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DIARY FOR AUGUST.

1. Monday..... *Lammas.*
6. Saturday ... .. Articles, &c., to be left with Secretary of Law Society.
7. SUNDAY ..... *11th Sunday after Trinity.*
10. Wednesday.... *St. Lawrence*
14. SUNDAY ..... *12th Sunday after Trinity.*
17. Wednesday.... Last day for service for County Court.
20. Saturday ..... Long Vacation ends.
21. SUNDAY ... .. *13th Sunday after Trinity.*
22. Monday ..... TRINITY TERM begins.
24 Wednesday.... *St. Bartholomew.*
26 Friday..... Paper Day Queen's Bench.
27. Saturday ..... Paper Day Common Pleas. Declare for County Court.
28. SUNDAY ..... *14th Sunday after Trinity.*
29. Monday..... Paper Day Queen's Bench.
30. Tuesday..... Paper Day Common Pleas.
31. Wednesday.... Paper Day Queen's Bench.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

AUGUST, 1864.

THE STAMP ACT.

Our Legislature has at length thought fit to follow the example of England in imposing a species of tax hitherto unknown in this country. Whether we are to accept it as an indication of the march of civilization westward, or simply as an evidence that our wants or expenditure as a country is increasing with our age, we have, nevertheless, something novel presented for the consideration both of the Canadian merchant and the Canadian lawyer.

Bills and notes were in England exempt from any stamp duty until the 22 Geo. III., c. 33. At that time, and until 16 & 17 Vic. cap. 59, the paper which was to be used for the bill or note was stamped or impressed with a die; under the latter Statute adhesive stamps were introduced.

This Act is much simpler in its provisions than the enactments in England on the same subject, and many of the cases there decided touch upon points which cannot arise here. But we trust that the experience of other countries has been used as far as possible by the framers of this Act, and that little difficulty will be experienced in the working of it.

We notice in the first place that section 7 empowers the Governor, by order in Council, to declare that any kind or class of instruments as to which doubts may arise are, or are not chargeable with any and what duty, according to the true meaning of the Act,—a provision which, if made use of promptly and carefully as each question arises, may be the means of saving much litigation and expense.

In *Tomkins* v. *Ashby*, 6 B. & C. 542, Lord Tenterden remarks that "Acts of Parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature."

The various instruments or writings affected by this Act may be classed as follows:—

1. Bills of exchange and promissory notes payable to order or bearer.

2. Letters of credit or documents whereby any person is liable to have credit with or to receive from or draw upon any person for any sum of money.

3. Receipts for money given by any banker or other person which entitles the person paying the money or the bearer of the receipt to receive the like sum from any third person.

The exemptions from duty under this Act are,—

Bills of exchange, drafts, or order drawn by or to any officer in Her Majesty's Imperial or Provincial service in his official capacity, or any acceptance or endorsement by him on a bill of exchange drawn out of Canada.

2. Bank notes payable on demand to bearer issued by any chartered bank or bank doing business under the Free Banking Act.

3. Cheques on any bank or licensed banker.

4. Post office money orders.

5. Municipal debentures and coupons.

Cases will doubtless arise under this Act, as in England under the Stamp laws there, as to what are, or are not bills of exchange or promissory notes,—and, for the benefit of our unprofessional readers, it may be useful to define them.

"A bill of exchange is a written order from A. to B. directing B. to pay a sum of money therein named," or, as it otherwise described, "an open letter of request by A. to B., desiring B. to pay a sum of money to a third person or any other to whom that third person shall order it to be paid, or it may be made payable to bearer." The order or request to pay need not be in any particular form; any expression amounting to an order or direction is sufficient.

"A promissory note is an absolute promise in writing, signed, but not sealed, to pay a specified sum at a time therein limited or on demand or on sight to a person therein named, or to his order or to the bearer." No precise form or words is essential to the validity of either a bill or a note. But they must have all the requisites contained in the above definitions. They may be written in pencil as well as ink, nor is a date absolutely necessary; and, in such a case, the bill or note will be considered as

dated at the time it was made. The word "pay" is not indispensable, but any expression amounting to an order or direction or promise to pay, as the case may be, is sufficient. They must be payable in specie, and must be for the payment of a certain sum of money only, and not be made to pay a sum of money, *or* do something else, or to pay a sum of money *and* do something else (*see* Byles on Bills).

It would be impossible to mention here all the various irregular instruments purporting to be bills and notes upon which judicial opinions have been given, but they will be found collected in the books that treat on the subject. There is, however, a case of *Palmer* v. *Fahnestock*, 9 U C. C. P. 172, of considerable interest to mercantile men, which it would be well to refer to. The action was brought on an instrument purporting to be a promissory note, with the words "with exchange on New York" inserted after the statement to be paid. The defendants demurred to the declaration on the ground that the instrument was not a promissory note, the amount being uncertain and indefinite. *Draper*, C. J., C. P., in delivering judgment said, "On the face of this note it is payable in Kingston, and it is, for all that appears, made in this Province, and, if that could make any difference when it is payable here and sued upon here, I assume it is also made here, I cannot, therefore, treat it as an engagement to make a payment in New York, neither maker nor endorser having engaged for that. I rather read it as a promise to pay in Kingston such a sum of money as will be equivalent to £72 17s. in New York, and, if this be the true reading, the instrument ceases to have certainty in amount. . . . . I am afraid this decision will give rise to trouble and disappointment among commercial men who have adopted this system of giving and taking notes of hand in this form. . . . . But, upon the fullest consideration, I do not perceive that we can hold that the amount to be paid is made certain either by the terms of the instrument, or by the application of any rule of law as in the case of a note payable with interest."

Although a writing be defective as a bill or note it may nevertheless be evidence of an agreement, but in such a case it requires no stamp under our Act.

An I. O. U. does not amount to a promissory note and requires no stamp. It is only to be looked upon as an acknowledgment of a debt, (*Fisher* v. *Leslie*, 1 Esp. 425; *Beeching* v. *Westbrook*, 8 M. & W. 412.

The clause with reference to letters of credit is sufficiently explicit. But a question might arise under the next clause as to whether "deposit receipts" given by bankers come within the Statute. In the English Act there is a special provision with respect to them. It will be seen moreover that this receipt is to entitle the depositer to receive the money from a *third* person. In fact the writing here alluded to would be in the nature of a letter of credit. An ordinary deposit receipt would only entitle the depositer to receive the amount deposited from the bank or banker who received the money and gave the receipt. It would therefore seem that it would not require a stamp.

Section 9 provides that any person who puts his name to or becomes a party to or pay any bill, draft, or note chargeable with duty, before such duty (or double duty as the case may be) has been paid by affixing the proper stamp, shall incur a penalty of one hundred dollars, the instrument shall be invalid and of no effect at law or in equity, and the acceptance or payment or protest thereof shall be of no effect, unless some subsequent party to the instrument or person paying the same, may, *at the time* of his so paying or becoming a party thereto pay a double duty thereon, but that this shall not release the prior party who ought to have paid the duty from the penalty he has incurred.

It has been held in several cases in England under a similar enactment that a bill or note not duly stamped is not available in evidence, even as an admission, (*Jardine* v. *Payne*, 1 B. & Ad. 663; *Cundy* v. *Marriott*, Ib. 696.) But Lord Ellenborough considered that it might be looked at to ascertain a collateral fact (*Greyory* v. *Fraser*, 3 Camp. 454.) This was an action for money lent. The plaintiff's witnesses proved that he had lent money to the defendant, who gave a note for it on unstamped paper. The defence was that the defendant was made drunk by the plaintiff, and induced to sign the note produced; but that he had received no part of the amount of it. His Lordship said—"The note certainly cannot be received in evidence as a security, or to prove the loan of the money; but I think it may be looked at by the jury as a cotemporary writing to prove or disprove the fraud imputed to the plaintiff." In *Keable* v. *Payne*, 8 A. & E. 555, in assumpsit for goods sold, plaintiff's case was that defendant had received them of M. who had received them from plaintiff, the owner, by pretending to purchase them by means of a cheque which M. knew would be dishonoured. *Held* that in support of this case, the cheque, though unstamped (a stamp there being necessary,) was admissible in evidence,—(see *Reg* v. *Gompertz*, 9 Q. B. 824 to same effect.) Nor is it any defence to a prosecution for forgery that the instrument was not duly stamped.—(*Rex* v. *Hawkswood* 3 East P. C. 955).

It may naturally be asked with reference to this section, how is a subsequent holder of a note to know whether the stamp was affixed before it was signed by the prior party

or parties to it? It would seem only reasonable to suppose that if it could be distinctly proved that the note came into the holder's hands unstamped, such holder could not recover on it. But it would be impossible to go any further in that direction without putting a damper upon mercantile transactions. *Wright* v. *Riley*, Peake 173, was an action against an endorser of a bill of exchange which, when produced, appeared to be properly stamped; but the defendant proved that it was not stamped when drawn, nor for some time afterwards. Lord Kenyon said, "that though the Commissioners might have exceeded their duty in stamping the bill against the positive directions of the Act of Parliament, still as it had been stamped it became a valid instrument, and that a judge at Nisi Prius could not enquire how and at what time it was stamped. Much inconvenience might arise and a great check be put upon paper credit if the objection was to be allowed, for how was it possible for a man taking a bill in the ordinary course of business to know whether it had been stamped previous to the making of it or not." And this case has been, so far as it went, recognized in *Green* v. *Davies*, 4 B. & C. 235.

Making use of the same stamp a second time is provided against by section 2, which requires the signature or initials of the maker or drawer to be written on the stamp and on an integral or material part of the instrument to which it is affixed.

Any alteration in a bill or note in a material part (though with the consent of all parties), after it has once issued, necessitates the affixing a new stamp. A note of nine months after date was by consent of all parties, a fortnight after it had been delivered to the payee, altered to ten months after date. Lord Kenyon held a new stamp necessary, (*Wilson* v. *Justice*, Bayley, 6th Ed. 118; and see *Bowman* v. *Nichol*, 5 T. R. 537, to same effect) the reason being, of course, that it is a new and different instrument. But if the alteration be made to correct a mistake, and merely to make the bill or note, what it was originally intended to have been, it does not become a new instrument, and no fresh stamp is necessary (*Kershaw* v. *Cox*, 3 Esp. 246; *Jacob* v. *Hart*, 6 M. & S. 142; Watson, B. in *Dodge* v. *Pringle*, 7 L. J. Ex. 116; *Knill* v. *Williams*, 10 East. 431; *Downes* v. *Richardson*, 5 B. & Ald. 674). Any alteration in the date, sum, or time of payment, or the insertion of words rendering negotiable an instrument which before was not so, makes a new stamp necessary, and so it has been held that an alteration by the drawer or an indorsee, so as to give an unwarranted place for payment, vacates the acceptance (Bayley, 6th Ed. 118, 121). And an altered bill or note will be void in the hands of an innocent indorsee as well as in the hands of parties cognizant of the alteration (*Outhwaite* v. *Luntley*, 4 Camp. 179). By a most reasonable rule it lies upon the plaintiff to shew that any alteration appearing on the face of the bill was made under such circumstances as not to vitiate it (*see* Byles on Bills, 304).

It may be stated as an established rule that every contract is, in general, to be regulated by the laws of the country in which it is made. But, "in the time of Lord Mansfield," observes Abbott, C. J., in *James.* v. *Catherwood*, 3 D. & R., 190, "it became a maxim that the Courts of this country would not take notice of the revenue laws of a foreign state. There is no reciprocity in nations in this respect. Foreign states do not take any notice of our stamp laws, and why should we be so courteous to them, when they do not give effect to ours? It would be productive of prodigious inconvenience, if, in every case in which an instrument was executed in a foreign country, were we to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid."

Sections 1, 2 and 8 require that bills of exchange drawn out of the Province be properly stamped by the acceptor, or first endorser thereof, at the time of such acceptance or endorsement, and bills or notes drawn here, but payable out of the Province, would doubtless be subject to a stamp under this Act.

It has been held in England that if a bill is drawn there on a person in a foreign country, but made payable in England by both drawer and acceptor, it requires to be stamped as an inland bill (*Amner* v. *Clark*, 2 C. M. & R. 468).

If a bill purports to be drawn out of the Province, the presumption would be that it was really so drawn; but evidence would be admissible to contradict this presumption (*Abraham* v. *Dubois*, 4 Camp. 269).

ACT AMENDING THE DIVISION COURTS ACT.

The following is a copy of the Act passed last session, on the subject of Division Court Procedure, noticed editorially in our last number:—

An Act to amend chapter nineteen of the Consolidated Statutes of Upper Canada, intituled, "An Act respecting Division Courts."

Whereas it is desirable to lessen the expense of proceedings in Division Courts in Upper Canada, and to provide, as far as may be, for the convenience of parties having suits in these Courts: Therefore, Her Majesty, by and with the consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. Any suit cognizable in a Division Court may be entered and tried and determined in the Court the place of sitting whereof is the nearest to the defendant or defendants, and such suit may be entered and tried and determined irrespective of where the cause of action arose, and notwithstanding that

the defendant or defendants may at such time reside in a county or division other than the county or division in which such *Division Court is situate*, and such suit entered.

2. It shall be sufficient if the summons in such case be served by a bailiff of the Court out of which it issues, in manner provided in the seventy-fifth section of the Division Courts Act; and upon judgment recovered in any such suit a writ of *Fieri Facias* against the goods and chattels of the defendant, and all other writs, process, and proceedings to enforce the payment of the said judgment, may be issued to the bailiff of the Court, and be executed and enforced by him in the county in which the defendant resides, as well as in the county in which the judgment was recovered.

3. This Act shall be read as incorporated with and as part of the said Division Courts Act, and the foregoing sections shall be considered as inserted next after section seventy-one in the said Act, and the authority from time to time to make rules and to alter and amend the same (given under the sixty-third of the said Act) shall extend to the provisions in this Act contained.

CHAPTER V.

An Act for the collection by means of Stamps, of Fees of office, dues and duties payable to the Crown upon Law Proceedings and Registrations.

[Assented to 30th June, 1864.]

Whereas it is expedient that all Fees and Charges, payable to the Crown, for or upon any proceeding or matter in this Act mentioned shall be collected in the manner herein provided: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. Upon, from and after the first day of October next, Stamps shall be issued by order of the Governor in Council in such form and subject to such other direction as shall be thereby and as shall thereafter be from time to time by the like order provided, for the purposes hereinafter mentioned.

2. In Upper Canada such Stamps shall be used in lieu and in payment of the law fees and charges which are due and payable to the Crown under and by virtue of the Consolidated Statutes for Upper Canada, that is to say: chapters fifteen, sixteen, nineteen and thirty-three, and section twenty-nine of chapter ten, section eleven of chapter twelve, section sixty five of chapter thirteen, and section twenty-six of chapter thirty-five and under or by virtue of this Act or of any other Act or Acts whatsoever in either now or hereafter to be in force in Upper Canada, and under or by virtue of any order in Council or Proclamation made or issued or hereafter to be made or issued under such Acts or any one or more of them.

3. The following sections four, five, six, seven and eight, shall apply to Lower Canada only.

4. In Lower Canada the provisions of this Act shall apply in the following cases, that is to say:

1. To all fees of office payable or which may be hereafter become payable to any Prothonotary, Clerk of Appeals, Clerk of the Circuit Court, Sheriff, Coroner, Clerk of the Crown, Clerk of the peace, Clerk of any Judge of Sessions of the Peace Crier, Assistant Crier or Tipstaff of any Court, and which under any statute now in force, or that may hereafter be passed may form part of or be required to be paid into "The Officers of Justice Fee Fund" and so long as such fees continue to form part of such fund;

2. To every duty and tax imposed by the Act twelfth Victoria, chapter one hundred and twelve, intituled; *An Act to make provision for the erection or repair of Court houses and Gaols at certain places in Lower Canada*, or by the thirty-second Section of the one hundred and ninth Chapter of the Consolidated Statutes for Lower Canada, and the subsections thereof, or imposed or that may be imposed by any order in Council under the authority of the said Act, or of the said Section, upon the proceedings in and by the said Act, or in and by the said Section declared to be liable to such duty or tax, and which under any statute now in force or that may be hereafter passed, may form part of or be required to be paid into "The Officers of Justice Fee Fund" or "The Building and Jury Fund" and so long as such fees continue to form part of such funds or of either of them.

5. But the provisions of this Act shall not apply to any commission or remuneration in the nature of a commission *chargeable upon or retained out of moneys levied by execution* or otherwise, even though they may form part of either of the said Funds.

6. It shall not be necessary that any account be rendered to the Minister of Finance, of any fees of office, taxes or duties collected by means of stamps under the provision of this Act.

7. No public officer shall be entitled to any commission or percentage upon any fees, taxes or duties collected by stamps under the provisions of this Act, other than the commission hereby awarded upon the purchase of such stamps.

8. Such portions of the ninety third and one hundred and ninth chapters of the Consolidated Statutes for Lower Canada, and of the Act twelfth Victoria, Chapter one hundred and twelve, as are inconsistent with the provisions of this Act are hereby repealed.

9. All the fees, dues, duties, taxes and charges payable under the said Acts and parts of Acts, shall be considered to be fees, duties, taxes and charges payable to the Crown for the purposes of this Act, and shall throughout this Act be comprised in the word "fees" or fee."

10. The word "Officer" whenever used in this Act, and when applicable to Lower Canada, shall be held to comprise all Prothonotaries, Clerks of Appeal, Clerks of the Circuit Court Sheriffs, Coroners, Clerks of the Crown, Clerks of the Peace Clerks of Judges of Sessions of the Peace, Criers, Assistant Criers, Tipstaffs, Clerks of Commissioners Courts, Registrars.

11. Upon, from and after the day in the first section mentioned, no money shall be paid to or shall be received by any Court or to or by any Officer entitled to receive any such fees as aforesaid, for any such fee due and payable to the Crown, under any of the said Acts.

12. Upon from and after the said day, no matter or proceeding whatever upon which any fee is due or payable to the Crown as aforesaid, shall be issued or shall be received or acted upon by any Court or by any Officer entitled to receive any such fee until a stamp or stamps under this Act for the sum corresponding in amount with the amount of the fee so due or payable to the Crown as aforesaid, for, upon or in respect of such matter or proceeding, and in lieu of such sum so due and payable to the Crown, shall have been attached to or impressed upon the same.

13. Every matter and proceding whatever, upon which any such fee is due or payable to the Crown as aforesaid, and which is not so duly stamped shall, if not afterwards stamped under the provisions of the Act, be absolutely void for all purposes whatsoever.

14. In all cases of search, examining and authenticating office copies of papers made by the Attorney or Solicitor, and in all other cases when it has not been customary to use in reference to such search, examination, authentication, matter or thing, any written or printed document or paper whereon the stamp could be stamped or affixed the party or his Attorney or Solicitor, requiring such matter or thing so to be done, shall make application for the same by a short note or memorandum in writing, and a stamp or stamps to the amount of the

fee so payable, shall be stamped on or affixed to such note or memorandum.

15. No Sheriff or other Officer or person shall serve or execute any writ, rule, order or proceeding, or the copy of any writ, rule, order or proceeding upon which any such fee or charge if due or payable, and which is not duly stamped under this Act, and every such service and execution contrary to this Act shall be void, and no recompense shall be allowed therefor.

16. No matter or proceeding which may have been duly stamped for the purpose for which it may have been used, shall be considered as stamped for any other purpose, in case another fee or charge is due or payable thereon for any other or further use of the same matter or proceeding.

17. The court in which any such matter or proceding is, or is pending, which ought to be, but is not so duly stamped, shall not, nor shall any Judge of such Court take or allow any matter or proceeding to be had or taken upon, or in respect of such matter or proceeding, although no exception be raised thereto by any of the parties, until such matter or proceeding has been first duly stamped.

18. Any party to any matter or proceeding in any Court which ought to be, but is not so duly stamped, may apply to the Court in which such matter or proceeding is pending, or to any Judge having jurisdiction in the case, for leave to have the same duly stamped, and in case this Act has not been knowingly and wilfully violated, the application shall, on payment of costs, be granted for the duly stamping of such matter or proceeding with stamps of such amount beyond the fee due thereon as may be thought reasonable, not exceeding ten times the amount of the stamp.

19. The affixing of such stamp or stamps, under any order made for that purpose, shall have the same effect as if the said matter or proceeding had been duly stamped in the first instance.

20. In every case in which a stamp or stamps has or have under this Act been attached to or impressed upon any matter or proceeding, it shall be the duty of the officer who may issue or who may receive such matter or proceeding, forthwith upon the issue or upon the receipt thereof, to cancel the same by writing or stamping or impressing in ink on such stamp his name and the date thereof, so as effectually to obliterate and cancel the stamp, and so as not to admit of its being used again.

21. All fees now payable or hereafter at any time to become payable shall, after the passing of the act, or after they shall become payable, be at the following rates: all such fees up to ten cents shall be made and paid at ten cents; all from ten cents to twenty cents, at twenty cents; all from twenty cents to thirty cents, at thirty cents; and so in like manner all other fees which are not multiples of ten cents, shall be stated and payable at the multiple of ten cents next above the sum at which they are so stated; excepting the charge now made of one penny per folio in the Court of Chancery, in Upper Canada for examining and authenticating office copies of papers, and in such cases the charge under this Act shall be for examining and authenticating office copies of papers when the same do not exceed three folios five cents and for every three folios above the first three folios an additional five cents—and for any number of folios less than three, above any number of folios divisible by three, the charge for such broken number shall be *five cents.*

22. The Finance Minister shall procure the necessary stamps required under this Act, which he shall deliver to the Receiver General from time to time as they may be required, and he shall keep an account of the numbers, denomination and amount thereof, and of the dates at which they are so procured and delivered.

23. The Receiver General upon payment to him of the proper amount, shall deliver such of the said stamps as may be from time to time required and he shall keep an account of the number, denomination and amount thereof, according as he shall receive and deliver them.

24. The Receiver General shall, subject to the provisions hereinafter contained, allow to any person who takes at any one time stamps to the amount of five dollars or upward discount at the rate of five per centum:

The Governor by order in Council may, however, if he deems it expedient to do so, make arrangements with any particular person or persons, for the sole sale of stamps to him or them in any locality, and for such time as may be thought expedient, at any rate of discount not exceeding however the rate above stated, and in such case, the Receiver General shall not issue any stamps to any other person or persons in the locality specified in such order in Council.

26. In case an arrangement is so made with any person or persons for the issue of stamps as under the next preceding section mentioned, each such person shall be bound at all times to keep on hand such a supply of the different kinds of stamps during the time for which the arrangement lasts as may be reasonably expected to be required of him; and he shall be bound to sell the same to all persons who may demand the same upon payment to him of the amount or value of such stamps: and in case of any violation of any duty imposed by this section, he shall forfeit as a penalty to Her Majesty a sum not exceeding twenty dollars, and shall further be liable for the damages sustained by any party through such violation of duty.

27. The Governor in Council may, from time to time, make such regulations as may be thought expedient, for an allowance for such stamps issued under this Act as may have been spoiled or rendered useless or unfit for the purpose intended, or for which the owner may have no immediate use, or which through mistake or inadvertance may have been improperly or unnecessarily used; and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value to the owner or holder thereof, after deducting the discount (if any) allowed on the sale of stamps of the like amount.

28. In case it may be necessary to distinguish the stamps which are issued for any special fund or purpose from those which are applicable to the Consolidated Revenue of the Province, the Governor may by Order in Council direct such distinction to be made and observed in such manner, and from and by such means or differences in the lettering or numbering or in the colour or form or otherwise of the stamp, as he may find or consider it to be necessary or expedient.

29. Every person who shall knowingly issue, or shall knowingly receive, procure or deliver, or who shall knowingly serve or execute any writ, rule, order, manner or proceeding upon which any fee is due and payable to the Crown as aforesaid, without the same being first duly stamped under this Act, for the fee payable thereon, shall be subject for the first offence, to a fine not exceeding ten dollars, for the second offence, to a fine not exceeding fifty dollars and for the third and every subsequent offence, to a fine of two hundred dollars: and in default of payment of such fines to an imprisonment not exceeding one month for the first offence, three months for the second offence and one year for the third and any subsequent offence.

30. Every person who shall fail or omit to obliterate and *cancel any stamp in the manner and at the time hereinbefore* provided, shall be subject to a fine not exceeding twenty dollars, and in default of payment thereof, to imprisonment for a period not exceeding two months.

31. All fines imposed by this Act shall be paid to the Receiver General, for the general uses of the Province, and shall be recovered before any court having competent jurisdiction to the amount, at the instance of Her Majesty's Attorney General or Solicitor General; and the production of

any such writ, rule, order, matter or proceeding unstamped, or stamped for too low and insufficient a sum, or the stamp of which is not properly and sufficiently obliterated and cancelled, or the proof of any such writ, rule, order, matter or proceeding having been unstamped or not sufficiently stamped at the time when it was so issued or received, or served or executed as aforesaid, or of the stamp not having been properly and sufficiently obliterated and cancelled, shall be sufficient *primâ facie* evidence of such writ, rule, order, matter or proceeding having been knowingly or wilfully so issued or received, or served or executed without being or having been stamped, or without the stamp having been properly and sufficiently obliterated and cancelled.

32. The copying or imitating of any stamp, issued under this Act, shall be forgery, and shall be punishable as such; and the using again or re-issuing of any stamp which has before been used, or which has been obliterated and cancelled as for a new and valid stamp, shall be a misdemeanor, punishable by a fine not exceeding fifty dollars, or by imprisonment not exceeding two months, or by both at the discretion of the Court.

33. This Act shall not apply to any Court or officer established or appointed under chapter one hundred and twenty-eight, of the Consolidated Statutes for Upper Canada, nor to any matters or proceedings had, taken, or recorded before this Act takes effect.

SELECTIONS.

ASSIGNABILITY AT LAW OF CHOSES IN ACTION.

In the "Bill to alter the law for remuneration of Attorneys and Solicitors, &c., it is provided by the 5th section that "whereas by the common law, choses in action do not admit of being assigned or transferred by deed, be it enacted that from the passing of the Act, *every* chose in action may be assigned *at law* and the assignee is hereby empowered to bring, maintain, and take, in his own name, or, being a corporation, in the name of such corporation, all such actions, suits, and other proceedings in respect of such chose in action as might have been brought, maintained, or taken in his own name, or by virtue of any power of attorney, by the person or corporation making such assignment. But this enactment shall not affect any rule of courts of equity as to priority of interest, by reason of priority of notice."

Now, if we look for the meaning of "a chose in action," we shall find in "Les Termes de la Ley" that a thing in action is when a man hath cause, or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity or rent, action of covenant or word, trespass of goods taken away, *beating or such like*" And although the King may grant things in action *certain*, yet it is said "that the King himself cannot grant his thing in action that is *uncertain* as *trespass* and *such like*;" and see 1 Chitty's Practice of the Law," p. 99. It appears plainly, therefore, that in correct legal sense choses in action are not confined to rights arising out of *contract* only.

Now it surely cannot be the intention of the framers of this bill to make rights of action for *torts*, as trespass, assault, slander, seduction, &c., assignable. Yet it is difficult to say that the general language here used would not if sanctioned by the Legislature, have that result. It will not, we think, be generally received as a proof of our superiority over our ancestors in the knowledge of social polity and jurisprudence, if we should legalize a practice which appeared to the founders of our juristic system to be fraught with the gravest evils. Nor ought we readily to charge them with over estimating the gravity of those evils, if we consider the precautions which are to be found in the Roman law against the mischiefs which were apprehended from permitting the unrestricted transfer of such things incorporeal as, in that highly refined system, were considered to be *res litigiosæ*. The horror of our ancestors against vicarious litigation may have produced rules of undiscriminating rigidity, which may be found to be incompatible with that free action of the principles of commerce which is a necessity of modern life. But it is extremely doubtful whether the inconveniences which would result even from a regid adherence to the old rules in all their trenchant severity, would not be less than those which would follow from a simple abrogation of them. Our old law seems not to have distinguished, as regards the danger which its rules against maintenance were framed to prevent, between the right to bring an action for the recovery of an ascertained and definite sum, such as would have furnished ground for the action of *debt*, and the right to recover an unascertained sum in *damages* for an actual or supposed wrong, whether flowing from a breach of contract, or from what was a tort in reality, and not in legal fiction merely. Whether the right claimed consisted in debt or damages, it involved in its nature the notion of deprivation of posession, and that was thought to be a sufficient reason for confining the remedy to the person against whom the tort or breach of contract had been committed. The King's courts were open to *him* if he chose to resort to them; but this was a privilege he was not allowed to transfer to another. He must assert it himself, and assume all the responsibilities he would thereby incur (when amercements were not not merely a form), or it could not be asserted at all. To meet the wants of commerce the aid of the elastic principles of equity has been resorted to, and the simple rigour of these old rules has undergone a salutary practical modification; yet that aid seems only to have been afforded for the object of facilitating the dealing with those rights to the benefit of contracts which, by a sort of common consent, have been deemed to be legitimate objects of commerce; and this category appears never to have comprised that class of wrongs and breaches of contract, which in judicial discussions have been sometimes referred to as "those for which vindictive damages might be given" (see *Beckham* v. *Drake*, 2 Ho. of Ld. Cas. 279). This demarcation seems to be based upon sound reason and morals. It is to be apprehended, however, that the language of the measure we are now dealing with would, in effect, remove this salutary distinction.

But, independently of this objection, it would seem that even if the general language employed should be restrained by interpretation to such choses in action only as are now held to be assignable under the equitable doctrine of the assignor becoming a trustee for the assignee (Butler's note to Co Litt. 332, b. n. 1); still the consequences which may follow from the operation of the terms of the proposed enactment are such as may justly cause alarm. If the bill should become law, without any alteration in its language, there seems to be nothing to prevent A., having a claim against B., however unreasonable, shadowy, or remote, and however unlikely it may be to ripen into a right of property by the judgment of a Court, from transferring such claim, by the simple execution of a deed, to C., whose own desperate fortunes may make *him* indifferent to any retribution which may befall him in the shape of costs. For it is to be observed that the bill contains no provision for giving security for costs, and as C. would be suing in his own right, and for his own benefit, in the eye of the law, he could not be called to give security under the present practice (see *Parker* v. *Great Western Railway Company* 19 L. J. N. S. C. P. 335). So A. might be able to indulge in the vindictive luxury of bringing the scourge of litigation to bear on B. without any danger to himself *pro falso clamore suo*. The present law, by requiring the action to be brought from that danger, and this no doubt operates as a very salutary protection against the multiplicity of unjust appeals to litigation. To hold that the right to enforce an obligation shall not be transferrable from an original party to it to any stranger,

seems at first sight to be, on philosophical grounds, the true principle, and to be involved in the conception of an obligation, for it is difficult to say why the parties to a contract have not a right to insist that it was part of their contract that the persons by and to whom obligations to which they necessarily become liable are to be performed, should be as certain as the thing or subject of the contract itself. The rules of our own law as to the privity of contract, recognise this principle; which may be also found in the *juris vinculum*, which in the Roman law, was thought to connect the parties to every obligation. On the other hand a right to recover a debt certain is essentially as much property as a revisionary interest in land, and it is equally difficult, on principle, to say why one such right should be assignable and the other should not All systems of European law have, however recognised the principle, though relaxation of its strict vigour have taken place in almost every code, but precautions have nevertheless been generally taken to prevent the mischiefs which a total disregard of the principle would produce. An enactment simply in the terms now under comment would seem to open the door to all the evils which, in the advanced period of the Roman legislation, led to the adoption of those provisions which aimed at abating the noxious practices of the *redemptores litium*.* It seems very doubtful, again whether, under the 5th section, the debtor would be able to set off as against the assignee any cross demand he might have as against the assignor in respect of dealings prior in date to the assignment. Courts of equity have by their rules on this subject provided for all these equitable adjustments, but something more than the concise terms of this section seems to be required in order to ensure that, in a court of law, the rules of equity will be followed out. A change is so important a principle as the non-assignability at law of a chose in action, if it be necessary, ought certainly to be carried out by such language as to leave no doubt that all the precautions which have been gradually adopted in equity for preventing the evils against which the legal maxim was intended to guard will, as far as possible, be kept in view, when courts of law are called upon to apply the novel doctrine. We think it will occur to all who have considered the doctrines of equity on this head, that, besides the objections which have been already alluded to, it would be unsafe, on the meagre terms of this section, to expect that the new doctrine, as worked out in courts of law without the adoption of other legal rules to the same end will operate satisfactorily. At the same time it is obviously inconvenient that the incidents of this kind of property should be so different according to the particular forum in which it is attempted to enforce the obligation.

Three graziers at a fair had left their money with their hostess, whilst they went to market; one of them returned, received the money and absconded: the other two sued the woman for delivering what she received from the three before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced, when Mr. Noy, not being employed in the case, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed; and having received it he moved in arrest of judgment, that he was retained by the defendant, and that the case was this:—the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready whenever the three men should demand it together: this motion altered the whole proceedings—Noy's maxims—(referred to by *Martin*, B, in *Watson* v. *Evans*, 32 L. J. Ex. 137.)

Nor could all three, it would appear, under these circumstances, have maintained an action at law—*Brandon* v. *Scott*, 26 L. J. Q. B. 163.

* Trapp on Maintenance, pp. 6—7.

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 151.)

Sections 137 and 138 of the English County Courts Act (9 & 10 Vic. cap. 95) are nearly identical in terms with sections 192, 193 and 194 of the Division Courts Act. Under the English act it was held by Campbell, C. J., at Nisi Prius, in *Estob* v. *Wright et al*, 1 Cox, Mac. & Hert. 527, that the notice must correctly specify the Court in which the action is to be brought. The objection to the notice tendered in evidence was that it gave notice of an intended action in the Court of Common Pleas, instead of the Queen's Bench, the action having been brought in the latter court. "There may be," said Lord Campbell, C. J., "at this moment an action in the Court of Common Pleas; at any rate the notice cannot apply to the present action. . . . This is not such a notice as is required by the act." (See also *Taylor* v. *Fenwick*, 7 T. R. 529.)

In *Buck* v. *Hunter*, 20 U. C. Q. B. 436, an objection was taken to the notice of action, in that it stated that the plaintiff would "cause a writ of summons to be sued out of Her Majesty's County Court of the county of Brant," against the defendant, &c.; whereas the suit was afterwards commenced, not in the county of Brant, but in the county of Wentworth. The objection to the notice was sustained.

A notice stating that the suit would be brought in the Court of Queen's Bench *or* Common Pleas, was held to be insufficient, and that the particular court should have been specified (*Bross* v. *Huber*, 18 U. C. Q. B. 282); but a mistake in describing the statute under which the officer acted, if it give him notice of the action and of the cause of action is sufficient, and the reference to the wrong statute may be rejected (*McGregor* v. *Galsworthy*, Car. & Ker. 8); and a slight want of technicality in the description of the writ will not prejudice the notice of action (*Robson* v. *Speerman*, 3 B. & A. 493).

In stating the cause of action, the same technical precision as in pleading is not necessary; it is sufficient to apprise the defendant of what is intended to be proceeded for (*Jones* v. *Bud*, 5 B. & Ald. 837).

The act requires notice of "one month at least," and so the day of service of the notice, and that on which it expires, ought to be excluded in the reckoning (3 Term

Rep. 623; 4 M. & R. 330; 5 Bing 339). In *McIntosh* v *Vansteinburgh*, 8 U. C. Q. B. 248, however, it was held that a notice served 28th March, writ issued 29th April, gave a Division Court bailiff the one month's notice of action required.

2nd. As to the limitation of the action.

The six months should be reckoned exclusive of the day (*Young* v. *Higgon*, 6 M. & W. 49). With regard to statutory limitations in actions of tort, it is laid down generally that the period begins to run from the moment when the cause of action accrued, and not from the happening of the damage resulting therefrom (*Sutton* v. *Clark*, 6 Taunt. 29; *Violet* v. *Simpson*, 8 E. & B. 344; 27 L. J. Q. B. 138). But if an act, lawful when done, but, in consequence of damage or injury occasioned to another, became unlawful, the cause of action will only accrue when such injury happens, and the statute will begin to run from that period (*Gillin* v. *Boddington*, R. & M. 161; *Roberts* v. *Read*, 16 East. 217; *Benoni* v. *Buckhouse*, 28 L. J. Q. B. 378); and the time of limitation runs from the time of the commission of the wrongful act, and not from the time when the plaintiff first had knowledge of it (*Howell* v. *Young*, 5 B. & C. 265), unless, indeed, the knowledge was fraudulently concealed from the plaintiff.

3rd. The enactment is imperative that the action must be laid and tried in the county where the wrongful act complained of was committed.

As regards venue, it was held that a declaration laying the venue "in the United Counties of," &c., was bad on special demurrer (*Nelson Road Co.* v. *Bates*, 4 U. C. C. P. 281).

UPPER CANADA REPORTS.

ERROR AND APPEAL.

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

[Before the HON. SIR J. B. ROBINSON, Bart., President, the HON. P. M VANKOUGHNET, Chancellor, the HON. W. H. DRAPER, C.B., C. J. C.P., the HON. V. C. Esten, the HON. MR. JUSTICE RICHARDS, the HON. Mr. JUSTICE HAGARTY and the HON. MR. JUSTICE MORRISON.]

(ON AN APPEAL FROM THE COURT OF CHANCERY)

FREEMAN v. THE BANK OF UPPER CANADA.*

A., on the 2nd of February, 1857, created a mortgage of real estate in favour of B., which was duly registered on the 11th of July following.

B., by an endorsement on the mortgage, assigned the same to C.; subsequently a judgment was recovered against B., which was duly registered, after which C. registered the assignment of mortgage to himself *Held*, affirming the judgment of the court below, that the judgment, by reason of such prior registration, had priority over the assignment to C., which, by reason of such non registration, was void as against the judgment creditor.

The bill in the court below was filed by the The Bank of Upper Canada against Levi Potroff, Lewis Birely Freeman, Peter James Gage and William Freeman, setting forth that on the 2nd day of February, 1857, Potroff executed a mortgage on certain lands in the county of Wentworth, in favour of the defendant, Lewis B Freeman, to secure the sum of £750, which was duly registered on the 11th of July following: that on the 30th of June, in the same year, Lewis B. Freeman assigned the mortgage to the defendant William Freeman, which assignment was registered on the second day of December following.

That on the 29th day of September in the same year, (1857,) the bank recovered a judgment in one of her Majesty's superior courts of law at Toronto, against the defendants, Lewis B Freeman and Gage, for £610 2s 11d, damages and costs, which judgment was duly entered up of record, and registered in the said county of Wentworth on the same day: that a *fi fa.* goods, issued on said judgment, had been returned *nulla bona*, and by reason thereof the bank submitted they had acquired a lien on the interest of Lewis B Freeman, in and under such mortgage, prior to any interest acquired by William Freeman in said mortgage, by virtue of the assignment thereof to him: that the moneys secured by the mortgage were wholly due and unpaid: that the defendant Potroff had been notified of the claim of the bank under their judgment, requiring him to pay the bank, and not to pay any other person.

The prayer of the bill was, that the plaintiffs might be declared entitled to the benefit of such mortgage prior to William Freeman, and to have the moneys secured thereby applied in the first place towards satisfaction of their judgment and the costs of the suit: that the necessary accounts might be taken: that the amount found due might be paid, or in default of payment foreclosure.

The evidence in the cause verified substantially the statements in the bill. Potroff and Gage allowed the bill to be taken *pro confesso* against them; and the court declared the bank entitled under their judgment to the benefit of the mortgage in preference to William Freeman, as the assignee thereof, and to have a sufficient part of the moneys secured thereby applied in satisfaction of such judgment; directed the usual accounts to be taken, and in default of payment a sale of the mortgage premises.

From this decree the defendant William Freeman appealed, on the following grounds:—

1st. Because upon the whole case the appellant had acquired an exclusive right to the mortgage and the money secured thereby, in preference to the respondents, the Bank of Upper Canada, and the bill ought to have been dismissed.

2nd. Because by the registration of the judgment of the respondents, the Bank of Upper Canada, before the registration of the assignment of the mortgage in the pleadings mentioned, the respondents, the Bank of Upper Canada, acquired no right to the benefit of the mortgage in preference to the appellant.

3rd. Because the registered judgment of the respondents, the Bank of Upper Canada, bound only the equitable interest of the respondent, Lewis Birely Freeman, in the said mortgage, and the money secured thereby at the time of the registration thereof, and that the said Lewis Birely Freeman having long before, and prior to the recovery of the judgment, assigned the said mortgage and all his interest therein, absolutely, for a valuable consideration and *bona fide* to the appellant, the judgment did not attach at all upon it.

The respondents, the Bank of Upper Canada, contended that they were entitled to retain the decree pronounced, on the ground, that by effect of the registry laws in force at the time of the several matters in the pleadings mentioned, the appellant's title to the mortgage in question, under the assignment thereof to him, was postponed to that of the Bank of Upper Canada, by virtue of the subsequent judgment recovered by them against mortgagee, Lewis Birely Freeman, the said judgment having been duly registered in the county wherein the mortgaged premises were situate before the assignment was registered.

Potroff also desired the decree should be reversed or varied to the extent and for the reasons assigned by the appellant.

Proudfoot for the appellant The effect of the proviso in the third section of 13 & 14 Victoria, ch 63, was to render liable for sale only such property as belonged to the debtor. In this case, the property in the mortgage had ceased to belong to Lewis B. Freeman long before the bank recovered the judgment under which

* The judgment in this case was mislaid, so that it could not be reported before.—(REPORTER'S NOTE.)

they now claim to have priority over the appellant: referring to *McMaster* v. *Phipps*, 5 Gr. Ch. R. 253; *Bowen* v. *Lord Oxford*, 6 D. M. & G. 192; *Hawkins* v. *Gathercole*, 6 D. M. & G. 1; Sugden's Vendors and Purchasers, 424-427.

Brough, Q. C., for the respondents, the Bank of Upper Canada. The fact of the judgment being registered renders the prior unregistered conveyance void as against the judgment creditor, and the property embraced in such unregistered conveyance from thence forward is treated as belonging to the debtor until the judgment is satisfied. He cited, amongst other cases, *Latouche* v. *Dunsany*. (1 Sch. & L. 137.)

The judgment of the court was delivered by

VANKOUGHNET, C.—This case rests within narrow limits. The defendant, Lewis B. Freeman, having a mortgage of certain premises as security to him for £750, assigned the mortgage by deed poll endorsed thereon, on the 30th of June, 1857, to the defendant William Freeman. The mortgage was registered, but the assignment of it never was. On the 29th of September, 1857, the plaintiffs, the respondents here, recovered a judgment against the defendant Lewis B. Freeman, the mortgagee, and caused the same to be duly registered on the same day in the county where the mortgaged lands lie. The plaintiffs file their bill to have this mortgage security realized to pay off this mortgage debt, claiming that by virtue of the registration they have fastened their judgment upon it as the property of Lewis B. Freeman. Hard as it may appear, that one man's property should be taken to pay another man's debt, yet I see no means of escape from the operation of section 3 of the statute 13 and 14 Victoria, chapter 63, or of the sections 2 and 3 combined. Under section 261 of chapter 22, Consolidated Statutes of Upper Canada, the sheriff might upon a writ of *fi. fa.* against goods, have seized this mortgage, (putting the assignment out of sight for the moment,) and proceeded to enforce payment of it. The plaintiff could of course have execution of it in equity, and the only obstacle offered is the assignment of it. But under section three of the 13 & 14 Victoria, chapter 63, we must, as against the plaintiffs' registered judgment, hold that this assignment is void, or non-existent; for the language of the act is, "that every deed," &c., "whereby any lands," &c., "may be in any wise affected in law or in equity shall be adjudged fraudulent and void, not only against any subsequent purchaser or mortgagee for valuable considerations, but *also against a subsequent judgment creditor*, who shall have registered," &c. This language is too explicit to be evaded, though I confess I have sought, but in vain, for some distinction on which to withdraw this case from it. I have considered the opinion expressed by my brother *Sprague* in *McMaster* v. *Phipps*, but I think we should not be warranted in putting upon the language of the act the narrow construction which he there ascribes to it, consistent as that would be with all our previous notions as to the rights of judgment creditors. Were that construction to prevail, the third section so far as it relates to registered judgments would be inoperative, because the second section amply provides for all cases of transfer subsequent to the registration of the judgment. In answer to the plea of hardship, it may be said that the policy of the legislature in enforcing registration was known alike to all, and machinery provided by which each one might secure his title. The provision may be arbitrary, but so are all acts of parliament, from the Statute of Frauds down, and he who neglects to observe them has only himself to blame.

Proudfoot contended, that he came within the provisions of the second section, and was entitled to protection as a purchaser for valuable consideration without notice. This provision appears to have been literally copied into our act from section thirteen of the 1 & 2 Victoria, chapter 110, without regard to the distinction between the two acts. In the English act it a provision of great importance. Under our act I do not now see under what set of circumstances it can be used. It cannot apply to a case of a transfer, before that has arisen which, upon registration thereof, is to affect such transfer, for not only would it be absurd for the legislature to provide against notice of that which did not exist, but the third section of the act expressly avoids such transfers by the prior registration of deeds or judgments subsequently created. It cannot relate to a transfer executed subsequently to registration, for the same act provides that such registration shall in equity constitute notice. When then can this provision apply?

The appeal must be dismissed with costs.

[Before the HON. ARCHIBALD MCLEAN, EX C. J., President,* the HON. WILLIAM HENRY DRAPER, C. B., C. J., the HON. P. M. VANKOUGHNET, Chancellor, the HON. WILLIAM B. RICHARDS, C. J. C. P., the HON. VICE-CHANCELLOR ESTEN, the HON. MR. JUSTICE MORRISON, and the HON. MR. JUSTICE ADAM WILSON.

(ON AN APPEAL FROM THE COURT OF CHANCERY.)

ELIZA HENRIHAN, ADMINISTRATRIX OF MICHAEL HENRIHAN, APPELLANT, AND JAMES GALLAGHER, RESPONDENT.

Lease with right of purchase—Personal representative heir at-law

Held, affirming the decree of the Court of Chancery, that an assignment by the personal representative of a lessee for years, does not carry with it a right of purchasing the fee contained in the lease, but this court varied the decree, by setting the vendee of the personal representative to execute a mortgage upon the property, the conveyance of which he had obtained from the lessors as assignee of the lease.

Sampson v. *McArthur*, (8 U. C. Chan. R. 72.) remarked upon and over ruled, so far as the same decided that the right to purchase contained in a lease was personalty.

This was an appeal from a decree of the Court of Chancery, as reported in 9 U. C. Chan. R. 588, where the facts giving rise to the case sufficiently appear.

From that decree the plaintiff appealed, on the ground that the term created in the parcel of land by the lease in the bill mentioned, having, on the death of the lessee, Michael Henrihan, become vested in the appellant as administratrix, and the covenant contained in the lease on the part of the lessors, The Canada Company, conferring on the lessee the privilege of purchasing the fee simple and inheritance in the said parcel of land, being in nature a covenant running with the land, the respondent, James Gallagher, by virtue of the conveyance and assignment made to him by the appellant, became entitled to the benefit of such covenant, and to a conveyance of the land in fee simple, upon payment to the Canada Company of the purchase money, payable to them according to the tenor of the covenant.

J. Hillyard Cameron, Q. C., and *Brough, Q.C.*, for the appellant.

The effect of the decree from which this appeal is brought is to declare that the right to purchase the fee vested in the heir-at-law, and that the administratrix in assigning the term could not thereby affect the interest of the heir. The lease in question only gives an option to purchase.

The fallacy is in treating this mere option of purchasing as if there were a valid or binding contract for a purchase, to which the court would attach all the rights and liabilities of equitable ownership. The lease only created a term, and the covenant is incorporated with it, and has no existence out of or apart from it.

Had this lease been assigned by the lessee himself, it would undoubtedly have carried with it the right to purchase the fee; by the death of the lessee the term became vested in the administratrix, and the effect of her deed was to pass, and it did in fact pass, to Gallagher the residue of the term, and if so, the right to purchase went with it. *Welchman* v. *Spinks*, 5 L. T. N. S. 385; *Green* v. *Low*, 22 Beav. 625; *Thompson* v. *Guyon*, 5 Sim. 65; *Lawes* v. *Bennett*, 1 Cox 167; *Townly* v. *Bedwell*, 14 Ves. 591; *Re Houghton*, 11 Ir. Ch. 136; Sudgen's Vendors and Purchasers, 14th ed. page 597, were, amongst other authorities, referred to.

The respondent did not appear.

The judgment of the court was delivered by

DRAPER, C. J.—The opinion given by the late Sir *J. B. Robinson*, in *Sampson* v. *McArthur*, was not concurred in by the other members of the court, and the appeal in that case was dismissed exclusively on the points raised by the appeal itself, upon none of which they thought the plaintiff entitled to succeed. In that case his lordship expressed the opinion that the bill should have been dismissed with costs; but the defendant, McArthur, did not ask for or desire this, and was willing to take what the decree gave

* Was absent when judgment was pronounced.

him, not asking for more, and the Canada Company simply submitted to whatever was decreed and majority of the court neither expressed, nor intended to decide, that the right to purchase was to be viewed as personalty, and passed as such. I made a minute at the time of our dissent from the opinion as to that point expressed by his lordship, though we all concurred in dismissing the appeal.

I think that the right of purchase did not pass to the administratrix; and I should have been of opinion that this appeal should be dismissed with costs but it has occurred to us that as between these parties it is just that a mortgage should be given by the defendant to the plaintiff All we desire is to protect the rights of the infant heirs, which we think can effectually be done by inserting in the decree and mortgage that it is to be without prejudice to the rights of the co-heirs of Michael Henrihan, under the covenant contained in the lease.

The decree will, therefore, be varied to this extent.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Reporter to the Court.*)

Laughtenborough v. McLean.

Assessment—Sale of lands for arrears of taxes.

The north and the south half of a lot of land having been assessed separately and different amounts charged against each half of which amounts were afterwards added together and charged against the whole lot and a portion of the whole lot having been sold for the combined amounts being the respective arrearages of taxes due upon each half lot. *Held*, that such sale was illegal.

[C. P., H. T., 27 Vic.]

This was an action of ejectment to recover possession of the south-west quarter of lot No. 10, in the 8th concession of the township of Innisfil, to which the defendant appeared and defended for the whole of the land claimed.

The plaintiff claimed title as lessee of the Rev. Samuel B. Ardagh, rector of Barrie, and who, as such rector, is grantee of the Crown.

The defendant claimed title under a deed from James Clement, who purchased the land at a sale of lands for taxes in the county of Simcoe, and obtained a deed from the sheriff in pursuance of such purchase.

The trial took place before *Morrison*, J., at Barrie, in March, 1863.

The plaintiff put in the patent, dated 21st January, 1836, granting among other lands, the whole of No. 10 in the 8th concession of Innisfil, as a glebe and endowment to be held appurtenant with the parsonage or rectory, at the town of Barrie, and a lease from the rector to the plaintiff, dated the 2nd of April, 1856, of the south-south half of this lot No. 10, for the period of twenty-one years, rendering rent.

The defendant put in a deed from the sheriff of Simcoe to James Clement, dated the 26th of July, 1859, for the premises claimed, and a deed for the same land from Clement to the defendant.

The land was sold for taxes under a writ from the treasurer, dated the 23rd of February, 1858, designating the whole of lot No. 10, containing 200 acres, the taxes upon which were stated at $72 02. The sale took place on the 13th of July, 1858.

The treasurer was examined as a witness, and by a memorandum put in by the parties it was admitted that the following should be received as his evidence:

Lot No. 10, in the 8th concession of Innisfil, was included in the warrant of the treasurer of the county of Simcoe to the sheriff of the same county, for the year 1858, for the sale of lands in arrear for taxes, with directions to sell this lot for £18 0s. 1d., the lot having fallen in arrear for that amount in the following manner, as appears by the books in the treasurer's office:

For the year 1853 the whole lot was assessed for £1 12s. 7½d., and was entered for that amount in the treasurer's books as a whole lot.

For the year 1854 the whole lot was assessed for £2 7s. 5d., and was entered for that amount in the treasurer's books as a whole lot.

For the year 1855 the lot was assessed as the north and south halves, at £1 8s. 4½d. for each half, and the treasurer appears to have coupled the two halves together thus:

North half, } 200 { £1 8s 4½d } £2 16s. 9d.
South half, } { £1 8s 4½d }

on the assessment roll, and to still have entered the lot as a whole one in his books.

For the year 1856 it was again *assessed* as two halves, north and south, but the treasurer entered it on his books as a whole lot, 200 acres.

For the year 1857 the south half alone was assessed on the non-resident roll, and the treasurer then divided the lot, in making the entry in his books, into the north and south halves, and charged against each half £8 2s. 6d., being one-half of the whole tax, then against the whole lot; and against the south half he placed in addition the sum of £1 15s. 1d., being the tax against that half for 1857.

In the year 1858 the whole lot was returned to the sheriff as in arrear for £18 0s. 1d., being the above amounts of £8 2s. 6d., £8 2s. 6d. and £1 15s. 1d., which include in them the interest at 10 per cent. from year to year.

The sheriff advertised the lot as a whole lot, and sold fifty acres off the south half.

A lease of the north half of this lot for twenty-one years, from the rector to John Dickie, dated the 1st of December, 1852, was put in, and it was sworn that eight or nine years before the trial, Dickie lived on the lot under the lease; that he raised a shanty on the lot, and lived there for four months or longer, and did some underbrushing, and lived a long time in the township, leaving about five years ago.

It was contended for the plaintiff that the offering the whole lot for sale for taxes partly due on the whole and partly due on the south half only, was illegal; that, the taxes not being apportioned, the owners of each half would have to redeem the whole.

The learned judge directed a verdict for the plaintiff, with leave reserved to defendant to move to enter a verdict for him if the court should be of opinion that the warrant of the treasurer and the sale by the sheriff were valid.

In Easter Term, 26 Vic., *McMichael* obtained a rule *nisi* on the leave reserved.

McCarthy, for the plaintiff, shewed cause this term. The north and south halves should have been assessed separately for some years before 1857. In 1857 the south half was separately assessed, and therefore the sale of the whole lot for the separate arrearages on each half of it was unwarranted. The treasurer's duty was to keep different accounts with these half lots. He referred to Con. Stat. U. C. ch. 55 ss. 115, 124; *Doe dem Upper et al* v. *Edwards*, 5 U. C. Q. B. 594; *Ridout* v. *Ketchum*, 5 U. C. C. P. 50; *McGill* v. *Langton*, 9 U. C. Q. B. 91; *Hall* v. *Hill*, 22 U. C. Q. B. 578; *Sibbald* v. *Roderick*, 11 A. & El. 38; *Clarke* v. *Woods*, 2 Exch. 396.

McMichael supported the rule, contending that the sale was regular; it was warranted by the treasurer's books, which had never properly separated the half lots, but had returned the whole lot in one parcel for the purposes of taxation. *Peck* v. *Munro*, 4 U. C. C. P. 363.

Adam Wilson, J.—It does not appear in what manner this land was assessed for the years 1852 to 1856 inclusively; whether in the name of *the owner*, under the 16th Vic. ch. 182, sec. 7, or in the name of any *occupant*, sec. 7, or in the names of the owner *and* occupant, sec. 7. It does not even appear very distinctly whether the land was assessed as "non-resident land" or not.

It may during these years have been assessed in the name of some person as owner or occupier; it was assessed for 1853 and 1854 as a whole lot, but for the years 1855 and 1856 the halves seem to have been separately assessed, although the treasurer, while he entered each half lot of 100 acres in his books as assessed for a separate sum, carried out the whole quantity of land at 200 acres, and for the total taxes, as if it were a single sum, and as a single rating or lot.

Whether there was any and what possession, and by whom during these four years is not properly explained. It is said that John Dickie, who became the lessee under the Rev. Mr. Ardagh in December, 1852, lived on the north half for several months about

the years 1854 or 1855, put up a shanty and did some underbrushing, and continued to live in the township until about the year 1858. This may account for the division of the lot in halves in the years 1855, 1856 and 1857.

From such very imperfect information I will assume that in the years 1853 and 1854 the whole lot was assessed as a single lot and properly so I will also assume, for although Dickie received a lease in December, 1852, he may not have entered on the land or have been known to the assessor during these years, and the assessor would therefore be fully justified in treating the lot as an entire lot; see secs 7 and 8 of the act. I will also assume that in the years 1855, 1856 and 1857 the assessor for each year had such information or knowledge as induced him to divide the lot into the north and south halves, as separate assessable properties and that he did so divide it appears from the admissions of the parties It may not, therefore, be very material whether in any or what name, or in what capacity it was entered by the assessor in his book in connexion with this lot, or with either half. The principal question is, what is the assessment, and by whom and when is is made? Is it the rating upon the assessment roll? or is it the entry upon the collector's roll? or is it the entry made by the treasurer in his books? The routine appears to be:—The assessor makes up his roll, assessing all lands and in the names of all persons as owners or occupiers, excepting in the case of non-residents, who do not desire their names to be entered The assessor delivers this roll to the clerk of the municipality, who puts up a copy of it for public inspection. The clerk transmits a copy of this roll to the county clerk. The clerk of each municipality makes out a collector's roll for the township, &c., in which he sets down the name in full of each party assessed, and the correct assessed value of the real and personal property of each party; and he also makes out in a roll the lots, parts of lots, or parcels of land assessed against non-residents whose names have not been set down in the assessor's roll. The collector returns his roll to the treasurer of the township. The treasurer of each municipality furnishes the county treasurer with a copy of the collector's roll returned. The treasurer of the county after this receives all such arrears. The treasurer of the county enters under the heading of each municipality in his county all the lands therein on which it appears from the returns made to him by the clerk of the municipality, and from the collector's roll returned to him that there are any taxes unpaid, and the amounts so due. And whenever a portion of the tax on any land has been in arrear for five years, the treasurer of the county issues his warrant to the sheriff to levy on the land for the arrears. The assessor, when he assesses any person, but before he completes his roll, is required to leave for every party named thereon a notice of the value at which his property has been assessed; and any person complaining of such assessment can apply for relief to the court of revision. The party assessed may also have inspection of his assessment from the copy put up by the clerk before the court sits When the revision is concluded, "the roll is finally revised and corrected," and it is declared to be "valid, and to bind all parties concerned."

The collector's roll contains some of the particulars of the assessment roll, copied from that roll No one knows anything of what actually goes into this roll, although he knows that nothing ought to go there but what is upon the assessment roll The collector's roll is made, not for the purpose of creating a charge, but for the purpose of collecting a charge already made by the assessment roll.

In like manner, when this roll is returned to the township treasurer, and a copy by him sent to the county treasurer, and an entry made by him in his books, no charge is created; the arrears are merely recorded for final collection.

It appears to me, therefore, that the "assessment" is the rating which is made upon the assessment roll by the assessor and that it is completed when the roll is finally passed If this be so, then it follows that the entry as made upon that roll is the assessment which is to govern, and that all the other copies and entries ought to correspond with the primary roll, and are only copies of and entries from it

As the *assessments* for 1855, 1856 and 1857 were made against these half lots, and as the treasurer's books are not against the assessments in this particular, they should be read so as to correspond with the assessment rolls, if it be possible so to read them, and so I think they may be read.

From these considerations it appears that the assessments of 1855 to 1857, being made against the half lots only, do not authorize the charges of the two to be combined against the whole lot—and a portion of the whole lot to be sold for the separate arrearages due upon each half of it.

The decisions of our courts before referred to show how the law must be upon these facts; that the sale of the portion of the whole is not the part that would have been sold upon a sale of a portion off each of the halves that were charged, and that each part has been thus charged with twice as much as it ought to have been; and that as such sales are really a forfeiture of the freehold they must be conducted with the utmost regularity.

It is no answer to say that the treasurer might, on being satisfied that any parcel of land had been sub-divided, have received the proportionate amount of the tax charged upon the whole for this is not a case where the whole has been charged, but where the sub divisions have been charged, and the whole is attempted to be made responsible for it.

The provision referred to is when the assessor, according to the best information in his power, has assessed and returned a whole lot which should really be in parcels, and which may be strictly liable to be treated thenceforward as a whole lot if the parties affected do not correct it by appeal, or have it corrected by the treasurer. It has no application to this case, which is just the converse of the one referred to

As no question was raised before us as to the liability or non-liability of this land being part of a rectory appropriation, to be sold absolutely for taxes, we express no opinion upon it, and from the conclusion at which we have arrived it is not necessary we should do so.

The *postea* will therefore be delivered to the plaintiff.

Per cur.—Rule discharged.

Henry Haacke v. Peter Adamson.

Magistrate—Conviction by—Wrongful arrest—Quashing of conviction—Notice of action—Con Stat U C., c.. 126.

Action against a magistrate for wrongful arrest and imprisonment, upon a conviction for selling spirituous liquors without license, contrary to a by-law, &c. The 1st count of the declaration was in trespass, the 2nd in case—to which the defendant pleaded not guilty by statute &c

At the trial the selling of the liquor, for which the plaintiff was convicted, was fully proved; also that the conviction had never been sealed. A verdict was rendered for the plaintiff for $100 in each of the counts in the declaration. On motion, in the alternative, for a nonsuit or a new trial.

Held, 1st That under Sec. 3, ch. 126 Con Stat., an action of trespass will not lie against a magistrate until the conviction complained of has been quashed.

2nd. That the conviction referred to never having been sealed it was not necessary to treat it as a valid conviction and to have it quashed before action brought.

3rd. That notwithstanding the conviction was void he defendant was entitled to notice of action, as he was acting in his official capacity of magistrate and had jurisdiction over the plaintiff and the subject matter, &c.

4th That as only one wrong was complained of by plaintiff, he cannot recover on the two separate counts, but must elect on which of them he will enter his verdict.

Semble, that plaintiff cannot recover on the first count because the magistrate had jurisdiction, &c., and by the provision in the statute the action should be in case charging malice.

5th That on whichever count the verdict is entered the damages must be reduced to three cents under Con Stat U C ch 126 sect. 17, as plaintiff was proved "guilty of the offence of which he was convicted," and that in this respect the statute applies as well to actions of trespass as to case.

6th That the statute does not require any particular addition or description of the magistrate to be given in the notice of action served upon him.

(C P, H. T., 27 Vic,

This was an action against a magistrate for an alleged wrongful arrest and imprisonment of the plaintiff, upon a conviction for selling spirituous liquors without license, contrary to the by-laws of the township of Stanley, in the counties of Huron and Bruce.

The 1st count of the declaration was in trespass. The 2nd count in case.

The defendant pleaded not guilty by statute, and he stated the following public acts in the margin of his plea —Consol. Stats. of U C., ch 126, secs. 1 to 20 inclusive; also ch 54, sec 243, sub sections 6, 7, and 8 and A & B., sec. 246, sub-sections 1 to 6 inclusive, and secs 248 to 258 inclusive.

The cause was tried at the last Goderich assizes before the Chief Justice of the Queen's Bench, when a verdict was rendered for the plaintiff of $100 on the 1st count and $100 on the 2nd count

At the trial at the close of the plaintiff's case the defendant objected there could be no recovery on the trespass count, nor on the 2nd count, which is in case, because the conviction had not been quashed; but there was a variance between the 2nd count and the notice of action, the declaration stating that the defendant was a justice of the peace, the notice not doing so; that the warrant ought to have been quashed before the action was brought; and that there was no evidence of malice.

For the plaintiff, it was contended that the magistrate had no authority to issue his warrant to arrest after the conviction had been removed by *certiorari*, and therefore trespass would lie; that the conviction was bad; it was never sealed. No by-law was proved on which the warrant purported to be founded. If such a by-law did exist, it should have been set forth in the warrant to shew that the warrant was in conformity with it. That there was no variance, the notice being addressed to the defendant as a justice of the peace or acting as a justice of the peace.

The learned Chief Justice overruled all the objections, although with some doubt as to the first count.

The defence was then gone into. It was shown that after the plaintiff was convicted he admitted there was ample evidence in support of the charge against him of selling liquor without a license. He complained of the amount of the penalty, but it was the smallest which the by-law allowed. The defendant advised him to petition the township council to remit part of the penalty. The plaintiff had been a tavern-keeper for fifteen years, and had been a member of the township council; he had been before the defendant as a justice of the peace on former occasions. The township by-law was proved. The plaintiff petitioned the council for the remission of his fine. He had applied for a license but was too late, as the full number of licenses had been then issued which the council could grant. The selling of the liquor was clearly proved.

The learned Chief Justice left it to the jury to say whether the conviction had been sealed, stating if it had not it was invalid, in not reciting the by-law and showing that it authorized the fining and imprisoning which the conviction imposed. He also left it to the jury to say whether the defendant had issued the warrant after he was aware the conviction had been removed by *certiorari*, and if they found the conviction was not sealed, and that the defendant knew of the removal of the conviction before he issued his warrant to find on the first count for the plaintiff. As to the second count the Chief Justice directs the jury there was strong evidence shewing probable cause for the conviction; an absence of malice, and the defendant acted *bona fide;* but if the warrant was issued after the defendant knew of the removal of the conviction, that was some evidence of a want of probable cause for issuing it, from which malice might be inferred. Leave was reserved to the defendant to move to enter a nonsuit on the 1st count, if it should be thought, case and not trespass was the proper remedy, and leave was also reserved to the defendant to move to reduce the verdict on the 2nd count, if the jury found for the plaintiff on that count, to the sum mentioned in ch. 126 of the Consol. Stats. of U. C, sec. 17. The defendant's counsel contended that this section applied as well to the 1st as to the 2nd count, upon which the jury found for the plaintiff as before stated.

H. Cameron, in last Michaelmas Term, moved for and obtained a rule calling on the plaintiff to show cause why a nonsuit should not be entered on the first count pursuant to leave, and why the damages on the 2nd count should not be reduced to three cents, according to the statute pursuant to leave, or why the verdict generally should not be set aside and a new trial granted for misdirection in ruling the plaintiff was entitled to recover substantial damages on the 2nd count, and to recover on the 1st count, although the conviction had not been quashed, and in ruling there was no variance between the notice of action and the 2nd count, and that the defendant acted without reasonable and probable cause, and also why a new trial should not be granted upon all or any of the above grounds, and also because no recognizance having been entered into according to the 5 Geo. II. ch. 19, the defendant was authorized in issuing his warrant, or because the damages are excessive and because the plaintiff has recovered on both counts for the same wrong; or why the plaintiff should not elect on which count he shall enter his verdict.

This last term *R. A. Harrison* shewed cause The conviction should have been under the seals of the justices, and as it was not it was void Paley on Summary Convictions, 4 Ed. 126, 243; *Regina* v. *The Inhabitants of St Paul*, 7 Q. B 232. A by-law not under seal was refused to be quashed because it was void, the same rule applies to convictions; In re. Croft, 17 Q B U. C. 269. It should also have recited the by-law under which the justices professed to act. This essential form is now dispensed with by the 27th Vic ch 28 That the conviction being bad trespass will lie *Brooks* v *Hodgkinson*, 4 H. & N 712; *Cameron* v. *Lightfoot*, 2 W Bl 1192; *Gray* v. *McCarty*, 22 Q B U. C 568; *Lawrenson* v. *Hill*, 10 Ir C L. Rep 177; *Leary* v. *Patrick*, 15 Q B. 266; *Haylock* v. *Sparke*, 1 El & Bl. 471; Paley on Convictions, 398-9. As to the 2nd count he referred to *Gray* v. *Cookson*, 16 East, 13; *Rogers* v. *Jones*, 3 B & C. 409; *Bross* v. *Huber*, 15 Q B. U C 625. There was evidence of malice; *Burney* v. *Gorham*, 1 C. P U C 358 It was then argued that on issuing the warrant the defendant acted ministerially, not judicially. That the want of a recognizance did not authorize the magistrate to proceed against the *certiorari*, it is only by practice that the courts have extended the statute to convictions; Paley on Convictions, 365-6 As to the recovery on each count he cited, *Holford* v *Dunnett*, 7 M 348 *H. Cameron* supported the rule and contended that even although the conviction should have been under seal trespass will not lie so long as it has not been quashed, *Gates* v *Devenish*, 6 Q B. U C 260 That the magistrate had jurisdiction and therefore could not be a trespasser; that trespass will not lie under ch. 126, sec. 1, 2, or 3; that *Bross* v. *Huber*, before referred to, shews that sec 17 of the statute, applies as well to trespass as to case, and therefore if the plaintiff is entitled to a verdict at all on the 1st count the damages should be reduced to three cents; that the notice should have stated the defendant was a magistrate, and it is not sufficient that it is directed to him as a magistrate; that the defendant did nothing after he had notice of the *certiorari*, although no recognizance had been entered into, he had issued his warrant before the *certiorari* had issued, though after he had notice that it would be applied for, and all he did after was not to withdraw it; and that the plaintiff must elect as to which count he will take his verdict upon.

ADAM WILSON, J.—The act ch. 126, provides, sec. 1, "that every action brought against a justice of the peace for any act done by him in the execution of his duty as such justice, with respect *to any matter within his jurisdiction* as such justice, shall be an action on the case, &c." Section 2, "that in a matter in which a justice of the peace has *not* jurisdiction, or exceeds his jurisdiction, or for any action done under any conviction, order or warrant, any person injured may obtain a warrant against him in the same form and in the same case as he might have done before the passing of the act." But that by sec. 3 "no *such* action shall be brought for anything done under such conviction or order until it has been quashed" These provisions are taken from the Imperial Act, 11 & 12 Vic, ch 44. An action of *trespass* will not now lie against a magistrate until the "conviction or order has been quashed," for sec. 1 limits the form of action to case, so long as the magistrate had jurisdiction over the matter adjudicated upon.

There is some little confusion in these provisions for which see *Barton* v. *Bricknell*, 13 Q B. 395, and *Leary* v. *Patrick*, 15 Q B. 266 The conviction and warrant in this instance have not been quashed, but the plaintiff says the conviction being void for want of a seal, it could not have been quashed, and it is therefore to be treated as if no conviction in law or in fact had ever been made. The consolidated Act of Canada, ch 103, sec. 42, requires the "conviction" to be drawn up in form by the justice or justices, under his or their hand and seal, or hands and seals. See also sec 50

In the case of *Regina* v *The Inhabitants of St Paul*, before referred to, an exception was taken to the order, that it was not sealed, although there were certain impressions printed as and to

represented seals, but that this was not a sufficient sealing; the court however decided the order was sufficiently sealed In that case the want of seals was one of the grounds taken on motion to quash the order, and it does not seem to have been thought that that would not have been a proper cause for which to quash the order, if the seals had been really wanting. The decision in our own court however, before referred to in 17 Q B 269, is against this view, for there the Chief Justice said the Municipal Act requires that by-laws shall be under seal,—"if this is not sealed, and it appears that it is not, and never was, it follows that what we are asked to set aside is not a by-law, and we have no power to quash it, nor is there any need that it should be quashed."

The case *The King* v. *Austrey*, 6 M. & S. 319, would seem to shew that the court would entertain a motion to quash a certificate for not being sealed, when by the terms of the statute it was required to be under the hands and seals of certain persons, although for the want of such seals the certificate was held to be void. One reason, perhaps, for such an interference may be that a "conviction" may more t. n a "by-law," does not, *ex vi termini*, mean an instrument under seal. A conviction is only the entering on parchment the proceedings of the court which have already taken place, it is like recording judgment in a superior court, *Hutchinson* v. *Lounds*, 4 B. & Ad 118 Although the conviction, for want of such seals, may, notwithstanding such defect, be quashed on application, I do not think it follows that it is necessary to do so, for by this material and essential defect in it, it is not such a proceeding as the statute requires, and there is, therefore, in point of law, no conviction.

The plaintiff must therefore be considered to be in the like position in seeking for redress by action, when there has been no conviction, as he would have been if he had succeeded in having the conviction quashed, and to bring an action, if he chose to do so, for the proceedings wrongfully taken against him, but this action must be in case, under the first section of the act, because the magistrate had jurisdiction.

The conviction being void does not however dispense with the necessity of notice of action to the defendant, as he unquestionably acted as a magistrate in all he did, and had complete jurisdiction over the plaintiff, and over the subject matter upon which he adjudicated, accordingly notice of action was duly served setting forth the two causes of action in the declaration contained; we have no doubt that as only one wrong was done to the plaintiff, and not two different acts, or two wrongs, that the plaintiff cannot recover on two separate counts which represent two distinct causes of action *Holford* v *Dunnett*, 7 M. & W. 348, before cited, and also the case of *Ruthven* v. *Stinson*, lately decided in this court clearly establish this.

The plaintiff should be put, therefore, to his election as to which count he will enter his verdict upon. We do not think he should have recovered on the first count at all, because the magistrate had jurisdiction of the offence, and by the express provisions of the statute the remedy in such a case should have been in an action on the case charging malice.

On whichever count the verdict is entered we are of opinion the damages to be recovered should only be three cents, because the plaintiff, by his own shewing, was proved very clearly to have been "guilty of the offence of which he was convicted." and in our opinion this section of the statute applies as well to actions of trespass as to case, and we see no reason why there should be any distinction whatever between one form of action and another in this respect The case above mentioned in 15 Q B. U. C. 625, is an authority for this construction.

If there should be any question upon the reservation at the trial, as to the defendant's right to have the damages reduced to three cents on the count in trespass, in case the plaintiff should elect to take his verdict upon that count, we shall be obliged to order a new trial generally without costs, and in that event we think the plaintiff should not recover upon either count Not upon the first count, because the magistrate had jurisdiction and did not exceed his jurisdiction, nor upon the second count, because there was no conviction proved as is there alleged

The notice of action is not objectionable, the statute does not require any particular addition or description of the magistrate to be given, and in the absence of such a direction we should be carrying the general inclination of the courts, to maintain magistrates when they have been acting justly and reasonably, quite too far by giving effect to so literal and critical an exception as has been taken to this notice. See Chitty's Forms, 9 Edn. 38; Arch. Pr. 11 Ed 1290.

We also feel there would be great difficulty in giving effect to the want of a recognizance when all the purposes of the recognizance have been answered, and when the objection to the want of it was not raised at the trial, but was taken for the first time before us upon this application for a new trial.

It may be that the learned Chief Justice stated the case rather more strongly against the defendant than may have been quite warranted, but we do not feel quite justified in setting aside the verdict *in toto* upon that account, as there were other circumstances beside this particular one from which malice might, to some extent, be inferred. The point to which we have referred in the learned Chief Justice's direction is contained in this part of his charge—"The warrant was issued after the notice of the removal of the conviction by *certiorari*. I think this shews a want of reasonable and probable cause for issuing the warrant, from which the jury may infer malice" While according to the case of *Booth* v. *Clive*, 10 C. B. 827, in which the judge of a county court issued an order for committal of the defendant after the service of a prohibition upon him, the direction to the jury should rather have been, as it was there, "that if the defendant, in making the order, acted under the *bonâ fide* belief that his duty as judge of the county court rendered it incumbent upon him to do so, notwithstanding the prohibition, the act done by him must be considered as done in pursuance of the County Court Act, and that he was therefore entitled to notice,"—which seems to indicate that if a notice of action had been given the like question of *bonâ fides* would have been submitted to the jury for the general acquittal of the prisoner.

In the present case *mala fides* was rather assumed from the defendant's issuing his warrant after he had notice of the *certiorari*, than the *bonâ fides* of the act left to the jury; but still, as we have before said, there were other circumstances properly left to the jury as to the defendant's conduct.

The rule will therefore be absolute for the plaintiff to elect upon which count he will enter his verdict, and upon such election a verdict for the defendant will be entered on the count; that the damages be then reduced to three cents for the plaintiff. On failure of the plaintiff so to elect, or if he elect to enter his verdict on the first count, and refuse so to reduce his damages, then the rule will be absolute generally for a new trial without costs.

Per cur.—Rule absolute.

PARK v. HUMPHREY.

Trover—Joint contract.

A and B having contracted with C to put in the crops on a certain farm, and to do all the necessary farm work thereon for the whole season, and for which they were to have on-half of the crops for that year; under the contract A and B sowed a quantity of wheat, and B having absconded, his interest in the wheat, while growing, was sold under an execution issued on a judgment, obtained in the division court, against B at the suit of D, who became the purchaser thereof A. subsequently sold all his interest, and that of B in the wheat, to C, who harvested it. D having brought an action of trover to recover the one quarter of the quantity of the wheat, claiming to have become the owner of that portion of it by purchase at sale on the writ of execution from the division court, which was produced and proved at the trial but no certified copy of the judgment signed by the clerk, and sealed with the seal of the court, was produced

Held, that as between A and B the contract was joint, and that trover by D. for the one-quarter sold to him, under the execution against B, was not maintainable *Held*, also, that as against a party whose goods have been sold under an execution from the division court, the production of the writ of execution is sufficient, but that as between a *third* party and the vendee under the execution, the judgment in support of it should be shown.

[C. P., H. T., 27 Vic.]

This was an appeal from the county court of the county of Norfolk, in which the plaintiff declared in trover, and on the common counts

The appellant, on the 27th day of April, in the year 1861, made the following agreement with Millard and Brown: "It is agreed between John J. Park, of the first part, and John Millard and Mark Brown of the second part, that the said John J. Park

will furnish a team of horses and such farming implements as are required for use on the farm, together with seed to be sown on the place, and the parties of the second part agree to do all the work in a good and proper manner and in proper season, and as the party of the first part shall direct; and harvest all the grain raised on the farm, and each party to pay for the threshing of their respective share of the grain raised by the said parties on the farm; the parties of the second part agree further to keep up the fences and repair them when needed for the protection of the crops at their own cost and expense. They also agree to draw and sow the plaster required on the place at their own expense, the first party to furnish the plaster at the bed or mill. The second parties agree to board all threshers who may be engaged to thresh on the place to dig all the potatoes and other roots and house the share of the party of the first part. They are also to do the haying, and to put two-thirds of all produce on the farm in the barn for the party of the first party; and they further agree not to go off the place to do any work at any time during the season when their labor is required thereon. This bargain to be for this summer and fall, and to cease when the *fall work is done.*"

Hyde Park Farm, April 27th, 1861.

For the year 1862-3 the agreement was parol, varied in this, that Park was not to find horses, and Millard and Brown were to have half, instead of one-third, of the crops for that year.

In the fall of 1862 wheat was sown on about forty acres. In December, 1862, Brown absconded. On the 7th of January 1863, one Wood, bailiff of the third division court of the county of Norfolk, sold Brown's quarter of this wheat, then growing, on an execution against his goods, issued out of that court on a judgment recovered by Humphrey, the respondent, against Brown. In July, 1863, Millard sold his own interest in the wheat yet growing, and professed to sell Brown's also to Park, who, in his own right, and by virtue of this sale, claimed all the wheat which he harvested and dealt with as his own. Humphrey, under the sale to him by the bailiff, claimed a quarter of the wheat, and offered to harvest the whole, in performance, thus far, of Millard *and Brown's agreement with Park, who would not permit him* to do it. Excepting this offer to harvest it, it did not appear Humphrey offered to do or did any thing else. After Park harvested the wheat, and claimed all as his own, this action was brought to recover one-quarter of it.

At the trial before his honor Judge Salmon, at the sittings of the county court in September last, the plaintiff Humphrey rested his right to recover Brown's share of the wheat, estimated at between 500 and 600 bushels, on the proof of the agreement, and that Millard and Brown had sown the wheat, and on proving the sale of Brown's interest in it, under the execution, and on proof of his offer to harvest it, and Park's refusal to allow him. For the defendant it was objected by Mr Matheson, "that the plaintiff could not maintain the action, Millard and Brown being partners, and the court could not enquire what share or interest Brown had in the wheat." The learned Judge overruled the objection, giving leave to the then defendant Park to move against his ruling, if the jury should find against him. The jury found a verdict for Humphrey against Park for $150.

Next term Matheson moved a rule on the 6th October, calling on the plaintiff, upon notice of the rule to be given to him or his attorney, on the 8th day of October instant, to shew cause why the verdict entered for the plaintiff in that cause should not be set aside and a nonsuit entered on the grounds that no sufficient or legal evidence was given at the trial of the cause of the judgment alleged to have been recovered in the third division court for the county of Norfolk by the plaintiff against one Brown, and on the grounds that the plaintiff had no *locus standi* in that honorable court to maintain the action, inasmuch as it would be necessary to take an account of the partnership transactions and dealings between said Brown and Millard before he could maintain said action, and on grounds reserved at the trial of the cause. Upon hearing the parties, the learned Judge gave the following judgment:

Upon the first of the two points raised by this rule, I am of opinion that Millard and Brown were tenants in common, and not partners in the wheat put in on the *defendant's farm*, on shares, each having a separate though undivided interest of one quarter in it, and that therefore the points raised by Matheson on that ground will not apply; that Millard had no power to dispose of or sell to the defendant Brown's interest in the wheat; that the claim defendant had against Millard and Brown was not one incurred on account of this wheat; Brown only signing the note as security for Millard for a pair of horses, in which he had no interest. As regards the other point raised, that it was requisite, in addition to producing and proving the execution issued from the third division court for this county, and the sale by the bailiff, under it, of Brown's interest to the plaintiff; that a certified copy of the judgment, signed by the clerk and sealed with the seal of the court, or the clerk's books ought also to have been produced; I have some doubt on the point, but incline in this case, upon the whole, to think not, more particularly as the plaintiff who purchased from the bailiff is the execution creditor, and would therefore, I take it, not be considered in the light of a stranger, and it was proved by the bailiff that he was present when the judgment was obtained If a certificate or memorandum of the judgment was absolutely necessary, this is very particularly given in the first part of the execution itself, where the clerk certifies, under the seal of the court, that on a particular day judgment was obtained, specifying the amount of debt and also of the costs, and that it was unsatisfied, shewing on its face that it was matter in which the court had jurisdiction The defendant purchased the wheat from Millard long after the sale, knowing all the circumstances, and that Brown had left the country, and at less than one-half its value, as proved by the plaintiff at the trial, and not attempted to be refuted or denied by the defendant. I therefore discharge the rule, giving the defendant four days to enter an appeal.

Against this judgment Park appealed for the reasons following:

1st. That under the circumstances no action of trover can be maintained.

2nd That under the circumstances reported by the learned county court judge, there was not sufficient evidence of a judgment to support the bailiff's sale.

During last term this appeal came on to be he

Anderson, for the appellant, contended, that the right was joint and could not be severed, and that Millard had a right to sell the whole to Park. He cited *Hare* v. *Celey et al*, 1 Cro. El. 143; *Mayhew* v. *Herrick*, 7 C. B. 229; *Morgan* v. *Marquis*, 9 Exch. 145; Addison on Torts, 191, 2, 3.

J. Read, for respondent, contended that the bailiff could sell Brown's right in the growing wheat, and that one quarter of the wheat was respondent's, who offered to do all Brown was required to do to entitle him to it, and that Millard's sale to appellant only passed his share. He cited *Delisle* v *Dewitt*, 18 U. C. Q B., 155; Story on Partnership, 4, secs 261, 2, 3, 307, 8, 11, 12, 417, 20, 54; *White* v. *Morris*, 11 C. B. 1015.

JOHN WILSON, J.—*Looking at this agreement*, we construe it, not as a letting of the land on shares, by which a term and possession of it were acquired by Millard and Brown, but as a contract for remuneration for their care and labour in growing the crops, to be performed by them as Park directed. It is like the case of *Hare et al* v. *Celey*, Cro. Eliz 143. As between Millard and Brown the contract was joint, the remuneration joint, by other crops as well as wheat; any breach of that contract by Park gave them jointly a right of action against him. It does not appear, under these circumstances, that Millard and Brown performed their agreement with Park, and could not have severally recovered from him, in an action of trover, a quarter of the wheat. At the time of the sale their right to it had not arisen. But if Brown could not himself recover a quarter of the wheat, Humphrey, his vendee, could not Before Millard and Brown could have recovered on their joint contract, they must have shown a substantial performance of it, which Humphrey did not

attempt to shew. But assume, for the moment, that Millard did perform what he and Brown had agreed to do, although the evidence shews that Brown did nothing after December, and Humphrey, his vendee, offered to harvest the wheat only, could Brown have claimed one-half of the half of this wheat as his, without any assent of Millard to a division of their joint half, or of Park to a division of the whole? They had rights to adjust with Park, rights to adjust between themselves But Humphrey is at most, the vendee of Brown by means of the sale on the execution. For all the purposes of dealing with this question, Millard and Brown were contractors in this joint enterprise; neither could, as between themselves, have asserted the right to take half of the half of the wheat, without adjusting the debts and accounting for the labor and debts incurred in respect to it The horses were Millard's It was the work to be performed by them, we infer, which entitled Millard and Brown to half the crops instead of one third, as it had been when Park found the horses We think Brown could not have brought trover against Park for this wheat, and therefore Humphrey, his vendee, cannot

This virtually disposes of the case, but we are asked to dispose of the other point As against the party himself whose goods have been sold by the bailiff under execution, it is enough to show an execution, but as between a third party and a vendee under an execution we think the judgment in support of it ought to be shewn.

Judgment will be to allow the appeal and to direct the court below to enter a nonsuit, pursuant to the leave reserved.

Per cur.—Appeal allowed.

Baker et al v. Vanluven.

Agreement—Substantial performance—Acceptance and acquiescence—Work and labour, &c

A having signed an agreement, not under seal, in the following words: "To William Baker Christopher Vanluven, John Ansley Zadoc Wright, and John Hughes, gentlemen—We, the undersigned, understanding that you have resolved to build a church 30 × 40 feet, at a cost of $1,000 in the village of B, do hereby covenant and promise to pay you the several sums opposite our respective names, to assist you in the erection of the said church, and we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st of October 1860"—and the parties having built a church at the place named thirty six feet wide by forty eight feet long and of the value of $1,200, with which A found no fault, but had a pew therein cushioned for his own use, which he had always occupied *Held*, that the church built was a substantial performance of the agreement, and *held* also, that by the acquiescence and acceptance of the work by A a new contract might be inferred in which A. would be liable for work and labour and materials provided.

(C P, H. T. 27 Vic)

This was an action, brought in the county court of the united counties of Frontenac, Lennox and Addington, to recover $100 and interest, being a subscription, by the defendant, for building a church, in the following words:

"To Wm. Baker, Christopher Vanluven, John Ansley, Zadoc Wright and John Hughes, gentlemen.—We, the undersigned, understanding that you have resolved to build a church 30 × 40 feet, at a cost of $1,000 (one thousand dollars), in the village of Battersea, do hereby covenant and promise to pay you the several sums opposite our respective names to assist you in the erection of said church, and that we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st of October, 1860." It was not under seal.

The declaration contained a special count on this contract averring performance, and also the common counts.

The defendant pleaded to the first count, that the plaintiff did not erect and build a church in the village of Battersea in manner and form as in the declaration alleged. He pleaded never indebted to the common counts.

The cause was tried before the judge of the county court of the united counties of Frontenac, Lennox and Addington, at the sittings held at Kingston in December last.

The plaintiffs proved that the defendant subscribed the instrument, that a church had been built by them which had been called the "Wesleyan Church," and had been dedicated and opened for divine service in the year 1861; that the defendant had a pew cushioned in the church for his own use, which he has always occupied; that some trouble had arisen between the defendant and plaintiffs; that the defendant did not find fault with the church, but said it was larger than the specifications. The church was, in fact, 36 feet wide by 48 feet long, and worth $1,200. The defendant made no objection to the building until he was called upon for his subscription

For the defence it was objected that the defendant had agreed to pay for a church 30 feet by 40 feet; that the one built was 36 feet by 48 feet; that the defendant never promised to pay for such a church.

Leave was reserved to move to enter a nonsuit on the objections taken.

The jury was charged to return a verdict for the plaintiff if they believed the defendant promised to pay the $100 mentioned in the subscription, and that they might allow interest if they thought proper. The verdict was for the plaintiffs for $112

In January Term of the County Court, *Gildersleve* obtained the following rule:—It is ordered that the plaintiff, upon notice of the rule to be given to his attorney, shall, within four days, shew cause why the verdict obtained in this cause should not be set aside and instead thereof a nonsuit entered pursuant to leave reserved at the trial of this cause, on the following grounds: that the plaintiffs at said trial proved the performance, by them, of a different contract from that alleged in their declaration, namely, the erection of a church of the size, thirty-six feet in width by forty-eight feet in length, instead of a church thirty feet in width and forty feet in length, as alleged in said declaration as forming the consideration of the defendant's promise declared on, and in the mean time all proceedings be stayed.

Sir Henry Smith, Q. C., shewed cause.

C. F. Gildersleve was heard in support of the rule, whereupon the learned judge delivered the following judgment:

The conduct of the defendant in resisting the payment of his subscription, because the plaintiffs have built a larger church, a better church, and a more valuable church than the one contemplated appears to me to say the least of it, unreasonable and out of the ordinary course of things The defendant, however, has a right to avail himself of every advantage which the law allows him in resisting this suit On examining the pleadings and evidence, and in looking into the authorities the court finds itself compelled to hold that the plaintiffs cannot recover on the present record. The main question is, what is the issue raised by the first plea The plaintiffs allege, in their declaration, that in consideration that the plaintiffs would cause and procure to be erected and built a church in the village of Battersea, of the size 30 feet in width and 40 feet in length at a cost of $1 000, the defendant promised that he would pay them $10) on the 1st October, 1860, followed with an averment that the plaintiffs did cause and procure the said church to be erected and built. The defendant pleads "that the plaintiffs did not cause and procure to be erected and built a church in the manner and form as in the declaration alleged." There can be no misunderstanding as to the issue thus raised. The plaintiffs assert that they caused a church 30 feet in width and 40 feet in length to be erected at a cost of $1,000. The defendant denies the allegation in direct terms. The evidence produced at the trial proved that the plaintiffs erected a church 48 feet in length and 36 feet in width at a cost of about $1,200. The court cannot say that 48 and 36 amount to the same thing, or that 3 6 means 30. The evidence sustains the plea, and disproves the allegation in regard to the erection made in the declaration The dimensions of the church, and the cost of it, have been made material allegations of the declaration. The defendant has traversed them as such, and, according to the evidence, the issue should have been found for the defendant, unless it can be said that 30 feet express the same thing as 40 feet, and 36 feet the same thing as 48 feet, and $1,000 represents the same amount as $1,200 The arguments addressed to the court, upon shewing cause to the rule, so forcibly by *Sir Henry Smith*, appears to me have been predicated on an erroneous assumption of the relation between the parties, namely, that the church was built for the defendant by the plaintiffs, under a contract to build between

them. This is not the case The consideration upon which the promise to pay the $100 is founded is treated as a contract to build between the present parties. The consideration upon which the defendant promised to pay the plaintiffs $100 is set out in that declaration as follows: "That the plaintiffs would cause and procure to be erected and built a church of the size 30 feet in width and 40 feet in length, at a cost of $1,000, for the use of the defendant and others." This consideration is prospective and conditional, and the execution of it, as laid in the declaration, is a condition precedent to the performance of the promise by the defendant. The plaintiffs have alleged in their declaration an execution of the consideration in the terms of the contract; but the evidence has shewn that it was executed in a different manner and at variance with that alleged in the declaration. On a party subscribing to a church or a shanty, he has a right to make his own terms, and trustees and committees may make their terms also; but trustees cannot compel a subscriber to pay if they depart from the terms of the subscription. The present plaintiffs in building a larger church and a more extensive one than that mentioned in the declaration and subscription book, have so departed The defendant had an undoubted right to say to the plaintiffs, I will subscribe $100 towards the erection of a church for the Wesleyan Methodists, at Battersea, of certain dimensions, that is to say, 30 feet wide and 40 long; but I will not give a cent towards a church built for the Presbyterians or Roman Catholics, or any other body than the Methodists, or towards any church of larger dimensions than 30 feet in width and 40 feet in length; and this, in effect, is what he has really said. To meet the evidence, the plaintiffs should have alleged that they have executed the consideration on which the defendant promised to pay the $100, by causing a church to be erected of the size of 30 feet in width and 48 feet in length, at a cost of $1,200. Such a declaration would, I apprehend, be held bad on demurrer. It is true enough that when a contract has been entered into for the building of a house for a certain sum of money, to be paid on the completion of the building, in accordance with certain plans and specifications, it is not necessary to the maintenance of an action upon the contract that there should be an exact performance of the contract in every minute particular: substantial performance is sufficient. The present action is not brought upon a building contract, but upon a promise to pay $100 towards the erection and building of a church, to be built of a certain dimension, and of a certain value The defendant had it not in his power to accept or reject the building He had nothing to do with the building of the church; but he has promised to contribute towards the erection of a church of specific dimensions, of a specific cost, and to no other according to the evidence. The proof is that the plaintiffs have built an edifice of different dimensions and of different value from what they allege in their declaration to have built They cannot be said to have substantially executed the consideration. They have erected a church, it is true, but not in the terms of the agreement on which the defendant promised to pay the one hundred dollars. This is not a case on which the plaintiffs can fall back on the common counts, and recover upon the *quantum meruit*. This is not an action by the builders on a building agreement to recover the contract price, or to recover the value of the work done and materials found, against a party who has accepted the building and enjoys the possession The fact that the defendant rents a pew in the church cannot make any difference: any person who conforms to the rules of the church, and can pay for a pew, may rent it. If a man declares upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he cannot recover on either count; not on the first, because of the variance, nor on the second, because there was a special agreement; but if he prove a special agreement, and the work done, but not pursuant to agreement, he shall recover upon the *quantum meruit*. It cannot be said, in a legal sense, that the church at Battersea was erected in pursuance of any agreement with the defendant or that any work was done or performed for him in regard to it The contract for the building of it was with the plaintiffs themselves; and the work performed in the erection of the church was performed for them and not for the defendant It is for the plaintiffs to consider whether a special replication might not bring the defendant to a proper sense of duty, or whether relief cannot be had in another quarter, on a ground of the knowledge of the deviation and acquiescence in them. On the present record, under the evidence, I think the plaintiffs cannot recover. Therefore the rule to enter a nonsuit must be made absolute.

I would refer to *Neale* v. *Ratcliff*, 15 Q B. 916; *Beech* v. *White*, 4 P. & D 399; *Friar* v. *Grey et al*, 15 Q B 891; *Porcher* v. *Gardner*, 8 C. B 461; *Meniaaff* v. *Read*, 7 C. B. 139; Wm. Saund. 319; *Hill* v. *Mount*, 18 C. B. 72; *Thompson* v. *Gillespy*, 5 E. & B. 209.

From the judgment of the County Court the plaintiffs appealed to the Court of Common Pleas, and contended that the verdict for the plaintiffs rendered in this cause should stand and that the rule for a nonsuit should have been discharged on the grounds that the plaintiffs have proved that the contract set out in the declaration has been by the plaintiffs substantially performed; that the work done by the plaintiffs had been accepted by the defendant; that the plaintiffs did not prove the performance of a different contract from that alleged in the declaration; that under the common counts of the declaration the plaintiffs are entitled to recover under the evidence.

Sir H Smith, Q. C., for the appellant, contended that there was a substantial performance of the contract and an acceptance of the church. Addison on Contracts, 5 ed. 410, 1040; Saund. on Pleadings and Evidence, 2 vols 961; *Ireson* v. *Mason*, 13 U C C. P. 323; *O'Kell* v. *Smith*, 1 Starkie, 107; *Fisher* v. *Samuda*, 1 Camp. 190; *Lucas* v. *Godwin*, 3 Bing N. C. 737; *Chappel* v. *Hicks*, 4 Tyr. 43; *Stavers* v. *Curling*, 3 Bing N. C. 355; *Good* v. *Harper*, 3 Q B. U. C. 67; *Basten* v *Butler*, 7 East. 484; *Moneypenny* v. *Hartland*, 2 C & P. 378 *Wetherell* v. *Bird*, 2 Ad. & E. 373; *Hayselden* v *Staff*, 5 A. & E. 161.

A. Crooks, Q C., for the respondent, contended that the building of the church of the size mentioned in the subscription list was a condition precedent to the paying the subscription, and that there was not a performance of the contract so as to entitle him to recover. He cited *Munro* v. *Butt*, 8 El & Bl. 738; *Cutter* v. *Powell*, 2 Smith, L. C. 1, 19, 30; *Stevewright* v. *Archibald*, 17 Q. B 103; *Gaskin* v *Counter*, 6 U. C C. P. 99; *Munro* v. *Butt*, 4 Jur. N S 1231; *Blyth* v. *Samuda*, 2 F. & F. 430; *Cross* v. *Elgin*, 2 B. & Ad. 106.

JOHN WILSON, J.—With deference to the opinion of the learned judge, we think he was mistaken in applying to this case the principle in the leading case of *Cutter* v *Powell*, and on all the cases depending upon it. It belongs, we think, to that class of cases, in which a substantial performance of the contract is all that is required to entitle the party to recover who has thus performed it; or to that class of cases, where by acquiescence and acceptance of the work, a new contract may be inferred so as to entitle the plaintiff to recover for his work and materials. Here the essence of the contract was the building of a church, for the use of a certain denomination, who were to use it, and the parties who used it would seem to be those who were entitled to say how far the building was constructed according to the contract. True, its dimensions and value were stated, and it exceeded them in both particulars, but it was built satisfactorily, from all that appears, to every one interested, to those for whom it was built and who were to occupy it, and to the appellant himself, for he found no fault with the building, and he took a pew, which he fitted up for his own use and occupied. He did not object to the size of the building until called upon to pay his subscription We are of opinion the learned judge was right in his first impression of the case. The jury would have been well warranted in finding, as matter of fact, that the contract was substantially performed, and they in effect so found it, by finding a verdict for the plaintiff. It would seem unreasonable that the defendant should allow the plaintiffs to go on with the building, of the increased size, and after it was all finished in strict accordance with the contract in every other particular, and, after using and occupying it, then turn upon them and say, "you have not performed your contract."

We think the judgment of the court below should be reversed, the rule for a nonsuit discharged, and the postea given to the plaintiffs.

Per cur.—Appeal allowed.

PRACTICE COURT.

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

McKENZIE ET AL v. HARRIS.

Specially endorsed writs—Interest—Priority of judgments—Fraud—Collusion, what constitutes—Effect of endorsement of claim for interest.

A subsequent judgment creditor cannot attack a prior judgment on the ground of irregularity, such as insufficiency of special endorsement on the writ of summons, to support a final judgment in default of appearance

A subsequent judgment creditor may attack a prior judgment on the ground of fraud.

Where the application is really in the interest of a subsequent judgment creditor, the mere fact that the judgment debtor makes an affidavit in support of the application, is not enough to make him the party applying

Where the debt is *bona fide* due, the circumstance that the debtor facilitates the plaintiff's recovery of a judgment on a special endorsed writ, even in pursuance of a previous understanding, while he defends suits brought again t him by other creditors, is not enough to constitute fraud.

The Con Stat. U. C cap 26, sec 17, which avoids judgments obtained on cognovits delivered under circumstances therein mentioned, does not extend to judgments obtained under specially endorsed writs.

Quære—Is the fact t at the debtor agrees to expedite the creditor's recovery of a just debt by judgment, under any circumstances, a collusive a fraudulent or a wrongful proceeding? *White* v. *Lord*, 13 C C C P. 289, in this respect doubted

Semble—The endorsement for interest on a specially endorsed writ, is in general a matter of claim only. If it be correct, judgment goes rightly for it, without any enquiry, where the plaintiff claims it, and defendant does not dispute it

(Practice Court, June 18, 1864.)

R A. Harrison obtained, during Easter term last, a rule calling on the plaintiffs to show cause, 1st. Why the final judgment which was entered as on a specially endorsed writ, the execution issued thereon, and all subsequent proceedings, should not be set aside for irregularity, because the writ of summons was endorsed for interest, without showing that the claim for interest arises upon a contract, express or implied, to pay interest. 2nd. Why the judgment and execution, or the execution and all proceedings had thereon, should not be set aside, because the judgment and execution are fraudulent and void as against the creditors of the defendant, as the judgment and execution were obtained through collusion between the plaintiffs and defendant, and with intent to defeat and delay creditors of the defendant, or with the intent of giving a preference to the plaintiffs over the other creditors of the defendant. 3rd. Why, upon the grounds last aforesaid, the execution of the plaintiffs should not be postponed as to the satisfaction thereof until after the execution at the suit of Robert McIntyre and other creditors of the defendant against the goods of the defendant be satisfied. 4th. Why such other rule or order as to an issue or otherwise should not be made as to the court should seem meet, upon grounds disclosed in the affidavits and papers filed 5th. And why such rule or order as to the costs of this application and all subsequent proceedings should not be made as to the court should seem meet, upon grounds disclosed in affidavits and papers filed.

S Richards, *Q. C.*, showed cause. He argued that the motion was made on behalf of Robert McIntyre, a judgment creditor, subsequent to the plaintiffs'; that a subsequent judgment creditor could not make such an application (*Wilson* v *Wilson*, 2 U C. Pr. R 374; *Balfour* v. *Ellison*, 3 Ib. 30); that interest was demanded before the action was brought, as the affidavits which he produced showed (*Mearns* v. *The Grand Trunk Railway Co.*, 6 U. C L J 62; *Standing* v *Torrance*, 4 U. C L J. 235; *Rodway* v. *Lucas*, 10 Exch. 667); that the judgment could not be fraudulent, because the action was not defended; that a preference is not fraud; and besides, there was a just debt (*Young* v. *Christie*, 7 Grant, 312; *Wood* v. *Dixie*, 7 Q B 892).

R A Harrison, contra, submitted that the application was for defendant as well as McIntyre, because that the defendant had made an affidavit to sustain the motion; but it was of no consequence whether the defendant was a party to it or not—the application should prevail (*Armour* v *Carruthers*, 2 U C. Pr R 217; he also cited *Rogers* v *Hunt*, 10 Exch 474; *McKinstry* v *Arnold*, 4 U. C L J 68); that fraud, in law, was sufficient to affect these proceedings; that the plaintiffs were actively concerned in procuring the defendant to let them obtain judgment without a defence (Con Stat. U. C cap. 26; *Perrin* v *Bowes*, 5 U. C. L. J. 138); that the question of collusion, if it exist (and the case depends upon it), must be tried by an issue to be directed for that purpose (*Klein* v *Klein*, 7 U C. L J. 296; *Fergusson* v. *Baird*, 10 U.C C.P 493); that the plaintiffs' execution should be postponed, under any circumstances (*McGee* v. *Baird*, 3 U. C. Pr. R. 1; *Billiter* v. *Young*, 3 L T. N S 196).

The writ was issued on the 24th February, 1864, and was specially endorsed as follows:

The following are the particulars of the plaintiffs' claim:

			Dr.			
1863.	July 31,	Balance	$1,539 70	— 184 —	$77 65	
	Oct. 11,	Note	104 42	— 112 —	3 19	
1864.	Jan. 31,	Balance of interest..	75 68			
			$1,719 70		$80 84	
			Cr.			
1863.	Oct. 27,	By cash	$200 00	— 96	$5 26	
1864.	Jan. 31,	Balance	1,519 70	balance	$75 58	
			$1,719 70		$80 84	
1864.	Jan 31,	To balance.....	$1,519 70			

On which the plaintiffs claim interest until judgment

Judgment was entered about the 14th March, 1864, for.....	$1,529 93	debt,
And.....	28 47	costs,
Making	$1,558 40	

For which sum an execution was placed in the sheriff's hands on the 19th of the same month, on which he seized, and under which he held the goods.

The defendant swore, that, pursuant to a previous understanding with the plaintiffs, and for the purpose of giving them a preferential judgment, he did not put in any defence to the writ served, but allowed the plaintiffs to obtain judgment: that on his telling the plaintiffs' agent, in February last, he had been threatened to be sued by Stewart & McIntyre but who had afterwards agreed not to sue him if he would send them $200 on account in a few days, the plaintiffs' agent advised him not to send the money to Stewart & McIntyre, but to pay it to him; and that the agent also got him to consent that the plaintiffs should get what the agent said would be a friendly judgment for their claim, promising that they would protect him by the judgment, and make his other creditors wait upon him, as they (the plaintiffs) being a rich house, could afford to wait for him after they got judgment; that upon these assurances and promises he did not send the $200 to Stewart & McIntyre, and did not put in any defence to the writ; that on the 20th February he wrote to the plaintiffs that some of his creditors were pressing him, and he wished the plaintiffs to get their friendly judgment, pursuant to the understanding with Mr. Cleghorn, their agent; that the answer received from the plaintiffs was in part as follows:—"We have to tell you that we have instructed our solicitors to get judgment against you as soon as they can, and will explain to them the object of our taking this course. If you can't send the $200, send all you can by return post" That before making the arrangement with the plaintiffs, he was justly indebted to Stewart & McIntyre and other creditors in large sums of money, of which the plaintiffs, before getting his consent to the judgment, were well aware; that on the sheriff levying on his goods he wrote to the plaintiffs asking them if that was the way they were going to protect him, for it was contrary to the understanding; that the plaintiffs answered to the effect that "Our solicitors say the sheriff cannot be instructed to stay proceedings, as it would give priority to any execution that he might have after us. You see, therefore, that any execution after ours, will force the sheriff on with ours"

Duncan McIntyre swore, that Robert McIntyre obtained judgment, on the 25th April, 1864, against the defendant for $692 debt, and $33 24 costs, and an execution had been given to the sheriff thereon; that defendant owed Stewart & McIntyre (Stewart being now dead) for four promissory notes for $200 each, with interest from the 24th April, 1860; that the defendant had stated to deponent he (the defendant) was not able to meet his engage-

ments or to pay his debts in full; and that he was in this state of insolvency before the plaintiffs induced him to allow them to get their friendly judgment against him.

Mr Deacon made affidavit, among other things, to the effect that the defendant was insolvent, and unable to pay his debts in full when the judgment was obtained by the plaintiffs against him, as he (Mr Deacon) had learned from the defendant himself

There were various other matters sworn to in the affidavits filed for the application, which it is not material to recapitulate or to notice.

James Cleghorn, the plaintiffs' agent swore, that the defendant justly owed the plaintiffs the amount of the judgment, and had owed them the debt for about three years; that the debt which the defendant contracted with Stewart & McIntyre was for the purchase from them of a house and shop and piece of land for $1,800; that he had paid for principal and interest on account $1,130; that the defendant had never received, as he said, any deed or bond for the same; that when the defendant said to Cleghorn he was going to pay $200 more on the shop, Cleghorn said to him, as he had already paid so much on that property out of the goods got from the plaintiffs and others, he ought not to pay more until he had made payments on account of the goods that had been supplied to him; that in February last the defendant showed him a statement of his affairs, in which he appeared to have $800 over and above all his liabilities (a copy of the statement was filed, showing $1,180 in the defendant's favour); that the defendant had paid the plaintiffs $120 on the judgment; that the judgment was obtained in the usual course, and there was no fraud or collusion between the plaintiffs and the defendant; that the sole object of the plaintiffs in recovering judgment was to recover the amount due to them, and there was no intention or agreement whatever to defeat or delay any of his other creditors

Mr. McLennan swore, that on the 31st January, 1864, he had been informed and believed the defendant admitted the correctness of the balance of the plaintiff's account of $1,519 70 to Cleghorn; that the interest at 6 per cent. on this sum from that day to the 14th March, 1864, when judgment was signed, was $10 23, making the principal sum of $1,529 93; that it is usual to add interest to accounts from the time they become due until judgment.

Mr McKenzie also made an affidavit denying collusion.

ADAM WILSON, J.—Upon the affidavits filed on behalf of plaintiffs, claims was admitted by the defendant, in February last, to be correct as it was made up to the 31st January at the sum of $1,519 70. No claim of interest was then made for the future—but interest is embraced in the statement up to the 31st January—nor was any promise to pay interest made by the defendant.

It is not denied as expressly sworn by the defendant that it was arranged between the plaintiffs and defendant that the defendant should give them "a preferential judgment, or a friendly judgment, and that the plaintiffs should protect him by the judgment, and make his other creditors wait upon him"

It is clear that interest has been included in the judgment to the amount of $10 23, from the 31st January to the 14th March, when the judgment was entered.

The justice of the plaintiffs' debt is not disputed, for which, excepting their judgment and execution, they have no security Nor is the justice of McIntyre's claim disputed. But it is said he still has the property in his own hands which he sold to the defendant for $1,800, as security for his judgment for $1,025 24, which is all that is now owing to him upon the property.

The case of *Armour* v. *Carruthers* 2 U. C Pr Rep 217 is an authority to show that Robert McIntyre may make such an application as the present on the ground of fraud or collusion, but not on the ground raised as to the special endorsement, for that is an irregularity at the most, of which none but the defendant himself can complain. (See *Wilson* v. *Wilson*, 3 U. C. Pr. Rep. 374; *Balfour* v *Ellison*, 3 U C Pr Rep. 30)

It is unnecessary, therefore, to enquire into the propriety of the claim made for interest; for I am of opinon, although the defendant has made an affidavit to support this application, he is not applying to set it aside, and that the application is really made by McIntyre only.

If it were necessary, however, to enquire into the propriety of the special endorsement for interest, I should hold that in this case the claim is for a liquidated demand in money; because it is a debt acknowledged by the defendant to be due by him to the plaintiffs of a particular sum, on the 31st January, 1864 and is therefore within the 15th section of the Common Law Procedure Act, as on "a simple contract debt" Then the endorsation for interest is a matter of claim merely by the plaintiff. If it be correct, judgment goes rightly for it, without any enquiry, because the plaintiff *claims* it, and defendant does not dispute it If it be not correct, the defendant may either enter an appearance and resist it before a jury, or may apply to the court to set aside the judgment signed, on a summary application.

The court can say nothing about the claim, whether it is right or not The plaintiff is not obliged to show upon the face of his claim that he is indisputably and unquestionably entitled to it; it is sufficient that he *claims* it.

In this case, however, there is almost a conclusive reason why the plaintiffs would seem to be entitled to interest from the defendant, and it is that they have charged him with interest to the 31st January, and he has admitted this to be correct. He could scarcely be allowed to say now that he was not any further to pay interest on this debt If it were right to pay interest at all, it is right to continue that interest It is never doubted that when once interest begins, it is to be continued. The contest always is, whether it is to begin or not.

The case of *Young* v *Christie*, 7 Grant, 312, properly decides, as to the question of fraud, that a judgment by default is not within the terms of Con. Stat U C cap. 26, sec 17, which applies merely to a confession of judgment, cognovit actionem or warrant of attorney to confess judgment, and that a priority obtained by one creditor upon a judgment by default over another creditor whose action has been defended, is no ground for treating the judgment as fraudulent.

Then the case of *Wood* v. *Dixie* (7 Q B 892) is clear authority that a sale of property for good consideration is not, either at common law or by the statute of Elizabeth, fraudulent and void merely because it is made with the intention to defeat the expected execution of a judgment creditor.

An accord and satisfaction is good to take a smaller sum in satisfaction of a greater, when the defendant in the cause agrees also to withdraw a plea of infancy which he had pleaded (*Cooper* v *Parker*, 15 C B. 822), and no doubt it would be good to withdraw any other plea. Why, then, should the mere fact of inducing a person not to plead, or to withdraw a plea he had pleaded even for the purpose of accelerating the creditor's recovery and getting a prior judgment to any other creditor, be objectionable in any manner?

A cognovit is, under the circumstances mentioned in the act just referred to, void, but that is because the act has expressly made it so; but a cognovit for the purpose of giving that creditor a preference, was perfectly good at the common law.

It is frequently done in the case of executors who are sued, and who may defeat a pending suit against themselves, by confessing judgment to another creditor, such a defence may even be pleaded *puis darrien continuance*. (See *Prince* v *Nicholson*, 5 Taunt. 665) The giving of cognovit by an executor to a friendly creditor to defeat a hostile creditor, is a course spoken of as being a very usual one (See Arch. Prac. 11 ed. 1220; *Lyttleton* v. *Cross*, 3 B & C. 317)

The case of *White* v. *Lord* (13 U. C. C. P. 289), decided under the Absconding Debtors Act, does not, I think, apply to this case; but I am not prepared to assent (excepting so far as I am bound by its authority) to the opinion "that the defendant agreeing to expedite the plaintiff's recovery of a just debt by judgment," is a collusive, a fraudulent or a wrongful proceeding, or necessarily tending to defeat creditors further than any other preference manifestly not against law has the like effect and purpose.

The affidavits of the plaintiffs show the defendant was not insolvent when he consented to the plaintiffs' getting their judgment against him; but it also manifestly appears that the plaintiffs did obtain this judgment for the purpose of protecting the defendant, and making the other creditors wait; yet they have not done this, and are not doing it now The defendant's complaint is, that they are not doing it But he could not be heard to complain of this breach of agreement. I do not see what injury this agreement,

so long as it is not used as a protection and means of delay, or the breach of it by the plaintiffs, can be to the other creditors If they cannot complain of this friendly or preferential judgment (and I think they cannot), they cannot complain either that a fraudulent bargain made between the plaintiffs and the defendant as to the mode in which this judgment should be dealt with, has not been carried out by the plaintiffs, but is so conducted as any judgment fairly obtained ought to be conducted, by being promptly enforced The failure to keep this improper bargain, to the prejudice of the defendant's other creditors, is a matter solely between the plaintiffs and the defendant, with which the other creditors have nothing whatever to do.

It does not appear that this applicant will not be satisfied out of the defendant's goods and if it distinctly appears he is not likely to lose, when he still holds in his hands the property which he sold to the defendant for $1 800 for a little more than one half that sum, having already been paid the difference betwe : this larger claim and the amount of his judgment.

Rule discharged, without costs.

COMMON LAW CHAMBERS.

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

SOMMERS v. CARTER

Security for costs—Time for application.

Where appearance was entered on 13th September, 1862 declaration filed on 29th of same month order for security for costs obtained on 7th October 1862, on the ground that plaintiff had left Canada, that order rescinded on 11th March, 1863 on the ground of his return Plaintiff again left Canada in October 1863 An application made in March 1864 for security for costs, was held not to be too late, there being nothing to shew when defendant first had notice of plaintiff leaving in October, 1863, or that he defendant had taken any steps in the cause, between that date and the date of his application.

(Chambers, March 30th, 1864.)

This was a summons calling upon plaintiff to shew cause why all the proceedings in the cause should not be stayed, until security for costs were given by plaintiff to defendant.

On 13th September, 1862, the defendant entered his appearance.

On 29th of same month, declaration was filed.

On 7th October, 1862, defendant obtained an order for security for costs, on the ground that plaintiff had left Upper Canada, and was resident in the State of Michigan.

On 9th of the same month, the order for security for costs was served.

On 11th March, 1863, the defendant upon an affidavit, that during the month of October preceding he had returned to Canada, and was at the time of the application, residing in the Township of Norwich, in the County of Oxford, as his usual and permanent place of residence, obtained an order rescinding the order of 7th October, 1862, directing security for costs to be given.

In October, 1863, plaintiff again returned to the United States of America, there to reside.

On 21st March, 1864, notice of trial was served for the then coming assizes, to be holden on 30th of same month, in and for the County of Oxford.

On 24th March, the affidavits were sworn on which to apply for a second order for security for costs.

On 26th of same month, the summons was granted.

There was nothing to shew either when the pleas were filed, or when issue was joined in the cause.

S Richards, Q.C., for defendant.

W. Freeland, for plaintiff.

DRAPER, C. J.—The only objection I see to the defendant's application, is apparent delay. Plaintiff left Canada in October, 1863—this application is just made. It is not shewn that defendant only recently discovered that plaintiff had gone; but this case differs from any that I can find. The defendant applied early, and obtained an order for security for costs in October, 1862. No security was given, and in March, 1863, the plaintiff got that order rescinded, on the ground that his absence was temporary and he had returned. Since then no step has been taken in the cause, until the 21st of this month, and defendant makes this application immediately thereafter.

In *Duncan* v *Stint*, 5 B & Al 702, reference is made to a previous case, where the court said "When a cause is pending, a party if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of England."

In *Wainwright* v. *Bland*, 4 Dowl. P. C. 547, there had been a trial, and the application for security was made after notice of trial again given. Defendant admitted he knew plaintiff had gone abroad before the trial, and it was held he was too late, and that he should have moved before; as expense might have been unnecessarily incurred.

Brown v. *Wright*, 1 Dowl. P. C. 95, the court quote and act upon the passage cited from *Duncan* v. *Stint*.

Doe v. *Brood*, 1 Dowl. N. S 857, proceeds on the same principle, and so in *Foster* v. *Coster*, 8 A. & E. 419 (in notes)

There is nothing to shew when plea was pleaded, or issue joined, unless the latter step were taken by plaintiff on the day on which he gave notice of trial

The declaration was filed on 29th September, 1862, and as the first order for security for costs was not obtained until 7th October, 1862, the plea was probably pleaded before that order. If so, no step in the cause, strictly speaking, has been taken since then, for the order for security and the order rescinding it, are collateral proceedings.

It appears to me, therefore, looking at the plaintiff's delay in proceeding at the fact that it does not appear that defendant took any step in the interim, and considering what I take to be the principle of the cases cited, I should make this order.

Order accordingly.

CROSS v. WATERHOUSE.

Trespass—Verdict for 1s—Plaintiff's costs—Defendant's costs.

Where plaintiff in an action of trespass for false imprisonment, recovered a verdict for one shilling only, and the judge refused to certify it was held that plaintiff was entitled to no costs whatever, and that as plaintiff was entitled to no costs, sec 328 of Consolidated Statutes Upper Canada, cap 22, which enables a defendant under certain circumstances to set off so much of his costs of defence, between attorney and client, as exceed the taxable costs that would have been incurred in the Division Court against plaintiff's verdict and costs, was inapplicable.

(Chambers, April 12, 1864)

Plaintiff obtained a summons on 28th March last, calling upon the defendant to shew cause why an order should not be made upon the master to review his taxation herein, and directing him to disallow to defendant so much of the defendant's costs taxed between attorney and client, as exceed the taxable costs of defence which would have been incurred in the inferior court, and not to set off the same against plaintiff's verdict, upon the ground that the plaintiff having sued in trespass and recovered by the verdict of a jury, less damages than $8, and the judge at the trial having refused to certify, plaintiff was entitled to no costs whatever, and that it is only where a plaintiff is entitled to some costs, that defendant is allowed to tax his costs of defence as between attorney and client, and set off the same against plaintiff's verdict and costs, and why the writ of execution directed to the sheriff of the County of Hastings, against the goods and chattels of one plaintiff, for the excess of costs taxed by the master to the defendant, should not be set aside, upon the ground that the said writ was not warranted in law, and upon grounds disclosed in affidavits and papers filed.

The affidavits shewed that the action was trespass for false imprisonment, the pleas were not guilty and leave and license, upon which the plaintiff joined issue.

The cause was tried at the Fall Assizes for the year 1863, at Belleville, before Morrison, J. Plaintiff recovered a verdict for one shilling only. The judge refused to certify under Consolidated Statutes Upper Canada, cap. 22, secs. 324, 328. Defendant afterwards applied for and obtained an order for the delivery of the postea to him.* The defendant then gave notice of taxation of costs before the deputy clerk of the Crown, at Belleville. Plaintiff produced no bill. Defendant on 11th March, 1864, taxed his bill between attorney and client, and set off so much of it as exceeded the taxable costs that would have been incurred in a Division Court, against plaintiff's verdict, leaving a balance against plaintiff of $75 59, for which execution was issued by the defendant, directed to the sheriff of the County of Hastings, against the goods

* 10 U. C. L. J., p. 73.

and chattels of plaintiff. Plaintiff gave notice under the statute for revision of the costs, by the principal taxing officers of the court at Toronto, who on 28th March, decided in favor of the course followed by the deputy. Plaintiff on same day obtained the foregoing summons for revision.

Lauder, shewed cause, contending that the cause might have been held in the Division Court, and if so, that defendant was under Consolidated Statutes Upper Canada, cap 22, sec. 328, entitled to tax his costs as between attorney and client, and set off so much of his bill so taxed, as exceeded the taxable costs that would have been incurred in the Division Court He referred to *Cameron* v. *Campbell*, 1 U. C P. R. 170; *Ib.* 71; 12 U. C Q. B. 159; and *Dauby* v. *Lamb*, 31 L. J., C. P., 17.

Robert A. Harrison, in support of the summons, argued that at Common Law there are no costs, that the Statute of Gloucester gives costs to plaintiffs recovering damages, that the Statute of Henry the Eighth gives costs to defendants obtaining verdicts against plaintiffs, that other statutes gave costs of particular issues according to the finding, that no statute except Consolidated Statutes Upper Canada, cap 22, sec. 328, gives costs against a successful plaintiff, where there is only one issue joined between the parties and that found for the plaintiff, but that statute only applies to cases where plaintiffs are entitled to *some* costs against which the costs taxed may be set off, and here that sec. 324 of Consolidated Statutes Upper Canada, expressly declares that in such a case as the present, the plaintiff is not entitled to recover "any costs whatever." He referred to *Johnston* v. *Morley*, 9 U. C. L. J. 263, *Cameron* v *Campbell*, ubi supra.

DRAPER, C J.—I think defendant is not entitled to tax costs against plaintiff, and so must make the summons absolute.

Summons absolute.*

WINGALL v. THE ENNISKILLEN OIL COMPANY.

Several summonses to plead several matters—Practice as to costs—Sufficiency of pleas—Plea to damages—Plea setting up rescission of contract in writing, before breach, by a contract not in writing—Sufficiency.

Where defendants called upon plaintiff to show cause why defendants should not have leave to plead several pleas, and one of them was uncertain, as to it the leave was refused; and leave to amend it by severing it and making two good pleas was also refused, because the summons was merely to show cause why the plea, as it was originally proposed to be pleaded, should not be pleaded.

Defendants obtained a second summons, calling upon plaintiff to show cause why the pleas should not be pleaded in the amended form, and that summons was made absolute, and as what was asked in the second application should have been made part of the first, the second summons was made absolute only on payment of costs.

Where, to a declaration on a contract for the making and delivery of a certain number of barrels the breach alleged was that after the delivery of a certain number of barrels, defendants refused to allow plaintiff to deliver the remainder, and the damages claimed were as well for the price of those delivered as for loss of profits on those which defendants refused to be allowed to be delivered, a plea of payment as to all delivered, though objected to on the ground that it was merely a plea to damages, was allowed on the ground that it answered a substantive part of the plaintiff's cause of action, and was not a mere plea to damages.

Quære—As to the sufficiency of a plea to a written contract, that before breach it was rescinded, and a new contract substituted not alleging the rescission to have been in writing? Such a plea was allowed to be pleaded, but leave given to plaintiff to reply, take issue and demur; the demurrer, if any, to be first determined.

(Chambers, April 24, 1864.)

This was a summons calling upon the plaintiffs to show cause why defendants should not have leave to plead several pleas to the declaration in this cause.

The first count recited that before the making of the agreement between the plaintiff and the defendants hereinafter next mentioned, the defendants and one William Wiley had duly entered into a contract, whereby the defendants agreed to purchase from the said William Wiley 2 500 good barrels of eight hoops each, to be made by said Wiley of thoroughly seasoned timber, warranted not to leak, and to pay for the same on delivery at the rate of $2 20 per barrel, and to take said barrels as fast as four men could make them, until they (the defendants) had used up what barrels they then had on hand, and thereafter in larger quantities, as fast as the said William Wiley could cause the same to be made, said barrels to be delivered in the defendants' storehouse once every week, or as often as they might require them, and whereby the said William Wiley duly agreed to make and deliver the said barrels accordingly at the price aforesaid; that afterwards the said William Wiley entered upon the performance of the contract, and in part executed the same; and after the making and delivery by him to the defendants of certain (to wit, 160) of the barrels according to the provisions of the said contract, he the said William Wiley, for a good and valuable consideration in that behalf, assigned and transferred to the plaintiff all his remaining interest in said contract, and the right to make and manufacture for the defendants the residue of the said barrels, at the price and on the terms thereby stipulated and provided for; of which assignment the defendants then had notice, and assented and agreed thereto; and thereupon, in consideration that the plaintiff at the special request of the defendants, with the approbation and concurrence of the said William Wiley duly agreed to complete the said contract of the said William Wiley with the defendants, and to make and deliver the residue of the said barrels according to the said contract, and to take and receive payment therefor at the rate aforesaid, as follows, namely, a sufficient amount each week to pay the workmen, and the balance a reasonable time thereafter (during which it was to remain in the hands of the defendants), the defendants duly agreed to permit and allow the plaintiff to complete the said work, to wit, the residue of the barrels provided for by the said contract, upon the terms aforesaid, and to purchase, take and receive the same from him accordingly. And the plaintiff did thereupon make and construct a portion of the said residue of the said barrels, and delivered the same to the defendants (who accepted the same), of the quality and description in strict accordance with the terms aforesaid, and laid out large sums of money and incurred heavy liabilities in providing materials and hiring workmen fully to complete the same; and has always been ready and willing to make and complete the whole of the residue of said barrels, according to the said agreement, whereof the defendants have always had notice.—Breach: That the defendants, after having accepted and received from the plaintiff (subsequent to the said agreement with him) part of the said barrels so made and delivered as aforesaid, would not permit the plaintiff to proceed with the said contract, and manufacture and delivery of the residue of the said barrels thereby provided for, but wrongfully discharged and prevented the plaintiff from doing and completing the same, and refused to take or receive the same from the plaintiff; *per quod* the plaintiff has not only lost the price of the barrels so made and delivered by him as aforesaid, and the profits which would otherwise have accrued to him from the completion and delivery of the residue thereof, but has also lost a large sum of money laid out by him as aforesaid in providing for the completion thereof, and has sustained damage by reason of said liabilities so incurred as aforesaid.

The second count alleged, that the defendants, on the 24th October, 1862, in consideration that the plaintiff agreed with the defendants to do certain works and furnish certain materials therefor for the defendants, that is to say, to furnish good seasoned white oak staves, good quality hoop iron, pine or whitewood lumber, good quality glue, paint, and all materials necessary for making first quality barrels or casks for refined oil, and to manufacture in a good and workmanlike manner fifty barrels per week, of forty gallons, or their equivalent in casks of eighty gallons each, for the term of twelve months from the date of said agreement; said casks or barrels to be made of thoroughly seasoned staves, plump seven-eighths of an inch in thickness, to have four hoops on each end, the chime hoops to be made of iron one and three-quarters of an inch in width, each of the other three to be made of iron one and a half inches wide, the centre pieces in heads of pine or whitewood one inch in thickness, heads to be painted and inlaid around the croze with white lead, the barrels or casks to be properly glued and thoroughly tested by being blowed off; the plaintiffs guaranteeing the barrels or casks to be tight, and not to leak oil, and in every way perfect and suitable for shipping oil to Europe; and to deliver them in the house of the defendants once a week, or as often as might be necessary, at and for the price and sum of five cents per gallon for all the barrels to contain on an average forty-four gallons each, and four

* Defendant, during the last Easter Term, obtained a rule in the Queen's Bench to reconsider the order of Draper, C. J., but that rule is still pending.—*Eds. L. J.*

dollars each for all casks to contain eighty gallons or upwards, made from fine eighth staves in stock for that purpose; to be paid for in cash by the defendants to the plaintiff in full once a week, or as soon as delivered by the plaintiff; the defendants having the privilege of taking all the barrels, up to one hundred per week, that might be manufactured by the plaintiff The defendants duly agreed with the plaintiff to permit him to do and complete the said works during the said year on the terms aforesaid, and to take and purchase from the plaintiff at the respective rates aforesaid at least fifty barrels per week, of forty gallons each, or their equivalent in casks of eighty gallons each, to be manufactured by the plaintiff during the term of one year from the date of said last mentioned agreement as aforesaid —Averment: That plaintiff did accordingly commence, and did in part perform the said last mentioned works on the terms aforesaid, and furnished all the materials, and manufactured certain (to wit, 900) barrels of forty gallons each, of the quality and description aforesaid, and delivered the same in the storehouse of the defendants in the quantities and in all respects in strict accordance with the terms aforesaid, during the period (to wit, eighteen weeks) from said last mentioned agreement, and was always ready and willing to do and complete the whole of said works of the qualities and in the quantities aforesaid during the remainder of the said year, and to allow the defendants the privilege of taking all the barrels, up to one hundred per week, that might be manufactured by the plaintiff according to the said last mentioned agreement, and laid out large sums of money and incurred heavy liabilities in procuring materials and in hiring workmen fully to carry out and complete the said last mentioned agreement; of all which the defendants have always had notice.—Breach: That defendants would not permit the plaintiff to proceed with or complete the performance of the said last mentioned agreement, and the manufacture and delivery of the barrels and casks for the defendants thereby stipulated for, but wrongfully refused to take or purchase from the plaintiff or allow him to deliver any more or further barrels or casks, other than aforesaid (to wit, eighteen weeks of the said year), as provided in said last mentioned agreement, and thereby wrongfully discharged and prevented the plaintiff from completing and performing the the same; *per quod* the plaintiff lost not only the price of the said barrels and casks so manufactured and delivered by him as aforesaid, and the profits which would otherwise have accrued to him from the completion of the said last mentioned agreement, but has also lost a large sum of money, laid out by him as aforesaid, in providing materials for the completion thereof as aforesaid, and has sustained damage by reason of the said liabilities so incurred as last aforesaid.

The declaration also contained the common counts for goods bargained and sold, for goods sold and delivered, for work and materials, for money paid, and for money had and received.

The defendants' summons was for leave to plead:

1. As to the first count, that they did not agree as in that count is alleged.

2 As to all the barrels in the said first count alleged to have been delivered to the defendants, that before action they satisfied and discharged the plaintiff's claim by payment.

3. As to so much of the said first count as charges that the defendants would not permit the plaintiff to proceed with the said contract, and manufacture and delivery of the residue of the said barrels, but wrongfully discharged and prevented the plaintiff from doing and completing the same, that they did not so discharge or prevent the plaintiff.

4. As to so much of the said first count as charges the defendants with refusing to take or receive barrels from the plaintiff, that they did not so refuse, but accepted all the barrels which the plaintiff delivered or offered to deliver, in pursuance of the said agreement.

5. As to the second count, that they did not agree as therein alleged.

6. As to all the barrels in the said second count alleged to have been delivered, that before action they satisfied and discharged the plaintiff's claim by payment.

7. As to the alleged breach of the agreement in the said second count mentioned, that they did not refuse to take or purchase from the plaintiff any barrels made and delivered by the plaintiff in pursuance of the said contract.

8. And for a further plea to the first and second counts, that after the making of the several agreements in those counts mentioned, and before any breach thereof by the defendants, it was mutually agreed between the plaintiff and the defendants, that in consideration of the defendants agreeing to pay the plaintiff for one hundred barrels then not completed, but which the plaintiff then promised to complete and deliver to the defendants, and further agreeing that when they (the defendants) should require more barrels for use they should purchase them from the plaintiff on the terms of the agreement in the said second count mentioned, which the plaintiff promised that when thereto required by the defendants he would act upon and complete, and further agreeing that until they should so require the plaintiff to proceed they would not procure or purchase barrels from any person other than the plaintiff, he (the plaintiff) should waive the said agreements in the said first and second counts mentioned, and discharge and release the defendants from further performance thereof; and the defendants then paid the plaintiff for the said one hundred barrels so to be completed by the plaintiff, and agreed that when they should require more barrels for use they would purchase them from the plaintiff on the terms of the agreement in the said second count mentioned; and that until they should require the plaintiff to act upon and complete that agreement, they should not procure or purchase barrels from any person other than the plaintiff; and the defendants have not yet required more barrels for use, and have not purchased barrels from any person other than plaintiff.

9. And for a plea to the common counts, never indebted

10. And for a further plea to the common counts, payment.

Robert A Harrison showed cause. He objected to the first plea, because two agreements made by defendants were alleged in the first count, and according to the plea it was uncertain which of them the defendants intended to deny. He objected to the second plea, because it was pleaded to damages only, the count being for the recovery of unliquidated damages, for breach of an agreement, and the plea answering only a part of what plaintiff would be entitled to recover as a portion of his damages, viz, for delivery of barrels before breach of the agreement. He objected to the sixth for the same reason that he objected to the second plea. He had no objection to the seventh plea, but objected to the eighth, because the alleged waiver was not shown to have been in writing. He cited *Gass* v *Lord Nugent*, 5 B. & Ad. 58; *Harvey* v. *Graham*, 5 A. & E. 61, 73

James Bealy, in support of the summons, admitted his first plea was uncertain, but applied to sever it, so as to traverse each of the agreements mentioned in the first count He contended that he ought to be allowed to plead the remaining pleas.

Robert A. Harrison objected to the first plea being amended. He said his only instructions were to show cause why it should not be allowed; that he had shown sufficient cause, and it ought therefore to be disallowed. He was not called upon to show cause why it should not be severed, and the two pleas proposed to be substituted for it allowed He argued that defendants should, if they desired to sever their first plea, take out a second summons, and that in the meantime so much of their summons as asked to have the first plea in its present form allowed should be discharged.

DRAPER, C J.—Strictly speaking, Mr. Harrison is correct. If he insists upon it, I must refuse leave to plead the first plea as originally proposed to be pleaded. I shall, however, grant defendants, if they desire it, a summons for leave to plead two pleas in lieu of the first plea as now framed, and in the meantime enlarge the summons now pending.

Defendants accordingly took out a second summons, calling upon plaintiff to show cause why defendants should not have leave to deny both the agreements alleged in the first count to have been made by defendants, and had the first summons enlarged.

Robert A Harrison showed cause He said he was not authorized to make any objection to the two pleas in the form now proposed to be pleaded, but submitted, as the second application was made necessary by the fault of defendants, who should in the first instance have asked what they now ask, the second application should only be granted on payment of costs.

James Beaty supported the summons.

DRAPER, C. J.—I do not look upon the second and sixth pleas as pleaded merely to damages. They appear to me to answer parts of plaintiff's causes of action, and, taken *in connection with* the other pleas proposed to be pleaded, the whole of plaintiff's causes of action are answered. The only plea I have any real doubt about, is the eighth plea. The want of a statement that the rescission of the first agreement was by writing is the cause of my doubt. If defendants desire, they may insert the statement that it was by writing. If they decline, I will, on the authority of the *Solvency Mutual Guarantee Co* v *Frony*, 7 Jur. 8. 99, and the cases therein cited, allow the plea; but if plaintiff desire to traverse, reply and demur he may do so; the demurrer, if any, to be first argued. Defendants' second summons must also, I think, be made absolute; but as what defendants by that summons ask should have been made part of the first summons, defendants must pay the costs of the second application. The costs of the first application will, as is usual, be costs in the cause.

Order accordingly.*

HENDERSON v. CHAPMAN AND GEREAU.

Master and servant—Action for negligently setting fire to plaintiff's barn—Pleading—Materiality of allegations in declaration—Effect of not guilty—Evidence.

The first count of a declaration for setting fire to plaintiff's barn, &c. alleged that plaintiff *at the time when*, &c., was possessed of a farm, &c., that defendant Chapman was *at the said time*, possessed of the southerly portion of the lots of which plaintiff had the northerly parts, and that Gereau being the servant and agent of Chapman, and by his instructions, permission and authority, carelessly and negligently set fire to a brush heap on Chapman's land, &c., and that by reason of negligence and carelessness the fire spread to plaintiff's land and burned his barn, &c.

The third count alleged possession of plaintiff and Chapman as in the first count, it then described the defendants premises as adjoining the plaintiff's premises, and then alleged that defendant Gereau by the order, instructions, sanction and permission of Chapman, he the said Gereau, *being at the time* in the service and employ of Chapman, set fire to a brush heap, &c., and the defendant did not use due care, &c., whereby, &c.

Held 1. That the allegation that Gereau was at the time when, &c., was a material allegation.

Held 2. That the allegation of Gereau *being*, &c., in the first count referred to the *time* stated, namely, at the time of the committing, &c., was sufficiently certain.

Held 3. That the allegation distinctly appeared in the first count, and was quite distinct from the wrongful act alleged.

Held 4. That the allegation that Gereau was at the time when, &c., was not in issue under the plea of not guilty, and should if intended to be disputed, have been specially traversed.

(Chambers, May 2nd, 1864.)

The first count of the declaration stated that plaintiff, at the time when, &c, was possessed of a farm, &c., that the defendant Chapman was at the said time, possessed of the southerly portion of the lots of which the plaintiff had the northerly parts, and that Gereau being the servant and agent of Chapman, and by his instructions, permission and authority, carelessly and negligently set fire to a brush heap on Chapman's land, for the purpose of clearing a portion of said land, and that by reason of negligence and carelessness, the fire spread to plaintiff's land and burned his barn, stable and shed, &c. The second count stated that plaintiff when, &c., was possessed as in first count, and defendants negligently set fire to a bush heap on a particular lot, for the purpose of clearing the said lot, and by reason, &c. The third count alleged the possession of plaintiff and Chapman as in the first count, it then described the defendants premises as adjoining the plaintiff's premises, and that there was only a concession road between them, and then it alleged that defendant Gereau, by the order, instructions, sanction and permission of Chapman, he the said Gereau being at the time in the service and employ of Chapman, set fire to a brush heap, &c., and the defendants did not use due care, &c., but by reason of the negligence of both the defendants, &c., and concluded as in the first count.

The defendants pleaded separately not guilty.

The cause came on for trial at the last Kingston Assizes, before Mr Justice Adam Wilson, when he determined that the pleas of not guilty did not put in issue the fact of Gereau being the servant of Chapman, and allowed a plea to be added denying the same, and as the plaintiff said he could not proceed with the trial if this new issue were raised, the learned judge put off the trial on payment of costs by the defendant.

Afterwards, the learned judge not being satisfied that his ruling was correct, and thinking that as the declaration was framed, the fact of Gereau being such servant was not positively and affirmatively alleged as "*at the time* of the committing of the grievance," he told the defendants attorney he would grant him a summons, calling on the plaintiff to shew cause why the defendant should not be relieved from the payment of costs, if he desired it.

Accordingly a summons was granted by the learned judge at Kingston, returnable before him there, but was enlarged before him in Toronto.

S. Richards, Q. C., for plaintiff.

Sir H. Smith, Q. C., for defendant.

Mitchell v. *Crassweller*, 13 C. B. 237, was cited during the argument.

ADAM WILSON, J.—I have examined the different authorities bearing on this question, and it appears that the test whether the allegation of a person being the servant of another is put in issue or not, is this, if the allegation be that at the time when the wrongful act was committed, such a person was such servant, and that such servant did the wrongful act, then the fact of being such a servant is made a material allegation, and if not traversed, is not in issue, but is admitted.

In actions for criminal conversation or seduction where it is alleged that the defendant had carnal knowledge of the plaintiff's wife or seduced the plaintiff's servant, the fact of the person being the wife or servant is not disputed, unless specially denied; because such fact is distinctly asserted, and is a fact distinct from the wrongful act complained of.

It is said in the cases that the plaintiff alleges his rights have been invaded, and that that the defendant is the person who has invaded them, that there are thus two propositions presented, and if both are meant to be disputed, the *right* of the plaintiff as well as the *wrongful act* of the defendant, must be traversed, and that not guilty only denies the defendant did this wrongful act, *i. e.* committed the seduction, &c., and does not deny that the plaintiff's *right* has been invaded, or in other words, does not deny that it was the plaintiff's *wife* or his *servant* who was the person seduced. See *Kenrick* v. *Horder*, 7 El. & Bl., 628; *Torrence* v. *Gibbins*, 5 Q. B. 297; *Ford* v. *Laugeois*, 19 U. C. Q. B., 312.

So it would seem to follow that when the plaintiff says, the defendant by one A B, *then* being his servant, wrongfully set fire to a brush heap, by which the plaintiff's property was destroyed, he states two propositions:—

1. That A B. *was then* the defendants servant, and
2. That the defendant by A B, wrongfully set fire to the heap.

The wrongful act is the negligently setting fire to the brush heap by the defendant. The allegation that A B was the defendants servant at the time, is no part of the wrongful act, but is altogether a distinct allegation. See *Patten* v. *Rea*, 2 C. B. N. S. 606; *Hart* v. *Crowley*, 12 A. & E. 378.

It is not necessary that such a statement to be material, should be set out in an inducement to the court, as appears by the cases of *Dunford* v. *Trattles*, 12 M. & W., 529; *Grew* v. *Hill*, 3 Ex. 801; and *Kenrick* v. *Horder*, in which the whole allegation is contained in the charging part of this count, but if an inducement is used, it appears to be of no consequence in what part of the declaration it is contained, whether at the beginning or at the end.

Applying these views to this declaration, does it appear that it is anywhere distinctly alleged that *at the time of the wrongful act*, Gereau was the servant of Chapman? I think it does so appear expressly in the third count, however, it may be in the first count. This substantially settles the question. The fact of Gereau being Chapman's servant *at the time of the alleged negligence*, is expressly asserted, and was not therefore in issue at the trial under the plea of not guilty. The order, therefore, which was made at the trial, ought to be allowed to stand.

The argument both at the trial and in Chambers, took place chiefly on the first count, and I may say that I think my first impression was correct, and that the allegation of Gereau *being* the servant, &c., refers to the time stated, namely, *at the time of the* committing of the grievances, just as in the case of *Mitchell* v. *Crassweller*, 13 Q. B., where the word *being* was held to apply to

* Plaintiff rather than lose a trial simply took issue, recovered a verdict, but was afterwards nonsuited in term, on the ground that the contracts sued upon in the first and second counts were executory, and not proved to be under the seal of defendants, a corporation.—EDS. L. J.

the next antecedent date, but that was not stated as here to have been *at the time of the committing of the grievances*, but simply on the 8th of September, 1852, which *might have* been an entirely different date from that on which the grievances were committed and which it was held was rather to be so inferred than otherwise, so that the reason which was given for holding that that declaration did not sufficiently assert that the person was then the defendant's servant, is the very reason why the first and third counts must be held in this case sufficiently to assert that fact.

I must therefore discharge this summons, but without costs, as it was taken out at my request. I very much regret that I postponed the trial at all, notwithstanding the amendment, for I am now persuaded the plaintiff ought to have been ready to have met this allegation, and that he was as ready as he probably ever will be to meet it, and I regret this the more that I had already devoted nearly a whole day to the case, as far as it went before this question of amendment arose.

Summons discharged without costs.

HAROLD AND WIFE v. STEWART AND MOORE.

Ejectment—Limit defence—Judgment—Execution—Regularity of proceeding.

Where there is a limited defence in ejectment, it is irregular for plaintiff to enter judgment without first obtaining a judge's order, or a rule of court authorizing the signing of judgment which rule or order or a duplicate thereof, must, under Rule 92 Har C L P Act, 634, be filed together with the writ

Semble, the writ of execution in ejectment should, as in other actions, follow the the judgment and where, by reason of a limited defence, plaintiff is entitled to recover less than what he claims in his writ of summons, there should be some entry on the roll to authorize the deviation.

(Chambers, May 23, 1864.)

This was a summons calling upon the plaintiff in ejectment to show cause why the judgment execution and all subsequent proceedings should not be set aside for irregularity with costs.

The writ of ejectment claimed possession of the north-west half of the west half of lot number eighteen in the fourth concession of the township of Esquesing, containing fifty acres more or less, also the north half of the north-east half of said lot, containing fifty-one and thirty-seven hundredths acres more or less, which may be butted and bounded as follows:—Commencing at the distance of twelve chains and seventy-three links from the (*a*) (north-east) angle of said lot measured on a course north forty-five degrees eleven minutes west, (*b*) (north-westerly along the allowance for road) between concessions four and five. Thence following said (*c*) (concession line) on said course seventeen chains and eighty-five links more or less to the north (*d*) (west) angle of said lot. Thence on a course south thirty-seven degrees and forty-six minutes west (*e*) (being south-westerly on), the line between lots eighteen and nineteen thirty-three chains eighty (*f*) (eight) links more or less to the centre of said concession. Thence, following the line between the (*g*) (north-east) and (south-west) halves of said lot, on a course south forty-five degrees eleven minutes east (*h*) (eleven chains and eighty six links). Thence north-easterly (*i*) (about twenty-two chains to a post, which post is one chain thirty-nine links south-easterly from) the south-west corner of the driving house (and in a line with the west end thereof. (*k*) Thence northerly, fifty-five links to the southerly fence of the lane leading from the line between concessions four and five to the barn. (*l*) Thence following said (southerly fence of said lane ten chains, fifty links) more or less to the place of beginning. Excepting therefrom half an acre of land on which stands the dwelling house of the defendant Stewart as reserved to (*m*) (her) by the wife of her husband.

The defendants limited their defence as follows:—

To that part of the north half of the north east half of number eighteen, contained in the following boundaries—commencing at the gate on the fourth line at the entrance of the lane; thence running up the southwardly fence of said land to the south-west corner of the driving house; *and thence* forming a jog and running south-west, so as to divide the said half lot in two portions of equal extent to the line between the north-easterly and south-westerly halves of said lot; then south-eastwardly along said division line to the side road; thence eastwardly along the side road to the concession line; thence north-westerly, along that line, to the place of beginning.

Upon this limited defence the plaintiffs signed judgment as follows:—"As no appearance has been entered or defence made to "the said writ except as to the said part, therefore it is considered "that the said plaintiffs do recover possession of the land in the "said writ mentioned, except the said part, with the appurtenances, and that they have execution forthwith."

Upon this judgment plaintiffs issued execution, not following the judgment, but setting out the description contained in the writ of summons above given, omitting those portions placed in brackets and inserting instead thereof the words in the notes at the bottom of the page.

The defendants obtained the summons calling on the plaintiffs to shew cause why the judgment, the execution and all proceedings had therein should not be set aside for irregularity, with costs, because,

1. The judgment had been signed without first obtaining a judge's order or rule of court authorizing the signing thereof or because,

2. If such order had been obtained, the same, or a duplicate, had not been filed with the judgment and with the writ of summons.

Or why the execution should not be set aside, because it does not follow the judgment, but directs the sheriff to give possession of a portion of the premises for which the defendants have defended.

The plaintiffs filed an affidavit of a licensed surveyor to the effect that he had made a survey of the land in dispute, and that he had handed to the plaintiff's attorney a description of the part of the north half of the north-east half of eighteen for which the defendants do not defend; and that the description of the north half of the north-east half of the lot in no way interferes or encroaches upon that part of the lot for which the defence was entered.

Wells showed cause, contending that the rule number ninety-two of the General Rules Harrison's C L P. Act, 634, does not require an order or rule to be obtained preparatory to signing judgment or issuing execution when the defence is limited, but only when personal service has not been made; and that the plaintiffs are at liberty to issue their writ of possession, describing the premises altered, as they necessarily are, by excluding from the former description the portion for which the defendants defend as set out in their notice limiting their defence.

C. S Patterson, in support of the summons, opposed both of these propositions.

ADAM WILSON, J.—The rule in question provides that "no judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ, alluding to the C. L. P. Act., 1856, together with the writ, or a copy thereof, where there is a limited defence, or where personal service has not been effected without first obtaining a judge's order or a rule of court authorizing the signing such judgment, which said rule or order, or a duplicate thereof, shall be filed, together with the writ."

I read this rule as providing that, in all cases where the defence is limited, or personal service has not been made, judgment shall not be signed without first obtaining a rule or order authorizing it to be signed, and that the rule or order, or a duplicate of it, must be filed with the writ.

In this case there is a limited defence, and judgment has been signed without plaintiffs having first obtained a rule or order permitting it to be signed.

Upon this ground, therefore, the judgment and all proceedings had therein must be set aside for irregularity, with costs, as a wholly unauthorized proceeding, and one directly in violation of the terms of the rule in question.

As to the other ground that the execution does not follow the judgment, I think this is also a valid objection.

The rule is that execution must follow the judgment, or show some reason why it does not, and what warrants the variance.

(*a*) Most eastwardly. (*b*) Along the more westwardly limit of road allowance. (*c*) Limit. (*d*) East. (*e*) Along (*f*) 0. (*g*) Northerly and southerly. (*h*) 12 c 8 lks.

(*i*) 21 c. more or less to the most eastwardly angle of the barn, thence northwardly 1 c. 19 lks.

(*k*) Thence on a course S 37°, E. 94 lks to a post planted in the line of the southerly fence of the lane which leads from the said driving house to the said concession road.

(*l*) Fence in a north-eastwardly direction, 9 c., 87 lks. (*m*) Isabella Stewart.

Bicknell v. *Wetherell*, 1 Q B, 914; *Phillips* v *Birch*, 4 M. & G 403; *Doe dem Saul* v. *Dawson*, 3 Wils. 19; *Gore Bank* v *Gunn*, 1 U C. Cham R 170. The court or a judge cannot tell, judicially, that the courses and distances in the writ of possession do properly describe the premises in the writ of ejectment, excluding the portion for which the defendants have appeared and defended And, besides this, it does not clearly appear there are such changes from the writ which no defence on the part of the defendants could render necessary, or justify, and there is no entry on the roll which authorizes any deviation.

The plaintiffs are in truth attempting to make the court do for them what they ought to do for themselves, viz, take possession of the property they claim to have obtained judgment for at their own peril

In Adams on Ejectment it is said it is now the practice of the sheriff to deliver possession of the premises recovered according to the directions of the claimant, who acts at his own peril (Ib 307). And it was to provide against any injurious consequences to himself, from following the claimant's directions, that he usually demanded, and it was supposed he was entitled to require, indemnity from the claimant before executing the writ (Ib 308). But as the plaintiff is now a real person, it is said the sheriff cannot refuse to obey the writ unless he be indemnified See also *Cottingham* v *King*, 1 Burr 629; *Connor* v. *West*, 5 Burr 2672; *Doe dem the Queen* v. *The Archbishop of York, et al*, 14 Q B. 81, 109

I think the judgment, execution, and all subsequent proceedings, must be set aside with costs.

Summons absolute, with costs.

THE QUEEN v. SIMPSON.

Con. Stat. U. C., cap. 24, s. 19—Service of summons to warrant an order for the payment of money—Necessity for personal service—How and when dispensed with.

Where an order for payment of costs is sought which may under Consol Stat. U C. cap 24 s. 19. be followed by execution, the service of the summons must, in general be personal.

The court may, under special circumstances, dispense with personal service.

Where the defendant is abroad or it is known where he lives personal service will not be dispensed with, unless it be made to appear that the defendant is keeping out of the way to evade service; and even in this case, it is by no means clear that personal service will be dispensed with

Service on the attorney, on the record, and on the wife of the defendant, it not being shown that he was keeping out of the way to avoid service, was held insufficient, though it was shown that he had left Upper Canada, and gone to reside in the United States of America.

[Chambers, May 24, 1864.]

Kingstone obtained a summons upon Horace H Hawkins, the private prosecutor in this cause, to show cause why the order of Mr. Justice Adam Wilson of the 25th of May last should not be rescinded, and why the copy and service thereof should not be set aside; because, 1. The summons on which the order was made was not personally served on the defendant, and no order was made dispensing with personal service. 2. Neither the allocatur nor the summons was personally served on the defendant. 3. The defendant's wife had not time to shew cause against the summons before it was made absolute. 4. The affidavits of service do not shew that the original summons was shewn to the persons on whom the same was served. 5. The affidavit of service on the defendant's wife does not allude to any summons or copy of summons thereto annexed.

And on grounds disclosed in affidavits and papers filed.

And why the said Hawkins should not pay the defendant the costs of this application, and that in the meantime proceedings be stayed.

Prince showed cause.

Kingstone supported the summons. He argued that personal service was necessary. *Clifton* v. *Durand*, 3 U. C. Prac. Rep., 60; *Wilson* v. *Foster*, 1 D. & L., 496; *Winwood* v. *Holt*, 3 D. & L., 86, *Hawkins* v. *Benton*, 2 D & L., 466, 470 That if personal service not made, an order dispensing it with was necessary. 2 Arch. Pr., 1567, 1569 That where allocatur not personally served, the rule must be personally served. 2 D. & L., 466, 470, above referred to, in notes That the affidavit of service of summons should have referred to summons as "hereunto annexed" *Fidlett* v *Bolton*, 4 D P C., 282, 1 Arch. Pr., 162, 1570. And as to service of the summons, he further referred to *Kitchen* v. *Wilson*, 4 C. B. N. S., 483.

The defendant was indicted for publishing a libel. He appeared and pleaded by attorney under the Consol. Stat. U. C., ch. 103, and was convicted. The private prosecutor then took proceedings for the costs under ss. 14, 15, & 16 of that Act.

A summons was taken out by the private prosecutor, calling on the defendant to shew cause why he should not pay the sum of £27 5s. 5d., certified by the Clerk of the Crown and Pleas on the 16th of May, 1864, to be costs sustained by the private prosecutor, and also the costs of the application.

This summons was served on the attorney on record for the defendant by serving a copy on his Toronto agent.

The summons, on its return, was enlarged until the defendant was served.

The affidavit of service stated that the copy of the power of attorney from the private prosecutor to Mr. McDougall (who made the service upon her), and a copy of the allocatur and of the summons were served on the defendant's wife at the last place of residence of the defendant. That the defendant had left the country and gone to the United States, and means to live there permanently, as the deponent was informed and believes, and that he cannot be served with any papers as his whereabouts is unknown. The affidavit also stated that the money was demanded of the defendant's wife, who did not pay the same, and that the amount was unpaid.

Before the summons was granted there was an affidavit of similar services having been made on the attorney on record for the defendant, and that he had refused to pay the amount.

ADAM WILSON, J.—The practice is said to be that the court will not grant a rule for payment of money unless the same formalities as to service, &c., are observed as in the case of an attachment. (Arch. Pr., 11 Ed., 1583) Therefore, a rule will not be granted calling on a party to pay money mentioned in the master's allocatur, unless the allocatur be personally served. (*Ibid*, citing *Doe d. Steer* v. *Bradley*, 1 D.N.S., 259.) But, under special circumstances, the court will dispense with personal service. (*Ibid*, citing *Hawkins* v. *Benton* supra; *Doe d. Steer* v. *Bradley* supra, *Smith* v. *Troup*, 7 C. B, 757. See also *Allier* v. *Newton*, 2 D. P. C, 382; *Thomas* v. *Rawlings*, 4 H. & N., 875.)

Some strictness is to be observed in services of this kind, when the order is in the nature of a judgment, and to be followed by writs of execution, as in the case of a judgment at law in a civil action. (Con. Stat. U. C., cap. 24, s. 19.)

The rule being that personal service shall be made, and that it shall be dispensed with only in certain very rare cases, I shall examine whether the facts of this case bring it within the limits of those cases in which personal service has been excused.

In *Clifton* v. *Durand*, 3 U. C. Prac. Rep., 60, a summons of a similar kind was held not to have been well served by service on the defendant's daughter at his dwellinghouse, upon its being shown that he was not found at his office—it appearing he was in the country and would be back in a day or two—because the service should have been personal, or there should have been an order dispensing with such kind of service.

In *Wilson* v. *Foster*, 6 M. & G., 149, putting up a copy in the master's office and leaving a copy at the defendant's last known place of abode were not allowed to be good service, the defendant being abroad.

In *Hawkins* v. *Benton*, 8 Jur, 1122, a demand of the amount of the award and allocatur was made by letter, the receipt of which was acknowledged. Defendant, an attorney, by his town agent, took a copy of the award. Service was also made at the defendant's dwelling house on his clerk, by delivering a copy of the award and allocatur and showing him the originals. A rule to shew cause was then granted.

In *Winwood* v. *Holt*, 9 Jur., 454, the award and allocatur and rule making the submission a rule of court, had been personally served, and a demand made of the amount. A rule was then granted on the defendant to shew cause why he should not pay the amount. A copy of this rule was delivered at the defendant's residence to his wife, and the original rule shewn to her. Alderson, B, said, "Under the circumstances of this case you had better serve the defendant personally. There is every reason to suppose you can do so, for it appears that you know where he lives." The rule was then enlarged to make a personal service.

In *Smith* v *Troup*, 7 C. B., 757, the defendant was served with a copy of the award and of the rule, making the submission a rule

of court, and of the appointment to tax costs. The defendant's attorney attended the taxation. The defendant was personally served by a process server with a copy of the allocatur and power of attorney, and a written demand of payment signed by one of the attornies under the power, the originals being then shown to him. On affidavits setting forth the facts and shewing repeated attempts by one of the attornies to make a personal demand upon the defendant, and his inability to do so in consequence of the defendants migratory habits, and that the money was still unpaid, a rule to shew cause was granted why the money should not be paid. Wilde, C. J., "I never knew the court dispense with personal service in a case of a proceeding to attachment, except when the party was shown to be keeping house so as to evade the service. The case of *Hawkins* v. *Benton*, shows the court will dispense with the strict observance of the rule requiring the demand to be personal, where it is made evident to them that the party has been evading service. The affidavits in the present case are extremely strong to show how industriously the defendant has been hunted from place to place for the purpose of making a personal demand on him. I therefore think this is a case in which the strict rule may, on the authority of *Hawkins* v. *Benton*, be dispensed with.

In *Kitchen* v. *Wilson*, 4 C. B. N. S., 483, an application was made to make the service on Wilson's partner a good service of the writ of summons on Wilson, because he was in America, his address there not being known, and he having no private residence here. The court said, "There is nothing to show that Wilson is keeping out of the way to evade service." The rule was therefore refused.

In *Thomas* v. *Rawlings*, 4 H. & N., 875, the London agents of the defendant were served with a copy of the award and the rule of court. The defendant had sold all his stock and the house appeared deserted. The defendant made an appointment for a meeting on Sunday, but refused to appoint another day. The defendant's house had been watched, and it was believed the defendant was lurking inside, the doors being kept locked and the windows nailed down. The defendant's wife had been seen and everything was explained to her, and copies of papers were left with her to deliver to her husband, but she refused to do so, and in spite of every effort, it had been found impossible to serve him personally. Pollock, C. B., said, "We cannot break in on an established rule of practice. There may be an exception where personal service is actually begun and is there interrupted or prevented by an assault; but the evasion of service which will suffice to dispense with personal service in ordinary cases will not suffice in cases of attachment. No doubt there have been cases in which, under peculiar circumstances, personal service even in such cases has been dispensed with; but we do not think that there are here such circumstances as ought to dispense with the service which the ordinary rules of practice require." Watson, B., said, "There is no case in which personal service has been wholly dispensed with in case of an attachment, though there may be some in which an incomplete personal service has been aided." The rule was refused.

The result of all these cases is, that where personal service of part of the proceedings has been made on the defendant, as in *Winwood* v. *Holt* and *Smith* v. *Troup*, the court will, under special circumstances, dispense with personal service of the rest of the proceedings (4 H. & N., 875). But where the defendant is abroad, (6 M. & G., 149; 4 C. B. N. S., 483) or it is known where he lives, (9 Jur., 454) personal service will not be dispensed with, unless it appears the defendant is keeping out of the way to evade service (4 C. B. N. S., 483; C. B., 757); but even in such a case, it is not certain the established rule of practice requiring personal service will be dispensed with (4 H. & N., 875).

In the case now before me, the attorney on the record and the wife of the defendant have been respectively served with the allocatur and power of attorney to demand and receive the costs, and demands have been made upon them, and the excuse for not making personal service upon the defendant is, "That he has left this country and gone to reside in the United States of America, and means to live there permanently, as the attorney for the private prosecutor is informed and believes, and he cannot be served with any papers as his whereabouts is unknown."

The defendant has never been personally served with any of the proceedings which have been lately taken against him, and he does not even know of such proceedings being carried on against him. It is not shewn that the defendant has left the country to evade a personal service being made upon him or that any and what enquiries have been made as to his present residence, from which it may appear whether he can or cannot be personally served in the foreign country. This is not at all like the case where the affidavit showed "how industriously the defendant had been hunted from place to place for the purpose of making a personal demand on him," and on which personal service was excused, but there it must be remembered that the defendant had been personally served with all the papers and even with a written demand of payment—but this demand was served by a process-server, who had no special or proper authority to make it—the essential acts had all been performed personally, and all that was asked was to excuse this personal demand under very strong and peculiar circumstances. Nothing approaching to such a case is made out on this occasion.

I therefore think the order in question must be rescinded

UNITED STATES REPORTS.

SUPREME COURT

(From the Legal Intelligencer.)

ROWLAND E. EVANS v. THE PHILADELPHIA CLUB.

The amotion of members of private corporations.

At Nisi Prius. Opinion by

WOODWARD, C. J.—This case touches the power of a private corporation to disfranchise one of its members, and it will be necessary and proper to examine, somewhat minutely, the authorities of the law bearing upon the point.

The leading case upon this branch of law is that of James Bagg, decided in the reign of James I., (A. D. 1616,) and reported in Coke's Reports, part XI., page 93. Bagg was one of twelve chief burgesses of the borough of Plymouth, in England, and having been guilty of the most scandalous and disorderly speeches to the mayor and his fellow burgesses, was expelled, but the King's Bench restored him by *mandamus*. Among other things it was resolved "that no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do it, either by the express words of the charter or by prescription; but if they have not authority, neither by charter nor prescription, then he ought to be convicted by course of law before he can be removed." And in support of this Lord Coke quotes that famous clause of Magna Charta, beginning "Nullus Liber Homo," &c.

Though much was said about disfranchisement in Bagg's case, it was really a case of amotion, and not of disfranchisement. Bagg was removed from the office of burgess, and not expelled from the borough, by the action of the corporation. Mr. Willcock, in his excellent treatise on Corporations, page 270, defines amotion as applicable only to officers, and says it causes a cessation of the particular offices from which they are amoved, but in no manner affects their right to the freedom of the municipality; whilst disfranchisement is applicable only to the freedom, and cuts off the corporator from all rights and privileges of the corporation. It appears, he says, that there is *not* an incidental right in corporations to disfranchise their members, but it must be claimed by prescription or express grant of the charter. For this he refers himself to Bagg's case, which, he says, has never been expressly overruled; the cases in which it has been questioned having been cases of amotion. He then goes on to make some general observations on the subject, all of which are so excellent, and some of which are so pertinent to the case in hand, that I am tempted to transcribe them. He says: "At the time when James Bagg's case was before the court, their attention had been rarely attracted to the consideration of corporate causes, and the distinction between the right to the offices and the right to the freedom of a municipality had been little considered. The particular case was of amotion from office; the arguments were in general more applicable to disfranchisement. But there is a material difference in principle. The enjoyment of office is not for the private benefit of the corporator, but an honorable distinction which he holds for the welfare of the corporation, and therefore, though it be an office of a freehold nature, it is entirely conditional. . . . But the

franchise of a freeman is wholly for his own benefit, and a private right; a right in the municipality similar to that of a natural subject in the State, of which he ought not to be deprived for any minor offence against his corporate fealty, any more than that for which, as a subject, he ought to be deprived of his franchise as a liegeman. For this reason, all minor corporate offences, *such as improper behaviour to his fellow corporators*, where not punishable by the general law of the land, as well as violations of his corporate duties, ought to be punished by penalties imposed by the ordinances of the municipality and not by disfranchisement. But such offences against the general law, as occasion a forfeiture of all civil rights, import in themselves a forfeiture of the corporate franchise; and offences against the corporation, which tend to its destruction, such as defacing the charters, altering the corporate records so as to destroy the evidence of their title to privileges, or that of the title of his fellow corporators to their franchises are of course causes of disfranchisement."

These observations relate to municipal corporations; but why are they not equally applicable to private corporations? The interest or "freedom" which a member has in a private corporation is as truly a "franchise" as that which any of the burgesses mentioned in Bagg's case, had in the borough of Plymouth, and may often be a much more valuable franchise. Where it has been obtained by the payment of a pecuniary consideration, and property is held in connection with it, it is a vested estate, and certainly ought not to be sacrificed on account of minor offences, which would not be permitted to forfeit individual interests in a municipal corporation. And if a power to disfranchise in a municipal corporation does not exist unless expressly granted, it is very safe to conclude that it is not inherent in a private corporation, and must have an express grant to support it.

The extent to which Bagg's case has been overruled is clearly indicated in Lord Bruce's case, 2 Strange R 819, which was a case of amotion, not disfranchisement, and where it was said "the modern opinion has been that a *power of amotion* is incident to the corporation, though Bagg's case seems contrary" Richardson's case, 1 Burrow's R 517, was amotion from a municipal office—that of Portman of the borough of Ipswich. Lord Mansfield went very fully into the law of corporations, and whilst the amotion was not sustained, he sanctioned, very distinctly, the "modern opinion" referred to in Lord Bruce's case, and stated three sorts of offences for which an officer or a corporator may be discharged:

1. Such as have no immediate relation to his office: but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise.

2. Such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office.

3 Such as are of a mixed nature, as being an offence not only against the duty of his office, but also a matter indictable at common law.

Of these distinctions, limited originally to municipal corporations, I shall have something to say hereafter, when I come to speak of them in connection with private corporations

In Earle's case, Carthew's R 173, it was held that a member of a corporation cannot be disfranchised except for that which works to the destruction of the body corporate, or of the liberties and privileges thereof, *and not for any personal offence of one member to another.*

Tidderly's case, 1 Siderfin's R 14, was a question of restoring a municipal officer who had voluntarily resigned, and Chief B. Hale held that every corporation had power to receive a resignation, and might, for good cause, remove

These cases are sufficient to reflect the opinion of the English courts on Bagg's case A more full reference to the authorities will be found in the notes to Willcock's chapter on disfranchisement, in his work on Corporations. The result seems to be, that the resolution I quoted from Bagg's case has been so far modified that the power of *amotion* is inherent in the nature of corporations and not dependant upon prescription or charter, but the authorities do not establish the point that corporations have inherent power to *disfranchise* a private member. But Bagg's case is an authority against the power of disfranchisement no farther than the reasonings therein are entitled to respect, for the point of the case had not reference either to private corporations or to the power of disfranchisement. Whilst, therefore, *the very point of the case* may be regarded as overruled, the reasonings, as expounded by Mr Willcock, are such as to commend them to universal acceptance. Where corporations are founded upon private capital, the modern English cases are very unanimous in holding that no stockholder can be disfranchised, and thereby deprived of his interest in the property of the corporation, without an express authority for the purpose in the charter.

In Pennsylvania, *The Commonwealth, ex rel John Binns* v. *The St. Patrick Benevolent Society*, 2 Binn 441, is the leading case. The society, under a power conferred by its charter, made a by-law that vilifying a member by another member should be punished as a crime against the society, by removal from office, fine, or expulsion. Binns having been convicted of grossly vilifying a fellow-member, was expelled therefore under this by-law. The Supreme Court restored him upon mandamus, mainly on the ground that the by-law was not necessary for the good government and support of the affairs of the corporation—that it subjected the rights of membership to the uncertain will of a majority—that "the offence of vilifying a member, or a private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment cannot be necessary for the good government of the corporation" Chief Justice Tilghman, delivering the opinion of the court, quoted Lord Mansfield's three sorts of offences as laid down in Richardson's case, and said Binns' offence did not come within either of them, and he concluded by declaring that "without an express power in the charter, no man can be disfranchised unless he has been guilty of some offence which either affects the interest or good government of the corporation, or is indictable by the law of the land"

In *Fuller* v *The Trustees of the Plainfield Academy*, 6 Conn. R. 532, Judge Digget alluded to the doctrine that a power of amotion is incidental to corporations, but seemed to doubt whether it was applicable to any but municipal corporations, and quoted Judge Story as saying in the Dartmouth College case, that there could be no amotion of the trustees of that institution, and he restored the trustee of the Plainfield Academy who had been expelled for disrespectful and contemptuous language towards his associates, and for neglect of duty as a trustee. "The court," he said, "cannot justify expulsion from office on such charges, what the trustees might have done to one of their number who had committed a crime which would banish him from society, it is not necessary to decide" Another principle was asserted in this case, that the place of a trustee in an eleemosynary corporation, though no emoluments are attached to it, is a franchise of such a nature that a person improperly dispossessed of it is entitled to redress by mandamus. See also *Dartmouth College* v. *Woodward*; 4 Wheaton, 676.

In the case of *Gray* v. *The Medical Society of Erie*, 24 Barbour's R 570, a physician was asking to be restored to a society from which he had been expelled for violating a by-law that prescribed a tariff of fees for medical services The Supreme Court of New York went very fully into the authorities upon corporate powers, and held that the power given to medical societies by statute to make by-laws and regulations relative to the admission and expulsion of members, was not an arbitrary or unlimited power, and that a by-law must be reasonable, and adapted to the purposes of the corporation.

In the case of *The Comm'th* v *Philanthrophic Society*, 5 Binn. 486, we have in our own courts what is very rare in the authorities an instance of expulsion that was sustained. A member made a demand upon the society for relief agreeably to the rules of the institution, and presented a physician's bill which he had altered from four to forty dollars, and which he claimed to have paid Upon the ground that this was a scandalous crime, amounting almost, if not quite, to technical forgery, and that it was directly injurious to the society, his expulsion was supported.

In *Comm'th* v *The Franklin Beneficial Association*, 10 Barr, 357, a member was restored who had been expelled for enlisting in the army in violation of a by-law of the society.

In *The Comm'th* v *The German Society*, 3 H. 251, a society for "mutual support and assistance," the cause of disfranchisement was that the member had assisted, as president of the society, *in defrauding it out of fifty cents*, and had defamed and injured the society in public taverns. It was held not to be a sufficient cause, and he was restored.

When the charter of the Butchers' Beneficial Association was presented to our Supreme Court, it was rejected, on the ground, among others, that it allowed the association to expel members who should be "guilty of actions which may injure the association." This, said the Chief Justice, we cannot approve; for it gives the association an entirely indefinite power over its members. For any action which may injure them they may expel, and therefore they may expel a member for becoming insolvent. It is totally incompatible with the whole spirit of our institutions, to clothe any body with such indefinite power over its members; for it is equivalent to socialism, and is a rejection of all individual rights within the association. It is common in such charters to found the right of expulsion on the fact that the member has been found guilty of some crime on a trial in court, and this is quite proper. 11 Harris' R. 151.

In the case of *The Beneficial Association of Brotherly Unity*, 2 Wr. 299, a charter was rejected because it gave a majority the power to expel any member "guilty of an offence against the law"—the court holding that a constitution that puts all power over rights in the hands of a majority is no constitution at all.

Gathering now, into one group, the principles of decision that lie scattered through the authorities, they may be stated thus:

1. That the power of amotion for adequate cause, is an inherent incident of all corporations, whether municipal or private, except, perhaps, such as are literary or eleemosynary, but the exercise of this power does not affect the private rights of the corporator in the franchise.

2. That the power of disfranchisement which does destroy the member's franchise, must, in general, be conferred by statute, and is never sustained as an incidental power, without statute grant, except in two cases—first, on conviction of the member in a court of justice of an infamous offence—and second, where he has committed some act *against the society* which tends to its destruction or injury.

3. That the power to make by-laws is incidental to corporations, and generally expressly conferred by statute; but by-laws which vest in a majority the power of expulsion for minor offences, are, in so far, void, and courts of justice will not sustain expulsions made under them.

4 In joint stock companies, "or indeed, in any corporation owning property" (Angell & Ames on Corporations, § 410), no power of expulsion can be exercised unless expressly conferred by the charter.

With these principles in view, I take up the charter of the Philadelphia Club, and find that it was incorporated on the 8th May, 1850, under the name of the "Philadelphia Association and Reading Room," (afterwards changed to that of the "Philadelphia Club,") with authority to "elect officers, to establish by-laws for their government, and to hold real estate, the yearly value of which shall not exceed three thousand dollars;" but there is no power either of amotion or disfranchisement expressly conferred. They make no pretence to this power by prescription.

The by-laws established by the corporation provide for the election of officers, and the order of proceedings, and fix "the entrance money" to be paid by resident members at $100, with a semi-annual subscription of $20; and for non-resident members at $50 with a semi-annual subscription of $15. The LXV., LXVI., and LXVII. by-laws enact that "if the conduct of a member be disorderly, or injurious to the interests of the club, or contrary to its by-laws," he shall be requested to resign, and if the request be disregarded, the board shall refer the matter to the next stated meeting of the club, and "at such meeting the circumstances of the case shall be considered, and the member may be expelled."

The Relator became a member of the club in 1848, and it is not alleged that he has failed to pay *any of his dues*, or perform any of his duties to the club, but the return alleges that on "the evening of the 24th of February, 1863, the defendant was guilty of breaking the 65th by-law by having an altercation within the walls of the club-house with Samuel B. Thomas, and by striking him a blow." For this he was expelled.

Now, undoubtedly, such conduct was disorderly; for though the objects and purposes of the society are not set forth in the charter, it is said to be a club for the cultivation of social relations, and these are friendly and kind relations, and are not promoted by such conduct as is imputed to the relator. But does a single instance of disorderly conduct justify disfranchisement? It is not alleged that the relator is a quarrelsome person, or habitually disorderly. On the contrary, it was admitted in argument that he is a respectable gentleman, and it is shown that when the offence occurred he was sitting in the bar-room of the club house in quiet and friendly conversation with another person, when Thomas entered and uttered defamatory words which the Relator understood to be applied to himself. It was therefore an assault upon Thomas provoked by himself. It was not an interruption of any deliberations or proceedings of the club in a state of organization—it occurred not in a reading-room, or an eating-room, nor at a card or billiard-table, but in what is called the office or bar-room of the house.

I look upon the occurrence as disorderly and injurious to the interest of the club, within the meaning of the 65th by-law, but as one of those "minor offences," of which Mr. Willcock speaks, and for which a majority have no power, even under the by-laws, to disfranchise a member. And upon the doctrine of the cases I have referred to, I hold the by-law void so far as it inflicts this extreme penalty for such an offence. I would be very sorry to say that anything short of a statute could confer on a majority of the members of any corporation power to expel a fellow member for merely disorderly conduct. Talking or whispering in a reading-room, or wandering from the question in debate, or interrupting another when he is speaking, and very many mere breaches of good manners are disorderly, and injurious to such a club, and fit to be visited by reprimands and fines, but are not such offences against corporate duty as forfeits the franchise. Unless this unhappy occurrence be viewed through an atmosphere of passion and prejudice that shall distort and magnify its proportions, it must be regarded as belonging to the class of minor offences, not punishable by expulsion. The Relator's offence was not directed against the society, but against his fellow-member, as in Earle's and Binns' case. The law affords no precedent for punishing an offence between fellow-members by disfranchisement. I am unwilling to make so bad a precedent of the case.

But what is conclusive of this case is, that the corporation possesses property, real and personal, and is at liberty to accumulate more, until an annual revenue of three thousand dollars comes to be enjoyed; and the Relator has purchased and paid for the right to participate in that franchise. It is not a joint stock company at present, for under its by-laws no pecuniary profits are divisible among the members, but it may become so, and whether it does or not, the Relator has a vested interest in its estate, and cannot be deprived of it by the proceedings that were had against him. On this point the authorities are clear, and without conflict. Nothing but an express power in the charter can authorize a money corporation to throw overboard one of its members. I have shown that the act of incorporation contained no such power. On the contrary, it excluded it, for the proviso reads "that nothing herein contained shall be so construed as to authorize said Philadelphia Association and Reading-room to do *any other act or acts* in their corporate capacity than are herein expressed."

For these reasons a peremptory mandamus must be awarded, and because the view I have taken of the case results in this conclusion, it is not necessary for me to discuss the formalities of the proceedings of the club under their by-laws, which led to the expulsion.

Let a peremptory mandamus issue.

GENERAL CORRESPONDENCE.

To the Editors of the Upper Canada Law Journal.

Toronto, *July* 25, 1864.

Gentlemen,—There is an impression abroad that lawyers are in the enjoyment of a holiday or holidays of considerable length during part of the summer months. I presume this impression has arisen from some undefined notion of what is known to the profession as the "long vacation." That such a thing as the "long vacation" is mentioned in certain statutes and rules of Court cannot be denied, but that any vacation of any length practically exists as far as the mass of the profession is concerned, is a hollow mockery.

It is, I believe, admitted by those who have studied the subject, that head-work and confinement to an office is more trying to the constitution than manual labour, nor is there any doubt but that the life of a painstaking lawyer is a life of toil, much more so than is generally supposed. It follows therefore, that those who lead such a life should have the relaxation that is necessary to sustain them. Many of the fraternity can manage to get away from town, or at all events from their offices, for a short time, but there is always something to be done, and somebody must be ready to do it. But it seems to me that this *something* should be made as little as possible consistent with the necessities of the public. Perhaps a little ventilation of the subject might lead to an improvement in the premises, if I am right in imagining that an improvement can be made.

Yours truly, A Junior Partner.

[The business of the country must be done, whether some few suffer for it or no; but at the same time we think that there is some truth in what our valued correspondent urges. Chancery practitioners have less to complain of in this respect than their brethren of the Common Law. A Judge sits in Common Law Chambers throughout vacation, but such a thing is unheard of in Chancery, though applications may be made in matters of injunctions. The business that is done in the offices of the Registrar and Master in Chancery during vacation amounts to nothing; but, on the other hand, the offices of the Deputy Registrars in County Towns are open, appointments given, and business done then, as at other times. It may reasonably be asked why, if business can be postponed in one case, it cannot in the other. The subject is worth discussion, but we are not at present prepared to express any opinion as to the best mode of obtaining for the profession at large what the long vacation was undoubtedly designed for and is still supposed to accomplish as well for the benefit of lawyers and officers as for the judges of the Courts.—Eds. L J.]

MONTHLY REPERTORY.

CHANCERY.

V.C.W. London and South Western Railway Company v. Bridger

Specific performance—Contract—Costs—Will—Construction—Legal Estate—Power of Sale.

A. who was under obligation to convey land to a railway company, died, having devised his property to his children (of whom some were infants) equally, without giving any sufficient power of sale to trustees. The company having filed a bill for specific performance, *held*, that the suit was necessary, and that each party must bear his own costs.

A will contained the following words, viz.:—"As it may probably happen that the arrangements made by this will cannot be carried into effect, without a sale of the whole or at least a great portion of my said real and personal estates, I recommend great caution in the sale thereof, for I believe that my landed property is daily increasing in value"—followed by a nomination of executors and trustees, "for duly carrying the disposition of all the property, thereby given or alluded to, into effect.

Held, that this was not sufficient, to divest a legal estate previously devised to children and to vest it in the trustees, although,

Semble, the words might give a simple power to sell in an event which might possibly, though not certainly, happen.

L.J.

The Solicitors and General Life Assurance Society v. Lamb.

Policy—Condition—Assignment—Suicide.

A. effected upon his own life a policy of insurance, which contained a provision that if the insured should die by his own act, the policy should become void, except to the extent of any interest acquired thereon by assignment, for valuable consideration.

A mortgaged the policy, together with other property, to B. as a security for an advance exceeding the amount of the policy, and amply secured by the other property exclusive of the policy.

A. afterwards died by his own act.

Held, that the policy was valid to the extent of the interest of the assignee, and that the insurers having paid the amount to the assignees, had no equity to obtain repayment from the estate of A.

V. C. K. Lee v. Hammerton.

Demurrer to evidence—Report by medical officer to an insurance company—Privilege—Production of a confidential communication.

In a foreclosure suit, the defence of insanity being set up, production of the report of the medical officer of an insurance company as to the state of health of the party, was demurred to as privileged, because confidential.

Held, that it must be produced, and demurrer overruled with costs.

M. R. Nelson v. Clamp.

Practice—Cross-examination in court—Absence of a witness.

Where a witness who has made an affidavit for the plaintiff, and whom the defendant desires to cross-examine, is unable through illness to be present at the day fixed for the hearing of the case, the defendant may insist upon the affidavit being withdrawn, or the cause standing over, till the witness can appear: and the court will not proceed with the examination of the other witnesses.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

CHARLES WILLIAM PATTERSON, of Toronto, Esq., Attorney-at-law, to be a Notary Public in Upper Canada.

JOSIAH MARSHALL BABINGTON, of Dundas, Esq., to be a Notary Public in Upper Canada.

GEORGE MACLEOD MUNRO, of Hanover, Esq., to be a Notary Public in Upper Canada. (Gazetted, July 2, 1864.)

HON. JOHN A. MACDONALD, Queen's Counsel, to be a Notary Public in Upper Canada. (Gazetted, July 16, 1864.)

A. S. STOCKWELL, of Leamington, Esq., to be a Notary Public in Upper Canada.—(Gazetted, July 30, 1864.)

REGISTRAR OF SURROGATE COURT.

The HON. WILLIAM CAYLEY, to be Registrar of the Surrogate Court of the United Counties of York and Peel.—(Gazetted, July 2, 1864.)

CORONERS.

JAMES DOUGLAS, Esq., M.D., GEORGE RUTHVEN, Esq., M.D., and SAMUEL EDWARD McCULLY, Esq., M.D., Associate Coroners, County of Kent.—(Gazetted, July 30, 1864.)

TO CORRESPONDENTS.

"A Junior Partner," under General Correspondence, p. 224.