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DIARY FOR MARCH.

1 Tuesday ..... *St. David.*
6. SUNDAY..... *4th Sunday in Lent.*
7. Monday ..... Recorder's Court sits
8 Tuesday ..... Quarter Sessions and County Court Sittings in each County.
10. Thursday ... Sittings Court of Error and Appeal.
13. SUNDAY .. *5th Sunday in Lent.*
14. Monday ..... Last day for service York and Peel.
17. Thursday ... *St. Patrick.*
20. SUNDAY ..... *6th Sunday in Lent.*
24. Thursday .. Declare for York and Peel.
25 Friday ..... *Good Friday. Annun. V. M.* LADY DAY.
27 SUNDAY ..... *Easter Day.*

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

MARCH, 1864.

THE CORONER NUISANCE.

We do not assert that all coroners are nuisances; but we do assert that the existence of a legion of hungry coroners, especially in our cities and towns, is a public nuisance.

If a stranger to our country were to judge of the number of violent deaths that take place in our midst from the number of coroners that exist among us, he would in all probability come to the conclusion that about one half of the inhabitants of Canada are murderers, and the remaining half intending suicides.

But at present we are not so much concerned with our appearance in the eyes of the world, as with the evil itself which we look upon as a social nuisance, and for the removal or abatement of which some remedy must before long be applied.

If there is one thing more than another that a statesman ought to see enforced, it is respect for the law and its administration. Bring the law or its administration into contempt, and you weaken if not destroy the bonds of society. Now, we know of nothing which has such a tendency to bring the administration of law into contempt, as the prevailing system of appointing coroners, and the conduct of the men who receive these appointments.

A coroner is a judge He should therefore possess the cardinal qualities of a judge—learning, wisdom, and dignity. Can it be said that the coroners of the present day in Canada possess these qualities? Do the successive governments that from time to time make these appointments, ever look to the ability or capacity of the man, before giving him the office of coroner? We fear not. If we judge the tree by its fruits, we should say not. Who receive the appointments in our cities and towns? Generally medical men, with little or no practice, whose only aim is to make money out of the office. Men of this class are not the most likely to be fitted to discharge, with satisfaction to the public, the important duties of this important office. And how do they discharge the duties? A man is found dead. Suspicion of death by unnatural means exists. The fact of the death becomes known. Forthwith a batch of coroners, like so many vultures, make for the carrion. When they reach the place where the body is laid out, a wrangle for priority ensues, which not merely disgraces the office, but shocks our feelings of common humanity. Why is this? It is because of the shameless desire of "Her Majesty's coroners" to make money out of their honorable office, and the determination at all hazards to do so. The picture is revolting. Is it founded on fact? We need not cast back in our memory for cases that unfortunately are too numerous within the memory of us all. Let us take the last one.

Greenwood, a prisoner under sentence of death in the common gaol at Toronto, on the night preceding the day appointed for his execution, put an end to his life by his own hands. He did so shortly before midnight. Coroner Scott is the first in "at the death." He reaches the gaol shortly after the death, and some time before the physician of the gaol. He is, however, *chassèed.* Though apparently quite acceptable to the gaoler, he is not accepted by the sheriff. The sheriff called upon Dr. Hallowell, and requested him to hold the inquest. He, early in the morning (about 2 o'clock) proceeded to one of the police stations; and while making out his warrant for the summoning of a jury, Dr. Riddel, who was neither acceptable to the gaoler nor accepted by the sheriff, handed in his warrant. The rivals thereupon, in the police station, had a wrangle, which ended in a wrangle (without more), probably owing to the presence of the police. Dr. Hallowell discovered some flaw in Dr. Riddell's warrant, and therefore affected to treat it as a nullity; but Dr. Riddel, notwithstanding, bright and early proceeded to the gaol to see the body, and was denied access to it. After some altercation with the gaol officials, he left. Next we have Dr. Hallowell holding the inquest, and Dr. Riddel, for some reason or other, present also at the inquest. What took place afterwards may be gathered from the report of the *Globe:*

* * * * * * *

At this stage of the proceedings, some of the jurymen expressed a wish to have Coroner Riddel placed in the witness-box, as it was

rumoured through the city that he had made some remarks with regard to the state of the turnkeys on the night of the suicide.

Coroner HALLOWELL remarked, that if Dr. Riddel had anything to state, he would be happy to take it, provided the jury desired it.

Dr. RIDDEL said he had nothing to say that could throw any light on the question before the jury; and, at all events, from the position he occupied as associate coroner, he thought his evidence would not be admissible. He had taken legal advice on the matter, and was informed that he need not give evidence.

Some of the jury opposed the taking of the doctor's evidence; the majority, however, insisted that it should be taken, in order that the rumours that were in circulation might be cleared up.

Dr. RIDDEL repeated, that as associate coroner, he did not think he should give evidence in the case.

Dr. HALLOWELL said that Dr. Riddell was not associated with him, and he would take his evidence if the jury desired it.

The jury expressed a wish that Dr. Riddel should be examined.

Dr. RIDDEL—I know nothing about the case; but if the jury desire it, I will answer whatever questions they choose to ask me.

The jury did desire it, and Dr. Riddel was accordingly sworn.

Dr. HALLOWELL—Now we will hear what you have to say.

Dr. RIDDEL—Before I proceed, I must say that I do not think that the Coroner has treated me fairly in stating that I am not associate coroner, when he asked me to take a seat by his side and assist him. And I ask him did he not do so?

Dr. HALLOWELL—I will not answer any questions of that kind.

Dr. RIDDEL—Then you should not state what you know to be untrue.

Dr. HALLOWELL (rising and addressing the policeman)—Remove this person; remove him. I will not take his evidence.

SEVERAL OF THE JURY—You must; you must; he is sworn.

The policeman moved around, and approached Dr. Riddel.

Dr. HALLOWELL—I will not be insulted in my own court.

Dr. RIDDEL—I did not wish to insult you. You know you asked me to assist you.

Dr. HALLOWELL—You have insulted me. Remove him (to policeman).

POLICEMAN—Doctor, will you please accompany me.

Dr. RIDDEL—I did not wish to insult you; I merely wished to place myself right before the jury.

Dr. HALLOWELL—Well, you have insulted me, and you must apologise to the court.

Dr. RIDDEL—I do not think I said anything improper; but if I did, I am sorry for it.

Dr. HALLOWELL—Very well; I accept your apology, and I suppose the jury are also satisfied with it. I will now hear what you have got to say in the matter.

* * * * * * *

As Dr. Riddel was leaving the court, the turnkey threatened him with violence, and called him a lunatic. The doctor appealed to the sheriff for protection, and that gentleman informed him that he should have it.

Next day the inquest was resumed, but not without further reference to the squabbles of the coroners. We gather the following also from the report of the *Globe*:

* * * * * * *

Coroner HALLOWELL, in opening the court, said, that before proceeding with the evidence he felt it his duty, from what had occurred the preceding day, to make a few remarks. In justice to the sheriff, the governor of the gaol, the public, and himself, he must refer to the inquest, and define his position there. On Tuesday morning, about two o'clock, the sheriff called at his (the coroner's) residence, and informed him that William Greenwood had committed suicide, and that he wished him to hold an inquest on the body. He accordingly went at once to No. 1 Police Station, and told Sergeant-Major McDowell that he had been requested by the sheriff to hold an inquest on the body of Greenwood. [The coroner here, in order to show that the sheriff had power so to direct him, read from the Consolidated Statutes a clause of an act bearing upon the matter.] The coroner then went on to say that while he was in the Station, writing out his warrant, Coroner Riddel came in, when Coroner Hallowell said, "Doctor, I am afraid you are too late." Dr. Riddel made some remark, and, looking over Dr. Hallowell's shoulder, and seeing that his warrant was not complete, handed in his own, saying that he did not think he was too late yet. Some words then took place between them, when, as Dr. Hallowell states, Dr. Riddel said that he felt very anxious to hold the inquest, and would even give the fees to Dr. Hallowell if that gentleman would allow him to hold it. Dr. Hallowell said that he was highly indignant at such a proposal, and felt fully confident that he had the law on his side, and would hold the inquest.

A JUROR—We have come here to inquire touching the death of William Greenwood, and I do not think we have any right to listen to the facts of coroners' quarrels.

SEVERAL JURORS—Go on, go on, Mr. Coroner; we will hear you.

A JUROR—The coroner has had his conduct in this case shown up in a fearful light, and it is only right that he should be allowed to explain himself.

The coroner stated that it was for that reason that he wished to explain himself. The warrant of Dr. Riddel said that he wanted twenty-four men of the police force to act as jurors in the case. It was a mistake, of course, but such a glaring one that it could not be received, and the warrant was accordingly passed over. During Tuesday he had met Dr. Riddel at the gaol, and that gentleman acted very properly and friendly, and Dr. Hallowell said to him that he would like him to assist him at the inquest. Those were the facts of the case, so far as he was concerned.

The inquiry was then proceeded with.

* * * * * * *

It now remains for us to ask, how long is this state of things to continue? Surely nothing more disgraceful could well occur; and when we know that such things often and often occur, it is time that something should be done to prevent a repetition of them. But what is the remedy? Some say, abolish the fees appertaining to the office, and leave the office to those who are not so needy or so sordid as to desire to make money out of it. Others say, let there be some coroners, but instead of allowing them to receive fees, let them be paid by salary. Others say, abolish all existing commissions, and let there be one or two stipendiary coroners appointed for each city, town and village in the Province.

There is something to be said in support of each of these views. Greed is at the bottom of the mischief of which we complain. If we cannot abate the nuisance, we may at all events do something to regulate it.

The office of coroner, among our ancestors, was deemed an office of such dignity that no man holding the office would condescend to accept pay for his services; and so *strong* was this feeling, that a statute was passed enacting that no coroner should "demand anything of any man to do his office, upon pain of great forfeiture to the king." (Westm. 1, cap. 10.) But in process of time, when chivalry was on the wane, and the desire for money on the increase, a statute was passed enacting "that a coroner shall have for his fee, upon every inquisition, upon the view of a body slain, thirteen shillings and four pence of goods and chattels of him that is the slayer or the murderer, if he have any goods; and if he have no goods, of such amercements as shall fortune any township to be amerced for the escape of the murderer." (3 Hen. VII. cap. 1.) The growing desire for money caused officials to attempt to extend this statute to cases of death other than murder or homicide, and the consequence was that the legislature again interfered and enacted, "that upon request made to a coroner to come and inquire upon the view of any person slain, drowned, or otherwise dead by misadventure, the coroner shall diligently do his office without taking anything therefor, upon pain to every coroner that will not endeavour himself to do his office as aforesaid, or taking anything for doing his office, upon every person dead by misadventure, for every time forty shillings." (1 Hen. VIII. cap. 7.) In later times the fees to coroners, with a view to increased diligence on the part of those officers, have in England been much increased, and the payment of coroners for services performed is become a matter of course (25 Geo. II. cap. 29; 1 Vic. cap. 68; 7 & 8 Vic. cap. 92, sec. 24).

Without, however, stopping to inquire whether in England the payment of coroners is either necessary or proper, we may, without fear of contradiction, say that in Canada payment of coroners is both necessary and proper. We have not as much wealth as people possess in older countries. We have not men of property who seek employment in order "to kill time." All men with us live by their employment. Few, if any, can afford to give up their time to society without compensation of some kind. And if in England it has been found necessary to pay coroners, in order to secure diligence, it is much more necessary to do so in Canada.

But we apprehend the vice of our system is not that our coroners are paid, or are paid in a particular manner, but that we have too many of them. If fifty men are appointed to do the work that one capable man can do, and all live by their fees of office, we can easily see why they race for work and consequent gain. With multiplication we have deterioration. Much better would it be to appoint a few capable men than many incapables. No doubt there are capable men at present holding the office; but for one capable fifty incapables can be found. The fact that a fit man can be found holding the office is attributable to accident rather than design. The chief qualification appears to be, and to have been, that a man is a good politician *or the friend or supporter of a good politician*. This should not be. The office of coroner should not, any more than any other judicial appointment, be conferred because of mere political subserviency. Besides the indiscriminate and unlimited appointment of all and sundry the supporters of some government member for the time being in the Legislative Assembly, is an abuse of patronage alike disgraceful to the giver as it undeserving on the part of the part of the receiver. If the hangers on of political partizans must be supported by means of public employment, give them something where their venality and incapacity will not be so conspicuous and so pernicious. We have no reference to any particular coroner. We complain not of any particular appointment. Our fault finding is with a system so rotten that its very existence has a tendency not only to bring the administration of justice into contempt, but to demoralize society and shock humanity.

A change, therefore, is desirable. The first step no doubt would be to revoke in towns and cities all existing commissions. The next, to appoint in each city or town one or two men, selected because of their competency and respectability. This, as an experiment, we think might be safely tried. Whether paid by salary or by fees we think matters not. The fee system had better, perhaps, for the present be allowed to continue. In a city like Toronto, represented in the Legislative Assembly by two members, there might well be two coroners—one for the east and one for the west—each having a distinct and exclusive jurisdiction, in a distinct and exclusive district. In the event of sickness, incapacity or unavoidable absence of the coroner of any one district, or vacancy in the office of coroner of that district, the coroner of any next adjoining district might, upon the request of any two magistrates, be called upon to act in that district. And in the event of a coroner holding an inquest in any other district than that to which he is appointed by the Crown, he should in the inquisition certify the cause of his attendance and holding the inquest; which certificate should be taken as conclusive evidence of the sickness, incapacity or unavoidable absence of the coroner in whose stead he held the inquest, or of there being a vacancy in the office of coroner for that district. Nothing could be more simple than an amendment in the present system, such as suggested. It would not be wholly without precedent, even in the case of coroners (See Eng. Stat.

7 & 8 Vic. cap. 92 secs 19, 20). But we have a system quite analogous in the case of magistrates. At one time all magistrates were and, we fear, still are appointed with as little regard to competency as coroners. Such magistrates were found wholly inadequate to the discharge of the judicial duties appertaining to their office in cities and towns. The consequence was the appointment of stipendiary or trained magistrates in cities and towns. This is all that we at present demand in the case of coroners.

We are by no means satisfied that medical men make the best coroners. Provision is made for the summoning of medical testimony in all cases where necessary. The coroner sits not as a doctor but as a judge. An acquaintance, therefore, with the rules of evidence, and the procedure in courts is, to a great extent, necessary on the part of coroners. It cannot, like medical testimony, be supplied from external sources. It must have its existence in the man himself—the coroner. None possess this knowledge to so great an extent as lawyers. If lawyers are competent to sit on the bench at the final inquiry as to the means of death on a charge of murder, surely they are equally so to sit at the preliminary inquiry or coroner's inquest. We merely throw out the suggestion for what it is worth. We might say much more in favor of it, but our motives as the organ of the legal profession might be suspected. We, therefore, prefer merely to make the suggestion as we have done, and leave to others upon whom the responsibility of appointments to office rests to deal with it. There is no law which declares that medical men only shall be appointed, and no law which declares that lawyers shall not be appointed. If the experiment of appointing lawyers be deemed worth a trial, there is nothing as the law stands to prevent the trial.

PARTITION OF REAL ESTATE.

We noticed in the columns of a Toronto cotemporary, not long since, an article on this subject, under the head of "Legal Intelligence." It certainly was legal intelligence, and that of a novel, if not startling description. It commenced with a statement that the English law of primogeniture, which formerly prevailed in this province, was abolished "in the fourth year of the reign of Wm. IV." Now the act abolishing the right to primogeniture was, as every body knows, introduced by the Hon. Robert Baldwin, and became law in 1851 by the statute of 14 & 15 Vic., ch. 6.

The next piece of information which the learned writer to whom we have referred gives us is, that under the act abolishing the law of primogeniture "it became necessary to make provision for the division among the children of deceased of lands of the estate left by their ancestors"—thus leading the unlearned in such matters to suppose that there was no statutory provision for partition *before* the time alluded to. On turning to the statutes, however, it will be found that in 1832 an act was passed for the purpose of providing for the partition of real estate held by joint tenants, tenants in common, and co-parceners in this province. Now the statute abolishing the right to primogeniture was, as we have shewn, passed nineteen years after the act of 1832.

The writer in question is sadly at fault in his chronology. We should judge that he is a votary at the shrine of Chancery, and so earnest in the study of its rules that he is oblivious to such trifles as dates. His aim is to shew the superiority of the Court of Chancery over Courts of Common law in dealing with matters of partition; and if the practice of that court bore the slightest resemblance to the admirable theories of it, there would be some reason for the preference. But even the writer of this article acknowledges that "a bill in Chancery is looked upon as something to be, by every means, avoided as a monster dragging its weary length along, and with maw sufficient to swallow up all laid before it, etc." In fact, being, as we imagine, a Chancery man, he would prefer assisting this *equitable* "monster" (which he describes in such elegant language) in his digestion, rather than allow his Common law brother to get a share of the spoils.

No one can deny that very great and important reforms have lately been made in the practice of the Court of Chancery (thanks perhaps to the Common law experience of Chancellor Vankoughnet); but we certainly do not think that the Court of Chancery is the place where a suitor would find or could expect to find very great speed in the conduct of his suit—and this we say without the slightest disparagement of the judges and officers of the court. Nor do we think that the machinery of the Common law courts so "limited" or their practice so "unyielding" as to be "entirely incompatible" with the investigation and carrying out the partition of real estate.

It is not our desire or intention to defend the Partition Act (Con. Stat. U. C., cap. 86) in all its details. But it does not merit such abuse as to be called one of the most "crude, inexplicable, and unwieldy pieces of legal workmanship" which ever "came from any press of even colonial Queen's Printer." Nor does it lead us to suppose that it was "framed by a caucus of printers, with the aid of a drunken attorney to supply the legal jargon." Such strong language as this is rather calculated to defeat than to promote the intention of the writer; and does not redound to the credit either of the writer or of the publisher of them. We are glad however that the subject has come up for discussion, as there are some things in the act which

require amendment. But in admitting this, we are very far from admitting that the act should be repealed bodily, or from admitting that the Court of Chancery is the *only* court that can satisfactorily administer justice in the premises.

The difficulty that arose in the case referred to by the writer in question, under the seventeenth section of the act, might, if we are rightly informed, have been in great part avoided by a more careful consideration of the statute. The statute, however, is certainly defective in not providing for the case of a disagreement between the arbitrators in the mode of partition. The same defect existed in the act of 1832, from which this section is taken. A few words, however, would supply the remedy.

The statement that "the inevitable delay in all proceedings under this act can scarcely be over estimated" comes rather amusingly from a person who proposes giving sole jurisdiction in partition to the Court of Chancery. The reason for this, so far as the Courts of Common law are concerned, is said to be that certain rules and directions of the court are required, which can only be obtained from these courts in term, and that the courts have only four terms in the year. Supposing this objection to be well founded (and we do not say that it is not) the remedy would appear to be to substitute a judge in Chambers for the Court. We think a judge in Chambers could not only transact more expeditiously but more satisfactorily much of that which, under the act in its present form, devolves upon the Courts in term time.

With respect to the case (*Re Maclean*) also referred to by this writer, we cannot think that more than two years were taken up in the legitimate conduct of the suit. There were probably some circumstances which would in any case have prevented the more speedy determination of it. But has not this writer heard even of Chancery suits which have been more than two years in progress? We may here mention a case, (*In Re Westervelt*) where, upon a reference to the Real Representative on a petition filed in the Queen's Bench, a partition was found to be injudicious for the interest of the parties concerned. A sale having been ordered, part of the property was sold at public auction and brought a good price, and the sale was confirmed by the court. The remainder of it was withdrawn for want of buyers: was again advertised and sold most advantageously: the sale confirmed: deeds and mortgages given—and all within little more than twelve months.

With respect to the other case referred to by the writer in question, (arising under the 17th sec.) the efforts of counsel to bring it on for hearing during the term could not have been very prodigious, for it is well known to the profession that during the first few days of term there is never a "press of business," but rather the reverse. And the reason that cases have occasionally to stand over till next term is because motions and arguments that might be had within the first week are allowed to remain unattended to till the end of the second week.

We then come to the question of costs. An application to a judge in Chambers instead of to the Court, would, in the first place, be a great saving of expense. In the next place, we should suggest a more economical mode of advertising, (the expense of which does not certainly seem proportioned to the probable benefits to be derived from it). We allude particularly to the advertising in the *Gazette*, where advertising for unknown or absent parties is necessary (sec. 14). These cases, however, are exceptionable; but still it would seem better to substitute another mode of giving notice to the parties mentioned, either by advertising, say once or twice in the *Gazette*, and more frequently in the most widely circulated papers where the proceedings are commenced, or where the absent parties reside or are supposed to reside, or by sending notices by mail to the latter, or by both—in the discretion of the judge. In cases where there are no unknown or absent parties, notice of any sale to be made by the Real Representative is to be given in the same manner as is required on the sale of real estate by sheriffs under executions (sec. 32). The only other section which says anything about advertising is sec. 27, which provides for a short notice to incumbrancers to be inserted once a week for four weeks in the *Gazette* and in a county paper. So that after all there is not so much cause for complaint on the score of printers' bills. The bill of costs *In re McLean*, referred to by this writer, contained several items not strictly connected with the suit itself. The costs *In re McBride*, where a petition was made, were taxed at a trifle over thirty-four pounds.

We would further suggest the advisability of the making of a tariff of fees by the judges of the courts, under the authority of sec. 42. A carefully prepared tariff, having reference to the value of the property to be partitioned or sold and to the difficulty of the case, which would give sufficient remuneration to the practitioner for his time and trouble without making the costs too great a tax on the property, would be of much service, and reduce the expenses of the suit when such reduction would be proper, and at the same time settle what are now matters of uncertainty.—*Communicated.*

THE "LAW TIMES"

We notice that the *Law Times* reports, now so widely and so favourably known, will, with the commencement of the 10th volume, be printed with a larger and bolder type

than hitherto cast for the purpose, and on improved paper. There will be no alteration in the length of the page, so that the bound volumes will precisely match their predecessors on the shelf, but the pages will be slightly increased in width. This, with three or four additional numbers, will give to the reader the same quantity of matter as hitherto: so that the improvement so often requested by subscribers will be made without in any respect affecting the completeness of the series of the reports. It is announced that the addition of double numbers shall not exceed three in the half-year, and that if more than these should be required by the influx of reports, they will be presented without additional charge. We congratulate the proprietor of the *Law Times*, and its subscribers, upon the proposed change. The reports of the *Law Times* are noted for their expedition, completeness and accuracy—qualities wherein no "official reporter" can excel, if equa them.

JUDGMENTS.

QUEEN'S BENCH.

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

Monday, February 1, 1864.

Rogs v. *Carley*—Rule absolute for new trial, upon payment of costs.

The Queen v. *The Buffalo and Lake Huron Railway Company.*—Rule absolute to quash return, and for peremptory mandamus.

Watson v. *Miller et al.*—Plaintiff's rule discharged, and postea to defendants.

Beaty v. *Robinson.*—Rule *nisi* refused.

Monday, February 29, 1864.

Smith v. *Groube.*—Rule discharged. If affidavit filed to shew that the defendant not the owner of the adjoining lot, then new trial to be ordered on payment of costs.

Hunter v. *Farr.*—*Held*, that executors have no power under Con Stat. U. C. cap. 87, sec. 5, to convey the legal estate in a mort gage. Rule absolute to enter nonsuit.

Moore v. *Andrews.*—Upon defendants consenting to a verdict for plaintiff on certain issues, then rule discharged, otherwise new trial on payment of costs.

McLean v. *Buffalo and Lake Huron R. Co.*—Dec'aration and plea held good. Judgment for defendants without costs. Leave to plaintiff to take issue.

Evans v. *Turley.*—Judgment for plaintiff on demurrer. Leave to apply to amend refused.

Clark v. *Ritchey* (two cases).—Judgment suspended on first rule till result of new trial, which is granted on second rule on payment of costs.

Brannigan v. *Cartwright.*—Rule absolute.

West v. *McInnes.*—Appeal from the decision of the county judge of the county of Hastings dismissed with costs.

Little v *Kerr.*—Appeal from the decision of the county judge of the county of Middlesex dismissed with costs.

McGee v. *Great Western Railway Co.*—Appeal from the decision of the county judge of the county of Oxford dismissed with costs.

Kelly v. *Bull.*—Judgment for plaintiff on demurrer. Leave to plead refused.

Seymour v. *Graham.*—Rule absolute.

Konkle v. *Maybee.*—Rule absolute.

Mason v. *Thomas.*—Rule absolute to enter nonsuit.

Rogers v. *Wallace.*—Rule discharged without costs.

Monaghan v. *McMullen.*—Rule absolute to set aside nonsuit, and for a new trial, on payment of costs within three weeks.

Holmes v. *McKechnie.*—Rule absolute for new trial.

Reed v. *Jarvis.*—Judgment for plaintiff in conformity with decision of Common Pleas.

Cooper v. *Watson.*—Judgment for demandant on demurrer.

Cooper v. *Watson.*—Rule refused.

Randal v. *Burton.*—Rule absolute.

McDonald v. *Macmillan.*—Rule discharged.

Nicholson v. *Bell.*—Rule absolute for new trial on payment of costs.

Wallis v. *Harrold.*—Rule absolute to enter nonsuit.

Brethour v. *Boulton.*—Stands till Saturday, with a view to the consultation of Mr. Justice Adam Wilson, the judge who tried the cause.

Livingstone v. *Gartshore.*—Rule refused.

Clark v. *Stevenson.*—Rule *nisi* granted.

Ward v. *Hill.*—Rule *nisi* on grounds stated in affidavits.

Regina v. *Peterman.*—Rule *nisi* granted.

County of Waterloo and County of Brant.—Rule *nisi*.

Regina v. *Stevenson et al.*—Rule *nisi* as to defendant Rowe; refused as to the others.

Gainor v. *Salt.*—Rule *nisi* calling upon all parties except sheriffs.

Saturday, March 5th, 1864.

Robinson v *McKeand*—The question raised was whether plaintiff, having proved his claim in Scotland under the Scotch Bankruptcy Law, was barred from prosecuting this action for the same claim. Held he was not. Judgment for plaintiff on demurrer to both of defendant's pleas.

Corporation of Ottawa v. *Cross.*—Appeal from the decision of the judge of the County Court of the county of Carleton allowed; and rule absolute for new trial in court below without costs.

Manning v. *Ashall.*—Appeal from the decision of the judge of the united counties of York and Peel dismissed with costs.

Lee v. *Mitchell.*—Appeal from the decision of the judge of the united counties of York and Peel dismissed with costs; the promise on which plaintiff relies not being in writing, and being held to be within the Statute of Frauds as a promise to answer for the debt of another.

Edgar v. *Canadian Oil Company.*—An oil case. Rule for new trial discharged.

In the matter of Wilson and the Quarter Sessions of Huron and Bruce—Rule absolute for mandamus upon the Court of Quarter Sessions commanding that court to hear an appeal.

The Queen v. *Lee.*—Point reserved from the Quarter Sessions of the county of Simcoe as to whether or not defendant was properly convicted of having obtained property under false protences. Conviction affirmed.

Keene v. *Henderson.*—Held that objections may prevail upon a writ of error, which would not be good in arrest of judgment, and judgment of court below in this matter reversed.

Preston v. *Wilmott.*—Appeal from the decision of the judge of the united counties of Northumberland and Durham allowed.

Cummings v. *Perry.*—Stands till next term for information that is required by the court.

Stevenson v. *Major.*—Trespass. Justification as for a distress for rent. Rule discharged.

Brethour v. *Bolster.*—Action to recover compensation for injuries done to plaintiff's land by backing of water thereon. Rule *nisi* discharged. Leave to appeal.

Williams v. *Commissioners of Cobourg Trust.*—Release of dower executed under power of attorney before power revoked upheld. Rule *nisi* discharged.

In the matter of Quinn and the Treasurer of Dundas.—Rule for mandamus on the collector of taxes refused.

In the matter of Westerfelt's partition.—Rule to go confirming sale.

In the matter of Tozer qui tam v. *Preston.*—Rule for mandamus upon the judge of the county of Carleton to certify an appeal refused.

The Queen v. *Toronto Roads Company.*—Rule to allow claim to be made to goods unsold by the sheriff at the time of the application, although goods alleged to have been in fact since sold; the decision being considered *nunc pro tunc* for the purposes of the application.

COMMON PLEAS.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON, J.

Saturday, February 6, 1864.

Osser v. *Vernon.*—Rule *nisi* discharged. Leave to appeal granted.

Osser v. *Thompson.*—Rule *nisi* discharged. Leave to appeal granted.

Fraser v. *Fraser.*—Plaintiff's rule *nisi* discharged.

Ruthven v. *Stinson.*—Plaintiff's rule *nisi* discharged

Ruthven v. *Stinson.*—Defendant's rule absolute for new trial without costs, if defendant so desire. Defendant to decide before first day of giving judgment after this present term; otherwise, rule discharged.

Monday, February 8th, 1864.

Lynch v. *Byrnes.* New trial. Costs to abide the event.

Roberts et al. v. *Minten et al.*—Rule absolute to set aside nonsuit and for new trial, without costs.

Tate v. *Tollerton et al.*—New trial. Costs to abide the event.

Kennedy v. *Mulligan.*—New trial without costs.

Teefy qui tam v. *Duncumb.*—New trial. Costs to abide the event; with leave to plaintiff to apply to amend declaration.

Monday, February 29, 1864.

Crawford v. *Beard.*—Postea to defendant

McKenzie v. *Summers.*—Rule *nisi* discharged.

Vandelinder v. *Vandelinder.*—Rule discharged.

Fawcett v. *Mothersil.*—Rule discharged.

Forest v. *Oates et al.*—Rule absolute for new trial on payment of costs, with leave to them to add the pleas which they desired to add at the trial.

Montgomery v. *Boucher.*—*Held*, that where a note fixes the rate of interest (such, for example, as 20 per cent) that note continues till payment. Rule absolute to increase verdict.

Young et al v. *Moderwell.*—Rule discharged.

Dickenson v. *Duffil.*—Rule absolute to dismiss appeal with costs.

Baker v *Vanluven.*—Appeal from the decision of the judge of the united counties of Frontenac, Lennox and Addington allowed. Rule for nonsuit in court below discharged, and postea to plaintiff.

Reford v. *McDonald.*—Rule absolute for new trial on payment of costs, with leave to send back commission to have it properly attested.

In re the matter of G. S. Ross and the United Counties of York and Peel.—Rule discharged as to fifth section of a by-law, and made absolute as to a portion of the second section, with costs.

Dauphine v. *L'Esperance.*—Judgment for plaintiff on demurrer to plea

Dewar v. *Carrique.*—Appeal from the decision of the county judge of the county of Halton affirmed, except as to the demurrer to the third plea of defendant Dewar, and as to that judgment below reversed without costs.

Clement v. *Clement.*—Stands till Saturday.

In re Scarlett and the Township of York.—Rule discharged without costs.

Sutherland v. *Dumble.*—Rule absolute to set aside verdict and all proceedings subsequent to writ of summons, without costs.

Caspar v. *Franklin.*—Time extended upon terms.

Miller v *Kinsley.*—Appeal from the decision of the judge of Frontenac, Lennox and Addington dismissed with costs.

Tyke v. *Cosford.*—Appeal from the decision of the judge of the county of Wellington allowed, and rule *nisi* for nonsuit in court below to be discharged.

Bellhouse v. *Bellhouse.*—No rule.

Reg. ex rel. Keller v. *Macarow.*—Rule *nisi.*

Saturday, March 5th, 1864.

Lautenburgh v. *McLean.*—Ejectment for land sold for taxes. Sale held invalid because land not properly rated. Postea to defendant.

Raynes v. *Crowder.*—Ejectment. Defendant claimed under a sheriff's deed of the land sold for taxes, and contended that sheriff's vendee had procured the deed by fraud, by inducing others not to bid against him. Verdict for plaintiff. Rule absolute to set aside verdict for plaintiff and enter it for defendant, upon the ground that the remedy, if any, against the deed is in equity.

Hooper v. *Christo.*—Rule discharged.

Palsgrave v. *Murphy.*—This was an appeal from the decision of the judge of the County Court of the united counties of York and Peel. The question was as to the sufficiency of the guarantee sued upon under the Statute of Frauds. Appeal dismissed with costs.

McNaught v. *Turnbull.*—Application to rescind the certificates for full costs given by McLean, C. J., at a time when he had ceased to be a judge of either of the Superior Courts of Common Law. Rule discharged without costs.

Clement v. *Clement.*—Rule absolute to set aside nonsuit.

Hunter v. *Johnston.*—Action on a covenant for title. Question as to amount of damages to which plaintiff entitled. If plaintiff consent to reduce his verdict to £32 5s., verdict to stand; otherwise new trial without costs.

Beavan v. *Wheat.*—Rule absolute to set aside plaintiff's execution: his judgment to stand as the foundation for an attachment. Costs to be paid by plaintiff.

Haacke v. *Adamson.*—An action against a magistrate. The first count was trespass: the second, case. Plaintiff had a verdict on each count for $100. It was proved at the trial that the plaintiff was guilty of the offence with which he was charged. The court held that under these circumstances plaintiff was entitled to not more than three cents damages on either count; and that under no circumstances was plaintiff entitled to hold his verdict on both counts for the same alleged wrong. Plaintiff to elect on which count he will hold his verdict, and verdict to be reduced to three cents on that count. Verdict to be entered for defendant on the other count. If plaintiff decline to elect, rule absolute for new trial without costs.

Crooks v. *Dickson.*—Rule absolute to set aside verdict: costs to be costs in the cause. Defendants to pay costs of amendment

before Tuesday next, and plaintiff to be at liberty to give notice of trial to-day for next Toronto assizes.

Palmer v. *Holmes*.—An oil case. Rule *nisi* for new trial discharged.

McCleary v. *Bettes*.—An action for malicious prosecution. The question was whether the fact that defendant had preferred a bill before the grand jury for felony, plaintiff being in custody—which bill the grand jury ignored—was any evidence of a want of reasonable and probable cause. The court held it some evidence and so set aside the nonsuit. Rule absolute without costs.

Styles v. *Taylor*.—Rule for new trial without costs on the ground of misdirection.

Reid v. *Horton*.—Action against an attorney for negligence. The question was as to whether or not there was evidence of the retainer alleged in the declaration. The retainer alleged was one to investigate a title. Evidence held sufficient, and so rule discharged.

SPRING CIRCUITS, 1864.

EASTERN CIRCUIT.

THE HON. MR. JUSTICE A. WILSON.

Cornwall	Tuesday	15th	March.
L'Orignal	Tuesday	22nd	"
Ottawa	Monday	28th	"
Perth	Tuesday	5th	April.
Brockville	Friday	8th	"
Kingston	Tuesday	19th	"

MIDLAND CIRCUIT.

THE HON. CHIEF JUSTICE RICHARDS.

Belleville	Monday	14th	March.
Whitby	Wednesday	23rd	"
Cobourg	Tuesday	29th	"
Peterborough	Tuesday	12th	April.
Lindsay	Tuesday	19th	"
Picton	Wednesday	4th	May.

HOME CIRCUIT.

THE HON. MR. JUSTICE HAGARTY.

Milton	Monday	14th	March.
Hamilton	Thursday	17th	"
Welland	Wednesday	30th	"
Niagara	Monday	4th	April.
Barrie	Monday	11th	"
Owen Sound	Tuesday	10th	May.

OXFORD CIRCUIT.

THE HON. MR. JUSTICE J. WILSON.

Guelph	Monday	14th	March.
Berlin	Monday	21st	"
Stratford	Friday	25th	"
Woodstock	Wednesday	30th	"
Brantford	Wednesday	6th	April.
Simcoe	Wednesday	13th	"
Cayuga	Monday	18th	"

WESTERN CIRCUIT.

THE HON. MR. JUSTICE MORRISON.

London	Tuesday	15th	March.
St. Thomas	Wednesday	23rd	"
Chatham	Tuesday	29th	"
Goderich	Tuesday	12th	April.
Sarnia	Wednesday	20th	"
Sandwich	Tuesday	26th	"

THE HON. CHIEF JUSTICE OF UPPER CANADA

County of the City of Toronto	Monday	14th	March.
United Counties of York and Peel	Tuesday	11th	April.

TO OUR READERS.

We have delayed the issue of this number of the *Journal* to enable us to give in full the judgments delivered last term.

SELECTIONS.

LAW REPORTING.

The task of reporting the decisions of any Court is one of more labour, and requiring a higher order of talent, than many would suppose. Almost every lawyer thinks himself competent to perform the work notwithstanding the innumerable failures of other men in the same line. Yet the fact is that very few have the sound judgment, quick perception, and fine discrimination, which are essential to the success of a reporter. Very few of those who have actually undertaken the task have been fitted for it by nature, and the majority of American reports are not worthy of much commendation. The English reports have been of variable quality, but for the last thirty years have been prepared with faithfulness and ability.

It would be altogether beyond our command of time or space to review all the trash that has been published in the way of Texas, Alabama, Arkansas, Tennessee, Georgia and Florida Reports, filled as they are in great part with the maunderings of ignorant Judges, compiled by utterly incompetent reporters. Nor can we do more than briefly express our regret at the lowered standard of judicial capacity in some of the Western States, which, in times past, contributed a respectable addition to American law.

The reports of this State are of very uneven value. Johnson's, Hill's, Denio's and Paige's Reports are valuable both for their matter and for the style in which they are prepared. Most of the others are valuable only from the fact that they contain the opinions of the Courts, and not from the ability with which they have been compiled. This is especially the case with Wendell's Reports, which are models of slovenly work. Cowen's Reports were prepared with extreme care, and are full of valuable material. The fault which we find with them is in the excessive length of the head-notes, which include every dictum and speculation of the Judges, leaving the reader in as much doubt which of the points stated are law, and which are mere illustrations. This defect greatly mars the work. The Court of Appeals reports have erred on the other side, giving only the chief points decided, and wholly omitting to notice the minor rulings of the Court, particularly on questions that are deemed (not always justly) to be settled. Thus in *Forbes* v. *Waller* (25 N. Y. 430) it is expressly ruled that a creditor's action may be maintained on an execution returned in less than sixty days. In *Van Alstyne* v. *Cook* (id. 489) it is adjudged that the omission of the Clerk's signature to a judgment roll is an error that may be disregarded. Neither of these rulings is noticed in the head-notes, as we think they should have been, seeing that they are decisions of the Court of last resort on points not previously determined by it, though passed upon by Courts below.

It is desirable that the arguments of counsel should be given in a condensed form—indeed, it is often extremely difficult to understand the opinion of the Court without it. On the other hand, a literal transcript of counsel's briefs is generally a mere imposition upon the patience and pocket of the reader.

In reporting the decisions of inferior tribunals, the head-notes should contain too little rather than too much—in reporting cases in a Court of last resort, they should contain too much rather than too little.

The statement of facts should be full, but divested of all that does not conduce to a fuller understanding of the case. The names of the parties, the nature of the transaction, and

he precise amount or thing in controversy, should be stated with peculiar exactitude. If more than one case is decided in one opinion, the titles of all should be given. The want of these details often makes it difficult to recognize the same case on appeal. Thus, we are well satisfied that the case of *Voorhies* v. *Baxter* (1 Abb. Pr.) is the same as that reported on appeal (17 N. Y. Rep.) as *Voorhies* v. *Childs*, Executor; that *Reubens* v. *Joel* (13 N. Y.) really affirms *Neustadt* v. *Joel* (2 Duer.); and that *Gardner* v. *Clark*, as reported successively in 6 How. Pr. R., 17 Barb., and 21 N. Y., is but one case. This, however, is not so clear as it might easily have been made by a more explicit statement of facts in each case. No reporter can tell, with absolute certainty, that his cases have not been reported before, or will not be again. He should therefore so prepare his report as to facilitate the search of his readers for the same case in its antecedent or subsequent stages. —*N. Y. Transcript.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

IN THE MATTER OF A PLAINT INSTITUTED IN THE DIVISION COURT OF THE UNITED COUNTIES OF HURON AND BRUCE, BETWEEN WILLIAM E. GRACE, PLAINTIFF, AND SAMUEL S. WALSH, DEFENDANT.

Division court—Splitting demands—Prohibition.

Plaintiff rendered an account to defendant commencing with the amount of an account rendered on the 30th of June, 1862, and continuing to the 14th of October, when the balance, after allowing a credit of $4.25, was $106 43 In February, 1863, he sued in the Division Court, the statement of claim commencing with the 24th of April, and ending on the 10th of October, 1862, and amounting to $99.31 He was allowed to recover without abandoning the excess, notwithstanding the production of the larger account rendered: and in May he sued for the items included in that account, but not in the former action, and was also allowed to recover. Defendant then applied for a prohibition. *Semble*, that the application should have been made in the first suit, but the point was not settled, as, after rule nisi granted, the plaintiff consented to the writ going without costs. [Q. B., T. T., 1863.]

John Paterson applied for a rule calling on the judge of the County Court of Huron and Bruce, and the said William E. Grace, to show cause why a writ of prohibition should not issue, directed to the said judge, to prohibit him from further proceeding in the above-mentioned plaint, instituted about the 23rd of May last, on the ground that the plaintiff ought not in law to be allowed to prosecute the plaint in the Division Court.

The applicant, Walsh, gave notice in writing on the 25th of July last to the judge, and on the 27th of July last to the plaintiff, Grace, of his intention to move, on the ground that Grace split an indivisible cause of action for goods sold and delivered, in order to bring two actions.

From the affidavits it appeared that the plaintiff rendered to the defendant an account, commencing with the amount of an account rendered on the 30th of June, 1862, $27 71, and continuing on to the 14th of October, 1862, when the amount was $110 68, and credits were given for $4 25, leaving a balance apparently due of $106 43. On the 13th of February, 1863, the plaintiff took out a summons from the Division Court. The statement of claim attached to the summons commenced with an item on the 24th of April, 1862. The last item was under the date of the 10th October, 1862, and the amount was $99 31. The items prior to the 1st of July in this claim amounted to $28 02½ All the other items after June 30th to October 14th corresponded exactly in description and price, except one, where there was 12½ cts more charged in the last than in the first.

When this suit was brought to trial, it was objected for the defendant that this claim was a portion of a larger account, and the larger account was produced, and the right of the plaintiff to recover was disputed, on the ground that he was splitting his demand, contrary to the 55th section of the Division Courts' Act, and that he could not maintain this suit without abandoning the balance The judge replied, that the objection could not prevail against the plaintiff in that suit, as upon the face of the claim then in the court there was no appearance of the same having been divided: that the objection could only be of effect in case any future action was brought for the recovery of the difference of the account produced and that sued for; and he gave judgment for the plaintiff

On the 22nd of May, 1863, the plaintiff took out another summons against the defendant, claiming an account of $12 This was composed of the very same items as had been charged by the plaintiff to defendant in the account first rendered, but not included in the account first sued for, and at the foot of this claim the credits given in the account rendered, amounting to $4 25, were also given. The plaintiff in the second action claimed $7 75 When this came on for trial, it was objected for the defendant that the plaintiff having previously divided his claim and recovered judgment for the greater portion thereof, he must be taken to have abandoned the claim in the present action, as it was the remaining portion of the divided claim.

It was stated that the judge of the Division Court on that occasion gave judgment for the plaintiff, and on the 22nd of June, 1863, the defendant gave notice to the plaintiff that he should move to have the judgment set aside and a nonsuit entered according to leave reserved, or for a new trial, setting out on what grounds the application would be made. A day was appointed to hear the parties, and the defendant was represented by an agent, who swore that no one appeared to oppose the application, nor was it to his knowledge opposed by affidavit or otherwise, but the application was refused and the judgment ordered to stand.

DRAPER, C. J.—I entertain some doubts on this case, not that I have any doubt that this is precisely one of the very cases the legislature meant to provide for. What I am not clear about in my own mind is, whether the prohibition should not have been applied for in the first suit, for if it was made plain to the judge presiding that the plaintiff was then suing for the portion of a larger demand over which the division court had no jurisdiction, then the case should have been stopped, unless the plaintiff abandoned the excess, and if he did not a prohibition would have gone. Whether under the facts shewn it will not lie, I think doubtful. We will let the rule go, in order to hear the point argued. See *In re Ackroyd*, 1 Ex. 479; *Isaac* v. *Wyld*, 7 Ex. 163; *Lord Bagot* v. *Williams*, 3 B. & C. 235.

Per cur.—Rule nisi (*a*).

CORRESPONDENCE.

To the Editors of the Law Journal.

HILLSBORO, February, 15th, 1864

GENTLEMEN,—You will much oblige by answering the following in your next issue.

A sues B (a tradesman) who a *few days* before the sitting of court absconds. C takes out an attachment and seizes B's account book. C of course has to sue, &c., at the next sitting of court, which will not be till June. Does A get the full amount of his judgment from the proceeds of the book, or does he only get a proportion?

Your obedient servant,

THOS. W. K. SCOTT,
Cl 5th Div. Ct. Co. Lambton.

[The question put by our correspondent is not free from doubt. We think, however, that A would be entitled to get the full amount of his judgment; the only deduction which could be

(*a*) In the following term the rule *nisi* was taken out and made absolute, with out costs, by consent.

properly made in any case would be the costs of the attachment. In respect to such proceedings in the superior courts, the 21st sec. of the Absconding Debtors Act, Con. Stat. U. C., *cap.* 25, *enacts* that persons who have commenced suits, the process of which was served before the suing out of a writ of attachment against the same defendant as an absconding debtor, may, notwithstanding the writ of attachment, proceed to judgment and execution in the usual manner; and shall have the full benefit of priority of execution in the same manner as if the property and effects of such absconding debtor still remained in his own hands and possession: but if the court or a judge so orders, subject to the prior satisfaction of all costs of suing out and executing the attachment.

This practice would probably be in all cases followed in the Division Courts; and where the property was considered insufficient to satisfy all the claims likely to be proved against it the judge would no doubt order the costs of the attachment to be deducted from the first execution or executions obtained in the usual manner. This would be only just, especially where, as it often happens, the attaching creditor is the means of saving the property from being carried off and lost perhaps to all the creditors.—Eds. L. J.]

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Tate and The Corporation of the City of Toronto.

Garnishment.

Where several judgment creditors proceed against the same garnishee, they are entitled to be paid in the order in which their attaching orders are served, not rateably.

The sum attempted to be garnished was money awarded to the judgment debtor, of which, according to the affidavit of one of the arbitrators, a certain sum was for work done under a contract, and the remainder for damages which he had sustained by having the work taken out of his hands. *Held*, that as this latter portion did not become a debt until the award was made, only the attaching orders coming in after the award would bind it, not those before.

[Q. B., T. T., 1863.]

All in this court.

1. *In re the arbitration between George Tate and the Corporation of the City of Toronto.*
2. *Sutton and Ommaney* v. *George Tate.*
3. *Tully and Grundy* v. *George Tate.*
4. *Munroe and Grundy* v. *George Tate.*
5. *Lindsay et al* v. *George Tate.*
6. *Shepherd* v. *George Tate and Mark Hutchinson.*
7. *Melling* v. *George Tate*
8. *Whitehead* v. *George Tate.*
9. *Jack* v. *George Tate.*
10. *Hutchinson* v. *George Tate.*
11. *Nightingale* v. *George Tate and Mark Hutchinson.*
12. *Nightingale* v. *George Tate, Hugh Miller, and D. B. Harrison.*
13. *McClain* v. *George Tate.*
14. *McKay* v. *George Tate, Hugh Miller, and D. B. Harrison.*
15. *The Bank of Montreal* v. *George Tate.*

All in the Court of Common Pleas.

All in the County Court of the united counties of York and Peel.

16. *Gundry* v. *George Tate.*
17. *Walton* v. *George Tate.*
18. *Playter* v. *George Tate.*
19. *Severs* v. *George Tate*

In the County Court of the county of Wellington.

20. *Carroll* v. *George Tate, Hugh Miller, and D. B. Harrison.*

McMichael, on behalf of Thomas Nightingale, in Trinity Term, 26 Vic., obtained a rule entitled in the above causes, calling upon the above-named plaintiffs, judgment creditors, to shew cause why the money paid into this court on the 15th of July, 1862, by the Corporation of the City of Toronto, garnishees, to the credit of the cause firstly above named, under the the order of Burns, J., dated 5th July, 1862, should not be paid to the attaching creditor, Thomas Nightingale, or so much as would satisfy his two judgments in the causes above-named in which he is plaintiff; or why the above-named plaintiffs, judgment creditors, should not be first paid the amounts of their judgments in the cause thirdly above-named out of the said money, under the terms of an agreement dated the 29th of May, 1861, of another agreement dated the 3rd of June, 1861, and of another agreement dated the 18th of December, 1860, and why the balance of the said money should not be distributed as this court might think proper; or why this court should not make such distribution of the money, and order the same to be paid out to the judgment creditors, or some of them, in such amounts and order as to this court should seem fit; or why the court should not make such orders and give such directions respecting the said money, and the costs of all or some of the judgment creditors, as to the court might seem best: upon reading the order of Burns, J., and the papers filed in the above-named causes in Chambers, and filed in support of the application, and on grounds disclosed therein and in the papers filed.

This rule had been enlarged from term to term, and was now brought on.

It appeared that on the 13th of June, 1862, Morrison, J., granted a summons, entitled in the original cause of *Tate* v. *The City of Toronto*, calling on the plaintiff, Tate, to shew cause why the corporation should not have leave to bring into court the sum of $5,645, being the amount said to be awarded to Tate, together with the sum of $1,550 claimed by the arbitrators as the expenses of the arbitration and the award, in order that the sum of $5,645 might be paid out under the direction of the court to the different judgment creditors of Tate, who had obtained summonses or orders to attach the said sum in the hands of the said corporation as garnishees, or taken proceedings under the garnishee enactments, as the court might think fit; and that the claim of the arbitrators might be referred to the proper officer to be taxed, and the amount when taxed be paid to the arbitrators under the order of this court, and that the corporation be discharged from the operation of the said summonses, orders, and other proceedings.

A copy of this summons was served on each of the judgment creditors of Tate named in the title to the present rule.

On the 18th of June, 1862, Burns, J., made an interim order on this summons, that the corporation should deposit forthwith $1,550 with the master, and upon the arbitrators being notified of such deposit, that the arbitrators should file the original award with the clerk in Chambers, and thereupon that it should be referred to the master to tax the proper fees to the arbitrators, and on such taxation to pay over the amount taxed out of such deposit

On the 5th of July, 1862, Burns, J., made a further order, that the corporation be at liberty to pay into court the sum of $5,645, the balance of the award in this cause, to the credit of the cause of *Tate* v. *The Corporation of the City of Toronto*, to depend, as to its distribution, upon such applications as the creditors jointly or severally might make upon the garnishment summonses sued out by Tate's creditors from the several courts, the court undertaking to hear such attaching creditors, and the creditors consenting to the court entertaining the application: the money to be paid into court forthwith: the costs on the part of the corporation of this application to be dealt with by the court, and all further proceedings in all the suits mentioned in the affidavit of service of the summons (being all the suits mentioned in the title to the rule) to be stayed until the court should have disposed of the application.

There was an arbitration between the Corporation of the City of Toronto and Tate, in which an award was made, dated the 20th of February, 1862. And the arbitrators found that there was due from the corporation to Tate $6,750, out of which sum they awarded that the corporation should deduct and retain $1,105, being the amount, with interest, of two certain bills then overdue for $500 each, dated respectively the 2nd May, 1860, and drawn by Tate on and accepted by the Chamberlain of the said corporation, payable to the order of Mark Hutchinson, and which bills they awarded and directed that the corporation should forthwith

pay; and that the corporation should pay to Tate $5,645, being the balance of the sum of $6,750 so found due to Tate, on or before the 20th of March, 1862, which sum was in full as well of all demands under the contract between the parties as of all other matters in difference between them. And they awarded for fees of arbitration, including expenses of preparation and execution of the award, $1,550.

Under the order of Burns, J., it was admitted that on the 15th of July, 1862, the corporation of the city of Toronto paid $5,645 into court. It was stated by Mr. E. C. Jones, who appeared as counsel for Mark Hutchinson, one of the judgment creditors, that this amount was composed of two distinct sums, one of $4,234 40, being for work and labour, &c., done by Tate, and $1,410 60 for damages, called by the arbitrators "compromise."

There was among the papers a statement, sworn to be in the hand-writing of Mr Manning, one of the arbitrators, in which the following figures appeared to represent certain matters:—

$26,261 00	which was obviously the value shewn by the statement of all Tate's work and materials.
164 00	opposite to which was written "plant."
$26,425 00	
21,571 00	the total amount charged against Tate.
$4,854 00	
485 40	opposite to which was written, "20 months' interest."
$5,339 40	opposite to which was written, "amount due."
1,410 60	opposite to which was written something in pencil, (all the rest being in ink) which might probably have been intended for "compromise," as Mr. Harrison stated, but it was not possible to assert this from looking at the writing.
$6,750 00	opposite which was written, "Amount due Tate."
1,105 00	opposite which was written, "Deduct notes payable by Chamberlain."
$5,645 00	opposite which was written, "Award"

This statement was explained by Mr. Manning on his examination under oath. He swore that the $1,410 60 was allowed by compromise between him and the other arbitrators, and, as he explained it, it was given to Tate for damages sustained by him for having the work taken out of his hands.

In Trinity Term *E. C. Jones* appeared to this rule for Mark Hutchinson.

R. A. Harrison for John Melling, John Shepherd, James Lindsay and others. He stated that the work was taken out of Tate's hands by the corporation about the end of June, 1860. He also stated that the gross sum awarded was composed of two sums. He referred to an affidavit of John Turner to establish that Melling recovered judgment against Tate on the 6th of August, 1860, for £714 7s. 3d. debt, and £4 1s. 11d. costs, and the next day obtained an attaching order on the corporation. He cited *Richardson* v. *Greaves*, 10 W. R., 45. *Holmes* v. *Tutton*, 5 E. & B., 66; *Salaman* v. *Donovan*, 10 Ir. C. L. Rep., Appendix, 13; *Sparks* v. *Younge*, 8 Ir. C. L. Rep., 251; *Dresser* v. *Johns*, 6 C. B. N. S., 429.

Sampson appeared for Tully and Gundry, and for Thomas Gundry, in a case in the county court to which the agreement as to paying Tully and Gundry did not, as he contended, relate. In the county court suit there was an attaching order both before and after the award. In the other suit the attaching order was after the award.

Beaty appeared for Walton, a creditor by judgment in the county court. His attaching order was so late that he admitted his client could obtain nothing unless there was a rateable distribution. He referred to Drake on Attachment, p. 455.

Tilt appeared for Jack. His attaching order was served on the 22nd of February, 1862, after the award.

Crombie appeared for the Bank of Montreal, for Monro, and for Merrick.

C. Robinson, Q. C., appeared for Whitehead.

M. C Cameron, Q. C., appeared for Nightingale, and also for Shepherd, and he moved the rule *nisi* absolute and supported it.

The affidavit of John Turner, referred to by Mr. Harrison, shewed attaching orders served on the corporation as follows:

C. P.—*Melling* v. *Tate*, received 10th August, 1860.
C P.—*Hutchinson* v. *Tate*, received 22nd January, 1861.
B R —*Sutton* v. *Tate*, received 5th March, 1861.
Co C.—*Severs* v. *Tate*, " 8th " "
C. P.—*Lindsay* v. *Tate*, " 9th " "
Co C.—*Gundry* v. *Tate*, " 15th April, "
Co.C.—*Carroll* v. *Tate*, " 29th " "
Co.C.—*Merrick* v. *Tate*, " 2nd May, "
Co.C.—*Walton* v. *Tate*, " 2nd " "

All these were received by the deputy chamberlain, John Turner, before the award was made; and since the award he received the following:

C. P —*Hutchinson* v. *Tate*, received 21st February, 1862.
Co C.—*Severs* v. *Tate*, received 22nd February, 1862.
C. P.—*Nightingale* v. *Tate*, received 22nd February, 1862.
Co.C.—*Gundry* v. *Tate*, received 26th February, 1862.
B. R.—*Tully* v. *Tate*, " 27th " "
C. P.—*Melling* v. *Tate*, " 28th " "
Co C.—*Carroll* v. *Tate*, " 3rd March, "
B. R.—*Munro* v. *Tate*, " 6th " "

Besides the foregoing, it was shewn that attaching orders had been served on the corporation as follows:

C. P.—*McKay* v. *Tate*, served on Charles Daly, 23rd February, 1861.

C. P.—*McClain* v. *Tate* served on Assistant Chamberlain, 1st May, 1861.

C. P.—*Jack* v. *Tate*, served on the Chamberlain, 22nd February, 1862.

C. P—*Jack* v. *Tate*, served on the Chamberlain, 17th May, 1861.

C. P.—*Whitehead* v. *Tate*, served on the Chamberlain, 29th March, 1862.

C. P.—*Shepherd* v. *Tate*, served on the Mayor and Clerk, 23rd January, 1861.

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

We have gone through the papers brought into court on this argument.

One question that has been raised is, whether each judgment creditor is entitled to be paid in full, as far as the debt due by the garnishee to the judgment debtor will go, in the order and priority in which the attaching orders were served, or whether all the attaching creditors are entitled to be paid rateably.

It appears to us that the whole reasoning of Lord Campbell, in *Holmes* v. *Tutton*, (5 E. & B, 65) is strongly in favour of the former conclusion, and particularly at page 80, where, in reference to the language of the 62nd section of the English C. L. P. Act of 1854, that the service of the order on the garnishee shall bind such debts, he observes, "We construe the word *bind* as not changing the property or giving even an equitable property, either by way of mortgage or lien, *but as putting the debt in the same situation as the goods when the writ was delivered to the sheriff*," in which case the first writ must be satisfied in full before a subsequent writ can have anything applied to its satisfaction. And in *Salamans* v. *Donovan*, (10 Ir. Com. Law Rep. Ap. 13) it was held that where a judgment creditor obtains a charging order, (attaching dividends of stock in the books of the Bank of Ireland) which order is duly served, the bank will be held responsible if it pay such dividends to another judgment creditor, who subsequently to the date of the first order has obtained in a different court, not only another charging order attaching, but also an absolute order for the payment of such dividends.

According to these authorities, the first attaching order, from the time of its service, operates on the debt due by the garnishee to the judgment debtor, in like manner as a *fi. fa.* against goods operates from the moment of its delivery to the sheriff on such debtor's goods. The creditor whose execution is first has priority, and so, we apprehend, has the creditor who first serves his attaching order on the garnishee, and so on, in succession. The case of *Webster* v. *Webster*, (8 Jur. N. S., 1047) contains some expressions apparently affecting this question, but it appears to us to rest principally on the custom of the city of London, as to one point,

and as to the operation of an assignment of money before it came to the hands and possession of the garnishee.

The second question is whether the amount of the award is divisible, one part of it being for a debt due in June, 1860, the other being in the nature of damages given to the plaintiff over and above the debt actually due to him.

Mr. Manning's statement establishes that this sum was not awarded as part of the debt due to Tate by the City of Toronto under his contract, but as damages sustained by him for having the work taken out of his hands. The attaching orders could not affect anything but debts owing or accruing due to the judgment debtor by the City of Toronto when each attaching order was served; and this latter sum of $1,410 60 did not become a debt due to Tate until the award was made, and was not affected, as appears to us, by any attaching order served before the making of the award. The attaching orders which came in after the making the award would therefore, in our view, bind the new debt in the order in which they were received.

We are therefore of opinion that a rule absolute should issue, directing the master to ascertain the order in which the creditors of Tate, or any of them named in the rule *nisi*, served their respective attaching orders on the garnishees, before the date of the award, and that, out of the moneys paid into court to the credit of this cause, he do pay the sum of $5,339 40 to such creditors in the order of priority so ascertained, paying each creditor in full as far as that sum will go. And that the master do ascertain the order in which the creditors of Tate, or any of them named in the rule *nisi*, served their respective attaching orders on the garnishees after the making of the award, and that out of the moneys paid into court to the credit of this cause, he pay the sum of $1,410 60 to such last named creditors in the order of priority so ascertained, paying each creditor in full as far as the last named sum will go.

If any part of the sum paid into court is absorbed by a charge of commission or fees authorised by rule of court, a rateable proportion thereof is to be deducted from each of the sums of $5,339 40 and $1,410 60, and the balance only distributed.

NICHOLLS v. MARY NICHOLLS, EXECUTRIX OF NATHAN NICHOLLS.

Judgment and execution—Amendment of—Right of other judgment creditors to object.

The plaintiff having declared against defendant as executrix, and obtained judgment by default, by mistake entered it and issued execution as against her in her own right, and on discovering the error obtained an order to amend the judgment roll and *fi. fa.* so as to correspond with the declaration. On motion to set aside this order, at the instance of other judgment creditors of defendant as executrix, *Held*, any fraud or collusion between the plaintiff and defendant in the suit being denied, that the applicants had no right to prevent or interfere with such amendment, and that the fact of their judgments being unknown to the judge when he made the order was immaterial.

[Q. B., M. T., 1863.]

S. Richards, Q. C., on behalf of Peter Clark, Hugh Clark, James Beachell, and Thomas Bacon, judgment creditors of defendant, obtained a rule *nisi* calling on the plaintiff and defendant respectively to show cause why an order made in this cause by Adam Wilson, J., in June, 1863, ordering that the judgment roll in this cause should be amended, and also the amendments made pursuant to that order, and the writ of *ven. ex.* for part and *fi. fa.* for residue against lands, and also the *fi. fa.* against lands, issued on that judgment, directed to the sheriff of Northumberland and Durham, should not be set aside, on the following grounds:

1. That the order and amendments prejudice the rights of other judgment creditors, namely, Peter Clark, Hugh Clark, James Beachell and Thomas Bacon, who have obtained two judgments in the County Court of Northumberland and Durham against the defendant, executrix as aforesaid, and Adam Holmes and John Butler, each of whom has obtained a judgment in the said County Court against the defendant as executrix, on all which judgments writs of execution against lands were in the sheriff's hands before and at the time of making the order: that the order and amendments prejudice a Chancery suit mentioned in the affidavits and papers filed, instituted by one of the judgment creditors for the benefit of himself and the other creditors of the testator: that the fact that any of the said executions were in the sheriff's hands was not made known to the said judge, nor were any of the judgment creditors made parties to the application, or had any knowledge thereof.

2. That the order should not have been granted, as it prejudices the rights acquired by the judgment creditors under their executions against lands.

3. That the causes of action, or some of them, in respect of which the judgment is entered on the roll, are against the defendant personally, and not against her as executrix, and do not warrant a judgment against her as executrix.

4. That there is no sufficient writ of execution against goods to warrant the writ against lands, or the *ven. ex.* and *fi. fa.* for residue, as the writ against goods directed the amount to be made of the personal goods of the defendant, and not of the goods of the testator in her hands as executrix to be administered, and that writ does not on the face of it appear to be founded on a judgment against the defendant as executrix.

5. The *fi fa.* against lands directs the amount to be levied of the lands of the defendant.

6. That the *ven. ex* and *fi. fa.* against lands does not truly recite the preceding writ of *fi fa.* against lands: that there is no writ such as is recited in the *ven. ex.*, and no judgment warranting such a writ as is recited in the *ven. ex.* and *fi. fa.* for residue.

Or why such other order should not be made for the relief of the judgment creditors, or some of them, as to this court may seem meet on the facts.

From the judgment roll in this cause it appeared that the plaintiff declared against the defendant, "executrix of the last will and testament," &c., "for money payable by the defendant as such executrix as aforesaid, to the plaintiff for goods sold and delivered by the plaintiff to defendant as such executrix, for money lent by the plaintiff to the defendant, as such executrix, for money paid by plaintiff to defendant, as such executrix, at her request, and and for money received by defendant as such executrix for the plaintiff's use," and for money found to be due by defendant "as such executrix" to the plaintiff on accounts stated. Judgment was entered by *nil dicit*, that the plaintiff do recover against the defendant* the said £259 16s 3d. The amendment made under the order was by inserting, after the word defendant (at*), the words "as such executrix as aforesaid," and adding after the statement of the amount recovered the words following, "to be levied of the goods and chattels which were of the said Nathan Nicholls at the time of his death in the hands of the defendant as executrix as aforesaid to be administered, if she hath so much in her hands, and if she hath not so much thereof in her hands to be administered, then £8 4s. 11d., being for the costs aforesaid, to be levied of the proper goods and chattels of the defendant.

This rule was granted in the Practice Court, and was made returnable here.

The affidavits in support of the application set out the proceedings in this cause, verifying by copies the original judgment roll, the amendment, and the summons and order for the amendment. Copies of the judgment rolls in the County Court, and of the bill in Chancery referred to were also put in.

An affidavit of the attorney for the plaintiffs in the suit in the County Court, stated (par. 22) that no affidavits or papers on which the summons or order moved against were founded, were found upon search with the judge's clerk in Chambers, and (par. 23) that the deponent believed that neither the judge who granted the summons nor the judge who made the order were informed of the existence of the Chancery suit, or of the recovery of the judgments in the County Court, or of the proceedings therein, and that he sincerely believed that had they been so informed the order would not have been made, and he believed there was a fraudulent concealment of these facts, or some of them, from the judge; and he stated (par. 24) that the effect of the order was to prejudice the suit in Chancery, and the claims of the judgment creditors in the County Court, and that the plaintiff's object in obtaining the same was to defeat the recovery of these claims; and (par. 25) that he had been informed by the attorney who entered an appearance for the defendant in this suit, that he received his instructions from the plaintiff and the plaintiff's attorney in this suit, and that he never saw the defendant, and that his instructions were to enter an appearance, but to do nothing further.

The affidavits in answer stated that the Chancery suit and Butler's suit in the County Court were at an end The plaintiff's attorney denied "fraudulent concealment," and stated his belief that the object of obtaining the order to amend was not to defeat the other claims, but to cure an irregularity in his own judgment.

He also denied giving any instructions to the attorney who appeared for the defend · and said the defendant's attorney had assured him he made no such representation. He swore that an affidavit and exhibits attached thereto were produced on moving for and obtaining the summons: that all the proceedings in the suit were intended to be against the defendant as executrix: that the irregularities amended occurred through the mistake of a clerk, and were not discovered until a few days before the date of the order to amend.

The agent for the plaintiff's attorney, who obtained the summons and order to amend, denied "fraudulent concealment" on his part.

The plaintiff swore to the justice of the claim · which he had recovered judgment, denying any fraudulent intent or collusion between him and the defendant. He swore positively that the defendant was indebted to him as executrix, and that the action was commenced to recover that debt, and not for the purpose of defeating the rights or claims of the other creditors of the testator. He denied fraudulent concealment on his part.

Spencer shewed cause, and cited *Balfour* v. *Ellison*, 3 U. C. P. R. 30; *Farr* v. *Arderley*, 1 U. C. R. 337; *Jones* v. *Jones*, 1 D & R. 558; *Perrin* v. *Bowes*, 5 U. C. L. J. 138; *Ferguson* v. *Baird*, 10 U. C. C. P. 193; *Leigh* v. *Baker*, 3 Jur. N. S. 668.

S. Richards, *Q C*, in support of the rule cited *Purdie* v. *Watson*, 8 U. C. P. R. 23; *McGee* v. *Baird*, Ib. 9.

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

This rule is obtained by Peter Clark, Hugh Clark, James Beacheil and Thomas Bacon, represented to be judgment creditors of the defendant as executrix of her deceased husband Nathan Nicholls.

Neither of them shew or profess to have any interest in this cause, nor yet in the order and proceedings founded thereon, against which they move, except so far as they make the judgment against the defendant in her representative character regular, and so support the execution founded thereon. The plaintiff had obtained priority in judgment and execution, but discovering a mistake in the manner in which the judgment was entered, he applied for and got an order to amend, making it right in form as against the executrix, and consistent with the statement in the declaration. If the amendment is valid, and is sustained, the plaintiff retains his priority, and his judgment will be first satisfied. The defendants assume that but for the amendment their judgments, though entered at a later date than the plaintiff's, would be entitled to prior satisfaction out of the testator's estate.

It is objected that as strangers to this cause they have no right to be heard to object to the order and what followed upon it.

The first and second objections taken in the rule are that the amendments prejudice the rights of the creditors who have recovered judgments in the County Court, as well as those of the plaintiff in the Chancery suit. But these creditors have no right to be heard to prevent, and if not to prevent certainly not to annul, amendments in a suit between other parties, on the ground that without such amendments the plaintiff therein will fail in his suit against a debtor who owes all of them on different accounts. They can have no vested interest in mistakes or imperfections existing in his suit against their common debtor, though such mistakes or imperfections, being unremedied, will be fatal to his recovery.

If fraud or collusion between the plaintiff and defendant were alleged, as where the plaintiff was thereby enabled to obtain judgment for an unfounded demand, or other creditors are misled or delayed, the plaintiff taking some advantage thereby, or other creditors are influenced and induced to take or withhold particular proceedings, or to change their position unfavourably to the recovery of their just debts, there might be found a mode to prevent the success of such frauds, though perhaps not in this form. I refer to *Harrod* v. *Benton* (8 B. & C. 217) and *Martin* v. *Martin* (3 B. & Ad. 934).

But the only ground suggested (and that more in the affidavit than in the rule) beyond the necessity of the amendment for the plaintiff's interest, and the procuring the order to make it, is an alleged fraudulent concealment of the existence of the Chancery suit and the County Court suits. We do not find it asserted in the affidavits on which the rule *nisi* was granted that the plaintiff was aware of these different suits; but if he was, how did it become his duty to make their existence known, and if not his duty where is the fraud in withholding the information? The affidavits filed on shewing cause deny any fraudulent concealment, at least as explicitly as it is asserted on the other side, and as to the Chancery suit, they show it is settled. On any ground of fraud or collusion we think the case wholly fails, and that the applicants are prejudiced because the plaintiff's judgment and execution, as amended, is entitled to priority over theirs—the judgment being, as is sworn, for a *bonâ fide* debt—is no reason for our interference.

In *Purdie* v. *Watson* (3 P. R. 23), the Court of Common Pleas made a very similar amendment.

The other objections apply only to irregularities or informalities in the plaintiff's suit, such as a mere stranger to the cause has no right to interfere with.

We think the rule must be discharged.

We refer to *Perrin* v. *Bowes*, 5 U. C. L. J. 138; *Balfour* v. *Ellison*, 3 U.C. P. R. 30; *Farr* v. *Arderley*, 1 U. C.R. 337; *Jones* v. *Jones*, 1 D. & R. 558; *Ferguson* v. *Baird*, 10 U.C. C. P. 493.

KELLY v. HENDERSON.

Verdict subject to reference—Second verdict taken—Irregularity.

Where a verdict had been taken in 1860, subject to a reference, which was never proceeded with, and a second verdict was taken in 1863, *Held*, that the second verdict was irregular, while the first remained, and must be set aside with costs. [Q. B., T. T., 1863.]

In Easter Term, *Robert A. Harrison* obtained a rule *nisi* to set aside the verdict rendered for the plaintiff at the last assizes for the county of Hastings, for irregularity, with costs, on the following grounds:—1st. That in the year 1860, a verdict was taken subject to a reference, which verdict was in no manner disposed of at the time of the second trial in 1863. 2nd. That no proceeding was had in this cause for more than four terms next preceding the entry of the record in this cause in the year 1862, except a proceeding which was void, and no term's notice of intention to proceed was given before the entry of the said record. 3rd. That no notice of trial was ever given by the plaintiff or his attorney, or by any person on his behalf, to the defendant, or to any person on his behalf, for the last spring assizes for the county of Hastings, at which assizes the last mentioned verdict was rendered; or for a new trial, on grounds disclosed in affidavits and papers filed.

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

The affidavits on which this rule was granted established clearly that a verdict was rendered in this cause subject to a reference: that although the time for making the award was repeatedly enlarged by the arbitrator, and again extended by the written consent of the defendant, no award had ever been made. It did not even appear that the plaintiff obtained an appointment from the arbitrator to enter into the case. But the verdict still remained.

The affidavits filed for the plaintiff did not deny the foregoing facts; they only offered explanations for the delay, which to a great extent they attributed to defendant's repeated promises to settle, and they set forth that though no notice of trial was served personally on defendant or any one else for him, for the last spring assizes, this arose from no one being in defendant's office, and therefore the notice of trial was put under the door. But they made no allusion whatever to the assertion on the other side, that the verdict taken in this cause in 1860 had never been set aside.

DRAPER, C. J.—The authorities are conclusive on the question. Under the circumstances stated the second verdict is irregular while the first remains, unless the irregularity has been waived by both parties, which is not shewn here. *Hall* v. *Rouse* (6 Dowl. 656), *Evans* v. *Davies* (3 Dowl. 786), *Harrison* v. *Greenwood* (3 D. & L. 353), all sustain the defendant's contention.

Per Cur.—Rule absolute, with costs.

ALLEN v. BOICE.

Notice of trial too late—Reference at nisi prius—Time for moving

Where notice of trial had been served too late, but the cause was entered, and referred by the judge at *nisi prius* to arbitration, no verdict being taken. *Held*, that a motion to set aside the proceedings must be made within the first four days of the next term [Q. B., M T., 1863.]

C. Robinson, Q C., on the last day of the term, applied for a rule *nisi* to set aside the notice of trial, and the order made by the presiding judge at *nisi prius*, referring this cause to arbitration, on the ground that the notice was too late, and was irregularly served upon a person as agent for defendant's attorney; or to set aside the order of reference for irregularity, on the ground that the plaintiff obtained the same *ex parte*, and after the defendant had protested against the service of the notice of trial, and against further proceedings under the same.

The application had been made on the day before in Practice Court, and refused by the learned judge presiding there (John Wilson, J.) as too late, but with leave to apply to the full court.

The venue was laid in Stormont, one of the United Counties of Stormont, Dundas, and Glengarry, and issue having been joined a notice of trial was on the 26th of October last served on the defendant's attorney for the next ensuing assizes at Cornwall, on the 2nd of November, 1863, which was clearly too late. The defendant's attorney hearing that another notice of trial had been on the 24th of October served on Mr. Pringle, a practising attorney at Cornwall, as agent for defendant's attorney, served the plaintiff's attorney on the 31st of October with a notice that Mr. Pringle was not his agent, and that he refused to accept the service on him and that if the plaintiff's attorney proceeded application would be made to set the proceedings aside.

The plaintiff's attorney entered his record, but no trial was had or verdict taken, but the cause was referred to arbitration by the learned judge presiding.

DRAPER, C J.—On the foregoing facts it appears to us that the motion should have been made within the first four days of this term (Michaelmas). No excuse is offered for the delay, or any suggestion for departing from the usual rule.

Per cur—Rule refused.

COMMON PLEAS.

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

BROWN v. RIDDELL.

Arrest—Capias—Affidavit—Consol. Stats. U. C, ch. 24 sec. 5.

A party having been arrested upon the affidavit of the defendant, and two corroboratory affidavits, which stated that "from information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said John Riddell is privately making away with his property with the intention of realizing the same and leaving Upper Canada, and that unless the said John Riddell is forthwith apprehended he will leave Canada and depart out of the jurisdiction of this honourable court. * * * and for the express purpose of defrauding me of the damages, I may recover against him.

Upon motion to set aside the *capias*, and arrest all proceedings thereon, or to discharge the defendant from custody.

Held, that under the affidavits made in this case, the court could not infer that the plaintiff did not shew such facts and circumstances as satisfied the judge there was reasonable and probable cause for believing that the defendant was about to leave the Province But inasmuch as the defendant's own affidavit denied the charge upon which he was arrested most unequivocally, and showed circumstances by which it might be inferred he had no intention (then) of leaving the province, the court ordered him to be discharged from custody, but refused to set aside the *capias* and arrest thereunder.

REMARK.—This decision is not to be referred to as upholding arrests upon affidavits such as were made in this case.

(C. P., T. T., 1863.)

During Trinity Term last, *R. A. Harrison* obtained a rule *nisi* to set aside the order of Adam Wilson, J., of the 27th of June last, authorising the issuing of a *capias* for the arrest of the defendant in this cause, and all proceedings had thereunder and subsequent thereto, including the writ of *capias* under which the defendant was arrested and in close custody, upon the ground that the affidavits upon which the order was granted were not sufficient, according to law, to warrant the making of the order, and that the order was improvidently made, and upon grounds disclosed in affidavits and papers filed. Or why the defendant should not be altogether discharged out of custody upon the ground that at the time of the making of the order he, the defendant, had no intention of quitting Canada, and upon grounds disclosed in affidavits and papers filed, and why such order as to costs should not be made as to the court might seem meet.

During the term *Harman* shewed cause, and contended that the statement contained in the affidavits filed on behalf of the plaintiff stated such facts and circumstances as shewed there was good and probable cause for believing that the defendant, unless forthwith apprehended, was about to leave Canada. That the affidavits filed on behalf of the defendant shew, that shortly before the affidavit to arrest was made, defendant proposed to his cousin to buy his farm, no doubt with the intention of leaving the country. True, he stated afterwards that he concluded to abide the consequences of an action, but the plaintiff would not be safe in relying on that determination. He contended there must be a clear case before the order could be set aside or the defendant discharged from custody. He referred to *Delisle* v *Legrand*, 6 U. C. L. J. 12; *Palmer* v. *Rogers*, 6 U. C. L. J. 188; *Terry* v. *Comstock*, 6 U. C. L J. 235; *Bullock* v. *Jenkings*, 20 L. J. Q. B. 90; 1 L. M. & P 645.

Harrison, contra, contended that the plaintiff's affidavits failed to establish any facts from which the intended departure of the defendant could be inferred. He also contended that other affidavits than those before the judge might be used, and at all events on that part of the application to discharge defendant out of custody the affidavits he filed might be read, and they shewed conclusively from facts and circumstances that defendant could have no intention of leaving the country. He referred to *Pike* v. *Davis* 6 M. & W 546; *Gibbons* v *Spalding*, 11 M. & W. 174; *Peterson* v. *Davis* 6 C. B. 235; *Allman* v. *Kensel*, 3 U. C. Prac. Rep. 110; *Samuel* v. *Buller*, 1 Ex. 439; *Graham* v. *Sandrinelli*, 16 M. & W. 191.

RICHARDS, C. J.—The statute authorising the arrest is Con. Stat. U C., cap. 24, sec 5. It provides that in case any party or plaintiff being a creditor, or having a cause of action against any person liable to arrest by affidavit of himself or some other individual, shews to the satisfaction of a judge of either of the superior courts of common law that such party has a cause of action against such person to the amount of $100 or upwards, or that he has sustained damage to that amount, and also by affidavit shews such facts and circumstances as to satisfy the said judge that there is good and probable cause for believing that such person is about to quit Canada with intent to defraud his creditors generally, or the said party or plaintiff in particular, such judge may by a special order direct that the person against whom the application is made shall be held to bail for such sum as the judge thinks fit.

Under sec. 31 of the Common Law Procedure Act, any person arrested on a *capias* issued out of either of the superior courts of common law, may apply at any time after his arrest to the court in which the action had been commenced, or to a judge of one of such courts, for an order or rule on the plaintiff to shew cause why the person arrested should not be discharged out of custody, and such court or judge may make absolute or discharge any such order or rule, and direct the costs of the application to be paid by either party, or make such other order therein as to such court or judge may seem fit; but any such order made by a judge may be discharged or varied by the court on application by either party dissatisfied with such order.

The grounds of belief as to defendant's intended departure are thus stated in plaintiff's affidavit in applying to my brother *Wilson* for the order directing the arrest: "From information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said John Riddell is furtively making away with his property, with the intention of realizing the same and leaving Upper Canada, and that unless the said John Riddell is forthwith apprehended he will leave Canada, and depart out of the jurisdiction of this honourable court * * and for the express purpose of defrauding me of the damages I may recover against him." Two other persons made similar affidavits, stating that from information they had received, and from their own personal knowledge they had good reason to believe, and did verily believe, that the said John Riddell was furtively

making away with his property with the intention of realizing the same for leaving Upper Canada.

Bullock v *Jenkins*, 1 L. M & P 645, is an authority that on an application to reverse the judge's order for holding the defendant to bail no other affidavits can, in general, be used than such as were before the judge when he made the order; but on an application to discharge the defendant from custody fresh affidavits may be used.

Graham et al v. *Sandrinelli*, and *Talbot* v. *Bulkeley*, 16 M. & W. 191 and 194, are authorities to shew that where a deponent states only that he has been informed and believes that the defendant is about to leave England, without stating from whom the deponent obtained the information, is not sufficient ground for an order for the defendant's arrest.

Pegler et al. v. *Huslop*, 1 Ex. 437, decides that it is allowable when the defendant appeals to the court against an order to hold to bail, to use affidavits in denial of the plaintiff's cause of action. But the court will not interfere unless it plainly appears that the plaintiff has no cause of action against the defendant.

The affidavits used by the plaintiff do not bring the case quite within the principle on which the cases referred to in 16 M. & W. were decided. The plaintiff does not merely state that he is informed and believes that the defendant is about to leave the province, but that from information he had received from various sources, and from his own personal knowledge, he had good reason to believe that the defendant was *furtively* making away with his property with the intention of realizing the same and leaving the country. Two other persons at the same time, and before the same commissioner, make similar affidavits. If the deponents in those affidavits had informed him of the facts there stated, and plaintiff had stated that he had got such information from them the persons from whom he got the information being mentioned, the evil referred to in the cases quoted would not exist. The judge had the affidavit of these two persons with that of the plaintiff, and it seems to me was justified in giving as much force to them as if the plaintiff had stated that he had been informed by those deponents of the same circumstances that they mention in their affidavits. If the plaintiff's affidavit had been framed in that way, I have met with no decided case that declares the order made on such an affidavit would be wrong. Though not wishing this decision to be referred to as justifying parties in making such affidavits as those now under discussion when they wish to obtain a judge's order to hold a defendant to bail, I am not prepared to say that the plaintiff did not shew to the judge such facts and circumstances as satisfied him there was reasonable and probable cause for believing that the defendant was about to leave the province. I cannot therefore set aside the judge's order and the proceedings under it.

But the next question is, as to discharging the defendant out of custody, on the ground that he did not intend to abscond His own affidavit shews that he did contemplate selling his farm in consequence of the proceedings threatened against him; and it seems to me to that extent plaintiff was justified in making the affidavit of his intending to dispose of his property to leave the country. But he denies in the strongest language the charge brought against him, and endeavours to show by confirmatory facts and circumstances that he is not guilty of the seduction of the plaintiff's daughter, and says that he has determined, after consultation with his friends, to defend the suit, and abide its results That his occupation and pursuits, and the preparations he had made for completing his house and making improvements on his farm, all shew that he had no intention of leaving the country. Many of the circumstances to which he refers as to his position, property, and contemplated improvements, are confirmed by two other affidavits which he files.

No attempt is made to answer these affidavits, or to contradict the facts stated in them.

The defendants' affidavit denying the charge of seduction would not be sufficient to authorise his discharge, but it is permissable to take that into consideration in judging of the probabilities of his being about to leave the country. He states also that plaintiff wished him to marry his daughter, and offered him £100 through a friend to do so, and threatened him with a prosecution if he refused. If he had intended to leave the country, it is not probable that after that kind of notice and threat he would have continued his plans for the improvement of his place and have remained to be arrested.

On the whole, I think the defendant, as he has entered an appearance in the suit of the plaintiff against him, may properly be discharged from custody, and the costs of this application to be costs in the cause.

Per cur.—Judgment accordingly.

Cross v. Richardson.

Libel—Newspaper—Evidence.

In an action of libel for publication in a newspaper, the plaintiff's counsel proved the paper containing the publication, but did not file it, or read the article containing the alleged libel: the defendant's counsel opened his case, but declined calling any witnesses. The plaintiff's counsel then moved to have the paper read and filed, which the learned judge allowed, reserving leave to the defendant to move to enter a nonsuit, if the court were of opinion he was not entitled to do so Upon motion to enter a nonsuit, *held*, that the evidence offered was not admissable, except in the discretion of the judge trying the cause A nonsuit was therefore ordered. [C P., T. T., 1 Geo.]

This was an action for libel published in a newspaper.

The different papers were proved by the plaintiff at the trial, but they were not put in by him and filed or read when he closed his case.

The defendant's counsel commenced his case and said he would not call witnesses.

The plaintiff then desired to have the papers read.

The defendant's counsel objected to this as they had not been put in and read at the proper time.

The Chief Justice of this court was of opinion the plaintiff could not at that stage of the proceedings as of right put in and read the papers, but permitted him to do so, reserving leave to the defendant to move to enter a nonsuit, if according to the strict practice the plaintiff had not pursued the proper course The case then proceeded and a verdict was found for the plaintiff for $1 damages.

In Easter Term last *Eccles, Q. C.*, obtained a rule calling on the plaintiff to shew cause why the nonsuit should not be entered pursuant to the leave reserved.

In Trinity Term *Prince* shewed cause. *Eccles, Q. C.*, contra.

Adam Wilson, J.—Some of the following cases bear on the point:—*Giles* v. *Powell*, 2 C. & P. 259. After the plaintiff had closed his case his counsel desired to call a witness to prove that the bills had been dishonoured, and that due notice of dishonour had been given. This was opposed by the defendant's counsel because it was to give fresh evidence after the plaintiff had closed his case.

Best, C. J., said, "I shall always allow a party to adduce fresh evidence on points of this kind. I had a conversation with my Lord Chief Justice Abbott on the subject, and his lordship stated that he would never allow a witness to be called back to get rid of any difficulty on the merits, or on any thing which went to the justice of the case, but that he always allowed it to be done to get rid of objections which were beside the justice of the case and little more than matter of form. I shall therefore allow the witness to be examined."

Walls v. *Atcheson*, 2 C. & P. 268.—The plaintiff closed his case. The defendant contended he had no right to recover. An argument took place upon the case as it then stood. The plaintiff's counsel then proposed to read a notice which he had intended to have given in evidence, but which from some circumstance or another had been overlooked. The defendant's counsel objected to the plaintiff's mending his case after an argument.

Best, C. J.—"I would not allow the addition of any parol evidence by a witness. I have communicated with the Chief Justice of the King's Bench upon this subject, and we have agreed that it is better not to lay down any particular rule, but to leave it to the discretion of the judge who tries a cause, under the particular circumstances to admit or not admit what may be material. In this case I think I ought to admit this paper, because it cannot have been got up and manufactured for the purposes of the cause, since the commencement of the trial." The notice was then read.

George v. *Radford*, 3 C. & P. 464.—In an action for malicious arrest after the plaintiff had closed his case and the defendant's counsel had commenced to address the jury the Chief Justice said

as the plaintiff had given no evidence of malice he must be nonsuited. The plaintiff's counsel desired leave to call more witnesses. Lord Tenterden, C. J., "You have closed your case and Sir J Scarlet had begun to address the jury, if you had any more evidence to offer you should have adduced it before you had closed your case. I cannot receive it now." The plaintiff's counsel said the strict rule has been very much relaxed. The Chief Justice, "Perhaps too much, as I am sorry to say a great many other rules have been." The plaintiff was nonsuited.

Abbot v. *Parsons*, 7 Bing. 563.—When the judge was summing up, and not before, the counsel for the plaintiff objected that the evidence did not support the particular item of set-off The jury found for the defendant. The plaintiff moved for a new trial. It was opposed because the objection should have been taken while the witness was in the box, and it was too late when the judge was summing up.

The court so determined, Mr. Justice *Park* adding, because then the evidence might have been admitted or rejected as the case required.

In *Middleton* v. *Barned*, 4 Exch. 241, *Parke*, B., says, "We never interfere in the case of a judge at the trial who has or has not allowed a witness to be re-called, after the party has closed his case, unless it be perfectly clear that the judge has wrongly exercised his discretion." See also *Adams* v *Bankart*, 5 Tyr, 425. A nonsuit may lie on the opening speech of counsel, but I apprehend the judge might allow some misstatement to be corrected and the case to proceed, the same as the court may grant a new trial upon its being shewn that if the case had gone to the jury sufficient facts could be shewn. *Edger* v. *Knapp*, 5 M. & G. 753.

Field v. *Woods*, 7 A. & E. 114—The plaintiff produced the draft declared on and it was read. The objection was that it was post-dated, and was not stamped. The defendant on opening his case proposed to shew these objections, but it was held he should have specially pleaded these facts. The court overruled the decision of the judge and granted a new trial; part of the decision turned upon the effect of this draft having been read in evidence at the trial.

Channell on this point in shewing cause said, if the objection is directed against the reading of the document at all, the answer is that the defendant should have interposed when it was put in and stopped the reading. That was not done in a case some time ago where the counsel had suffered an objectionable document to be read and a motion was afterwards made for a new trial, the counsel stating that his omission to object at the proper moment was accidental, the court refused a rule to shew cause.

Littledale, J, says, the practice has been lately that if a document was once read an objection should not be taken to it afterwards, but that has been when the defect appeared on the document itself, but here the objection arose on matter extrinsic, and the judge could do nothing in the first instance but admit the document subject to an objection to be raised afterwards by proof.

Holland v. *Reeves*, 7 C. & P. 36, *Follett*, S. G., in his cross-examination of the plaintiff's witness put a letter into the witness' hand and asked him to read it.

Erle.—If the Solicitor-General is going to read this letter as his evidence, he ought to have it read now, that I may re-examine upon it.

Follett, Solicitor-General.—I am not bound to put it in till after I have addresed the jury.

Alderson, B.—I cannot compel the Solicitor-General to put in a letter which is a part of his evidence till he has addressed the jury.

A return to a mandamus must be received by the court, and when received and filed it then becomes a record. Every return is ambulatory, and in the breast of the person to whom the writ is directed till it is filed. *Rex.* v. *Holmes*, 3 Bur. 1641.

Faith v. *McIntyre*, (7 C. & P. 44) When the plaintiff's counsel proved a letter by the defendant's witness, which he read in his address to the jury, a reply to it was not allowed, but the letter was directed to be put in. The ordinary course of proceeding where documentary evidence is produced is to prove it, then if the judge decide that it is sufficiently proved it is received by the court, which is evidenced by being filed and endorsed accordingly, and then strictly it should be read by the officer or clerk of the court, until then it is not fully entitled to stand as evidence. See *Doe. dem. Gilbert* v. *Ross* 7 M. & W. 114

It frequently happens, however, that a document, although proved and received by the court, is not filed, or not read from inadvertence on the part of the side producing it, or because both sides have taken it as if it had been read and was fully before the court. Until such document is read to the jury it cannot however be properly considered as evidence, any more than what a witness can prove can be taken as evidence until he has declared it openly; the reading in the one case is analogous to the declaration in the other case. There is this difference however between them, that the document after it is proved can be taken up and read at any time and perhaps at a more convenient time, but this course might be highly inconvenient to witnesses.

A document not read by the plaintiff as a part of his case before he has closed is just the same as omitting inadvertently to ask some particular question of a witness before the witness has been allowed to leave the box—an inadvertence which may be remedied by the judge in his discretion—and perhaps an inadvertence which should the more readily be permitted to be cured, because it is very much the practice not to read such documents in any formal manner, unless expressly required to be so read by the other side.

But the strict practice is that such documents should have been filed or received by the court, and should have been read to the jury to constitute them fully as evidence for the plaintiff; and although the Chief Justice had the right to admit them afterwards if he chose to exercise the right in the plaintiff's favour, he did not do so, but he, with the consent of the parties, reserved the question for us to say whether according to the strict practice the plaintiff could insist that such documents were properly in evidence, or could, after his case was closed, insist on their being read to the jury, and I am of opinion that according to the strict practice such documents were not in evidence when the plaintiff's case had been closed, and that the plaintiff could not insist upon their being admitted afterwards.

The case may have been one, and I believe was one, which in the opinion of the learned Chief Justice fully called for the strict practice, and with which I am not disposed to interfere.

The rule will therefore be made absolute for a nonsuit.

Per cur.—Rule absolute.

COMMON LAW CHAMBERS.

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

SCOTT v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

The phrase "costs in the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award, as follows, "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of $201 50," it was *held* that the words "costs in the cause" meant the whole costs both of plaintiff and defendants. Also *held* that arbitrators fees may be referred to the Master for taxation.

[Chambers, Jan. 23, 1864.]

This was an application to review the Master's taxation of costs to the plaintiff, and to direct that the costs of the plaintiff and defendants in the cause should be taxed and thrown together, and that one half of such costs should be borne by plaintiff and the other half by defendants; and further to direct the Master to consider if the charges made by the arbitrators for their services be reasonable, and to decide if they are reasonable, on such evidence as may be brought before him.

The costs were taxed under an award which, so far as material on the question of costs, was in the following form: "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of two hundred and one dollars and fifty cents."

The Master allowed plaintiff half of his own costs of the cause, but refused to tax the arbitrators' charges.

Beaty shewed cause in the first instance, and contended that as the award directed "that the plaintiff and defendants should each pay half the costs of the cause," that the decision of the Master was correct, the words "costs in the cause" having a technical meaning, and meaning only the costs of the successful party in the cause. That the Master had decided correctly in taxing only the plaintiff's costs in the cause and charging half of it to the defendants, the award substantially being in favor of the plaintiff. That as to the arbitrators' fees *prima facie* they were correct, and the Master was bound to take the same as correct until they were impeached, which could only properly be done by application to the court. He cited *Walton* v. *Ingram*, 5 Jur. 467; *Day* v. *Harris*, 1 Dowl. N. S. 353; Marshall on Costs, 198, 432, 434.

Lauder, in support of the application, contended that the costs of the cause in the award meant the whole of the costs, and that they should have been taxed and thrown into hotch-pot and then divided, each party to pay half. He further argued, that the arbitrators' fees could be taxed like any other item. He cited *Bates* v. *Townley*, 19 L. J. Ex. 399; 2 Chitty's Archbold, 11 edn. p. 1671.

RICHARDS, C. J.—In relation to the costs, the reference stated that the costs of the cause in the award and reference were to be in the discretion of the arbitrators. And the award on that point is as follows: "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of two hundred and one dollars and fifty cents. Our said costs appearing in detail as follows:

Edwin H. Ruthland.

Attending meeting, December, 1860, 3 days.....	$24 00
Travelling expenses	23 00
Attending in March, 1861, 4 days	32 00
Attending in August, 1862, 4 days.....	32 00
Travelling expenses	33 00
Travelling expenses	15 00
	$159 00

Henry Waiter.

Attending meeting in March, 1861.....	$8 00
Travelling expenses	2 50
Attending in August, 1861	24 00
Travelling expenses	8 00
In all $201 50	

There is no doubt that the phrase "costs in the cause" generally means the costs only of the party who is successful in the cause; and when referring to the costs of the proceedings that take place before it is ascertained who may be the successful party, it is a convenient mode of referring to them; and when the successful party is known, the costs follow to him as a matter of course. But where the successful party is known, there is not the same necessity of applying the same meaning to the words. If it had been intended that the defendants should pay only half of the plaintiffs costs in the cause, it could have been so stated with little difficulty. If that is the proper view to take of the effect of the words used in the award, then the reference to the plaintiff paying any thing would be quite superfluous. If the arbitrators had simply awarded that the defendant should only pay half of the plaintiff's costs in the cause, that would be sufficient; but when they direct that each shall pay half the costs of the cause, if the whole costs both of defendants and plaintiff are not meant, I do not see how we can give effect to that part which requires the plaintiff to pay half of the costs. If the defendants are to pay half of the plaintiff's costs, and the plaintiff is to lose the other half and not to pay any thing, then the word "pay" has a different signification as applied to plaintiff and defendants, though used at the same time as applicable to both. There is really no paramount reason why this should be so; and full effect may be given to the words used, by deciding that the words mean the whole of the costs in the cause, plaintiff's as well as defendants'; and as all the issues but one in the cause are found for the defendants, this would give them the costs of those issues, and will help the interpretation I give to the words of the award.

I am therefore of opinion that the "costs of the cause," as referred to in the award, mean the whole of the costs, as well those of the plaintiff as the defendants.

As to the amount charged by arbitrators for their fees being subject to be taxed by the Master, there can now be no doubt. In *Roberts* v. *Eberhardt*, 32 L. Times Reports, 36, 28 L. J. C. P. 74, in the Exchequer Chamber, the present Chief Justice Earl said, in practice, the arbitrator usually obtains his fee from the successful party, by keeping his award until he is paid. * * The arbitrator cannot judicially decide the amount of his own fee, whether he specifies it in his award or demands it orally from the parties. If he pursues the usual course above suggested, the party made liable by the award may have the amount taxed, and then is liable to his opponent only according to the allocatur. * * * The decision of the arbitrator on his own costs is always subject to some review, because he may not decide finally in his own favor

Barnes v. *Hayward*, 1 H. & N. 742, seems an express authority in favor of the Master taxing the charges of the arbitrators. There the plaintiff paid the full amount charged by the arbitrators, and, on the taxation of the plaintiff's costs, the Master deducted £132 from the amount of the arbitrator's charges. The plaintiff moved for a rule to shew cause why the Master should not review his taxation and allow the plaintiff the full amount paid by him to the arbitrators. This the court refused to do. Pollock, C. B., said, "The plaintiff should not have paid an exorbitant demand. The Master acted rightly in disallowing these exorbitant charges." The defendant on the same occasion moved to revise the costs, with a view to their being further reduced; and on consulting with the Master, after cause shewn against it, the court ordered a revision on behalf of defendant.

In *Fitzgerald* v. *Graves*, 5 Taunton, 342, the arbitrator had awarded £121 to be paid to himself for arbitration fees This sum the plaintiff paid in taxing the costs in the cause. The item was objected to, but the prothonotory there as the Master here thought that as the sum had been awarded and paid, he had no authority to enquire into the unreasonableness of the amount. On a motion to review the taxation, the court made the rule absolute.

This case seems sustained by the later authorities. In *Dixie* v. *Alexandre*, 1 L. M. & P. 338, Baron Alderson, speaking of the arbitrator's fees, says, "If the defendant thinks them unreasonable, he should apply to have them referred to the Master, to be taxed in the same way as any other costs."

Threlfall v. *Fanshawe*, in the same reports, at p. 340, is an ably argued case and refers to many authorities on the point, though the decision of the case on some of the points is doubted in *Parkinson* v. *Smith*, 30 L. J. Q. B. 178; see also *Frinton* v. *Branson*, 20 L. J. Q. B. 17; *Rose* v. *Redford*, 10 W. R. 91.

The learned Chief Justice subsequently made the following order:—I do order that the Master review his taxation of costs in this cause, and that the whole costs of the cause, both of plaintiff and defendants, be taxed, and then that the whole costs be paid, one moiety by each party, in pursuance of such award; and I further order that, on such revision of taxation, the Master shall also consider, on such evidence as may be brought before him, the reasonableness of the arbitrators' fees, and tax the same as he shall think reasonable.

CROSS v. WATERHOUSE.

Practice—Compelling plaintiff to bring in the record for the purpose of having judgment entered—Judge in Chambers.

Held that a defendant who conceives he has a right to costs against a plaintiff, in consequence of plaintiff having recovered in a Superior Court an amount within the jurisdiction of an Inferior Court, is entitled to call upon plaintiff either himself to proceed to the entry of judgment, or to bring in the record in order that judgment may be entered by defendant.

Held also, that a Judge in Chambers has power to entertain the application and to make the order.

[Chambers, Feb. 11, 1864.]

Lauder obtained from Richards, C J, a summons, calling upon the plaintiff to show cause why the plaintiff should not bring in the Nisi Prius record in this cause, and have the judgment duly

entered and docketed according to the practice of the court, or why the plaintiff should not by his agent or attorney deliver the said record to the defendant, his attorney or agent, to have judgment entered herein, and pay the costs of the application, upon grounds disclosed in affidavits filed.

The affidavits showed that the action was trespass for assault and false imprisonment, to which defendant pleaded not guilty and leave and license; that the cause was entered for trial at the last assizes for the County of Hastings; that it was tried, and resulted in a verdict of one shilling for the plaintiff; that the learned judge who tried the cause had not certified for costs; that notwithstanding the demand of defendant, plaintiff, who had taken the record out of court, refused either himself to enter judgment or deliver the record to defendant to enable him to do so

Robert A. Harrison showed cause. He submitted that plaintiff was entitled to the postea, and that it was in his discretion to enter judgment or not as he saw fit; that the defendant showed no reason for asking to have the record delivered to him; that even if it were delivered to him, he had no right against the will of plaintiff to enter up judgment for plaintiff; and that at all events a Judge in Chambers had no power to make the order that was asked. He referred to *Taylor* v. *Nesfield*, 4 El. & B. 462.

Lauder, contra, argued that defendant was entitled to have judgment entered, in order that if he was entitled to costs against the plaintiff the costs might be taxed and form part of the judgment. He also contended that a Judge in Chambers had power to make the order. He referred to *Engler* v. *Twisden*, 4 Bing. N C. 714; *Newton* v. *Boodle*, 5 C. B. 206; *Chut* v. *Bunnell*, 25 L.J.Q B. 98; 1 Chit. Archd. 11 edn. p 525.

MORRISON, J.—Having taken time to consult the judges of both courts, made the summons absolute, but without costs. He ordered plaintiff within ten days to bring in the record for the purpose of having judgment entered.

Order accordingly.

HAM ET UX v. LASHER ET AL.

Local action—Change of Venue at instance of plaintiffs—Grounds—Terms.

The refusal, upon good grounds, of the judge appointed to hold the assizes for a particular county to try a cause wherein the venue is laid in that county, is a ground for changing the venue, especially when the difficulty of obtaining witnesses to attend at the place where the venue is laid, coupled with the fact that three trials were had in that county, each of which resulted in favor of defendants, and each of which verdicts was set aside by the court, renders the obtaining of a just verdict much more difficult than elsewhere But in such a case plaintiffs applying for a change of venue will be ordered not only to pay the extra costs to which defendants may be put by the change of place of trial, but, in the event of success, ordered not to tax against defendants the increased cost of having a trial in the place to which a change of venue is desired.

Also held, that in a local action it is not obligatory upon the court or judge to order the trial to be had in the next adjoining county only, if in view of all the circumstances of the case, a change to a county more remote is deemed more convenient or desirable.

(Chambers, February 19, 1864.)

J V. Ham, plaintiff in person, obtained a summons calling on the defendants to shew cause why the trial of this cause should not be had in the county of the city of Toronto, and not in the united counties of Frontenac, Lennox and Addington, where the venue is laid; and why for that purpose a suggestion should not be entered on the record that the trial be had in the said county of the city of Toronto, according to the Common Law Procedure Act, on the grounds that a fair and impartial trial could not be had in the united counties of Frontenac, Lennox and Addington, and on grounds disclosed in affidavits and papers filed.

The only affidavit filed on the part of plaintiffs was that of the plaintiff, J. V. Ham. He swore that the action was ejectment, brought to recover possession of lots numbers six and seven in the Gore in rear of the first concession in the space called the broken centre concession of the township of South Fredericksburgh, in the united counties of Frontenac, Lennox and Addington, which the plaintiffs claim by grant from the Crown, bearing date the twenty-fourth day of July, 1861, to Eliza Anne Eleanor Ham, one of co-plaintiffs, as the devisee of Timothy Thompson, a U. E. Loyalist, to whom the said land was allotted, and for whom it was reserved by the Government at the first settlement of that township, but who died before the patent issued therefor: that the action was commenced on the twenty-fourth day of September, 1861, and issue joined on the ninth day of October following, except by the defendants William O'Donnell and Walter George, against whom the plaintiffs signed judgment by default, and that the action was tried at the Kingston Fall Assizes of the year 1861, before a common jury, and resulted in a verdict for the defendants, which verdict was set aside, as being contrary to law and evidence and the judge's charge, and for the improper reception of evidence, and a new trial was ordered—costs to abide the event: that it was again tried at the Kingston Fall Assizes of the year 1862, before a common jury, and again resulted in a verdict for the defendants, which verdict was again set aside as being contrary to law and evidence and the judge's charge, and for the fraud of the defendants in empanelling said jury, and for the misconduct of one of the jury (whom the plaintiff challenged) in answering to and being sworn in the name of another juryman, and a new trial was ordered as before: that it was again tried for the third time, before a special jury, at the Kingston Spring Assizes, 1863, and again resulted in a verdict for the defendants, which verdict was again set aside, as being contrary to law and evidence and the judge's charge, and a new trial was again ordered as before: that whenever deponent took surveyors to the land in question, and went to point out the lines, so as to ascertain the boundary, the members of the defendants' families who defend the action (except those of defendant Lasher) ordered the deponent and his surveyors off, and threw stones at deponent, and endeavored to do him grievous bodily harm, and threatened to shoot and murder him, and sent for a gun to do so, and thereby they put deponent in bodily fear: that the plaintiffs have a good cause of action on the merits, and that none of the defendants have any good cause of defence on the merits: that at each of the said trials defendants did not produce or pretend that they or either of them had any title to lots numbers six and seven, but alleged to the jury (without any legal proof thereof) that no such lots were in existence: that the defendants at each of said trials falsely alleged to the jury trying the cause, that the Government of the day had issued the patent for said lots numbers six and seven to deponent's wife, as a reward for the political services of deponent, all of which was untrue: that defendants and persons through whom they claim, have owned or occupied the land north of and adjoining said lots numbers six and seven for a great number of years past, and when the said Eliza Anne Eleanor Ham applied to have the said patent issued to her after the death of the widow of the said Timothy Thompson (whose widow was his devisee for life) a member of the Legislative Council, resident in Lennox and Addington, was employed to oppose and prevent the issuing of said patent to her, and the member of the Legislative Assembly for Lennox and Addington was also employed for the same purpose, and also to endeavor to get the patent for part of said lots issued to a person through whom the defendants Lasher and O'Donnell claim some of the said adjoining land to the north: that from the opposition thus made by those two members and the time occupied by the department in investigating into and deciding upon the matter, the issuing of said patent was delayed about eight years after the final order in council for its issue to the said Eliza Anne Eleanor Ham had been made: that deponent had often been credibly informed, and had good reason to believe, that before and since the issuing of said patent to his wife, both the said members of parliament had often, in the hearing of numbers of persons liable to serve as jurors in said united counties, publicly said that the said Eliza Anne Eleanor Ham would never recover possession of said lands in said patent, or that she ought not to recover the same, and that the Government ought not to have granted the said lands to her, or words to that effect; and both these gentlemen said the same thing in deponent's presence, and thus these two gentlemen, without any intention of doing any wilful injury to the plaintiffs or their cause of action, or of obstructing the course of justice in the matter, have unintentionally been the means of creating and have created a very great and general prejudice throughout said united counties against the plaintiffs' right to recover, as those two gentlemen were and are very much respected in said united counties, and much looked up to, and what they said on this subject was implicitly believed, and has had and still has a very great effect on the minds of those

liable to serve as jurors in said united counties: that owing to the peculiar formation of the said township, and of some of the adjoining townships in the said united counties, and to the manner in which they were originally laid out by the Government (some lots never having been run out upon the ground, but, as in this case, only laid out on a plan) there are a great number of gores and irregular blocks of land, which, in a great many cases, appear to have been taken possession of by the owners or occupants of some of the adjoining lots, which possession, in many cases from length of time, has debarred the owner with a paper title from obtaining possession; in other cases the owners or occupants of the adjoining lots have quarreled amongst themselves about the possession of such gores and irregular blocks of land, and on the whole they have been the source of much litigation and discussion among the inhabitants of said united counties liable to serve as jurors, and deponent was informed and had good reason to believe, that it is almost impossible for a non-resident ever to recover by law possession of any such disputed gore or blocks, no matter how clear he may prove his title thereto: that most of the defendants had not only told deponent, but had publicly asserted and declared that no matter what the plaintiffs prove at nisi prius a jury could not be got in said united counties, the whole number of which would agree on a verdict for plaintiffs: that deponent had been repeatedly told the same thing by dozens of other persons resident in said united counties, and in fact by almost every such person from whom he made enquiry, and that he had good reason to believe, and did verily believe such to be the fact: that the several defendants' relatives and connections by marriage and otherwise are very numerous, and mostly resident within said united counties, and that great numbers of them have taken great pains and trouble to circulate within the said united counties unfounded reports prejudicial to the justice and honesty of the plaintiffs' claim to said lots, and of the manner in which the patent therefor was obtained, and that they have succeeded to a very great extent in creating an extraordinary prejudice against the plaintiffs in said united counties, and that they are continuing to endeavor to prejudice the persons liable to serve as jurors in said united counties against the plaintiffs, and against allowing the plaintiffs' claim to the said land, in which deponent fears they have so far succeeded as to preclude the possibility of the plaintiffs getting a fair and impartial trial in said united counties: that since the first trial of the cause at Kingston, it had excited a considerable discussion among the inhabitants of said united counties liable to serve as jurors therein, almost every one of whom deponent had good reason to believe had made up his mind upon the case: that owing to the facts and circumstances mentioned, and owing to other facts and circumstances, and to the fact that the plaintiffs have already had a considerable litigation against parties in possession of other lands of the said Eliza Anne Eleanor Ham in South Fredericksburgh, a very great and general prejudice exists throughout the said united counties against the plaintiffs and against their right to recover the said lots, so much so that the plaintiffs could not reasonably expect a fair and impartial trial, if the same be had within the said united counties where such prejudice does exist, and that if a change of place of trial be refused to the said plaintiffs, it will in fact amount to a denial of justice to the plaintiffs: that John Stoughton Dennis, A. B. Perry and John Shier, provincial land surveyors, are all material and necessary witnesses for the plaintiffs on the trial of the cause, and that the plaintiffs could not safely proceed to the trial thereof without the evidence of each and every one of them: that owing to the official employment of the said John Stoughton Dennis as Brigade Major, the plaintiffs were unable to obtain his evidence at the last two assizes for the said united counties, and that plaintiffs could not possibly obtain the attendance of all those three surveyors at the Kingston assizes again: that it is almost impossible to obtain the attendance of the said John Stoughton Dennis, A. B. Perry and John Shier at the same time at any other place than Toronto: that Joseph Gunsoles is a material and necessary witness for the plaintiffs on the trial of this cause, and that the plaintiffs could not safely proceed to the trial thereof without his evidence: that he is very old and infirm, and although subpœnaed at the last trial of this cause, he then was too weak to attend and believe that he not likely to survive any length of time, or even until the next fall assizes, if so long: that the plaintiffs had good reason to believe and verily did believe, that unless the said cause were tried soon that they would be deprived of the benefit of the evidence of the said Joseph Gonsoles: that the Honorable Adam Wilson, the justice assigned to take the next assizes in and for the said united counties, was once engaged as counsel for the plaintiffs in the cause, and, therefore, refuses to try and will not try said cause: that Toronto is the only place where plaintiffs can procure at the same time the attendance of all such witnesses as are necessary for them to substantiate their case: that the application was made *bona fide* for the sole and only purpose of having a fair and impartial trial of the cause.

Robert A. Harrison shewed cause. He filed an affidavit made by defendant Lasher wherein it was sworn:

That there is no gore or space, except the allowance for road, between the first and second concessions of the township of South Fredericksburgh, in the county of Lennox and Addington, between lots six and seven, in those concessions; that the defendant, Wm. O'Donnell, at the time of the commencement of this suit, was merely in occupation of part of the said lot number seven, in the second concession, as tenant, but, having no title or estate, he did not defend this action; that at the second trial of this cause, there was no fraud on the part of the defendants in empannelling the jury, nor was there any misconduct on the part of one of the jurors in answering to and being sworn in the name of another; that the juror challenged was named Rumbough, and the juror called was named Trumpour (but pronounced Trumpo), and, owing to the similarity of the names, and the indistinct manner of calling them over, by accident the juror Rumbough was sworn; that before the close of the said trial, on the second day thereof, the plaintiff, John V. Ham, discovered the mistake, and yet elected to proceed with his case; that deponent has a good defence to this action on the merits, and holds his title to the land sought to be recovered, or a portion thereof, under patents from the Crown, granted long previously to the plaintiffs' patent, and upon that ground, and from proof of original monuments and surveys, the plaintiffs were defeated at each of the said trials; that deponent never alleged to the jury at any of the said trials that the Government had issued any patent to the said Eliza A. E. Ham, as a reward for the political services of her husband; that deponent never employed any member of the Legislative Council or of the Legislative Assembly, to oppose the issuing of any patent to the said Eliza A. E. Ham, but had heard that the Hon. B. Seymour had land in the first concession of South Fredericksburgh, and was unwilling to be disturbed in his possession, as held by the ancient survey and boundary of his land in that township; that deponent did not believe that any member of Parliament had ever in any manner spoken to or influenced any juror at any of the said trials, and at the last trial no single special juryman came from the township of South Fredericksburgh; that deponent did not believe that any member of Parliament, except the Hon. B. Seymour and the late David Roblin, Esq., took any interest in this cause—the former by reason of his having land in the vicinity, and the latter from his local knowledge of the circumstances—that the said Hon. B. Seymour had for many years past left the said counties, and now resides at Port Hope, and the said David Roblin was defeated as a candidate for the said county of Lennox and Addington in the year 1861, and had now been about a year deceased; that deponent had had no litigation about any land in South Fredericksburgh until the present suit, which deponent believed and had been informed was brought and persisted in for the purpose of compelling the defendants to buy off the plaintiffs, and it is not true that new residents have difficulty in recovering possession of any gore or block of land in that township if they can prove a good title thereto; that deponent had never told the said John V. Ham, nor has deponent ever publicly asserted or declared, that, no matter what the said plaintiffs prove at Nisi Prius, a jury could not be got in said united counties, the whole number of which would agree on a verdict for the said plaintiffs; that no prejudice exists in the said united counties against the plaintiffs and it is not true that almost every one liable to serve as jurors had made up his mind, and further, that as fair and impartial a trial could be had in the said united counties as in any other; that the cause had always been determined by the said three several juries on

questions of fact, and the proved existence of known posts and monuments, and ancient blazes on the trees, made at the time of the first survey of the country; that John S. Dennis, A B. Perry and John Shier, provincial land surveyors, were all examined by the plaintiffs, and were witnesses for them at the former trials, or some of them, and there was no good reason why they could not attend again at any future trial in the said united counties, and that the said A B. Perry and all of the defendants except one reside in the said united counties; that the plaintiffs neglected to bring on the said cause at the last fall assizes, held at the said city of Kingston; that the said Joseph Gunsoles was not called at the first or last trials of this cause, and is now said to be out of his mind, and confined to a room for safe keeping, and the evidence of the said Joseph Gunsoles was quite immaterial; that deponent had been put to enormous expense in defending the cause and procuring witnesses, and the expenses will be much increased by taking the trial of the said cause to Toronto; that one of the defendants' witnesses resides in the township of Thurlow, in the adjoining county of Hastings.

Mr. Harrison also filed the affidavits of John Fitchett and Martin Hough, two others of defendants, to the same effect as the foregoing, and in addition denying that any attempt had been made or intended on Mr. Ham's life, but, on the contrary, when he went to the land in dispute with the surveyors, was shown the original posts and afforded every opportunity of surveying the land.

Mr. Harrison then argued that so far as any prejudice against plaintiffs or their cause was alleged to exist in the counties where the venue was laid, that nothing of the kind was shewn to exist, though plaintiffs, having an exaggerated notion of their own cause, and of the attention paid to it, no doubt really believed the prejudice to exist. He contended that it was not clearly and satisfactorily made out, even by plaintiffs' own affidavit, that an impartial jury could not be had at Kingston; and unless it were so, no change of venue ought to be effected. *Davies* v. *Lowndes*, 4 Bing. N. C 711; *Thornton* v. *Jennings*, 7 Dowl. P. C. 449; *Seely* v. *Ellison*, 8 Dowl. P. C. 266; *Doe Hickman* v. *Hickman*, 9 Dowl. P. C. 364. But even if that were shown by the plaintiffs' affidavit, still his affidavit was in that respect contradicted, and that owing to the contradiction in the affidavits the court ought not to interfere. *Doe dem Lloyd* v. *Williams*, 5 Bing. 205. So far as Brigade Major Dennis was concerned, Mr. Harrison argued that the mere inconvenience to a public officer of attending a trial is no ground for a change of venue (*Bucknell* v. *Phillips*, 7 Scott, 274), and that, so far as Gunsoles the infirm witness was concerned, what was alleged was a ground for a commission to examine him, rather than for change of venue. (Con. Stat. U C cap. 32, sec. 19.) He admitted the fact of the judge of assize having been once counsel for plaintiffs, and refusing to try the cause, was a more formidable ground, but submitted that as plaintiffs were suing for the recovery of land, and not of a debt, and had themselves allowed more than one assize to pass without going to trial, they should delay to the fall assizes But in case a change of venue were determined upon, he said it should not be to Toronto, but to Hastings, or some county adjoining the county where the land is situate (1 Chit. Archd. 9 Ed. 278), and that under any circumstances it could only be on payment of the costs of the application, and extra costs of defendants' witnesses, and plaintiffs' undertaking, if successful, not to tax against defendants the extra costs of having a trial in Toronto. (*County of Ontario* v. *Cumberland*, 3 U. C. L. J. 11; *Comeford* v. *Daly*, 11 Ir. Com. Law Rep 62.)

J. V Ham, contra, argued that the cases upon which the defendants relied were cases altogether distinguishable from the present, for in none of them was it shown that there had been three adverse verdicts set aside by the court. He submitted that the fact of defendants having riotously attempted or threatened to take his life, was *per se* a good ground for change of venue (*Jones* v *Price*, 7 Dowl. P. C. 13; *Reg* v. *Long*, 4 Jur. 172), and that without imposing any terms on plaintiffs (*Ib*); but that whether it were or not, the refusal of the judge to try the cause was without more a sufficient ground for change of place of trial (*McDonald* v *Provincial Life Insurance Company*, 4 U C L J 20); and that if the venue were changed on this ground, as the plaintiffs were in no manner to blame, the change should be without terms (*Ib.*). He argued against a change of venue to Hastings because of his inability to procure the attendance of his principal witnesses at any other place than Toronto.

Morrison, J.—In view of all the circumstances of this case, and particularly in view of the fact that the judge appointed to hold the next assizes at Kingston, for good reason, refuses to try this cause, I have come to the conclusion that plaintiffs are entitled to have the place of trial changed. I find, upon reference to the cases cited, that even in local actions there is nothing making it obligatory upon me to change the venue to an adjoining county only. I think that the next trial had better take place in the city of Toronto, and I shall give the defendants the option of having the cause tried either before a city or a country jury. Nothing more remains for me to determine but the terms. I do not think I ought, under the circumstances, to make plaintiffs pay the costs of this application; but shall make the costs of the application costs in the cause. I am clear, however, that if plaintiffs persist in desiring a change to Toronto, they ought to pay defendants not only the excess of costs in the aggregate for the attendance, mileage and expenses of defendants' necessary witnesses called at the trial, over what would have been incurred were the trial to take place in Kingston; but in the event of plaintiffs succeeding should tax no more costs for attendance, mileage and expenses of witnesses on their behalf, than if the trial were had at Kingston. I therefore, make the summons absolute upon these terms.

Order accordingly.*

Salter v. McLeod.

Change of venue—Political feeling of parties—No ground.

The fact that the question for trial in an interpleader issue is the alleged insolvency of a member of parliament at the time of an alleged assignment of road stock, coupled with the circumstance that one of the parties to the suit contesting the question of insolvency is a political opponent of his, is not a ground for change of venue, although it be shown that a verdict was rendered which the court afterwards set aside, but rather a ground for the summoning of a special jury.

[Chambers, Feb. 20, 1864.]

Defendant obtained a summons calling on plaintiff, her attorney or agent, to shew cause why the venue in this cause should not be changed from the county of Essex to the county of Middlesex, and why the declaration should not be amended accordingly, and all further proceedings herein in the county of Essex, up to the entry of judgment in this cause, should not be stayed, on grounds disclosed in said affidavits filed.

The principal affidavit filed was that of the attorney for the defendant. He swore that he was defendant's counsel at the trial of the cause, at last Essex Assizes, when a verdict was rendered for plaintiff, which verdict had since been set aside and a new trial ordered; that notice of trial had been given for next Essex Assizes; that the cause is an interpleader issue, the defendant having a judgment against one Arthur Rankin, caused certain shares in a gravel road joint stock company to be taken in execution, and a claim thereto being made by the plaintiff, the issue was ordered; that the case for the plaintiff rests almost wholly on a transfer made by the said Rankin of said shares to John Salter, of whom plaintiff is administratrix, and the main question at said trial was whether said transfer was void under the statute respecting assignments by insolvent debtors; that the evidence conclusively established Rankin's insolvency at the time of making the assignment; that there was no evidence to the contrary; that his Lordship, Chief Justice Richards, directed the jury to find whether said Rankin was or was not then insolvent, and the jury said that they were not satisfied that such was the case; that for several years past there had been a dispute in Essex respecting the fitness of the defendant or the said Rankin to represent the said county, in the Provincial Parliament; that said dispute influences particularly the class of men from which the jurors are selected; that deponent heard a great deal during the said last Assizes from jurors of the influence of this feeling in the decision of the cause; that

* Defendants exercised the option of having the cause tried before a country jury, and so the order was made that the trial of the cause should take place in the city of Toronto before a jury of the united counties of York and Peel, instead of at the city of Kingston, in the united counties of Frontenac, Lennox and Addington, upon the terms above specified.—Eds. L. J.

deponent had no doubt whatever this feeling was the sole cause of the extraordinary verdict rendered at that Assizes; that he had no doubt whatever that an impartial trial of the cause could not under ordinary circumstances be had in the county of Essex.

Defendant also made an affidavit, in which he swore he was satisfied from conversations with many parties in reference to the verdict rendered in this cause at the last Assizes, and from his knowledge of the feeling which actuates a large portion of the community from which jurors are taken, that the verdict was given in consequence of an impression that if said Rankin was proved to be insolvent such proof would have an injurious effect on his political prospects, and that he (deponent) was satisfied a fair and impartial trial of the cause could not be had in the county of Essex.

Robert A. Harrison showed cause. He argued that the statement of the fact that McLeod and Rankin were opposed in politics, coupled with the suggestion that in consequence an impartial trial of the cause could not be had in Essex, was no ground for changing the venue from a county so extensive as Essex, and where there were as many persons of one particular shade of opinion as the other, but rather a ground for having the cause tried by a special jury. He referred to *Seely* v. *Elleson*, 8 Dowl. P. C. 266.

Mr. Prince supported the summons.

MORRISON, J.—I cannot accede to this application It seems to me, upon the authority of *Seely* v. *Elleson*, that I must discharge the summons. If there is really any foundation for the statements made on the part of the defendant, his remedy would appear to be the summoning of a special jury.

Summons discharged.

CHANCERY.

(Reported by ALEX. GRANT, Esq., *Reporter to the Court.)*

MILLER v. ATTORNEY-GENERAL.

Jurisdiction—Remedy of subject against the Crown.

The defendant was surety to her Majesty on the bond of A., a customs officer. A. became a defaulter and absconded. The defendant being sued at law on the bond set up the equitable defence, that when the bond was executed by him his principal was in charge of the small port of Bruce Mines; that the bond was given and executed only in respect of that office; that the government had afterwards removed the principal to another port where larger customs receipts were collected, and where consequently the risk was greater, and where the alleged defalcation occurred. The express terms of the bond were however in respect of the office of collector of customs in Canada, without any reference to Bruce Mines, and the plea was held bad on demurrer by the Court of Queen's Bench. The defendant then filed his bill in this court, setting forth the facts, and praying for a stay of proceedings at law, or similar relief against the Crown *Held*, that this court has no jurisdiction to grant relief in the premises, the rights of the Crown being brought directly in question.

The bill in this cause was filed by Daniel G. Miller, under the circumstances set forth in the head-note, and in the judgment of his lordship the Chancellor. The facts are fully stated in the action at common law, *Regina* v. *Miller*, 20 U. C. Q. B. 485. The Attorney-General having demurred to the bill the demurrer came on for argument.

J. W. Gwynne, Q. C., for the plaintiff.

Hodgins, for the Attorney-General.

The following authorities were referred to in the argument: *Priddy* v. *Rose*, 3 Mer. 86; *Attorney-General* v. *Halling*, 15 M. & W. 687; *Attorney-General* v. *Sewell*, 4 M. & W. 77; *Rankin* v. *Huskisson*, 4 Sim. 13; *Taylor* v. *Attorney-General*, 8 Sim. 413; *Colebrooke* v. *Attorney-General*, 7 Price, 146; *Rogers* v. *Maule*, 3 Y. & C. 74; *Attorney-General* v. *Lambirth*, 5 Price, 386; *Evans* v. *Sally*, 9 Price, 525; *Attorney-General* v. *Galway*, 1 Molloy, 95; *Barclay* v. *Russell*, 3 Ves 425; *Penn* v. *Lord Baltimore*, 1 Ves. 446, & 3 W. & T. 767; *Paxlett* v. *Attorney-General*, Hard. 467; *Reeve* v. *Attorney-General*, 2 Atk. 223; *In re Holmes*, 2 J. & H. 527; *Holmes* v *Regina*, 8 Jur. N. S 76; Manning's Ex Prac. p 87; Blackstone's Commentaries; Chitty on Prerogative of Crown 340; Broom's Legal Maxims, p. 57; Imperial Acts, 33 Hen VIII, ch 39, sec. 55; 23 and 24 Vic, ch 34; 5 Vic, ch 5; Provincial Acts, 34 Geo. III., ch. 2; 7 Wm. IV., ch. 2, and Con. Stats. U. C, chs 10 & 12.

After taking time to look into the authorities

VANKOUGHNET, C.—This bill is filed by the plaintiff to be relieved from liability upon a bond executed by him as security for one Acton, for the proper discharge by the latter of his duties as a collector of her Majesty's customs. Upon this bond the Crown has recovered judgment at law for actual default in paying over money, notwithstanding certain defences urged by the now plaintiff. The bill prays for an injunction to restrain the Attorney-General from proceeding upon this judgment. The Attorney-General demurs, among other things, to the jurisdiction of the court. No case is to be found in which such relief as is sought here has ever been given by the Court of Chancery. All the text books which treat of the subject negative the right of the Court of Chancery to decree direct relief against the Crown, when the contest is simply one between it and the subject. Blackstone's Commentaries, Chitty on Prerogative, Manning's Exchequer Practice, Broom's Legal Maxims, all speak broadly to this effect. In *Priddy* v. *Rose*, and *Brown* v. *Bradshaw*, Prec. in Ch. 7, 153, the same doctrine was admitted; and only in cases where the rights of the Crown have come incidently in question, and the Attorney-General has been brought before the court to protect them; or in cases where the Attorney-General has submitted them to be dealt with by the court, has a decree ever been made by which those rights were impaired or interfered with. There are some cases in which decrees have been made against public officers discharging duties under the Crown, who have been rather in the position of stakeholders or trustees for the public, or individuals claiming to have certain rights and privileges with which these officers were interfering or permitting interference, as in the case of *Rankin* v. *Huskisson*, and the case of *Ellis* v *Earl Grey*, 6 Sim. 214.

The claim of the Crown against the plaintiff is one relating to the revenue, with which in England the Court of Exchequer, and in this country the Courts of Queen's Bench and Common Pleas have peculiar power to deal. The statute 33 Hen. VIII., ch. 39, sec. 55, directs in what courts (the Court of Chancery not being one) debts due to the Crown shall be sued for. Section 79 provides, "that if any person or persons of whom any such debt or duty is at any time demanded or required, allege, plead, declare, or shew in any of *the said courts*, good, perfect, and sufficient cause and matter in law, reason or *good conscience* in bar or discharge of the said debt," &c., then *the said courts* shall have full power to adjudge and discharge the person so impleaded." &c. Under the authority of this section the Court of Exchequer in England has frequently granted relief against the strictly legal claims of the Crown. All the cases which were cited to me in support of this bill were cases from the Exchequer, and it seems reasonable and convenient that the whole matter should be disposed of there when on grounds of equity the court can stay its legal process The Court of Exchequer has long claimed and exercised an equitable jurisdiction in matters of revenue, and while the Attorney-General was proceeding by a *sci fa.*, or an extent on the one side of the court, matter in equity might be shown on the other side why the legal process should not have effect. The history of this jurisdiction is traced and its character explained in the very interesting and elaborate judgment of *Pollock*, C. B., in *Attorney-General* v. *Halling*. Much valuable information on the same subject is to be found in the case of the *Attorney-General* v *Sewell*. A difference of opinion has prevailed in England as to the effect of the imperial statute, 5 Victoria, ch. 5. In the *Attorney-General* v. *The Corporation of London* the Master of the Rolls thought that all the equitable jurisdiction of the Court of Exchequer, as well in matters of revenue as otherwise, was by that act taken from that court and tranferred to the Court of Chancery. Some observations favouring this view were made in the House of Lords on the hearing of the appeal in that case, as reported in 1 H Lds., 440; but neither then, nor on the hearing in the court below, was it necessary to decide that question; and Lord Cottenham expressly reserved his opinion upon it In the *Attorney-General* v *Halling*, the learned Barons of the Exchequer deliberately considered the subject, and came to a clear conclusion that they still retained their equitable jurisdiction in matters of revenue; and, accordingly, in that case they exercised it. I follow this decision in preference to the view of Lord Langdale. I think it better considered, and, until overruled by a higher authority

binding; and, moreover, the reasoning in support of it seems to me very strong The consequence of this holding would be that the peculiar equitable jurisdiction of the Court of Exchequer in matters of revenue was not by that statute transferred to the Court of Chancery. If it was, it might be contended that under our act, 20 Victoria, ch 56, sec 1, the Court of Chancery in this province possessed the same powers as those transferred from the Exchequer to Chancery, under the imperial act of 5 Victoria Even if this were so, it would not follow that the Court of Chancery here was the sole tribunal in which parties to claims by the Crown in respect of revenue could have relief, or would at all interfere if the court of common law had power to do equity. The statute 34 George III., ch. 2, which constituted the Court of King's Bench in Upper Canada, appears to me to have given to that court all the powers which the Court of Exchequer in England then possessed "in the matters which regard the King's revenue;" although the language of the act, by which this power is, as I think, conveyed, is open to some criticism. The imperial act of 5 Victoria could not affect this jurisdiction. The matter in dispute here is one which specially regards the revenue, and in respect of which I think relief can only be obtained in the Court of Queen's Bench here, where the proceedings at law are carried on, or by petition of right. It is not for me to do more than to intimate to the plaintiff the mode of proceeding by which he may establish his equity, if any, to relief. The Court of Queen's Bench will judge of its own powers and jurisdiction, and settle the form by which, if at all, its equitable aid can be invoked.

Finding that I have no jurisdiction in the matter, I abstain from expressing any opinion upon the merits of the case as stated in the bill.

Demurrer allowed.

Norwich v. The Attorney-General.

Jurisdiction of court— Remedy of subject against the Crown.

The municipality of Norwich became sureties to the Crown for moneys advanced to a railway company. The property and functions of the company were altered and interfered with by acts of parliament, and the company finally united with another The completion of the railway through the township of Norwich was thus indefinitely postponed, and the advantage expected to be derived by the township, when its municipality became indebted to the Crown, was not realised. The government having taken proceedings for the collection of the sum secured, the municipality filed a bill to stay such proceedings *Held*, (following the decision in *Miller* v. *Attorney General*,) that this court has no jurisdiction in the matter, and that the equitable jurisdiction in matters of revenue in this province, at the suit of a subject, resides in the superior courts of common law, if at all, and not in this court.

The plaintiffs in this suit were the Corporation of the township of South Norwich, the defendants were the Attorney-General for Upper Canada, the Corporation of North Norwich, and James Carroll, Esq., sheriff of the county of Oxford.

The bill set forth several acts of parliament establishing, and otherwise affecting various railway corporations, and from the matters at length alleged, it appeared that the provincial act 10 & 11 Victoria, ch. 117, after reciting in its preamble the expediency of constructing a railway from Woodstock to the shores of Lake Erie, at some point between Ports Dover and Burwell, provided for the erection of "The Woodstock and Lake Erie Railway and Harbour Company," with corporate seal, capability of holding property for the use of the company, power to lay a track, construct a harbour at terminus, &c

The works of the company were to be commenced within five years, and completed in ten, or the charter forfeited. That by statute 16 Victoria, chapter 239, it appeared that the works having been delayed, the time for completion was then extended to two years, the company allowed to carry the Road to Dunnville, and the capital stock authorised to be increased to £500,000 and the company permitted to borrow money to build the road. That the 16 Victoria, chapter 23, authorised municipalities in Upper Canada to raise money by debentures upon the credit of the municipal loan fund to aid public works. Upon any municipality becoming indebted under this act, provisions are made for requiring its officers to levy the amount due at the requirements of the Receiver-General When default was made for two months the Governor-General's writ was to issue to the sheriff of the county, and the debt levied as a tax upon the ratepayers. At the date of the passing of these acts the township of Norwich was undivided, and the proposed railway would have run through it, and by a by-law made the 1st of December, 1852, the township council determined to lend £50,000 to the railway company, and that the same should be raised on the credit of the municipal loan fund. Debentures to that amount were issued by the government in favour of the company, who gave their bond to the township to indemnify them, and the township became the debtors of the government. The company agreed to pay the township interest at the rate of six per cent. per annum on the amount of the debentures, and the balance due, at the expiration of thirty years. Other neighbouring municipalities made similar arrangements with this railway and the government, so that the directors had £145,000 of debentures at their disposal.

Working was re-commenced, but the parties disagreeing it was abandoned, and the road was still unfinished. It was alleged that £350,000 would be required to render it available, the money already expended had become lost, the country through which the works passed had been rather injured than benefited by them in their unfinished state. By 18 Victoria, ch. 179, the company were conditionally allowed to extend their railway to the Suspension Bridge, and from Port Dover to St. Thomas. The capital was to be raised to the sum of £1,000,000, and the company was authorised to amalgamate with any other similar company.

The plaintiffs complained that this and some other alterations in the law of incorporation of this company then made were to their prejudice.

By 13 Victoria, chap. 192, another million of pounds was to be raised for the Amherstburgh and St. Thomas Railway Company, and the track was to run from St Thomas to Amherstburgh; that the township of Norwich was then divided into North and South Norwich, which were still held jointly liable to the government for the debt, but liable to contribution as between themselves; that by 19 Vic, chap. 74, shareholders desirous of being relieved from their responsibility to the Woodstock and Lake Erie Railway Co, were allowed to relieve themselves on surrendering the stock they held, and many of the stockholders took advantage of this, and by this means the plaintiff's security against the company was materially lessened. This having been done with the consent of the government, the plaintiffs allege as a ground of equitable relief, that the Woodstock and Lake Erie Company, and the Amherstburg and St. Thomas Company amalgamated in February, 1858, with a joint capital of two millions of pounds, and the title of "The Great South Western Railway Company" was then assumed; which algamation was effected by written agreements between the companies, and one of the provisions of the agreement permitted a delay in the completion of the Woodstock and Port Dover road, which was prejudicial to the plaintiffs, and being done without their consent was also charged as a ground for relief. This arrangement was subsequently confirmed by the statute 22 Victoria, ch. 113, and by the 5th section of that act the capital was increased to $10,000,000; and that other clauses in this act worked still further damage to the plaintiffs, in effect postponing the construction of the Woodstock and Erie road indefinitely. That the 22 Victoria, ch. 90, incorporated the Niagara and Detroit Rivers' Railway Company, from which lines were to run in one direction to Fort Erie, and in the other, to Amherstburgh, covering thus the proposed line of the Woodstock and Lake Erie road. New regulations for the management of this company were enacted, and as these materially varied the terms of the agreements subsisting when the plaintiffs became indebted as such sureties, they were set forth as grounds for relief. The property moreover, of several of the former companies, of which this was the successor, was vested in this company, and this included the revenues of the Port Dover Harbour. This railway was to be completed in five years That thereby the company, to aid which the township of Norwich incurred their present liability, in fact never came into practical operation—that its properties and functions were at various times altered and interfered with by the legislature, and its identity at length destroyed by incorporation of its privileges, remaining estate, and line itself with the last mentioned company

That the Woodstock and Lake Erie Company paid the Crown only the first instalment on the loan, and now, notwithstanding

that damage, rather than advantage, had accrued to the plaintiffs from the railway works, the Governor-General's warrant had been issued to the sheriff requiring him to levy by assessment, sums in the aggregate amounting to $8,700, and interest, this being for instalments due in 1859-60.

The bill prayed for a declaration that the sums claimed ought not in equity to be levied, and that the sheriff might be restrained from proceedings under the Crown writ.

The Attorney-General in this case, instead of demurring, as was done in *Miller* v. *Attorney-General*, put in an answer requiring proof of the facts alleged, and also raising the question of the court's jurisdiction as against the Crown. The other defendants raised no material questions in their answers.

Evidence was taken and the cause heard at Hamilton before his honour Vice-Chancellor *Spragge*, at the fall sittings in 1863.

Blake and *Kerr*, for the plaintiffs.

McGregor, for the Attorney-General.

The same authorities were cited as are referred to in *Miller* v. The *Attorney-General*.

SPRAGGE, V. C.—The judgment of his lordship the Chancellor in *Miller* v. *Attorney-General* decides against the plaintiffs the question of jurisdiction raised by the answer and argued before me in this suit; unless the jurisdiction can be sustained upon the ground that the Governor-General, whose warrant to levy the rate upon the municipality is sought to be enjoined, fills the character, *quoad* this act, of an agent of the legislature, and not as representing the Crown.

I do not think the jurisdiction can be sustained upon this ground. It is the right of the Crown, as representing the public revenue of the province that is brought in question. The warrant of the Governor-General is merely part of the machinery by which the revenue is, in such cases to be collected, the Receiver-General and the Secretary of the province being also instruments used in the process of its collection.

The frame of the bill is also against the plaintiffs' position.

It is the Attorney-General that is made a party defendant, and, of course, as the proper officer of the Crown. The 78th and subsequent paragraphs of the bill, in terms state the equity as against the Crown, and the first branch of the prayer is, "that it may be declared that the said liability is no longer subsisting, and that the Crown is no longer entitled to levy any sum from your complainants in respect thereof." I think the bill is properly framed as it is, and that the Crown properly represents the public revenue whether the mode of its collection be by warrant of the Governor-General or in any other mode.

I have not considered the general question of jurisdiction, as that point is *res judicata* by the decision of *Miller* v. The *Attorney-General*. It certainly is an anomaly that the equitable jurisdiction in matters of revenue at the suit of a subject in this province resides in a court of common *law*, *if at all*, and not in a court of equity.

ROBINSON v. BYERS.*

Assignee of mortgagee's executors—Their power to assign mortgages—Con. Stat. U.C. cap 87, sec. 5—Parties

Held, 1. That under the Con. Stat. U. C. cap. 89, sec. 5, executors of a deceased mortgagee have no power to sell or assign the legal estate in the land, but only to release or convey the legal estate on the money being paid.

2. That the executor is a necessary party to reconvey the legal estate, on the money being paid to such assignee.

In this case the bill was filed at Belleville by the plaintiff, as assignee of the executors of one Hubbs, deceased, the mortgagee of certain freehold property, claiming, as such assignee, to be mortgagee of said property in the place of Hubbs. No defence was put in to the suit, save the usual answer of infant defendants.

On the cause coming on by way of motion for decree,

Hodgins, for plaintiff, asked for the usual decree of foreclosure, and referred to Con. Stat. U. C. cap. 89, sec. 5.

Holden, for infant defendants, submitted their rights to the protection of the court.

VANKOUGHNET, C.—The plaintiff claims to be the assignee of the executors of the mortgagee, and as such seeks foreclosure.

Neither the executors nor the heirs-at-law of the mortgagee are parties to the bill; but the plaintiff contends that the legal estate in the land passed to him by the assignment from the executors, and in support of this position he relies upon section 5 of chapter 89, Consolidated Statutes of Upper Canada.

Without the aid of this statute, there could be no pretence for such a contention by the plaintiff.

The language of section 5 is, that "when any person entitled to any freehold or leasehold land by way of mortgage has departed this life, and his executor or administrator is entitled to the money secured by the mortgage, or has assented to a bequest thereof, or has assigned the mortgage debt, such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the said mortgage, may convey, release and discharge the said mortgage debt and the legal estate in the land."

This provision does not, in my opinion, give the executor any power to sell or assign the legal estate in the land. It simply gives him power to release or convey the legal estate in the land, or discharge the debt, on the money being paid; and as it authorises him to do this after the mortgage debt has been assigned by him, or after he has assented to a bequest by his testator of it, I suppose we must assume that the Legislature intended that he might discharge this duty when the money was paid to the party who would be so entitled to receive it, *i. e.*, either by bequest or assignment. This is an awkward and troublesome method of procuring the reconveyance of the legal estate, compared with that which might have been had, had the Legislature, when they permitted the executor to assign the debt, given him power also to assign the security, *i. e.*, the legal estate in the land given in security; and this, it seems to me, they have not done; and it may be doubtful whether, after even payment to the assignee of the executor, the latter can reconvey the legal estate, though I think, in my construction of the statute, he can.

Of course the legal estate, until released, remains in the heirs of the mortgagee, and they can be compelled to convey, even though the executors have that power under the statute.

Per Cur.—Bill dismissed.

CHANCERY CHAMBERS

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

JACKSON v. JACKSON.

Sequestration—Process against tenant—Costs.

The tenant of a party against whom a writ of sequestration has issued, will be ordered to pay to the commissioner rent shewn to be due, and also to attorn and pay the accruing rents.

This was an interlocutory application in the case reported in the 8th volume of Grant's Chancery Reports, page 499. The defendant failing to pay the plaintiff certain sums due for alimony and costs, as directed by the decree pronounced in the cause, a writ of *fi fa.* was issued against his goods.

The sheriff proceeded to seize certain goods on the defendant's farm, when they were claimed by one Blanchard, a son-in-law of the defendant, whereupon an interpleader issue was ordered between the plaintiff and Blanchard, and was tried before Sir J. B. Robinson, Bart., C. J., in April, 1860, and a verdict given in favour of the plaintiff, and the amounts then due were recovered.

From the evidence produced it appeared that one Jones had been a farm labourer of the defendant, and was present as a witness at the interpleader trial.

The defendant Jones, and Blanchard rode home together, and Blanchard then determined to leave the neighbourhood, and Jones took an assignment of a lease of defendant's farm, formerly made to Blanchard.

A further sum had become due from the defendant, and a writ of *fi. fa.* issued for its collection having been returned *nulla bona*, a writ of sequestration was placed in the sheriff's hands, of which due notice had been given to Jones.

A sum of fifteen pounds having by the terms of the lease become due since such notice was served.

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* Upheld by the Queen's Bench, in *Hunter* v. *Parr*, H. T. 27 Vic.—EDS. L. J.

J. C. Hamilton, for the plaintiff, applied for an order on the tenant requiring him to pay to the sheriff, as commissioner, the sum due for rent, and for an order requiring Jones to attorn to the sheriff, and pay all rent, in future accruing under the lease, so long as the sequestration continued in force.

The application was opposed by *Carroll* on behalf of Jones and the defendant, who produced affidavits by them to the effect that, on leasing the premises, Jones had paid in advance the half-year's rent now sought to be obtained.

Jones was cross-examined, and his knowledge of the transactions between Blanchard, the defendant, and plaintiff, was proved, and his statement as to payment of the rent in advance was made to appear incredible, or if such payment had been made, it was in fraud of the plaintiff

It was also in evidence, that in conversations relative to the lease made shortly before this application, Jones had admitted that the £15 would become due as claimed by the plaintiff.

Smith's Chy. Prac. 1857, p 123; Daniel's Prac. vol. 2, p. 821; *Wilson* v. *Metcalfe*, 1 Beav. 270. And as to costs, *McKay* v. *McKay*, 6 Gr. Chy. R. 389; and *Prentiss* v. *Brennan*, 2 Gr. Chy. R. 582, were referred to.

ESTEN, V. C., before whom the motion was made, after consideration, made the order as asked, and, under the circumstances, also directed that the defendant and Jones should be liable for the costs of the application.

BANK OF MONTREAL v. KETCHUM.

Held, that under the orders of the 29th of June, 1861, a mortgagee is not entitled to an order for the delivery of possession as against the tenants of the mortgagor, although such tenancy may have begun after the mortgage was made.

This was an application by McCarthy, on behalf of the Bank of Montreal, for an order against the mortgagee and his tenants, to deliver up possession of the mortgaged premises after foreclosure.

Blain, for a tenant who held under a lease made before the mortgage, and the defendant.

Foster, on behalf of a tenant whose term commenced after the mortgage was given by the landlord Ketchum, objected that the order of the 29th of June does not apply to tenants, its terms referring to the mortgagor alone.

SPRAGGE, V C., after consideration, refused to make any order against the tenants, and as to them discharged the application with costs.

FORBES v. ADAMSON.

Mortgage—Decree for sale—Purchase by assignee of mortgagor—Deficiency.

The owner of land, after creating a mortgage thereon, assigned his equity of redemption to a third party, who covenanted to pay off the mortgage debt, and afterwards became the purchaser of the mortgaged premises, under a decree at the suit of the mortgagee At the sale the amount realised was not sufficient to cover the amount due to the mortgagee. *Held*, that under the circumstances he was not entitled to any lien on the estate for the deficiency.

The facts are stated in the judgment.

Fitzgerald, for the plaintiff, relied on *Otter* v. *Lord Vaux*, 2 K. & J 650.

Robert A. Harrison, contra.

VANKOUGHNET, C.—In this case Forbes being mortgagee, under a decree of this court procured a sale of the mortgaged premises, which was made accordingly, to one who had purchased the estate of the mortgagor in the lands, subject to the mortgage, but had before the sale under the decree sold and conveyed away all his interest in the land to another party. The price at which the lands were sold under the decree was less than the amount due to Forbes on his mortgage. On settling the conveyance to be executed by Forbes to the purchaser, the former claims a right to reserve in it any claim he may have against the land or against the purchaser, on account of the balance of his mortgage money; which he contends is, notwithstanding the sale, a lien or capable of being made a lien on the lands as against the purchaser by reason of his having purchased and once owned the estate, subject to the mortgage, and having thereby become liable to indemnify his vendor, the mortgagor, against any claim by the mortgagee in respect of that mortgage; and it is argued, that inasmuch as the mortgagee can sue the mortgagor now for, and recover against him, the balance of the mortgage money, and the mortgagee will then have his remedy over against the purchaser from him. *ergo* the mortgagee can at once have the benefit of that remedy of the mortgagor by anticipation, and can have a lien on the land for it, and in support of this position *Otter* v. *Lord Vaux* is cited. I do not think that Forbes, the mortgagee, can on that decision sustain the pretension he makes here. In that case the mortgagor had executed two mortgages to different parties, and the first mortgagee having under a power of sale sold a portion of the mortgaged premises to the mortgagor for a less sum than the amount of the first mortgage, the latter claimed to hold them absolutely, and freed from the second mortgage of his own creation. The court held that he had done no more than he was bound to do when he got rid of the first mortgage, and thereby improved the security for the second mortagee; and that he stood in no other position than if he had paid off the first mortgage, or paid a portion of it, and obtained a release of the premises from it.

The plaintiff here, the mortgagee, has to make out three things before he can claim that the purchaser here stands in the same position as did the mortgagor to the second mortgagee in the case cited; and they are:

1st. That the first mortgagee in that case could have claimed a lien on the land for the balance of his mortgage money after having agreed to sell, and sold the premises to the mortgagor for a certain sum absolutely.

2nd. That the plaintiff has any right to put the mortgagor in motion against his former vendee, the present purchaser, to indemnify him against the mortgagee's claim for the balance of his mortgage money:

3rd. That the mortgagor himself can by reason of his right to such indemnity claim a lien upon the premises which the mortgagee is about to convey.

I do not think that *Otter* v. *Vaux* will help the plaintiff over any of these difficulties. I see no privity whatever through the mortgagor or otherwise, between him and the purchaser arising out of the previous position of the latter as once purchaser and owner of the equity of redemption. The mortgagor may never choose to urge his claim to indemnity. There may be a good defence to it arising out of transactions between him and his vendee, which the plaintiff here would have no right to disturb, and it is new to me to hear that the plaintiff has a right to fall back upon the debtors of his debtor, or to set the latter in motion against them in order that he may thus secure funds wherewith to be paid. It is a process of garnishing which the plaintiff is not at present at all events entitled to avail himself of. I see no right, therefore, the plaintiff has to insist upon any reservation in the conveyance which he is called upon to execute.

The position and liability of a purchaser of an estate subject to a mortgage has been discussed in the following cases: *Forrester* v. *Leigh*, Ambler, 171, *Tweddell* v. *Tweddell*, 2 B. C. C. 101, *Buller* v. *Buller*, 5 Ves. 534, *Waring* v. *Ward*, 7 Ves. 332, *Barhand* v. *Thanet*, 3 M. & K. 507.

LEWIS v. JONES.

Dismissing bill—Taking replication off the files.

Where a plaintiff had filed an irregular replication, afterwards obtained by consent an order to amend the same, but did not do so, and a defendant moved to dismiss for want of prosecution, when the court treating the irregular replication as no replication, ordered a replication to be filed within two months, or bill should stand dismissed: at this time two of the defendants had not answered, and on the 12th of the month the replication was amended. Four days afterwards the plaintiff obtained an order *pro confesso* against the two defendants who had not answered; under these circumstances a motion to remove the replication from the files, and to dismiss the bill for want of prosecution was granted with costs.

This was a motion by *S. Blake*, for defendant Jones, to remove the replication in this cause from off the files of the court, and dismiss the bill for want of prosecution, under the circumstances stated in the head-note and judgment, citing *Johnson* v. *Tucker*, 15 Sim. 599.

Hodgins, contra.

ESTEN, V. C —I think the defendant E C. Jones is entitled to every branch of this application. My brother Spragge evidently

considered the replication as no replication, because he ordered the replication to be filed within two months. That replication did not in terms embrace all the defendants, and was bad on the face of it; the present replication in terms embraces all the defendants, but as to six, or at all events two of them, it was wholly irregular, they not having answered, and the bill not having been taken *pro confesso*. A defendant under such circumstances is entitled to move to take the replication off the file, and strike the case out of the paper of causes. In addition to this it appears that on the authority of *Johnson* v. *Tucker*, the defendant is entitled to move the replication off the files on the ground of the neglect to serve notice of the filing. The case of *McDougall* v. *Bell* must be deemed, if contra, to be overruled by the course of practice. The defendant is also entitled to have the bill dismissed as against him, for want of prosecution, on the ground of non-compliance with the order of the 18th of October, 1862: that order directed the plaintiff to file a replication within two months, and in default that his bill should be dismissed. Conceding that under this order the plaintiff could amend the replication already on the files so as to make it a proper one, yet he has not done so. It is wholly irregular. Now he cannot surely put any thing he pleases on the files and call it a replication, and compel the defendant to move to take it off the files. At all events the defendants could under such circumstances move *uno flatu* to take the replication off the files and dismiss the bill, and this he has done. If I was satisfied the defendant had with full knowledge delayed for several weeks to make any objection, and permitted the plaintiff to set down the cause, I should probably decline to interfere, but there is no evidence that the defendant knew of the amendment of this replication until the notice of examination and hearing. A certificate was relied upon as shewing such notice on the 16th of December, 1862, but on inspection it proves to be a certificate of the non-production of papers. I think the application should be granted with costs.

Hill v. Rutherford.

Enrolling decree—Paying out money pending.

A sum of money having been paid into court by the defendant, instead of being paid to plaintiff as directed by a decree of the court: upon depositing which proceedings against the defendant were stayed he having signified his intention of appealing from this decree, the plaintiff moved to have this money paid out to him pending the appeal. The defendant upon the motion undertook to enroll the decree at once if plaintiff would consent, and to urge on the appeal to a hearing; the court refused the application, but without costs; and on the application of the defendant the deposit on the re-hearing was retained in court for two weeks, to enable the defendant to proceed with the appeal.

Upon the re-hearing of this cause the decree was affirmed as reported in 9 Grant, 207, and the amount due had, on the application of the defendant, been paid into court, instead of being paid to the plaintiff, the defendant intending to carry the cause up to the Court of Error and Appeal. A motion was made on behalf of plaintiff to have this money paid out to him. Against the application *Fitzgerald* shewed cause, and offered to enrol the decree and carry up the appeal at once if plaintiff would consent; and at the same time asked that the deposit on re-hearing might not be paid out to the plaintiff.

Esten, V. C.—I think the motion for payment of the $350 should be refused without costs, the motion for staying the payment of the deposit should be granted upon terms. The decree may be enrolled by consent even if it cannot be enrolled without consent. The plaintiff of course does not wish to delay the appeal. Let the decree therefore be enrolled at once, the plaintiff waiving all objections if any, and payment of the deposit be stayed for a fortnight. I give no costs of this application. The defendant must undertake to prosecute his appeal, and liberty must be given to apply.

Cotton v. Cameron

Dismissing bill—Undertaking to answer.

A solicitor undertook to put in an answer, which was not insisted upon, and the solicitor for the plaintiff undertook to go down to examination but failed to do so, a motion made by this defendant to dismiss was refused, but, under the circumstances, without costs.

This was an application for an order to dismiss for want of prosecution, by *H. Murray*, on behalf of defendant Lee, against which

Hodgins shewed cause.

Esten, V. C.—I think the motion must be refused. It is sworn that Mr. Boulton was solicitor for Mr Lee, and as such promised to answer, and dispensed with service; this fact not being disputed, Lee is bound to answer, and the bill might be taken *pro confesso* against him. It is clear that Mr. Murray is his solicitor, as he undertook to put in an answer for him, provided it were accepted without oath or signature. Then Lee is bound to answer, and Mr. Murray is his solicitor. The undertaking of Mr. Hodgins' clerk to go down to examination may be a reason for setting down the cause, but affords no ground for dismissing the bill. It does not appear that Mr. Murray was aware of Mr. Boulton's undertaking. No costs.

LOWER CANADA REPORTS.

GENERAL SESSIONS OF THE PEACE—DISTRICT OF QUEBEC.

Gilchen, appellant, and Eaton, respondent,

Held.—That on appeals from summary convictions to the Court of General Sessions of the Peace, the appellant cannot of right demand that a jury be empannelled to try the appeal, and that it is discretionary with the Court to try the appeal, or to grant a jury.

Judgment rendered the 10th April, 1863.

This was an appeal from a judgment rendered by Maguire, Judge of the Sessions of the Peace, exercising summary jurisdiction whereby the said James Gilchen was convicted—for that he did on the 30th day of December last past, at the said city of Quebec, unlawfully assault and beat one Henry Pardoe Eaton, without any cause or provocation whatever, and was adjudged to forfeit and pay the sum of $10, and costs, amounting to $8 20, and in default of the said sums being paid forthwith, to be imprisoned in the house of correction for one month. The appeal having been returned on the day fixed for trial, the case was called, and the parties being ready, the respondent was put in the box to be sworn and examined.

Hearn, for appellant, objected to the respondent proceeding until a jury should be empannelled, on the ground that an appeal such as the present could not be tried or determined without the intervention of a jury.

Duggan, for respondent, replied that the appellant could not of right demand a jury trial, that the granting or refusing a jury trial was altogether in the discretion of the Court (Con. Stat. Canada, Cap 99, secs. 117, 119).

The Court overruled the appellant's objection, and held that it had the right to hear and determine appeals, under the provisions of the act cited, and that the allowance or refusal was entirely in the discretion of the Court.

The appeal was then heard by the Court without the intervention of a jury, and the conviction affirmed with costs.

The appellant subsequently applied for a writ of *certiorari* before Taschereau, Justice,—in Chambers.

Hearn, for appellant, contended that the 37th sect ot chap. 91 of the Con. Stats Canada, authorising a justice of the peace to hear and determine common assaults, shewed clearly that the prosecutor was not bound to have his case disposed of in a summary manner. It was only upon the complaint of the party aggrieved, *praying the justice to proceed summarily*, that the magistrate had a right to act. Without that prayer the justice had no jurisdiction. The prosecutor had a right to proceed by bill of indictment, and if he did, could the case be tried without the intervention of a jury? Clearly not. The 117th sec. of cap. 99, Con. Stats. of Canada, giving to the party aggrieved by any summary conviction or decision an appeal to the Quarter Sessions, recognises the right not only of the defendant (who did not select the first tribunal, but who was bound by the prayer of the prosecutor to submit to its jurisdiction) to appeal, but it also recognises the right of the prosecutor to appeal from the decision of the Court he had selected. And section 119 of the same act indicates that the appeal is triable by jury.

In assuming the power to try the appeal without the intervention of a jury, the Recorder interpreted the words "the Court of General Quarter Sessions shall have power to empannel a jury" as discretionary.

The petitioner for the writ submits that the insertion of those words in that section was to present the possibility of a doubt arising as to the powers of the Court sitting in appeal, and to have the Court proceed in the same manner as if the case had originally been brought before it.

Duggan, contra —Sec. 117 of the act cited distinctly states "that the Court shall *hear and determine* the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court seems meet." Words could not be made to convey a meaning clearer than those used in this section, "that the Court shall hear and determine the matter of the appeal," and but for the 119th section, there would be no power in the Court to empannel a jury in any case of appeal.

Petition rejected with costs.

GENERAL CORRESPONDENCE.

Articled Clerks—Contract of service, how satisfied—Con. Stat U. C., cap. 35, sec. 3, sub-sec. 1.

To the Editors of the Law Journal.

Gentlemen,—You will confer a favor by answering the following in your next issue.

A., an articled clerk, under articles bearing date in 1858, serves with an attorney for two years. At the end of that time he leaves the office, and engages in the business of grocer, &c.. At the expiration of eighteen months he resumes the study of the law with the same attorney, under the original articles.

Question: Should A. have had a renewal of his articles in 1863 (five years from date of same), to enable him to make good the eighteen months lost; or, without a renewal of his articles, is it sufficient that he serves the further term of three years from the time of such resumption, to entitle him to admission as attorney?

Yours truly, Law Student.

Chatham, Feb. 1, 1864.

[The answer to the question raised by our correspondent depends on the construction of sec. 3, sub-sec. 1, Con. Stat. U. C. cap. 35.

It provides that no person shall be admitted as an attorney unless he has, during the *term* specified in his contract of service, duly served *thereunder*, and has, during the whole of such term, been actually employed in the proper practice or business of an attorney by the attorney to whom he has been bound, &c.

Strictly speaking, this enactment contemplates only one contract of service—one term and service continually during the whole of that term.

In case the attorney, *before* the determination of the contract, become bankrupt, or take the benefit of any act for the relief of insolvent debtors, or, having been imprisoned for debt, has remained in prison for the space of twenty-one days, the court may order the contract to be discharged or assigned (sec. 14). So if the attorney dies *before* the expiration of the term, or discontinue practice, or if the contract be, by consent of parties, cancelled, &c., the clerk may be bound by *another* contract in writing to serve as clerk during the residue of the term (sec. 15).

It is impossible for us to say, as a matter of law, that a clerk who, after service for two years, voluntarily abandons the profession, and then for eighteen months follows the grocery business, can afterwards enter into *another* contract for the residue of the term contemplated by his original contract, and so avail himself of the time served under his first contract; but we are clear that service under the original contract could not avail him after the term contemplated by the original contract had expired.

Possibly the Benchers of the Law Society, in the event of a second contract for the residue of the term being entered into, *may* hold it sufficient, but as a matter of law we cannot say they *must* do so.

The object of the Legislature is, that every person, before he be admitted to practice the profession of the law, shall acquire competent skill and knowledge to conduct the business of an attorney. To attain that object the Legislature has expressly enacted that there shall be a service as a clerk under a contract to serve for five years. Continuous service is, when practicable, certainly intended, and not without good reason. —Eds. L. J.]

Summary convictions.

To the Editors of the Law Journal.

Gentlemen,—I find some discussion upon this subject in the two last numbers of your journal, and propose to put in my mite of information.

I perceive by reports in your journal that in several counties the costs of appeal are thrown upon the complainant, when the conviction is quashed for want of form. This is unreasonable; because the complainant has no control in this respect over the convicting justice, who is not bound to accept his assistance or advice, and therefore he should not be subject to his default. The practice in the county of Lambton is, not to give costs in this case.

Where the appeal is tried on the merits, the costs, as a general rule, follow the verdict; but sometimes the Court of Quarter Sessions exercises a discretion even in this case.

Where either party fails to appear on the appeal, it is presumed he has no merits; at all events he gives no information to guide the court, and he loses the costs as for want of merits. This probably is the nearest to justice that can be established as a general rule.

I do not think the suggestions of the jurisdiction being given over to the Division Courts, or of a legal clerk being appointed to a petty sessions, would work well in the present state of the Province.

Speaking for the Justices of Lambton, I am able to say that, making some allowance for their difficulties, they do, upon the whole, perform their duties satisfactorily.

I remain, &c., P. T. Poussett,

Sarnia, Feb. 2, 1864. *Clerk of the Peace.*

[We thank our correspondent for his communication. The question about costs is a difficult one to deal with—the chief difficulty being to determine what is substance and what is form. It is necessary for a conviction to state the offence with which the party is charged, and a defect in this respect is deemed matter of substance. If no offence in law is shown on the face of the conviction, it would be idle to submit to a jury the determination of the question whether it is true in fact Discussions about costs are often more troublesome and wearisome than the disposal of questions raised as to the sufficiency of the facts in law to constitute the offence, or sufficiency of the conviction in form to disclose the offence. And in some counties it has been found that to follow the general rule of allowing costs to abide the event, though perhaps working hardship in some cases, upon the whole works well, and greatly tends to the speedy and sound administration of criminal justice.—Eds. L. J.]

Attorney and Clerk—Service—Sufficiency of service—Benchers.

To the Editors of the Law Journal.

Gentlemen,—Answers to the following questions will be acceptable to several articled clerks.

1. If an articled clerk serve an attorney for 5 years, but was not 16 until 6 months after the execution of his articles, is the service sufficient?

2. If an attorney omit to state in his affidavit filed with his clerk's articles that he was "a practising attorney," but swears that he was "duly admitted, and resided at Toronto," will he be be allowed to correct the omission by a subsequent affidavit?

Awaiting your reply in the *Law Journal*.

I am, yours, &c.,

Toronto, 9th Feb'y, 1864. Articled Clerk.

[1. We think, as at present advised, that the service would be sufficient.

2. An attorney may be "duly admitted," and "resident in Toronto," and yet not "a practising attorney." We are by no means clear that the statute requires *this* affidavit to state that he is a practising attorney. Supposing it to be necessary, we cannot undertake to say whether or not the Benchers would allow the omission to be corrected by filing a subsequent affidavit. What they may in their discretion see fit to do or not to do, it is impossible for us to divine. Our correspondent had better give them a trial.—Eds. L. J.]

Unpatented Lands—Liability to taxes prior to Stat. 27 Vic., cap. 19.

To the Editors of the Law Journal.

Gentlemen,—You will confer a favour on an old subscriber by giving your opinion in reply to the following question:—

Are unpatented lands in Upper Canada liable to taxation before the enactment of ch. 19, 27 Vic, supposing lands to be leased on a license of occupation issued to occupants by the Crown?

Yours, &c.,

Owen Sound, February, 21, 1864. Aliquis.

[We can do no better than refer our correspondent to our remarks to a letter inserted under "General Correspondence" 9 U. C. L. J., p. 83. He will there find the information which he desires.—Eds. L. J.]

Chambers only once a week—Remedy.

To the Editors of the Law Journal.

It is said that during the coming Assizes for the city of of Toronto and the united counties of York and Peel, Chief Justice Draper will only hold Chambers once a week! If this be done it will be found that great inconvenience will be the result to the profession in the country: in fact the legal business of Upper Canada will be to a great extent stopped.

Judges of assize have power, under certain circumstances, to appoint Queen's counsel to take their place. I would respectfully suggest that during term and during the sittings of the courts of assize in Toronto, power should be given to the judges to nominate and appoint a Queen's counsel or barrister in good standing to hold Practice Court and Chambers. Either this should be done, or else provision should be made for the appointment of a Practice Court Judge, whose exclusive duty it should be to sit in Practice Court and Chambers.

Yours, Lex.

Hamilton, February 29th, 1864.

[The proposal for the appointment of a Practice Court Judge does not, we believe, meet with favor from the Judges. Some of the Judges say that attendance at Chambers is necessary to keep them from becoming rusty in the practice. The suggestion as to the occasional appointment of a Queen's counsel or barrister in good standing is deserving of serious attention. We recommend it to the consideration of the law officers of the Crown.—Eds. L. J.]

Municipal by-laws—Fine—Imprisonment—Necessity for distress.

To the Editors of the U. C. Law Journal.

Gentlemen,—For an offence under the by-laws, has the mayor authority to state in his order that, in case of non-payment of fine and costs, the offender shall be committed, at the expiration of the time given for the payment of the same, to gaol; or must a distress warrant issue, followed by commitment if no goods are found? The statute seems to favor the latter idea. Con. Stat. U.C. c. 54, sec. 243, sub-secs. 6, 7, 8.

Your answer on this point will confer a favor.

I am, Gentlemen, your obedient servant,

John Twigg, T. C.

Picton, March 1, 1864.

[The power of imprisoning is given either as an original punishment or as the means of enforcing payment of a pecuniary fine. It is in the latter view that the power to imprison appears to be used in the section to which our correspondent refers. And where the power to imprison is merely subsidiary to the enforcing of a fine, a magistrate cannot in general legally commit till an opportunity be given of ascertaining the want of sufficient goods to answer the amount of the fine. (See *In re Slater and Wells*, 9 U. C. L. J. 21)—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. DAILEY v. DE FRIES AND ANOTHER.

Bill of exchange—Defence to—Fraudulent drawing—Notice of fraud—Onus of proof—Evidence.

The plaintiff having, without inquiry and at a heavy discount, taken a bill drawn by a partner in fraud of the firm, from a person who had taken it from the fraudulent drawer with knowledge of the fraud; the bill having upon it a name which made it perfectly good,

Held, that these facts were evidence on which the jury might presume that the plaintiff took the bill *malâ fide*.

Q. B. SANDBEY v. MICHELL AND ANOTHER.

Administration—Bond given by administrator in Probate Court—Effect of condition—Validity—Breach—Wasting assets—Right of action for benefit of particular creditor

A bond given by the sureties of an administrator in the Probate Court, in the form issued by that Court, cannot be put in force by a particular creditor, for his own benefit, and it is not a good breach in an action by a creditor thereon that the administrator has so wasted and misapplied assets out of which he could have paid the creditor's debt that it is unpaid.

Quære, whether such a bond is valid.

Semble, that it is so.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW (London: Butterworth, 7 Fleet Street,) is received. It had a miraculous escape from a watery grave. It was on board the *Bohemian* at the time she struck a rock, and no doubt was for some time submerged, for the number reached us in a such a wet state that for several days we were unable to open it. When we did open it it was with much pleasure, for several of the articles are of rare merit. The first on "Law Reporting," is a temperate and well-written paper on a topic which at present is causing much discussion in the mother country. The writer recommends two sets of reports—one "ephemeral," for immediate use; and the other "permanent," for future reference. Next we have two papers on "American Secession and State Rights." In the number of the *Law Magazine* for August, 1862, appeared an article on the subject, which provoked two answers, one from Judge Redfield, of Boston, Mass., U.S., and another from G. H. S., also of Boston. The former was published in the *Law Magazine* for November, 1862: the latter is published in the current number. This number also contains a reply from the original contributor. We but add the parties are "at issue." The remaining papers are on various topics, such as "What is the value of a Ship?" "Recent works on the English Constitution:" "On the sphere and functions of an Academical Faculty of Law;" "General average;" "Enemy's Territory;" "Patent Law Amendment;" "Transfer of Lands by Registration of Titles;" and an *omnium gatherum* headed "Postcript."

THE WESTMINSTER REVIEW for January (New York: Leonard, Scott & Co.) is also received. The publishers announce that, in consequence of the great scarcity of printers, caused chiefly by the continuance of the war, they divided the January number of the Reviews among several job offices, to facilitate their early publication; but the experiment failed, and, moreover, resulted in the inferior workmanship shown in the present number. They promise to endeavor to prevent this in future, but subscribers are requested not to become impatient at delay or irregularity in the future receipt of their publications while causes remain which the publishers cannot control. The contents are: Life and Writings of Roger Bacon—The Tunnel under Mont Cénis—Astrology and Magic—The Depreciation of Gold—Gilchrist's Life of William Blake—Parties and Prospects in Parliament—The inspired writings of Hinduism—Russia—The Physiology of Sleep.

THE LONDON QUARTERLY for January (New York: Leonard, Scott & Co.) is also received. The contents are: China—New Englanders and the Old Home—Forsyth's Life of Cicero—Captain Speke's Journal—Guns and Plates—Eels—Rome in the Middle Ages—The Danish Duchies.

Leonard, Scott & Co. deserve great credit for the manner in which these reprints have hitherto been published. They also deserve the thanks of the American reading world for the opportunity afforded of having the staple literature of England furnished at very low prices. Subscribers no doubt will exercise all possible forbearance with the publishers under the circumstances which now for the first time since the series was commenced cause delays and irregularities—circumstances which the publishers well say they cannot control. We know that whatever is possible for men to do under the circumstances, in order to meet their engagements, will be done by these enterprising publishers.

GODEY for March is also received. It abounds as usual with illustrations and valuable information. Now that Spring is approaching Godey ought to be much in demand among that class for whom it is particularly intended—the ladies.

APPOINTMENTS TO OFFICE, &c.

COUNTY CROWN ATTORNEYS.

TIMOTHY BLAIR PARDEE, of Sarnia, Esquire, Barrister-at-Law, to be County Attorney in and for the County of Lambton, in the room and stead of Frederick Davis, Esquire, resigned. (Gazetted February 20, 1864.)

CORONERS.

ETIENNE ROMUALD EUGENE RIEL, of the City of Ottawa, Esquire, M.D., Associate Coroner for the City of Ottawa and County of Carleton respectively. (Gazetted January 30, 1864.)

FREDERICK HOMER YOUNG, of Picton, Esquire, M.D., Associate Coroner, County of Prince Edward. (Gazetted February 13, 1864.)

RICHARD LUND of Cookstown, Esquire, M.D., Associate Coroner, County of Simcoe. (Gazetted February 13, 1864.)

NOTARIES PUBLIC

ADAM HUDSPETH, of Lindsay, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted January 30, 1864.)

SAMUEL McCOY, of Newcastle, Esquire, to be a Notary Public in Upper Canada. (Gazetted January 30, 1864.)

WALTER J. HAYWARD, of Belleville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 13, 1864.)

DAVID GLASS, of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 20, 1864.)

CHARLES F. CLARKE, of Clinton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 20, 1864.)

ROBERT SULLIVAN, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 20, 1864.)

GEORGE THOMAS WEBSTER, of Brantford, Esquire, to be a Notary Public in Upper Canada. (Gazetted February 27, 1864.)

PROSPER A. HURD, of Prince Albert, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 27, 1864.

REGISTRARS.

ALEXANDER BURRITT, Esquire, to be Registrar of the City of Ottawa. (Gazetted February 20, 1864.)

JOHN McLAY, Esquire, to be Registrar of the County of Bruce, in the room of Nathaniel Hammond, removed. (Gazetted February 27, 1864.)

TO CORRESPONDENTS.

"T. W. R. S."—Under "Division Courts"

"LAW STUDENT"—"P. T. I."—"ARTICLED CLERK"—"ALIQUIS"—"LEX"—"J.T." Under "General Correspondence."

"S. G. W." will appear in next issue. Thanks