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THE

UPPER CANADA LAW JOURNAL

AND

MUNICIPAL AND LOCAL COURTS' GAZETTE;

FROM JANUARY TO DECEMBER, ~~1859~~ 1860.

EDITED BY

W. D. ARDAGH, ESQ., AND ROBERT A. HARRISON, ESQ., B. C. L.

BARRISTERS-AT-LAW.

VOLUME VI.

TORONTO:

PRINTED AND PUBLISHED AT 17 & 19 KING STREET, BY MACLEAR & CO.

1860.

MACLEAR & CO., PRINTERS, 17 & 19 KING STREET EAST, TORONTO.

GENERAL INDEX.

TABLE

OF THE

CASES REPORTED AND CITED IN THIS VOLUME.

DIARY FOR JANUARY.

1. SUNDAY.....	*1st Sunday after Christmas.* Circumcision. Taxes to be computed from this day.
2. Monday.....	County Court Term begins. Surrogate Court Term begins Recorder's Court begins Heir and Devisee Sittings commence. Municipal Elections.
5. Thursday.....	Toronto Winter Assizes begin.
6. Friday.....	Epiphany.
7. Saturday.....	County Court and Surrogate Court Term ends.
8. SUNDAY.....	*1st Sunday after Epiphany.*
11. Wednesday....	Election of School Trustees.
14 Saturday.....	Heir and Devisee Sittings ends.
15. SUNDAY.....	*2nd Sunday after Epiphany.*
21. Saturday.....	Articles, &c., to be left with the Secretary of Law Society.
22. SUNDAY.....	*3rd Sunday after Epiphany*
23. Monday.....	Last day for notice for Examination, Toronto.
29. SUNDAY.....	*4th Sunday after Epiphany.*
31. Tuesday	Last day for Cities and Counties to make returns to Government. Day for Grammar School Trustees to retire.

IMPORTANT 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. Patton & 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 Professors and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JANUARY, 1860.

OUR CALENDAR.

We have to apologize for the delay in the issue of this number. The delay is thus explained:—it is our practice to issue the Law Journal Calendar for each year with the first number of the year. We had prepared the Calendar for 1860 in the usual manner, and sent it to our Printers for publication. When partly in type, the Court of Chancery made new rules, entirely altering the periods for hearing and examination terms. This rendered necessary a corresponding alteration of our Calendar, which alteration has been attended with much delay. We hope, in future numbers, to make up for lost time.

MORTGAGES.—POWER TO DISTRAIN.

The most common security for money loaned in Upper Canada is a mortgage on real estate.

Almost every man in this section of the Province is the owner of some real estate, and is either a mortgagor or mortgagee.

When land is bought it is usual to pay only a portion of the purchase-money and to give a mortgage for the balance. The mortgagee converts his mortgage into cash at a discount, and by this means receives cash for his land.

So in the case of direct loans, the security generally taken is a mortgage on land. Now that the usury laws are abolished the direct loans on mortgage are more frequent than the indirect, by the sale of mortgages made for sale In every aspect the mortgage is an important mode of conveyance, and one which ought to be well understood.

It is an object with the capitalist to ensure regular and prompt payments, more especially of interest—in all probability the source whence his living is derived. Formerly this was sought to be accomplished by a threat of the known powers of a mortgagee, such as to eject to for money due and to foreclose. In later times mortgagees receive greater powers, that is of sale upon default, without any recourse to Courts either of Law or Equity. Still delays are created, either by defences, for time, or specious promises of performance, and still lenders are without their interest.

It has often occurred to us that where the parties are willing a power of distress might be given, and by this step more gained towards regular collection of monies due than by any other course usually adopted. English capitalists must have regular payments of interest, and owing to the irregular mode of paying interest in Canada are frequently deterred from risking their money among us. This is a misfortune to them and to us. Were we to acquire more exact business habits, especially in money engagements, money would be less scarce than it is at present. Abroad there would be more confidence in us, followed by a flow of capital from the Mother Country seeking investment here.

We have had occasion to examine the cases as to distress, and, in the expectation of our research being of some benefit to others, proceed to note the results.

To enable a mortgagee to distrain on the mortgagor in possession, Coote, in his work on mortgages, says an agreement to that effect should be inserted in the mortgage deed, and a sum certain be stated by way of rent. Let us refer to the cases:

The first is *Doe Dem Garrod* v. *Olley et al*, 12 A. & E. 481.

It was an action of ejectment on the part of the plaintiff, who produced and proved the Court Rolls of the manor of which the *locus in quo* was copyhold of inheritance. The rolls contained a presentment of the admittance of Garrod, the lessor of the plaintiff, on the conditional surrender, therein vested, of Burgess, a copyholder out of Court. On the part of the defendants a mortgage deed between Burgess of the one part and Garrod of the other, was put in evidence and recited the title of Garrod to the copyhold in question, and an agreement for a loan of £850 by Garrod to him to be secured by a sur-

render of the copyhold and an assignment of other property therein mentioned.

The deed contained a covenant by Burgess to surrender the premises to Garrod, subject to the proviso that if Burgess should, on 11th July then next, repay the sum of £850, with interest at 5 per cent, then the deed and surrender should become void It also contained a power of sale—after default in payment—of principal and interest.

Then followed this provision :—It is declared and agreed between the parties that he the said John Burgess, his heirs or assigns, shall, during his or their occupation of the said copyhold, messuages, &c., yield and pay for the same to the said John Garrod, his heirs, &c., the yearly *rent*, or sum of £50, free from all deductions whatsoever, by equal half-yearly payments on, &c.; and that it shall be lawful for the said J. Garrod, his heirs, &c., to have and use such remedies by distress and otherwise for recovery of the said yearly rent of £50 or any part thereof when in arrear, as landlords have for recovering of rents upon common demises, provided that the reservation of such rent should not prejudice the right of the said J. Garrod to enter into and take possession of the said hereditaments, &c., and to evict the said Burgess, his heirs, &c., at any time after default shall be made, &c.

Burgess made default in the repayment of the loan, and became a bankrupt. The defendants were his assignees under the fiat.

Afterwards the lessor of the plaintiff distrained on the premises for £50 "for arrears of *rent* due from the said J. Burgess to the said J. Garrod, for the same house and premises upon and up to 11th July last."

No notice to quit had been given before the action by the lessor of the plaintiff to the defendant.

There was a verdict for the lessor of the plaintiff, with leave to the defendant to move to enter a nonsuit.

A motion was afterwards made to enter a non-suit, pursuant to leave reserved, and it was contended that the clause as to distress created the relation of landlord and tenant, so as to make a notice to quit necessary; and though the sum reserved was not the precise amount of the interest, the Court refused to enter the nonsuit.

Thus it will be seen that the validity of the power was in no manner questioned. The only question raised was as to its effect in regulating the position of the parties.

The case was singular in this, that the power of distress was not for either interest or principal *co nomine*, but for a sum of money described as rent.

The next case to which we shall refer was free from these difficulties; It is *Chapman* v. *Beecham*, 3 Q. B. 723.

On 24th August, 1832, the defendant having lent to the plaintiff the sum of £800, the latter to secure repayment, executed a mortgage, and in the mortgage covenanted that he would repay the sum of £800, with interest for the same at the rate of 5 per cent. on days named; and for better securing the payment of the interest granted to the defendant—that as often as it should happen that the interest should be in arrear for the space of 21 days it should be lawful for the defendant into and upon the said land, &c., to enter and distrain for the same *interest* and the arrears thereof, and the distress and distresses then and there found, to impound and to detain, and in due time to appraise and dispose of the same according to the course of law in the same manner in all respects as landlords are, by Act of Parliament or otherwise, authorized to do in respect of distresses for arrears of rent upon leases for years, to the intent that the defendant should by the same distress or distresses be paid and satisfied all arrears of the said interest and all costs occasioned by the non-payment thereof.

The interest having fallen in arrear, the defendant distrained and the plaintiff replevied.

It was contended by the plaintiff that there was not the relation between the parties that authorized a distress, that after default the land in law became absolutely the defendant's, and that a man cannot distrain on his own lands, and that after default the legal interest of the plaintiff expired, and the rent merged in the estate of defendant.

The Court held that the clause was a simple agreement between the parties that *interest* should be levied by distress, and that plaintiff had the power of granting the right of distress, his possession of the land being undisputed. In other words the meaning of the agreement was held to be that in the event of the money not being paid, the defendant might satisfy himself by securing goods on the premises, and per Coleridge, J. "The whole stands on the agreement of the parties. The title is immaterial. The party in possession says the other may distrain *co nomine*. You may call it what you please; the words make no difference."

The opinion of Coleridge, J., thus wisely and clearly expressed, appears to be the law. The parties agree that interest should be collected by distress. That agreement neither makes the interest rent nor the parties landlord and tenant. If the party who gives the right of distress is in possession no question of title or estate can be raised. The agreement is one that can be legally made, and when made is, like other agreements, construed so as to further the intention of the parties.

In one case where the clause was thus expressed :—And for the better securing the said principal money and all in-

terest and expenses and in contemplation and part discharge thereof, the said Thomas Thein (mortgagor) doth hereby *allow* to the said John Baker, (mortgagee) his executor, for all the said premises at the full and clear quarterly *rent* for each quarter, and to be recoverable by distress and sale, &c.;" but the mortgage also contained a power of immediate entry and sale in the event of default, the Court held that no notice to quit or demand of possession was necessary. It was in effect held that whatever might be the means of attainment, as the mortgage contained a clause for immediate entry in case of default, that the case came within the authority of *Doe Dem Garrod* v. *Olley*.

These are the leading cases, and so far as they go the law seems to be well settled. In England it is the practice of conveyancers to insert a distress clause in mortgages. The practice is not only sanctioned by long continued usage, but, as we have seen, by express judicial decisions.

How far the right of distress extends to goods and chattels of a stranger on the premises at the time of distress, we do not undertake to say. The question, so far as we can learn, is yet to be determined. (See *Freeman et al* v. *Edwards et al.* 2 Ex. 732.)

JUDGE CAMPBELL.

It grieves us to notice the death of this able and much respected County Judge. He was not only one of the oldest, but most reliable of the County Court Judges. He always manifested a lively interest in the welfare of the *Law Journal*, and did much to promote its success. Often has he contributed to our columns, and, sad to relate, wrote to us on the day on which he breathed his last—little expecting that his career of usefulness was so near its end. He died at Niagara, on 18th January, 1860, aged 53 years, 10 months and 23 days. The deceased was a brother-in-law of Mr Justice Burns. We subjoin a short memoir of the lamented Judge taken from the *Niagara Mail*:—

The father of Judge Campbell, Donald Campbell, Esq., was a native of Islay, Argyleshire, Scotland, who emigrated to the late Province of North Carolina, previous to the American revolution. He took up arms for the Royal cause, and entered as Ensign in the "North Carolina Volunteers"—his name is mentioned among the list of the U. E. Loyalists, published by Lorenzo Sabine, in Boston, 1847. In the North Carolina volunteers he served under Lord Cornwallis. He was then made Lieutenant in Sir John Wentworth's Nova Scotia Regiment, and from that was transferred to the 7th Regiment or Royal Fusileers which was commanded by the late Duke of Kent, the father of Her present Majesty. From the Fusileers he became Captain in the 5th Foot, and afterwards was made Fort Major, of Fort George, Niagara, which office he held for several years. He died on the 1st December, 1812, and his remains are interred in the south west bastion of Fort George.

Edward Clarke Campbell, the late lamented Judge, was the eldest son of Major Campbell, and was born at Niagara 26th February, 1806. After his father's death, Mrs. Campbell, his mother, removed with her family to Nova Scotia where her relations all lived. The late Judge was christened in Nova Scotia, and there received the name of Edward from his Royal Highness the Duke of Kent, who stood sponsor for him at his baptism. He received his education in the ancient College of Windsor, Nova Scotia. In 1824 he returned to his native town, Niagara, to enter upon the study of the law, and was articled in the office of the late Hon. Robert Dickson. He was called to the Bar Dec. 28, 1829. In 1832 he entered into partnership with Mr. Dickson, which continued until Mr. Dickson retired from business.

At the outbreak of the rebellion in 1837, he raised a fine company of volunteers, and proceeded to join the force assembled at Chippawa, and continued there doing military duty for some months. After that he was appointed Captain in the 1st Lincoln Militia, and became Major in 1849. In his military capacity, Judge Campbell manifested the same spirit of order, kindness, and punctual discharge of duty, that distinguished him in civil affairs.

In 1841, at the time of the Union, he was a candidate for Parliamentary honors, and was elected by a majority of one over the Hon. H. J. Boulton, to represent Niagara, in the first Union Parliament held at Kingston, where he sat during the first Session. At that Session, the Act creating the Division Courts in Upper Canada was passed, previously to which time the Judge of the County Court was the present Mr. Justice Burns, who resigned the Judgeship on the passage of that Act. Mr. Campbell, with the unanimous consent of his constituents, resigned his seat in Parliament, and accepted the office of District Judge, and was appointed December 23, 1841. His jurisdiction at first comprised the three present Counties of Lincoln, Welland, and Haldimand, subsequently, when the other Counties were separated for judicial purposes, he was Judge of Lincoln only.

In 1845 or 1846 he was elected Bencher of the Law Society. He was also one of the five judges appointed by the Act of 1853, to frame rules for the practice and proceedings of the Division Courts of Upper Canada. He devoted much time to this duty, and with Mr. Gowan, Judge of Simcoe, was instrumental in placing the transactions of these Courts upon the present satisfactory and efficient system.

Judge Campbell was a most active member of various societies. He filled the office of president of the Agricultural Society of the united Counties of Lincoln and Welland, and subsequently of the County of Lincoln for many years with rare zeal and efficiency. He was also president of the Niagara Electoral Division Society, Horticultural Society, and Mechanics Institute, which latter office he held almost from its establishment some 12 or 13 years ago. He was elected, last year, president of the Provincial Fruit-growers' Association, a Society particularly congenial to his favourite leisure pursuits, for, as a florist and agriculturist, Judge Campbell ranked among the very foremost in the country. The Provincial Association also enrolled him among its most active and intelligent directors, and his death will cause a sad blank in the meetings of that body.

Judge Campbell married the eldest daughter of the late Rev. John Burns of Niagara, and sister of the present Mr. Justice Burns. He leaves behind him a widow, and two sons, and three daughters.

The health of the Judge had, many of his friends thought, been declining for some time, still nothing to excite apprehension. He had been confined to his house some days in consequence of a severe cold, caught by sitting in his office, in the Court house, the room not been properly heated. This however was not the immediate cause of his death, which was the rupture of one of the arteries connected with the liver. There

is little doubt but that aneurism of the artery had been going on for some years, brought on probably by too much sedentary labor, and then at times taking exercise too violent for the system. On Wednesday morning last he thought he felt somewhat better, and would breathe some fresh air, which he was told he might do, he went out of doors for a few minutes and fell in the yard, he was carried into the house, and died in half an hour afterwards.

As a Judge, the soundness of his judgment, his rigid impartiality, and minute care to arrive at a right decision, gained, him the unbounded respect of the Bar, and the most implicit confidence of all classes of suitors. His punctuality to all engagements and close attention to every minutiæ of his official duty, was the theme of wonder and admiration. In all respects the late Judge was a man such as Canada posseses few equal, and the like of whom is not often found.

Upper Canada owes an immense debt of gratitude to him, for the solid acquisition which it has made through him, in the departments of horticulture and floriculture, which add so much to the enjoyments and elegancies of human life—arts which he cultivated with unwearied industry, devotion and success.

His townsmen in Niagara, will sadly miss his tall and stately form along their streets, and none who knew him will ever cease to revere his memory; and recall his kind offices, *and constant good will to his native town. His funeral took* place on Saturday, and was attended by an immense concourse of people from all parts of the County. The members of the Niagara Mechanics' Institute attended in a body, also the Niagara Fire Department, of which he used to be an active member, and many eyes unused to the melting mood, filled with tears, when all that remained on earth of this good and noble character was committed to its last resting place.

CHANCERY.

The Rules of 23rd December, 1857, as to the terms for examination of witnesses, and hearing of causes, have been lately much altered. The new Rule of 26th December, 1859, which we subjoin, is now to be observed. It will be noticed that Sandwich, Brantford, and Whitby, are added to the places formerly appointed for the examination of witnesses. No mention is made of Niagara, though named in the Rules of 1857. Whether it is to continue as a place for the examination of witnesses, or is intentionally dropped we are not informed.

MONDAY 26TH DECEMBER, 1859.

The following Terms are fixed for the examination of witnesses, at the undermentioned places, viz.:

TORONTO.—The first Tuesday of February; and the first Tuesday of September.

SANDWICH.—The third Tuesday of February; and the third Tuesday of September.

CHATHAM.—The fourth Tuesday of February; and the fourth Tuesday of September.

LONDON.—The first Tuesday of March; and the first Tuesday of October.

BRANTFORD.—The third Tuesday of March; and the second Tuesday in October.

HAMILTON.—The fourth Tuesday of March; and the third Tuesday of October

BARRIE.—The first Tuesday of April; and the fourth Tuesday of October.

GODERICH.—The second Tuesday of April; and the first Tuesday of November.

WHITBY.—The third Tuesday of February; and the third Tuesday of September.

COBOURG.—The fourth Tuesday of February; and the fourth Tuesday of September.

BELLEVILLE.—The first Tuesday of March; and the first Tuesday of October.

KINGSTON.—The third Tuesday of March; and the second Tuesday of October.

BROCKVILLE.—The fourth Tuesday of March; and the third Tuesday of October.

OTTAWA.—The first Tuesday of April; and the fourth Tuesday of October.

CORNWALL.—The second Tuesday of April; and the first Tuesday of November.

The following terms are fixed for the hearing of causes:

From the fourth Monday of April, to the Saturday of the following week.

From the third Monday of November, to the Saturday of the following week.

THE UPPER CANADA LAW JOURNAL IN ENGLAND.

The Editor of the *Solicitors' Journal*, London, England, concludes an article, headed "Legal Education in the Colonies," with the following tribute to ourselves:

"We are unwilling to conclude this article without mentioning that *the Upper Canada Law Journal*, to which we are indebted for anything we know on this subject, is a publication of great merit. The character of the contributions to its columns is a cheerful proof of the high intellectual culture of the profession in that Province, and affords of itself, perhaps, as good evidence of the beneficial results of the academic training to which we have referred, as could possibly be adduced."

Never unmindful of the good opinion of others, we are particularly obliged to our able contemporary, for the handsome, but, we think, too flattering manner in which he has noticed our efforts. In a Colony, compared with the Mother Country, there are many difficulties in the way of successfully publishing a first class legal periodical. The chief difficulty is the want of a sufficient number of subscribers to make the project remunerative. The next is the dearth of competent men sufficiently at leisure to contribute to its columns. Notwithstanding these and similar difficulties which we need not notice, our efforts shall always be directed towards maintaining the reputation which we appear to have acquired among our London contemporaries.

COMMON LAW REPORTS.

Our thanks are as usual due to the obliging Reporters of of the Courts of Queen's Bench and Common Pleas. Owing to their courtesy we are enabled in this number to publish some important cases in advance of the regular series. The Chamber cases in this number are also unusually full. It is our intention to make them as correct and reliable as possible. In future the proofs of these cases will be corrected by one of the Editors of this journal.

DIVISION COURTS.

THE NINETY-FIRST CLAUSE.

In a late number of the *Daily Colonist*, we find the subjoined remarks, pointed and decided, as becomes a leading organ of public opinion.

When a well informed journal expresses an opinion, it is entitled to great weight, and we gladly avail ourselves of such valuable testimony in support of our own views.

"We are glad to see the *Law Journal* come out boldly in defence of the 91st Clause. We have no sort of sympathy with those people who place the personal feelings of the debtor above the just claims of the creditor, and we believe that the 91st clause exercises a very wholesome influence over a class of debtors whose pockets could not well be reached by any other equally lenient process. The facts given by the *Journal* in support of its views are unanswerable, and ought to put an end to any further agitation on the subject. We regard this article as so important on all points that we shall give it in full in a future issue. The Legislature has gone quite far enough in the expression of sympathy with unfortunate debtors. Let us have something now of the same feeling for *unfortunate creditors.*"

OFFICERS AND SUITORS.

Remuneration to Clerks.

The article in our last number, referring to the enormous income enjoyed by some three or four Division Court Clerks — an income out of all proportion to the labor required of them—has been noticed by one of the leading organs of public opinion in Toronto. The *Colonist* argues with us on all points. We copy a portion of the article.

"A little enquiry on the subject by the Legislature would do no harm," says the Editor. So say we,—and further, that we believe it would show a state of things calling for legislative remedy. In consequence of the recent depression in business transactions, it will be found that the fee fund of last year will be far below that of previous years; that instead of there being a surplus over the disbursements required for the courts, there will be a deficiency; and the overplus, after paying officers fairly for their time, labor and responsibility, should go to make up this deficiency.

If any one doubts the fact that Clerks in cities are overpaid, let him ascertain the number of suits entered for the year, and, counting $1 60c. for each suit (a fair average in such divisions), see what the result will be, and satisfy himself. The *Colonist* says:

"As to Division Court clerks, we quite agree with the *Law Journal* in the opinion, that those functionaries are a most respectable, and intelligent body of men, and that their duties are responsible and require to be discharged with great care and diligence. The fact, however, that some of them are under the present system, very much overpaid, is, we believe, equally incontrovertible, and a little enquiry into the subject by the Legislature would do no harm. Perhaps, too, if the enquiry were extended to the Sheriffs' Offices it would be as well. We have a very good opinion of the system which prevails in many Government offices of doing business entirely by deputy. Why should Sheriffs, Registrars, or any other officers receive such a large salary as to be enabled to make their offices an entirely honorary one to themselves by paying a deputy to do the work, and still leaving themselves a handsome income? It would be far better to make the office an honorary one in reality or else to fix the salary so that the responsible officer should be the working man also.

The Toronto Board of Trade have thought the subject deserving of notice, and speak of it as a matter of notoriety that some of the Clerks and Bailiffs are better paid than the Judges, and they are of opinion that some change is necessary. To use their own words, they say—

"It is the opinion of your Council that it would be advantageous to the public interest if the fees paid the officers of our Courts were reduced and funded and a fixed salary given instead thereof."

Clerks' Association.

We have received several letters on the subject of an Association being formed in each county by the Division Court Clerks, and regular yearly or half-yearly meetings being held for mutual improvement, and securing concert of action. As we are not sure that these letters were intended for publication, we do not feel at liberty to give them. In our last number (referring to the Association in the county of Simcoe), we expressed a favorable opinion of the movement, and we continue to think it would prove beneficial in a variety of ways. Such associations exist in most of the counties in England, and work well.

At the meetings in each county, one of the body might be chosen as corresponding secretary, and one as a delegate to "*the Division Court Clerks' Society for Upper Canada;*" for we see no reason why the movement should not end in such a society being formed, to meet once a year; and the expense of delegates attending such a meeting would be very trifling, divided in just proportion between the Clerks in each county. But there is very little use in talking about a thing, the benefits of which are manifest. Let Clerks in each county act, and form an Association, and discuss the proposition of *a Society for Upper Canada.*

It would require but a small outlay to have the proceedings, including questions settled on discussion at the general meeting, published in pamphlet form; but all these are matters of detail. Again we say, let Clerks *act;* and so far as lies in us, we shall assist and foster the movement, and willingly open our columns to communications on the subject. If the officers of Division Courts, now, desire to submit a petition, or take any other step as a body, the matter, if done at all, must be undertaken by some one who, for the time, takes charge of the movement,—a most unsatisfactory plan, in every respect. With such societies as we refer to in existence, intercommunication would be easy: the opinion of all could be ascertained, and the whole body could speak as one man.

The Division Courts' Act.

In the October number, speaking of the Consolidated Statutes, we expressed ourselves that "all officers of courts of justice *ought* to be provided with the body of the law which is to guide them;" and in particular referred to Division Court officers; for, as we then said, we did not see how the Government could avoid supplying the Division Court Consolidated Act, at least. We have now the

satisfaction of being able to state, that an order in Council has been passed for the supply of copies of the Division Court Act to the *Judges*, *Clerks* and *Bailiffs* of the Courts, and that they have been sent to the County Judges for distribution. It will be a very great convenience, indeed, to have an authorized copy of the Act, in pamphlet form; and the attention to this matter is an additional proof that the interests of the local Courts are not lost sight of by the Attorney-General for Upper Canada.

CORRESPONDENCE.

OWEN SOUND, November, 1859.

To the Editors of the Law Journal.

GENTLEMEN,—With you I think it likely, that Government will supply *Clerks* with a copy of the Consolidated Division Court Act. And as the Legislature has not accorded to Bailiffs, a tariff of fees commensurate with their paying for such a Law Library as they—to be efficient officers—ought to have, and as they have many times greater need for a knowledge of the law generally, than Clerks have, I do not see that Government—to be consistent—can avoid supplying Bailiffs with a copy of *all* Statutes affecting their duties.

'Tis true, you have provided for Bailiffs having all the information contained in the *Law Journal;* but then, the *Journal, containing* as it does, the Bailiff's Manual—which would be all the more valuable and complete, if it contaned a full list of exemptions from seizure—together with the Division Court Acts, does not contain all, or nearly all that it is highly needful for Bailiffs to know. For example, who would suppose, from the all sufficient way in which "the Acts" and "the Manual" are spoken of, that it would be requisite for a Bailiff to study "Militia Law," in order to determine if an old mare, found at a Farmer's Barn, or running loose on the road, is exempt from seizure? Yet such is the fact, and the like is the case with many other Acts.

Indeed, I do not believe that any lawyer could, without a critical examination, announce a list of all the Statutes that do not affect a Bailiff's duties, and if such is the case, how absurd to expect a correct discharge of those duties by such means as the existing remuneration—forbiding, as it does, the purchase of such expensive tomes—is calculated to retain?

In a circular accompanying the last issue of the *Law Journal*, I see that the Consolidate Statutes are $7 50. If I attempt to economise I must—I presume—at least order the following "codes." "The Acts relating to the administration of justice in Upper Canada." "The Municipal Acts of Upper Canada." "The Acts relating to Bills of Exchange." "The Acts relating to Criminal Law of Upper Canada." "The Militia Acts," and most likely some others. Here is $3 40, and to this should be added, the cost of such works as I take, "The Municipal Officer's Reckoner" to be (for without great care and assistance, the conversion of pounds, shillings, and pence, into dollars and cents—now made necessary—by persons all their lives accustomed to the former only, will be accompanied with many "awful errors"). And then think of the number of "services" at 4d. each, the "seizures" and "arrests" at 1s. 6d. each, and the number of miles at 2½d. per mile, to be travelled—through mud, in these back Townships, of undefinable depth—to effect those duties, in order to earn the above unavoidably necessary books, and then let it be said if in fairness the Government should leave Bailiffs to pay for them.

Yours truly,

PAUL DUNN,

Bailiff of D. C., Co. of Grey.

[We have omitted some words from Mr. Dunn's letter, erroneously imputing to us some suggestions which we did not make. He certainly makes out a strong case in favor of the class to which he belongs.—EDS. L. J.]

WILTON, 7th January, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—The zeal and ability with which you have advocated many reforms in our laws, tending to the benefit of the community, and the retention of others that a repeal of would be injurious, prompts me to abandon a foregone conclusion, that I would not take the trouble to make out another return for the information of the Government and Legislature.

As I, with all the other Division Court Clerks, was required last year by the Goverment, to make out a laborious return of 18 months' proceedings, to which was added the time and expense of going to the Judges Chambers with our books, for the purpose of having it tested. And for which we received no remuneration. Albeit, the Government pays liberally to other persons for work done, either directly, or in the shape of casual advantages.

I, therefore, in compliance with your repeated request, send a return of proceedings taken under the celebrated 91st clause of the Division Court Act, in a form as condensed as possible: viz., whole number of suits entered during 18 months ending 1st July, 1859, 608; including, Judgment Summonses, 16; aggregate amount for which same issued, $450 80; paid on same, $218 17; orders made, 11; withdrawn, 2; dismissed, 1; no subsequent action taken, 3; *indefinitely stayed*, 3; commitments issued, 2; returned paid, 1; returned *non est*, 1; committals, none.

I am satisfied that fully three quarters or more, of the amount realized in this Court, under the effect of said clause, would have been lost to the plaintiffs, had that clause of the Act not been in operation. And having a very good knowledge of the working of that clause in the other Divisions, in these counties, I entertain no fear that my assertion would not be maintained by the other Clerks, as applicable to the whole counties. I am also satisfied, that there has been no case of unjust oppression in these counties, as the Judge very wisely, and very justly, guards against any oppressive measures being taken advantage of under that clause; while at the same time, he manifests an equal desire to protect parties seeking redress under that clause, for their just claims. And I do not hesitate to say, that the so called amendment of last session to the 91st clause, will be the means of greater oppression by the unnecessary accumulation of costs, than could or would have been felt in these counties, under its original form. I am not charging the fault upon the party who moved that amendment, but upon the parties by whom that amendment was passed.

I remain, yours truly,

H. PULTZ, *Clerk.*

D. C. No. 11, U. Co. of Frontenac, Lennox. and Addington.

[Letters such as the above, fully corroberate the remarks made by us on the 91st clause, in our last number of the *Law Journal*. Were each Division Court Clerk in Upper Canada, to address us on the subject, we quite think that the result would be much the same. The repeal of the 91st clause by the Legislature, would be a rash and imprudent step. The abuses are more fancied than real.—EDS. L. J.]

OWEN SOUND, 16th January, 1860.

To the Editors of the Law Journal:

GENTLEMEN,—I beg to state the following case, and, if proper and convenient for you to do so, you will oblige me by giving your opinion upon it, in the next issue of the *Journal:*

On the 28th October last, an execution was issued to me, under which I the next day seized and advertised a few stacks of hay. At the time of sale (9th November following), a per-

son present claimed two of the stacks as his property. Of course I did not sell them. The last stack the *defendant* forbid me to sell, alleging that it did not belong to him. I told the company that with my understanding of the statutes (see 13 & 14 Vic. cap. 53, sec. 102; 16 Vic. cap. 177, sec. 7; and the Consolidated Act, sec. 175), I could not properly attend to the unsupported claim of the party against whom the execution had issued; but that if any other person would claim for himself, or if any person, including even the defendant, would claim as agent for the absent, said to be claimant, I would respect the claim. No one did so; and as the defendant's statement appeared to me to be a fiction, I sold the hay. On the 12th instant, the said stack, or the value of it (a very liberal sum), was, for the first time, by a third party, claimed from me. The hay grew where it was seized and so'd, on the defendant's farm. You will see that it was advertised for an ample length of time, and no claim was made other than as above stated.

I should like your opinion on the case generally, but more particularly, first, as to whether the above would be a proper case to interplead in; and, secondly, if, when property has been seized, bearing such strong appearance of belonging to the party, has been duly advertised, and then sold unclaimed, the officer can be still held accountable to the claimant. It seems to me that there is not a more important point connected with a bailiff's duties, and as such your opinion must be of the first consequence to us all.

Trusting that your former invitations to be communicative will be my sufficient apology for troubling you.

I am your most obedient servant,

PAUL DUNN.

[We think our correspondent right in declining to act on the mere statement of the defendant.

There is nothing in the circumstances of the case which would debar a *bona fide* owner of "the last stack" from seeking a remedy against the bailiff, though they are such as to raise a strong presumption that the defendant was in truth the owner of the hay; and in any action brought by the claimant, or on an interpleader issue, the burden of proof would be upon him, to show that the property was his.

The bailiff may at once sue out an interpleader summons, if he consider it necessary for his safety to do so.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*

THE MUNICIPALITY OF EAST NISSOURI v. HORSEMAN, CARR AND JOHNS.

Commission under 12 *Vic. ch* 81 *sec* 181—*Duty of reeve and councillors to facilitate the enquiry—Obstructing commissioners and keeping back evidence—Action therefor—Judgment by default against one defendant—Right to call him for the others—Damages.*

In an action against three members of a municipal corporation, one being the reeve for combining to delay and obstruct the proceedings of commissioners appointed to enquire into the affairs of the township, under 12 Vic., ch. 81, sec. 181—

Held 1 That one defendant, who had suffered a judgment by default, could not be called as a witness on behalf of the others 2. That the jury were properly told, that it was the duty of defendants and more especially of the reeve, to direct the clerk to produce before the commissioners his books, and to facilitate the enquiry 3 There being evidence to go to the jury to shew that the clerk had absented himself and kept back the books, &c., in collusion with defendants, and that in consequence the costs of the commission, which otherwise would not have exceeded £75 or £100, were increased to £328, that £250 damages was not excessive.

The first count of the declaration alleged "that the defendants, during the year 1856, were township councillors for East Nisouri, and then and during the time hereinafter mentioned respectively held, occupied and enjoyed the said offices, and upon the petition of one-third or upwards of the members of the municipal corporation of the township of East Nissouri, and sufficient cause being shewn, His Excellency the Governor General of this Province, by order in Council, dated on or about the 1st of July, 1856, directed to be issued, and thereupon was issued, according to the statute in such case made and provided, a commission under the great seal of this Province, directed to David Shank McQueen, Esquire, James Ingersoll, Esquire, and George Washington Whitehead, Esquire, the Commissioners therein named, directing them, the said Commissioners, or as many of them as were therein empowered to act, to enquire into the financial and monetary affairs of the Municipal Council of the township of East Nissouri, and all things connected therewith, and the said commissioners were thereby, and by force of the statute in such case made and provided, empowered to act in the execution thereof, and had all such powers vested in them as are by law vested in commissioners of enquiry appointed under the Act of the Parliament of this Province, passed in the ninth year of the reign of Her Majesty Queen Victoria, chapter thirty-eight, intituled, "An Act to empower commissioners for enquiring into matters connected with the public business to take evidence upon oath," and the said commissioners, or such of them as were empowered to act as aforesaid, were by virtue of the said commission, and of the said statute, empowered to summon and require to come before them any party or witnesses, and to require them to give evidence on oath, orally or in writing, and to produce such documents and things as such commissioners as aforesaid should deem requisite to the full investigation of the matters into which they were so appointed to examine. And the said commissioners, in pursuance of their said powers, did on the said 1st day of July, 1856, meet and assemble together to enquire into the financial and monetary affairs of such municipal corporation and all things connected therewith, and did then summon and require to come before them, the said commissioners, the said defendants, as witnesses, to give evidence on oath, and to produce certain documents which the said commissioners deemed requisite, and which were in fact requisite to the full investigation of the matters into which the said commissioners were appointed to examine—that is to say, the assessment rolls and the collectors' rolls of the said township of East Nissouri, the minute books and entries of the proceedings of the meetings of the said municipal corporation, the resolutions, and by-laws of the said municipal corporation, and the receipts, vouchers, accounts, and other writings relating to the financial and monetary affairs of the said township and connected therewith, and which were required by the said commissioners in the said enquiry. And the defendants well knowing the premises, but contriving and maliciously intending to obstruct, hinder and delay the said commissioners in the discharge of their duties, and in making the said enquiry, and to cause great expense and damage to the plaintiffs, by reason of the expenses of the said commissioners, and in and about the execution of the said commission, and to obstruct, hinder, and prevent the said commissioners from obtaining the said evidence, and to obstruct, hinder and delay the production of the said documents before the said commissioners, the defendants on, to wit, the day and year last aforesaid, wickedly and maliciously among themselves did conspire, contrive, confederate and agree together to obstruct, hinder and delay the said commissioners as aforesaid in the discharge of their duties as such commissioners, and in making the said enquiry, and to cause great expense and damage to the plaintiffs, by increasing the costs and expenses of the said commission as aforesaid, and to obstruct, hinder and prevent the said commissioners from obtaining the said evidence, and to obstruct, hinder and delay the production of the said documents respectively before the said commissioners as aforesaid, and to obstruct, hinder and prevent the said inquiry into the financial and monetary affairs of the said municipality; and the defendants maliciously contriving and intending as aforesaid, afterwards, and during the continuance of the said commission, and on the said 1st day of July, and on divers other days and times between that day and the 1st day of July, 1857, and in pursuance of and according to the said conspiracy, combination, confederacy and agreement, and in order to carry the same into effect, did then, and on the said other days and times, refuse and neglect to attend before the said commission as witnesses as aforesaid, and did neglect and refuse to give evidence to the commissioners as aforesaid, and did neglect and refuse to produce to the said commissioners the said documents respectively, although the said defendants might, and could, and ought to have so attended and

given such evidence, and produced such documents respectively; and did procure one Gregg Nealon, the clerk of the said municipality, and who as such clerk had the custody and possession thereof, to part with the possession and custody of the said documents, or a portion of them, to some person or persons to the plaintiffs unknown, or to the defendants, or some of them, or to conceal himself, or to remove himself to some place to the said commissioners unknown, for a long time, to wit, for the space of six months, to avoid being summoned or attending as a witness before the said commissioners, and to avoid, obstruct, hinder, delay and prevent the production of the said documents before the said commissioners as aforesaid, and did otherwise cause and procure the said documents to be concealed and kept concealed from said commissioners during the period aforesaid, whereby the enquiry of the said commissioners was obstructed, hindered, and delayed, and the plaintiffs were in consequence made liable to pay a large sum of money, to wit, the sum of £300, over and above what the plaintiffs would otherwise have been compelled to pay, if it had not been for the said acts and conduct of the defendants in pursuance of the said combination, confederacy, conspiracy and agreement of the defendants as aforesaid. And the plaintiffs say that the necessary expense of executing the said commission, as provided by statute in that behalf, would not have exceeded the sum of £50, except for the unlawful and malicious acts, conduct, combination, confederacy, conspiracy, and agreement of the defendants as aforesaid; but in consequence and by means thereof, and of the premises, the expenses of executing such commission of enquiry amounted to the sum of £350, and the same were after the execution thereof, and before the commencement of this suit, settled and allowed by the Inspector-General of this Province for the time being, according to the statute, at the sum of £350, being the sum of £300 more than would otherwise have been incurred or allowed, and which said sum the plaintiffs have paid to the said commissioners before the commencement of this suit; and by means of the premises the plaintiffs have been and are otherwise greatly prejudiced and damnified."

The second count was for money due and payable by defendants to plaintiffs, and for money paid to the defendants' use.

Besides demurring to the first count the defendants Horseman and Carr pleaded thereto—1st. Not guilty. 2 That the commision mentioned in the count was not issued upon the petition of one-third or upwards of the members of the said corporation. 3. To so much of the first count as charged that defendants did neglect and refuse to give evidence to the commissioners, and neglect and refuse to produce documents, and to so much of the alleged conspiracy, combination, confederacy, and agreement, as relates thereto, that the defendants did, within a reasonable time, and as soon as they could do the same after they were required by the commissioners, attend before them, and did give evidence and produce documents. 4. That the commissioners had no power to summon the defendants, or call for the production of books. 5. That the sum of £350 was not settled or allowed by the Inspector-General, as alleged. Issue joined thereon.

Plea to the second count—Not indebted.

The defendant Johns suffered judgment by default.

At the trial at Woodstock, before Robinson, C. J., it was proved that more than one-third of the ratepayers of the township, members of the corporation, had petitioned the Governor to issue a commission of enquiry, under the provisions of the 181st section of 12 Vic., ch. 81 and that on the 12th of June, 1856, a commission of inquiry was issued, directed to the judge of the county court and two other gentlemen, commanding them to make diligent enquiry and investigation into all and singular the financial and monentary affairs of the corporation, and all things connected therewith, giving such power and jurisdiction as shall and may be necessary to carry into effect the objects of the commission, and which under the act may be given; the report to be made within six months. Full power and authority was given by the commission to the commissioners, for the better discovery of the truth, to call before them, as well the head of the corporation, as such and so many of the members, officers, clerks and servants thereof, as also such other persons engaged or in any wise employed in or about the said corporation, or the affairs thereof, as well as all other persons whom the commissioners might judge necessary; and for the purpose of such enquiry full power and authority to administer oaths and affirmations, and to cause the head of the corporation and all others to produce upon oath all charters, records, deeds, muniments, statutes, rules, or ordinances, books, documents accounts, papers or other writings of what nature or kind soever belonging to the corporation.

A second commission issued on the 12th of November, 1856, extending the time for the commissioners to report for three months from the 10th of December, 1856.

A third commission issued on the 9th of March, 1857, extending the time still further for two months from the 10th of March.

The commissioners made their report on the 6th of May, 1857.

The amount of the expenses of the commission, as audited and allowed by the Inspector-General of the province, was £328 6s 1d., and this was paid from the corporation funds by the treasurer of the township.

A number of witnesses were examined to establish that the defendants impeded the investigation of the commissioners by the non-production of books and papers which were required, though it appeared that the defendants themselves did attend the meeting, and gave evidence: that they put off from meeting to meeting giving such information as was sought at their hands, and that the clerk, who was under their influence, withdrew himself to another part of the country, where he could not be found, and thus prevented the commissioners from obtaining the minute-book of the proceedings of the council, and other books, papers, and information: that the three defendants systematically acted together in all matters of the affairs of the township, without allowing the other two councillors to have any voice whatever, during the year 1856. Two of the commissioners were examined, who testified that if the defendants had promptly afforded them the information required they could have completed the investigation in a week or so, and that the whole expenses of the commission would not in such case have exceeded £75 or £100, instead of £328 6s. 1d. which it amounted to.

Under the second count, the plaintiffs proved that on the 16th of January, 1857, the day before these defendants would retire from the office of councillors, the defendant Horseman drew an order on the treasurer for £10 10s. in favour of Gregg Nealon, or bearer, for services as township clerk in 1856, and that order was indorsed "pro Gregg Nealon, Dennis Horseman." This order was produced to the treasurer on the 17th of January, and paid to Carr in Horseman's presence. The clerk, Nealon, was then absent, and had not been in the township for some months, and at that time he had township moneys in his hands not accounted for. (See *Municipality of East Nissouri* v. *Horseman*, 16 U. C. Q. B. 576.)

On the part of the defendants, witnesses were examined to prove their attending the commissioners and giving evidence, and their willingness and readiness to afford the commissioners information. After closing their other evidence, they offered Johns, against whom there was judgment by default, as a witness on their behalf. The Chief Justice rejected him as not competent, for though not a party to the issue being tried, yet he was a party to the record, and damages were being assessed against him at the same time.

The Chief Justice remarked to the jury, that the action was of a special and unusual character, and should not be supported except upon clear and satisfactory evidence of misconduct on the part of the defendants. That they need not necessarily find both guilty, but might separate them. That as to the defendant Horseman, who was reeve, though he could not be expected to take the books and papers, which properly were in the custody of the clerk, out of such custody, and bring them himself to the commissioners, yet it was his duty, as head of the corporation, to have directed the clerk to produce them to the commissioners, and it was incumbent upon him to facilitate the means of enquiry. That if he or the other defendants, on the other hand, concluded with the clerk to keep back the papers and documents, that would clearly be *positive* misconduct. If the jury found there was such misconduct in both or either of the defendants, then the enquiry would further be what damage the corporation had sustained thereby. That must be measured by the conduct of the defendants, and how far and to what extent they had obstructed the inquiry of the commissioners, and what expenses this had caused in the investigation which had been paid from township funds.

The Jury gave a verdict for the plaintiff for £250.

Beard obtained a rule *nisi* for a new trial—1. On the law and evidence. 2. For misdirection, in ruling that there was any evidence to go to the jury, and that the defendants, were bound as councillors to have produced before the commissioners the books of the township, the same not having been proved to have been in in their possession. 3. For the improper rejection of the evidence of Johns. 4. For excessive damages.—He cited *Austen* v. *Willward*, Cro. Eliz. 860; *Thorpe* v. *Barber*, 5 C. B. 675; *Haddrick* v. *Heslop*, 12 Q. B. 284; *Amey* v. *Long*, 9 East 473.

D. G. Miller and *Anderson* shewed cause

McLEAN, J.—On examination of all the evidence, I cannot say that the first objection is well founded. I do not think the verdict contrary to law, for the law will undoubtedly warrant such a verdict on sufficient evidence; and as to the evidence, I must say I think it very strong against the defendants, and shows that they were endeavouring to escape from an enquiry which was calculated to bring out against them very gross and fraudulent acts of misconduct while placed in the position of councillors and guardians of the interests of their township. It is not perhaps surprising that they should try to avoid such an exposure as took place before the commissioners, but if in their efforts to prevent their misconduct from being known they caused to the township, which it was their duty to protect, a loss and expenditure of money to a large amount, they ought not to complain if they are held responsible for the consequences of their acts. Had they been conscious that their conduct as members of the municipal council was upright and honest, a sense of justice to themselves should have induced them to court and encourage enquiry; but the reverse, as appears by the evidence, appears to have been the case. The books and papers of the corporation, which were necessary to the proper investigation of the financial affairs of the township, were not produced, on the pretence that they were in the possession of a clerk who was conveniently absent at the time, but from the evidence there is every reason to believe that they were within the reach and control of the defendants. The clerk of the council, in whose possession the documents were said to be, was also a clerk of Johns one of the defendants, and after his alleged departure, and while another person was acting as clerk, a sum of upwards of £10 was granted to him by the defendants for alleged services in 1856, the defendant Horseman first signing the order on the treasurer in his character as reeve, and then endorsing it as agent for Nealon, the clerk.

The jury, after hearing all the evidence, were satisfied that if there were documents or books in the hands of Nealon they were there by the consent and desire of the defendants, and could be produced by them at any time, if they desired to do so, and I certainly think the evidence leads strongly to that conclusion. If the charge to the jury on that point had been even stronger than it appears to have been, it would still not be subject to be regarded as misdirection.

As to the rejection of one of the defendants, Johns, as a witness for his co-defendants, it appears to me to have been strictly correct. He would have been a competent witness for the plaintiff, and so would either of the defendants; but he could not be called for the defendants while he as well as they were interested in reducing the amount of damages or preventing any from being recovered. In giving evidence for the others he would, in fact, be giving evidence for himself. I think, therefore, he was not a competent witness for them, his name as a party being still on the record and he being equally interested in the result with the other defendants, so far as the damages were concerned

The damages are certainly large, but then it appears that had it not been for the obstructions and delays caused by the defendants, the costs of the commission would not have exceeded £75 or £100, but that in consequence of their conduct the expense actually paid amounted to £328 6s. 1d. If the jury took the £75 as the probable amount of costs, if all information had been readily afforded, then their verdict of £250 would scarcely reimburse the plaintiffs for the extra costs occasioned by the defendants, so that the verdict cannot by any means be considered excessive; but if £100, the larger sum mentioned, were taken as the probable cost of the commission, and the jury took into consideration the interest on the actual sum paid out, the verdict could hardly be said to be excessive. They were at liberty to allow what would replace the money expended in consequence of the defendants' misconduct, and it cannot, I think, be fairly alleged that they have done more.

On all the grounds urged for a new trial I think the defendants must fail, and that their rule must be discharged.

BURNS, J.—This case has already been before the court upon demurrer, and the declaration is fully set out in 16 U. C. Q.B. 556.

1. As to the rejection of the defendant Johns, against whom there was a judgment by default. The venue in this case is in the usual form after a judgment by default and judgment for plaintiff on demurrer—namely, that it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgment against the defendants Horseman and Carr be be suspended until the trial of the issues they have put upon the record; and as well to try those issues as to assess the damages on occasion whereof Horseman and Carr had put themselves upon the judgment of the court, as to enquire against Johns what damages the plaintiffs have sustained, let the jury come, &c. We had a similiar question to this a few terms ago in an action of assumpsit, in which it was held that one defendant who had suffered judgment by default could not be examined as a witness on behalf of a co-defendant on issues raised by himself. This case is an action of tort, and the case of *Thorpe* v. *Barber*, (5 C. B, 675) shews that in such cases the defendant, still being a party to the record, and interested in the question of damages, is not a competent witness for his co-defendant upon the trial of issues raised against him. Great pains were taken in that case to review and consider the conflicting decisions which had previously prevailed upon the question. In the same year the question was brought before the Queen's Bench, but there it was whether in a similar case the plaintiff could call as a witness for him in such an action a defendant who had suffered judgment by default, and after reviewing the authorities it it was held the plaintiff might do so. The court upheld the doctrine laid down in *Thorpe* v. *Barber* (*Haddrick* v. *Heslop*, 12 Q. B. 267). The two cases, therefore, establish the principle, and the destinction between the plaintiff and the defendant calling such a witness.

The defendants counsel endeavoured to draw a distinction in the present case, that the damages might and ought to be assessed against the defendant Johns separately from the others, and that would have the effect of rendering him a competent witness for the others, and he relied upon some old cases on the subject of severing the damages to establish this proposition. The argument seems specious, but when examined will not bear the light. The declaration charges these defendants with conspiring, combining, confederating, and agreeing together to obstruct, hinder, and delay the commissioners in the discharge of their duties in making the enquiry, and to cause great expense and damage to the plaintiffs by increasing the costs and expenses of the commission, and to prevent the commissioners from obtaining the evidence. The defendant who has suffered judgment by default has thus admitted all that is charged, and admits his complicity with the others. The point was much discussed in *Hall and another* v. *Goodchild* (5 Burr. 2790), and the doctrine laid down by Lord Mansfield in giving the judgment of the court is, that where a joint trespas is stated, and the jury find two or more defendants of that joint trespass, they cannot sever the damages against each. In *Sahn* v. *Long* (1 Wils. 30), where one of two defendants allowed judgment by default, it was held the jury must assess the same amount of damages against him that they gave against the other.

There was, in my opinion, no misdirection to the jury in respect of the evidence. It was proved sufficiently clear, beyond all doubt that if the defendants had promptly afforded the commissioners the information required, they would have been enabled to have completed their report in some eight or ten days, at an expense of some £75 or £100. The jury were not told that it was the duty of the defendants to take the books, papers and documents out of the custody of the clerk, and produce them to the commissioners, but were told that the defendant Horseman as the head of the corporation, and the other defendants as councillors, had a right to direct the clerk to obey in furnishing that information, and it was their duty to give such directions. There can be no question but that such was their duty. The clerk, it appears, got out of the way, and it was a question for the jury to say whether that pro-

ceeded from the connivance and collusion with the defendants to frustrate the means of enquiry. If it were so, then there was an active act of obstruction to the commissioners, as well as passive acts by their not doing what was their obvious duty to do under the circumstances. It appears the commissioners did not rely upon the defendants producing the books, &c., but took steps to summon the clerk, who, after being summoned, had communications with defendant Carr, and then the clerk informed the officer summoning him that Carr would produce the books to the commissioners. It was proved that something like a book, which was supposed to be the minute book of the council, was concealed by Carr under his coat when he appeared before the commissioners, but he did not produce it. The defendants made a show of complying with the requirements of the commissioners, by causing the clerk to send a quantity of papers and documents to the commissioners; but when they were examined they were found to have nothing whatever to do with the enquiry the commissioners were to make. In point of law the action was held to be sustainable by the determination of the demurrer, and all that remained after that was to see that the facts stated in the declaration were sustained by the evidence. I think it impossible to read the evidence, and not see that the corporation had abundant reason to complain of the conduct of the defendants, and that it sustained a right of action against them for putting the corporation to extra and unnecessary expense. If the corporation should be put to extraordinary expenses in consequences of those who are chosen to be their guardians falling into an error in the discharge of their duty, or such duty be conscientiously discharged at a greater expense than some might consider right, of course no action can be maintained by the corporation to be reimbursed. In this case the defendants were charged with misconduct in the management of the financial and monetary affairs of the township, and they knew that the investigation which was being proceeded with was to ascertain whether such misconduct could be established or not. Not only every principle of duty as guardians of this corporation should have prompted them to be ready and active in rendering their assistance to the commissioners, but the dictates of their own consciences as honest men, irrespective of office, should have actuated them in being willing to repel with indignation the charges made against them if there were no truth in them, and it should have been their desire to urge on the enquiry as fast and as speedily as possible. Instead, however, of doing so, the evidence but too plainly establishes, not only the absence of desire to facilitate the enquiry, but absolutely an obstruction to the proceedings of the commissioners. And not content with that, the very day before they go out of office they pay that same clerk, or rather pay themselves in his name, a sum of money, at a time when he had left that part of the country, as we must infer, for no other inference can really be drawn, to avoid an examination before the commissioners, and at a time, too, when he had moneys in his hands belonging to the township unaccounted for. With respect to the damages being excessive, when the facts are looked at, and we see that the expenses of the commission were £328 6s. 1d., and the jury have reimbursed the corporation to the extent of $250, it is quite impossible to say the defendants have any right, either legal or moral, to complain.

Rule discharged.

COMMON PLEAS.

ROBERT GASKIN v. WILLIAM WALES.

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

Building Contract—Regulated Damages—Penalty.

Held under the facts of this case, 1 that there was a covenant on the part of the defendant to pay £4 per week for so long as his contract should remain unperformed after the day limited. 2. That an action would lie at the suit of the plaintiff, to recover this sum from the defendant. 3 That the £4 per week is to be regarded as liquidated damages, and not as a penalty.

(Trinity Term, 23 Vic.)

Declaration that defendant, by deed, in consideration of £795, to be paid him by plaintiff, agreed to do the excavations, and mason and plasterer's work necessary for building a dwelling house for plaintiff, in a substantial and workmanlike manner, according to certain plans and specifications, on or before 1st September, 1854, when defendant was to give plaintiff possession, and in default defendant agreed to pay plaintiff £4 per week, as rent or compensation for each week the said agreement remained unperformed after the 1st September, 1854. Averment that defendant did not complete and finish the work on or before the 1st September, 1854, and that plaintiff did not receive possession until the 1st March, 1855, being 24 weeks; nor did defendant pay plaintiff £4 per week for the said 24 weeks, or any of them.

PLEAS—1. *Non est factum.* 2. That defendant did fulfil his agreement. 3 That he did not finish the work by the 1st September, 1854, by the leave and license of the plaintiff. 4. That plaintiff did not perform and did not pay the £795, according to the tenor and effect of the deed. 5. Payment of £4 per week for 20 weeks. 6. That after the breach and before the commencement of this suit—in a final settlement of accounts between plaintiff and defendant—plaintiff was indebted to defendant in $100, and in consideration that defendant had agreed to give plaintiff three months for the payment thereof, plaintiff agreed to waive all claim for damages by reason of the breach. 7. That by the deed it is provided that the £4 per week should be deducted from the last payment to be made by plaintiff, and that defendant, after the making of the deed, and in pursuance of the terms of the contract finished the whole of the work by him to be finished, and that after completion, defendant delivered the work to plaintiff in full satisfaction, discharge and performance of the contract by defendant, and plaintiff accepted the same in full satisfaction, &c; and plaintiff thereupon, after such acceptance, paid defendant the full amount of the last payment which was to be made by him to defendant, in pursuance of the contract. Issue was taken on these pleas.

The trial was held at Kingston, in May, 1859, before Burns, J. The contract dated 14th February, 1854, made between plaintiff of the first part, defendant of the second part, and W. R., as surety, for defendant of the third part, was put in and proved. By it, defendant agreed to do the excavations, masons and plasterer's work necessary for building a dwelling house for plaintiff, on a lot in the City of Kingston, belonging to the plaintiff, in a good, substantial and workmanlike style, in accordance with and agreeable to the plans and specifications thereto annexed, and signed and sealed by plaintiff and defendant. The plaintiff covenanted to pay defendant £795 in manner stated. And for the faithful performance by defendant, according to the plans and specifications, the surety covenanted with plaintiff that defendant should keep the covenants and agreements therein on his part to be kept, and should do the work in every respect as contained in the said plans and specifications.

At the end of the specifications were added—"CONDITIONS.—The whole of the before specified works, together with any other not herein specified, which might be necessary to complete the entire building agreeable to the true intent and meaning of the plans or the architect's explanations and working drawings, to be hereafter furnished, shall be done by the contractor in a perfectly sound, clean, and workmanlike manner, to the entire satisfaction of the architect; and the contractor shall provide all and every description of labor, and materials of the best quality of their respective kinds, sufficient for the full completion of his contract. Should any portion of the work be done contrary to plans or directions, the same shall be altered without delay, and made in accordance with drawings or explanations, and the expense of such alterations to be borne by the contractor." There were several other conditions as to alterations of the plan, authority of the superintendent over workmen or materials, extra work, &c., not material to be set forth. Then followed,—"The work to be progressed with as fast as practicable and no delay caused to the carpenters; and the entire buildings, including fence, walls, finished, and the premises cleared and levelled off, and undisturbed possession given thereof on or before the 1st day of September next ensuing, and in default thereof you shall pay a rental for excess of time over and above the 1st day of September next, at the rate of £4 cy., per week—the amount of such rent to be deducted from your last payment on the contract. The contractor to find good and sufficient surety to be bound with himself in the sum of £200 cy., for the due performance of his contract." "In witness whereof we have hereto set our hands and seals this 14th February, 1853." Signed and sealed by plaintiff and defendant.

The plaintiff gave evidence shewing that the work specified was not finished until long after the 1st September, 1854—not till the Spring, the latter part of April, 1855. About Christmas, 1854, the plaintiff told the carpenter, who was engaged to do that portion of the work, that he need not hurry, for he (plaintiff) would not put his family in it. The architect, who superintended it, swore that the defendant could have completed his work by the 1st September, if he had put on men enough. The defendant's counsel objected—that the contract was a joint contract and not several, and that as defendant did at last complete the work, the presumption was, that the £4 per week was deducted by the plaintiff out of his last payment, and that the damages were not fixed. The learned judge overruled the objections The defendant gave evidence that plaintiff had said to a man employed by the carpenter, in reference to the work, that he did not care about his house being finished till he came back from England, but that plaintiff did not go to England with the idea that the house was to be delayed till his return. The learned judge reserved leave to the defendant to move on his objections if the Court should think there was anything in them, and that the damages were not liquidated, and the jury found for plaintiff damages, £96.

In Easter term, *Richards, Q C*, obtained a *rule nisi* for a new trial, on the ground the verdict was against evidence; that there was no right to sue for the penalty, but that the plaintiff's remedy was limited to deducting the £4 per week from the last payment accruing to defendant on the contract, and that the damages were not liquidated by the contract, or for non-suit upon the leave reserved.

Read, Q. C., shewed cause in Trinity term. The contract was the several contracts of the defendant. [*Richards* gave this up, as also the objection, that it was to be presumed the plaintiff had deducted the £4 per week from the last payment.] The damages are clearly liquidated *Denton* v. *Richmond*, 1 C. & Mee. 734, in which Vaughan, B. refers to *Astley* v. *Weldon*, 2 B & P. 350; *Birch* v. *Stevenson*, 3 Taunt. 469. It has been asked where was the agreement to pay £4 per week? It is true, it is not in the articles of agreement, but it is in the specifications annexed to the agreement, which though drawn up in January 7, 1854, as information to those who might desire to contract, must be treated as incorporated with the articles as part of what defendant had agreed to do. He agreed to do a certain work by a certain day on plaintiff's land; he was lawfully in possession of the land up to that day for the performance of the work, and he agreed, that if he continued in possession after that day to complete the work, he would pay a rental for the land. The contract and the whole of the specifications are to be read together, and there is at least an implied covenant to pay this rent. *Earl of Shrewsbury*, v. *Gould*, 2 B. & A 487; *Duke of St. Albans* v. *Ellis*, 16 East, 352; *Sampson* v. *Easterby*, 9 B. & C., 505, affirmed in Exch. Ch. 6, Bing. 644; *Courtney* v. *Taylor*, 6 M. & G., 851. Bull, N. P 156.

Richards, Q. C, referred to the fact that the specification was drawn up in Jan 7, 1854, and the contract was not executed until 14th February following. The specification was a mere proposal. The contract is to do the work according to the plans and specifications annexed, and says nothing about paying rent, damages, or penalty, if it is not done by the day fixed; therefore, the contract negatives the idea that this part of the proposal was accepted. But if this be binding on defendant as an agreement, it must be taken as an express contract, specifying also the mode of payment, *i. e.*, by deducting from the last amount the defendant was entitled to receive. The fixing £4 per week is no more a part of the contract than the fixing the mode of payment is, *i. e.*, by deducting: and no action will lie as the parties have agreed upon another remedy, which remedy the plaintiff waived by paying the full balance due. He cannot change the nature of the contract by his neglect to take advantage of the express terms.

DRAPER, C. J.—During the argument, the *nisi prius* record and the exhibits produced at the trial were not in Court, and the learned Counsel argued under the disadvantage of not certainly knowing their contents. We have them before us now, and find that the articles of agreement were executed on the 14th of February, 1854, and that the specifications, though purporting to be drawn up in the month of January preceding, were signed and sealed by plaintiff and defendant, though not by the surety, on the day the articles were executed; and were at the time of the execution of those articles, annexed thereto—at least the articles so state.

The questions arising are,—1. Whether there is any covenant on the part of defendant to pay £4 per week, for so long as his contract should remain unperformed after the 1st September, 1854. 2nd. Whether, if so, an action will be for this sum or whether the plaintiff has no other remedy but to deduct it from the last payment—and 3rd. whether the £4 per week is to be regarded as a penalty, or as liquidated damages.

I do not feel any difficulty as to the last two questions. No authority was cited to establish that the plaintiff can have no remedy for the £4 per week except to deduct it from the last sum due to the defendant. Assuming for the moment the right to recover the £4 per week; the case of *Fletcher* v. *Dyche*, 2 T. R. 32 shews that if the non-defendant had brought an action for the price of the work—this stipulated sum might have been set-off. But in order to make it the subject of set-off, it must be a debt, and if a debt it would be capable of being set off—not merely against the last payment accruing but against any other debt which the plaintiff had a right to claim from the defendant. I do not regard this expression used as confining the plaintiff to this remedy, it is rather to be looked on as the defendants assent to a ready mode of the plaintiff obtaining the stipulated damage for defendant's non-performance. It might easily have happened that all that actually remained due to defendant, when the work was completed, would be insufficient to pay for the quasi demurrage and if so according to the defendants agreement, the plaintiff would be without remedy for the excess.

As to the question of liquidated damages the cases cited by Mr. Read, establish the proposition contended for by him or the part of the plaintiff. *Fletcher* v. *Dyche*, already referred to, *Reynolds* v. *Bridge*, 2 Jur. N. S. 1164, and *Gilmour* v. *Hall* 10 U. C. Q. B., 309, are all to the same effect.

The first question is the only one, on which I have felt a serious doubt. It was put by Mr. Read, on the foot of an implied covenant. I am not prepared to hold that it can be sustained on that ground. The rule as laid down by Parke, B., in the *Great Northern R. R. Co.*, v. *Harrison*, 12 C. B , 576, is, that the whole of a specification is not to be considered as incorporated with the deed or contract but only so much of it as that deed refers to. Here the question is, whether the terms of the deed are sufficient to refer to, and include the whole of the writing annexed, that part of it headed "conditions" as well as that part which consists of what may more properly and strictly be treated as specifications. I think this must depend on the intention of the parties to be collected from the two instruments, but more especially of course from the deed containing the defendants covenant.

It must be conceded that their so called specifications were prepared some weeks before the contract was made in order no doubt to obtain tenders for the work, and that in them is expressed not merely those things which are usually understood by the term specifications, but also those of other terms and conditions which the contractor was expected to submit to and be bound to fulfil. If the term specifications as used in the contract can be properly held to mean, all that is contained in the instrument annexed thereto, then the covenant to do the mason work, &c., of the dwelling house, "in accordance with and agreeably to the plans and specifications thereto annexed," would include the payment of the £4 per week as much as it would include any matter strictly falling within the more limited but usually accepted meaning of the word specification, and the covenant would be express, and not merely implied.

The instrument annexed is divided into two parts, specifications and conditions. If all the "conditions" are held to be excluded from the covenant, upon the ground that they are not specifications, and therefore are not referred to in the contract, then there is no express covenant as to the workmanship being done to the satisfaction of the architect, nor as to the quality of the materials, nor as to many other things, which though under this heading of conditions, of a character belonging to a specification of what the contractor was to perform, or to submit to in the doing the work itself, such as alterations of the plan, the authority of the architect

to object materials, or the performance of extra work. Nor is there any stipulation as to the terms when the contract is, on the part of the defendant to be fulfilled. Without importing these into the contract, it would be very imperfect and would not be what it is plain was within the intention of both plaintiff and defendant in entering into it.

But if for the purpose of giving effect to what the parties certainly intended, it is necessary to give a more extended meaning to the word specifications annexed to the contract, then its common acceptance warrants, or in other words if we cannot but see that such was the meaning in which it was used, and that it refers to the instrument annexed in all its particulars, then can it be said, that while the time at which the work is to be completed is included within the defendants covenant, the condition to pay the £4 per week is not? I cannot help saying that in my opinion the clearly expressed meaning and intention of these parties is to include the whole. Not content with referring to the plans and specifications thereto annexed, as the guide for the performance of the *work*, they refer to the fact that the plaintiff and defendant have signed and sealed them on the same day that the contract itself bears date, and the signing and sealing being at the foot of all that is annexed to the contract, shews as I think that by the term "*specifications*" they included everything to which their hands and seals were annexed, and which were annexed to the contract.

I think therefore on these facts the case comes fully within the principle of the cases of *Great Northern Railway* v. *Harrison*, 12, C. B. 576, and of *Knight* v. *The Gravesend Waterworks Company*, 2 H. & N. 6.

Indeed I am not satisfied though I do not rest upon this, that if a count had been framed upon this annexed instrument alone, executed as it is, under the hands and seals of the two parties, the plaintiff would not have been entitled to recover upon it as importing a covenant in itself, distinct from the articles of agreement, though relating to the same subject matter. Or, it is open to consideration, whether we might, not as regards the plaintiff and defendant look at both instruments as together making one contract, in which case the plaintiff's right to recover would be undeniable. This however is only another form of stating the argument first relied upon, as to the incorporation of the whole of the paper annexed.

The Court of Queens' Bench have we understand during the present term given judgment in an action brought by this plaintiff against the surety for the same breach, that in not paying the £4 per week. Possibly among other reasons why the surety should not be held liable, it may have been considered that as regards him the right of the plaintiff to retain from the last payment to be made to the defendant, might be considered as one of the securities, which the surety had a right to look for his protection, and that the surety had an equitable if not a legal right to treat the fact that the plaintiff made the payment in full, without deducting the £4 per week on account of the non-completion of the contract by the stipulated time, as a bar to his enforcing the demand against the surety, or the decision may have turned entirely upon the manner on which the right of action against the surety was presented upon the pleadings. However this may be, I do not see any sufficient ground on which we can hold that the plaintiff has not a right to recover against the defendant. I think the defendant is proved to have covenanted to complete the work by the 1st day of September next after the date of the contract, or to pay £4 per week for each week after that date that the work should be unfinished as liquidated damages.

In my opinion therefore the rule should be discharged.

Per Cur. Rule discharged.

CHAMBERS.

DELISLE v. LEGRAND ET AL.

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

Arrest—Cause of action—Intention to quit Canada—Setting aside.

Semble—A defendant arrested may dispute either the cause of action, or other matters which the plaintiff's affidavit to arrest contains; but, unless in a very clear case that the plaintiff had no cause of action, the court will decline to interfere.

The affidavit of the plaintiff in this case was sustained as against the objections taken to it.

December, 1859.

This was summons to set aside the order of the county judge of the County of Essex for Defendants' arrest, and the writ of capias with costs, and to *discharge defendants from custody*, on the ground that the affidavit to hold to bail was insufficient: inasmuch as plaintiff had no cause of action to the amount of twenty-five pounds, and the facts and circumstances to satisfy the judge that there was good and probable cause to believe the defendants, unless forthwith apprehended, were about to leave Canada with intent to defraud Plaintiff, were untrue.

The affidavit of the plaintiff, sworn to on the twenty-fourth of October, 1859, upon which the judge of the county court made an order that the defendants should be held to bail in the sum of two hundred and forty-five dollars, twenty-five cents, stated that the defendants were indebted to him in that sum, upon a promissory note, overdue, made by the defendants on the twenty-first day of August, 1857, by which they promised to pay to the plaintiff's order the said sum, twelve months after date, without interest: that defendant, Legrand, four weeks before the date of the affidavit, told plaintiff that he meant to go to France to get money, and pay his debts on his return; that plaintiff was informed that morning by one Gilbert Brisbois and others, that both defendants were preparing to leave Canada; that the family of the father of defendant, Rabidon, of which he is a member, had gone to the State of Michigan, and that on enquiry he was informed both defendants were to follow the family, Legand being married to a sister of Rabidon; that he believed the facts true, and that unless defendants were arrested, he would lose his debt, it being their desire, as he believed, to quit Canada with intent to defraud him of the debt.

The defendants both swore, they believed the action had been brought on a joint promissory note given by them to one Brussie, the plaintiff and one Morrin being endorsers as sureties for money lent to the defendants by Brussie: that they had no intention of quitting the Province. Rabidon swore he believed his arrest was caused through ill-feeling on the part of the plaintiff, and Legrand swore that he believed plaintiff was merely acting as agent for Brussie, as, the day after making his affidavit, the plaintiff asked him for seven dollars to pay Brussie the interest on the note, as Brussie wanted the same; that three months before, plaintiff had acquiesced in his, Legrand, going to France.

Paul Rabidon, a brother of one of the defendants, swore to his belief that neither defendants meant to leave the Province. The defendant, Charles Rabidon, and his brother made a second affidavit of a conversation with Brussie: that he held the note mentioned in the defendants' first affidavit.

Gilbert Boisbois made an affidavit denying the truth of the statement relative to him, contained in the plaintiff's affidavit; that he believed the action was brought on a promissory note given by the defendants to one Brussie, the same having been endorsed by plaintiff; that he believed plaintiff was only acting as agent for Brussie, as plaintiff told him after the arrest of the defendants, that his furniture would be sold to pay that note to Brussie, unless he did something to justify himself.

In answer the plaintiff put in affidavits. He swore that the promissory note in question was redeemed by him before this action was brought; that he was not acting as the agent of any one in the matter; that before commencing the action, James Harken, De la Forrest, and others informed him, that defendants were about to leave the Province.

Emanuel Boisee swore that the note in question was endorsed by the plaintiff, and was in his hands, but that before the commencement of this suit the plaintiff paid him the amount, and took the note back. Antoine P. Reaume swore that defendant, Rabidon, about a month ago, told him he was going to follow his family, who were gone, or then immediately going to the United States. James Revill swore; that about eighteen months ago, plaintiff and defendant, Legrand, gave him instructions to draw a chattel mortgage, to secure to plaintiff payment of a promissory note, which he believed to be the one in question; that he did prepare a chattel mortgage, but Legrand did not execute it.

James Harkin swore; that about two weeks before the issuing of the capias, he heard from various persons that defendants were going away, and told plaintiff of it.

John Williams made an affidavit to nearly the same effect.

Felix A. Lafferty swore that about five weeks ago defendant, Legrand, told him he was going to France.

Joseph De la Forrest swore: that he lived five months with defendant, Legrand, that during this time Legrand spoke frequently of going to France; but, at the same time, said plainly it was not his intention to go to France, but to the United States of America; that two *months ago* defendant, Legrand, said, that as soon as he could collect money enough to go to the United States, he would leave "this wretched country;" that on two occasions he sent deponent to collect money, directing him to tell parties to pay at once, as he was going away to the United States; that Legrand promised deponent to write a letter to some person in the State of Illinois, to ascertain if it would be a good place for a French doctor, which deponent did and got the answer annexed to his affidavit; that it was understood between him and Legrand, that as soon as the latter went to the United States he should open a drug store, and that in time deponent should join him, to be his apothecary; that Legrand said if he would not take his family at once, he would leave his wife with her brother, Paul Rabidon, and afterwards send for her, and that long before the capias in this cause was taken out, he, deponent, informed plaintiff of the principal facts above stated.

Draper, C. J.—Under the statute, 22 Vic., chap. 96 (1858) s. 2, the plaintiff, in order to procure a judges order must shew:

1. That he has a cause of action to the amount of twenty-five pounds, or has sustained damage to that amount.

2. He must shew such facts and circumstances as shall satisfy the judge that there is good and probable cause for believing that such person, unless forthwith apprehended, is about to quit Canada with intent to defraud his creditors generally, or the plaintiff in particular.

As to the first point the plaintiff's own affidavit states all that is necessary to warrant the order to arrest. The affidavits in support of the defendant's application throw considerable doubt on the matter; but Boisee's affidavit, filed in reply on behalf of the plaintiff, sets the matter at rest, and fully establishes the plaintiff's right to sue.

According to the opinion of Coleridge, J. in *Copeland* v. *Child*, 17 Jur. 507, the if plaintiff's affidavits were sufficient in this respect, the court would on such an application enquire no further, "for," as he observes, "if affidavits were received which go to the right of the matter, there would be this inconvenience, a judge might, by listening to the party who swears most stiffly, come to one decision, the jury on the trial might arrive at another."

In *Peyler* v. *Hislop*, 1 Exch, 137, the Court of Exchequer expressed a contrary opinion, Parke, B., observing that the defendant was not precluded from disputing at this stage of the proceedings, either the cause of action, or other matters which the plaintiff's affidavits contain; but he added, "it must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere."

In *Hammers* v. *Hughes*, 18 C. B. 52, the Court of Common Pleas adopted the opinion expressed in the Court of Exchequer, and virtually overruled that expressed by Coleridge, J.

Acting on this decision, I have considered the question, but have no doubt that the summons, so far as this part of the question is concerned, must be discharged.

I have as little doubt on the other point. The affidavit of De la Forrest fully sustains the plaintiff's affidavit, and affords good and probable cause for believing that Legrand was about to leave the Province, and that the plaintiff, before the issuing of the capias, was informed of the facts.

The case is not so strong with regard to Rabidon; but, taking all the facts and circumstances together, I do not think it right to interfere.

The case of *Graham* v. *Sandrinelli* 16 M. & W. 191, caused me some doubt, but there, the plaintiff's affidavit, on which the order to arrest was made, was not supported by affidavits on shewing cause, and the defendants own affidavits that they were not about to leave the Province, are, I think, sufficiently met; or indeed I think that they alone would not justify the order prayed under any circumstances.

Summons discharged.

Fowler v. Port Hope, Lindsay and Beaverton Railroad Co.

(Reported by C. E. English, Esq., M.A., Barrister-at-Law.)

Arbitration—Excess of Authority—Indefiniteness of Award—Reference back to Arbitrator.

An award must be certain, definite, and in accordance with the submission.

A leases a line of Railway, or rather a right of way over a Railway, from B. at a rental to be determined by arbitrators, and covenants to run "at least one train per day, with leave to run more, the maximum number of trains to be fixed by said arbitration."

An award fixing a rental to be paid for ensuring *four* trains a day instead of *one*, is bad and will be referred back for reconsideration.

Hagarty, J.—By lease of 13th November, 1857, the applicant, Fowler and another agreed to build a Railway from Peterborough to Millbrook. The Port Hope and Lindsay Company demised to him the Railway, &c., &c., for a term of 999 years, at a rent of $5 per *annum*. Fowler covenanted to pay that rent, and to finish the Railway in working order within a specified time, and that he would during the time run at least one train for goods and passengers each way, each working day over the whole line, and would pay a rent or compensation for the use or right of running one or more through trains from Peterboro' (by Millbrook) to Port Hope, and *vice versa*, for goods and passengers as therein provided; such rent or compensation to be ascertained and paid weekly in advance as therein after provided; and it was declared and understood by the parties, that Fowler should have the right to run through trains from Peterborough (by Millbrook) to Port Hope, and *vice versa*, over the line between Millbrook and Port Hope at all times day and night, upon payment of a rent or compensation therefor, to be fixed by arbitrators chosen in the usual way, once in every three years; and that the arbitrators should fix and determine the maximum daily number of such through trains, and the maximum number of cars and engines of which the same be composed respectively.

After the making of the road, the parties appeared to have had other dealings as to rolling stock. No question arises as to the appointment of Mr. Shanly as referee. That gentleman, after hearing the parties, made his award dated 18th May, 1859.

The award recites a resolution of the Company of 18th March, 1859, appointing Mr. Keefer arbitrator, to fix and determine the amount of compensation to be paid to the Company by the Lessee for the use of the road from Millbrook to Port Hope, and the works and premises of the Company at the latter place, under the terms of the lease; and that the Lessee be required to name an arbitrator; and that by another resolution of the Company of 14th April, 1859, he, Walter Shanley, was appointed to arbitrate upon the said matters referred to in the resolution of 18th March, instead of Mr. Keefer, and which resolution was *accepted in writing* by Foster. Mr. Shanley proceeded to award, that the annual rent to be paid by the said J. Foster to the said Company, &c., under the terms of the lease referred to in the said resolution, should be for the three years next ensuing the execution of the award, $15,000 for each year, the said rent to be paid by weekly payments in advance, as in the said lease is mentioned and set forth:—"And I so further award that the maximum daily number of trains to be run by the said John Fowler, in consideration of the above mentioned payments of $15,000, on the main line of the Port Hope, Lindsay, and Beaverton Railway Company, from Port Hope to Millbrook, or *vice versa*, shall not exceed four on each day, each train of which said trains shall be drawn by one engine, and shall not to exceed 18 cars in number." The award then proceeded to direct, that in consideration of such rent, Fowler should be entitled to the use of the Station ground, time table, &c., at Port Hope, so far as required for the accommodation of his trains—he not unnecessarily interfering with the business of the Company; and further, that for such rent he might have the use of the sidings as well as of the main line, and to the services of suitable men of the Company, and to the platforms, &c., and that if Fowler found it necessary to run more than the four trains per day between Port Hope and Millbrook, and *vice versa*, then, and in that case, he would have the right to put on one or more additional, by first giving notice to the Company, and paying an advance to them of $20 per day for each additional train, consisting of but not exceeding one engine and eighteen cars.

M. C. Cameron, on behalf of Mr. Fowler, obtained a rule to shew the cause why the award should not be set aside

aside, on the grounds, 1st,—That it was uncertain and not final, and did not pursue the submission in this, that by the lease Fowler was to pay a compensation for running one or more trains, and the arbitrator did not determine the compensation for running one train, but for running four, and it was not certain whether he meant four trains back and forward, or two trains each way, and he was to fix the maximum number of trains, and he did not do so, but gave a discretion to Fowler to run any number of trains, paying a certain rate per day for each train over four; that the arbitrator had nothing to do with the working of the Railway, and exceeded his authority in awarding as to the use of sidings, &c., or why the award should not be remitted back to the arbitrator for reconsideration, &c, &c.

Cameron, Q. C., and *Galt*, Q. C., shewed cause.

I do not consider that anything turns on the affidavits filed It is necessary to read together all parts of the lease bearing bearing upon Fowler's use of the Company's line to understand clearly the matter really submitted. As I understand the case, judging wholly from the lease, submission and award it appears to be this: Fowler gets a lease at a nominal rent of the Company's corporate rights for a long period, and contracts to make a line of road from Peterborough to intersect the Company's road at Millbrook, and to make such portion for his profit, he being, in fact, proprietor for the time of that portion He bargains with them to run at least one train each way daily, between Peterborough and Port Hope. In doing so he would use, of course, that part of the Company's line between Millbrook and Port Hope; to make his portion profitable he would naturally require to use their portion in connexion therewith, and they would naturally expect payment for such use of their portion. He therefore agrees to pay them a rent or compensation for the use or right of running one or more through trains from Peterborough to Port Hope, and *vice versa*, such rent to be ascertained as thereinafter provided.

So far we can understand their position.

He is bound to run at least one train each way daily, and it is to be ascertained what he is to pay therefor; and it is also contemplated to ascertain what he is to pay for running more than one train each way—as he may naturally desire to run more if business requires. In a subsequent part of the lease it is expressly declared that he is to have the right to run through trains between Port Hope and Millbrook, on paying a rent therefor, to be fixed by arbitration, the arbitrators fixing the maximum daily number of trains.

There were therefore two things to be ascertained—1st, The amount which Fowler should pay merely for doing what his contract compelled him to do, viz.: the running of at least one train each way daily. It is obvious that he might not desire to run more, and it might be a loss instead of a profit to do more. 2nd, If he desired to avail himself of the right conferred by his lease of running any greater number of trains, then the arbitrator is to fix the maximum of trains and the rent or compensation to be paid therefor. It appears to me that it is one thing to determine the rent to be paid by Fowler for what he is bound to do under his contract, and another thing, the amount to be paid should he avail himself of the privilege allowed him of doing more.

Mr Shanley in his award assesses $15,000 as the annual compensation to be paid by Fowler under his lease, without saying for what it is to be paid. He proceeds then to award that the maximum number of trains to be run by Fowler, in consideration of such payment on the Company's line from Port Hope to Millbrook, or *vice versa*, shall not exceed four each day. He further gives him the right of putting on extra trains on giving a certain notice and paying $20 daily for each extra train.

As I read the award the right to run four trains is expressly in consideration of the $15,000; it seems conceded in argument, and is in accordance with common sense, that the wear and tear of a railroad is naturally in proportion to the amount of work, and that two trains each day would not do the same injury that four trains would; I think it just to assume that the arbitrator so understood it and considered the $15,000 at the proper rent for the right of running any number up to four trains. I think the Lessee, Fowler, has the right to have it clearly stated what is the amount of rent that he must pay for running the number of trains which under his contract he is bound to run, and which number he may not desire to exceed.

I think the award must be referred back to the arbitrator for reconsideration on this head. I do not consider the other objections important The time for making the award stands enlarged until 1st day of next year, with power to referee to enlarge again.

Order granted.

McINNES v. MACKLIN.

Orders for Ca Sa—Application to discharge same—Induction to defraud—Practice.

Quære—When one judge on a statement of facts has granted an order for a Ca Sa to issue, can another Judge taking a different view of the same facts, interfere in the matter without any new matter being shown?

The question whether any debt is due or not will be entertained on an application to discharge an order for a Ca Sa, but unless a very case is made out the court or judge will not interfere.

The affidavit in support of an application for an order to hold to bail should state the name of the parties informant, but if it shew facts sufficient to satisfy the mind of the judge, this is sufficient, it need not copy the words of the statute.

(September 3rd, 1859.)

The defendant had been arrested on a *Ca Sa* issued on the order of Mr. Justice Burns, under 22 Vic., cap. 96.

The affidavit of plaintiff stated that defendant was indebted in two hundred and twenty-four pounds, eighteen shillings and three pence on a judgment. That five days before the day of affidavit, defendant informed plaintiff that it was his intention to leave Upper Canada and to go to the Red River settlement by the way of Lake Superior, and that he did not intend to be absent from Canada for a longer period than six months. That on the same day plaintiff was informed and believed that defendant did not intend to go to the Red River settlement, but intended to go to New Caledonia by way of New York. That the informant told plaintiff he had seen a letter from defendant to a person in New York inquiring for a ship sailing to the Isthmus of Panama and that he believed defendant would sail in the ship "Star of the West" from New York to the Isthmus of Panama, on the twentieth day of the month of June. That plaintiff believed that defendant intended immediately to leave Upper Canada with intent to defraud, and that the informant declined making an affidavit of the facts. That plaintiff believed defendant made the statement as to the Red River to deceive and mislead his creditors, and that he had no intention of returning to Upper Canada.

On the ninth of July Defendant obtained a summons from the Chief Justice of Upper Canada, to shew cause why he should not be discharged from custody and the Bail Bond be cancelled on the ground that the affidavit on which the order had been obtained did not disclose the name of the party from whom the plaintiff received the information, that defendant was going to New Caledonia and on grounds disclosed in affidavits and papers filed.

Defendant supported his application by his own affidavit setting forth an account of his dealings with the plaintiff, that on 9th June he had assigned certain collateral securities to his creditors for their claims that they were not all unpaid, that it was true he was about starting for British Columbia, *via* New York and the Isthmus of Panama, but that his absence was to be only six months, that he was certainly to return within that time, that he was leaving his wife and family behind, that it was publicly known that he was so going away, that he had at first spoken of going by the way of the Red River settlement, by the overland route, and strongly denying all fraudulent designs.

Several other affidavits were filed corroborating these statements. The plaintiff filed numerous affidavits in reply.

The summons was enlarged from time to time, and was argued on the twenty ninth August. The defendant produced further affidavits in answer to those of the plaintiff, and both sides exhibited great industry in producing counter affidavits each eliciting some new matter and answered by the other side. This was done by the consent of the parties, and resulted in producing in all thirty six affidavits, several deponents from time to time producing two or three answering and rebutting charges.

Freeland for defendant, *Sadlier* for plaintiff.

HAGARTY, J.—It is very much to be regretted that this unrestrained license of swearing has been allowed in this case as the result has been the placing on the files of this court a vast mass of slander and irrelevant vituperation, and parties seem to have been permitted and encouraged to indulge in all sorts of personal ill feeling, *and naughty, wholly beside* the merits of the case and the points really at issue. It seems strange that the consideration of the question whether a man in business in London was about to abscond or not, should induce a large number of persons to work industriously to blacken and defame each other on oath. If their doing so had at all tended to elucidate the matter really in question it would be simply one of the painful necessities of legal disputes. When such abuse is indulged in on wholly irrelevant points it becomes intolerable and deserving of severe reprobation.

On the argument Mr. Freeland for defendant, in addition to the ground set forth in the summons contended that the defendant should be discharged as the debt had been secured and was not in fact due. And that the affidavit to arrest only spoke of a departure from Upper Canada, instead of Canada. He cited *Talbot* v. *Buckley*, 16 M. & W. 173, *Givens* v. *Spalding*, 11 M. & W. 173, *Choate* v. *Stevens*, Taylors' Reports, U. C., 620., *Bradenburg* v. *Needham*, 1 Dowl., P. C. 439, *Baltman* v. *Dunn*, 7 Dowl., 105, *Ross* v. *Balfour*, 5, U. C. O. S. 683, *Larchin* v. *Willan*, 7 Dowl., P. C. 11.

First as to jurisdiction. Our statute following the words of the English Act, 1 & 2, Vic., cap. 110, allows the defendant to apply *to a Judge or to the Court in which the action is brought* for an order or rule for his discharge, and that either judge or court may make absolute or discharge, such order or rule provided that the order made by a judge may be discharged or varied by the Court.

In *Graham* v. *Sandranelli*, and *Talbot* v. *Buckley*, 16 M. & W. 196, in pronouncing the judgment of the Court, Parke, B., says, That the Judges were not agreed upon the question, whether if the Judge secondly applied to should differ from the first on the same state of facts, he has power or right to order the previous discharge as upon an appeal to the Court. Although Baron Parke speaks of "the same state of facts" in the case before the Court, the second application was as here on new facts shewn by affidavits of defendant and others, negativing an intention of leaving England. It is not necessary further to discuss the question of my jurisdiction in Chambers as I dispose of this case on my view of the merits.

As to the debt being due. It was at first thought that this question could not be raised on motion, and Sir John Coleridge, in *Copeland* v. *Child*, 17 Jurist 566, so expressly decided. It is clear however from *Stammers* v. *Hughes*, 18 C. B. 527, *Pegler* v. *Huslop*, 1 Ex. 437, that there is jurisdiction to try if a debt really exist. Mr. Justice Williams adds,—"I never for a moment doubted that the question was an open one, but at the same time, I have always said I would not take upon myself to try a question which was at all doubtful." Parke, B., says, "It must be a very clear case that the plaintiff had no cause of action or we should not interfere."

Now the case before me is anything but a clear case, and the defendant has by no means satisfied my mind that he has been held to bail for any amount not truly due. I therefore pass to the other points taken.

The chief objection to the affidavit seems to be the omission to give the name of plaintiff's informant. From the remarks made by Alderson, B., during the argument of *Talbot* v. *Buckley*, it appears to be the opinion of that learned Judge, that the informant should be named. The same view is strongly laid down by Parke, B., in *Gibbons* v. *Spalding*, 11 M. & W. 173, but is somewhat qualified by the judgment in *Arkenheim* v. *Colegrave*, 13 M & W. 620.

I do not, however, consider this affidavit to fail on this ground. The plaintiff swears that defendant himself informed him that he was going to the Red River settlement out of the jurisdiction, although to return, as he alleges, in six months. He adds to this, that he was elsewhere informed that defendent was going to British Columbia *via* New York.

I think the information furnished by defendent cannot be overlooked in judging of the sufficiency of the affidavit. In *Hargreaves* v. *Hayes*, 5 El. & B. 272, the plaintiff swore to have been informed by defendant that he was going with his family to reside permanently in Australia. Campbell, C. J. says,—"The Act requires that the affidavit shall be such as to satisfy the judge, and if it state facts sufficient to lead the Judge to believe that the defendant, unless forthwith apprehended will leave the country, that is enough." Sir J. Coleridge, "It does not follow that the affidavit must copy the words of the Statute; all that is necessary is that it should satisfy the judge that the contingency is at hand." Crompton, J. "It is left to the judge to decide whether he is satisfied that the defendant will leave the country unless forthwith apprehended."

It is to be borne in mind that the Canadian Statute requires the further proof of the departure with intent to defraud.

The technical objection as to the departure from "Upper Canada" instead of "Canada," would have prevailed most probably in the old affidavit, not stating facts as now required. I think that the facts sworn to as to Red River and British Columbia, and other places beyond the Province of Canada, may, in this case, be held to cure *the objection at this stage of the proceedings.*

As to the general ground that defendant now shews facts to prove that he did not contemplate such a departure as would have warranted his being arrested, I do not consider that I am called on to interfere. The facts of the case are very peculiar. The defendant was confessedly in great pecuniary difficulty, and about to depart for a very remote part of the world, involving even on his own showing, an absence of six months, and possibly for a longer period. It would, of course, be wholly in his own option whether to return to Canada or not.

I abstain from any mention as to the impression on my mind as to his intentions, especially as it is stated that an action is pending for malicious arrest. It is sufficient for me to say that I do consider it to be a case in which, assuming that I have jurisdiction, I am by law required to discharge the defendant from arrest.

I discharge the summons without costs.

The learned judge also referred to the following cases:—*Ross* v, *Montefiore*, 1 H. & N. 722; *Bullock* v. *Jenkins*, 20 L. J. 90, Bail Court; *Burness* v. *Guaranovitch*, 7 D. & L. 235; *Gadsden* v. *McLean*, 9 C. B., 288.

BECKET ET AL v. DURAND.

Costs of the day—Nonpayment thereof—Staying proceedings—Costs.

Nonpayment of cost of the day, is not a sufficient ground for staying proceedings until such costs are paid, especially when such a course would entitle the defendant to sign judgment for his costs, for not proceeding.

There might be an extreme case, when staying proceedings for nonpayment of cost of the day, would be the proper course.

Where a summons moved *with costs* is discharged, it is discharged with costs. A notice to proceed to trial, given by the defendant to the plaintiff under the Statute, is a waiver of any objections that might otherwise have been to a notice of trial regularly given thereafter, and pursuant thereto.

(December, 1859.)

Issue was joined in March, 1858, and notice of trial was served for the Spring Assizes of 1858.

The plaintiffs did not go to trial, and the defendant taxed costs for not proceeding to trial, at £11 5*s.* 8*d.*

The plaintiffs reside out of the Province, and gave the usual security for costs, before issue joined. The defendant demanded the costs so taxed, of the surety, and also of the plaintiffs' attorney.

Since entering the cause for trial, the plaintiffs took no proceeding until the third of October, 1859, when they gave notice of trial for the then ensuing Assizes at Toronto.

On the 8th of September, 1859, defendant served on plaintiffs' attorney, a notice under the 151st section of the Common Law Procedure Act of 1856, to proceed, and thereupon the plaintiffs gave this last notice of trial.

The defendant obtained a summons to stay all further proceedings, until the costs for not proceeding to trial should be paid, and and to set aside the notice of trial, because the plaintiffs had not given a term's notice of their intention to proceed before giving it, upwards of four terms having elapsed since the last proceeding.

The only disputed fact, was as to the plaintiffs' attorney having *undertaken to pay the costs, before giving notice of trial.* The plaintiffs' attorney denied having given any such undertaking, and stated that he could not proceed to trial, because a commission to examine a witness had been refused, but that the plaintiff expected to procure the attendance of this witness, at the then ensuing Assizes for Toronto.

DRAPER, C. J.—I find no authority for staying proceedings until the costs of the day are paid, though an extreme case might arise, in which *such a course would be* proper (see *Henzell* v. *Hocking*, 9 Jur. 18). The defendant, if successful in this action, will, I apprehend, be able to recover these costs, and if he fails, will be allowed to set them off against the sum recovered by plaintiffs.

Besides, I do not see how I could properly make such an order, when the defendant has given the plaintiffs notice to proceed, and will be entitled to enter a suggestion and sign judgment for his costs, if the plaintiffs omit either to give notice of trial, or to proceed to trial pursuant thereto, or do not obtain an extention of the time for going to trial.

The giving the notice to proceed, appears to be proceeding in the cause, (see *Knight* v. *Gaunt*, 17 Jur. 139,) and I presume that in strictness the defendant could not have taken it, after the lapse of four terms, without giving a term's notice. But plaintiffs do not object to this, they comply with defendant's notice by giving notice of trial. There has, therefore, been a proceeding in the cause, within four terms next proceeding the giving notice of trial. It certainly would be a strange result if the defendant could call on the plaintiffs to proceed by giving notice of trial, and then move to set aside the notice for irregularity.

The summons must therefore be discharged, and with costs, because moved with costs. *Henzell* v. *Hocking*, is exactly in point in this respect.

Summons discharged with costs.

JONES v. HARRIS.

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

Interpleader—County Court—Certiorari.

A certiorari does not lie to remove an interpleader issue from a County to a Superior Court.

If such a writ do improvidently issue the application should be to quash the certiorari and not for a procedendo.

(27 December 1859.)

This was an an application to set aside a writ of certiorari and proceedings under the following circumstances.

On the twenty ninth of June 1859, the Judge of the County Court of the County of Middlesex, at the instance of the Sheriff made an interpleader order in a suit of *Harris* v. *Andrews'*, to try whether certain goods seized by the sheriff under a *fi. fa.* were the goods of the claimant (Jones).

The order directed the parties to try the issue at the then next sittings of the County Court in London and the question of costs, repayment of possession money, and all further questions were reserved until after the trial of the issue.

The execution creditor Harris was made Defendant.

The issue was delivered afterwards on the second of September, the plaintiff sued out a writ of certiorari upon a præcipe and removed as the writ expresses it, the plaint and proceedings into the Court of Queen's Bench

Subsequently to this being done the defendant made an application to a judge in Chambers for security for costs, and on the thirteenth of October an order was made *ex parte*.

This application to set aside the certiorari was made by defendant.

BURNS, J.—There is no doubt the proceeding by certiorari is altogether irregular. Such a writ does not apply an to issue directed by the Court or Judge which has possession of the cause out of which the issue to be tried springs. The ordinary writ of certiorari removes the cause to a superior court, and when once removed the Superior court disposes of the cause thoroughly. There is no going back to the inferior court for judgment or anything connected with the suit.

It is obvious that the writ of certiorari does not remove the judge's order for the interpleader issue, for that has been made in the suit of *Harris* v. *Andrews*, which is in no way brought into the superior Court by the writ of the certiorari. Besides this difficulty a judge's order cannot be removed in that way to a higher tribunal.

The writ of certiorari then, if it could issue, would do nothing more than remove the feigned issue which the parties had entered into pursuant to the order of the judge of the County Court, and all that the Superior Court could do would be to let it be tried as a record of the Superior Court. If it were so tried the parties would have to get the *matter back again in some* way to the County Court to be disposed of finally, for the judge of that Court has reserved all questions until after the issues should be tried. The judge has ordered the issue to be tried at the County Court in London. What becomes of that provision, and where is the issue to be tried when the party has brought it into the superior Court? All these difficulties shew that the writ of certiorari does not apply to removing an issue directed by the Court. The parties must try it in the Court where ordered and under the terms provided for.

The plaintiff resists the application on the ground that the defendant has assented to the case being regularly before the Superior Court because he has obtained an order on the plaintiff to compel him to give security for costs. But the most direct and positive assent of the parties upon the facts as they appear could not possibly give the Superior Court jurisdiction.

The defendant asks for a writ of procedendo to send the matter back to the County Court there to be disposed of. I do not think such a writ can properly issue for that would be recognizing a right to bring the matter up. The only proper order to make is to quash the writ of certiorari as being improvidently issued in a case where it never ought to have issued. If the defendant had applied for that in the first instance he might have obtained the costs of the application but he has led the plaintiff into the belief by his applying for and obtaining an order for security for costs, that he thought all right and therefore there should be no costs.

The order of the Judge of the County Court has never been removed from that Court, and the parties must apply to the judge for time to comply with the terms of it in regard to trying the issue thereby directed.

THE BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

Several actions on Promissory notes—One of Defendants out of Jurisdiction—Costs.

The Consolidated Act of Upper Canada, cap. 42, sec. 23, providing that in case several suits be brought on one bond or on one promissory note, to or against the maker, drawer, acceptor, or indorser of such note, &c., there shall be collected or received from the defendant the costs taxed in one suit only at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or received from the defendant does not apply to the case where one of the parties to the note not sued with the other is at the commencement of the suit out of the jurisdiction of the Court.

(Chambers, Dec. 15th, 1859.)

This was a summons calling on the plaintiff to shew cause why the judgment should not be entered, and the costs if any taxed at Toronto, and why also the plaintiff should not be deprived of all costs except the disbursements in the cause, and a suggestion to that effect be entered pursuant to the statute on the grounds that defendant should have been sued along with the other parties to the note sued on in this cause, when they were sued and not separately.

From the affidavits filed it appeared that this case was brought to recover the amount of a promissory made by Messrs Smith & McNaught and indorsed by Hugh Workman, John Turner and the defendant Elliott. An action had been brought against the other defendants, in which judgment was obtained by default, and full costs taxed against them.

Both summonses in the suits against the defendant and the other parties to the notes were issued on the 11th August last. The writ in this suit was issued against Elliott as an absent defendant.

Defendant for many years past resided in Brantford, and had been a member of the Town Council. It was also stated in the affidavits filed on his behalf, that he was again elected in January last and had acted as a Town Councillor part of this year. But the affidavits in reply stated, that on getting a contract to build a Post Office in Quebec he resigned his office as Town Councillor.

Previous to the month of June last he obtained the contract to build the Post Office and went to Quebec to look after the work leaving his family behind him. Up to the time of the application he visited Brantford three times. First in the month of June, next in September, (the affidavits filed on his behalf state the early part of September while those filed for the plaintiff say the middle of September), and again in October. He remained several days on each occasion. In the affidavits filed on behalf of defendant, it was stated that the writ might have been served in time at Brant-

ford in June to bring the cause down to trial at the last Brantford assizes.

By affidavits of the plaintiff's attorney and his clerk, it is shown that a note endorsed by the defendant for £25 had been placed by plaintiff's in the attorney's hands for collection in July, that inquiries were then made made for defendant, and it appeared that he was in Quebec looking after the building of the Post Office. A writ against him as an absent defendant was personally served there, and he settled the suit. About the 10th August the note in this cause was placed in the attorney's hand for collection, enquiries were made and the information obtained, was that the defendant was still at Quebec but they could not learn if he was soon to return to Upper Canada. On the next day a writ was issued against the other parties to the note as residents of this Province, and a separate action commenced against Elliott as a non-resident defendant, and he was served at Quebec on the 15th of August and put in a defence to the suit.

In the affidavits filed on behalf of the plaintiffs, the opinion is expressed that unless defendant had been served as an absent defendant he would not have visited Upper Canada in September, and he could have been served herein time for the last Brantford assizes. That defendant's desire was to delay and throw them over, and the attorney was obliged to take the course he did to serve the interest of his clients.

Burns, for the defendant contended that plaintiffs were bound to have proceeded against defendant at same time as the other parties to the note, and not having done so was not entitled to any costs except disbursements in the second action.

Harrison, on the contrary contended, 1st that plaintiffs could not have proceeded against defendant in the suit with the other parties to the note, defendant being at the time a resident in Lower Canada, and 2nd that even if plaintiffs could have so proceeded, it was not reasonable to compel them to do so, under the penalty of being deprived of full costs, the separate action against defendant.

The authorities cited by Counsel are referred in the judgment.

RICHARDS, J.—I shall refer to the statutes applicable to this cause as they are found in the Consolidated Statutes.

By cap. 42, sec. 23, the holder of a bill may serve all or any of the parties to it in one action and proceed to judgment, execution against the defendants as if they were joint contractors. Then follow several sections as to the mode of procedure and and the rights of several defendants between themselves and the plaintiff respectively. Sec. 35, provides in case several *suits* be brought on one promissory note against the maker or indorsers respectively, then shall be collected from the defendant the costs taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or received from the defendant.

The 29th section provides that when several defendants are included in one process under the act, and any of them cannot be served therewith by reason of absence from or concealment within Upper Canada, then the action may proceed as against the other defendant or defendants without prejudice, and the plaintiff may afterwards sue the defendant separately who has not been served with process, and may recover costs as if the act had not been passed.

It is urged on behalf of the defendant that inasmuch as plaintiff could have issued a concurrent writ against the defendant to be served out of the province and against the other defendants to be served within Upper Canada, and has not done so, he is to be considered as in no more favorable position than if he had commenced a separate action whilst the defendant was within Upper Canada.

I am not prepared to assent to this proposition for it is undoubtedly more inconvenient to effect service on parties out of the Province than within, and when so served there is delay as to the time for appearance, and the other proceedings against an absent defendant in case of non-appearance are to be approved, directed by a judge's order, causing considerable delay and increase of expense, &c.

I do not think therefore that it is unreasonable that a plaintiff should proceed against such of the parties to a note as are resident in Upper Canada, and against any other party when he should return to the Province as an absent defendant before his return.

I do not think that the Legislature intended anything more than to deprive the plaintiff of the additional costs when he unreasonably and unnecessarily multiplied suits against the parties to a promissory note, bill of exchange, &c.

In the present case I think the plaintiffs were not bound to wait until the defendant came to Upper Canada before suing him separately if he was absent at the time of commencement of the action and such absence was likely to continue as it appears, from the affidavits filed it was so as to prevent the service here of a summons within a reasonable time.

The 29th section if construed literally might make it necessary to include the name of the absent defendant in the writ against the others in order to entitle a plaintiff to costs, if such absent defendant were afterwards sued separately. It seems to me that it would not be interpreting this section of the act in its true spirit, if we were *to hold it necessary to insert in a writ against the other* parties the name of a person then out of the province and likely to be so for some considerable time, when it was notorious he could not be served here merely for the purpose of enabling the plaintiff if he should sue him separately afterwards to recover his full costs of suit. The way in which the section is framed is evidently for the relief of plaintiffs, where he defendants are all named in the writ to enable the action to go on, when one is not served either from being absent from the Province or concealed within it. I think as already mentioned the object of the statute is to prevent the multiplying of suits for the purpose of making costs. I do not think the Legislature ever intended where a indorser on a note was absent perhaps in California or Australia, that a plaintiff in proceeding against the parties resident here should be compelled to insert his name in the summons as a matter of form when he could not be served here or issue a concurrent writ against him to be served there under the penalty of being deprived of full costs in the event of sueing such indorser separately to recover the amount from him.

I am not therefore prepared on the merits to direct the suggestion applied for to be entered.

If I thought the plaintiffs only entitled to collect or recover the full costs in one suit only, I am not prepared to say that the defendant is in a position to compel "*the plaintiff to elect*" to take the full costs in the same suit against the other defendants and only the disbursements in this suit.

The statute does not in words direct that the judgments are not to be entered in all the suits for the full costs, but that there shall be collected or recovered from the defendant costs taxed in one suit only at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or recovered.

It may be argued that the plaintiff is not compelled to make his election until the costs in all the suits are taxed, or until he has *collected* or *received* the costs in one. However it is not necessary in the view I take to decide this point

I see no reason to direct judgment to be entered or costs taxed here. If defendant thinks the costs not properly taxed they may be revised here without difficulty under the provisions of the statute.

The summons will be discharged without costs.

Summons discharged without costs.

MCNAUGHTON v. WEBSTER.

Interpleader—Attachment of debts—Books of account—Sale thereof by Sheriff.

A sale of books of account by sheriff, under an execution, does not pass the property in the debts or accounts therein charged.

Semble, that books of account and open accounts cannot be seized by sheriff, under 20 Vic., cap. 57, s. 22; at least they cannot be sold or transferred, but, if seizable at all, must be held by sheriff in security for judgment debt and collected as such in his own name.

An order attaching a debt in payment of a judgment, is a bar to any action brought for the recovery of such debt, so long as it is in force.

An interpleader will not be granted in order to try the validity of an attaching order, or to determine the amount due to the judgment debtor.

Any debt that a defendant could set off at law against his creditor may be attached under garnishee clause of C. L. P. Act, 1856.

Quære. What right has an attaching order on the party's right to set off?

This was a summons calling on the plaintiff and the Commercial Bank to shew cause why they should not appear and state the

nature of their respective claims to the subject matter for which this action was brought, and to maintain or relinquish their respective claims.

The affidavits and papers upon which the summons was granted, shewed that on the 15th September, 1859, a writ of summons issued in this cause, which was specially endorsed, and the last item of the plaintiff's claim was under date of 1st February, 1859, the whole amounting to $138 16½, the correctness of which was admitted by defendant, who claimed, however, to have a contra account overdue. The plaintiff declared on the 11th October, 1859, on the common counts. On the 20th April, 1859, an attaching order was issued in a suit of the Commercial Bank of Canada, judgment creditor; and James McNaughton, (the present plaintiff,) and James Wilson, judgment debtors. And the now defendant, Webster, was then named as one of the garnishees, which order was served on the defendant as such garnishee before the commencement of this suit: but no order calling on him to pay to the Commercial Bank the debt due by him to McNaughton had ever been served.

It was sworn by the defendant, that, as he was informed, the plaintiff was not actually prosecuting this suit, but that one John Sudden, (also a garnishee named in the attaching order,) claimed the debt due by defendant to the plaintiff, under a sheriff's sale of the plaintiff's books; and that John Sudden was the actual plaintiff in this cause, while the Commercial Bank claims the money by virtue of their attaching order; and that the defendant was willing to pay the debt according to any order of court that might be made, and he expressly denied any collusion with the Commercial Bank.

On showing cause by the Commercial Bank, it was shewn that the attaching order was served on the 30th April, 1859, on the defendant, and that, on the 8th August last, a notice was published in the town and country papers, calling on the several parties named in the attaching order, to pay the several debts due by them to McNaughton and Wilson into the hands of the agent of the Commercial Bank at Galt.

It was sworn, that the books of account said to have been purchased by Sudden, were seized by the sheriff of Waterloo, under a *fi. fa.* against the goods of McNaughton and Wilson, but that the debts contained in such books were in no manner attached by Sudden.

McNaughton, the plaintiff, filed affidavits; that he had no interest in the suit, as his interest in the account from which the action was brought, was sold by the Sheriff to Sudden; that there was no settlement of accounts between plaintiff and defendant; that he had not received the defendants account, and was not aware what the balance was; that his books were seized by the sheriff sometime before the defendant informed him of the attaching order.

Sudden swore, that about the 15th August last, he bought, at sheriff's sale, the plaintiff's books of account, for about $16 00: that he was then informed he could collect the accounts therein; that he was informed the attaching order above mentioned was served on defendant after the sheriff had received the writ; that the sheriff had informed him, that the proceeds of the sale of the books had been applied on the execution. He did not directly state that he paid the $16 00. He denied all collusion with McNaughton There was another affidavit, to shew that the account between plaintiff and defendant was an unsettled account.

DRAPER, C. J.—It has been urged, that because there has been no balance struck (and it is, therefore, not settled how much plaintiff has a right to receive from defendant) the debt was not one which could be attached. By virtue of the order set forth, I see no foundation for this objection. The plaintiff or Sudden, using his name, has considered the claim to be sufficiently certain to endorse the summons in this action specially. The principal question in this action is, whether this is a proper case to call upon the plaintiff and the Commercial Bank to interplead.

In seeking to solve this question, it appears to me necessary, in the first place, to determine whose rights are involved As to the defendant in this suit, there is no doubt; but as to the plaintiff, it is expressly asserted by himself, that he has no interest in the question. And one Sudden claims to be beneficially interested, and to have the right to use the plaintiff's name to sue for, and recovor whatever the defendant may owe the plaintiff; and he founds this claim upon the fact, that the sheriff, on an execution in his hands, against the goods and chattels of the now defendant, sold the books of account belonging to the defendant; and that he, Sudden, purchased them for the sum of $16 00; and that by this purchase, he acquired the property in, and the right to all debts due to the defendant, which were entered and charged in these books; the debt now claimed from the defendant being one of them.

No one on behalf of the plaintiff, or rather of Sudden, was able to inform me on what authority this claim rests.

The 20th Vic. cap. 57, sec. 22, certainly authorises the sheriff to seize money, bank notes, cheques, bills of exchange, promissory notes, bonds, mortgages, specialities, or other securities for money; but this does not include debts due upon open accounts, even if by any strained, and, to my mind, untenable construction, such accounts could be held to be liable to seizure, as "securities for money." The direction of the statute referred to is, that such securities shall be held by the sheriff, as a security for the sum he is empowered to levy, and he, not the owner of such securities, is unauthorized to sue in his own name for the recovery of the sum secured thereby,

Sudden, therefore, has no right, in my opinion, to advance on this question. It is simply a question between the plaintiff resting on his own right, the defendant and the Commercial Bank, as a judgment creditor of the plaintiff, having an order attaching the debt due by the defendant to the plaintiff.

Then the solution becomes, I think, simple. There is an order directing the defendant to pay to the Commercial Bank the debt owing to the plaintiff; and the plaintiff, notwithstanding this order is in full force, for anything shewn to me, then sues for the money. If it were necessary to go so far, I should, as at present advised, hold, that the order, so long as it exists, is a complete bar to the action. If the Commercial Bank are negligent, or are delaying with or without collusion with the defendant to the plaintiff's prejudice, an application may, I presume, be made by the plaintiff to set aside the attaching order; but I perceive no necessity for an interpleader.

The defendant may, under sec. 196 of the Common Law Procedure Act 1856, forthwith pay into court the amount due from him to the plaintiff, as judgment debtor to the Commercial Bank.

It does not appear to me to be necessary that he should wait to be served with a summons to pay to the Commercial Bank for that purpose, although he may not be safe to pay them directly, without an order for that purpose.

This mode of relieving himself is open to him without any application. If he intends to deny that he is indebted to the plaintiff in this suit, he may contest it under the 197th sec. of the same act; when the Commercial Bank claim it or not in this suit, either the plaintiff or the Commercial Bank has a right to try that question with him.

The denial on his part that he owes the plaintiff anything, cannot give him a right to ask for an interpleader; and if he does not deny the debt, he would be relieved by paying it into court, after being served with the attaching order.

I have not made up my mind upon general grounds that this is a fit case for an interpleader; there is the objection, that though the defendant is indifferent as to whether he pays the plaintiff or the Commercial Bank, yet he claims to have a set-off against the amount appearing on the plaintiff's books to be due. The question of how much his debt really amounts to, may be as well determined in this action, as on a writ under sec. 197 of the Common Law Procedure Act, but I do not see how it could be raised on an interpleader suit between the plaintiff and the Commercial Bank.

It was suggested that the debt claimed by the plaintiff was not subject to the attaching order, because the amount was not ascertained; that it was not a liquidated demand. I think there is nothing in the objection. The plaintiff's demand is, as appears from the endorsement on the writ, is liquidated in its nature. The price of the goods sold constitutes the demand, and it is not the less a liquidated demand, because the plaintiff may have paid part, or may have a right to set-off part. I apprehend it will be found, that any debt which a party may, by law, set-off

against his creditors, may be attached under the garnishee clauses. I say nothing as to what effect the attaching order may have on the defendant's claim to set-off.

I think this summons must be discharged, but without costs. The Commercial Bank, by delaying so long to act upon their attaching order, have, to some extent, afforded ground for this application; while the plaintiff (putting Sudden out of the question) should not have brought an action while the attaching order was still in force. As to Sudden, I do not see that I have authority to make any order upon him.

Summons discharged without costs.

THE QUEEN v. NORMAN SHIPMAN.

Crown—Recognizance to keep the peace—Venue.

The Crown has the right in a civil action to lay the venue in any County.

A proceeding by *sci. fa.* on a recognizance to keep the peace is a civil and not a criminal proceeding.

Where the recognizance is removed into one of the superior Courts at Toronto, the United Counties of York and Peel are the proper Counties in which to lay the venue.

In such a proceeding the venue cannot be changed without the consent of the Attorney-General.

As the declaration would be only a transcript of the writ no declaration need be either filed or served

It is not irregular to state the venue in the Nisi Prius record without having stated it in any previous proceeding.

(Chambers, 6th January, 1860)

A writ of *scire facias* was sued out, 19th September, 1859, against Norman Shipman, upon a recognizance entered into by him on the 3rd of February, 1859, in the county of Lanark, before a Justice of the Peace there, the condition of which was, that the cognizor should keep the peace and be of good behaviour towards Her Majesty the Queen and all her liege people, and especially towards Daniel Harvey Shipman, for the term of two years.—The recognizance was in £50.

The averment in this suit was, that the Defendant did on the 10th March, 1859, at &c., in the county of Lanark, assault one Joseph Eaton, a subject of her Majesty, by taking hold of his coat collar, and tearing the coat off his back, and throwing him down on the floor, and otherwise ill using him.

The writ of *scire facias* was made returnable on 3rd October, 1859, in the Queen's Bench.

There was no mention of any county in the margin of the writ, which was directed to the Sheriff of the United Counties of Lanark and Renfrew, within whose bailiwick the defendant, Shipman, resided.

The defendant appeared on 3rd October, a rule to plead was issued and served, and a plea filed on 19th November, denying the assault and the matters alleged, and issue was joined.

No declaration on *sci. fa.* was filed, but defendant pleaded to the writ.

Of these proceedings a record was made up by the Attorney-General, and entered for trial at the January Assizes (1860), for the Counties of York and Peel.

The defendant objected that this could not legally be done, because there is nothing in the proceedings to show a venue laid in York and Peel; and nothing to indicate any venue, except the direction of the writ of *sci. fa.* to the Sheriff of Lanark and Renfrew, and the mention of the county of Lanark in the body of the writ, as the place where the assault was committed, which is stated to have been a breach of the recognizance.

In the record that was entered for trial, the county of York was entered in the margin in the usual way of stating a venue.

The defendant contended that there was nothing to warrant the laying such venue in the record, and the carrying the case to trial in the county of York, of which notice had been given.

The defendant's attorney made an affidavit that the cause of action, if any, arose in the county of Lanark, and not in York and Peel, or elsewhere out of Lanark; that the defendant had a good defence to the action on the merits, but that it would be necessary for him to subpœna three witnesses from Lanark, &c., and should the proceedings be not set aside, a change of venue to Lanark was asked.

On the part of the Crown an affidavit was filed, stating that in May, 1859, a writ of *certiorari* was obtained for removing the record of recognizance into the Court of Queen's Bench, upon which the recognizance was returned and filed. That after this the writ of *sci. fa.* was issued, upon which such proceedings had taken place as have been already stated.

Richards, Q.C., for defendant.

Harrison, for the Crown.

The following authorities were referred to in the course of the argument. Bunbury, 236, 237, 261; Manning's Ex. Prac. 108, 197, 203 Com. Dig. Prerogative, D. 85. *Attorney General* v. *Smith*, 2 Price 113. *Rex* v. *Wiblin*, 2 C. & P. 10. *Philips* v. *Smith*, 2 Dowl. N. S. 688. *The King* v. *Cousins, et al*, Parker 54. *The King* v. *Justices, West Riding Yorkshire*, 7 A. & E. 383, Bac. Abr. "Surety to keep the peace, and Surety for good behaviour." King's case, Cro. Eliz. 86. *The King* v. *Heyward et al*, Cro. Car. 498.

ROBINSON, C. J.—It is not disputed that it is common in practice to plead as has been done here to the writ, without any declaration having been filed; and if a declaration had been filed, it would have been a mere transcript of the writ and appearance.

Then it is clear that the Crown in any civil proceeding may lay the venue in any county, and even in an information for intrusion, may lay it in another county than that in which the lands lie.

This being a civil proceeding to collect a debt upon recognizance, the venue not only might be properly laid in the county of York, but would in any such case regularly be laid there, the record of the recognizance having been brought hither by *certiorari*.

In proceedings at suit of the Crown, the venue is never changed at the instance of the defendant unless the Attorney General consent.

So it is reduced to the question whether the record has been unwarrantably made up with a venue in the margin "County of York."

It cannot be held to be unwarrantable, I think, upon the ground taken that the question to be tried is the truth of the alleged breach, in other words, whether an assault has been committed, and that that is in fact a criminal trial, and should be in the county where the assault is alleged to have taken place. The proceeding by *scire facias* is a civil proceeding on the recognizance, to collect a debt, in which the Crown may lay the venue in any county; and as to the inconvenience of trying the assault here, that may or not be the case; for it is alleged that the defendant has been convicted of such assault as is charged, and if so, the conviction can be as easily proved in one county as in another. If, however, the party had not been yet convicted, and the fact of his guilt were yet to be found on the issue raised by a jury on the *sci. fa.* as seems to have been done in some of the old cases reported, still, I think, that would not enable me to over rule the privilege of the Crown, broadly lain down, that in a civil action the Crown may lay the venue in any county. (Com. Dig. Prerogative D 85).

The only question then is whether the *nisi prius* record should be set aside, as having nothing to warrant the venue stated in the margin, viz., County of York, that is nothing in the previous proceedings.

I cannot hold that the writ was irregular for not stating a venue in the margin, and defendant has pleaded to it and issue is joined; to be tried where? is the question raised by the defendant.

It is not alleged in the writ that the recognizance has been removed into this court, but it is admitted that it has been, and until it had been the writ of *sci. fa.* could not properly have issued.

Now the record, which is the foundation of the proceedings being here, we must see that this is the proper venue, that has been inserted in the margin of the *nisi prius* record. Is the venue so stated repugnant to or unwarranted by the previous proceeding, that is the writ? I incline to think not. 1st.—Because the writ does not state, and need not state any county in the margin by way of venue. 2nd.—What is stated in the body of the writ, as to the place where the assault was committed, does not go to the foundation of the action, which is the recognizance; but to the failure to observe the condition, which if observed would have defeated the recognizance, just as if A. had entered into a bond to indemnify B. against any trespasses that might be committed by C. on land in a certain county. If such condition were broken in suing upon the bond, the venue, might be laid

anywhere, notwithstanding the cause of action against the trespasser, and for the trespass would have been local.

There may be room for doubt upon the question, but considering the venue is not matter of substance, in such a case, because the crown has a right to lay it in any county, and it is laid in a county, in the record, and that county the most proper one, the recognizance being a record now in this court, I am of opinion that the summons should be discharged.—Summons discharged.

RICHARD CUTHBERT v. JOHN STREET, SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF TIMOTHY STREET.

Notice of Trial—Computation of time—Consolidated Statutes U. C cap. 22 J. W.

In computing the eight days required for Notice of Trial the Commission Day of the Assizes must be excluded.

(January 9th, 1860.)

This was an application to set aside the notice of trial in this cause served on Thursday the 29th December, for the Toronto Assizes held on Thursday the 6th January, 1860, on the ground that such notice did not give eight days pursuant to the statute.

The motion was supported by *Harrison* on the part of the defendant and argued on the part of plaintiff by *Beaty*, who referred to the practice under ch. 1, 2nd Geo. IV, secs. 22 & 36, as establishing a rule in cases like the present under precisely similar provisions.

Under the first of these sections, it was provided that, the first and last days of all periods of time limited by that Act, or thereafter to be limited by any rules or orders of Court, for the regulation of practice should be inclusive and the 36th section declared, "that no indictment, information, or cause whatsoever shall be tried at Nisi Prius, before any Judge or Justice of Assize, or Nisi Prius in any district of this Province, unless notice of trial in writing has been given *at least eight days before such intended trial.*

McLEAN, J.—Under that Act the practice certainly did prevail to give notice of trial so that computing the day of service of the notice and the first day of the Assizes eight days would be made up, but I cannot think that such a practice was correct or sanctioned by the Statute, and I am not at present aware of any judicial decision by which it is sustained. The statute clearly intended that a defendant at Nisi Prius should have at least eight days notice of trial and the number of days ought not to be abridged by making the first and last inclusive. It is I think also clear that at least eight days notice were required to be given *before* an *intended trial.*

Now if notice were given on a Monday of an intention to try a cause on the Monday following, the first day of the Assize, that could not be a notice of eight days *before* the *intended* trial for the tention to *try on*, the first day is manifested and a party must be entitled to the *whole* of that day to make up the number of days allowed for preparing a defence.

The Common Law Procedure Act 1856, sec. 146, made eight days notice of Trial or Assessment sufficient in all cases whether at Bar or at Nisi Prius. A change in the computation of time was introduced by this provision and continued until the Consolidated Statutes came into operation on the 5th of December last. Up to that time the rule adopted was to make the first day inclusive and the last exclusive or *vice versa*, and in the cases of *Frooman* v. *Stuart*, 2nd U. C. Prac. Rep. 124 & 126, and *Buffalo and Lake Huron Railway Company* v. *Brookshanks*, before me in the Practice Court as well as in a case before Sir J. B. Robinson in Chambers, v. *Dickson*, 1 U. C. Prac. Rep. 366, proceedings were set aside for irregularity, because that mode of computation of time in giving notice of trial or demanding plea was departed from. Now by the 21st chapter of the Consolidated Statutes sec. 201, it is declared that eight days notice of trial or of Assessment, the first and last days being inclusive shall be given and shall be sufficient in all cases whether at Bar, or at Nisi Prius, or at the County Courts; thus introducing again the period which was established under the 36 section of 2nd Geo IV, ch. 1. The question arising now is whether the first day of the Assizes can be reckoned as one of the eight days, and whether the practice which formerly prevailed in that respect shall be revived and continued hereafter.

I am clearly of opinion that the practice was wrong and ought not to be again introduced and in this opinion I am confirmed by *the views of a number of my brother judges* with whom I have consulted on the subject. By the old mode of computing time under ch. 1, 2nd Geo. IV, it was in the power of a plaintiff to abridge the time for notice of trial, so as in fact to give little more than six days; if notice were served at 9 or 10 o'clock at night on Monday for trial on the Monday following, and a cause were brought on at ten o'clock on the first day of the Assizes as might be the case, very little more than six days time would be allowed to prepare for trial, including the Sunday before the Assizes. A practice admitting of such abuse ought not I think to prevail, and though in computing the time, the first and last days must be inclusive, that must be taken to include the day of service and the day before the the Assizes if necessary to make up eight days; so that in no case can the first day of the Assizes be reckoned as one of the days which may be included in 8 days notice of trial.

The decision in this case may cause some inconvenience, but I think it better that a rule should be established by which every defendant shall be entitled to what the law intended to allow him, viz., eight days notice, before a suit can be brought to trial against him.

On these grounds I think the notice of trial in this case must be set aside, but as the point is new and the plaintiff's attorney might reasonably expect that the practice under the former act of Geo. IV, should again be continued, I make the summons absolute without costs.—Summons absolute without costs.

IN RE JAMES FRANCIS v. JAMES BOULTON.

Attorneys bill—Delivery and Taxation thereof—Costs of application.

An Attorney may be ordered to deliver his bill against his client though the same may have previously been fully settled and to give credit therewith for all monies received by him

When an order has been properly made for an attorney to deliver his bill and he makes default, he will have to pay the cost of such order in any event.

When after a claim has been settled this client applies to have the attorney's bill taxed, and nothing is found due to him in such taxation he will have to pay the costs of the application.

(November, 1859.)

This was a summons calling on Mr. Boulton to shew cause why he should not deliver to applicant his bill of costs to be taxed, and all credits for money received by him for applicant within one week.

It appeared Mr. Boulton had been employed by Francis as his attorney in these suits, one against Andrew Quinton, which was settled and the costs paid in another, against Hugh Johnston and Horatio Johnston, in which after the plaintiff Francis succeeded he arranged the matter with the defendants, and became liable himself to settle Mr. Boulton's costs, and the third against one Watson, in which Mr. Boulton collected upwards of £25.

The application related to these two last mentioned suits, and the object was to obtain the bill in the suit *Francis* v. *Johnston et al*, in order to have it taxed and to ascertain how much Francis ought to claim in the suit against Watson.

It appeared also that in the suit against the Johnstons, Francis had paid Mr. Boulton a retainer of $10.

One Cool made an affidavit that he was acting under a power of attorney from Francis in this matter. In his affidavit of 27th September 1859, Mr. Boulton says, he has received the balance in suit of *Francis* v. *Watson*, of £25 or thereabouts, which he is ready to account for.

On 27th September, 1859, order that Mr. Boulton should deliver his bill of costs in the suit *Francis* v. *Johnston*, and give all credits within a week from the service of the order. This order was served on the same day.

On 17th October, 1859, there was a summons calling on Mr. Boulton to shew cause why he should not pay Francis £26 16s. collected by him from Watson; and the costs of the application. This was granted on an affidavit of the Sheriff of Halton, that on a writ of execution in the cause *Francis* v. *Watson*, there was collected £26 16s. debt, and £12 18s. costs, taxed, writ and interest which money on the 7th May, 1859, was paid to Mr. Boulton, and an affidavit of the demand of the money and of the service of the order for the delivering of the bill and that no bill had been delivered.

On 18th October, 1859. Mr. Boulton filed an affidavit made by one Manasset Leeson, that he Leeson had a demand against Francis, due on a mortgage, that Francis gave him an order on Mr. Boulton for money collected on the notes mentioned in a receipt (produced) 20th December, 1856, note of Thomas Fallow and Joseph Fallow, for £31 5s. but to sue one Wm. Johnston for a horse, this note having been given on representation that it was good; also Wm. Watson's note for £24 10s. for collection; also Andrew McQuenalan's note for £26 5s. for collection. That Leeson gave the order to Mr. Boulton, who accepted the same, and agreed to pay him the balance after deducting certain costs due him by Francis, that he (Leeson) found there was only a balance of some $60 due on the whole transaction, which sum he (Leeson) arranged with Mr. Boulton, in fu . of the order and agreement with Francis, that Francis seems desirous of getting the money into his own hands to his (Leeson's) injury, and that the present proceeding is to his injury, and contrary to the agreement with Francis.

On 24th October, 1859, affidavit of John Cool, that Francis is indebted to him and therefore gave him a power of attorney dated 25th August, 1859, to receive all monies due to him by Mr. Boulton, for collection by him on Francis' account.

On 28th October, 1859, affidavit by Charles Durand, of Mr. Boulton's admission of liability to pay the balance of the money collected from Watson, to Francis, deducting the costs due in *Francis* v. *Johnston*, the admission being made after the making *of the order of 29th September last, and no allusion being then* made to any liability to pay Leeson, and explaining that Francis residence in the Township of Normanby, in the County of Grey, renders it difficult to have communication with him.

On 29th October. 1859, there was an order that Mr. Boulton should pay to Francis £26 16s. collected from Watson, and the costs of the application subject to any deduction for the bill of costs ordered by the order of 28th September last, to be taxed provided Mr. Boulton within three days from the date (29th Oct.,) renderd and tax his bill.

On 1st November, 1859, affidavit of Mr. Boulton, that when Durand first applied to him in this matter, he told him Francis had given Leeson an order for the balance due him. That at the time of the first application he did not recollect that he (Mr. Boulton) had accepted that order. That on seeing Leeson he (Mr. Boulton) arranged the amount due to Francis, as sworn to by Leeson. That he was engaged at the assizes, when the case came on and the order of 29th October, was made.

On the application of Mr Boulton, Mr. Justice Burns rescinded the order of 29th October, leaving both parties to procure further affidavits.

On 14th November, 1858, affidavit of Alexander F. Scott, that George Wright, holds a mortgage on a lot of land in Brampton, given by *Alexander A. Anderson et ux to secure £93 9s. 10d* with interest. That Anderson had bought the lot of one Elliott, and gave a mortgage to him, and then Francis bought of Anderson, subject to the said mortgages that he (Scott) was not aware that Manasset Leeson, has or had any claim on the lot or the mortgage. That on the 22nd April, 1858, £53 4s. 8d. was paid on the mortgage to Wright, to Mr. Scott by Francis, and was endorsed thereon, and that no other payment was made.

On 17th November, 1859. affidavit of Manasset Leeson, that he was paid the balance due Francis, by Mr. Boulton, being $60 by the transfer of a note of one Thomas Donaldson, for that sum, which he knew to be good for the amount, and has given credit to Francis for the amount on a bill due by Francis, on mortgage which he was to pay on a lot of land, which he had agreed to discharge from incumbrances, and which he had sold to Leeson. That he gave the writing from Francis to Mr. Boulton, as well as the original receipt of Mr. Boulton, when he settled the same with him.*

On 19th Nov. 1859. affidavit of Mr. Boulton, that this order was an open letter from Francis, and handed to him by Leeson, when he produced "my receipt to said Francis last spring, as I think," that this open letter was lost having been treated as unimportant when Leeson delivered up Mr. Boulton's receipt.

Draper, C. J.—In the absence of any affidavit from Francis to *the contrary, I must presume that he did give Leeson such* an order or open letter.

It would have been much more satisfactory if it had been distinctly stated when this order was delivered to Mr. Boulton; Leeson says nothing as to the time, Mr. Boulton only says it was last spring, *as he thinks*. It would also have been satisfactory to know when the arrangement between Leeson and Mr. Boulton, and the transfer of Donaldson's note took place. It might have been stated whether it was before or after the 24th September last. Any such arrangement *after* that summons, would be open to a very different construction, as to motives from what it might receive if made before. But the balance between £26 16s. collected as debt from Watson, with subsequent interest from the date of the endorsement on the execution, and the payment to the Sheriff; and the sum due Mr. Boulton, for costs in the suit against Johnston, has not yet been ascertained

I gather from the affidavit of Leeson, and Mr. Boulton, that it is intended to be urged that Leeson settled the balance at $60. And therefore Francis is concluded. I see no authority for Leeson to do more than obtain from Mr. Boulton the sum due by him to Francis, but not to compromise or give up any part of Francis's claim whatever it might be. Therefore this payment to Leeson, if good in other respects, does not conclude Francis.

I therefore, 1st. Order that Mr. Boulton render his bill in pursuance of the order of 27th September last, giving credit for the full sum of debt and interest, received by him in the suit of *Francis* v. *Watson*, within a week, and that as he is in default in not having obeyed that order he pay the costs thereof.

2nd I order that such bill be taxed, and that if there is a balance after allowing to Mr. Boulton, the amount of that bill and the $60 paid to Leeson, that he do within a week after such taxation and demand of such balance, pay the same and the costs of this application to Francis or his lawful attorney.

3rd. That Mr. Boulton do within one week produce an affidavit shewing whether the arrangement with Leeson, and transfer of Donaldson's note was before or after the summons of 24th September, 1859. If before,—and if there be no balance due Francis as stated in the preceding paragraph then the summons to be discharged with costs.

* This order or writing by Francis on *Mr. Boulton, in favor of Leeson, was not* produced.

Commercial Bank of Canada v. Lee and McCulloch.

Issue Book—Notice of trial—Irregularity—Setting aside.

A defendant who files one plea, and by mistake serves a different one, cannot be heard to object to the issue book, on the ground that it does not contain a true copy of the plea filed.

Notice of trial in and "for the County of York" and not "United Counties of York and Peel," is a mere irregularity which may be waived.

Draper, C. J.—This is an application to set aside the notice of trial, for irregularity.

The defendant, by a mistake which was explained (though not on affidavit), filed a plea at London, and served a different plea on the agent of the plaintiffs' attorney at Toronto. The defendants attorney resides at Stratford. He employed an agent at London to file appearance there, as the writ was issued from the office there, but instructed (in order to throw the plaintiffs over the Winter Assizes) that agent not to accept service of any papers.

In consequence, the plaintiffs' attorney sent a message specially to Stratford, and served his declaration. In the same spirit, the defendants' attorney employed the same agent to file a plea in London, but instructed that agent not to serve a copy on the plaintiffs' attorney, who resides in London, and whose clerk was present when the plea was filed. He sends a copy to serve on the agent of the plaintiffs' attorney in Toronto. The plaintiffs' attorney, without waiting to be served, makes up his issue book, and from the declaration, and from the plea already filed, and immediately sends to Stratford to have the joinder of the issue, issue book, and the notice of trial, served on defendants' attorney, all which was done. It is now objected that the issue book is irregular, because it was served before a copy of the plea was served. On examining the papers, it appears that a copy of the plea filed, never was served at all. As I understood the explanation offered

on behalf of the defendants' attorney, the clerk of his agent at London, mislaid or lost the plea sent to him, and understanding it to be one of payment, drew up and filed a common plea of payment, as appears on the issue book. But the plea intended to be filed, was only pleaded to part of the cause of action, and the copy served in Toronto, no doubt a true copy of that sent to London to be filed, was a copy of the one filed. Misled by this, the defendants' attorney has made a statement in his affidavit which is untrue, for he asserts that a true copy of the plea filed is annexed to his affidavit, which is not the case, and the summons was granted among other objections, because the issue book did not contain a copy of the plea.

It is obvious that this is a mere error, but it is unpleasant to swear to an untruth even inadvertently, and in this instance, it ought to be the more unpleasant, because it arises from attempting what I must characterize as a disingenious and shuffling practice, in order unfairly to throw the plaintiffs over the Winter Assizes. This objection was, of course, abandoned, when the explanation was given, and I have no difficulty in overruling the other, namely, that the issue book was made up and served with notice of trial, before the plea was delivered. There was no regular delivering of the plea at all, and in effect, the defendants seek to derive an advantage from their own irregular proceeding. I think the plaintiffs might waive service of a copy of the plea, upon the principle *Quilibet potest renunciare juri pro se introducto*, and that the proceeding was regular.

It is further objected, that the notice of trial is wrong, because it takes no notice of the defendant Lee, who has suffered judgment to go by default. Lee is sued as maker, and McCulloch as endorser, and I do not see on what ground McCulloch can claim to regulate the plaintiff's proceedings against Lee, though they are joined in the same action.

Then the notice of trial is objected to, because it is thus worded, after the Court and cause, "Take notice of trial in this cause, for the next Assizes, to be holden at the City of Toronto, in and for the County of York, on the fifth day of January, A. D. 1860. Yours, &c." The objection is, that the Assizes are held in and for the *United Counties of York and Peel.*

It appears that this notice was served at the same time as the issue book, in which the venue in the margin is correctly laid. The cause is properly intitled, and I think it cannot be said the defendants' attorney was or could be misled, and his affidavit sets up no such a pretence. It unequivocally informs him, the plaintiffs will proceed to trial at a certain time, viz., the 5th January, 1860; and at a certain place, viz., the City of Toronto, which is in the County of York. I think the notice would have been good, if the words "in and for the County of York," were left out, and therefore am not disposed to hold that their insertion can vitiate.

Just at the close of my hearing the parties, it was suggested that there was another irregularity, namely, that the record had been entered for trial pending this summons, which operated to stay the proceedings, and I was asked to consider that point also. At first I was disposed to do so. But the parties seem to me to differ somewhat as to the enlargment of the summons. The minute of enlargment signed by my brother Hagarty, seems open to the construction that such objection comes too late. I shall therefore leave it to be moved, if the defendants' attorney thinks fit to do so. Possibly he may consider that it will be quite as creditable to himself, after all that has appeared in this matter, not to bring up a doubtful question, for if the enlargment was at his instance, and the conditions of it for his advantage, he is not very likely to succeed.

At all events, I think it better to dispose of this summons as it stands, and I have no hesitation in discharging it with costs.

GENERAL CORRESPONDENCE.

HAMILTON, January 3, 1859.

TO THE EDITORS OF THE LAW JOURNAL.

Municipal Law—Disqualification.

A question agitates this City, as I presume it will other places, *i. e.*, whether, or not, a person holding a license from or under a Corporation, by himself or partner, other than a Saloon or Innkeeper, can be considered duly qualified under our Statute, for the office of Alderman or Councilman?

It is thought strange here, that such classes are permitted to enter our Council, for we have invariably found them to legislate for their own interests. Of course they have a voice and a vote in fixing the amount of their own licenses, and may benefit themselves in many other ways. I could give you instances, but do not wish to be personal. Your answer to the above question, will suit all the purposes of my enquiry, and may be of use to more than one place or person in the Province.

Yours &c.,
"SCRUTENS."

[It is impossible for us to answer the question put by our correspondent, without understanding more fully than he explains, the nature of the license to which he refers. Some licenses from a Municipal Corporation, are in the nature of contracts or dependent upon contracts. A person holding such a license, would be disqualified as "having by himself or his partner, an interest in a contract with the Corporation."—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. C. BECKH v. PAGE AND ANOTHER. *June 21st.*

Sale of goods—Mercantile contract, construction of—"Or any less number that may arrive"—Bales of hides.

The plaintiff sold to the defendants certain bales of hides described in the contract as—

"P. B. 326	425	100	bales containing	15,600 lbs.
H. B. 1	15	15	" "	2,810 "

(or any less number that may arrive.) East India hides said to be very good Patna, shipped per "Ontario" Calcutta to Hamburg, and to be delivered at 11½d per lb. round, but the wrappers to be charged at 8d per lb. The bales were formed of hides wrapped up in hides. The ship and cargo having met with sea damage, the master put back to Calcutta and eighteen of the bales in question which had been damaged were sold, the remaining ninety seven arrived at the port of discharge, but the defendants refused to accept them.

In an action for not accepting.

Held, (affirming the judgment of the Common Pleas), that the words "or any less number that may arrive," applied equally to the number of bales and to the number of hides, and therefore that the defendants were liable though the number of bales tendered was short of the precise number mentioned in the contract.

Q. B. BRUNSDON v. ALLARD. *June 9th.*

Attorney's lien for costs—Right of the parties to compromise.

If the parties to an action enter into a compromise, the effect of which is to deprive the plaintiff's attorney of his lien for costs, the court will not set it aside, unless it be collusively entered into with the express object of defeating the attorney's lien.

Semble, that if a case for the interference of the court be made out, the proper way of proceeding is to apply to the court to compel the defendant to pay the attorney his costs.

EX. C. JACKSON AND ANOTHER v. FOSTER. *June 18th.*

Insurance—Condition that life policy shall be void in the event of suicide, unless third party have acquired a bonâ fide interest for valuable consideration—Assignment by operation of law—Bankruptcy.

B a merchant at Valparaiso, insured his life in England under a policy subject to this condition:—This policy will be void if the life assured die by his own hands or the hands of justice by duelling or suicide, but if any third party have acquired a *bonâ fide* interest therein by assignment or by legal or equitable lien for a valuable consideration or as security for money, the assurance thereby effected shall nevertheless to the extent of such interest be valid and of full effect. On the 9th of July 1856, while the policy was running, B became bankrupt and according to the law of Valparaiso his property became vested by operation of law in the escribano or notary of the Consulado Court. On the 14th July B committed suicide. On the 15th July a meeting of creditors was held and the plaintiffs were appointed assignees, upon which the property of B became vested in them.

Action having been brought to recover the amount insured.

Held, (affirming the judgment of the Queen's Bench,) that the plaintiffs were not entitled to recover as they were not such third parties as the exception in the condition was intended to refer to.

COCKBURN, C. J.—The bankrupts assignees are not a third party, they only represent the bankrupt's estate as it was at the time of bankruptcy and not the interest of a third party.

EX. CARTER v. CRICK. *May*, 7.

Warranty—Sale of goods—Representation.

Where the plaintiff hearing from a third person that the defendant had some seed barley for sale, went to him and saw a sample of it, and upon the defendant saying, "it is very good, or else I would not sell it to you," the defendant's clerk at the same time writing to the vendor of the defendant in the plaintiffs presence, in these words, "I shall be glad to know what sort it is, as it would do very well for seed," bought sixty-six quarters of it, and it turned out to be barley of an inferior kind, not usually grown.

Held, that these representations did not amount to a warranty that the barley was of any particular kind.

EX. COBBETT v. THE GENERAL STEAM NAVIGATION CO. *May*, 3.

Costs—County Courts Act—Concurrent jurisdiction—Dwelling by Corporation.

A Corporation does not dwell, within the meaning of the 128th section 9 & 10 Vic., c. 95, at a place other than their chief office, where they carry on business by means of an agent merely.

EX. CORNISH v. ABINGTON. *April*, 29.

Evidence—Estopped by conduct—Interference from silence.

Plaintiff's foreman sold goods of his master to the defendant, representing when he sold them that he was dealing on his own account, and selling the goods as principal. The sales were entered in the plaintiff's books as made to the defendant, and invoices were sent by the plaintiff to the defendant, in which the defendant was charged with the goods to the plaintiff. The foreman explained to the defendant that it was done by mistake, as he, the foreman and not the defendant, ought to have been charged in the invoice, and the defendant gave the foreman bills for the value of the goods, and afterwards settled the amount on account with him.

Held, that the plaintiff was entitled to recover the price of the goods in an action for goods sold and delivered, on the ground that the defendant had, as found by the jury, so conducted himself as naturally to induce a belief in the plaintiff's mind that the defendant was purchasing the goods of him.

Q. B. FRANCIS v. HAWKESLEY. *May*, 30.

Statute of limitation—Acknowledgment in writing.

A party chargeable with a debt wrote a letter, wherein he states an account, making the debt one of the items against himself, and claiming a balance in his own favor, and offered to make an arrangement which was not accepted.

Held, that the letter was not an acknowledgment within Lord Tenterden's Act.

C. P. ANN LUCAAN v. KIRKMAN. *April*, 21.

Promissory note—Effect of putting name on back of note by person, other than by payee or indorsee—Notice of dishonour—Waiver of.

A being indebted to B makes a promissory note, payable to the order of B, which B agrees to take on having C's name endorsed by C on the back of the note. Thereupon, and before any endorsement by B, C writes his name on the back of the note. This, alone does not amount to an authority to B the payee, to put his name on the back of the note above C's name, so as to constitute C an indorsee, and so liable as a second indorser.

Quære.—What would the effect have been if C had given such authority expressly.

Q. B. MACDONALD ET AL., v. LONGBOLTON *May*, 27.

Written contract—Evidence to apply—Effect of that evidence—Excess

The defendant, a wool buyer, purchased of the defendants, sheep-farmers, a quantity of wool described simply as "your wool." A previous conversation had taken place between the parties in which the plaintiff had stated that beside their own clip of wool, they had purchased the clips of four or five neighbouring farmers whose names were specified, and that altogether the quantity amounted to "2300 stones, a hundred stones more or less."

Held, in an action against the defendants for not accepting the wool, that evidence of this conversation was admissible to explain what was meant by the term "your wool."

Held also, per CAMPBELL, C. J., and ERLE, J.,—that this conversation was not thereby made a part of the contract so that the quantity specified became an ingredient in the contract and that the contract was performed by the plaintiffs sending all the wool which they then had amounting to 2,595 stones.

WIGHTMAN, J.,—*dissentiente.*

Semble, per ERLE, J.,—that even if the quantity mentioned was a part of the contract that it was a question for the jury whether or not the excess was unreasonable.

EX. PRICE v. WORWOOD. *April* 30

Ejectment—Forfeiture—Waiver of forfeiture—Payment of rent—Evidence of breach of covenant to insure—Evidence of insufficient distress

A tenant admitted twice before the commencement of an action of ejectment, under a condition for re-entry on failure to keep the premises insured, that he had not insured the premises. The last admission was about a month before the action was brought, and he then said he did not insure for want of money. The day previous to the bringing of the action, the landlord received rent from an under tenant.

Held, that there was evidence that the premises were uninsured after the receipt of the rent.

Semble, that the receipt of the rent was no waiver of the previous forfeiture.

Evidence of a search of the ground floor only, where there are rooms in an upper floor is not sufficient for the purpose of showing that their are not goods on the premises sufficient to satisfy arrears of rent.

EX. WRIGHT v. MILLS. *May* 12.

Practice—Signing judgment after death of defendant on the same day.

Where judgment was signed on the same day that the defendant died, the defendant dying at half past nine in the morning, and the judgment being signed at eleven, the hour at which the office opened.

Held, on the authority of *Regina* v. *Edwards*, 9 Ex 32, that the signing judgment being a judicial act took precedence of all other acts done on the same day, and was valid.

C. P. *May*, 11, 26.

MARSHALL v. THE BISHOP OF EXETER AND ANOTHER.

Common Law Procedure Act 1852, *secs.* 80, *and* 81.

Sections 80 and 81 of the Common Law Procedure Act 1852, apply to pleadings in *Quare impedit.*

L. C. CROUCH v. WALLER. *June* 1.

Separation deed—Public policy.

A deed of separation and a deed of settlement were executed in pursuance of an award. The former contained some provisions as to the custody of the children, contrary to public policy, and the master of the rolls being of opinion that both deeds constituted one transaction, held both void.

On appeal, *Held*, that though both sprung out of the same circumstances, and were executed in pursuance of the same award, the deed of settlement was independent and that an annuity under it was absolutely payable.

CHANCERY.

V. C. S. IN RE GROVE'S TRUSTS. *June* 4.

Will—Construction—Gift of annuity for separate use.

A testator by his will requested his executors to invest in Government securities sufficient money in their names to produce £40 a year and pay the same quarterly, to A for her separate use, without power of anticipation.

Held, that A. was not entitled to have the corpus of the fund producing the annuity transferred to her.

V. C. IN RE MARSDEN'S TRUSTS. *June* 4.

Power—Fraudulent execution—Married women.

Where a discretionary power given to a married woman to appoint among her children, is executed by appointing the whole to one, and there is evidence to prove that such appointment was made upon the arrangement that such child should hand over half the sum appointed to her father, and give him a life-interest in the remainder; such appointment is void as a fraud on the power, although the arrangement is never communicated to the appointee.

Where an appointment is valid on the face of it, if it can be proved that the exercise of the power is not an honest one, but tending to defeat the object, the Court will declare it to be void as a fraud upon the power.

Where an appointment is in fraud of a power, there is an important distinction between the case of defeating the objects of the power and those to take in failure of those objects.

REVIEW.

THE LOWER CANADA LAW ALMANAC FOR 1860. Compiled by George Futvoye, Advocate. Printed and published by authority, by John Lovell, Montreal. Price, 2s. 6d.

This appears to us to be a very useful compilation, and furnished at a moderate price. It is something similar to the Sheet Almanac which we issue yearly for Upper Canada.

The Law Almanac for Lower Canada is printed and published "by authority." What does this mean? It cannot mean that either Mr. Futvoye or Mr. Lovell require the permission of Government, the one to compile or the other to publish the Sheet Almanac. We are sufficiently rebellious to publish a Law Sheet Almanac for Upper Canada without any such permission.

We fancy the expression, "by authority," must have a different meaning. Is it that the Government aids with money the Lower Canada publication? If so, why the charge of 2s. 6d. per copy? We presume the Government has no desire to make a profit on such a puny enterprize.

We have heard that the Government aid the Lower Canada Law Reports, and it is not improbable that the Lower Canada Sheet Almanac receives some substantial crumbs of comfort. If this surmise be correct, we find no fault with the Government for its connexion with these legal publications. We think it the duty of Government to succor publications of the kind, but think also that kindred publications in Upper Canada should not be neglected.

It is admitted everywhere that the *U. C. Law Journal* has done more to extend the usefulness of local courts, than any other influence at work in Upper Canada, and yet we have never yet received one sixpence of Government aid.

THE ATLANTIC MONTHLY. Boston: Ticknor & Fields.

The number for February, just received, contains the following:—Counting and Measuring; My Last Love, A Shetland Shawl; Riba de Roma; The Amber Gods; The Poets' Friends; The Memorial of A. B.; Some Account of a Visionary; The Truce of Piscatagua; The Maroons of Jamaica; The Professor's Story; Mexico.

The article, "Counting and Measuring," is deservedly placed first in the number. It is both learned and interesting. Both counting and measuring are arts, and the gradual improvement of the arts, as the mind of man expanded, is beautifully described. This paper is evidently the production of a scholar. Of the light articles, we have perused "My Last Love" and "Some Account of a Visionary." Both are well written, and well worth reading. Other papers in the same number we have no doubt are as much so, but we have not had leizure to read them.

GODEY'S LADY'S BOOK. Philadelphia: Louis A. Godey.

In this, as in each number, our fair friends will find much to instruct—much to delight. Lessons are given both as to "the ornamental" and "useful."

APPOINTMENTS TO OFFICE, &c.

JUDGE.

JOHN BOYD, of the City of Toronto, Esquire, Barrister at Law, to be Junior Judge of the County Court, in and for the *United Counties of York and Peel.*—(Gazetted 17th December, 1859.)

REGISTRARS.

The Honorable GEORGE STRANGE BOULTON, to be Registrar for the West Riding of Northumberland.—(Gazetted 10th December, 1859.)

JOHN M GROVER, Esquire, to be Registrar for the East Riding of Northumberland.—(Gazetted 10th December, 1859.)

GEORGE C. WARD, Esquire, to be Registrar for the East Riding of Durham

ROBERT ARMOUR, Esquire, to be Registrar for the West Riding of Durham.

JAMES BELL, Esquire, to be Registrar for the South Riding of Lanark

ORMOND JONES, Esquire, to be Registrar for the North Riding of Lanark.—(Gazetted 10th December, 1859.)

CORONERS.

WILLIAM CREELMAN, Esquire, Associate Coroner for the City of Toronto.—(Gazetted 10th December, 1859.)

DANIEL YOUNG, Esquire, M. D., Associate Coroner, County of Hastings.—(Gazetted, 16th December, 1859.)

NOTARIES PUBLIC.

HUSON WILLIAM MUNRO MURRAY, of Toronto, Esquire, Barrister at Law, to be a Notary Public in Upper Canada.—(Gazetted 10th December, 1859.)

WILLIAM HENRY WILKINSON, of Napanee, Esquire, Attorney at Law, to be a Notary Public in Upper Canada.—(Gazetted 10th December, 1859.)

JOHN WILLIAM DUNKLEE, of Clifton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 17th December, 1859.)

JAMES R. COTTER, of Dunnville, Esquire, to be a Public Notary in Upper Canada.—(Gazetted 31st December, 1859.)

TO CORRESPONDENTS.

PAUL DUNN, H. PLITZ.—Under "*Division Courts.*"

SCRUTENS.—Under "General Correspondence."

STUDIOSUS.—Required your name. No notice taken of anonymous communications.