was held that when a sum of money is set apart and charged upon land, the interest of which is to be paid annually, if it be not punctually paid the annuiant is entitled to recover interest upon it annually from time it was payable. The same doctrine as to interest on arrears, of ground rent is laid down in *M'Quesney* v. *Hester*, 9 Casey, 435.

Ground rents, which are in a great measure peculiar to Pennsylvania, and commenced in the early settlement of the Province, in the city and county of Philadelphia, and assisted greatly in building up our metropolis, have long been favorite investments for prudent and cautious persons, who desired an unquestionable security in the land, accompained by a punctual payment of the rent, or interest of the sum invested in them. They are no longer perpetual, but may be extinguished by the owner of the land on the payment of the principal sum named in the ground rent deed. Our Orphans' Courts are authorized to let the vacant land of minors on ground rent, and under the act of 1853, the Court of Common Pleas have authority to decree the leasing of real estate on ground rent, and every power to sell in fee simple real estate created by deed or will, is taken to confer an authority to sell and convey, reserving a ground rent or rents in fee.

It is clear, then, that there is nothing in the law of Pennsylvania, proceeding from public policy, prohibiting interest upon these coupons in this case. These coupons, which are perhaps copied from coupons of interest warrants attached to English railway debentures (4 Rail and Canal Cases, 709,) are negotiable instruments, which may by sued on separately by the holder without the bonds. as soon as they become due, and from their form there can be no reason why interest should not be recovered upon them in the same manner as upon arrears of ground rent or of annuity. The principal cannot be sued for until 1883, and to recover this the suit would be upon the bond. To secure the payment of the interest punctually, coupons are attached, the same effect as premissory notes; and if so there cannot be any defence to the payment of interest on them as a compensation for the default of the debtors?—Bonds like these have been declared by legislature proper investments by trustees and executors, and could it be supposed that the payment of the interest could be indefinitely delayed without any pecuniary punishment? If, therefore, upon a proper demand being made for payment, interest could be recovered by suit, equity and good conscience will give the interest from refusal to pay. This does not interfere with any case decided by this court from *Sparks* v. *Garrigues*, (1 Binney, 152,) to the present time.

Reason, common sense, and the universal understanding in such a case, leads to this result; but are there any direct authorities upon the point?

The case *Hollingsworth* v. *The City of Detroit*, 3 M'Lean, 472, is full, clear and distinct, in favour of the payment of interest or the coupons. Judge M'Lean reserved the question for the purpose of taking the advice of the judges of the Supreme Court. They, it is understood, unnanimously concurred with him in opinion (17 Conn. p. 246.) This decision has been followed in all cases in the western district by Mr. Justice Grier, and it has not been thought expedient by the defendants to take the opinion of the Supreme Court of the United States in regard to this question.

On the other hand, there is the case of *Rose* v. *The City of Bridgeport*, 17 Conn. p. 242, decided in 1845, where it was held that interest could not be recovered on the coupons, for interest attached originally to bonds issued by the city of Bridgeport to the Housatonic Railroad Company, to pay their subscriptions to the stock of that company. The court held—1. That their obligation to pay either principal or interest arose from the bond. 2. That the action brought was essentially an action on the bond, and with neither of those propositions do the later authorities agree. 3. That the plaintiff was not to recover interest on the sum specified on the coupon after it became due, and for authority to support this proposition, the court refer to the of *Camp* v. *Bates*, 11 Conn. R. 487, decided in July, 136; (see 26 Connecticut Rep. page 121.) —Upon examining the very learned opinion of Judge Huntington in that case, it is clear that its general spirit would authorize the conclusion at which we have arrived. We would refer to pages 497, 498, 500 and 503, more particularly, in illustration of what we have said, but the whole opinion is deserving of an attentive perusal. We cannot help thinking that the peculiar hardship of the case of the city of Bridgport had some influence on the minds of the court. In *The City of Bridgport* v. *The Housatonic Railroad Company*, 15 Conn. 475, they had affirmed the validity of the bonds issued by that city to pay what was to it a very onerous and heavy subscription to the stock of that railroad; and in *Beardsley* v. *Smith*, 16 Con. 368, they had decided that an execution issued on the judgment obtained by the railroad company against the city in the former case might be levied on and satisfied out of the private property of an individual member of the corporation.

Nearly the whole value of a thirty years bond of a corporation depends upon the punctual payment of the interest, and public policy requires that it should be enforced by obliging them, after demand and refusal, to compensate their creditors for their default by paying interest on the amount due. Where there is a total denial of all obligation to pay either principal or interest, it may be considered that a demand would be unnecessary.

Judgment affirmed. *Luzerne Legal Observer.*

GENERAL CORRESPONDENCE.

Summary Procedure before Magistrates.—Appeals.

To the Editors of the Law Journal.

Gentlemen,—In your December number you touch upon a crying evil—the repeated failure of justice caused by defects in the formal convictions drawn up by magistrates under their summary jurisdiction. I quite agree with your remark, that "it is a great evil when offenders are allowed to escape by reason of informality in the proceedings to convict them, and the constant recurrence of the evil is calculated to weaken the force, if not of all laws, at least of those for the prevention and punishment of small crimes and misdemeanors," and shall be glad if any suggestion of mine is of service in correcting the present defects of the law. Your soliciting suggestions from "persons of experience," however, requires me, in the first place, to disavow any pretension to a right of being heard as one of such persons. My experience in appeals from magistrates' convictions has not been extensive, but sufficient to fully appreciate your article, as well as to feel that to be of counsel for the

appellants in such cases is often one of the *dirtiest* (if I may be allowed the expression) portions of a barrister's legitimate duties. In the large majority of cases, counsel must feel they are using their knowledge of the law to protect "notorious offenders, wilful Sabbath-breakers, and violators of the wholesome restrictions on inn-keepers;" yet, so far as I understand the rules of the profession, they are not at liberty to refuse a retainer from such persons for such a purpose, if the law is clearly on their side. The evil is certainly in the *law* itself, not in those who take advantage of the law, or in those who aid them in doing so. An alteration in the law, then, is the proper remedy. You suggest three methods of amendment—1. A uniform mode of procedure in all cases of summary convictions, and giving a full set of forms of convictions. 2. To transfer the jurisdiction in the cases mentioned to the Division Court. 3. The appointment of a barrister of five years standing, as clerk in each petty sessional division, at a fixed salary. Any and all of these methods would no doubt lessen the evil complained of, yet they have their objections. Any set of forms that could be drawn up would not, in all probability, be sufficient to meet the variety of cases in which magistrates now have summary jurisdiction, and even if it was, I need not tell you that formal defects in the convictions would still not be unknown to the courts! Again, the Division Courts already have sufficient business to get through without giving them a large portion of the present duties of magistrates. Besides, this remedy would in most cases inconvenience the public, by compelling the parties and their witnesses to go further for redress than at present. And, lastly, the appointment of a barrister of five years standing as clerk to the petty sessions, would increase expenses and by no means insure a certainty of the convictions being confirmed on appeal. They are difficult documents to draw, and it would be easy to mention cases where they have been quashed for defects in form, although drawn up by counsel of more than five years experience. I remember one case in which the conviction was drawn up by one lawyer and passed under the supervision of two others, and yet was quashed for a defect in form. Now, a remedy to be effective should be certain in all cases, and if possible inexpensive; and if, at the same time, free from inconvenience to any one, so much the better. The amendment in the law, then, that I would suggest as coming nearer to these desiderata than any other I know of, is to allow *amendments after the appeals are lodged*. If the formal convictions could be amended as fast as the counsel for appellants suggested defects, we should hear little about appeals for the future. In ninety-nine cases of appeal out of every hundred, the appellants rely solely upon picking holes in the formal convictions, and if these holes could be stopped as fast as discovered, I am satisfied that appeals would be very rare. I can see no objection to allowing such amendments, for the object of the law in requiring so much technicality to be observed in drawing up a conviction, is not in order to try the magistrate's legal knowledge or to place difficulties in his way, but to insure the record of his proceeding, containing enough to show his jurisdiction over the case and under the circumstances in evidence before him, and to show with sufficient certainty the particular offence, with time, place, &c., so as to enable the defendant to make use of it if brought up for the same offence a second time. Allowing amendments as suggested would improve the record for these purposes

Every man has his hobby on most subjects, and this perhaps is mine with regard to convictions, and may prevent my seeing difficulties in the way of amendments which others will see; but I have made "my suggestion," and if worthy of publication it is at your disposal. It does not deal with any but technical defects in the formal convictions. These alone I consider have caused the evil complained of, and if a remedy is found for them, the law regulating convictions might in other respects be left unaltered. Yours, &c., W. B.

Barrie, Dec. 28th, 1863.

[Our thanks are due to our correspondent for his suggestion. Want of space, however, prevents any further observations from us on this subject at present.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—I notice in your last number of the "Law Journal" your very appropriate remarks on the importance of some alteration being needed in the practice of "summary convictions b re magistrates."

As you truly say, notorious offenders often come off "scot free," through some technical informality in the proceedings. This fact is becoming so notorious, that well-disposed parties are not inclined to lay complaints against the violators of the law, knowing that the accused, if convicted, will appeal, if for no other purpose than to compel the complainant to spend time and money for the purpose of appearing against them.

Some conscientious poor man lays a complaint against a notorious Sabbath-breaker, who is duly convicted perhaps without the slightest palliating cause. The convicted appeals. The complainant must employ counsel, take his witnesses to the sessions, and lose two or three days—or not appear; and in case the latter course is adopted, the conviction is quashed, and perhaps with costs.

The fact is, numbers of crimes go unpunished from this very reason. Still the press is crying out that "crime is on the increase." And why should it not be, where it is *virtually encouraged?*

I will give a case that occurred at our last sessions in this county. A complaint was laid before a magistrate against a tavern-kpeper for keeping a gambling-house. The tavern-keeper was duly summoned, and several witnesses were examined on both sides. The guilt of the tavern-keeper was clearly established to the satisfaction of the bench of magistrates, who fined the accused in a moderate sum, who gave notice to the complainant of his appeal, but did not enter into bonds, as the statute enjoins. The respondent, being a poor labouring boy, took no heed of his notice of appeal, and did not appear at the sessions. The case was called on, and, no one appearing, the conviction was quashed.

Query, could the appeal be legally entertained, when no bonds were entered into by the appellant? And if no appeal lay, would not the convicting justice be held harmless by enforcing the conviction by distress warrant?

His Honor the County Judge was not acting as chairman at the time, being ill that day. or no doubt he would have called for the necessary papers precedent to the appeal, and, not finding bonds entered into, would not have entertained the appeal. Your opinion will oblige

A JUSTICE OF THE PEACE.

Dec. 28, 1863.

P.S.—The conviction was made pursuant to a by-law of the County Council for the suppression of vice, &c.

[We are not at all satisfied that our statute regulating appeals from summary convictions requires a recognizance in *every* case to be entered into by the appellant.

The statute seems to provide for an appeal under three different states of circumstances.

1. In case a person, complainant or defendant, thinks himself aggrieved by an order, decision or conviction, and within four days after conviction, &c., gives to the other party, &c., a notice in writing of his intention to appeal, &c.

2. *And* in case of "an appellant in custody," if he either remains in custody or enters into a recognizance with two sufficient sureties, &c.

3. *Or*, in case "the appellant be on bail," if he enters into such recognizance as aforesaid,—

Such appellant may appeal, &c. (Con. Stat. U.C. cap. 114.)

The recognizance, therefore, would appear to be required only in case of an appellant in custody or on bail. If the appellant be neither in custody nor on bail, no recognizance seems to be required. We know of nothing to prevent the party convicted paying the fine and costs, reserving his right of appeal, in which case no recognizance appears to be necessary (*In re Mason and Sessions of York and Peel*, 13 U. C. C. P. 159).

Of course if a Court of Quarter Sessions, without having jurisdiction over an appeal, quash a conviction, the order quashing the conviction would be a nullity, and the conviction, notwithstanding, open to be enforced in the ordinary manner.—EDS. L. J.]

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—You will much oblige by giving me your opinion upon a question about which there is much diversity of opinion among the profession in this city. The question is this, if the last day for service of notice of appeal from a magistrate's conviction fall on a Sunday, can notice of appeal be served on that day? If not, would service on Monday be sufficient? Yours faithfully,

A BARRISTER.

Hamilton, December 11, 1863.

[Paley, in his most useful work on Summary Convictions, doubts the sufficiency of service of notice of appeal on Sunday, but at the same time argues that the service of such a paper on a Sunday does not appear to be prevented by any statute. (Paley on Convictions, 4th edit. 312.) He refers to notices which may be legally served on a Sunday, and does not attempt to distinguish between a notice of appeal and the notice which he mentions. (*Ib.*) But the question appears to have been adjudicated upon in a case to which Paley makes no reference. (*The Queen* v. *Justices of Middlesex*, 3 New Sess. Cases, 152.) There it was held that notice of appeal from a magistrate's conviction is in the nature of process, and cannot be legally served on a Sunday. (*Ib.*) And it is clearly decided that service on Monday, where Sunday is the last of the four days for service of notice of appeal, is not sufficient. (*Reg.* v. *Justices of Middlesex*, 2 Dowl. N.S. 719; *Aspsell* v. *Justices of Lancashire*, 16 Jur. 1067, n.; *Peacock* v. *The Queen*, 27 L. J. C. P. 224; *Pennell* v. *Churchwardens of Uxbridge*, 5 L. T. N. S. 685.)—EDS. L. J.]

Law of insolvency—Favored creditors—Judgments by default.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Since the enactment of our Provincial Statute respecting preferential assignments, the apparent object of that law is frequently defeated by a proceeding upon the legality of which I would ask your opinion.

The statute seems to have in view the preventing of any one creditor from obtaining the proceeds of all the debtor's effects, to the exclusion of others; but should the debtor be disposed to favour a particular creditor, he takes one or other of these courses:

1. If no creditors have sued, the favoured creditor institutes a suit, the proceedings are carried on quietly, and judgment is taken, thus obtaining for such creditor a priority; or

2. If another creditor has sued, or if several have done so, appearence is entered and defence made to all but the suit of the favoured creditor, who is allowed to take a judgment by default, and thus becomes in effect a preferential creditor.

Be pleased to state whether or no a question as to the validity of such judgments has ever arisen the courts, and, if so, mention the case or cases

If there are no cases reported, an expression of your own views will oblige.

Your obedient servant,

Prescott, Dec. 22, 1863. L. E.

[We refer our correspondent to *Young* v. *Christie*, 7 Grant, 312, where he will find the question which he raises discussed and decided. The law as to the estates of insolvent debtors is any thing but satisfactory. It is so imperfect as to be liable to be defeated by endless subterfuges, and yet the Legislature does not appear to be equal to the task of amending it.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. HERMANN v. SENSECHAL.

Notice of action—False imprisonment—24 & 25 Vict. ch. 99, sec. 33—Bona fides—Reasonable belief.

In an action for false imprisonment, the defendant is entitled to notice of action, under sect. 33 of the 24 & 25 Vict. ch. 99, if he honestly believed in the guilt of the plaintiff, and also believed that he (the defendant) was exercising a legal power; and this is so, although it be also expressly found by the jury, that the defendant did not reasonably so believe, the latter finding being in such case immaterial.

Q. B. REECE v. CHAFFERS.

Practice—Compulsory reference—Action on attorney's bill—Matter of account—Defence on ground of negligence or special agreement.

In an action by one attorney against another to recover the amount of his bill for business done as an agent, there being a dispute as to items, and also a defence set up on the ground of negligence, and a special agreement that the business should be done for agency charges, and a judge having made an order at Chambers to refer the matter to the arbitration of the Master, under the compulsory powers of the Common Law Procedure Act, this Court refused to disturb the order, the Master being the proper tribunal in such a case; and it not having been made to appear that the dispute as to items was so entirely distinct from the other matter of defence, that the latter could well and conveniently be tried by a jury.

Q. B. ASHPITEL, EXECUTOR OF JAMES PETO, v. BRYAN

Bill of Exchange—Drawing and indorsing in name of dead or non-existing person—Declaration—Traverse of indorsement—Defence—Consideration—Delivery of goods belonging to intestate—Taking out administration.

Goods, the property of an intestate, were delivered to the defendant by a brother of the deceased, who assumed to have possession of them; and the defendant accepted a bill for the price, drawn in his presence and with his assent and at the desire of the brother, in the name of the deceased, and at the same time indorsed in that name to the brother and delivered to him. The brother's executor sued the defendant on the bill which was described in the declaration, not as drawn by the brother in the name of the deceased, but as drawn and indorsed by the deceased, and the defendant denied the indorsement so alleged.

Held, that he could not be allowed to deny it; and that even although the plaintiff had joined issue on the traverse, the plaintiff was entitled to the verdict thereon.

Held also, there was good consideration, and that the plaintiff was entitled to recover.

Q. B. GORTON v. HALL.

Practice—Error—Executors—Action against—Death before verdict—Entry of judgment—Alterations of judgment by Court of Error—Effect of as to time—Entry nunc pro tunc—Jurisdiction of court below to alter its judgment after judgment in Error.

An action having been brought against one of two executors, he died after the Assizes opened, and before trial. The verdict was for the plaintiff, and the judgment was entered (*de bonis propriis*) within two terms afterwards. But error was brought by the defendant's executor, and the Court of Exchequer Chamber altered the judgment by entering it *de bonis testatoris et si non, &c.*, costs, instead of a judgment *de bonis propriis*. The plaintiff, as it now appeared on the record that the original defendant had died, and the final judgment was beyond the two terms after verdict, applied to this Court to amend its own judgment in accordance with that of the Court of Error, and to allow him to abandon the proceedings in Error on payment of all costs. The Court, doubting whether it had power to grant such a rule, and, also, whether it was necessary, refused it, as the position of the parties had altered.

Q. B. LARCHIN v. ELLIS.

Arbitration—Award—Setting aside—Matter in difference not considered—Application to arbitrator for time to obtain and examine a witness—Materiality of witness' evidence—Exercise of arbitrator's discretion.

When an application has been made to arbitrators to afford time to obtain and examine a witness who is absent, and they have honestly (even although erroneously) exercised their discretion as to the materiality of his evidence, and have refused the postponement applied for, their award will not be set aside on that ground; and, *semble*, that a case of legal misconduct must be made out against the arbitrators to induce the Court to take that course; or that, at all events, there must be clear proof that substantial injustice has been suffered by the party applying.

Q. B. DAVIS v. BOWEN.

Attorney and client—Country client and London agent—Death of country client—Revocation of agent's authority.

A country attorney, being retained to conduct an action (on behalf of an infant) in which he obtained a verdict, employed, in the latter stages of it, a London attorney as his agent, and died before judgment was signed. The London attorney wrote to the client in the country, stating that he had acted as the agent, and proposing to continue so to do; and, receiving no answer, taxed costs, and signed final judgment without the knowledge of the client. Meanwhile the client, without any notice either to him or to the defendant, had employed another attorney. The Court refused a rule to set aside the taxation, the plaintiff's remedy, if any, being against the attorney.

Q. B. COLE v. THE HULL DOCK COMPANY.

Practice—Venue—Cause of Action—Expense.

Where the cause of action arose in the country, and the venue had been changed from London thither.

Held, that it was no ground for bringing it back to London that as sittings there would be far more frequent than the assizes, it would be more convenient for the plaintiff to try there than in the country, and the expense would be not much greater.

Q. B. ALLEN v. CLARK, EXECUTRIX.

Attorney and client—Liability of Attorney for negligence—Retainer for purchaser to complete a purchase—Duty of Attorney to make enquiry into title of seller.

An attorney had been employed by the plaintiff to complete a purchase of a leasehold property which the plaintiff had made at an auction, on conditions which stipulated that he should take "an under lease," and not demand an abstract of vendor's title nor enquire into the title of the "lessor." He made no enquiries, but simply got a pretended lease executed by the seller, who had sold fraudulently, without any title whatever; the lease itself not even reciting any title; and the pretended seller giving actual possession, and not having any deed or document in his possession to adduce as any evidence of title, had he been asked for such evidence; and the purchaser was evicted by the real owner.

Held, that there was evidence of negligence on the part of the attorney; and

Held also, that the proper measure of damage was the sum the plaintiff had to pay to obtain a title with interest and without any deduction for rent, as he was liable over to the true owner for mesne profits during the time he had occupied as owner.

CHANCERY.

L. C. GLEAVES v. PAINE.

Married woman—Mortgage—Surety for husband—Bankruptcy—Equity to a settlement.

A married woman being seized jointly with her husband, as of real estate, of which she was seized before her marriage, but of which no settlement had been made, joined with him in a mortgage in fee of the said estate, in order to secure her husband's debt, subject to a proviso for redemption by way of reconveyance to her use. The husband became bankrupt and the wife filed a bill by her next friend, against the assignees, alleging that the mortgaged property was her only means of support, and praying that it might be exonerated from the charge out of the husband's estate in bankruptcy, and that her husband's interest in the mortgaged property, or the equity of redemption thereof, might be settled on her and her children.

The assignees waiving their right to redeem, the wife was declared to be entitled to redeem the mortgage, and with her husband's consent, a settlement for her and her children was directed; but

Semble, a married woman would not be entitled to an equity to a settlement of such an estate, as against an adverse party.

V. C. S. ENO v. TATAM.

Will—Administration—Locke Kings Act—17 and 18 Vic. c. 113.

Gift of personal estate "subject to the payment of my debts, funeral and testamentary expenses."

Held, sufficient indication of testator's intention to exonerate his reality from a mortgage debt.

L. C. WETHERELL v. WETHERELL.

Will — Construction — Vested interests — Great grand children—Remoteness.

A testator bequeathed the annual interest only of the residue of his property, of whatever kind, in as many equal parts as might be children of W, share and share alike as each of the said children came of age. And in case any one of the said children should die without any children, then and in that case, his or her share of the said annual interest, should devolve to the surviving children, share and share alike. And so on successively, until the whole amount of the said interest of the said residue should come into the hands of the grandchildren and great grandchildren of W.

Held, that the children of W. took vested life interests subject to the gift over to the survivors, in case of the death of any of them without children; and that the gift to the grandchildren and great grandchildren was not void for remoteness, but was a valid and effectual gift of the corpus.

V. C. S. GIPPS v. DANIEL.

Purchase from client—Pressure—Undervalue—Temporary depreciation.

A purchase of mortgaged property by the solicitor of the mortgagor, being also the solicitor of the mortgagee at a time of temporary depreciation of the property, without any instructions from the mortgagee, or any purpose of apparent benefit to him can scarcely be a valid transaction.

Where a purchase by a solicitor from his client is defended on the ground of the intervention of other professional assistance, it must be shown that the new adviser had a proper opportunity of discharging his duty. If it appears that the purchaser from his late client is aware, or takes any advantage, of a neglect of duty on the part of the new adviser, but especially if he withholds or suppresses any information of importance, the transaction is vitiated.

L. J. BENTLEY v. MACKAY.

Deed—Rectification—Lapse of time.

Where a deed of family arrangement has been acted upon for thirteen years, and no fraud is imputed, the Court will not set aside or alter such deed on the mere allegation by some of the parties to it that its provisions did not carry out their intentions.

V. C. R. BANKS v. BRAITHWAITE.

Will—Construction—Gift of income of fund—Annuity, perpetual or for life—Cesser on death or alienation.

A testator gave his residuary personal estate to trustees, upon trust, to invest £10,000 in consols, and to retain so much thereof as would realize the clear yearly income of £150, and to pay the dividends to H. until he should become a bankrupt, or his interest should by assignment, charge, or any other means whatsoever, become vested in any other person, in which case the trust for his benefit was to cease; and, subject to the aforesaid trust, the sum of £10,000 was to become part of the residue. H. died without becoming bankrupt or assigning his interest.

Held, that the gift of income to H. was not perpetual, but ceased with his life.

L. C. GILBERT v. LEWIS.

Demurrer to part of bill—Suit against bankrupt—Solicitor—Fraud—Parties—Devise to A for her sole use and benefit.

On a demurrer extending to part only of a bill, a defence founded on the plaintiff's incapacity to sue, cannot be raised. A bankrupt solicitor is not a necessary party to a suit for setting aside a deed alleged to have been fradulently obtained by him for his own benefit before his bankruptcy.

A demurrer by a bankrupt solliciter to a part only of a bill, filed in such a suit against him and his assignees, alleging fraud on his part, without sufficiently stating in what it consisted, and seeking discovery from him, merely as incidental to the relief prayed, allowed.

Semble, a devise to a testator's widow, "for her sole use and benefit," without the intervention of trustees, does not give her a separate estate.

M. R. STEEL v. COBB.

Practice—Incapacity of defendant from age and illness—Appointment of guardian.

When a defendant to a suit, not required to put in an answer, was a person of great age, and had been afflicted with a paralytic stroke, and was incapable of giving a continuous attention to business, but whose health was not absolutely destroyed, the court declined to appoint a guardian to act for him in the suit; but the Court insinuated that if, in the course of the cause, it became necessary to obtain his consent to an arrangement or compromise, it might be necessary to appoint a guardian.

L. C. FARRANT v. BLANCHFORD.

Trustee—Breach of trust—Acquiescence by cestui que trust—Release.

A trustee, who had committed a breach of trust in allowing his co-trustee (the father of the *cestui que trust*) to deal with the trust fund, received from the *cestui que trust* a memorandum releasing him from all liability in respect of the breach of trust, which release was given at the father's request. After his father's death, and ten years after attaining his majority, he filed a bill to make the co-trustee liable in respect of the breach of trust.

Held, that the claim was barred by the acquiescence and release of the *cestui que trust*, and that the release was, under the circumstances, a valid discharge.

M. R. EDWARDS v. HARVEY.

Practice—Petition—Fund not dealt with for a long period—Payment to legal personal representative—Presence of persons beneficially entitled.

When a fund in court has not been dealt with for many years, the court will not order it to be paid out to the legal personal representatives of the claimants, but requires the persons beneficially interested in it to be brought before the court.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

DONALD McLENNAN, of Guelph, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada (Gazetted Dec. 12, 1863.)

JOHN H. DUMBLE, of Cobourg, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Dec. 26, 1863.)

CHARLES H. MORGAN, of Stratford, Esquire, to be a Notary Public in Upper Canada. (Gazetted Dec. 26, 1863.)

CORONERS.

ALEXANDER STEWART, of the Village of Heenansville, Esquire, M.D., Associate Coroner, County of Simcoe. (Gazetted Dec. 12, 1863.)

JOHN BURTCH, of the Village of Brucefield, Esquire, M.D., Associate Coroner United Counties of Huron and Bruce. (Gazetted Dec. 12, 1863.)

JOHN D KELLOCK, of Perth, Esquire, M.D., Associate Coroner, Associate Coroner, United Counties of Lanark and Renfrew. (Gazetted Dec. 26, 1863.)

SOLOMON W. DAVISON, of the Village of Newcastle, Esquire, M.D., Associate Coroner, United Counties of Northumberland and Durham. (Gazetted Dec. 26, 1863.)

JOHN KELLY, of Sault Sainte Marie, Esquire, M.D., Associate Coroner, Judicial District of Algoma. (Gazetted Dec. 26, 1863.)

TO CORRESPONDENTS.

"B. B."—Under "Division Courts."

"W B"—"A JUSTICE OF THE PEACE"—"A BARRISTER"—"L. E."—Under "General Correspondence."