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THE

UPPER CANADA LAW JOURNAL

AND

LOCAL COURTS' GAZETTE;

FROM JANUARY TO DECEMBER, 1857.

VOLUME III.

EDITED BY
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BARRISTERS-AT-LAW.

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OF THE

CASES REPORTED AND CITED IN THIS VOLUME.

DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—"A Clerk" writes to us as follows:

"I am greatly troubled about the payment of witnesses; where there are several in a case, it gives much additional trouble, as I take a receipt when paying each: and it happens sometimes that the plaintiff gives me no information about his witnesses, so that I cannot put their fees in the costs, and then when they come to get their pay, and find none for them, it is nothing but grumble, grumble. How had I best act? and say, can I make any deduction for my trouble in opening an account with each witness?"

The writer of the above, and many other Division Court Clerks, as we have reason to believe, have entirely mistaken the scope of their duties respecting witness fees. All the trouble "A Clerk" so pathetically refers to will be saved by an adherence to the prescribed practice.

In the first place, the Clerk has officially nothing whatever to do with the payment of the witnesses in the cause. The party on whose behalf they are summoned, pays them, and the expenses of witnesses are taxed and allowed as disbursements in the cause, and form part of the costs belonging to the plaintiff or successful party, and are payable, when collected, only to him. It is not unusual, we believe, for such party to authorise the Clerk to pay his witnesses due bills they hold for their fees, but if the Clerk undertakes to do so, it is a purely voluntary act on his part, and the practice is very objectionable.

The only safe course for the Clerk is to adhere strictly to the 48th Rule, which requires him, *before allowing disbursements to witnesses, to satisfy himself that the witnesses attended, and that the claim for fee is just.* In other words he must be satisfied that the witnesses have been paid: at pages 61 and 81, Volume I. of this Journal, the mode of taxation is fully entered upon, and forms given for affidavits of disbursements. A witness may refuse to attend, unless his expenses are tendered to him when served with the summons, or he may in Court refuse to be sworn until his expenses are paid: if he allows both occasions to slip without obtaining payment, he must look for payment to the party who caused him to be summoned, and not to the Clerk: and if that party will not pay him, he may sue him for the amount, unless he chooses to take it out in "grumbling."

T. B. asks if "a party may, under Rule 14, be described by a nickname "Yellow Jim."

We think he may, provided the plaintiff is unacquainted with his surname, and on enquiry is not able to learn it: and provided also, that "Yellow Jim" is the name by which he is generally known. The plaintiff might otherwise be in danger of losing his debt. At the same time it should be made quite clear to the judge, by proof, that the individual went by the "nickname" in question; that the plaintiff had used due diligence to discover his proper name, and that "Yellow Jim" was used of necessity and not in derision. An abuse of the privilege given by the 14th Rule would, no doubt, induce the Judge to deprive the plaintiff of costs.

T. L. is informed that we have yet some copies of Volume I. of this Journal, with Index, at 30s., bound.

It may be sent by mail, free of postage.

BAILIFFS.—T. B. asks the consequence of omitting to endorse the "amount of mileage," on warrant of commitment at the time he delivers it with the prisoner to the gaoler, and if he can afterwards endorse the "travel."

If the prisoner has been discharged by payment of the debt and costs the Bailiff loses the mileage; but if at any before the discharge the amount of mileage be endorsed, it is demandable with the debt and *costs*, before the party can obtain his release by payment.

SUITORS.

Goods bargained and sold.—In transactions relating to the sale of goods, it sometimes happens that there is no actual delivery of the goods. In order to support an action for goods bargained and sold the plaintiff must prove such a contract of sale as was sufficient in law to vest in the defendant the property in the goods, and confer on him a right to maintain an action for them even against the plaintiff himself upon tendering the specific price agreed on. If the sale be within the meaning of the 17th section of what is called the Statute of Frauds and of the price of £10 sterling or upwards the requisites of that statute must be proved.

The substance of the 17th section is shortly as follows:—No contract for the sale of any goods, wares, or merchandize, for the price of £10 sterling, *shall be allowed to be good*, except the buyer shall accept part of the goods so sold and actuallly receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract or their agents thereto lawfully authorized.

As we are speaking of goods bargained and sold it is not here necessary to notice what is a sufficient acceptance and receipt to satisfy the statute. But as the section alluded to is one of importance, and parties are constantly getting into difficulties by failing to observe its requirements, we will consider in detail—*The price—Earnest or part payment—*

Note or memorandum in writing of the bargain—The making and signing by parties—Signature by agents.

Of the price of £10 sterling:

The £10 sterling is equivalent to £12 10s. currency; if the price of the goods is under that sum, the statute does not apply. If several articles be bought at a shop at the same time, but at different prices, each article being under £10, but amounting altogether to say £70, it would be held to be one contract, and within the meaning of the statute.

(TO BE CONTINUED.)

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

(*For the Law Journal.*—BY V.)

CONTINUED FROM PAGE 183, VOL. II.

Levying Execution on the Goods of the Defendant.

(CONTINUED.)

If the goods, intended to be seized, be all on the same premises, seizing part in the name of the whole will be a good seizure of the whole. The Bailiff can afterwards in making the inventory, if the property on the premises be more than enough to cover the execution, select such goods as will be sufficient to satisfy the debt and costs, including his own fees.

What has been said so far respecting a seizure, supposes the defendant is a consenting party, or at least not actively opposing the Bailiff in levying execution. But this will not always be the case; on the contrary, officers too often meet with great difficulty and annoyance in the performance of this most unpleasant duty. The ordinary methods resorted to are by secreting or removing the goods, or by defendant's keeping the house door locked or fastened. An actual assault to prevent an officer from executing his duty, as well as the rescue of goods seized will hereafter be noticed. Nothing need be said respecting the removal or concealment of goods, except that the Bailiff is bound to use his utmost effort to find them out. Barring the outer doors against an officer needs some brief remarks by way of information and caution.

If the Bailiff finds that the outer doors of the defendant's house are fastened, so as to prevent his entering the house to seize the defendant's goods, he should get assistance and watch quietly for a reasonable time till the doors are opened, when he can make good a legal entrance, for the outer doors of the defendant's dwelling-house cannot be broken open, and the obstacle can only be overcome by a little patience, management and vigilance on the part of the Bailiff.[1]

As in the case of a Sheriff the Bailiff may enter the house of the defendant, when the outer door is open, to seize the defendant's goods, and this though there be no goods there, if there is reasonable ground for suspecting that they are there. On an execution against the goods of an intestate in the hands of the administratrix and her husband, the Bailiff may enter the house of the husband to search for the goods of the intestate, though none be found therein.

It seems that goods may be taken through the window of a house if open. *But the Bailiff cannot legally break open any doors or windows* of a defendant's dwelling under order to execute a *Fieri Facias*. Yet if he succeeds in getting an entrance into the house, he may break open any inner door or the door of a closet or cupboard, or the lock of a bureau, chest, desk, drawer, &c.; but it will be his duty first to ask the parties in the house to open them, and if they refuse, he may then use force to accomplish his object, doing as little damage as possible. The Bailiff should in all cases take that course which involves the least force or violence.

The protection extends only to the parties' dwelling-house, or buildings actually attached to it—therefore if necessary the outer door of a barn, stable, or outhouse, may be broken open even without a previous demand and refusal of admittance; though, as before mentioned, no needless violence should be resorted to, and the key should always be demanded before breaking the lock; further, if the defendant's goods have been removed to the house of a third party for the purpose of preventing the execution, *after demand and refusal*, the

[1] *Management and Vigilance.*—We take the liberty of inserting a novel and somewhat ingenious mode resorted to by a Bailiff of one of the English County Courts; we give it as related by R. Shaw, Esq. a Clerk of the Court. It was effected "by dressing an assistant in female attire: the would-be *old woman* passed by the defendant's abode at the very moment his good wife's curiosity and impatience could no longer retain her a prisoner. The *old woman* continued *her* walk some hundred yards beyond the defendant's house, *she* perceived the wife standing in the door-way enjoying the pure air, but evidently on the look out for the official, and in such a mood as evidently to treat with suspicion any human being in male attire: the tramping of the old woman did not fail to attract her notice, but as the person appeared to be one of her own sex, no alarm was exerted, and the wife remained in her anxious position ready to close the door, which she held in her hand, at a moment's notice: our *old woman* had by this approached to within a yard of the dwelling without the deceit being discovered; another step, and she was within the house. It is unnecessary to add, that the inmates were completely nonplussed at the ingenuity, and although to their cost, enjoyed a hearty laugh at the expense of the assistant, whose appearance was far from prepossessing."—[ED. L. J.]

Bailiff may break open the outer door, or any other door of such third party to make the seizure: also, if after a peaceable entrance into a party's dwelling house has once been effected by the Bailiff, and the defendant or any other person shall lock him in, he may lawfully break open the outer door in order to get out—or if the Bailiff gains an entrance through one door and seizes the goods, but is unable to remove them without opening the outer door, and the defendant refuses, or if neither he nor any one in his behalf be present whom the Bailiff could ask to open the door, he may break it open to carry away the goods:[2] so it seems that if an officer, being in a house for the purpose of executing a writ of execution, be forcibly turned out, he is justified in breaking it open in order to get in again.

It may here be observed, that the substantive provision of the 53rd section of the Division Court Act, as to where the execution may be executed, is re-enacted in the 1st of the 18th Vic., cap. 125. The former section enacts, that by virtue of the execution the Bailiff of the Court "shall levy by distress and sale of the goods and chattels of such party (the debtor) *being within the County which the said Court was holden*, such sum of money and costs, &c." Section 125 of the last Act provides, "that no writ in the nature of a writ of *Fieri Facias* or Attachment *shall be executed out of the limits* of the County over which the Judge of the Court from which the same issued, shall have jurisdiction."

We come now to notice what description of property may be taken by a Bailiff under an execution from his Court.

OBSERVATIONS ON THE USE AND VALUE OF AMERICAN REPORTS IN REFERENCE TO CANADIAN JURISPRUDENCE.

(An Extract from a Lecture by Oliver Mowat, Esq., Q.C., delivered at Osgoode Hall, in Michaelmas Term last, to the Student Members of the Law Society of Upper Canada, in accordance with a Rule of that Society.)

[NOTE BY THE EDITOR OF THE LAW JOURNAL.—Although the following extract from Mr. Mowat's Lecture is complete in itself, yet as we are unable to publish the whole Lecture as it was delivered, it is proper that we should notice how this extract was introduced: The Lecturer had been explaining the weight given in our system of Jurisprudence to precedents and judicial rules, and pointing out the reasons and advantages of this; he then gave some account of the sources from which the rules of Law and Equity in England and in Upper Canada have been drawn, and to which resort is still had in new and doubtful cases, and this part of his subject led him to speak of American Reports and Law Treatises.]

In new Cases for which English authority cannot be found, assistance in ascertaining and determining our own law may sometimes be derived from American Reports; and as a number of these Reports have lately been added to our Library, and as a complete set will, I hope, soon find a place there, I think I may with advantage suggest to you a few leading cautions in regard to the use of these Reports; for while, on the one hand, a judicious use of them is recommended, as I will show, by the authority and example of the best English Judges and Jurists; so, on the other hand, an indiscriminate resort to American decisions is extremely undesirable, and will occasion much profitless labor, both to those who indulge in it, and to the Judges before whom such reports may be cited.

First, then, never cite an American Report on a point of practice. Counsel was lately reproved by one of the Courts in England for citing an Irish case on a point of practice; and it would manifestly be much more absurd to cite an American case on such a point.

Then, secondly, upon other questions never cite an American case until you have ascertained that the English and Canadian authorities leave in doubt the point you are investigating. It is, generally speaking, in law as well as commerce, quite as absurd to import from a distance what we can better obtain at home, as to refuse supplies from a foreign source which are not otherwise to be had. Besides, on points on which we have authority in our own Courts, American decisions are not always in accordance with such authority, and may therefore mislead instead of assisting you. On a point of importance and difficulty, and on which but a single English decision can be found, an adverse American decision may indeed occasionally have weight in inducing a reconsideration of the question. Thus Lord Denman, when he learned that a decision of his own (*Devaux v Salvador*, 4 A. & E., 420) was opposed to the decision in an American case, (*Peters v. The Warren Insurance Co.*, 3 Sumner, 389) said, that "the opinion pronounced in the latter case would at least "neutralise the effect of the English decision, and induce "any of their Courts (in England) to consider the question an "open one." But in the Canadian Reports I do not at present recollect any indication of so much deference to a Republican Court.

Thirdly, never cite an American case unless you have first read the Report of it, if accessible, and ascertained for your-

[2] Cases on the subject are collected in Archbold's Practice. Title—Executions in general.

self that the case really is in point and does not proceed on any peculiar statute of the State.

I should add to these three rules a fourth, arising from the numerous points on which, in American books as in English, there is a conflict of authorities. Wherever there are several Courts of independent Jurisdiction there will be conflicting decisions; and from there being a larger number of such courts in the United States than in England, the Reports of the former contain a larger number of cases than the Reports of the latter, in which various Courts have come to opposite conclusions. This will render it peculiarly necessary for you when you resort to American cases and find one in point, to see whether the case you have found is the only one in point, and whether there are any others which conflict with it. You cannot safely avoid a like course when your examination is confined to English authorities; but in that case neither the temptation to avoid the trouble of the search, nor the danger of being misled yourself, or of imposing unnecessary labour on the Court by your neglect, are nearly so great. If your investigation of the American authorities is to guide your own opinion, you may as well not refer to them at all, as to neglect weighing, as far as you can, all they contain upon the question you are considering. If your investigation is in preparation for an argument before the Courts, you should either forego all reference to either class of the cases which conflict, or cite those against you as well as those in your favour. The diversity of decisions which is thus to be found in these Reports is much less embarrassing to us than it must be to the American Courts. In some respects indeed it is an advantage to us. It puts us in possession of what have appeared to able and learned Judges to be the strongest reasons in favour of every view of a doubtful question, instead of our having no more than the particular view formed by the first Court which may happen to have been called upon to decide the point. Our Judges, to whom as authority an American Report is nothing, have thus in such cases great advantages in coming to a sound conclusion.

The rules I have thus suggested for your guidance before the Judges are but corollaries of another and more general rule, which you should ever keep in mind, namely, that the true object of the arguments of Counsel is to assist the Judge in coming to a sound conclusion. When you cite cases which do not apply, or which for any reason are of no weight, you but embarrass a Judge instead of assisting him, and increase his labour instead of diminishing it. It is necessary for you therefore to bear in mind that English Reports, and I presume Irish Reports likewise, are of authority in our Courts; while American Reports may be useful, but they are not of *authority;* and in general they are only useful where authority is wanting, and where they either bear intrinsic evidence of merit, or record the decisions of Judges of known learning or ability—conditions one or other of which is to be found attaching to some of the Reports of almost every State of the Union.

You will thus perceive that though the Law Society has lately rendered a selection of American Reports accessible for the first time to those engaged in the study or practice of the law in Upper Canada, yet this has not arisen from any idea that such books may be used or cited as freely as any others. Indeed you could hardly commit a greater error than to assume that all the books which you find in the Library, in this or any other department of professional learning, may with equal propriety be cited when they happen to contain something which appears to be in point. In a Reference Library, like that belonging to the Law Society, (the only public Law Library in Upper Canada—a Library to the preservation and extension of which the whole profession contributes) the collection of works on law should manifestly be as nearly complete as possible; and it would certainly want a very material element of completeness if it did not, at the earliest practicable period, contain the Reports of all the United States of America, even though amongst these there may be not a few which can seldom, if ever, be cited to our Courts with advantage. The Law Library of the Society, to be worthy of the profession and the Province, must obviously contain many books that may be read or referred to, though not cited; as well as many others that may be both read and cited. It should contain some that are curious, as well as those that are useful. It should give the means, so far as books can give the means, of knowing the laws, as well as minutely studying the legal history, of at all events every country and state where the English language is spoken. The proceedings of a State in its infancy are in many respects as interesting, and in some respects as important, as those of a State in its maturity. Now, some of the American Reports are of so superior an order that their value has in in Great Britain been the subject of the highest possible eulogy, and cannot by lawyers anywhere be overlooked upon the most cursory, or disputed after the most prejudiced, examination of them. But the judicial status of the Courts to which these belong, had a beginning as well as a maturity. In some of them as I know, and in all of them as I may safely assume, the proceedings of the early Judges were as defective and unsatisfactory as, in learning and ability, the proceedings of their successors became all that could be desired; and the records of both periods are manifestly interesting, though for different purposes. Thus while the reports of the newest and wildest of the Western States will every year be improving, they must even now possess not a little interest for liberal minded lawyers and intelligent legislators, if not for educated and enlightened men of other classes, as showing, if nothing more, the new modes of practice, and the subjects of litigation prevailing in those States, as well as to no inconsiderable extent the manners of the people. And a Northern lawyer remarks: "It is striking to observe that while in many of the "older, richer, and more commercial States of the Union, the "old technicalities of pleading are fast vanishing under the "influence of a looser, and, as is claimed, a more liberal and "practical course of legal procedure, the subtle learning of "the science of special pleading is tenaciously retained in "many of the new States, and employed in the settlement "of questions of trifling amount." The same writer, in reference to a volume of Wisconsin Reports which he is reviewing, adds: "There is nothing in the Reports of New York or Mas-"sachusetts which brings us back so closely to the learning "of the Year Books, and Saunders and Chitty." But apart

altogether from such considerations as these, and bearing in mind, not in how many respects we differ, but in how many also our circumstances resemble those of the other sections of this continent, and considering the immense strides which the trade and commerce of this country are making, and the increasing intercourse of the people with the various States of the American Union, as well as of other countries—it is wholly impossible to say of any of the reports of any of the American States, any more than it is possible to say (and no one does say) of those books which have been on our shelves for years without perhaps being once used—that no case can occur in practice to any of us in which they may not be found important or material. An enlarged view of even what affects objects not more extended than mere practical utility would thus demand a place for all. But to confine our only public collection of law books to those works which we can turn to immediate profit in advising clients or addressing arguments to the Courts, would, I think, be manifesting a narrow mercantile spirit, which I hope is far from any of us. There are not, I believe, 5000 volumes of Law books in the English language; and I hope that is not a number which it is beyond the means of the profession in Upper Canada very soon to accumulate. For my own part, whatever others may think, I must say upon the whole, that I know not any sound principle of selection, that could be adopted for the Library, which would exclude any of these, or would justify unnecessary delay in obtaining all of them, with the exception indeed of Digests, Abridgements, Indexes, Books of Form, and such like—of which classes of works a judicious selection would seem abundantly sufficient for every possible object—and, with the exception also of various editions of the same work by the same or different editors—which, in general, I see no reason whatever for obtaining.

But in looking amongst all these for authorities to cite in your own debates at the meetings of the Osgoode Club, or of similar associations, at the present stage of your career; and in preparing opinions for clients and arguments for the Courts, hereafter, you should enable yourselves to employ an intelligent discrimination. In a single lecture I may do something, but I cannot do much to help you. I have given you some cautions against an improper use of the Reports of the American Union; and I may add now that, subject to these cautions, and to others which your own reading and reflection will from time to time suggest to you, a judicious resort to American decisions in cases untouched by authority you cannot safely permit yourselves, through either indolence or prejudice, to refrain from.

Those principles of Jurisprudence to which England owes so much, and most of which our Legislature has transplanted to Upper Canada, have also, as that highly distinguished Judge, Lord Stowell, remarked in reference to the United States, "been adhered to in America; and have been built "upon as occasion required with equal zeal, and with equal "caution in all the deductions." In other words, to use the language pronounced in the House of Lords by another learned Judge, who is just now the first on the English Common Law Bench, as well in station as in acknowledged learning and ability, I mean Lord Campbell: "The Americans carried the "Common Law of England along with them; and Jurispru "dence is the department of human knowledge to which, as "pointed out by Burke, they have chiefly devoted themselves, "and in which they have chiefly excelled." Accordingly, you yourselves know that some American treatises on Law have been selected for the examination of Students by both the Law Society and the Provincial University, in preference to any of the English works on the same subjects. Indeed the best books on many titles of Law are unquestionably those of American authorship. No books, for example, are more used in England or here than Judge Story's on almost every subject upon which he has written. Such is certainly the case with his works on Agency, Partnership, Bailments and Equity Jurisprudence. His able work on the Conflict of Laws has a world-wide reputation. It was the very first that appeared in the English language on the subject of which it treats, and it will probably have no rival for many years to come. The best books on Private Corporations Aggregate, on Waters and Water-courses, and on Limitations of Suits, have also an American authorship. So the work on "Covenants for Title," by Mr. Rawle, of Philadelphia, was the first separate work on that subject; and its very great ability has been acknowledged in England, as distinctly as it has been recognised in his own country. Again, our best book on Evidence (Taylor's) is little more, and professes to be little more than an Anglicised edition of a work by a Boston lawyer, the late Mr. Greenleaf, on the same subject. The same Mr. Greenleaf also made the only attempt which has yet been made to perform the very valuable service of collecting in one volume the many overruled and doubted cases which are scattered over the Law and Equity Reports. But a work of that kind, to be of much utility to the practical lawyer, should be revised, and a new edition published, every three or four years. No work on the important subject of Damages in an action at law had been given to the profession for eighty years before that which appeared lately from the pen of Mr. Sedgwick of New York; and the very great merit of that gentleman's treatise was recognised in England almost as soon as in America. An English barrister, Mr. Mayne, has lately published a good book on Damages, but we are almost as much indebted for it to Mr. Sedgwick's prior publication, as we are for Mr. Taylor's work to Mr. Greenleaf's, on Evidence. Again, a California lawyer's, Mr. Marvin's, Legal Bibliography, is by far the completest work of its kind we have had; and (what seems surpassingly curious) the fullest and best account yet written of the old English Reporters is by Mr. Wallace, a Master in Chancery in Philadelphia. To this list I might perhaps add some more of equal value to us: and though the number would even then fall short of the number of our English text writers on other subjects whose works have equal or superior ability, it is impossible not to perceive, even from the slight statement I have already given you, that legal science has made no contemptible progress among our Republican neighbours. Still, as Baron Gurney has remarked, "It makes Eng- "land justly proud of her American sons to see them competing "on equal terms with her ablest writers." And all the Ameri-

can writers I have named cite from the Reports of every, or almost every, State of the Union; and though for much of the law which these treatises contain they are indebted of course to English Jurists, a circumstance which gives them a large portion of their value to us, yet a great part of the merit of some of them, and part of that of all of them, they are indebted for to their own Judges. With the names of some of these Judges the youngest of you are probably familiar. Kent and Story, and Marshall and Wallwerth, are almost as well known to us as the names of our own most eminent Judges, but the Americans have many other Judges less known to us than these, but who, amongst their own countrymen, are regarded as not much, or not at all, inferior to those I have named.

The date of the earliest reference I have to an American Report by an English Judge is 1837, when Mr. Justice Patterson, in delivering the judgment of the Court of Queen's Bench in *Beverley v. The Lincoln Gas Light and Coke Company*, spoke of the decisions of "the Courts of the United States in America," as "intrinsically entitled to the highest respect," though, as I have explained, they are not direct authority for English Judges.

Two years afterwards the same learned Judge made the following statement: "The respect paid to American Reports "and Law Treatises in England is, I think, rapidly increasing, "and tends much to the improvement of our theory and prac- "tice, and, I trust, will continue." And in the same year Mr. Justice Coleridge, a high authority also, spoke "of the feeling "which exists in our Courts at present in regard to American "Jurisprudence," as "one of the highest respect." And three years later, the same learned Judge, in a letter to Judge Story, remarked, "that the position of an American lawyer is in "many respects more favorable for an extended and scientific "knowlege of law, than that of an English lawyer. The "simple circumstance that your constitution forces international "law on you, as an integral part of your studies, and that, by "something almost a necessity, the study of the Roman law, "is in my opinion an advantage far beyond that of our supe- "rior accuracy (if we have it) in our own Common Law, "acquired by the comparatively narrow range of our studies. "This is especially so with a Judge; for after all, the impor- "tant thing is how we use our knowledge, and this extended, "liberal and scientific study, must liberalise and enlarge the "powers with which we use our knowledge of details." This opinion the same excellent Judge repeated in another letter: "You have made good use of that advantage over English "lawyers which American lawyers always must have—that "the federal constitution of your commmonwealth makes you "necessarily familiar with American law while their peculi- "arities bring you also into contact with the Civil Law. The "want of these cannot fail to make our legal knowledge less "scientific than it ought to be."

The opinions of eminent English law writers follow those of the learned Judges whose language I have given you. Thus one eminent English Jurist, (Bowyer) the author of several books of acknowledged value to the profession, says that "the "decisions of many of the American Courts, and the arguments "which precede them, are in most respects equal to our own. "* * The growth of Jurisprudence in America has, like "that of the mighty Republic of which it forms an integral "feature, been wonderfully rapid, and from small beginnings "has matured itself in wisdom and strength with wonderful "rapidity." Another eminent English lawyer, after acknowledging that he had in his work made much of "the great "constitutional legal writers of that wonderful republic to "which we are bound by so many ties, both of race and "and interest," adds: "They are not known in this country "so generally as their learning, profound reasoning and wis- "dom deserve." The same writer states that some of their arguments and opinions he had transferred verbatim to his Book. The editors of the last number of that able English quarterly the "Law Magazine and Law Review," give their testimony to the same effect. They say: "We think we have "discerned amongst our legal brethren of the United States a "greater grasp of mind in discoursing upon law and jurispru- "dence than is ordinarily exhibited on this side of the Atlantic; "and hence, as we conceive, the fact that American law "treatises attract far more than recently they did, the attention "and respective consideration of English lawyers."

In the English Courts not a year now passes that we do not find references made in important cases to American decisions. Hardly a new Treatise appears but we have in it something from the same source. In Taylor on Evidence (of which I have already spoken) there seem as many cases cited from the American Reports as from those of England; yet he confined himself to such as in his judgment "either afforded favorable illustration of doubtful points of law, or laid down rules superior to those adopted in our own Courts." The Reports he principally refers to for this purpose are, I believe, those of the United States Courts and of the Courts of New England, New York and Pennsylvania; but he also cites freely from the Reports of Virginia and North and South Carolina; and places many of the decisions of these States, as well as some of the decisions of the Northern States, in the second of the four classes into which, following an eminent American Jurist whom he does not name, he divides the American Reports he cites from, by way of indicating to the English lawyer their comparative value. He also cites from the State Reports of New Jersey, Maryland, Ohio, Kentucky, Indiana, Louisiana, Tennessee and Alabama. So in "Mayne on Damages" there is quite a number of American Reports cited, "though," as the learned author states in his preface, "he only resorted to American decisions when none of our own were in point,"—a rule which he certainly seems never for an instant to have forgotten.

In some departments of law, American Reports are very rich in valuable decisions. Thus, not to multiply illustrations, I may mention that Dr. Phillimore, in his late work on International Law, found occasion to cite but 65 cases from the English, Irish, and Scotch Reports, together, while he cites 30 from the United States alone, and but 6 from the French. In his book on Domicile he cites 63 cases from the British Reports, and 12 from those of the United States.

All this seems the more remarkable when we remember the prejudices that English lawyers must have had to contend with

before reaching the conclusions they have thus intimated, or when we consider the very limited means which hitherto, or at all events until a few years since, they have had of becoming acquainted with the decisions of the American Courts. Indeed for some years after so many learned Judges expressed the opinions I have mentioned, and so late as the year 1848, the libraries of the Inns of Court in London are said to have contained neither a large nor a well chosen selection of American decisions. In that year the Librarian of the Middle Temple had determined, as the narrator of the circumstance mentions, "to remedy the evil;" but I am not aware what progress has since been made towards the accomplishment of this object. If the public libraries were thus defective so short a time ago, it is not likely that private libraries were better furnished; and with all these disadvantages the strongest testimony has already, you perceive, been borne in England to the value of the decisions of American Judges, and of the writings of American Jurists.

In Canada we must find advantage and interest in examining such decisions and writings far beyond what is the case in England. Our local circumstances are more nearly like those of the people of the United States. The classes of cases which arise more frequently in the United States than in England, are also more frequently arising with us. The Americans have the same difficulty to encounter as we, and we the same difficulty as they, in applying the legal and equitable principles recognised in that old and settled country from which they and we alike take the foundation of our systems. Our legislature has also adopted, and sometimes with little alteration, many valuable American Statutes. The interpretation of these by the Courts of the States in which they originated, or by which they have been adopted in the same way as by our own Legislature, is obviously most worthy of attention. Instances of such Statutes are those abolishing the old law of Primogeniture, regulating Chattel Mortgages, Limited Partnerships, and the sale of Infants' Estates by the Court of Chancery—and others. As Parliament has thus not unfrequently been able to borrow with advantage from the Statute Books of our neighbours, our judges and lawyers may doubtless resort at times with like advantage to their reports. But, strange to say, the Bench and the Bar of Upper Canada have until the present year had more limited means of becoming acquainted with the legal authorities of the United States than theretofore existed even in England. Notwithstanding this inconvenience however, American cases have occasionally been cited in the decisions of all our Superior Courts. I have met a reference to them by the Court of King's Bench in Upper Canada so long ago as 2nd & 3rd Wm. IV, when the well known case of *Gardner v. Gardner* was decided; and the reference then, for want of access to the reports themselves, had to be made on the faith of a private communication upon the subject by an American lawyer, whose name is not given. Very possibly there are earlier examples of the same kind. So, two years ago our Chancery Judges had some American reports expressly sent for, with a view to the decision of an important case which was then before that Court, and was soon afterwards disposed of in accordance with the American decisions. And American Reports have been cited in a number of other cases both by our Common Law and our Chancery Courts.

These facts will enable you to form some idea of the estimation in which American Judges and writers on law are held by the Judges and Jurists of England, and I suppose I may add, of Canada; and on the whole I trust you now perceive that American Reports, if used unwisely, may be worse than useless,—but if used wisely, are extremely valuable; and may perform an important service in moulding and perfecting our Canadian Jurisprudence.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

In re Day v. The Grand Trunk Railway of Canada.

(Hilary Term, 19 Vic.)

Railway Company—Compensation by.

The Grand Trunk Railway Company of Canada, under their acts of incorporation, and under authority of a by-law of the Municipality of Guelph, ran their line of road through and along a street in Guelph to which the lands of the appellant were adjacent.

Held, upon application for a mandamus on the Railway Company, that if the works complained of amounted to a public nuisance, it would not be a case for private compensation, and that if authorized by law, that the works did not injuriously affect the applicant within the meaning of the fourth section of the statute 14 & 15 Vic., cap. 51.

[5 C. P. R. 420.]

This a rule on the Railway Company to show cause why a mandamus should not issue to them to serve a notice on said Day, containing a description of the powers exercised and intended to be exercise by the said Company under the Acts of Parliament for making the railway from Toronto to Sarnia with regard to lot No. 1010 in the town of Guelph; a declaration of readiness on the part of the said Company to pay some certain sum for damages likely to arise to the said lot from the exercise of the powers of the said Company under the said acts of Parliament, and mentioning the name of a person to be appointed as arbitrator of the said Company if their said offer be not accepted, on affidavits stating that said Day owned the said lot No. 1010, being on the south side of Kent street, along the centre of which street the said railway is carried, occupying thirty-four feet of the centre thereof, and elevated from three to six feet above the surface of the street, leaving only about thirty-two feet on each side, rendering it necessary to use part of said lot; and that said Day hath sustained damage by reason the lot in addition to the said space to get into the yard of the thereof, such railway being carried along said street by authority of a by-law of the Municipality of the Town of Guelph. That a plan annexed showed the track of said railway in front of and adjacent to said Day's lot. That compensation has been demanded, but the said Company refuse it, or to appoint an arbitrator, &c. By the by-law referred to, passed 21st of April, 1854, the said Company was empowered to carry the said railway through the town of Guelph, and through, over and along any of the streets within the same, pursuant to the said plan in all things; and that the said Kent street, from the west boundary of Glasgow street to the east boundary of York street, should be forever stopped, provided only on the following conditions: *i.e.*, that the said Company shall be responsible and liable at their own costs and charges for any damages or claims of any individuals or parties that may have lawfully arisen, or may at any time lawfully arise or be made for or by reason of the carrying of the said railroad through the said town of Guelph, whether the same be direct or otherwise; and pay the said town of Guelph £115 on the passing of such by-law. Annexed thereto is a plan and specification, showing and describing the line and course of the said railway in passing through the said town of Guelph.

Crall showed cause, and contended that Day's own case showed he could not sustain the claim, the damages com-

plained of being purely consequential and too remote to entitle him to compensation as injuriously affecting his land within the statute.

That the Railroad Company have acted under authority of provincial statutes and a by-law, without touching Day's land at all, or causing anything else as back-water, &c.—Regina v. The Eastern Counties Railway Co., 2 R. W. Cases 736, questions Lord Denman's doctrine in Regina v. The Eastern Counties Railway Co., 2 Q. B. 347; The Cast Plate Manufacturers v. Meredith, 4 T. R. 794. He referred to the statute, 14 & 15 Vic., cap. 51, sec. 9, No. 5, sec. 12, sec. 10. Having a by-law, no case for compensation arises—sec. 8, sec. 11 (No. 5-7) No. 19. That they cannot arbitrate, no provision being made for such a case; and there is no right to take possession—Rex v. The Liverpool and Manchester Railway Company, 4 A. & E. 650; Regina v. The London and Southampton R. W. Co., 1 R. W. Cases, 717; Q. B. E. T., 1839—the municipality authorized to act, and must be liable if any one is.

Macdonald, in reply—That the Railroad Company is liable as if the words *injuriously affected* were in the act. The Company must comply with the terms of the by-law. The statute speaks of compensation when the land may suffer damage, or may suffer damage from the exercise of any of the powers &c.

He referred to sec. 11, Nos. 7 & 19, which contain language similar, and speak of injury to land taken, or suffering damage, &c. If the land taken applies to the road in this case the other alternative applies to Day, who is injured seriously. He referred to 14 & 15 Vic., cap. 51, sec. 4, and the subsequent act, and sec. 68. The East and West India Docks Birmingham R. W. Co. v. Gattke, 6 R. W. Cases, 371.—The by-law is incorporated with the statute, and both are to be taken together.

Galt said the Company are answerable to the municipality if the by-law is not complied with—not to Day—Sec. 1, Nos. 5 & 7.

So the question is, whether, if Day's lands are injuriously affected, in fact it forms a case entitling him to compensation under the provisions of the statute cited.—Regina v. The Eastern Counties Railway Company, 2 Q. B. 347, 569, S.C. 2 R.W. cases 736; The South Staffordshire Railway Co. v. North Staffordshire Railway Co., 16 Q. B. 923,—Law Times, 29th May, 1850, p. 106; The Caledonia Railway Company v. Ogilvie, 92 Eng. Rep. 22.

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

The provincial statute 14 & 15 Vic., cap. 51, sec. 4, enacts, that the power given by the special act to construct the railway, and to take lands for that purpose, shall be exercised subject to the provisions and restrictions contained in this act, and compensation shall be made to the owners and occupiers of, and all other parties interested in, any such land so taken or *injuriously affected* by the construction of the said railway, for the value of all damages sustained by reason of such exercise as regards *such lands* of the powers by this or the special act, &c., vest in the Company.

Sec. 11, No. 5—after deposit of maps, and giving notice, &c., application may be made to the owners of lands, or to parties empowered to convey lands, or interested in lands which may suffer damage from the taking of materials or the exercise of any of the powers granted for (qu. to) the railway, &c. See residue of the clause, and also sub-sections Nos. 7 & 19, and the statutes 14 & 15 Vic., cap. 73, and 16 Vic., cap. 37; the special act incorporating the Grand Trunk Railway of Canada, and chaps. 39 & 76. The imperial statute 8 & 9 Vic., cap. 18, sec. 68, enacts that if any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for, or *injuriously affected* by, the execution or the works, &c.

The case of the Caledonia Railway Co. v. Ogilvie (House of Lords Cases, March 30, 1855, 29 Eng. Rep. 22) makes it a test whether the words, *injuriously affected*, entitle the owner of lands to compensation in respect of any act which, if done by the Railway Company without the authority of Parliament, would have entitled him to bring an action against them; and though not a universal test, since the statutes may authorize what would otherwise be actionable, still it is applicable to the case before us. What the Railway Company have done was either legally authorized by the statute and by-law, or it was illegal. If illegal, or as if there had been no statute or by-law, it would be a public nuisance; and thus regarded, the applicant does not make out a case that would entitle him as a private individual to sustain an action because of the peculiar or special inconvenience experienced by him by reason of such nuisance; he was only inconvenienced like any other person, having occasion to pass that way; or, like all other who had houses, and resided in the vicinity of the street. I apprehend he could not maintain an action by reason of the inconvenience he experienced every time he went in or out of his own premises. But if he could, it is said in the above case by the Lord Chancellor it would only be a multiplication of the same damage, not a different damage; and that all attempt at arguing that it was a damage to the estate was mere play upon words. And if it is a public nuisance, it follows that it is not a case for compensation at all events; so to treat it would be impliedly admitting its legality in itself, apart from the applicant's claim.

Then if authorized by law, the case above cited establishes, I think, that the works complained of do not injuriously affect the applicant's land within the meaning of the statute, admitting the right to compensation when lands are injuriously affected by the construction of the railway as distinguished from lands taken, or lands temporarily occupied, or soil or materials removed therefrom in the course of, and for the purpose of the work.

It follows that in either point of view this application cannot be granted.

Mandamus refused.

CHAMBER REPORTS.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by T. MOORE BENSON, ESQUIRE.)

NIMMO v. FLANIGAN ET AL.

Demurrer to declaration—Averment of non-payment of promissory note.

The statement in a declaration that a promissory note was duly presented and *dishonoured*, is a sufficient averment of non-payment as against the maker, and probably as against the endorser also, but *query*.

[Oct. 31, 1856.]

Declaration—"For that the said defendant Flanigan on the 28th June, 1856, by his promissory note, now overdue, promised to pay to the defendant Strange, or order, £325, at the Bank of Montreal, three months after the date thereof; and the said defendant Strange endorsed the same to the plaintiff, and the said note was duly presented for payment on the day it became due, at said Bank, and was dishonored, whereof the defendants respectively had due notice; and the plaintiff claims £325."

Defendants demurred to the declaration, assigning as cause: that it is not alleged therein that the defendants, or either of them, did not pay the amount of the promissory note declared on, nor is any breach of contract alleged in the declaration.

† *McMichael*, for plaintiff, obtained a summons to show cause why the demurrer should not be set aside as frivolous, and the plaintiff have leave to sign judgment for want of a plea; or why the demurrer of the defendant Flanigan should not be set aside with costs, and the plaintiff have leave to sign judgment against the said defendant Flanigan, for want of a plea, and to

† 3rd November.

amend his declaration as to the defendant Strange, by adding thereto the words, "*and the said defendant, Strange, did not pay the said note.*"

(10th Nov.)—*Jackson* showed cause. The declaration does not follow the form prescribed by the C. L. P. Act, 1856, nor does it disclose any cause of action against the endorser by merely alleging that the note was presented and dishonored.

HAGARTY J.—I think the word "*dishonored*" applies equally to maker and endorser, and clearly infers that the note was not paid, and that therefore the declaration is good: as against the maker it is certainly sufficient. I will set aside the demurrer as to the maker, and leave the question as to the endorser to be argued in Term: because, although I think Mr. McMichael will succeed "on the very right of the cause and matter in law," yet it is naturally to be supposed that in framing the forms given in the statute, all unnecessary allegations were omitted, and therefore that those contained therein are necessary; and I would not like to take upon myself, in the absence of any direct authority on the point, to set aside as frivolous a demurrer to a pleading which does not follow the form prescribed, especially as it may be plausibly argued that even in pleading the endorser is in no default till he refuse to pay after notice of dishonour.

Demurrer as to matter set aside with costs.

STREET v. CUTHBERT.

Leave granted to administer interrogatories under 176th section before plea pleaded, leave to plead several matters being asked for in the same summons, and the interrogatories having particular reference to the pleas sought to be pleaded.

(Oct. 4, 1856.)

This was an application on a summons to plead several matters, and also to administer interrogatories to the plaintiff at the same time, under the 176th section. The action was one of dower, and the pleas sought to be pleaded by the defendant were:—

1st. *Ne unques seizin que dower.*

2nd. *Ne unques accouple.*

3rd. A release and assignment of dower.

The interrogatories sought to be delivered were as follows:

First—Have you at any time since the death of the late Timothy Street, made any disposition of or contract or covenant respecting your dower, or any claim or right of dower in to or out of any of the lands and tenements of which the said Timothy Street was seized? If yea! state particularly what disposition or dispositions, contract or contracts, covenant or covenants you have made of or respecting the same, what was the consideration therefor, when and with whom made and by what instruments, and the names of the witnesses thereto, and in whose possession, custody, control or power such instruments.

Second—Have you at any time since the death of the said Timothy Street, received any moneys, or securities for money, provision for your maintenance or other payment, satisfaction, compensation or equivalent for your dower, out of the lands in respect of which the said Timothy Street was seized, or any part thereof? If yea! state particularly such moneys, securities, payment, satisfaction, compensation or equivalent consideration, and from whom and in what account you received the same.

Third—Have you received, or accepted, or agreed to receive or accept any provision in lieu of dower, either made under the will of the said Timothy Street or by your son John Street, or by any person or persons whomsoever?

Fourth—Have you at any time since the death of the said Timothy Street, made or executed any release of action or other release whatsoever, with reference to your claims for dower, either to the said John Street or to any other person or persons whomsoever? If yea! state particularly when and whom such release or releases were made, the names of the witnesses thereto, and in whose possession, custody, control or power, the same.

Fifth—Was there not an arrangement made with you by John Street, either solely or in conjunction with others interested under the will of the said Timothy Street, or otherwise interested for the purpose of protecting those, &c., interested or protecting said estate from liability by reason of the covenants of the said Timothy Street, on account of any claims for dower which might be made by you on lands owned by said Timothy Street in his lifetime, and under which arrangement you released or assigned your claims for dower on behalf and for the benefit of those entitled to claims under such covenants, or having or being intended to have such effects? If yea! state particularly what such arrangement was, what was the consideration received by you thereunder, and what instruments, deeds or documents, were then made, required or executed by you, and who has in the possession, custody or control thereof, and to what lands the same has relation.

Sixth—Have you not given John Street or some other person or persons an interest in the claim for which this action is brought and does not the said John Street or other person prosecute and maintain this action either altogether or in part for his own immediate benefit, and on his behalf?

Seventh—To whom and for whose benefit was the benefit money or other consideration paid or given by John Douglas, Robert Mitten, John Mulbex, and others, who have compounded with you for your claims on some of the lands of said Timothy Street paid and given? Was not the whole or some part thereof paid to and received by John Street or some person other than yourself, and for his or their own personal benefit?

Paterson showed cause.

BURNS, J., in delivering judgment said: I perceive by reference to Finlason that Mr. Jarvis was quite right in *Street v. Proudfoot* in stating that interrogatories might be administered for the purpose of supporting a plea not yet pleaded; but in that case the order was rightly refused, because he did *not* at the same time apply for leave to plead some plea or pleas to which the interrogatories would have reference in the same summons. In this case it is different, as the defendant states, the pleas which he desires to plead and to support by interrogatories. I will therefore grant an order, but will so modify the interrogatories that they will in every part have precise reference to the pleas, and not be couched in general terms, which would be analogous to a fishing bill in equity. I will also grant leave to plead the three pleas. I had some thoughts at first that I ought not to grant leave to plead the third plea, but I have come to the conclusion that the proper

remedy for the plaintiff is, if the plea is bad in law, to demur to it.

The following order was then granted: "That the tenant have leave to plead the several matters mentioned in the abstract hereto annexed, and that the tenant have leave to deliver to the demandant or her attorney, interrogatories in writing pursuant to the statute in such case made and provided, to the effect of the interrogatories hereto annexed, as amended by me."

STARRATT v. MANNING.

Service accepted by attorney—Time for appearance.

Defendant's attorney accepting service of summons has the same time within which to appear as if the service of the writ of summons had been served on defendant himself.

[Oct. 8, 1856.]

Jones and Flanagan, for defendant, obtained a summons on the 4th October inst., to show cause why declaration and service should not be set aside, with costs, as irregular, on the ground that the said declaration was filed and served before the time for entering an appearance for defendant had expired and before an appearance had been entered. Order granted in terms of summons.

Plaintiff argued that defendant's attorney, by accepting service of writ of summons, undertook to appear immediately, that, in fact, the acceptance was an appearance for defendant.

BURNS, J.—The defendant's attorney, by accepting service of the writ of summons for his client, undertakes to appear for him; but the attorney has the same time allowed him within which to appear for the defendant, as if the service of the writ of summons had been made on the defendant himself.

TAYLOR v. MCKINLAY.

Pleading several matters.

Upon an application under 130th section of the C. L. P. Act, 1856, for leave to plead in denial of a deed or agreement, and at the same time in confession and avoidance of it, it should be shown that something material may turn upon the construction of such deed or agreement.

[Oct. 18, 1856.]

On the 16th October, 1856, defendant obtained a summons for leave to plead the pleas mentioned below, under the 130th section of the C. L. P. Act, 1856.

Declaration—That defendant, in consideration &c., agreed by writing under his hand to make and deliver to plaintiff a good deed in fee simple, of a certain lot of land, and that although plaintiff had paid said consideration, yet defendant had failed to make said deed. And for money paid by plaintiff to defendant on common counts.

The Pleas desired to be pleaded by defendant were:

1st. That he did not agree as alleged.

2nd. That plaintiff did not pay the consideration in first count mentioned.

3rd. That the agreement in first count mentioned was obtained from him by plaintiff, by means of fraud and covin.

4th. As to residue of declaration, that he is not indebted.

Blevins showed cause on 18th October.

BURNS, J.—I will allow the 2nd, 3rd and 4th pleas; but the defendant should not ask leave to deny his deed, and at the same time to plead in confession and avoidance of it, without showing that something material may turn upon the construction of it. I shall therefore disallow the 1st plea.

TAYLOR v. CARROLL.

Pleading several matters.

In an action against Sheriff on his bond, and also for neglecting to arrest a party against whom plaintiff had issued a Capias, and for a false return of such Capias, defendant will be allowed to traverse such party's indebtedness to plaintiff, and at the same time to plead "not guilty," and also to traverse the separate allegations of the declaration upon an affidavit of the matters required by 130th section of the C. L. P. Act, 1856, and further stating good reason for denying the indebtedness of such party to plaintiff.

[Oct. 22, 1856.]

The first count of declaration was upon the covenant of the defendant as Sheriff of the county of Oxford, given in pursuance of 3 Wm. IV, cap. 8, and alleged that defendant had wilfully misconducted himself in his office of Sheriff, by voluntarily allowing one, Sprague, who had been arrested at the suit of plaintiff, to escape.

The second count alleged that said Sprague being indebted to plaintiff, plaintiff placed a writ of Capias for his arrest in the hands of defendant; that though defendant had ample opportunity to take said Sprague, he had failed to do so, to the injury of plaintiff.

The third count alleged that Sprague, being indebted to plaintiff, plaintiff placed a writ of Capias for his arrest in defendant's hands; and that defendant falsely returned that said Sprague was not found in his county.

On the 21st October, 1856, defendant obtained a summons, under the 130th section of the C. L. P. Act, 1856, for leave to plead:

1st, to 1st count—That Sprague was not, at the time of issuing the writ in 1st count mentioned, indebted to plaintiff.

2nd, to 1st count—Traverse of arrest.

3rd, to 1st count—That defendant did not wilfully misconduct himself in his said office, to the damage of plaintiff, as alleged.

4th, to 1st count—That defendant did not voluntarily permit said Sprague to escape *modo et formâ*.

5th, to 2nd count—That Sprague was not indebted to plaintiff.

6th, to 2nd count—Not guilty.

7th, to 2nd count—That defendant could not during the currency of writ, arrest said Sprague.

8th, to 2nd count—Plaintiff not damnified.

9th, to 3rd count—Not guilty.

10th, to 3rd count—Sprague not indebted to plaintiff.

An affidavit of defendant's attorney was put in, which stated the matters required by the 130th section, and also his reasons for believing the 1st, 5th and 10th of the proposed pleas to be true in substance and in fact.

On the 23rd October, plaintiff showed cause.

BURNS, J., granted the defendant leave to plead as above.

Summons absolute accordingly.

BRETT v. SMITH ET AL.

Writ of trial.

The affidavit on which an application is made for a writ of trial should show where the venue in the action is laid.

[Nov. 7, 1856.]

Plaintiff obtained a summons from HAGARTY, J., calling on defendants "to show cause why the issues joined in this cause should not be tried before the Judge of the County Court of the united counties of York & Peel, and why a writ should not issue directed to the said Judge, commanding him to try such issues, and to return the same to this honorable court, together

with the finding of the jury endorsed thereon, pursuant to the statute in such case made and provided—on grounds disclosed in affidavit filed."

The affidavit filed showed the nature of the action and of the pleas put in by defendants; that issue has been joined; and that the trial of this cause will not involve any difficult question of fact or law.

(8th Nov.)—Defendant showed cause, contending that the affidavit filed by plaintiff is insufficient, in that it does not disclose where the venue in the cause is laid.

HAGARTY, J.—The objection to the affidavit is fatal, and I must discharge this summons, unless the defendant will allow the plaintiff to file a further affidavit showing where the venue is laid.

Defendant consented.—Summons absolute on filing such further affidavit.

GIBSON v. TORONTO ROADS COMPANY.

Addresses of Counsel—C. L. P. Act, 1856, section 157.

Under 157 sec. of C. L. P. Act, 1856, plaintiff's counsel has no right to address jury a second time, after address of defendant's counsel, unless the latter call witnesses.

[Nov. 2, 1856.]

This case was tried at the Assizes at Cobourg on the 3rd of Nov., 1856, before the Hon. the Chief Justice.

J. Boulton, for plaintiff, opened the case by an address to the jury, and afterwards called his witnesses.

Richards, for defendants, then addressed the jury, and at the close of his address stated that he did not intend to call any witnesses for the defence.

Boulton rose to address the jury a second time, but *Richards* objected, contending that as no witnesses were called for defence, *Boulton* had no right to reply.

ROBINSON, C.J., held that under the 157th sec. of the C.L.P. Act, 1856, *Boulton* might have addressed the jury a second time, in the event of *Richards* not announcing at the close of *Boulton's* case, his intention to adduce evidence; but that unless evidence was given by defendant's counsel, plaintiff's counsel had no right to reply, after the defendant's counsel had addressed the jury.

MUNICIPAL COUNCIL OF CO. ONTARIO v. CUMBERLAND ET AL.

Change of Venue—Terms imposed.

Where the Venue is changed at the instance of defendant in an action brough by a municipal council in their own county, on the ground that all the inhabitants are interested in the suit, and an impartial trial cannot be had—defendant will be ordered to pay costs of application, and, in any event, the extra mileage of plaintiffs' witnesses; and in the event of defendant succeeding he shall not tax against plaintiff the extra mileage of his own witnesses.

[Nov. 7, 1856.]

Harman, for defendants, applied to have the Venue changed from the county of Ontario to that of York, on the ground that as the municipal council of Ontario are plaintiffs, all the inhabitants of tha county are interested in the action—and defendants cannot get an impartial trial there.

C. S. Patterson showed cause. He only desired to impose terms; and cited *Pylus v. Scudamore*, 7 Scott, 124.

DRAPER, C.J.C.P.—I will order the venue to be changed, upon payment of the costs of this application; but the defendants must, in any event, pay the extra expense of mileage incurred for plaintiffs' witnesses in consequence of changing the venue; and in the event of the defendants succeeding in the action, they shall not tax against the plaintiffs such extra mileage of their own witnesses.

LOCK v. HARRIS.

Writ of trial.

On an application for a writ of trial, the affidavit on which the summons is obtained should show where the venue in the action is laid.

[Nov. 7, 1856.]

Plaintiff obtained a summons from *Hagarty, J.*, calling on defendant to "show cause why the issue joined in this cause should not be tried before the Judge of the County Court of the county of Elgin, and why a writ should not issue, directed to the said Judge, commanding him to try such issue, and to return the same to this honorable Court, together with the finding of the jury endorsed thereon, pursuant to the Statute in such case made and provided, on grounds disclosed in affidavit filed."

The affidavit on which the summons was granted stated the nature of the action and of the plea pleaded by defendant; that issue has been joined; and that the trial of this cause will not involve any difficult question of fact or law.

(8th Nov.)—Defendant showed cause, and contended that the plaintiff's affidavit should show where the venue is laid.

HAGARTY, J.—I must discharge this summons, but without costs, because the objection is technical, and no express decision is cited on the point, and the defendant refuses to allow the plaintiff to file a further affidavit showing where the venue really is.

Summons discharged without costs.

EVERY v. WHEELER.

Pleading several matters without leave—Signing judgment under 135th section of the Common Law Procedure Act, 1856.

In an action by bearer of a promissory note against maker, defendant cannot plead denying that the plaintiff is the bearer, and also in confession and avoidance without leave, under 130th section of the C. L. P. Act, 1856, and if defendant do so plead, plaintiff may sign judgment under 135th section; and where, after execution issued, a judgment regularly signed is set aside upon the merits, defendant will be ordered to pay into court the amount for which judgment was signed.

[Nov. 8, 1856.]

Declaration, by plaintiff as bearer against defendant as maker of a promissory note.

Without having obtained leave under the 130th section of the C. L. P. Act, 1856, the defendant pleaded:

1st. That plaintiff is not the bearer of said note.

2nd. Want of consideration for the transfer of said note to plaintiff.

3rd. Fraud and covin on part of plaintiff in obtaining said note.

Plaintiff signed judgment and issued execution under the 135th section.

(31st Oct.)—Deft. obtained a summons from HAGARTY, J., to set aside the judgment as irregular; or to set it aside and allow defendant to amend his pleas, on the merits.

(8th Nov.)—Plaintiff showed cause, and justified signing the judgment.

HAGARTY, J.—The defendant should not have pleaded as he did, without leave; the judgment was therefore rightly signed. I will however relieve the defendant on his affidavit of merits,

and set the judgment aside, on the condition precedent that the defendant pay into court £50, (that sum being sufficient to cover the amount for which judgment was signed) to abide the event of this suit, and pay all costs of signing said judgment and subsequent proceedings thereon, and the costs of this application—and, as the cause is in the Inferior Jurisdiction, allow plaintiff to go to trial at the next sittings of the County Court, taking one day's notice of trial.

Order accordingly.

CARRALL ET AL v. BALL.

Attendance of witnesses before arbitrator—7 Wm. IV, cap. 3, sec. 30—Production of documents.

An *ex parte* order, under 7 Wm. IV, cap. 3, sec. 30, commanding the attendance of witnesses before an arbitrator, will be granted upon affidavit of arbitrator that their evidence is necessary, and that their attendance cannot be procured without such order. On an application under 7 Wm. IV, cap. 3, sec. 30, for an order commanding witnesses to produce documents before an arbitrator, it must be shown that the documents required are such as witnesses would be compelled to produce at a trial.

[Nov. 14, 1856.]

Doyle applied *ex parte* for an order commanding the attendance of witnesses before the arbitrator to whom this cause was referred, and the production by them of all documents in their possession, relating to the matters in dispute, under 7 Wm. IV, cap. 3, sec. 30.

The affidavit of the arbitrator, on which the application was made, stated that upon proceeding with the reference it appeared to him that certain persons (naming them) are necessary and material witnesses in the matters referred; that they or some one of them are or is in possession of documents and papers which are necessary evidence; that the evidence of said witnesses and the production of said documents are necessary for the just settlement of this cause; that deponent believes it will be impossible to procure such attendance and production of documents without a Judge's order therefor; and lastly stated the residence of the witnesses, and that the reference had been adjourned to a certain day.

DRAPER, C. J. C. P., granted the order commanding the attendance of the witnesses, but refused to command the production of documents, because the affidavit did not show that the papers and documents required are such as the witnesses would be compelled to produce at a trial.(a)

CUFF v. SPROULE.

Practice—Proceedings commenced before C. L. P. Act. 1856—61st section.

The 61st section of the Common Law Procedure Act. 1856. has not a retrospective effect.

An appearance *per stat.* had been entered and declaration filed and served with demand of plea under the old practice before the C. L. P. Act, 1856, came into force.

Brooke, for plaintiff, applied for leave to sign judgment by default under the 61st section of the new Act, as in case of non-appearance.

DRAPER, C.J.C.P.—The 61st clause of the C.L.P. Act, 1856, has not a retrospective effect. Your proceedings were according to the former practice, and by it there was an appearance entered for the defendant, so that this is not even a case of non-appearance.

Application refused.

(a) See Harrison's C. L. P. Act, sec. 87, note *f*.

BLUMENTHAL ET AL v. SOLOMON.

Arrest—Foreigners—Residence.

The rule that our law will not allow one foreigner to arrest another, does not apply where the latter has done such acts as establish an intention to become a resident here, previously to the intention of a fraudulent departure.

[Dec. 18, 1856.]

The particulars of the case appear in the judgment.

HAGARTY, J.—Defendant has been arrested on the ordinary affidavit of debt.

Mr. McMichael obtained a summons for his discharge on affidavit of defendant, to the effect that he was a native of Germany; for the last ten years had lived in the United States—first in Albany, and the last seven months in Wisconsin—and until the last fortnight had never been in the British dominions: that he was arrested on Saturday, Nov. 15th, having arrived in Toronto "on the Monday but one before the last, the third day of Nov. inst."; that he hired his board for a few days in a boarding-house in this city; and that he never had, nor has he any residence or home in this city or in the Province of Canada; that the debt was contracted in New York and not in Canada; that plaintiffs are natives of Germany and have never resided in Canada, and all reside in New York, where their place of business is.

The defendant relies on the law as laid down in *Freer v. Ferguson*, 2 Cham. Rep. 144, and the cases there cited, and contends that his case is governed thereby.

Mr. C. Gamble, for the plaintiffs, distinguishes this case from those cited, and calls attention to the defendant's affidavit, in which he avoids all reference to any intention as to settling in Canada, or the object of his coming here. He cites *Lamond v. Eiffe*, 3 Q.B., 910; *Atkinson v. Black*, 1 D. & L., 849.

The case of *Freer v. Ferguson* seems to establish that it is contrary to the policy of our law to permit one foreigner to follow another foreigner to Canada, where the latter may happen to be on casual business, and arrest him for a debt contracted abroad. I do not understand it or the cases there cited as going further on this head.

As the defendant here had the opportunity in his affidavit of showing under what circumstances he came to Canada, and whether he was a mere transient visitor, or intending to become a permanent resident, and is silent on these points, I consider that the facts do not warrant me in regarding him in any other light than that of an ordinary resident arrested for a debt contracted abroad. His counsel ingeniously suggests that as he had only arrived a few weeks before, and the plaintiffs swear he was immediately about to depart from this Province, I should regard him as within the principle of the cases cited. It does not so strike me: the intention of a fraudulent departure may have been only formed a few hours or minutes before his arrest, and cannot, I think, affect the question whether he had or had not become a resident of Canada. *Bomberg v. Sternbock*, 1 Prac. Rep., 200, before the same learned Judge as in *Freer v. Ferguson*, is much in point. There the defendants swore they had been on business in Buffalo where the debt was contracted; that they came to Canada ten days before arrest, arrived in London, intending "to remain a short time and return to the State of New York."

The learned Judge says: "The defendants seem carefully to avoid saying that they still carry on business at Buffalo, or giving any information as to the nature of the business which brought them to Canada, so that I may judge as to any probability of their being in Canada merely on some temporary business, which would bring them within the rule that to allow foreigners to arrest each other would be a fraud upon our law." After noticing the affidavits filed by the plaintiffs to show that defendants had come to reside in Canada, the Judge proceeds: "The defendant's affidavit is not satisfactory to bring them within the case of *Freer v. Ferguson*, but if it were so, the fact that they must be treated as subject to our law is established clearly, I think, beyond all question."

I consider the affidavit in this case as far less satisfactory than that in the case just cited.

The case of *Brett v. Smith*, 1 Practice Reports, 315, before Richards, J., seems to regard *Freer v. Ferguson* in the light in which it is placed in the last case cited, as to the defendant being only temporarily here when arrested on the debt contracted abroad.

On the whole I am of opinion that I have not sufficient materials laid before me by the defendant to bring his case within the principle of those already decided in our Courts, and that his application must be discharged. It is hardly a case for costs.

Summons discharged without costs.(a)

Bamberg v. Solomon.

Arrest—Affidavit of debt.

A defendant will not be discharged from arrest because the affidavit of debt only alleges an "*intent to defraud deponent, as the assignee of the estate and effects of plaintiff.*" without alleging an "*intent to defraud plaintiff.*" But *Semble*, that such an affidavit should show the nature of the assignment, and that deponent is the real plaintiff.

[Dec. 18, 1856.]

The particulars appear in the judgment:

Hagarty, J.—This is a similar application to the last (*Blumenthal et al v. Solomon*) by the same defendant on an affidavit of facts almost identical.

The additional point taken is that the affidavit is insufficient. It is sworn by Blumenthal, assignee of the estate and effects of Jacob Bamberg, (the plaintiff,) that defendant "is indebted to the estate of the said J. B. and this deponent as the assignee thereof," in so much for goods sold by said J. B. before the assignment, concluding that defendant is about to leave, &c., "*to defraud this deponent, as such assignee as aforesaid, of the said debt.*"

It is objected that this latter allegation does not satisfy our Statute, which requires an intent to defraud "*the plaintiff.*"

The point is new to me, and I do not feel warranted in deciding that the affidavit is open to the objection taken. I rather incline to consider that it substantially complies with the Statute, although it would have been better, perhaps, to have shown the nature of the assignment, and that deponent was the real plaintiff more clearly.

A somewhat analogous objection was taken in *Chamberlain v. Wood*, 1 Prac. Rep. 195, where deponent called himself "attorney and agent," without saying "of the plaintiff."

Burns, J., refused to discharge, leaving defendant to apply in term if he thought proper, without prejudice to his giving bail in the meantime.

I shall take the same course, and discharge this application without costs, in the same manner.

Summons discharged without costs, with leave to apply in Term.

Kerr et al v. Wilson et al.

Practice—Absconding debtors—Continuation of proceedings commenced under old Law—C. L. P. Act, 1856, sec. 45.

Proceedings against absconding debtors which have been commenced before the C. L. P. Act, 1856, will be allowed to be continued as nearly as may be in accordance with the former practice.

[Dec. 16, 1856.]

A warrant of Attachment had been issued under the practice in force before the C. L. P. Act, 1856, and due notice given; by the direction of a Judge in Chambers since the new Act, plaintiffs took out a writ of Summons and endeavored to serve defendants.

They now produced affidavits showing that defendants had been served by leaving copies of the writ of Summons affixed to the doors of their respective last place of abode in this Province; and that copies had been put up in the office of the Deputy Clerk of the Crown in the county of Elgin, being the county in which defendants were last resident in this Province; also, that this action was commenced by attachment issued on the 10th June last; that defendants had some time previously absconded to the United States; that up to the time of their absconding, they resided and carried on business as partners at or near Vienna in the county of Elgin; that plaintiffs, after diligent enquiry, can obtain no information as to the place defendants have fled to, further than that they have gone to the United States; and that defendants have done no act in defence of this action.

Hagarty, J.—I will grant the same order as granted by Burns, J., in *Kekendall et al v. McKimmon*, 2 U.C.L.J., 184(a) and allow the plaintiffs to proceed by filing the declaration with a copy and notice to plead in the office of the Deputy Clerk of the Crown at St. Thomas, in the county of Elgin; and direct that such filing shall be deemed good service, and also that filing notice of assessment to the defendants in the said office shall be good service according to the practice in force before the C. L. P. Act, 1856.

Comstock v. Leaney.

Removal of suit from Inferior to Superior Courts—Commission.

An action in which it will be necessary to issue a Commission for the examination of witnesses, may be brought in one of the Superior Courts, although the amount sued for may be within the jurisdiction of an Inferior Court.

[Dec. 16, 1856.]

This action was brought in the Queen's Bench and a verdict recovered by plaintiffs for £8 3s. The only witness who could prove the account on which the action was brought resided out of the jurisdiction of the Courts, and it was necessary that a Commission should be issued to examine him.

On the application of *H. B. Morphy* for plaintiff,

Burns, J., before whom the cause was tried, now granted a certificate, "that in his opinion this cause was a proper one to be withdrawn, not only from the Division Court, but also from the County Court, and to be brought in one of the Superior Courts."

(a) For a review of the cases bearing upon the point decided in this case, see Harrison's Common Law Procedure Act, page 40.

(a) See Harrison's C. L. P. Act, p. 100.

RUDALL v. HURD ET AL.

Satisfaction Piece—Signature of plaintiff dispensed with—Rule 64, T. T.—20 Vic., 1856.

Plaintiffs' signature to the Satisfaction Piece, as required by Rule 64, T. T. 1856, will be dispensed with, and his attorney in the cause be authorised to acknowledge satisfaction, upon so being shown that the attorney is authorised by plaintiff to arrange the claim, and that the delay in obtaining plaintiff's signature will be prejudicial.

(Dec. 17, 1856.)

L. W. Smith applied for an order dispensing with the signature of the plaintiff to the Satisfaction Piece, as required by Rule 64 of Trinity Term, 20 Vic. 1856.

The affidavit of *Smith* showed that he had acted as plaintiff's attorney in this cause, and had issued an execution against the lands of defendants; that he had also since acted for plaintiff, who resides in England, in proving his claim against defendant Hurd, upon his judgment in this cause, as an Incumbrancer in a certain foreclosure suit in Chancery against said Hurd; that he (deponent) had been applied to by the solicitor of Hurd to discharge the judgment in this cause upon being paid the same; that Hurd's solicitor informed deponent that he was prepared to satisfy the judgment, if the same could be immediately discharged; that deponent is fully authorised by the plaintiff to collect the amount of the said claim, and to take all necessary steps therefor—in further proof of which he referred to a letter received by him from plaintiff, and now produced, dated "London, 27th June, 1856," authorising him (deponent) to act for plaintiff in arranging this claim; and that it is desirable that deponent should be allowed to sign the Satisfaction Piece, without delaying to send the same to England for plaintiff's signature.

HAGARTY, J., granted an order "that the signature of the plaintiff to the Satisfaction Piece in this cause, as required by Rule 64, Trinity Term, 1856, be dispensed with; and that the attorney for the plaintiff in this action be authorised to acknowledge satisfaction of the judgment in this cause."

RIDLEY v. TULLOCK.

Removal of suit from Division Court by Certiorari—13 & 14 Vic., cap. 53, sec. 85.

A suit will be removed by *certiorari* from a Division Court to one of the Superior Courts, upon its being shown that questions of law as to the application of the Statute of Limitations will arise in the trial.

[Dec. 17, 1856.]

Jackson, for defendant, applied under 13 & 14 Vic., cap. 53, sec. 85, for an order for a writ of *certiorari* to remove this suit from the First Division Court of the county of Hastings, to the Court of Queen's Bench.

The affidavit of defendant showed that the whole amount of the account sued on is £29 10s. 6d., but plaintiff abandoned the excess so as to sue in the Division Court; that the whole debt sued for, except ten shillings, appeared by plaintiff's particulars to have been contracted more than six years next before the Summons was issued herein; that defendant gave notice of his intention to plead the Statute of Limitations, and on the trial the Judge ruled that the claim being a running account, the last items of which were obtained within the six years, it did not come within the Statute of Limitations, and accordingly gave judgment for plaintiff; that he, defendant, obtained a new trial; that he has never promised to pay any part of plaintiff's claim within six years next before the issuing of said summons; that questions of law as to the application of the Statute of Limitations to bar plaintiff's claim, are likely to arise on the trial; and that he owes no part of plaintiffs claim, and is advised and believes that he has a good defence on the merits.

HAGARTY, J., granted the order, quoting the wide words of the Division Courts Act, 13 & 14 Vic., cap. 53, sec. 85, but expressing strong doubts as to the general sufficiency of the grounds alleged.

MCKELLAR v. GRANT.

Endorsement on Fi. Fa.—Certificate of Judgment—Concurrent writs of Execution.

The costs of a certificate of judgment may not be endorsed on a *Fi. Fa.* The costs of a concurrent writ will not be disallowed unless it be shown that it was issued merely to make additional costs.

[Dec. 17, 1856.]

This was an application by *Carrall* to reduce the amount endorsed on the *Fi. Fa.* by £2 10s. taxed off the bill of costs on revision of taxation, the amount charged for certificates of judgment—and the charge for one of the two concurrent writs of execution issued.

The plaintiff showed cause, and showed on affidavit that he had reason to believe that defendant had personal property in both the counties to which writs were issued.

HAGARTY, J.—The taking out and registering certificates of judgment was for plaintiff's own security, and he may not endorse the costs thereof on his execution. The case of *Wilt v. Lai et al*, 1 C. Rep. 216, decided that point. As to the charge for concurrent writs, I would not disallow the costs of a concurrent writ, unless it was very clearly shown that it was issued oppressively for the purpose of making additional costs, which does not appear to have been the case here.

Order absolute as to the £2 10s., and the charge for certificates, with costs.

TOPPING ET AL v. SALT.

Garnishee—Attachment of Debts—C. L. P. Act, 1856, sec. 194.

Semble, that debts of amounts within the jurisdiction of Division Courts will not be attached by the Superior Courts, under sec. 194 of C.L.P. Act, 1856.

[Dec. 18, 1856.]

The plaintiff had obtained an order from BURNS, J., attaching a number of debts, varying from £10 to 10s., due from certain persons to the defendant, and calling upon the garnishees to show cause why they should not pay these debts to the plaintiffs.

Some of the garnishees not having appeared nor paid the amounts due by them into Court, plaintiff asked for an order that execution should issue.

HAGARTY, J.—I have consulted the other Judges of the Court of Common Pleas, and as at present advised, and until a decision of one of the Courts in Banc shall have settled the practice, or some English decision be pointed out, it is considered that we ought not to grant orders attaching small debts, a list of debts like those in this case. The carrying out such a practice would have the effect of bringing into the Superior Courts innumerable suits which are far within the jurisdiction of the Division Courts, and increasing costs to a startling amount. No limit can be named at present. The Judges will probably come to some general understanding on the subject.

I will make no present order in this case. As the debts have been attached, the garnishees can pay them into Court under the Statute.

MONTFORD ET AL v. MCNAUGHT.

Writ of trial—Action on a guaranty.

An action on a guaranty is not within the meaning of 8 Vic., cap. 13, sec. 51. The Statute only applies where the production of the document and proof of signature would be, *per se, prima facie* evidence of indebtedness.

This was an action brought upon the following guaranty:

"£144 14s. 1½d. Brantford, 17th June, 1856.

"Messrs. O. F. MONTFORD & Co.:

"Gents, please let Mr. Wm. Latimer, have goods and work "out of your shop to the amount of one hundred and forty-four "pounds 14s. 1½d., and he will give you his note for that "amount, and I hereby guarantee the payment of said note "when due, said note to be made payable three months from "the above date.

"Yours, &c., JOHN MCNAUGHT."

Plaintiffs applied for a writ of Trial, under 8th Vic. cap. 13, section 51.

(Nov. 13, 1856.)—*Burns* showed cause, and submitted that this was not a case within the meaning of the Statute.

HAGARTY, J.—The meaning of the statute in saying "where the amount is ascertained by the signature of the defendant," is in my opinion where the simple production of the document and proof of the signature would be, *per se, primâ facie* evidence of the defendant's liability to a fixed amount. This is not such a case—other evidence would have been unnecessary. I must discharge this summons, but without costs, as no authority is cited on the point.

Summons discharged accordingly.

DUGGAN, ONE &C. v. COTTON.

Reference of Solicitor's Bill to be taxed—16 Vic., cap. 175, secs. 20, 25—Entitling of affidavits.

Application to have a solicitor's bill referred. to be taxed under 16 Vic., cap. 175, sec. 20, must be made *in the matter of such solicitor*, as required by 25th sec.

This action is pending in the County Court, and is brought by plaintiff, a solicitor, for his costs in different suits in the Superior Courts, upon the retainer of defendants. Defendants applied under 16 Vic., cap. 175, sec. 20, to have the bills of costs on which the action is brought, referred to be taxed, and entitled the affidavits on which they applied, and their summons, in the Courts and causes in which the business had been done.

(Nov. 11, 1856.)—*Burns* showed cause. The affidavits and summons are wrongly entitled: the application should have been made *in the matter of the attorney*, as required by the 25th section of 16 Vic., cap. 175.

HAGARTY, J.—The statute is peremptory, and I must discharge this summons, but without costs, as the objection is technical, and no authority is cited on the point.

Summons discharged without costs.

TO CORRESPONDENTS.

R. N.—Your communication came to hand too late for this number; it will be answered in the next.

C.—Particularly obliged by your communication; will gladly avail ourselves of the promise. The particular matter referred to will be most acceptable: "In the conflict of opinion there is light."

T. T.—The queries will be answered in our next.

M.—Our best thanks are yours. You will have heard from us through the "Corresponding Editor."

J. R.—Johnston & Co., *Philadelphia*—and Little, Brown & Co., of *Boston*.

J. M.—The case. you refer to. appears in the present number. On the general question no case has as yet come up for decision.

S.B.—Your complaint is in reference to the finding on a matter of *fact*. Such communications are fitted for this Journal.

J. B.—The publisher requests us to say that Vols. 1 & 2 were sent as directed and that the supply of Vol. 1 is now nearly exhausted.

H.—We are anxious to hear from you again. We wrote to you last month.

TO READERS AND CORRESPONDENTS.

All Communications on Editorial matters to be addressed to

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

Remittances and Letters on business matters to be addressed (*prepaid*) to

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

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

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

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THE LAW JOURNAL.

JANUARY, 1857.

TO OUR READERS.

The *Law Journal* has passed the ordeal of a second year. It has preserved the confidence of those who first approved of its publication; it has gained new and valuable supporters; spontaneous testimony has poured in upon us, to the value and general usefulness of the *Journal:* from the highest legal quarters we have received the warmest expressions of encouragement—and of those enlightened and intellectual friends who cheered us on to exertion, not a few have extended our means of selecting objects they approve.

We thankfully acknowledge assistance and suggestions received, and if our position did not enjoin upon us an obligation to reserve, could with pride indicate the sources from which much that appeared in the *Journal* emanated.

The system of reporting has met with favour at the hands of the profession, and the late arrangements by which they are promptly supplied with the Chamber Decisions on the Common Law Procedure Act, has added much to the value of the *Journal*, and has, we trust, convinced our brethren that professional interests are not forgotten.

There was some little misapprehension at first; it has, we believe, been removed. The *true* interests of the profession we have at heart, and they may be best served by making the most of matters as they are, and guiding progress for the future in a right and safe direction.

The *Law Journal*, we know, has also served the useful purpose of guiding Officers of Courts and Municipal Bodies in the discharge of their duties; in some cases preventing errors, in others saving from the consequences of persevering in illegal acts: and several of the improvements in the law and its administration advocated in our Journal, we have had the satisfaction of seeing carried into effect.

Our future must depend on the way we may be sustained: with a more general and liberal support we will be able to procure further assistance from talented writers here and in England, and with varied interests to serve we trust to be able to satisfy all.

If one third of our present subscribers would *each* take the trouble to procure one additional subscriber, they would most effectually further objects they approve, and enable us to make the *Journal* a legal organ worthy of Upper Canada.

From the first we have been anxious to obtain cases from the Divsion Courts and other Courts in which the local Judges preside: our supply of Local Courts Reports has hitherto been very scanty, as we have had to rely for the most part on the voluntary contributions of practitioners. The numerous objects, placed in one way or another under the jurisdiction of the County Judge, must constantly furnish cases of importance for determination, and a record of them would be extremely useful to all concerned in local administration. Practitioners are not always present in these Courts, and under any circumstances our experience leads us to believe that no regular general supply could be looked for from them.

We would therefore, to borrow the sentiments of an English periodical similar to our own, "beg to "ask the Judges of the County Courts to send us "*all* their *written* judgments, whenever they are "given. A collection of these, where they may be "regularly read and be preserved for the use of the "Judges and others, would be a valuable feature, "and it will not, we trust, be imposing too much "trouble to ask to ask the Judges to post their "written Judgments to us as soon as delivered. "The M.S., if desired, can be returned, but if they "possess a copy in print, it will probably be more "serviceable. We do not put this so much as a "favour to us as for the convenience of the Judges "themselves, and that of all engaged in the Courts, "to whom it must be of great utility and interest "to possess in print the Judgments that have been "deliberately prepared." These observations, correct in their application to the English Judges, have great additional weight as applied to our County Judges, who possess larger jurisdiction and also collateral powers which do not belong to the County Judge at home.

We would beg most respectfully to solicit our County Judges to favour us with all their written Judgment. Reports received from other quarters, which we deem on inspection worthy of publication, will be paid for.

In conclusion we would say, what has been done already must be our guarantee for the future. To make the *Law Journal* better deserving of public and professional support and to enlarge its sphere of usefulness will be our continuous aim.

MR. MOWAT'S LECTURE—AMERICAN REPORTS AND LAW BOOKS.

On another page will be found an extract from a well written and very valuable lecture delivered by Mr. Mowat at Osgoode Hall, last term. Not merely to Students, but to the Profession generally, will the extract given be found useful and interesting. Mr. Mowat very judiciously selected for consideration an important and hitherto almost an untouched topic. The estimation in which American Judges and writers on law are held by the Judges and Jurists of England, ("and I suppose I may add, of Canada," Mr. Mowat modestly says)

and the use and value to us of American Reports. The Lecturer very properly gives some leading cautions in the use of these reports, and is evidently of opinion that their employment should be circumscribed within the narrowest limits. In the main we are not disposed to differ with the opinions expressed, but would remark that, as Jurisprudence is entitled to a place among the liberal *sciences*, it follows that all sources, foreign and domestic, from which men of science may add to their information, should be unhesitatingly resorted to—more particularly in the business of Administration, where the absence of positive authority leaves only broad grounds of rational jurisprudence upon which to base a decision.

The ancestors of our American neighbors carried with them to this continent the body of the English Law, as it then stood, and the principles of the Common Law of England (excepting such as were inapplicable to the circumstances of the country) as well as the Statutes amendatory of the Common Law, constitute the Common Law in, at least, the Northern States. With us the English laws were expressly adopted and referred to as the Rule for the decision of all questions relative to property and civil rights.

Like the American people, our system of jurisprudence has been built on a noble foundation. We have altered and modified; as circumstances seemed to require, so have they. in local circumstances and present situation we are in many respects alike; and our commercial relations are every day becoming more intimate and more diffused. New combinations of facts are constantly arising and producing new questions of law amongst an enterprising and progressive people: in this respect both countries have much in common: our reports would be valuable to the Americans, and we readily admit that the value to us of American Reports can scarcely be overrated—not as guides certainly, yet it seems but reasonable that those who are called upon to decide should wish to know what others, distinguished for wisdom and experience, have done in cases similar to those in which they themselves may be called upon to act. "A Judge can have no wish upon a question of law, but to know what the law is," and in doubtful cases it would argue undue confidence to refuse the light of intelligent adjudication from whatever quarter it might proceed.

We quite agree with the learned lecturer that the Library of the Law Society of Upper Canada "would certainly want a very material element of completeness, if it did not at the earliest practicable period contain the reports of all the United States of America, even though amongst these there may be not a few which can seldom if ever be cited in our Courts with advantage." We do not however think with Mr. Mowat that Digests and Indexes should be excepted: these in many instances will be found greatly to facilitate reference to reports, and we would mention "*Putnam's* United States Equity Digest," and "The United States Annual Digest" as affording evidence of the correctness of our assertion.

The subject of Reprints of English publications "with American notes" is not touched upon in this lecture. We have always been of opinion that *unmutilated* reprints with notes and references to American cases by men of recognized ability were more valuable to the Canadian Lawyer than English editions, and that reading English works, by the light of American decisions, gave added information to the educated *lawyer*.

There is one point more in Mr. Mowat's very instructive remarks to which we would refer:—"The rules I have suggested for guidance are but corollaries of another and more general rule, which you should ever keep in mind, namely, that the true objects of the arguments of Counsel is to assist the Judge in coming to a sound conclusion." Too much prominence cannot be given to a sentiment such as this—it commends itself to every honorable mind. "While fulfilling his duty to his client," said an amiable advocate and writer, "the lawyer forgets not what is due to the community; * * * * he endeavours to co-operate with the Judge in building up good laws upon sure foundations."

"With reference to the task which I may be considered to have imposed upon Counsel (observed "Lord Langdale, in *Hutchinson v. Stephens*,) I "wish to observe that it arises from the confidence "which long experience induces me to repose in "them, and from a sense which I entertain of their "truly honorable and important services, which "they constantly perform as ministers of justice,

"acting in aid of the Judge before whom they prac-"tice. No counsel supposes himself to be the "mere advocate or agent for his client, to gain a "victory if he can on a particular occasion. The "zeal and the arguments of every counsel, knowing "what is due to himself and to his honorable pro-"fession, are qualified by considerations affecting "the general interests of justice."

CHAMBER CASES.

Our Chamber Reports are again so numerous that we can only, as before, give notes of many of them, which want of space will not allow us to publish in full in this number:—

CATARAQUI ROAD CO. v. DUNN.

Attachment of debts—194th section C. L. P. Act, 1856.

The affidavit required by the 194th section of the C. L. P. Act, 1856, for an order to attach debts will not be dispensed with, and that affidavit must be positive and explicit. Under certain circumstances, however, an affidavit founded on belief will be sufficient.—Per Hagarty, J.

B. & L. H. R. Co. v. GORDON.

Replevin—When local and when transitory—14 & 15 Vic., cap. 64.

Where the goods to be replevied have not been distrained, the writ of replevin may be sued out in any county, and a writ of Replevin may be issued from one outer county to replevy goods in another outer county.—*Ib.*, Nov. 12, 1856.

WHITTIER v. WHITTIER.

Interpleader summons—Affidavit for interpleader summons, 7th Vic., cap. 30, amended by 9th Vic., cap. 56, sec. 4.

The affidavit on which to apply for an Interpleader summons on behalf of Sheriff, should state that the application is made solely for the benefit of Sheriff, and that he does not collude with either claimant or plaintiff.—*Ib.*, Nov. 11.

HENDERSON v. CORNER.

Practice—Counsel fee.

The rule of Practice that a person cannot tax a counsel fee in his own case against the opposite party does not extend to his partner. A counsel fee will be taxed between party and party, even though the counsel did not attend the trial.—Per Burns, J., Dec. 2.

HARRINGTON v. HARRINGTON.

Ejectment—Defence by person not named in writ—C. L. P. Act, 1856, sec. 225.

A person in possession and not named in the writ of Ejectment will be allowed to appear and defend, even though the defendant have already given a confession of judgment and a writ of *Hab. fac. pos.* has been issued thereon.—*Ib.*, Dec. 4.

JONES v. DEBERGUE ET AL.

Attachment of debts—C. L. P. Act, 1856, sec. 194.

An order for the attachment of debts under 194th section of the C. L. P. Act, 1856, will be granted upon affidavit of *belief* of garnishee's indebtedness, provided sufficient grounds be shown in affidavit for such belief.—*Ib.*, Dec. 5.

HARRIS v. ANDREWS.

Practice—Appearance—C. L. P. Act, 1856, sec. 62.

An appearance is in time, even though filed while plaintiff is entering judgment, so that the judgment be not fully signed.—Per Hagarty, J., Dec. 19.

BEATY v. CHARITY.

Practice—Writ of trial—Commission.

It is a good objection to an application for a writ of trial that it will be necessary to issue a commission for the examination of defendant's witnesses.—Per Robinson, C.J., Dec. 22.

ERRATA.—In January No. of Vol. 3, page 4, column 2, line 28, "in" omit; page 6, column 1, line 9, for "Walworth" read "Wawrorth"; page 6, column 2, line 21, for "respective" read "respectful."

MONTHLY REPERTORY.

COMMON LAW.

C.P. BARBER v. BROWN AND SMITH. *Nov.* 11, 14.

Money had and received—Rent paid under mistake of facts—Set-off.

Money paid as rent under a mistake of facts recovered back in an action for money had and received. Defendants allowed to set-off ground rent, rates and taxes paid by them in respect of the premises occupied by the plaintiff.

EX. HUNTER v. GIBBONS. *Nov.* 24.

Pleading—Equitable replication—Statute of Limitations—Trespass.

A plaintiff will not be allowed to reply on equitable grounds to a plea of the Statute of Limitations to an action of trespass for breaking and entering the plaintiffs close, and taking and carrying away and converting the plaintiff's coal; that the causes of action were fraudulently concealed by the defendant until within six years before the commencement of the action.

Semble, that such a replication would be bad in any case.

Semble, per BRAMWELL, B., that it was not meant by section 85 of the C. L. P. Act, 1854, that replications on equitable grounds should be allowed where the matters therein stated disclose that the foundation of the plaintiff's claim is of a purely equitable nature.

EX. PISTRUCCI v. TURNER. *Nov.* 19.

Practice—New trial—Additional evidence—Surprise.

At the trial of an an action to recover damages for a personal injury by reason of the defendant's negligent driving, evidence was offered on behalf of the defendant that the plaintiff and his wife (who at the time of the accident were in another carriage which was being driven by the plaintiff,) had used expressions to the effect that it happened through the fault of the plaintiff himself. The plaintiff and his wife denied having used these expressions, and the jury found for the plaintiff. The Court refused a new trial to give the defendant an opportunity of showing that the expressions had in fact been used, and that the plaintiff was in fault as the point had been before the jury, and there was no case of fraud or perjury.

Q.B. GRACE v. WILMER. *Nov.* 17.

Practice—Change of Venue—Attorney's privilege to sue in Middlesex.

An attorney of one of the superior courts has the right to sue in Middlesex, if he sue in his own person as an attorney.

C.C.R. REGINA v. LISTER. *Nov.* 15.

Embezzlement—Evidence—Accounting—Entry in Ledger—7 & 8 Geo. IV, cap. 29, sec. 47.

A conviction for embezzlement was supported, though it appeared that the prisoner had entered the sum appropriated in his master's ledger.

C.C.R. REGINA v. GREEN. *Nov.* 15.

Larceny—Ownership of goods—Bailee—Stall, stealing from—Autrefois acquit—Amendment 14 & 15 *Vic., cap.* 100, *sections* 1, 2 & 3.

A boy 14 years of age living with and assisting his father in his business without wages, at one o'clock in the day succeeded his father in the charge of his father's stall, from whence some of his father's goods were stolen by the prisoner. *Held*, that in a count for larceny the ownership of the goods could not be laid in the boy.

The prisoner having been indicted on a count stating the ownership to be in the boy, was acquitted, and a second indictment was then preferred, laying the ownership in the father, upon which he was convicted.

Held, that a plea of *autrefois acquit* could not be sustained, and that the conviction was right.

Q.B. MARTIN v. ANDREWS. *Nov.* 22.

Money had and received—Witness' conduct money—Settlement of cause before attendance of witness required.

Where, in consequence of the settlement of a cause, the attendance of a person subpœnaed as a witness is not required and he has notice, money paid to him as conduct money may be recovered as money received to the use of the party paying.

C.C.R. REGINA v. HARRIET WILSON. *Nov.* 22.

Causing abortion—Administering and causing to be taken—Presence of prisoner at time of taking—Intent in taking— 7 *Wm. IV, and* 1 *Vic, cap.* 85, *sec.* 6.

Upon an indictment under 7 Wm. IV, and 1 Vic., cap. 85, sec. 6, for causing abortion, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but the taking was not in the presence of the prisoner, and that it produced miscarriage.

Held, that a conviction upon the facts above was right, and that there was an "administering and causing to be taken" within the Statute, though the prisoner was not present at the time.

Q.B. BROWN v. PELLEGRINI. *Nov.* 21.

Charter party—Reference to arbitration under Common Law Procedure Act, 1854, *sec.* 11.

By the 17 & 18 Vic., cap. 125, sec. 11, which enables the court as a judge to stay proceedings, when the parties to a contract agree that any existing or future differences between them shall be referred to arbitration, is meant all existing or future differences arising out of the contract itself: and it is not confined to the very subject matter of the action itself, in which the court or a judge is applied to stay the proceedings.

EX. HAMLIN v. THE GREAT NORTHERN R.W. Co. *Nov.* 19.

Damages—Measure of, in actions of contract—Damages in actions of tort—Injury to feelings—Functions of jury.

The damages in actions for breach of contract are ordinarily confined to losses which are capable of being appreciated in money: and with the exception of the case of a breach of promise of marriage, damages that are not capable of being estimated, such as injury to feelings or vexation, are not allowed: *aliter* in actions of tort.

Where the action was for breach of contract in not carrying the plaintiff to the end of the journey to which the defendants had contracted to convey him, and the Judge told the jury that they ought only to give the sum which it cost the plaintiff to make the residue of the journey, in addition to nominal damages. *Held*, that the direction was right.

EX. CLARKE v. LAURIE. (P.C.) *Nov.* 18, 19.

Trustee—Authority to bankers to receive money—Advances—Equitable plea.

A married woman and her husband requested her trustee to grant a power of attorney to the defendant to receive her dividends; he did so, and they afterwards opened an account with the defendant's agents at Brussels and arranged that in consideration of receiving certain advances they would instruct the defendant to remit the dividends from time to time. A debt having accrued to the bankers at Brussels, the authority to pay them the dividend was withdrawn, but the defendant received it as usual and remitted it to the bank at Brussels.

Held, that the plaintiff, the trustee, might maintain an action against the defendant for such dividend, and that the authority was not irrevocable, although the advances had been made on the faith of it.

No equitable plea will be permitted except in a case where the plea and the decision and judgment of the Court upon it will work out and complete all the equity that belongs to the matter to which the plea refers.

EX. ARANGUREN v. SCHOFIELD. *Nov.* 20.

Lost bill of exchange—Indemnity—Pleading.

Where an action is brought on a lost bill of exchange, defendant must plead and obtain the decision of a jury; the Court will not stay proceedings on payment of the amount, and call upon the plaintiff to give an indemnity against any other claim in respect of the lost bill.

Q.B. HEWETT v. WEBB. *Nov.* 21.

Practice—Discovery of documents—C. L. P. Act, 1854—*Affidavit.*

The Court will not compel a party to answer as to his possession of documents under section 50 of C. L. P. Act, 1854, upon a mere affidavit of belief that he has some documents relating to the matter in dispute.

Q.B. HEWITT v. WEBB. *Nov.* 21.

Practice—Common Law Procedure Act, 1856, *sec.* 50—*Discovery of documents.*

This Court will not grant a rule calling upon a party to an action to discover what documents he may have in his possession relating to the cause, but the party claiming the discovery must name what documents he desires to inspect.

C.C.R. REGINA v. SPENCER AND DAVIDSON. *Nov.* 22.

*Arson—Stack of grain—Flax—*7 *William IV, and* 1 *Vic., cap.* 89, *sec.* 10.

Upon indictment under 7 Wm. IV, and 1 Vic., cap. 89, sec. 10, for setting fire to a stack of grain, it was proved that the prisoners set fire to a stack of flax with the seed in it, and the jury found that flax seed is a grain:

Held, that a conviction upon the above facts and finding of the jury was right.

Q.B. RUSSELL v. PELLEGRINI. *Nov.* 21.

Practice—Enforcing obedience to an arbitration clause in a charter party—Sec. 11 *of C. L. P. Act*, 1854.

A charter party contained a clause that if any difference of opinion should arise between the parties either in principle or detail, the same should be referred to arbitration. An action having been brought upon that charter party by the ship owner for the agreed freight, and a cross action by the charterer for damages alleged to have been occasioned by the unseaworthiness of the vessel, the Court made absolute a rule under sec.

11 of C. L. P. Act, 1854, to stay all proceedings in the action by the ship owner, the charterer being willing to refer.

To bring a case within that section it is enough if there be a matter in dispute between the parties which they have agreed to refer, and an action also in respect of a matter agreed to be referred, although the action may have been brought in respect of some claim arising out of the same contract, which, as a matter legal right, is not substantially disputed.

Q.B. GIBSON v. VORLEY. *Nov.* 18, 25.

Practice—Alteration of defendant's name in writ of summons—Rescaling writ.

A writ issued by mistake against a defendant in a wrong name, may be altered by correcting the name and getting the writ rescaled without altering the teste.

EX. STOKES v. COX AND OTHERS. *Nov.* 29.

Insurance, fire—Policy, effect of description in—Alteration of circumstances not increasing the risk—Express conditions—Construction.

In a policy effected by the plaintiff with the "Birmingham Fire Office," the subject matter of the Insurance was described "On a range of buildings of three stories, all communicating, situate, &c., comprising offices, warehouses, curriers' shops, and dressing rooms, having a stock of oil (not exceeding four cwt.) deposited therein, part of lower story of said building being used as a stable, coach-house and boiler-house—no steam engine employed on the premises—the steam from said boiler being used for heating water and warming the shops: brick and tiled or slated.

N.B.—The process of melting tallow by steam in said boiler house, and also the use of two pipe stoves in said building are hereby allowed; but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein, nor any building adjoining thereto." The policy described with particularity four species of insurance, "common," "hazardous," "doubly hazardous," and "special risks"; and in describing the last, stated, "when insurances deemed special risks are proposed, the most particular specification of the property and all circumstances attending the same, with a ground plan of the premises, will be required: but all which special risks must be particularized on the policy to render the same valid or in force." The seventh condition indorsed on the policy, after providing that persons in cases of removal to other premises, or death, &c., might preserve their policies, "if the nature and risk insured be not altered," but in every case the policy would not be held in force until notice of the removal, &c., and indorsement on the policy, stated: "If after the assurance shall have been effected, the risk shall be increased by any alteration of the material composing the buildings, or by the erection of any stone coakel-kiln furnace, or the like, the introduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be endorsed on the policy by the secretary, or some other agent of the company, and a proportionate premium paid (if required), such insurance shall be of no force." The subject matter of the insurance in question was correctly described at the time of effecting the policy, the plaintiff, without notice to the office, erected in the stable the machinery of a steam engine, which was supplied by steam from the boiler mentioned in the policy, but the actual risk was not increased by it. The premises were afterwards destroyed by accidental fire.

Held, (reversing the decision of the Exchequer) that the assured was only required by the seventh condition to give notice to the office of an alteration by which the risk would be increased; and that as the risk was not increased by the introduction of the steam engine, the policy was not avoided, and the plaintiff was entitled to recover against the office.

Quære, as to the effect of a statement in the description of a policy requiring no express conditions.

EX. LORD LUCAN v. SMITH ET AL.

Libel—Pleading several matters.

To an action for libel the Court will permit a defendant to plead with the general issue, a plea stating that the alleged libel complained of is a fair comment in a public journal on the public acts of a public man.

CHANCERY.

V.C.K. BANNERMAN v. CLARK. *Nov.* 19.

Specific performance—Interest and costs.

A contract to sell an estate to B., the terms being that the contract shall be completed on a day named; and if from any cause whatsoever the purchase shall not be completed, the purchaser shall pay interest at £5 per cent from that time until the completion of the purchase. The title is accepted, the conveyance engrossed, and two days before the day named A. dies, having devised her real estate to an infant. A bill for specific performance is filed by B., who pays the purchase money into Court generally, and his right to specific performance being admitted, and no question raised as to title, the questions were whether B. was liable to pay interest; and if so, whether after payment into Court, *held*, that he was. No costs given to either party.

NOTICES OF NEW LAW BOOKS.

THE UPPER CANADA LAW DIRECTORY FOR 1857—*By* J. RORDANS. *Henry Rowsell, Toronto.*

Though many of our professional readers would require to be enlightened as to the nature and scope of a "Law Stationer's" business, we cannot just now spare time to do it: they must be content to know that we actually have a genuine Law Stationer in Upper Canada, and that that functionary is ambitious to serve the profession and himself by the same act. Mr. J. Rordans has compiled and published a Law Directory for Upper Canada. It embraces all the information usually found in such publications. For example the following:

Upper Canada Judiciary, &c.—Crown Law Department—Deputy Clerks of the Crown—Sheriff's Office—Surrogate Courts—County Courts—Recorders' Courts—Division Courts—Alphabetical List of practising Barristers and Attorneys throughout Upper Canada, with their places of residence—List of Toronto Barristers and Attorneys, with their places of business and residence—List of Barristers and Attorneys throughout Upper Canada, arranged under different different Cities, Towns, &c., with their Agents in Toronto—List of Commissioners for taking Affidavits in Upper Canada—List of Commissioners for taking Affidavits in Upper Canada to be acted upon in Lower Canada—Do. do. in Lower Canada to be acted upon in Upper Canada—List of Notaries in Upper Canada—Lower Canada Judiciary, &c.—English Judiciary—Irish Judiciary.

From the brief glance we have been able to give over the Directory, we have no hesitation in saying that it is a very laborious and creditable production, and commend it to the profession. Mr. Rordans really deserves to be encouraged to make the work an annual publication.