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VOL. VII. TORONTO, JULY, 1861. No. 7.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

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CONTENTS.

REMITTANCES.

P W K, Ireland, $4, Upper Canada Law Society, Toronto, $25, G. D., Toronto, $5, Hon O M., Toronto, $5, County of Elgin (J F.), $5, P G., Wallacetown, $7 50, N. M T, Toronto, $10, A. R., Port Hope, $5, P. F W., Kincardine, $4, A. E I., Hamilton, $15, R P J, Belleville, $20, Crown Land Department, $6, H. B. M., Toronto, $10, F. W. K, Toronto, $2.

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz :—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspayer in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. Wm. B. LINDSAY, Clk. Assembly.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL.—This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the profession in Canada, and will prove interesting in the United States.—*American Railway Review*, September 9th, 1859.

THE UPPER CANADA LAW JOURNAL.—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession but also to Magistrates, Bailiffs, &c., and in fact every person who wishes to keep himself posted in law matters. It has been recommended not only by the highest legal authorities in this Province but also in the United States and England. The present number is replete with useful information.—*Welland Reporter*, September 20th, 1859.

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 25th.*

THE UPPER CANADA LAW JOURNAL, for MAY. Messrs. Maclear & Co., King Street, Toronto.—In addition to the interesting reports of cases recently tried in the several Law Courts and a variety of other important matter, this number contains well-written original articles on Municipal Law Reform, responsibilities and duties of School Trustees and Teachers, and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazette May 19th*, 1859.

UPPER CANADA LAW JOURNAL.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs. Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 16th* 1859.

The Upper Canada Law Journal. Maclear & Co., Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal.—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co., of Toronto, and edited by the talented Robert A. Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentlemen will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription $4 00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 19, 1859.

The Law Journal of Upper Canada for January. By Messrs. ARDAGH and HARRISON. Maclear & Co., Toronto. $4 00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co., King Street East, Toronto.

This is the first number of the Fifth Volume, and the publishers announce that the terms on which the paper has been furnished to subscribers, will remain unchanged.—viz., $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province; so it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadain public.—*Thorold Gazette, January 27*, 1859.

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co., Toronto.—It is conducted by W. D. Ardagh and R. A. Harrison, B. C. L., Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator*, October 13th., 1858.

LAW JOURNAL for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford; it *should be taken*, however by every member of the Bar, in town, as well every Magistrate and Municipal Officer. Nor would politicians find it unprofitable, to pursue its highly instructive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov. 16th., 1858.

The *Law Journal* is beautifully printed on excellent paper, and, indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas.*

UPPER CANADA LAW JOURNAL, Maclear & Co., Toronto, January.—We have so frequently spoken in the highest terms of the merits of the above periodical that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

THE UPPER CANADA LAW JOURNAL for March. By W. D. Ardagh and Robt. A. Harrison, Barristers at Law. Maclear & Co., Toronto. $4 a year cash.—Above we have joined together for a single notice the most useful periodical that any country can produce and happy are we to add, that it appears to be well and deservedly patronized. We have so repeatedly alluded to its merits, that the reader will readily excuse any longer make mention.—*Whig, May, 18th 1859.*

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette*.

The August number of this sterling publication has been at hand several days. It opens with a well written original paper on "Law Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy.—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order and will be found worth a careful persual. A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada" is continued from the July number, it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects. All questions are answered by the Editors, and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to themselves as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina v. Cummings," by Robert A. Harrison, Esq., decided in the Court of Error and Appeal, is very full and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

THE UPPER CANADA LAW JOURNAL, &c.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (Vol. 4) commencing with January last. Its pages have been looked over by us with much interest. It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importance to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept 4th*, 1858.

THE LAW JOURNAL, for February, has been lying on our table for some time. As usual it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister's office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs.—*Hope Gaude, March 9th* 1859.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth viz that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July 7*, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," are well worthy of a careful persual. This work should be found in the office of every merchant and trader in the Province, being in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator*.—*June* 8, 1858.

U. C. Law Journal, August 1858: Toronto: Maclear & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Cobourg Star, August* 11*th*, 1858.

UPPER CANADA LAW JOURNAL.—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student; and carefully read, and referred to, by every intelligent Canadian who would become acquainted with the laws of his adopted country, and see how these laws are administered in her courts of Justice.—*Stratford Examiner, August* 12*th*, 1858.

DIARY FOR JULY.

1. Monday ..... Long Vacation commences. Co. Court and Surrogate Court Terms begin. Recorder's Court sits. Heir and Devisee sittings commence. Last day for County Council to equalize Rolls of local Municipalities.
6. Saturday..... County Court and Surrogate Court Terms end.
7. SUNDAY..... *6th Sunday after Trinity.*
13. Saturday ..... Last day for Judges of Co. Courts to make returns of Appeals from Assessments.
14. SUNDAY..... *7th Sunday after Trinity.*
16. Tuesday..... Heir and Devisee Sittings end.
21. SUNDAY..... *8th Sunday after Trinity.*
28. SUNDAY..... *9th Sunday after Trinity.*
31. Wednesday.... Last day for County Clerk to certify County Rate to Municipalities in County.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JULY, 1861.

COLONIAL BANKRUPTCY LAW.

It is not often that we find decisions of English Courts of Justice of especial interest to the Colonies. When any such present themselves, we endeavour to make them known through the pages of the *Upper Canada Law Journal.*

The decision of the English Court of Queen's Bench, in the case of Anderson, is the latest case of the kind to which we have hitherto found it necessary to refer.

One of less exciting interest, but not of less direct effect upon colonial interests, is *Bartley* v. *Hodges*, reported in other columns. In it the Court held that a discharge to an insolvent or bankrupt, under a Colonial Statute, is not binding upon his English creditors not resident or domiciled in the colony.

The proposition, though startling, is not without some show of reason to support it. It is not however for us at present to argue the reasonableness or unreasonableness of the decision, but to announce the fact of the decision.

When we consider that colonial merchants are in general more or less indebted to English houses, the importance of the decision cannot be over-rated. The effect of it may be to render necessary an imperial bankruptcy or insolvency law.

The aim of every good system of bankruptcy or insolvency is to relieve the honest debtor from *all* his past liabilities. No colonial act can, according to the decision mentioned, have that effect as against English creditors resident and domiciled out of Canada.

It is well that this point of law has been at the present time determined. There is among us a strong desire for some effective system of bankruptcy and insolvency law; and the question at once arises, whether under existing circumstances we should be content with one enacted by our own Legislature merely.

In connexion with the case reported, we may mention that it has we believe been held in our Court of Chancery that a bankruptcy vesting order, granted by a subordinate judicial officer in Scotland, under an imperial statute, is effectual in Canada, so as to pass real estate, &c., situate in Canada, to an assignee appointed by such officer.

This state of the law is really vexatious. It is unjust that a sheriff or sheriff's deputy in Scotland, or any foreign dominion, should have power materially to effect the interests of a great body of creditors in this colony in a matter where they are not consulted, and where it would be next to impossible to tender advice or offer opposition if deemed necessary, upon notice of the intended proceedings.

Legislation is much needed on bankruptcy and insolvency. The subject, though surrounded with difficulties might be satisfactorily handled by a person of competent skill and knowledge. Who shall be the person? He will earn a better and more lasting reputation than any advocate of mere theories, however attractive to the popular palate.

What we want is practical legislation, and this is the thing of all others that we have the most difficulty in obtaining.

NOTES ON THE PRACTICE OF BAILING IN CRIMINAL CASES UPON APPLICATION TO THE COUNTY JUDGE.

The preliminary investigation of nearly every indictable crime known to the law, takes place before Justices of the Peace. They either commit the alleged offender for trial before a jury, or they admit him to bail to answer to the charge preferred against him. Their power of bailing is restricted, and should in all cases be exercised with caution, —a Magistrate admitting a prisoner to bail in violation of law, would be liable to a prosecution.

The general duty as to bailing is laid down in the Consolidated Act of Canada, cap. 102, secs. 52 & 53. In cases of *misdemeanor* the party charged may be admitted to bail by one Justice, in cases of felony the order to bail must be made by *two* Justices at least.* The power of bailing may, in either case, be exercised if the Justices are of opinion

* By section 61, a Police or Stipendiary Magistrate may do alone what is authorised to be done by two Justices.

that the evidence adduced does not furnish such a strong presumption of the guilt of the accused as to warrant his committal for trial. Where the charge is murder or treason no Magistrate or number of Magistrates can admit to bail.

With a numerous body of Magistrates, very many of them imperfectly acquainted with the criminal law, an obviously safe general rule is to commit, if the facts in evidence establish a moral conviction in the Magistrate's mind of the guilt of the party accused—and this indeed is the course generally adopted in this country.

The law does not impose upon Magistrates the responsibility of accepting bail in doubtful cases, and does not contemplate their determining upon nice and critical questions of law, or accurately balancing a chain of circumstances *pro* and *con*. It leaves that duty to those who are trained to legal investigations and experienced in such matters.

It is not many years since prisoners could not be heard on an application to be bailed except before a Judge of the Common Law Courts in Toronto, which of course caused much delay and was a very expensive process. Latterly as the administration of the law has become more decentralized, various duties are made incident to the office of County Judge, and to obviate the delay and cost in applications from the outer counties of Upper Canada to Toronto, the County Judges in their several jurisdictions are authorised to bail prisoners committed for trial on criminal charges.

Section 54 of the act referred to—that is as substituted by the act 24 Vic, cap. 15, enacts as follows:—"In Upper Canada, in all cases of felony and of misdemeanor where the party accused has been finally committed as hereinafter provided, any County Judge who is also a Justice of the Peace for the county within the limits of which such accused party is confined, may, at his discretion, on application made to him for that purpose, order such accused party or person to be admitted to bail on entering into recognizance with sufficient sureties before two Justices of the Peace, in such an amount as the said Judge directs, and thereupon such Justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the Judge directing the admitting of such party to bail."

A mode of procedure is not here traced out, but enough may be collected from the several enactments bearing on the subject, to shew the proper practice in such cases.

Suppose, then, a practitioner instructed to apply to the County Judge for an order to bail a party committed for a crime. The first step will be to procure certified copies of the examinations and papers upon which the Judge is to act. If the party charged be actually in gaol, it may be assumed that the papers are filed with the County Attorney; for section 39 of the Consolidated Act before referred to, and section 9 of the Local Crown Attorney's Act (c. 106, U. C.), require the depositions and papers to be "delivered to the County Attorney without delay," and so in respect to Coroners by section 62 of the first named act. The words "without delay" must be taken to mean without unreasonable delay, and in practice the papers are usually sent by the next mail, or are at once sent in an enclosed packet by the constable intrusted with the execution of the warrant of commitment, to be by him delivered to the County Crown Attorney, when he lodges his prisoner in gaol. But if on enquiry it is found that the committing Magistrate has not transmitted the papers to the County Attorney, that officer would doubtless call upon the Magistrate at once to forward them; and that without prejudice to any proceeding that would lie against the Magistrate, for *default in not obeying the requirements of the statute*. In some cases it may save time to apply directly to the committing Justices: but, unless in very urgent cases, it is better to obtain the certificate from the County Crown Attorney—for unless everything is in form the papers may require to be again sent to the committing Magistrate for correction, and in any case, notice will probably be required to be given to the County Attorney.

The notice of application should be personally served on the committing Justice who has the papers. The following form is suggested:—

To A. B. and C. D., two of Her Majesty's Justices of the Peace for the County of —— (or to A. B., Coroner, as the case may be).

(Consolidated Statutes of Canada, cap. 102, sec. 62.)

GENTLEMEN,—Take notice that so soon as counsel can be heard, His Honor the Judge of the County Court of the County of ——, will be moved to admit to bail —— —— of, &c., committed by your warrant to the common gaol of the County of ——, on a charge of *larceny (or as the case may be)*, and now a prisoner in the said gaol; and you are hereby required, in accordance with the statute in that behalf, to transmit to the Clerk of the said County Court, close under the hand and seal of one of you the said Justices, a certified copy of all informations, examinations, and other evidences touching the offence wherewith the said —— —— has been charged, together with a copy of the warrant of commitment.

Dated, &c.

—— ——

Counsel, or Attorney (*as the case may be*), for the said —— ——.

The Magistrate, on receiving the notice, makes a verbatim copy of the papers, so as to embrace *all* the evidence given, and of documents referred to in it.

All the papers copied, one of the committing Magistrates adds at the bottom the following *certificate*:—

In the case of The Queen v. —— ——, *committed for larceny (or as the case may be).*

I, —— ——, one of the committing Justices in this case, do, in pursuance of the statute in that behalf, certify that the above are

copies of the information, examinations, and other evidences taken before me and —— ——, J. P., touching the offence wherewith such prisoner has been charged, &c.,

Witness my hand and seal this —— day of ——, 1861. [Seal.] E. F., J. P., Committing Justice.

The package is then put in a sealed envelope and addressed and marked thus,

"The Clerk of the County Court, County of ——. Informations, examinations, &c., in the case of *The Queen* v. —— ——, charged with *larceny (or as the case may be)*."

If the papers are in the hands of the County Attorney, that officer makes copies and adds the certificate, which of course will be slightly varied from the above form: and he in like manner encloses them in an envelope similarly addressed to the County Court Clerk. The certified copies are in both cases handed to the party applying for them.

The County Judge would probably require notice of the application to the County Attorney, and where the papers are in his hands, the demand of a certified copy, and notice of application may be joined as in the following form:—

County of ——
To wit: } *To E. F., Crown Attorney for the County of ——.*

Take notice that on —— next *at noon*, or so soon thereafter as counsel can be heard, His Honor the Judge of the County Court of this County will be moved to admit to bail —— ——, now confined in the gaol of this county, on a charge of ——, under a warrant of commitment by —— ——, Justice of the Peace. And you are required to transmit to the Clerk of the said County Court a certified copy of all the informations, examinations, and other evidences touching the offence wherewith the said —— —— has been charged.

Dated this —— day of ——

—— ——
Counsel (or Attorney) for the said —— ——.

The County Crown Attorney may allow the counsel for the prisoner to have copies made of the papers, adding the certificate merely—or make the copies himself; and the latter would seem in all cases the better course, for until used in court the papers should not be out of the hands of the proper officers. The Crown Attorney will be entitled to payment per folio for the certified copies. A copy also should be made of the warrant of commitment in the gaoler's hands, and verified by affidavit to be laid before the County Judge. At the time appointed, the County Judge hears the counsel for the applicant, and the Crown Attorney, if present, and acts as the case requires.

Notice of the application to the County Attorney should not be dispensed with by the Judge; for by the first sub-sec. of sec. 1 of the Local Crown Attorney's Act, that officer, after receiving the examination, &c., from the Magistrates, shall, "when necessary, cause such charges to be further investigated, and additional evidence collected if required." And it may be that he is about to have the matter further investigated, or is in course of collecting additional evidence, or that the person is charged or about to be charged with another crime. Therefore the necessity of the notice to him.

While the circumstances under which *Justices of the Peace* may bail are stated in the 52nd and 53rd secs. of cap. 102, Consol. Stat. Canada, there appears to be no restriction on the County Judge in the sec. 54 (as altered and recast by the act of last session), immediately following, which confers the jurisdiction. He may "in his discretion order such accused person" to be admitted to bail; but the crimes of treason and murder are expressly excluded from the County Judge's cognizance, and he has no power to admit to bail in such cases.

The amount of sureties in case of an order to bail is regulated by the Judge, and will of course depend on the nature of the crime and the position and circumstances of the party charged; and the Judge may require that the sureties shall justify, by affidavit, or that notice of the time and place of entering into the recognizance, and of the names of the proposed sureties, be given to the Crown Attorney, that he may be present on the occasion, and see that the sureties are sufficient.

The Judge's order may be in the following form:

The Queen v. *A. P., a prisoner in the gaol of the County of —— committed on a charge of ——*

Upon reading a certified copy of the information, examinations and papers, touching the offence wherewith the said prisoner is charged—the notice of motion to the County Crown Attorney, and affidavits filed; and upon hearing the prisoner by his counsel, and the County Crown Attorney on the part of the Crown—I do order that the said —— —— be admitted to bail, on entering into a recognizance with two sufficient sureties (himself in the sum of $ —— and the sureties in $ —— each), before any two of her Majesty's Justices of the Peace, in the town (*or city*) of —— for his appearance at the next Court of Oyer and Terminer and General Gaol Delivery (*or as the case may be*), to be holden in and for the said county of ——, to answer to the Queen in respect to the said charge of ——, and not to depart the court without leave.

And I do further order that [notice of the time and place of entering into such recognizance, and of the names of the proposed sureties, be given to the County Crown Attorney, that he may be present, if he thinks fit, *or* that] the said Justices do examine such sureties upon oath, as to their sufficiency for the amounts for which they are respectively to be bound.

Dated at —— this —— day of ——

—— —— Judge.

Furnished with this authority, and notice if required being served on the Local Crown Attorney, the counsel for the prisoner proceeds to obtain his discharge, thus:—

The order is brought to two Justices of the Peace, who take the recognizance as required, and issue a warrant of deliverance in the form given on page 1080 of the Consol. Stat. of Canada, and annex to it the Judge's order. Both

documents are left with the gaoler, and will be his warrant for liberating the prisoner, if he stands committed on the particular charge only.—*Communicated.*

HABEAS CORPUS IN THE UNITED STATES.

The right to the writ of habeas corpus is deemed the bulwark of an Englishman's liberty. It is a right which in England can only be suspended under very extraordinary circumstances, and then only upon the recommendation of *Parliament.*

In the United States, during the present crisis, it appears an attempt was made by the President to suspend the right, or to authorize its suspension by a subordinate military officer. This attempted invasion upon the liberty of the subject has been boldly met and ably defeated by the much esteemed Chief Justice of the United States in a judgment reported in other columns.

The importance of the judgment, and the interest which it must excite in the breast of every friend to constitutional liberty, is our apology for its insertion in the columns of our journal.

In it we see strongly manifested the necessity of placing the judicial, beyond the influence of the executive power. The safety of the subject, his right to the enjoyment of rights most sacred and most dear in every system of constitutional government, must in a great measure, if not altogether depend on the independence of the judicial power.

AMERICAN LAW BOOKS IN ENGLAND.

In an article in No. 20 of the *Law Magazine and Law Review*, for February 1861, page 235, new series, headed "Pleading of the present day," a new edition of Mr. Stephens's work on Pleading is reviewed; and also a work intitled "The Practice in Courts of Justice in England and the United States," by Conway Robinson, 4 vols., Richmond, U. S.

The latter work, by Mr. Robinson, which is not yet complete, was presented by the learned author to the Law Society of Upper Canada, as the volumes came out; and it will be interesting to readers of this journal to notice in what terms it is spoken of by the Editor of the *Law Magazine.* We therefore extract a few passages of the review:

"We have placed at the head of this article the title of "another work, well known in America as Robinson's Prac- "tice, because the fourth volume of that work, which treats of "Declarations, has just been brought to our notice. It con- "tains an ample collection of forms, which may be made "available by the modern English pleader. * * *

"It must not be supposed that Mr. Robinson is an advocate "for maintaining the declarations of the worst period of "pleading—the middle period—when language seemed to be "employed for the purpose of confusing thoughts, and enabling "lawyers to live by practising verbal tricks, and setting tech- "nical traps. It shews that the system of pleading has had "fictions and subtleties which might be lopped off without "trenching upon any principle of value. In modern times it "has been the aim of legislators and judges to get rid, on the "one hand, of what experience proved to be productive of in- "convenience, and to retain, on the other hand, all that was "truly valuable. Even in New York, where common law "pleading on a system is supplanted, it is not considered that "every vestige of its valuable rules has been swept away. * *

"What is the necessary consequence of abolishing special "demurrers, we have already pointed out, and Mr. Robinson's "pages confirm our views. We recommend to the English "lawyer that part of the *third* volume which treats on plead- "ing generally (Title 11), and the rules for framing the decla- "ration (Title 12). He will find it very instructive to com- "pare the nature of, and the delays effected in, pleadings in "other countries beside his own. In England we exclude too "much the benefits we might derive from the experience of "other countries; and for this reason (although we are aware "there are others more cogent to practical men), we should "advise to our readers a perusal of the above named divisions "of Mr. Robinson's work. It will then be seen that the vari- "ous questions with which law reform here is familiar, are "not confined to one system, but are common to all. The use "and abuse of forms, and rules, of professional habits of accu- "racy on the one hand, and of affectation and circumlocution "on the other, belong not to one, but to every country and "period. * * *

"Mr. Robinson shews great knowledge of the best prece- "dents of English books, and the principles of law upon which "*pleading is based; and practitioners would not find it diffi-* "cult to discover for themselves how far they could apply this "work in their daily avocations.

"We have spoken hitherto of those volumes only, of Mr. "Robinson, which relate to pleading, viz., part of the third "and the fourth volumes; but we would also desire to draw "the English reader's attention to the other volumes.

"The title of the work is '*The Practice in Courts of Justice* "*in England and the United States*,' and so far is much larger "than what is embraced in ordinary 'books of practice.' It "is not a mere digest of cases, nor does it consist of mere in- "structions for carrying on a suit; but it contains a body of "law invaluable both in the amount of matter and the manner "of its arrangement.

"It will be found always useful to a member of a liberal "profession, if he follow it in a liberal spirit, to have the "opportunity of comparing the results of systems other than "his own, and to see a subject treated on an original method.

"We cannot pretend to review here all the volumes of Mr. "Robinson's work; but will briefly indicate the contents, "that our readers may be able to judge to some extent of its "character.

"Vol. I. deals with 'the place and time of a transaction or "proceeding,' treating chiefly of the conflict of laws, and the "Statute of Limitations. The second volume treats of the "subject matter of personal actions—in other words, 'of the "right of action.' The third volume treats of personal "actions, with respect to the parties who may sue and be "sued; the form of actions and the frame of the pleadings. "The fourth volume is concerned with pleadings in personal "actions, treating particularly of declarations, and giving "forms thereof.

"There is yet one more volume to follow, in completion, we "presume, of this important work, which has been both con- "ceived and executed in a comprehensive spirit, deserving of "recognition in England."

The work which has called forth such remarks is one of no ordinary merit. Indeed it is not usual for English law periodicals to notice foreign and colonial publications; and when they do so, we may be certain that the work in favor of which the exception is made, is one really deserving of the recognition.

We have for ourselves examined Mr. Robinson's Practice, and can only say that it richly deserves all that is said of it by our London contemporary. The work is one which displays not merely great industry, but unusual ability. It is replete with knowledge. The writer is not content with the habit of too many legal writers, that of stringing cases together, without any attempt to investigate the principles which are imbedded in them. He goes to the root of the case. He gives us principles. His work might be appropriately entitled a work on "The principles of Practice."

Owing to its size, it is of course intended to be more than a mere *vade mecum*. It is a work of solid learning, elaborate and well written.

NEW MAP OF NORTH AMERICA.

Mr. Monk, map compiler and publisher, has issued a new edition of his well known Map of North America.

Extending several hundred miles farther north, it embraces about a million more square miles of her Majesty's dominions than shown on his former map. It gives a complete view of the great valleys of the Red River, Saskatchawan and Fraser's River, and, by showing them all on the same scale with Canada and the other better settled portions of the continent, conveys at once a more ready and correct impression of their vast extent than any map we have seen. It also gives the latest State and territorial boundaries in the neighbouring United States; and as three new Territories and one State were formed during the recent session of Congress, we find the form of nearly all the Territories west of the Missouri River much changed, and their physical features exhibited according to recent Government explorations. This map also shows much more of the divisions and sub-divisions of Central America and the West Indies, than we have seen on any former map.

A map of the World on the same sheet, which shows America in the middle and China in the east and west, by the location of the continents, gives both oceans entire, and demonstrates to the eye the vast importance of completing the great thoroughfare for the travel and commerce of the world across this continent. Toronto, we observe, is in the direct route between London (England) and Canton (China).

The map is conceived and executed in a style that does credit to both publisher and artists. It is useful for the office, as well as instructive for the family circle. The intelligent newspaper reader, having this map, will, at the present time, be able at a glance to trace the places of interest in the neighbouring Republic.

This map, however, must be seen, to be appreciated.

The Agent of the publishers for this Province, James D. Duncan, will, we are informed, be glad to wait upon any one addressing him through the Toronto Post Office. He will be in Toronto for a few days, in order if possible to ascertain the number of copies likely to be required in and about Toronto.

The price for the map, which is a very large one, mounted on rollers, is only $8 50.

JUDGMENTS.

QUEEN'S BENCH.

Present: McLean, J.; Burns, J.

June 17, 1861.

McInnes v. *Scott.*—Action for seduction. Motion for new trial on ground of excessive damages. Rule refused.

Nourse v. *Foster.*—Action for malicious arrest. At trial, plaintiff unable to produce original information, and nonsuited. Rule nisi granted to set aside nonsuit.

Frith v. *Nixon.*—Rule nisi refused.

Vidal v. *Donald.*—Rule nisi granted.

McGuire v. *Lang.*—Action for trespass. Rule nisi refused.

Cutting v. *Talcott.*—Interpleader. Rule nisi refused.

Howland v. *McNab.*—Action on promissory notes. Rule nisi refused.

Alexander v. *Case.*—Action on covenant for title. Rule nisi refused.

Shark v. *Smith.*—Action for a quantity of lumber furnished. Rule nisi granted.

McMurty v. *Swanston.*—Rule nisi granted.

Murphy v. *Case.*—*Interpleader. Rule nisi granted.*

Reid v. *Weir.*—Award as to amount due on a sub-contract for constructing portion of G. T. R. Arbitrator, in regard to one item, rock excavation, gave a large amount, as defendant asserts, owing to a mistake. Court do not think the arbitrator made a mistake per McLean, J. Burns, J.—The case of *Hodgkinson* v. *Fernie*, 8 C.B., N.S., 189, is explicit as to the propriety of refusing a rule. Rule nisi refused.

Carpenter v. *Henderson.*—Action against attorney for negligence. Verdict for plaintiff. Rule nisi refused.

The Queen v. *Fitzgerald.*—Rule nisi on defendant to show cause why second trial should be set aside, refused, although the proceedings of Quarter Sessions somewhat irregular in granting new trial on affidavit of defendant.

New Brunswick Oil Company v. *Parsons.*—Trial at Toronto, before Robinson, C. J. Verdict for plaintiff. Motion for new trial. Rule discharged.

Meagher v. *Ætna Ins. Co.*—Action on an insurance policy on the steamer Boston; value of vessel $15,000. The insurance company has its chief or head office in Buffalo, New York. *Held*—1st. That the law of Upper Canada must govern the contract. 2nd. That the clauses in the policy as to total loss or partial loss are inconsistent, but held that the contract was for insurance against a total loss. Rule absolute for nonsuit.

Merritt v. *Nevin.*—Rule to reduce verdict without costs.

Thompson v. *Sherwood.*—Verdict for plaintiff at trial, with $10 damages. Leave reserved to enter verdict for defendant. Rule nisi discharged.

Lucas v. *Gzowski.*—Action for digging well in London, on G. T. Railway. It was proved at trial that the work was badly done, and that the defendants had to reconstruct a well at a cost of over $400. Nevertheless the jury found for plaintiff. New trial, costs to abide event.

In Re Hughes, Judge Co. Court, Elgin.—Rule for mandamus calling upon a County Judge to issue an attaching order. It appeared that, on making the application, the attorney for the claimant swore that certain parties, one of whom was the Judge, were interested in the money. The Judge requested the affidavit to be withdrawn, which at first was refused, but afterwards withdrawn, and the name of the Judge altered to "another person." The Judge still refused; but afterwards it was shown that he had no interest. He was again applied to; but it appearing to him that his brother-in-law claimed the money, he then declined to interfere. Per Burns, J.—The proper remedy is by certiorari, which is *ex debito justitia*. See Tidd's Practice and cases cited. Rule discharged.

Bellhouse v. *Teguron*—Interpleader. Application as to the costs of the action. Rule absolute, and each party to bear his costs of application.

Corporation of Cayuga v. *Corporation of Haldimand.*—Mandamus nisi quashed, with costs.

Powell v. *Hyde.*—Rule discharged.

Murray v. *Brydges.*—New trial without costs.

Boardman v. *Gage.*—Rule nisi refused.

Saulter v. *Carruthers.*—Rule nisi to refer back award to arbitrator. Nothing appeared on face of award as a ground for sending back award, or for setting it aside. Rule discharged with costs.

Present: McLEAN, J.; BURNS, J.

June 22, 1861.

Vance v. *King.*—Postponed.

Henderson v. *G. T. R.*—Appeal from County Court of Counties of Frontenac, Lennox & Addington. Appeal dismissed with costs.

In Re Harris and School Trustees.—Motion for mandamus, calling upon trustees to levy a rate to pay an award in favor of teacher. Rule discharged with costs.

Reg. v. *Savage.*—Motion for attachment for wrong return to writ of habeas corpus. It appeared that parties not in custody, and rule discharged with costs.

In Re Hagerman v. *Corporation of Owen Sound.*—Motion to quash by-law. Rule absolute, except as to secs. 9 and 10, with costs.

Bradley v. *Terry.*—Ejectment. Motion for new trial. Rule nisi discharged.

Tabor v. *Corporation of Scarborough.*—Motion to quash a by-law levying a school rate. Rule nisi discharged.

Keachie v. *Burns.*—Rule nisi refused.

Reg. v. *Gillespie.*—Motion to discharge prisoner from contempt. Prisoner to be discharged on payment of all costs, and on filing affidavit of compliance with mandamus, to satisfaction of a Judge in Chambers.

COMMON PLEAS.

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

June 17, 1861.

Tisdale v. *Dallas.*—Demurrer. Judgment for plaintiff, with leave to defendant to apply to a Judge in Chambers, within ten days, for leave to amend.

Street v. *County of Kent.*—Special case. Judgment for plaintiff on first point.

Lloyd v. *Clark*—Demurrer. Judgment for defendant, with leave to plaintiff to amend on payment of costs within a month.

Campbell v. *Erie.*—Rule nisi to enter nonsuit made absolute.

Muir v. *Laurie.*—Demurrer. Judgment for plaintiff on demurrer.

Joseph v. *Stirling.*—Leave to amend on payment of costs.

Wilson v. *Bleker.*—Rule nisi for new trial refused.

Back v. *Whitney.*—Rule absolute to set aside judgment for irregularity, with costs.

Atkinson v. *Beard.*—Rule nisi discharged with costs.

Hammond v. *Heward.*—Rule discharged, and plaintiff to have judgment on demurrer.

Abbott v. *Skinner.*—Appeal from County Court Frontenac, Lennox and Addington. Dismissed with costs.

Thayer et al. v. *Street and Fuller.*—Judgment for plaintiff on demurrer.

Smith v. *Burton.*—Judgment for plaintiff on demurrer.

Davis v. *Levey et al.*—Appeal from a county court dismissed with costs.

Preston v. *Twigg.*—Motion to set aside verdict, and enter nonsuit. Rule discharged.

Alderdice v. *Distin.*—Rule discharged.

Scripture v. *Curtis.*—Rule nisi discharged.

Mickle v. *Oliver.*—New trial on payment of costs. If plaintiff elect to discontinue as to defendant Storey he may do so, and retain his verdict against the other defendants.

Howland v. *Jennings.*—Question as to whether 20 per cent. interest on a note could be recovered on note after dishonor up to judgment. *Held*, it could. Rule nisi discharged.

Cooper v. *Ewart.*—Rule absolute to enter nonsuit.

In re Abbott.—Rule refused.

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

June 22, 1861.

Harvey v. *Pridham.*—Judgment for plaintiff. Richards, J., *dissentiente.*

Meagher v. *Home Insurance Company.*—Rule absolute for nonsuit.

In re Cotter et al. and the Municipality of the Township of Darlington.—Rule nisi to quash by-law discharged with costs.

Doha v. *Tier et al.*—Postea to plaintiff.

Spry v. *Mumby.*—Judgment for defendant on demurrer, with leave to apply to a Judge in Chambers for leave to amend within a month.

Allnutt v. *Ryland.*—Rule absolute to enter verdict for £255 15s. 9d.

Powell v. *Bank of Upper Canada.*—Rule nisi discharged.

Corbett v. *Johnson.*—Postea to defendant.

Corporation of Essex v. *Park.*—Stands for counsel for plaintiff to say whether he will reduce amount of award to the amount received by the treasurer for Lunatic Asylum tax, otherwise award to be set aside.

Corporation of Essex v. *Prince et al.*—Unless plaintiff elect to accept nonsuit by four days of next term, verdict to be entered for defendant.

Gildersleeve v. *Hamilton.*—Rule nisi discharged.

Kerr v. *Fullarton.*—Rule absolute without costs.

Purdie v. *Watson.*—Rule absolute to amend judgment roll and *fi. fa.* goods on payment of costs and of all costs consequent on the issuing of the writ and *fi. fa.* residue lands set aside.

SELECTIONS.

THE CASE OF ANDERSON THE FUGITIVE SLAVE.

The application for the Writ of Habeas Corpus and Judgment considered; by THOMAS TAPPING of the Middle Temple.

(*From the Law Magazine and Review.*)

The application for the rule in Anderson's case has raised the most important point of colonial law that has occurred within modern times; viz., whether the Queen, by her Court of Queen's Bench at Westminster, has power to issue her prerogative *Writ of Habeas Corpus ad subjiciendum* into Canada, in respect of a matter arising entirely within that province, and over which the Canadian courts have jurisdiction?

The counsel for the applicants had to make out the affirmative of this very important question, and, in doing so, their argument would have been much more lucid, and better arranged, had it commenced with the most recent statute and authority, and worked chronologically back upon the older statutes and authorities, until all that was relevant had been exhausted, and all the observations necessary for the information of the court had been made. Such a course would have been not only in accordance with the practice of our best-trained and most eminent advocates, but have also had the paramount advantage of putting the court in possession of the latest judicial tests, whereby it could accurately ascertain the present legal value of the earlier cases.

But the argument addressed to the court in Anderson's case, was differently cast. It commenced with irrelevant authorities, nearly five hundred years old, about Calais, and, after discussing whether the English Court of Queen's Bench had power to issue a *certiorari* to Berwick, or a *habeas corpus* to Ireland, Guernsey, or Jersey, or other prerogative writs to the Isle of Man, and other British dependencies, this important case was left by counsel for the decision of the court. Not a single act of parliament either of the imperial parliament relating to Canada, or of the Canadian legislature, as to the constitution, jurisdiction, or procedure of its courts of justice, was cited; omissions the more remarkable as their citation would have saved the Court of Queen's Bench at Westminster a great deal of unnecessary doubt and difficulty, and prevented it from assuming a jurisdiction which, it is feared, will be not only opposed by the Canadians, but establish an evil precedent, and tend to unsettle the amicable relations which at present exist between this country and her North American possessions.

The argument had not, however, proceeded far before that very learned judge, Mr. Justice Hill, wishing to rightly direct it, called counsel's attention to the stats. 14 G. III. c. 83, "An Act for making more effectual provision for the Government of the Province of Quebec, in N. America," and the 31 G. III. c. 31, which divides the province of Quebec into Upper and Lower Canada; the citation of which by the learned judge, showed clearly that he wished to be informed how far recent statutory enactments had affected the jurisdiction of his court. But all the information he got from counsel was, "that the latter statute treated the province of Quebec, which comprehended both Upper and Lower Canada, as a colony and possession of the crown of England." Not a very profound observation, and certainly one not at all complimentary to the judge, who had the act of parliament before him.

After the customary pause that usually follows the answer of a judicial question, the counsel, still persevering with the original scheme of their argument, cited "Watson's case, 9 A. & E. 731; Vattel's "Law of Nations," B. I. c. 18, p. 210; 2 P. W. 75; 3 Bac. Ab. 424, 5th Ed. tit. *Habeas Corpus; Rex* v. *Cowle*, 2 Burr. 834, 855; *Grotius de Jure Belli ac Pacis*, b. ii. c. 9; Rymer's Fœd., vol. viii. p. 15, Lond 1709, vol. iii, part iv. p. 135, Hague, 1740; *Campbell* v. *Hall*. Cowp. 204: and were about to proceed further, when another learned judge, Mr. Justice Crompton, with characteristic acuteness, broke in upon the argument, and called attention to the real point in the case, saying—"You must make out that this court has concurrent jurisdiction with the courts in Canada." Whereupon Cockburn, C. J., also observed—"You must show that this court has the power of issuing the writ into a possession of the crown, in which there is not only an independent legislature but an independent judicature." To which the learned counsel replied by way of *petitio principii*, as follows:—"The fact that Canada has both a separate legislature and judicature makes no difference. The superior courts in England have a concurrent jurisdiction with the courts in Canada, as to issuing writs of *habeas corpus*;" and immediately referred to cases about the Isle of Man, *R.* v *Crawford*, 13 Q. B. 613; the stat. 5 G. III. c. 26; Carus Wilson's case, 7 Q. B. 984 (about Jersey), Dodd's case, 2 DeG. & J., 510, S. C. 4 Jur. *n. s.*, 291 (also about Jersey), and in *ex parte Lees*, El. Bl. and El., 828, S. C. 5 Jur., *n. s.* 333 (about St. Helena the writ being refused). At this juncture, Mr. Justice Hill, who during the citation of the last mentioned cases had evidently been pursuing a train of silent reasoning, remarked, "When writs of *habeas corpus* were issued to Ireland, there was an appeal from the courts there to this court;"* and Cockburn, C. J., immediately stated—"Lord Campbell seems to have had considerable doubt whether, in a case like the present, the writ of *habeas corpus* could be issued. He said (El. Bl. & El. 834, S. C., 5 Jur. *n. s.* 334)—'It was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus* could be enforced in such dependencies'"† and, after a few observations in reply from the learned counsel, the Chief Justice reiterated—"The question is, whether the issuing of this *writ is not beyond the ambit of our jurisdiction, and whether the right of issuing the writ is not vested in another jurisdiction; that is, in the courts of Canada.*" To this counsel made reply by erroneously informing the court, that—"The colonial courts in Canada are established by charter of the Crown, sanctioned by the Legislature, and further stated that the party (Anderson) was not in custody under the commitment of any court which had power to try him; nor was the court asked to interfere with any judgment or sentence of any court, but that the party (Anderson) was in custody under the warrant of a local magistrate." Cockburn, C. J., having here observed—"*It is a serious question whether we should attempt to exercise a jurisdiction which we have no means of enforcing;*" the argument ended. The judges retired, and upon their return into court—

SIR A. COCKBURN, C. J., said‡—"We have carefully considered this matter, and the result of our anxious deliberation is, that we think that the writ ought to issue. *We are sensible of the inconvenience which may result from the exercise of such a jurisdiction. We are also sensible that it may be thought inconsistent with that higher degree of colonial independence, both in legislation and judicature, which has been carried into effect in modern times with happy results.* At the same time, in establishing local legislative and judicial authority, the legislature of Great Britain has not gone so far as expressly to abrogate any jurisdiction which the courts in Westminster Hall possess, of issuing writs of *habeas corpus* to any part of her Majesty's dominions; and we find that that jurisdiction in these courts has been asserted from the earliest times, and exercised down to the most recent. We have it upon the authority of Lord Coke (2 Inst. 53), Lord Mansfield, Blackstone, and Bacon's abridgment, that these writs of *habeas corpus* have been and are to be issued into all the dominions of the crown of England, when it is suggested that one of the Queen's subjects is illegally imprisoned. And not only have we these authorities in the shape of *dicta* of eminent judges, and assertions of text writers, but we

* The learned judge was quite correct. *See Fryer* v. *Bernard*, 2 P. Wms., 261 cited *post*, p. 49.

† See also Brac. Lib. 3 vol. 106, 107, par. 4 & 5, cited *post* p. 57.

‡ We give the judgment in extenso, not only because it is a useful one to record, but because this article should not, for obvious reasons, go forth to the world without it.

have the practical application of the doctrine in cases in very modern times. The more remarkable instances are where the writ was issued to the islands of Jersey, Man, and St. Helena. Finding, upon these authorities, that the power has been not only asserted, but carried into execution as matter of practice, even where an independent local legislature and judicature were established, we *think that nothing short of a legislative enactment, expressly depriving us of this jurisdiction, will warrant us in withholding the exercise of it when called upon to do so for the protection of the liberty of the subject.* It may be that the legislature has thought fit to leave a concurrent jurisdiction to be exercised by the superior courts of this country and by the colonial courts, as there is in this court and the other courts of Westminster Hall. We can only act on the authorities, and we felt that we should not be doing right, under the authority of the precedents cited, if we refused to issue this writ." *Rule granted.*

So far for the argument and judgment in this important case; and it is worth noting that, during the whole of the discussion, the learned judges, as we have above shown, endeavoured by every means to ascertain their court's jurisdiction; while the learned counsel for the applicants not only used bold assertion for argument, but also neglected to cite either the Imperial statute 3 & 4 Vict. 35, or the Colonial statutes 2 W. IV. c. 8, and 22 Vict. c. 10, which are, by necessary implication, opposed to the jurisdiction of the court of Queen's Bench at Westminster.

But, before proceeding to lay the last mentioned statutes before the reader, it may be useful to shortly notice the *habeas corpus* acts, 31 Car. II. c. 2, and 56 G. III. c. 100; also to examine *seriatim* the nature and value of the above mentioned cases, premising that counsel for the applicants frankly admitted during their argument, that *no instance could be found of a writ of habeas corpus ad subjiciendum going into Canada,* and that the court of Queen's Bench at Westminster had no power to send such a writ either to Scotland or to the Electorate, all which Lord Mansfield had stated in *Rex* v. *Cowle.**

"THE HABEAS CORPUS ACT" is the statute 31 Car. II. c. 2, which was passed in the year 1678, and by it the writ runs into *any County Palatine, the Cinque Ports,* or other *privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey,* any law or usage to the contrary notwithstanding. Observe, no mention is made of Scotland, Ireland, the Plantations, the Colonies, or the Isle of Man.

The *habeas corpus* amendment act is the statute 56 G. III. c. 100, which was passed in the year 1816, and the territorial jurisdiction of that act is— *That part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the Isles of Jersey, Guernsey, or Man.* Again no mention is made of Scotland, Ireland, the Plantations, or the Colonies; but the Isle of Man is mentioned for the first time, because it had, about fifty-one years previously, by statute 5 G. III. c. 26, been vested inalienably in the crown.

The reference to THE CALAIS WRIT, 8 Rym. Fœd. 15, although it gave Mr. Justice Blackburn an excellent opportunity of showing his intimate and ready knowledge of English history, yet, as an authority in Anderson's case, was altogether irrelevant and improper. Every body knows, or rather believes, that the unfortunate Duke of Gloucester, the subject of the writ, was kidnapped, secretly hurried to Calais, and confined there in a prison for treason, by the command of his king, and with the alleged assent of the Earls of Rutland, Kent, Huntingdon, Nottingham, and Salisbury, the Lord De Spencer, and Sir William Scrope, who afterwards presented to parliament their appeal against the duke; and, in order that such appeal should be heard, procured the issuing of a writ of *habeas corpus,* directed to the Earl Marshal of Calais, to bring the Duke to Westminster *to answer* the appeal. But that writ was, as Mr. Justice Crompton accurately remarked, not a *habeas corpus ad subjiciendum,* but a *habeas corpus ad respondendum,* i. e., a process of the crown to bring in the Duke to answer a charge. Such a writ *ad respondendum* is still among the *formulæ* of the superior courts of Westminster, and in every-day use when the presence of a prisoner in court is necessary as a party litigant. The following is a copy of the Calais writ, which is given in order that it may be seen that it and the modern writ in Chit. *Practice Forms,* p. 725, are almost identical; and that if the former, so the latter should have been cited:

DE HABENDO THOMAM DUCEM GLOUCESTRIÆ AD PARLIAMENTUM.

A. D. 1397.
An. 31 *R.* 2.
Cl. 21 *R.* 2.
P. 1 *m.* 22.

Rex Carissimo Consanguineo suo. THOMÆ COMITI MARESCALLO, CAPITANEO VILLÆ NOSTRÆ CALESII, *et ejus locum tenenti— Salutem.*

Cùm,

Carissimus Frater noster, EDWARDUS COMES RUTLANDIÆ.
Dilectus Consanguineus noster, THOMAS COMES KANTIÆ.
Carissimus Frater noster, JOHAN. COMES HUNTYNGDONIÆ.
Dilecti Consanguinei nostri, THOM. COMES NOTTYNGHAMIÆ.
JOHANNES COMES SOMERSETIÆ. JOHAN. COMES SARUM ET THOMAS DOMINUS DE SPENCER, *ac.*
Delectus et fidelis noster, WILLIELMUS LE SCROP, *Camerarius noster,*

Coram nobis, in presenti parliamento nostro, inter alios appellaverint THOMAM DUCEM GLOUCESTRIÆ *in prisona nostra, sub custodia vestra, de mandato nostro, existentem, de diversis proditionibus, per ipsum et alios prædictos, contra nos, statum, coronam, et dignitatem nostram, factis et perpetratis.*

IPSIQUE APPELLANTES *appellum suum prædictum se optulerint, in parliamento nostro prædicto secundum Legem et Consuetudinem, in regno nostro Angliæ [illegible] usitatas, prosecuturi.*

Nobis humiliter supplicando quitanus ipsum ducem ad respondendum sibi, SUPER APPELLO PRÆDICTO, *coram nobis, in eodem parliamento nostro, corporaliter venire jubere velimus.*

Nos,

Supplicationi prædictæ annuentes,

Vobis MANDAMUS *firmiter injungentes, quòd præfatum Ducem* CORAM NOBIS *et* CONCILIO NOSTRO IN PARLIAMENTO NOSTRO PRÆDICTO, *cum omni festinatione quâ poteritis, salvò et securè venire faciatis,* AD RESPONDENDUM PRÆFATIS APPELLANTIBUS, SUPER APPELLO SUO PRÆDICTO, *secundùm legem et consuetudinem prædictas, et ad faciendum ulterius et recipiendum quod, per* NOS ET DICTUM CONCILIUM NOSTRUM, IN EODEM PARLIAMENTO NOSTRO, *de eo tunc contigerit ordinari.*

Et hoc nullatenus omittatis,

Et habeatis ibi hoc Breve.

Teste Rege apud Westmonasterium XXI. die Septembris, Per ipsum Regem et Concilium in Parliamento.

The Calais writ being now before the reader, it is clear that there are three principal and decisive objections against its being quoted as an authority in favour of the rule in Anderson's case, viz.:—1st, It was a *hab. corp. ad resp.,* and not a *hab. corp. ad subj.* 2nd, It was a writ *per ipsum regem et concilium in parliamento,* and not a King's Bench writ, issued by the king's *Justiciarii Angliæ.* And 3rd, It was part and parcel of one of the most unconstitutional, atrocious, and murderous transactions to be found in English history, and therefore should never have been referred to in support of a modern legal right.

In *Rex* v. *Cowle,* 2 Burr. 834 (1759), the argument arose on a rule to show cause why a *writ of supersedeas* should not issue to a *certiorari* directed to the Mayor of Berwick, to remove an indictment into the Court of Queen's Bench at Westminster. It was not a case of *habeas corpus ad subjiciendum,* and, if it had been, it would not have been an authority applicable to Anderson's case, as it arose in 1759, nearly one

* *Rex* v. *Cowle.* Burr. 834.

hundred and thirty years after the passing of the before mentioned statute, 31 Car. II. c. 2, whereby the Court of Queen's Bench at Westminster was empowered to issue such a writ of *habeas* to Berwick, and fifteen years before the passing of the above mentioned imperial Statute, 14 G. III. c. 83, which recognised the Canadian Courts of Civil and Criminal Judicature. But notwithstanding this, the eminent Chief Justice, Lord Mansfield, who delivered the judgment, uttered the following important passages, the latter of which define and explain the power and jurisdiction of his Court in granting the writ of *habeas corpus* to the Plantations. He said, "That writs not ministerially directed (sometimes called Prerogative Writs because they are supposed to issue on the part of the king), such as writs of mandamus, prohibition, *habeas corpus* and certiorari, are restrained by no clause in the constitution given to Berwick. Upon a proper case they may issue to every dominion of the crown of England. We cannot send a *habeas corpus* to Scotland or to the Electorate. But to Ireland, the Isle of Man, the Plantations, to Guernsey and Jersey, we may —and formerly it lay to Calais. *But, notwithstanding the power which the Court have, yet where they cannot judge of the cause or give relief, they would not think proper to interpose. Therefore, upon imprisonments in Guernsey and Jersey, in Minorca, and in the Plantations, I have known complaints to the* KING IN COUNCIL, *and orders to bail or discharge.* BUT I DO NOT REMEMBER AN APPLICATION FOR A WRIT OF HABEAS CORPUS. *Yet cases have formerly happened of persons illegally sent from hence and detained there, where a writ of habeas corpus out of this Court would be the properest and most effectual remedy.*" So that, taking the whole of this case together, and not selecting isolated passages, it is claimed as an authority against, and not in support of, the power of the superior courts at Westminster, to issue a writ of *habeas corpus ad subjiciendum* to Canada.

In support of Lord Mansfield's opinion, we may here conveniently cite without comment the case of *Fryer v. Bernard*, 2 P. Wms. p. 261, 262, M. T. 1724 (*not quoted in Anderson's case*), a sequestration case, in which it was held that, although the Court of Chancery in *England* might lawfully grant a sequestration against a defendant in *Ireland*, because the courts of justice here had a superintendent power over those in Ireland, and therefore that writs of error lay in B. R. in England to reverse judgments in B. R. in Ireland; yet that the High Court in Chancery in England could *not* legally grant a sequestration to the governor of *North Carolina, or any other of the Plantations*, because Plantation appeals were to the king in council, and not to the High Court of Chancery in England. The Lord Chancellor, Lord Macclesfield, in giving judgment, said—"But as to the sequestration to be directed to the governor of North Carolina, or any other of the plantations, the court doubted much whether such sequestration should not be directed by *the king in council, where alone an appeal lies from the decrees in the Plantations.* For which reason it seemed, that in such cases the planter ought to make *his application to the king in council, and not to this court.*"

The two cases, i. e., *Carus Wilson's case*, 7 Q. B. 984 (1845), and *Dodd's case*, 2 DeG. & Jones, 510, S. C., 5 Jur. n. s. 333 (1857), in each of which it was held that a *habeas corpus ad subjiciendum* issued by an English court could run in *Jersey*, may be conveniently considered together, as both admit of the same answer—namely, that each of them was decided after the passing of the statutes 31 Car. II. c. 2, and 56 G. III. c. 100, which expressly enact that Jersey shall be subject to the English writ. These cases were, therefore, not in point for the applicant.

Crawford's case, 13 Q. B. 613, was decided in the year 1849, and, although it was referred to by the learned counsel for the applicant, its relevancy is not apparent. It was an application for a *habeas corpus ad subjiciendum*, to be directed to the governor of the Isle of Man. This island was purchased by the crown in 1765 and the purchase confirmed by statute 5 G. III. cc 26 & 29, whereby the whole of the island and some of its dependencies were indienably vested in the crown, and became subject to the jurisdiction of the superior courts at Westminster, facts which seem to have been the ground for the court's decision; for, on referring to the report of the case, we find the following marginal note, which is borne out by the judgment:—*Semble.* "That a writ of *habeas corpus ad subjiciendum* runs to the Isle of Man, at any rate since the statute 5 G. III. c. 26, by which the island is vested inalienably in the king and his successors;" and accordingly we find that, though the power of the superior courts at Westminster, to issue their writ of *habeas* into the island, was not given by the previously passed *habeas corpus* act, 31 Car. II. c. 2, yet we also find that it was expressly given by the subsequently passed statute, 56 G. III. c. 100.

It is difficult to ascertain the object for which the case of *ex parte Lees* El. Bl. and El. p. 828, S. C., 5 Jur. n. s 334 (1858), was cited by the counsel for the applicants. It was not a Canadian case, and the learned chief justice, Lord Campbell, in refusing the rule prayed for, gave utterance to the following expressions as to the doubtful jurisdiction of his court:—"This was an applicatio... for a rule for a writ of error, or for a certiorari, or for a writ of *habeas corpus*, for the purpose of quashing a conviction of the supreme court of the island of St. Helena. Some old precedents of writs issued out of this court to the French dominions of our early English sovereigns were cited to show that such writs might lawfully issue. No precedent, however, of any such proceeding, with respect to a dependency like St. Helena, was brought before us; *and it was not at all explained in what manner our writs of error, certiorari, or habeas corpus, could be enforced in such dependencies.**

(*The conclusion in August number.*)

LORD CRANWORTH'S BILL TO AMEND THE LAWS RELATING TO CHARITABLE USES.

(*From the Solicitor's Journal.*)

The mortmain acts may be regarded in three distinct phases —according as we consider their contravention of the rule against perpetuities; the nature of the property to which they relate; or the administration and judicial procedure best adapted to the effective working of corporate or charitable institutions. The present observations are intended to apply only to the second of these heads of inquiry. The distinction of property into real and personal, which runs throughout our entire jurisprudence, has been, perhaps, in no branch of law more productive of inconvenience, than in that of which we are now treating. This complication has been in a great measure owing to the spirit in which the judges have endeavoured to carry out provisions of the Mortmain Acts, and the acuteness which they have consequently shewn in bringing cases within their purview, notwithstanding that the general leaning of the Courts is against a wide application of the doctrine of equitable conversion. But the main cause of the intricacies of the laws of mortmain is to be attributed to the difficulties that always attend the application of this doctrine. The Mortmain Acts apply to donations of real estate, or of property savouring of realty. Pure personalty is left, as at common law, wholly in the power of its owner, to be granted by will, or by a transaction *inter vivos*, without any ceremony being required to perfect the grant except what the law may require in case the donation were made to a private individual. Very many cases, however, have occurred in which land has been directed to be converted into money, or, *e converso*, in which money has been directed to be invested in land, and great

* This is a true test of jurisdiction, as is shown by Bracton, lib. III. fol. 106, 107 par. 4 & 5, *post*, p. 87.

difficulty has thus arisen in applying to such cases the equitable doctrine of conversion, and determining whether the subject matter of the donation were sufficiently impressed with the character which the donor intended to impart to it. If money were directed by a testator to be laid out in the purchase of land for charitable uses, the sum so bequeathed became, in the eyes of equity, real estate, and the bequest was, therefore, void. The direction as to its conversion into realty, however, might not be sufficiently imperative to alter the legal incidents of the subject of the grant; and hence great litigation has frequently arisen between the representatives of the donor and the declared objects of his bounty. Moreover, a donation might have been intended to be made out of personalty; but, *if it becomes necessary to resort to the real estate of the donor* so far the gift fails. Before directing the attention of the reader to the remedy for these evils, a brief statement of the origin and development of the mortmain laws, and of some of the cases in which their application has been found most difficult, may facilitate a right comprehension of the necessity, as well as of the efficacy, of the remedy we propose. This is, indeed, almost too obvious to require much advocacy, were it not so long overlooked. It appears to us to consist in the abolition of the distinction of possessions into real and personal so far as the Mortmain Acts are concerned, and the enactment of a single comprehensive measure which will apply equally to all descriptions of property.

Corporations had at common law a capacity to take lands, but not without a license both from the lord of the seigniory and from the Sovereign, the lord paramount of all estates in the kingdom. Under the feudal law, the lord of a seigniory was entitled to certain services or fines upon the succession of the heir, or the marriage of a daughter, of his tenant; and if the latter attempted to settle or alien the land in any manner that would abridge these privileges of the lord, the latter could enter for a forfeiture, the tenant having thus committed a breach of fealty, in violation of the terms of the feudal compact. But a corporation had no daughters upon whose marriage the lord could obtain the usual reliefs, nor heirs, since in construction of law it never died, and "*Nemo est hæres viventis.*" The alienation of lands to such a body being thus a virtual renunciation of all seignorial claims, a license from the lord and from the Crown was necessary even at common law. A similar dispensing power existed in the civil law, which ordained that a special privilege was indispensable to enable a corporation to take lands. *Collegium, si nullo speciali privilegio subnixum sit, hereditatem capere non posse, dubium non est*, Cod. 6, 8, 24. The English legislature added other restrictions, upon the ground that lands thus alienated were removed from the active use of commerce for a period beyond that allowed by the rule against perpetuities. The true reason, however, why alienations in mortmain were discountenanced by the feudal nobility of the middle ages is probably to be ascribed, not so much to the regard which the aristocracy of that period entertained for the interests of commerce, as it is to their losses of aids, reliefs, &c., before-mentioned, and also to their jealousy of the growth of ecclesiastical power. Of the many explanations of the primary sense of the word Mortmain offered by Sir Edward Coke, 1 Inst. 2, the most probable is the one preferred by Blackstone, viz., that religious persons being dead in law, lands holden by them were *in mortuâ manu*. The term is at present used to denote all the possessions of corporations, whether these be religious or lay, and is used chiefly to express the dead and unserviceable character of such possessions, so far as the purposes of commerce are concerned. Our readers are, of course, aware that most of the peculiar complications of English law, and its administration in the distinct channels of law and equity, have arisen from the conflict for pre-eminence that has so long existed between the common and the civil law. The statutes which directly or indirectly affect alienations in mortmain indicate, like so many legal epochs, the successive stages of this juridical contest, and illustrate the gradual development of our present law of real property.

Magna Charta (9 Hen. III., c. 36) was the first mortmain statute. It forbids the giving of lands to religious houses, which were almost the only corporations then in being. The statute 7 Ed. I., c. 2, extended the prohibition to grants made to the secular clergy. Notwithstanding this statute, however, grants to such corporations are only voidable and not void, unless they be made for charitable uses, within the meaning of the statute of 9 Geo. II., c. 36, in which case they are absolutely void. A lease for twenty, or even ninety-nine years, appears not to be within the former statute, but the law is otherwise as to lease for a long term. The statute 13 Ed. I., provided that religious corporations should derive no benefit from recoveries, and the same bodies are excepted in the statute *Quia Emptores*, 18 Ed. I, c. 1., by which tenants obtained full power to alien their lands. The 15th Rich. II., c. 2, likewise exempts religious houses from the benefit of trusts. This statute was the first Mortmain Act passed in respect to lay corporations; it extended to these the provisions of the statute 7 Ed. I, c. 2. The statute 23 Hen. VIII., c. 10, which is the Act against superstitious uses, prohibits alienations of land made for devotional purposes to non-corporate bodies, such as churchwardens, &c. Such donations, it appears, were not within the previous statutes of mortmain, and were not void, although constituting a perpetuity. This was allowed probably on the ground of the prevalence of the custom. The statute 9 Geo. II., c. 36, completes our list of the Mortmain Acts. The object of that Act, however, is not to prevent alienations in mortmain, but to prescribe certain formalities to grants of land for charitable purposes. Alienations in mortmain were not made void by the statutes passed prior to this Act, so as to let in the grantor or his heirs, but amounted to a forfeiture of the lands to the superior lord. Mesne lords, however, as also the sovereign, the lord paramount, could dispense with their own privileges—*Quilibet potest renunciare juri pro se introducto.* A license from these was, therefore, efficacious, notwithstanding the mortmain statutes. After the feudal tenures were abolished by the staute 12 Car. II., c. 24, the value of a seigniory became much diminished. Moreover, few mesne seigniories existed even at that period, owing to the long operation of the statute, *Quia Emptores*, which has prevented subinfeudation. The statute 7 & 8 Wil. III., c. 37, accordingly, has vested in the Crown alone full powers to dispense with the statutes of mortmain. But, as at common law, no devise of lands was good, and as corporations are expressly excepted in the statute of wills, 32 Hen. VIII., c. 1, no devise lands to a corporation was valid until the statute 43 Eliz. c. 3, allowed such devises in cases of charities. This exception has been greatly narrowed by the statute, 9 Geo. II. c. 36. The first section of this statute enacts that no manors, lands, or hereditaments, chattels, or sums of money to be laid out in the purchase of lands, shall be given or granted to any person or body politic for the benefit of any charitable uses whatsoever, unless the conveyance be by deed indented, sealed, and delivered in the presence of two witnesses, twelve months before the death of the grantor, and enrolled within six months next after its execution. The same section also enacts that donations of stock, to be valid, should be completed by an actual transfer six months before the death of the donor, and that all grants of land and of money or stock to be laid out in the purchase of land, be made to take effect immediately in possession for the intended charitable use, and be without any power of revocation or reservation whatsoever for the benefit of the donor. The second section exempts grants for valuable consideration from the previous provisions as to the sealing and delivery of the deeds of grant and as to the transfer of stock at the specified periods, respectively, before the grantor's death. Such deeds, however, are equally as liable to all the

other formalities required by the act, as if they comprised mere voluntary grants. The third section of the Act provides that all deeds, not in accordance with the prescribed formalities, shall be null and void. The fourth section exempts from the purview of the Act the two Universities and the colleges of Eton, Winch. 'er, and Wesminster.

A general impression having prevailed that all the conditions prescribed by this Act were waived by the second section as to cases of purchases made by charities, a general disregard of *all* the formalities prescribed by the first section frequently occurred in such cases of purchase. The Act 9 Geo. IV., c. 85, was passed to remedy some of these mistakes. It does not apply to deeds which contain a reservation in favour of the grantor, and it has only a retrospective operation. The chief object of Lord Cranworth's Bill, which is now before Parliament, is to dispense in future, in cases of purchase, with most of the formalities required by the Act of George II. The first section of the Bill proposes that no deed or assurance hereafter to be made for charitable uses, shall be deemed void within the meaning of the Act of George II., by reason of not being indented, nor by reason of reserving to the grantor a *nominal* rent, mines, easements, covenants as to repair or enjoyment, or a right of entry on breach of such stipulations; nor, as regards copyholds and customary freeholds, for want of a deed; nor, in cases of a purchase for full consideration, by reason of the consideration consisting of a rent reserved to the vendor or to any other person, provided that in all reservations the owner or vendor shall reserve the same benefits for his representatives as for himself. The second section provides that when the uses of a deed of conveyance are declared by a separate deed, the enrolment of the latter alone is in future to be sufficient. The third section validates all past deeds made for full value, under which possession is now held, if such deeds were made to take effect immediately in possession, without any power of revocation, and if such shall be enrolled (if not so already) within twelve months after the passing of this Act. The fourth section provides that if the uses of such deeds have been declared by separate deeds, the enrolment of the latter alone will be sufficient. The fifth section provides that the Act is not to invalidate any deed otherwise good, nor to apply to deeds already avoided or sought to be avoided in due course of law. The acknowledgment of deeds thirty years old, and of any other deeds, which it is impossible to have acknowledged within twelve months after the passing of the Act, is also declared unnecessary prior to enrolment. The last section of the Bill exempts from its provisions, Ireland, Scotland, the two Universities, and the Colleges of Eton, Winchester, and Westminster.

The case of *Jeffries* v. *Alexander* (7 Jur. N. S. 221), decided by the House of Lords last session, illustrates very clearly the various complications to which the present state of the law of mortmain has given rise. In this case a deed of covenant was executed by A. B. five years before his death, whereby he agreed that he would in his lifetime, or that his executors should within twelve months after his decease, but subject to the payment of his debts and legacies, invest a certain sum of money in Consols, in the names of trustees, for certain charitable uses. Part of the property left by the covenantor at his death consisted of personalty savouring of the realty. The House of Lords (Lords Cranworth and Wensleydale dissenting) held, reversing the decision of the Lords Justices, who had reversed that of Sir J. Romilly, M. R., that the deed of covenant, so far as the chattels real were concerned, was within the meaning of the third section of the Mortmain Act, and, therefore, void; although the deed did not *ex facie* violate the provisions of that statute. Where the proceeds of an estate devised to be sold were bequeathed in trust for charitable purposes, Lord Hardwicke held the bequest void, although such a bequest had no tendency to bring the lands into mortmain; *Attorney-General* v. *Lord Weymouth* (Ampb. 25). On the other hand, if a testator whose assets consisted exclusively of a bond due from a deceased obligor, were to make any charitable bequest, the real estate of the obligor would be resorted to if necessary for the purpose of discharging the bequest, *Foone* v. *Blount* (Cowp. 464). The principle of this case, however, which was cited by Lord Cranworth in support of his dissent in *Jeffries* v. *Alexander*, appears to be easily distinguished from that affirmed by the latter case, inasmuch as the resort to realty for satisfaction of the bequest in *Jeffries* v. *Alexander*, was rendered necessary by the donor's own acts; but in *Foone* v. *Blount*, this necessity was owing to the nature of the property of a party who had nothing to do with the bequest, and who could not, therefore, be affected by the Mortmain Act. In *Harrison* v. *Harrison* (1 Russ. & M. 71), a vendor's lien for unpaid purchase-money was held to be an interest within the meaning of the Mortmain Act; inasmuch as the vendor, like a mortgagee, had the legal estate, until a conveyance was perfected.

Assets are never marshalled in favour of charities: *Mogg* v. *Hodges*, (2 Ves. 53). Such bequests, moreover, fail in the proportion in which, if valid, they should have been paid out of realty, or out of personalty savouring of realty, such as mortgages, leaseholds, &c., *Attorney-General* v. *Tyndal* (2 Eden. 597). But a testator may direct his charitable bequests to be paid exclusively out of his pure personalty, and the Court will give effect to his intention; *Robinson* v. *Geldard* (3 Mac. & G. 735.) In *Tempest* v. *Tempest*, 5 W. R. 402, a testatrix by her will gave her real estate to trustees upon certain trusts, and amongst divers specific and pecuniary bequests bequeathed to the same trustees such a sum of money as when invested in consols would produce a certain clear annual income upon trust for certain specified charitable uses. She also directed that the said charitable bequests should be paid *in precedence of other pecuniary legacies* bequeathed by the same will out of such part of her personal property not specifically bequeathed as was by law applicable for charitable purposes, and she gave the residue of her personal property to the trustees upon the trusts in the will mentioned. By an order of Wood, V.C., on further consideration it was declared that the debts and funeral expenses of the testatrix, and the costs of the suit for administering her estate, were primarily payable out of her personal estate savouring of the realty. The ground of this decision would appear to be that the general rule against marshalling in favour of charities was neutralized in this case by the demonstrative character of the charitable bequests; demonstrative legacies not being liable to abate ratably with general or pecuniary legacies on a deficiency of assets. (*Vide* "Smith's Com. Real and Per. Pro.," 826.) On appeal from this order, the Lord Chancellor held that the testatrix did not indicate an intention of exempting the pure personalty from its usual liability to contribute ratably with the personalty savouring of the realty to the debts and funeral expenses of the testatrix and that, therefore, the charitable bequests could be enforced only against the portion of the pure personalty which remained after such a deduction. The principle of this decision appears to be that the rule against marshalling in favour of charities is not to be waived, except upon the expression of a clear intention in a will to that effect, and that a bequest of a demonstrative legacy out of a fund of pure personalty is not a sufficient indication of such an intention. These cases, and especially the judgments in *Jeffries* v. *Alexander*, clearly depict the complications which the distinction of property *into* realty and personalty has produced in this branch of law.

The laws and procedure relating to the administration of charities are in a very unsatisfactory state, notwithstanding that the reports of commissioners on the subject fill twenty eight volumes folio, and cover 28,000 pages. Upon this branch of the laws of charites we do not offer any comments at present. We merely suggest that, while the administration of

charitable funds is, no doubt, wholly distinct in its juridical relations from the laws which should regulate charitable donations and bequests, yet we would gladly see the whole mechanism, as well as the theory, of charities provided for by a single comprehensive enactment. Partial legislation is seldom desirable. By the Endowed School Act of last session, trustees of schools were bound to open them to Dissenters, without imposing any conformity to the Church of England. As an alleged corollary to this Act, the Trustees of Charities Bill, lately before Parliament, proposed that the appointment of the trustees of schools should be made without reference to religious qualifications. This Bill, if passed, might have been also found to be unequal even to the object of its author, as also wanting in harmony with the other parts of the system But if the administration of charities was provided for on the same principles, and by the same statute that regulated charitable donations and bequests, the chances of an incongruity between the theory and the working of these institutions would be greatly obviated. We regret that Lord Cranworth does not propose to deal with the whole law of mortmain, and submit a single comprehensive measure, which would be calculated to obviate the existing causes of difficulty. We do not see why purchases made by charitable institutions should be subjected to peculiar restrictions as to the formalities of conveyancing. If the accumulation of wealth by charitable corporations should be discountenanced upon grounds of public policy, let the law declare this. But is is somewhat absurd to allow these corporations to take as much personalty, and buy as much realty, as they can, but subject to restrictions which are necessarily troublesome and also frivolous.

The main cause of the intricacies of the laws of mortmain is, doubtless, to be referred to their applying merely to grants of realty. The first Mortmain Acts applied only to donations of land, as the personal property in the kingdom in those times was comparatively trivial, and incapable of conferring political power upon its possessors. The subsequent Mortmain Acts followed in the same track, and thus, in the Act of George the Second, we find no mention of personal property, except such as is directed to be converted into realty, although at that period the personalty of British subjects was of very considerable value. If the principle, then, of the Mortmain Acts be politic, they should, surely, apply to that description of property which at present constitutes so large a portion of the national wealth. The importance of extending their provisions to personalty is still greater than can be indicated by any estimate of the relative value of the personalty and the realty of British subjects, since the real estate which is not tied up in family settlements, and which alone can be granted to charitable or any other uses, is the only realty which the Mortmain Acts can affect. This amount of realty is, we may assume, at any given time, not a very large proportion of the whole landed wealth of the kingdom. On the other hand, the proportion of the whole personalty of British subjects, which is not out of the reach of transfer or donation, is always very great, and it is with this amount the proportion of disposable realty is to be compared. The laws of mortmain, then, have provided only for that part of the national wealth which, in respect to our present inquiry, is far the less valuable; while the distinction between realty and personalty, which these laws recognise, have been, as we have shown, productive of immense litigation. Land, indeed, affords, by reason of its indestructibility, a basis of peculiar value for the adjustment of political rights, and for securing an independence for an unborn generation; and to this limited extent we consider that the distinction which our law takes between real and personal property, has had very beneficial results. But when we find this distinction unnecessarily maintained in other branches of law, we should recur to first principles, and not perpetuate an undue extension of antiquated and subtle rules in a state of society and of national wealth, to which those distinctions were not originally intended to apply. Our mortmain laws, then, it is obvious, should equally relate to personalty and realty. Moreover, the equitable doctrine of conversion has so confused the boundaries of real and personal estate, that unless the former species of property greatly preponderated in value over the latter, the expensive distinction should be abrogated. It has not been our intention to have discussed in this paper the political phases of the laws of mortmain. The present principle of these laws is perhaps sufficiently sound, as after a license is obtained by the intended donee, the subject has full power to grant away all his property during his life, or at least before the period likely to precede the approach of his last illness. The law ordains, wisely, we think, that a testator should not selfishly enjoy his property during life, and then, on his death bed, with a view to his own spiritual good, cheat his relations or expectant heirs, or other realtives. This rule of public policy is not likely to conflict with the religious opinions of any class. But, whatever may be the principles of public policy which the legislature shall adopt for its guidance as to the laws of mortmain, it is, we think, an indispensable condition to the salutary operation of those laws, that they should make no distinction between grants of real and of personal property.

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 P. O."

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 147.)

Thus by operation of law certain Court Divisions may be established, as for a junior county, and will continue as they were before the separation, until altered by order of sessions. But as the number, limits, and extent of such divisions, and the designation of the Courts will in general but ill accord with the new order of things, the obvious duty of the magistrates assembled at the *first* general Quarter Sessions of the Peace for the new (junior) county, is to exercise the power given to them by the act for the appointment of new divisions for the county. The words, "*until* the justices," &c., plainly assume that such is to be done at an early day; in the meantime provision is made by the clause for continuing the Courts as established, and the business thereof.

As regards a senior county, on the dissolution of a union, section 14 enacts, that—

"At the first sittings of the General Quarter Sessions of the Peace for any senior county, after the issue of any proclamation for separating a junior from a senior county, the justices there present shall appoint the number (not less than three, nor more than twelve), the limits, and extent of the several divisions within the county, and the time when such change of divisions shall take effect; but if the justices do not make such change at the first sittings, they may do so at any other sittings of such Court, and a less number of justices shall not rescind or alter any resolution

or order made by a greater number under the provisions of this section."

The language of this section is, it will be noticed, express and positive. The justices of the senior county *shall* (the direction is imperative), at the first sittings of the Court of Quarter Sessions, appoint new Court divisions, as under section 8; and, moreover, *shall* appoint the time when such change of divisions is to take effect. The justices neglecting to make the change at the proper time, are not indeed *concluded* from acting, but the permission to do so at another sitting would not justify the omission to perform the duty at the first sittings of the Court.

Every order of sessions altering Court divisions ought to be made to take effect at a future day, and so appear on the face of the order. Sudden changes in the Court divisions would produce confusion in the business of the Courts, and cause public inconvenience: and a reasonable interval should be allowed between the publication of the order, and the time it is to take effect, to enable proper arrangements to be made for continuing to completion pending business, and to give the officers of the Courts affected, and to the public resorting to the Courts, timely notice of the change.

That such orders as these were not designed by the Legislature to come into force at once, may be collected from the language used in the 11th and 14th sections: and indeed the practical difficulty attendant on an abrupt change is so obvious, that it need not be enlarged upon.

While ample power has been given to justices in sessions, for increasing the number of divisions, for consolidating two or more, or for taking a part from one division and adding it to another to suit public convenience,—their every act in respect to these Courts, is subject, as we have seen, to this general restriction, that "a less number of justices shall not alter or rescind any resolution or order made by a greater number" (secs. 8 and 14). This, in the nature of things, would probably be held as law—the express provision gives emphasis to the prohibition. Alterations should be sparingly made in established Courts, and then only on public grounds. Constant changes in the local Courts are most embarassing to suitors, and disturb the general economy of the Courts. "Orders and resolutions" are both named, the Legislature probably having in view not only orders for appointing and altering Court limits, but also correlative resolutions of a precautionary character—such, for instance, as would prevent the body of magistrates in a judicial district being taken unawares, and changes made which would ultimately be disapproved in a full Court of Quarter Sessions. In view of the provision referred to, the name of every magistrate present, when any order or resolution under the act is passed in *Quarter Sessions, should appear in the minutes of the* Court.

The following section provides for a separate record of all orders of sessions relating to the appointment and alteration of Court divisions:—

"The Clerk of the Peace, in a book to be by him kept, shall record the divisions declared and appointed, and the time and places of holding the Courts, and the alterations from time to time made therein, and he shall forthwith transmit to the Governor a copy of the record." (Sec. 15.)

This record may be made by entering the orders of sessions with a proper caption, shewing the Court at which they were made, and the names of the magistrates present. *The places of holding the Courts* cannot be entered by the Clerk of the Peace, till he is informed thereof by the judge, whose duty it is, under the 6th section, to appoint them. *As to the times of holding the Courts*, it is not so clear what is the proper course; it may be that instantly the *entry is to be made* "once in every two months," in such and such Courts, and "once in every six months" (*or as the case may be*), in such divisions as the justices (acting under sec. 7), may certify to the expediency of holding a Court less frequently than once in every *two* months; or that the Clerk of the Peace first receives information from the judge, and then makes the entries. The justices' certificate has no force without the order of the Governor, which order is communicated to the judge; and the judge may, *in his discretion*, hold any Court *oftener* than once in two months; so that it is he only who can give *full* information to the Clerk of the Peace. And therefore the last suggested mode of complying with the requirements of the clause seems the more correct—indeed the only one that will enable full entries to be made in harmony with all the enactments.

The entries in this book are of such a public nature, that an examined copy or extract therefrom certified as such, and signed by the Clerk of the Peace, would be admissible in any Court of Justice, or before any person having, by law or consent of parties, authority to hear, receive, or examine evidence (Consol. Stat. U. C., cap. 33, sec. 6).

Intimately connected with the duty of appointment and alteration of Court divisions, is that set forth in section 7, as follows:—

"If the magistrates of any county in Quarter Sessions assembled, certify to the Governor that in any division of the county, from the amount of business, remoteness or inaccessibility, it is expedient that the Court should be held so often as once in every two months, the Governor in Council may order the Court to be held at such periods as to him seems meet, and may revoke the order at pleasure, but a Court shall be held in the division at least once in every six months."

Where a judicial district is extensive and portions of it but thinly populated, the public interests may require the

formation of a Court division in a remote or isolated settlement, perhaps approachable only at some seasons of the year, while to hold a Court in such a division six times in the year would be uncalled for and unnecessary, the local magistracy, who have the best means of knowing, are made the judges of this, and may certify as to the expediency of reducing the number of Court sittings. The considerations upon which this question of expediency is to be resolved, are—1. The amount of business for the particular Court: 2. The position of the division as to distance from the more settled parts, *i. e.*, its "remoteness:" and 3. Its unapproachableness; not absolutely, of course, but its comparative inaccessibility. If, then, the particular locality would furnish only a few cases in the year, or is far away from the business part of the county: or, from want of roads or other causes, is accessible by the ordinary modes of conveyance, only in midsummer or in sleighing time—these, or any one of these facts, would form grounds for a certificate under the section; and two or all three of them prevailing, would shew the inexpediency of holding more than two Courts in the year. To occupy the judge's time in holding such Courts, would be to provide for the *possible* accommodation of the few, at a *certain* loss to the many.

It will be seen that magistrates acting in Quarter Sessions, are invested with very extensive power for the appointing new divisions, thus calling Courts into existence, as well as for altering, from time to time, the number, limits, and extent of existing divisions: and this power, like all powers in law, must be duly executed at the times, and in the manner, and to the extent, prescribed by the statute; and magistrates have no authority out of the act, in respect to the Division Courts. So that if the power be not duly followed up in any act or order of session, it would be without authority, and so void.

(*To be continued.*)

CORRESPONDENCE.

A FEW MORE "VEXED QUESTIONS."

Another letter from Mr. Durand, which is given below, will be read with attention by every one interested in Division Court Law. Our readers will thank the writer for the interest he takes in courts, of which the profession generally take little notice. Few members of the profession gratuitously undertake the labor of an effort to promote what is sound in administration in these tribunals: and yet in the aggregate they embrace a very large share of the law business of the country, and affect the rights of thousands.

The questions which Mr. Durand notices will set men to think, and must but be contributory towards settling the questions of law which these points embrace.

To exhaust the subjects suggested would involve more time and larger space than has been allotted to this department in the *Law Journal*; and nothing more can be expected from a law periodical, under the circumstances, than a brief notice rather than a legal essay—holding open its columns, as we do, to all comers who are capable of contributing to the discussion of the topics suggested, and willing to take the trouble to do so.

On the first question—our present leaning is towards the broader construction of the jurisdiction clause. The words "all personal actions," in sec. 35, are commonly used in contradistinction to *real* or *mixed* actions; and under the first division of this clause, only three questions need be answered to determine jurisdiction: 1. Is the action a personal action? 2. Is the amount claimed £10 or less? 3. Is the action within any of the exceptions in sec. 54? If the answers to the first and second be in the affirmative, and to the third in the negative, the Division Court has jurisdiction. Then the residue of the section, if taken according to its literal and technical meaning, will include several causes of action which, if we rightly understand Mr. Durand, some of the judges have held not to be within the jurisdiction. The 199th section, providing for suits in cases of absconding debtors, uses the words, "debt or damages arising on any contract, express or implied, or any judgment," and if the narrow construction of sec. 55 prevailed, would give a larger jurisdiction in the case of absconding debtors, than in other cases, which never could have been intended. Any new question now arising in the Division Court Act, should be resolved on the act as it is: seeing that the Legislature has provided that if the provisions of the Consolidated Law are not in effect the same as the repealed acts, the Consolidated Law shall prevail.

We however invite discussion on this important question of jurisdiction.

2nd. This question is surrounded with difficulty. Our present impression is, that a summons sued out would save the operation of the statute for a year, and longer if continued by an *alias*. *Alias* and *pluries* summonses are recognized and sanctioned by the rules of practice.

We are disposed to agree with Mr. Durand's view as to the third question, and have noted the point for further examination. The case of *Harrison* v. *Breya*, reported in our last number, has a bearing on this point. We are not altogether satisfied with the decision in *Duggan* v. *Kitson*, as reported.

With renewed thanks to Mr. Durand for his communication, we commend it to the attentive perusal of our readers.

To the Editors of the Law Journal.

TORONTO, May 20th, 1861.

GENTLEMEN,—I now send you a few more "Vexed Questions" arising in the practice of the Division Court Law. They are by no means all that have been noticed by me; but the following, with those alluded to in a former number of your Journal by me, are the most important.

1st. A question often arises in division courts whether a suit can be entertained for more than £10 damages, in actions for breaches of covenant, and actions of assumpsit for breaches of parol agreements. It seems to be well understood that

actions for mere torts to personal chattels or personal wrongs cannot be brought in these courts, if the damages exceed £10, unless the excess be abandoned. On the other hand, it is very generally believed by laymen that actions for damages for breaches of covenant in leases to cultivate land in a husband-like manner, to repair, or to do some other act; and for failure to perform agreements to build houses or other specific jobs, may be brought to the extent of £25 for the uncertain damages. Also, that in cases of parol engagements to sell wheat or produce, to buy the same, or to deliver other property, as well as false warranties on horse trades, where the damages amount to £25, that they can be brought in Division Courts. I know several judges of these courts who hold that such amount of damages in such cases may be sued for therein. At a late Newmarket court, a professional gentleman attending there urged Judge Boyd to rule in this way, but the judge refused to do so. Judge Harrison used so to rule, but he has now altered his opinion, holding that the courts have in no case jurisdiction for mere damages above £10. The question has also been very ably decided by Judge McKenzie at Kingston, and by Judge Hughes at St. Thomas. Yet when one, especially a mere layman, reads sub-section 2 of section 54 of the Consolidated Statutes of Upper Canada, at page 145, in these words: "All claims and demands of debt, account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars," it must be admitted that the point is yet open to severe criticism and argument. We see a distinction drawn in these words between "claims of debt" and "claims of breach of covenant," in such a way as to lead one to suppose that a "breach of covenant" for mere damages may be meant. I believe, however, that a great majority of county court judges hold that the division courts are limited to the jurisdiction of £10 in all cases, where mere damages are sued for. I am not aware that the superior courts have decided this point. It seems to me the better opinion, that as in all personal actions (not limiting them to tort only) the jurisdiction in damages is £10: that there is no authority in the act to exceed that sum in other forms of action for uncertain damages.

2nd. Another very important question often arises, at least it has with me, in these courts, in relation to the Statute of Limitations, where a summons has been taken out in a suit to stay the operation of the Statute or in any way, but not continued from court to court. Suppose a case: "A." has a note against "B." for £10, and it has run five years and six months after maturity before suit brought. Six months before it is barred by the statute a summons is taken out, but not served, it may be, for various reasons—the man may abscond against whom it issues—he may conceal himself—cannot be found—or the bailiff may neglect his duty. An alias is not taken out at each consecutive court, but after the lapse of a year or within the year, but after the expiration of the six years from the maturity of the note, an alias summons is issued in continuation of the first, and served on the defendant. Now the question is, can he plead the Statute of Limitations in such a case? Is the first summons spent by lapse of time? Are continuances from court to court necessary? Does not the *bona fide* issue of a summons within the six years, although it is left in abeyance unserved for a year more or less, but yet finally served after the six years from the maturity of the note, prevent the operation of the statute? Section 74 of the Division Court Act, page 147 Upper Canada Consolidated Statutes, describes the manner in which suits are to be entered. Neither it, nor the tariff, nor any other clause of the act, says anything about the issuing of an alias summons. But of course when the suit is once entered it stops the force of the statute, and an alias or several summonses may issue, until the defendant is legally served; and if judgment be given against him, the clerk taxes all the summonses, including the first against the defendant. The foundation of the action is the first. It seems to me, until the first summons is disposed of legally by the judge, or the suit regularly withdrawn by the plaintiff, it remains in force to be reverted to, certainly until the *lapse of a year*, (and *quære*, until the lapse of six years?) where it appears that efforts to serve have been made without effect upon the defendant. Continuances are now abandoned in all the courts; and why should a summons be continued in the division courts from court to court? Section 69 of the Division Court Act may be supposed to refer to very doubtful cases like this. A suit once entered in the division court, remains there until disposed of by the judge or withdrawn by the plaintiff.

3rd. The Statute of Limitations also applies to another class of cases that very frequently arise in division courts. They are embraced within the provisions of section 193 of the Act, Consolidated Statutes page 171; where it is said, "That any action, &c., against any person for anything done in pursuance of this act, shall be commenced within six months after the fact was committed," "and notice in writing, &c., given of the causes of action, &c." The question arises thus: "A," a bailiff, is sued, together with his sureties, for a false return to an execution, or for the non-payment of money made under it. It is supposed by many that the bailiff may be sued (and has been the practice to sue) for any description of misfeasance within six years after the fact committed. It is sometimes very difficult to distinguish the exact time which legally separates cases where he must be sued within six months from those where he may be sued within six years after the fact committed. For the mere non-payment of money collected, it is quite clear he may be sued after the six months; but for any description of tort in his office, or wilful misconduct, he should be sued within six months. But it is easy to suppose a case not exactly coming within the shortest limit, whilst some might suppose it within the longest one. For instance: "A," the bailiff, after the payment of the debt, but whilst the goods are seized and in his hands, converts them to his use by wrongful sale—or receives the money without sale—does not pay it over—and another execution issues, on which the debtor's goods are sold for the same debt. Such cases have actually occurred within my knowledge. If sued after six months, could he plead the statute in the last two cases? Would the case of an action for a false return of *nulla bona* to an execution be within the six months' limit? The judges differ in their view of this clause. The question is, what class of cases falls within the six months' limit? Hundreds of instances exist where the plaintiff cannot know within six months whether the bailiff has made a false return or not. On the other hand it is a great hardship for the bailiff's sureties to be sued after six months. If sued at once they might resort to the bailiff for the claim, which, at the distance of six years, they might not be able to do.

4th. The question of the power to sell leasehold interests was decided lately in the Queen's Bench, in a case of *Duggan* v. *Kilson*, in which I was for the defendant. The court decided that a bailiff could not sell a term held by a tenant.

5th. The question whether a clerk's sureties are liable for fees wrongfully withheld by him from a bailiff, was also settled by the Queen's Bench lately, in a case in which I was attorney for the bailiff, in which it was held the sureties were liable. These questions had been before these decisions unsettled.

6th. The practice in interpleader cases in the division courts is not at all well settled. Clerks and bailiffs do not appear to properly understand it in all cases. I cannot, however, enlarge this letter already too long.

Truly yours,

CHARLES DURAND,
Barrister.

U. C. REPORTS.

COMMON PLEAS.

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

In re. George Lount, Registrar.

Registration—Fees of, when documents to be recorded in more than one tow ship —How chargeable.

Held. that the registrar is only entitled to charge for one registry of any document to be recorded in one *or more* townships, provided the number of words recorded "counting folios" does not exceed 800, and all in excess of 800 words are to be charged per folio as allowed by the Statute Con. Stat. U. C., ch. 89, sec. 33.

(C. P., H. T., 24 Vic.)

Spencer obtained a rule calling upon Mr. Lount to shew cause why a mandamus should not issue commanding him to put on record in the registry office of the county of Simcoe, a certain mortgage, dated on or about the 27th of December, 1860, and made by William Proudfoot and wife, to Mary McMichael and Jessie McMichael, on the ground that the same has been sent to him for registration, and his fees for recording the same have been paid him.

On moving the rule he filed an affidavit that he had computed the number of words in the memorial, that to the best of his knowledge and belief it contained no more than 475 words, without counting the words contained in the description. That the number of words contained in the description together with the necessary certificates to be endorsed on the mortgage would not exceed 700 words; that the application was made on behalf of the morgagees in order to compel the registrar to record the mortgage; that the total number of words contained in all the necessary entries to be made in all the books, including certificates, would not exceed, in his belief, 2250 words in excess of the first 800 words.

And a second affidavit, that about the 31st of December last, the deponent enclosed to the registrar a mortgage and the memorial thereof for registration, with 6s. 8d. for fees, to which he received a reply from the deputy-registrar that the fees were $6.25, as the lands mentioned in the mortgage were in five townships, which with the mailing fee would amount to $6.50, and claiming that sum, that he replied to the registrar that it was not the practice in the registry office, Toronto, to charge the full fee for each township, and requested him to lose no time in putting the mortgage on record, and what the statute allowed him beyond the 800 words would be remitted, that the registrar replied, affirming his first letter, and stating that on receipt, &c., the deed would be recorded, that deponent thereupon calculating the number of words as well as he could, sent $3.25 more, making $4.50 in the whole. The registrar replied, still demanding $6.50, *i. e.*, $6.25 for recording, and $0.25 for the mailing fee.

A. Wilson, Q. C., shewed cause, referring to Consolidated Statute U. C., ch. 89, secs. 30, 33, 74, sub-sec. 2; *Smith* v. *Ridout*, 5 U. C. Q. B. 617.

Spencer supported the rule.

Draper, C. J.—By Consolidated Statute U. C., ch. 89, sec. 33, it is enacted that when any deed, will, or other instrument embraces different lots or parcels of land situate in different localities in the same county it shall only be necessary to furnish one memorial of such deed. &c., and such memorial shall be copied into the registry book for the city, town, township, or place in which the different parcels or lots of land are situate in the same manner and to the same extent only as if a separate memorial had been furnished in relation to the lands situate within such city, town, township, or place respectively, and the registrar shall make the *necessary entries and certificates accordingly.*

By section 74, sub-section 2 of the same statute, the registrar is allowed for recording every deed, conveyance, &c., &c., including *all necessary entries* and certificates, one dollar and twenty-five cents, but in case *such entries* and certificates exceed 800 words, then at the rate of 13½ cents in the dollar for every additional hundred words, but in counting folios in cases within the 33rd section only one certificate of registry shall be charged for, and the marginal certificates, notes, or references, shall not be charged for. The 30th section of the act makes it the registrar's duty to "*enter*" every memorial in the registry book.

The case of *Smith* v. *Ridout*, (5 U. C. Q. B. 617) was decided under the 9th Vic., ch. 34. The 22nd section of that act made it the duty of every person holding or executing the office of registrar to keep and cause to be used for that purpose a separate registry book for each township, reputed township, city and town, the limit whereof shall be defined by law within the county or riding for which he shall be registrar. The 68th section of the Consolidated Statute contains a similar provision in almost the same words. The 16th section of the former act allowed the registrar for the recording of every deed, conveyance, &c., the sum of 2s. 6d., and no more, in case the same doth not exceed 100 words, but if it exceed 100 words, then at the rate of 1s. for every hundred words after the first 100. Upon this statute the court held that the registrar was entitled to "charge by the same rate for each registration, that is to say, 2s. 6d. for the first hundred words, and 1s. for each 100 words above the first 100, which computation is to be made upon the words contained in the recording of every such deed, that is upon the contents of the entry in the registrar's book, and not upon the words contained in the deed or conveyance itself." The judgment of the court is stated to be for the defendant, and so it certainly was, on the ground that the registrar's fees were not to be computed by the number of words contained in the deed to be recorded, or even the memorial produced for registry thereof, but by "*the contents of the entry* in the registrar's book," and it appears that the court allowed 2s. 6d. for the first hundred words in each entry in each separate book, at least, I so understand the judgment as printed, though a memorandum made by me at the time, for I was a member of the court when the judgment was given, tends towards the conclusion, or would admit of the interpretation, that the whole of the entries made by the registrar were to be put together as constituting one recording of the deed, and that the registrar had the right to charge 2s. 6d. for the first 100 words, and 1s. for every subsequent hundred.

But, however this may be, the words of the act now under consideration, differ materially from those of the 16th section of the 9th Vic., ch. 34, though the fees are as in the former act, "*for recording every deed,*" &c. A gross sum of $1 25c. is given for that service, "including all necessary *entries* and certificates," and a charge for each 100 words additional to the first 800, but, "in counting folios" (*i. e.* each 100 words) under the 33rd section, only one certificate of registry is to be allowed for. The 33rd section provides that in case of lands in several townships, only one memorial shall be necessary, which shall be copied into (synonymous with entered in) each proper township book to the same extent only as if there were no lands mentioned therein, lying in any other township, "and the registrar shall make the necessary *entries* accordingly," of which entries the *folios* are to be counted, as I read the provisions regulating the registrar's fees.

It appears to me the plain meaning of these provisions put together is that the "necessary entries" in each township book, constitute one "recording of the deed," for which the registrar is entitled to receive $1.25c., and no more, unless all these necessary entries and certificates, adding also one certificate of registry, exceed on "counting folios" 800 words, when the statute gives an additional allowance for every additional 100 words.

We may suppose a case where a memorial (drawing concisely) of a conveyance of four lots in different townships of the same county, described only by the numbers and concession would not require an entry in each township book exceeding four hundred words dividing one certificate of registry between the four.

According to the argument urged for the registrar, he would be entitled to five dollars, *i. e.*, $1 25c. for each entry in each book; *But charging for all necessary entries for the recording of the* deed at the rate of $1 25c. he would be entitled to $1 25c. for the first 800 words and at the rate of 13½ for 800 words or eight folios more, making in all $2 37c. or less than one half of the claim set up on his behalf. In my humble judgment the latter mode of charge is what this statute contemplates and prescribes. In this case the demand is for entries each at $1 25c.—$6 25c. and 25 cents for going to the post-office to mail the deed after registry. We have nothing to do with this latter charge—it is not authorised by the statute. The other party offers $1 25c. for the first 800 words, and at the rate of 13½ cents in the dollar for every ad-

ditional hundred words, in all $4 50c. In my view this is correct as to the principle, they can settle the computation.

But though this is my construction of the act, and as we have heard the case argued, I have thought it as well to express it, I cannot agree to grant a rule for a *mandamus* on the materials before us.

The rule does not state that the lands are in the county of Simcoe, nor do either of the affidavits filed, nor is it shewn, except by belief, on a computation made, without having the memorial present how many words it contains; nor do the affidavits shew in how many townships the lands lie, though in a letter annexed to the affidavit, it is said, in five townships and nothing to the contrary being said, we may assume they are all in the county of Simcoe.

When the facts we opened on moving the rule, it never occurred to the court that the affidavits were so entirely defective, nor was it suggested during the argument, nor was any reliance placed on the objection, that a *mandamus* was not the proper remedy, but that the same course should have been followed as in *Smith* v. *Ridout*. If the delay caused the security to be worthless, the registrar or the party undertaking to procure the registry might be called upon to make good the loss.

Under these circumstances, I think we ought to discharge the rule, for we should discountenance such imperfect and hastily prepared applications; but as no objection has been made on these grounds by the registrar, it should be discharged without costs.

Per cur.—Rule discharged.

CHAMBERS.

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

EMERY v. IREDALE.—EMERY v. HODGE.

Action for infringement of Patent—Prayer for Injunction—Damages within jurisdiction of Inferior Court—Right to costs—Patent Act.

Held—1. The fact that a plaintiff prays an injunction in an action in a Superior Court in which an injunction may be granted is not, even after verdict for plaintiff, sufficient to entitle plaintiff to recover Superior Court costs, without the certificate of the Judge who tried the case, when the amount of damages recovered is clearly within the jurisdiction of an inferior court.

2. The action itself must be of such a nature, and the equitable relief sought of sufficient importance, to justify the Judge who tried the cause in certifying it to be a proper action to be withdrawn from the inferior and tried in the Superior Court.

3. There is nothing in the Patent Act, Consol. Stat. Can. cap. 34, to justify the presiding Judge in refusing to certify for costs, merely because defendant might have defeated plaintiff entirely in his action by proper pleading, but had not done so.

4. Under the peculiar circumstances of these cases, *Held*, that the first was a case proper for a certificate, but the second case not so.

(Chambers, May, 1861.)

These were two actions brought by the plaintiff for the alleged infringement of letters patent for an invention granted to the plaintiff.

The declaration in the first case, alleged that the plaintiff was the true and first inventor of a machine for the manufacture of eave-troughs of tin and galvanized iron, and by letters patent, dated 28th November, 1857, which recited a petition of plaintiff stating that he claimed to be the original inventor of a press for the manufacture of eave-troughs of tin or galvanized iron, not before his invention known or used in this province, and not in public use or on sale in the province with his consent as inventor, our Lady the Queen, of her special grace, &c., did give and grant unto the plaintiff, during the term of fourteen years, the full and exclusive right and liberty of making, constructing, using and vending the said invention within the province, &c. To have and to hold, &c. Averment in first count, that since the letters patent, defendant, without the license of plaintiff, did work, use, exercise and put in practice the said invention, and did make and manufacture divers machines according to and by means of the said invention, and in second count, that defendant did, without plaintiff's license, make and manufacture machines intended to, and which did, imitate, counterfeit, and resemble the said invention, and divers parts thereof, &c. Claim of damages and a writ of injunction.

The declaration in the second was substantialy the same

The pleas in the first case were, 1. Not guilty. 2. That the supposed invention was not at the time, &c., new as to the public use and exercise thereof, &c.

The pleas in the second case were the same as in the first, with an additional plea, 3. That the plaintiff was not the true and first inventor, &c.

The trial took place at the Autumn Assizes, 1860, in the City of Toronto, before Richards, J.

The plaintiff put in his patent corresponding with the statement of it in the declaration, and having a specification setting forth its parts in detail and the mode of operation.

According to the evidence, some of the parts of the machine in detail were not new, but the combination of them as a whole was new. As was stated by one of the witnesses, he would be obliged to use three machines separately to produce the result which was obtained at once by the plaintiff's process.

It was not denied that the combination was new, but rather contended that the plaintiff claimed as new the parts in detail which were in fact not new, and so that his patent was void.

The jury in the first case found for the plaintiff, with damages amounting to $60; and in the second case they also found for plaintiff, with a verdict of $20.

In each case certificates were moved if necessary, and the question of costs by consent reserved.

The verdicts were moved against, but both rules discharged, on the ground that it was not open to defendants on the pleas pleaded to raise the objection against the validity of the patent.

Both cases are fully reported in 11 U. C. C. P. 106.

The question of costs was afterwards argued in Chambers, before Richards, J., who tried the actions.

R. A. Harrison, for plaintiff, contended that plaintiff was entitled to full costs upon two views.

1. That under the Statute of Gloucester, a plaintiff is entitled to full costs if he recover any damages whatever, unless deprived of costs by some subsequent statute; and that there is no statute subsequent to the Statute of Gloucester which deprives plaintiff of costs in cases such as these. He referred to the several statutes, 43 Eliz. cap. 6, sec. 2; 21 Jac. cap. 19, sec. 6; 22 & 23 Car. II. cap. 9; Consol. Stat. U.C. cap. 22, sec. 324, 328; and contended that none of them applied. He also submitted that the plaintiff was entitled to full costs without a certificate, because in both suits he prays an injunction, and inferior courts have no jurisdiction to entertain such actions. He argued that as an injunction is sought, and the inferior courts have no power to grant it, therefore the actions are not of the proper competence of the inferior courts, or either of them, and no certificate under sec. 328 of Consol. Stat. U. C. cap. 22, is necessary.

2. That at all events the actions were brought to try a right beyond the mere right to damages, and submitted that the Judge in his discretion should certify for full costs, with costs, inasmuch as the Court of Chancery always grants the injunction after the right is established. He referred to *Morison et al.* v. *Sampson*, 9 Dowl. P C 387; Hindmarch on Patents, 297-306; *Bateman* v. *Gray*, 8 Ex. 906; Chitty's Equity Index Practice Injunction.

D McMichael, for defendants, contended that the court has decided that plaintiff's patent is really void for claiming more than he is entitled to, though the particular technical plea might not have been pleaded to warrant a verdict being rendered for the defendants, yet the facts showing that the patent was void were brought out at the trial, and therefore under the Patent Act (Consol. Stat. Canada, cap. 34, secs. 23, 26, 27) plaintiff ought to be deprived of his costs. That, at all events, the amount he has recovered in each action being within the competence of the inferior court and the action itself could have been brought there were it not for the prayer of an injunction. That praying for an injunction could make no difference. That the action is brought to recover damages; and if the damages would be covered by an amount within the jurisdiction of the inferior court, the action should have been brought there, and if any necessity existed for an injunction it could have been had in equity. That if plaintiff is not entitled to costs without a certificate, the certificate should not be granted, for on giving judgment the court or some of the judges intimated that costs ought not to be allowed, and the facts

brought out on the trial show that plaintiff has really no right to recover at all.

Plaintiff's counsel intimated that he had no wish to claim triple costs, under Consol. Stat. Can. c. 34, s. 24, and his willingness to undertake to tax only full Superior Court costs in the event of getting a certificate.

RICHARDS, J.—I am not prepared to admit that because a plaintiff *prays* an injunction in an action where an injunction *may* be granted, that from this cause he is entitled to recover full costs in the Superior Courts, when he recovers damages clearly within the jurisdiction of the Division Court, and in other respects his action was of the proper competence of the inferior court.

Up to the present time the plaintiff has not obtained any injunction, and he may never even apply for one, much less obtain one, and yet I am called upon to say that he is entitled to full costs for such injunction. He in the same manner prays for an account of all the profits that have been made by defendants out of the use of the invention, and the inferior court could not aid him in that respect, yet the Court of Queen's Bench in England decided, in *Holland* v. *Fox*, 3 El. & B. 977, that no account of profits accruing before the bringing of the action would be ordered in cases where damages were recovered in the action for the infringement of the patent.

These actions are really brought to recover damages for the infringement of the patent, and incidentally to try a right. After the plaintiff has established his right, he may then apply for a perpetual injunction. If he applies to a court of equity, that court usually grants the injunction with costs, at the same time. I cannot doubt that that court may exercise its discretion in relation to costs in a proceeding of this kind, as it does in many other proceedings.

I am not prepared to declare that in all cases where the Legislature has given an equitable jurisdiction to the Superior Courts of common law, that merely calling upon the court, amongst other matters, to grant the plaintiff the aid of its special equitable jurisdiction, without such aid ever having been really granted, gives to a plaintiff the right to tax full costs of suit. The aid that he seeks may be of very trifling consequence. Suppose in one of these actions an account had been sought of the profits made from the use of plaintiff's invention, from the time the action was brought up to the rendering of the verdict. Suppose such profits had amounted to 5s., would it be contended, for enforcing such a right as that, that the Legislature intended a plaintiff should go into the Superior Court and recover fifteen or twenty pounds of costs? I think not. If the plaintiff's action is in other respects within the jurisdiction of the inferior court, merely praying an injunction or the taking of an account will not of itself in my judgment entitle him to full costs. The action itself must be of such a nature and the equitable aid sought of sufficient importance to justify the Judge in certifying it is a proper action to be withdrawn from the inferior and tried in the superior courts.

If the costs of procuring the relief if sought in a court of equity would be in the discretion of the court or a judge, I do not think, by giving the same power to grant relief to a court of common law, the Legislature intended that full costs should be allowed when the benefit incurred was of so trifling a character that the granting of full costs would really work gross injustice, according to the views now generally entertained.

I am not in these cases prepared to direct the Master to tax full costs in the absence of the certificate of the Judge who tried the cause.

I am not prepared to decide, as contended for by the defendant, that under the Patent Act the plaintiff is not entitled to any costs. The 18th section, and the 5th sub-section of that same section, refer to cases of disclaimer, and where the action is brought to recover damages for the infringement of so much of the patent as is the invention of the patentees; but in the cases before us the action is not brought for partial infringement. The 26th and 27th sections, and sub-section 2 of section 27, do not apply, for the judgment of the court is in favour of the plaintiff.

The question still remains, ought I, as the Presiding Judge, to certify that one or both of these actions were proper to be withdrawn from the inferior and tried in the superior court? If the verdicts had been under 40s., there is no doubt that it would be necessary to certify to give the plaintiff full costs. It is urged by the defendant that I should not certify, because from the facts which appear at the trial the plaintiff claimed more than he was entitled to; and if the pleas, which the court thought necessary to raise the point, had been filed, the plaintiff must have failed in his action and the patent would be void. That these facts manifestly appearing, I ought not to certify to give the plaintiff treble costs in an action that ought never to have been brought, and for the infringement of a patent which is clearly void. The case thus put seems strong for the defendants.

On the other hand, there is no reason to suppose that the plaintiff was guilty of any intentional fraud in claiming what he did in his specification, and that, independent of any former use of parts of it, the whole machine as an invention was an improvement; and the combination of the older parts with the additions which were undoubtedly new, made a machine which was valuable in itself and for which he could have obtained a patent.

The acts of the defendant were considered by the jury to be an infringement of the original combination and new parts of the plaintiff's invention, and for which he had a right to bring an action. I cannot therefore say that the facts presented at the trial did not show that the plaintiff had invented a machine by the combination of some parts previously known and used, for which he had a right to obtain a patent; nor can I say that defendants have not infringed upon the rights which would have been guaranteed to plaintiff by a proper patent. I cannot deny that plaintiff has a meritorious claim. Technically he might have been defeated, if the proper steps had been taken by defendants for that purpose. Fortunately for the plaintiff, the defendants failed to put the proper pleas on the record, to bring up the weak part of the case, and the court have held that his action will lie. I do not consider I would be justified in refusing him costs, merely because the defendants might have defeated him entirely in his actions, but have not done so.

As to the action against Hodge, it appeared in evidence that before the writ was issued the defendants wrote to plaintiff and offered to buy two of the machines of his manufacture, and enclosed him the money to pay for them. By this act it appears to me they sufficiently acknowledged plaintiff's right under his patent, and in purchasing the articles patented they showed a disposition to pay him for the use they intended to make of his invention. For some cause, the plaintiff chose to decline selling to the Hodges, and prosecuted them. The only object I can conceive he could have in bringing that action was to recover damages. The offer to purchase seemed to be so far a concession of plaintiff's right that it was not necessary to bring the action against them to try the right. It could then be only for the damages. The jury have found but £5 damages; an amount clearly within the jurisdiction of the Division Court. To recover this amount it was not necessary to bring the defendant into this court, and to prevent the use of the machine by them through an injunction could hardly be an object, for plaintiff was selling the machines constantly; and if he sold to defendants, he of course would not desire to restrain them; and if with a view to punish them he refused to sell to them, they could easily have purchased through a third party, and in that way would have been able to use them.

The facts as presented at the trial seem to indicate that plaintiff, having discovered that the Hodges had been infringing on his patent to the extent of using one or two machines not made by him, thought he had them in his power; and although before the action brought they had so far yielded to his claim as the inventor as to send the money to him for the purchase of two machines, yet he refused to sell to them, and determined to exercise his power by harassing them with costly litigation in the higher courts.

I do not think, if I can exercise a discretion in the matter, I should use it to encourage the bringing of actions from such motives. The supremacy of his patent having been recognised, he should have been content to stop there, and sell to those men who wished to purchase; or if any extraordinary expense had been incurred by him in getting up evidence to sustain an action against them, he should have so stated to them, and offered to forego any action if they would pay these expenses. Had this been done, his position would have been better before the court. It is true the Hodges, having been forced into court, did then deny his right, in

other words, they made the best fight they could, but it is evident they did not desire to come into court; they were brought there by what seems to be the somewhat harsh conduct of the plaintiff. Under these circumstances, I am not disposed to certify for full costs for the plaintiff in the action against the Hodges.

From the evidence given in the suit against Iredale, the defendant's course was different. After obtaining a knowledge of plaintiff's invention, he applied to a person to construct something similar for himself, and used it in a way to conceal the fact from the plaintiff and his agents, and throughout refused to recognize plaintiff's right. It did seem necessary then that plaintiff should bring an action to vindicate his right; and the action being one likely to raise difficult questions both of law and fact, perhaps it was not unreasonable in him to bring it in the Superior Court.

This is the first action in point of time, the writ having been issued in April, 1860, whilst the suit against the Hodges was not commenced until August in the same year. The plaintiff might more easily urge the necessity of bringing this action in the Superior Court that the one against the Hodges, for this action having been commenced long before that against the Hodges, the plaintiff's rights and the law on the subject could all have been settled by this suit, and then, if it had been necessary to sue the Hodges, there would be no difficulty in taking proceedings in the inferior court.

I cannot say that I am entirely free from doubt on the subject; but as the plaintiff is willing to undertake only to tax full costs of suit, and not treble costs, as the statute would seem to allow, I feel disposed to grant in the suit against Iredale the certificate that it was a proper action to be withdrawn from the inferior courts and to be tried in the Court of Common Pleas.

I find the following laid down in Grey on Costs, at page 216: It is to be observed that an action on the case for the infringement of a patent is within Lord Denman's Act (Consol. Stat. U. C. cap. 22, sec. 321), and also within the County Court Acts. In almost any successful action of this kind, however, a Judge would not hesitate to certify that it was to try a right besides the mere right to recover damages, and that there was good reason for bringing it in a superior court."

GRAY ET AL. v. P. J. O'NEIL.

Writ of summons—British subject residing abroad—Writ for service within the jurisdiction—Service—Practice—Amendment—Consol. Stat. U. C., cap 22, secs. 2 and 49.

A writ of summons was issued in the common form, for a defendant residing or supposed to reside within the jurisdiction, and personally served it in a foreign country on the defendant, a British subject without the jurisdiction of the Court. On an application to set aside the writ for irregularity, it appearing that defendant had been personally served, and that the time allowed for appearance was a reasonable time, an amendment was allowed without costs by the substitution of the form of a summons for a defendant without the jurisdiction, in lieu of the form used.

(Chambers, June 6, 1861.)

Defendant obtained a summons on plaintiff to shew cause why the writ of summons served on the defendant in this case, should not be set aside for irregularity with costs, on the ground that such writ is not in accordance with the form given by the statute of a writ to be served on a British subject residing out of the jurisdiction of the Court.

It appeared that the defendant had been a resident inhabitant of Toronto, but it was sworn in an affidavit filed in support of the application, that he was, at the time of the application and had been for several months past, residing at Port Huron in the United States of America, and that he was served there with a copy of the summons in this case.

In the copy of the summons served, the defendant was described as of the City of Toronto, in the county of York, and the copy was in the ordinary form, requiring him to appear within ten days, and with the ordinary notices indorsed on writs intended to be served within the jurisdiction.

It was sworn on the part of the plaintiff, that the defendant had been for many years and till lately, resident in Toronto: that to avoid being arrested in another suit he left Toronto about three months ago, and travelled about from place to place: that the deponent heard a few days before this application, that he was again in Toronto, but could not ascertain whether it was so or not, as his friends are on their guard when enquiries are made.

It was admitted that the defendant, at the time of the application, was a British subject.

The writ was issued 15th May, 1861, and the defendant contended that it ought to have been in the form directed by the C. L. P. Act, Consol. Stat. U. C., cap. 22, sec 43, and schedule A. 8, giving a suitable number of days in the body of the writ for the defendant to appear in, and with a memorandum indorsed that the writ was for service out of Upper Canada.

R. A. Harrison shewed cause. He contended that the writ was regular, and must be supported either if the defendant resides or was "supposed to reside within the jurisdiction" of the Court (Consol. Stat. U. C., cap. 22, sec. 2); and that the supposed residence of defendant was correctly described in the writ in this case. He referred to Prov. Stat. 12 Vic., cap. 63, sec. 22, and to the English Uniformity of Process Act, 2 Wm. IV., cap. 39, sec. 1, where similar language to that in the Common Law Procedure Act was used. He cited *Windham* v. *Fenwick*, 2 Dowl. *N. S.* 788; *Bulman* v. *Sharpe*, 16 M. & W. 93; *Jelks* v. *Fry*, 3 Dowl. P. C. 37; *Ripper* v. *Dawson*, 5 Bing. N.C. 206; as to the interpretation of the last mentioned statutes, and *Hesketh* v. *Flemming*, 30 L. & Eq. 259, to shew that the same rule of interpretation is to be applied to the construction of the Common Law Procedure Act. He admitted that if defendant were really resident without the jurisdiction of the Court at the time of the service of the writ, that the service of it was irregular; but submitted that the writ itself, and not the service of it, was moved against. He pointed out that even if one form of writ had, by mistake or inadvertence, been substituted for the other, that such mistake or inadvertence was "no objection to the writ" (Consol. Stat. U. C., cap. 22, sec. 49); and that, if necessary, an amendment would be allowed without costs (*Ib.* sec. 49).

ROBINSON, C. J.—The cases cited upon the effect of the English statute 2 Wm. IV., cap. 39, which is the same as our statute 12 Vic., cap. 63, sec. 22, do not serve as authorities upon this application, for here the defendant was served out of the jurisdiction, in a foreign country, under the provisions of the present C. L. P. Act, and for all we judicially know, the ten days mentioned in the writ as the time for appearing, may not, under such circumstances, have been sufficient.

The intention of the Legislature was evidently that in all cases where the plaintiff avails himself of this provision, allowing the process to be served out of the jurisdiction, there should be a time for appearance given in the process, which should be specially fixed with reference to the distance of the place of foreign residence. Here there was no special time fixed, but the defendant was required to appear as if he had been served within the jurisdiction, and the question is, can the plaintiff have the advantage of a service made out of the province, when the writ has not been framed as the statute directs, to suit the circumstances, and the consequence to the defendant in any case of the kind may be most material?

Where, as in this case, the defendant, though supposed to be resident in Upper Canada (if we are at liberty to assume that, when it is not sworn that the plaintiffs or their attorney were under that impression), was not in fact as resident, and the plaintiffs found that they were mistaken in that respect, it is rather difficult to admit that they were at liberty, on account of the mistake, to serve the process in a foreign country, when it was not such process as the Legislature have required it shall be if it is to be made that use of

But however that may be, the sections 48 and 49 admit of the form of the summons, and of the copy being amended, and, if the Court shall think fit, without costs, which may be done in this case, as the defendant has been personally served, and has had ample time to appear or may have such time reserved to him as may be thought proper.

The following was the order made:—

Upon reading the summons issued in this cause upon hearing the parties, and upon defendant undertaking within 48 hours from the time of the amendment hereinafter mentioned, to enter an appearance to the writ of summons issued in this cause when amended as hereafter mentioned, as if the said writ had been

issued and served after such amendment; I do order that the said writ and the copy thereof, personally served on the defendant and filed by him on this application, be amended by altering the said writ and copy, which are in the form of No. 1 of schedule A. to the Common Law Procedure Act, to correspond with the form No. 8 in the same schedule to the same act, without costs, and that if defendant make default in appearing within the time aforesaid, then that plaintiffs shall be at liberty to proceed in this cause to judgment and execution.

Order accordingly.

CARRUTHERS v. RYKERT ET AL.

23 Vic. c. 42, s. 4—Trial of Superior Court cause in County Court—Necessity for Notice of Trial—Service of Issue book.

An action had been instituted in the Court of Queen's Bench. After issue joined an order was made under and pursuant to s. 4 of 23 Vic. cap. 42, for the trial of the issue at the next sittings of the County Court of the United Counties where the action was commenced. On the same day in good time, plaintiff gave notice of trial for the County Court Sittings, but did not serve the issue book till the day following:

Held 1. That the order referring the cause for trial to the County Court Sittings did not dispense with the necessity of notice of trial for that sittings. 2. That the notice of trial being in good time was not under the circumstances irregular merely because no issue book had been in fact served till the day following, when too late to give notice of trial.

(Chambers, 12th June, 1861.)

This action was instituted in the Queen's Bench, and by an order of Mr. Justice Hagarty the issue joined between the parties was directed to be tried in the County Court of York and Peel.

On the 3rd of June, notice of trial to take place in the County Court to be holden on the 11th of June, was served.

On the 10th of June, defendant's attorney obtained a judge's summons to set aside the notice of trial, with costs, on the ground of irregularity—on account of no issue book having been served until after the time for giving notice of trial had expired.

When notice of trial was given no issue book had been served. It was served on the next day, 4th of June.

One of the defendants suffered judgment by default. The other two being sued, one as maker and the other as indorser of a promissory note, pleaded payment only, on which plaintiff joined issue.

Carruthers showed cause.

ROBINSON, C. J.—By our 33rd Rule, Trinity Term, 1856, it is provided that the Common Law Procedure Act having dispensed with the sealing and passing of the Nisi Prius Record, the practice in England as to making up and delivering paper books and issue books is to be followed in future.

The judge's order made on the 3rd June, 1861—that this cause shall be tried in the County Court for York and Peel at the next sittings of that court—can hardly be taken as dispensing with notice of trial, on the ground that the day of sitting of the County Court is fixed by Act of Parliament, and that that order was served on the defendant, because the plaintiff may not in fact be prepared to go down to trial at that sitting of the Court, and it is for him to give notice whether he will do so or not. The notice of trial was served long enough before the sitting of the Court. The only objection is that the plaintiff could not properly give notice of trial till he had delivered his issue book.

I think that the effect of our 36th Rule, Trinity Term, 1856, would have been to make the notice of trial regular in this case, even if the cause had not been sent to the County Court, by writ of trial, and if notice of trial in the Queen's Bench had been served before the issue had been delivered.

The case of *Mullins et al.* v. *Ford*, 4 D. & L., 765, appears to me to establish this.

I refer also to *Pool* v. *Pain*, 2 Lowndes, *Maxwell & Pollock*, 609, as bearing upon the question, although from the difference of circumstances it is less in point.

But, upon consideration, I do not see any room for doubt, under the particular circumstances of the present case, for this was sent as an issue to be tried in the County Court, under an order made by a Judge of this Court, on the 3rd day of June, and no doubt before the notice of trial was given, and the order is stated to have been made after hearing the parties.

The defendant does not pretend that he opposed the order being made on the ground that there was no issue then joined; or that he had been served with no copy of the issue; nor does it appear that he took exception in any manner to the want of service of the issue book. He must then have had sufficient notice before the notice of trial was served that the plaintiff had abided by the pleadings as they stood upon his traverse—of the defendant's plea of payment; and I do not think he can now be allowed to move against the notice of trial on the ground that he had not been served with the issue book.

Summons discharged with costs.

PRACTICE COURT.

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

MARTIN v. STINSON ET AL.

Rule Pr. 129—Service on Agent of Attorney.

Held, under the Rule of Practice, No. 129, that service of a Judge's order on the agent of the Attorney with an affidavit that the same has been disobeyed is sufficient to entitle the party who obtained the order to make the same a Rule of Court, and that on these materials he is entitled to a Rule of Court absolute in the first instance with costs.

(H. T. 1861.)

Harrison moved to make the order of Mr. Justice Burns, dated 2nd January last, a Rule of Court, with costs of making the same a Rule of Court.

He filed an affidavit shewing service of the same on the agent of the defendant's attorney in Toronto, and that the order so far as it relates to the payment of costs was disobeyed.

The question was, whether the serving of the rule on the agent is sufficient without being served on the attorney or on the defendants.

He cited Rule No. 129, Har. C. L. P. A., p. 649, and *Thompson* v. *Billing*, 11 M. & W. 361.

Jackson opposed the motion, and submitted that the service was not sufficient.

RICHARDS, J.—The Rule of Court, No. 129, states that when a judge's order is made a rule of court, it shall be a part of the rule that the costs of making the order a rule of court shall be paid by the party against whom the order is made: provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed.

Thompson v. *Billing*, cited by Mr. Harrison, is an express decision that service on the town agent is sufficient under the rule. The case seems better reported in 2 Dowl. N. S. 824. That case was decided under the Rule of the Court of Exchequer, made 22nd May, 1840, which required an affidavit that the order had been served on the party or his attorney and disobeyed. Though there was no mention of "agent" in the rule, the Court held service on the town agent of the attorney was all that was required.

By the Rules of Court in England, of Hilary Term, 1853, the words "or agent" were added after attorney, and the rule in England is now the same as our Rule No. 129 above quoted.

In *Morris* v. *Bedward*, 9 Dowl. P. C. 130, Patteson, J., held that service on the agent of the attorney was sufficient, though he understood the officers of the other courts thought the service ought to be on the attorney and not on the agent.

It was expressly decided in *Black* v. *Lowe*, 4 D. & L. 285, that where it appears from the affidavit filed that the order was served and disobeyed, the rule will be absolute in the first instance.

I think, according to these authorities, that plaintiff is entitled to have his rule absolute at once for making the Judge's order a rule of court, with the costs of making the same a rule of court.

Per Cur.—Rule absolute, with costs.

ENGLISH CASE.

From the "Law Times," June 8.

BARTLEY v. HODGES.

Insolvency—English bill of exchange—Discharge of defendant by a Colonial Court of Insolvency—Subsequent action to recover the amount.

A., who accepted a bill of exchange in England for a debt contracted in England, went to Victoria, in Australia, where he took the benefit of the Insolvent Debtors' Act for that colony. Upon being afterwards sued in England for the amount of the said bill, and pleading such discharge:

Held, that his discharge in the colony was no bar to the action.

This was a demurrer to the replication. The action was upon a bill of exchange (inland), of which the defendant was the acceptor. The facts raised by the pleadings disclosed that subsequently to the acceptance the defendant went out to Victoria, in Australia; that there he was placed under sequestration, and submitted to the laws of the colony passed for the relief of insolvent debtors; that his estate was placed under sequestration by the Supreme Court of Victoria, according to the laws of that colony, and that proceedings were thereupon had, and he afterwards obtained his certificate of conformity; that during these proceedings he was resident in Victoria, and subject to the jurisdiction of the said Supreme Court, and was by the law of the colony discharged from the said debt, the said court having jurisdiction to discharge him therefrom.

J. Brown, in support of the demurrer, contended that the debt was barred by the defendants's insolvency, for that by the sequestration of his property his entire means were taken from him: (13 & 14 Vic. c. 59; 18 & 19 Vic. c. 55; *Edwards* v. *Ronald*. Knapp's Cases before the Privy Council, 259; *Ferguson* v. *Spencer*, 2 Scott N. R. 229; *Sidaway* v. *Hay*, 3 B & C. 12) [Blackburn, J.—*Lewis* v. *Owen*, 4 B. & Ald. 654; *Phillips* v. *Allen*, 8 B. & C. 477]

Prentice for the plaintiff was not called upon.

WIGHTMAN, J.—In this case there must be judgment for the plaintiff. In all the cases cited for the defendant, where the discharge under the bankruptcy or insolvency laws of one country has been held to bind creditors in another country, or to be a bar to debts contracted in another country, the laws giving the discharge were those of the Imperial Legislature of England, by which both parties were equally bound. No case however, has been cited showing that an English creditor can be affected by the laws of a Colonial Legislature.

BLACKBURN, J.—This debt was not contracted in Victoria, nor was the plaintiff a domiciled subject of the colony. The rule is laid down in Story's Conflict of Laws, s. 342, and by Bayley, J. in *Philips* v. *Allen*. The colonial law cannot affect creditors resident in this country, any more than the laws of a foreign state.

Judgment for the plaintiff.

UNITED STATES LAW REPORTS.

IN RE JOHN MERRYMAN.

United States—Habeas Corpus—Right thereto—Power of Executive to suspend.

Held—1. That the President of the United States of America cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it.

2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid to the judicial authority and subject to its control.

(1st June, 1861.)

On the 26th May, A. D. 1861, the following sworn petition was presented to the Chief Justice of the United States on behalf of John Merryman, he being at the time in confinement in Fort McHenry.

To the Hon. Roger B. Taney,

Chief Justice of the Supreme Court of the United States

The petition of John Merryman, of Baltimore county, and State of Maryland, respectfully shows, that being at home, in his own domicil, he was, about the hour of 2 o'clock, A. M., on the 25th of May. A. D 1861, aroused from his bed by an armed force pretending to act under military orders from some person to your petitioner unknown. That he was by said armed force, deprived of his liberty by being taken into custody, and removed from his said home to fort McHenry, near to the city of Baltimore, and in the district aforesaid, and where your petitioner now is in close custody.

That he has been so imprisoned without any process or colour of law whatsoever, and that none such is pretended by those who are thus detaining him; and that no warrant from any court, magistrate, or other person having legal authority to issue the same exists to justify such arrest; but, to the contrary, the same, as above stated, hath been done without color of law, and in violation of the Constitution and laws of the United States, of which he is a citizen. That since his arrest he has been informed that some order purporting to come from one General Keim of Pennsylvania, to this petitioner unknown, directing the arrest of the Captain of some company in Baltimore county, of which company the petitioner never was and is not captain, was the pretended ground of his arrest, and is the sole ground, as he believes, on which he is now detained.

That the person now so detaining him at said Fort is Brigadier General George Cadwalader, the military commander of said post, professing to act in the premises under or by color of the authority of the United States. Your petitioner therefore prays that the writ of habeas corpus may issue, to be directed to the said George Cadwalader, commanding him to produce your petitioner before you, Judge as aforesaid, with the cause, if any, for his arrest and detention, to the end that your petitioner be discharged and restored to liberty, and as in duty, &c.

JOHN MERRYMAN.

Fort McHenry, 25th May, 1861.

United States of America, District of Maryland, to wit.

Before the subscriber, a Commissioner appointed by the Circuit Court of the United States, in and for the fourth circuit and district of Maryland, to take affidavits, &c., personally appeared the 25th day of May, A. D. 1861, Geo. H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God that the matters and facts stated in the foregoing petition are true to the best of his knowledge, information and belief, and that the said petition was signed in his presence by the petitioner, and would have been sworn to by him, said petitioner, but that he was at the time and still is in close custody, and all access to him denied, except to his counsel and his brother-in-law—this deponent being one of said counsel.

Sworn to before me, this 25th day of May, A. D. 1861.

JOHN HANAN. *U. S. Commissioner.*

United States of America, District of Maryland, to wit:

Before the subscriber, a Commissioner appointed by the Circuit Court of the United States, in and for the fourth circuit and district of Maryland, to take affidavits, &c., personally appeared this 26 day of May, 1861, George H. Williams, of the City of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God that on the 26 day of May he went to Fort McHenry, in the preceding affidavit mentioned, and obtained an interwiew with Gen. Geo. Cadwaladar, then and there in command, and deponent, one of the counsel of said John Merryman, in the foregoing petition named, and at his request, and declaring himself to be such counsel, requested and demanded that he might be permitted to see the written papers, and to be permitted to make copies thereof, under and by which he, the said General, detained the said Merryman in custody; and that to said demand the said Gen. Cadwalader replied that he would neither permit the deponent, though officially requesting and demanding, as such counsel, to read the said papers, nor to have or make copies thereof.

Sworn to this 26 day of May, A. D. 1861, before me.

JOHN HANAN,
United States Commissioner for Maryland.

Upon this petition the Chief Justice passed the following order:

In the matter of the petition of John Merryman, for a writ of habeas corpus:

Ordered, this 26th day of May, A. D. 1861, that the writ of habeas corpus issue in this case, as prayed, and that the same be directed to General George Cadwalader, and be issued in the usual form, by Thomas Spicer, clerk of the Circuit Court of the United States in and for the district of Maryland, and that the said writ of habeas corpus be returnable at eleven o'clock, on Monday, the 27th of May, 1861, at the Circuit Court room, in the Masonic Hall, in the City of Baltimore, before me, Chief Justice of the Supreme Court of the United States.

R. B. TANEY.

In obedience to this order, Mr. Spicer issued the following writ:

District of Maryland, to wit: United States of America.

To General George Cadwalader, *Greeting:*

You are hereby commanded to be and appear before the Honorable Roger B. Taney, Chief Justice of the Supreme Court

of the United States, at the United States Court Room, in the Masonic Hall, in the City of Baltimore, on Monday, the 27th day of May, 1861, at 11 o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there do submit it to, and receive whatsoever the said Chief Justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ.

Witness the Honorable R. B. Taney, Chief Justice of our Supreme Court, &c., &c., &c.

THOMAS SPICER, *Clerk*,

Issued 26th May, 1861.

The Marshall made his returns that he had served the writ on General Cadwalader on the same day on which it issued, and filed that return on the 27th May, 1861, on which day at 11 o'clock precisely the Chief Justice took his seat on the Bench. In a few minutes Colonel Lee, a military officer, appeared with General Cadwalader's return to the writ, which is as follows:

Head-quarters, Department of Annapolis,

To the Hon. Roger B. Taney, *Chief Justice of the Supreme Court of the United States, Baltimore, Maryland.*

Sir—The undersigned, to whom the annexed writ of this date, signed by Thomas Spicer, clerk of the Supreme Court of the United States, is directed, most respectfully states, that the arrest of Mr. John Merryman, in the said writ named, was not made with his knowledge or by his order or direction, but was made by Col. Samuel Yohe, acting under the orders of Major General Wm. H. Keim, both of said officers, being in the military service of the United States, but not within the limits of his command.

The prisoner was brought to this post on the 20th inst. by Adjutant James Whittimore and Lieut. Wm. H. Abel, by order of Col. Yohe, and is charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. He is also informed that it can be clearly established that the prisoner has made often and unreserved declarations of his association with this organized force as being in avowed hostility to the government, and in readiness to co-operate with those engaged in the present rebellion against the government of the United States. He has further to inform you that he is duly authorized by the President of the United States in such cases to suspend the writ of habeas corpus for the public safety.

This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarrassments.

He therefore respectfully requests that you will postpone further action upon this case until he can receive instructions from the President of the United States, when you shall hear further from him.

I have the honor to be, with high respect, your obedient servant,

GEORGE CADWALADER,

Brevet Major-General U. S. A. Commanding.

The Chief Justice then inquired of the officer whether he had brought with him the body of John Merryman, and on being answered that he had no instructions but to deliver the return, the Chief Justice then said:

Gen. Cadwalader was commanded to produce the body of Mr Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody or set at liberty if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here at twelve o'clock to morrow. The order was then passed as follows:

Ordered, That an attachment forthwith issue against General George Cadwalader for a contempt in refusing to produce the body of John Merryman according to the command of the writ of habeas corpus returnable and returned before me to-day, and said attachment be returned before me at 12 o'clock to morrow, at the room of the Circuit Court.

R. R. TANEY.

Monday, May 27th, 1861.

The Clerk then issued the writ of attachmen as directed.

At 12 o'clock on the 28th May, 1861, the Chief Justice again took his seat on the bench, and called for the Marshal's return to the writ of attachment. It was as follows:

I hereby certify to the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, that by virtue of the within writ of attachment to me directed on the 27th day of May, 1861, I proceeded on this 28th day, of May, 1861, to Fort McHenry for the purpose of serving the said writ. I sent in my name at the outer gate—the messenger returned with the reply "that there was was no answer to my card," and therefore could not serve the writ as I was commanded. I was not permitted to enter the gate. So answers

WASHINGTON BONIPANT,

U. S. Marshall for the district of Maryland.

After it was read the Chief Justice said, that the Marshall had the power to summon the *posse comitatus* to aid him in seizing and bringing before the Court, the party named in the attachment, who would, when so brought in, be liable to punishment by fine and imprisonment. But where, as in this case the power refusing obedience was so notoriously superior to any the Marshall could command, he held that officer excused from doing anything more than he had done. The Chief Justice then proceeded as follows:

"I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds:

"First—That the President, under the Constitution of the United States *cannot suspend the privilege of the writ of habeas corpus* nor authorize a military officer to do it.

"Second—A military officer has no right to arrest and detain a person not subject to the rules and articles of war for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party is arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority to be dealt with according to law."

It is therefore very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment.

"I forbore yesterday to state orally the provisions of the Constitution of the United States which make those principles the fundamental law of the Union, because an oral statemement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the Clerk of the Circuit Court in the course of this week."

He concluded by saying that he should cause his opinion, when filed, and all the proceedings to be laid before the President, in order that he might perform his constitutional duty, to enforce the laws by securing obedience to the process of the United States.

The following is a copy of the opinion subsequently filed by the Chief Justice:

TANEY, C. J.—The application in this case for a writ of *habeas corpus* is made to me under the 14th section of the Judiciary Act of 1789, which renders effectual for the citizen the constitutional privilege of the writ of *habeas corpus*. That act gives to the courts of the United States as well as to each justice of the Supreme Court, and to every district judge, power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. The petition was presented to me at Washington, under the impression that I would order the prisoner to be brought before me there; but as he was confined in Fort McHenry, at the city of

Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county. While peaceably in his own house with his family, it was, at two o'clock on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as aforesaid to Fort McHenry by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested, was demanded by his counsel, and refused. And it is not alleged in the return that any specific act, constituting any offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which in the judgment of the military officer constituted these crimes. And having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the President to suspend it.

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return; and I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress.

When the conspiracy of which Aaron Burr was the head, became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed on his part no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it; and in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if in his opinion the public safety demanded it.

Having therefore regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them; but being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the President, and believing as I do that the President has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act without a careful and deliberate examination of the whole subject.

The clause of the constitution which authorizes the suspension of the privilege of the writ of *habeas corpus*, is in the 9th section of the 1st article.

This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing "that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" and after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants; and, at the conclusion of this specification, a clause is inserted giving Congress "the power to make all laws which may be necessary and proper for carrying into execution the foregoing powers vested by this constitution in the government of the United States, or in any department or office thereof."

The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated; but as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen, and to the rights and equality of the States, by denying to Congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt where rights of such vital importance were concerned, and accordingly this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the constitution attached to the privilege of the writ of *habeas corpus* to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers, and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true that in the cases mentioned, Congress is of necessity the judge of whether the public safety does or does not require it, and their judgment is conclusive; but the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they gave the government of the United States such power over the liberty of a citizen.

It is the second article of the constitution that provides for the organization of the executive department, and enumerates the powers conferred on it, and prescribes its duties; and if the high power over the liberty of the citizen now claimed was intended to be conferred on the President, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a President of the United States of America, to hold his office during the term of four years, and then proceeds to prescribe the mode of election, and to specify in precise and plain words the powers delegated to him, and the duties imposed upon him. And the short time for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehensions of future danger which the framers of the constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government, which were considered as dangerous to the liberty of the subject, and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office. He is from necessity and the nature of his duties the commander-in-chief of the army and navy, and of the militia, when called into actual service. But no appropriation for the support of the army can be made by Congress for a longer term than two years; so that it is in the power of the succeeding House of Representatives to withhold the appropriation for its support, and thus disband it, if in their judgment the President used or designed to use it for improper purposes. And although the militia, when in actual service, are under his command, yet the appointment of the officers is reserved to the States, as a security against the use of the military power for purposes dangerous to the liberties of the people or the rights of the States.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the Senate, and cannot appoint even inferior officers, unless he is authorized by an act of Congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power; for the 5th article of the amendments to the constitution expressly provides that no person "shall be deprived of life, liberty or property, without due process of law"—that is, judicial process.

And even if the privilege of the writ of *habeas aorpus* were suspended by act of Congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal; for the article in the amendments to the constitution immediately following the one above referred to—that is, the 6th article—provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

And the only power, therefore, which the President possesses, where the "life, liberty and property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power, he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privileges of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the writ of *habeas corpus*, and the judicial power also by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted: for the 10th article of the Amendments to the Constitution in express terms provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Indeed the security against imprisonment by executive authority provided for in the 5th article of the Amendments to the Constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence.

Blackstone, in his Commentaries (1st vol., 133) states it in the following words:

"To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison." And the people of the United Colonies, who had themselves lived under its protection while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that in framing a government intended to guard still more efficiently the rights and liberties of the citizen against executive encroachment and oppression, they would have conferred on the President a power which the history of England had proved to be dangerous and oppressive in the hands of the crown, and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English Executive to usurp and retain it.

The right of the subject to the benefit of the writ of *habeas corpus*, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and as they supposed a freer government than the one which they had thrown off by the revolution. For from the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of *habeas corpus* to bring his case before the King's Bench; and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence was charged which was bailable in its character, the court was bound to set him at liberty on bail. And the most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ; and they continued until the passage of the statute of 31st Chas. II, commonly known as the great *Habeas Corpus* Act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute 13th Wm. III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, time-serving and partizan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decisions from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the *Habeas Corpus* Act of the 31st Chas. II., is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject, and the abuses which were practised through the power and influence of the crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly but fully all that is material to this subject.

Blackstone, in his Commentaries on the Laws of England (3rd vol., 133, 134), says:

"To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible.

"But the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court upon a *habeas corpus* may examine into its validity, and, according to the circumstances of the case may discharge, admit to bail or remand the prisoner.

"And yet, early in the reign of Charles I., the Court of King's Bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they would not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the *Petition of Right* (3 Chas. I.), which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year Mr. Selden and others were committed by the lords of the council, in pursuance of his Majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and the government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable; and when at length they agreed that it was, they however annexed a condition of finding sureties for their good behaviour, which still protracted their imprisonment, the Chief Justice, Sir Nicholas Hyde, at the same time declaring that 'if they were again remanded for that cause, perhaps the court would not afterward grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years."

It is worthy of remark that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject, that the delay of the time-serving judges to set him at liberty upon the *habeas corpus* issued in his behalf, excited the universal indignation of the bar. The extract from Hallam's Constitutional History is equally impressive and equally in point. It is in vol. 4, p. 9, and is also cited at length in the note to pp. 136, 137 of the 3rd vol. of Wendell's edition of Blackstone:

"It is a very common mistake, and not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the Court of King's Bench a writ of *habeas corpus ad subjiciendum*, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if indeed it is not more ancient), that the statute of Chas. II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of crown lawyers, had impaired so fundamental a privilege."

While the value set upon this writ in England has been so great that the removal of the abuses which embarrassed its enjoyment have been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England, short of that of Parliament, can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Com. 136): "But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient. It is the Parliament only or legislative power that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing." And if the President of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown—a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the commentaries on the constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States; and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking in his Commentaries of the *habeas corpus* clause in the Constitution, says:

"It is obvious that cases of a peculiar emergency may arise which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it—a very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body." 3 Story's Con. on the Constitution, section 1336.

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *ex parte* Bollman and Swartwout, uses this decisive language in 4 Cranch, 95: "It may be worthy of remark that this act (speaking of the one under which I am proceeding) was passed by the first Congress of the United States sitting under a Constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when in cases of rebellion or invasion, the pulic safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation they gave to all the Courts the power of awarding writs of *habeas corpus*."

And again, in page 101:

"If at any time the public safety should require the suspension of the powers vested by this act in the Courts of the United States, it is for the Legislature to say so. That question depends on political considerations, on which the Legislature is to decide. Until the Legislative will be expressed, this court can only see its duty, and must obey the laws."

I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me, show that the military authority in this case has gone far beyond the mere suspension of the privi- of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For at the time these proceedings were had against John Merryman, the District Judge of Maryland, the Commissioner appointed under the act of Congress, the District Attorney and the Marshall, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstrustion to the process of any court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the Dristict Attorney: and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshall to arrest him; and upon the hearing of the case would have held him to bail, or committed him for trial, according to the character of the offence as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the a- tion of the civil authorities, and therefore no reason whatever for the interposition of the military.

And yet, under these circumstances a military officer, stationed in Pennsylvania, without giving any information to the District Attorney, and without any application to the judicial authorities assumes to himself the judicial power in the District of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seised." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

And these great and fudamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

GENERAL CORRESPONDENCE.

Law Scholarships—Books.

TO THE EDITORS OF THE LAW JOURNAL.

June 8, 1861.

GENTLEMEN,—In the June number of your Journal you take notice of certain Scholarships, to be given by the Law Society to Students.

In the subjects of examination for the first and second years, amongst other works, are mentioned "Stephens' Blackstone's Commentaries." Will you be so kind as to mention, in your next number, what Students are to understand by the expression "Stephens' Blackstone's Commentaries." Whether as the wording would imply, an edition of Blackstone's Commentaries by Stephens, or Stephens' (own) Commentaries founded on Blackstone.

LAW STUDENT.

[So far as we can learn, the latter is the work intended.—EDS. L. J.]

Toronto, York and Peel—Separation.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Is it true that the City of Toronto is separated from the United Counties of York and Peel for judicial purposes? Are we to have two batches of officials in these United Counties? If so, I think there is just cause of complaint. Who petitioned for any such change? I have nobeen able to see the act which it is said effects the change, but shall be glad to know something about it from you.

ENQUIRER.

Toronto, June 27, 1861.

[The act to which our correspondent refers is 24 Vic. cap. 53. It is entitled, "An Act to provide for the separation of the City of Toronto from the United Counties of York and Peel for certain judicial purposes," and declares that "the City of Toronto shall be deemed a county for all matters and purposes in the act mentioned connected with the administration of justice," (s. 8). Now we have neither space nor inclination to specify for our correspondent all "the matters and purposes" mentioned in the act. Suffice it to say that the act contains no less than seventeen sections, and for these our correspondent must in patience wait till the published statutes are distributed.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. C. *May, 14, 15.*

WITHERS v. PARKER, *and another* (*Executrix and Executor &c.*)

Sheriff—Execution—Bill of Sale—Fi. Fa—Ca. Sa—Attorney—London Agent—Order for withdrawal of fi fa, not acted on—Consent to Judge's order.

P. recovers Judgment against F., and the Sheriff, on April 15, seizes under a *fi. fa*, in that action goods of F. in Hampshire. On the same day F, executes a bill of sale to W., and a writ of *fi. fa.* in an action at suit of W. is lodged with the same Sheriff. On

May 1, F. is taken on a *ca. sa.* in Middlesex at the suit of P. P's Attorney in Hampshire thereupon writes to request the Sheriff of Hampshire to withdraw from possession under the *fi. fa* The officer in possession does not, in fact withdraw; but he tells W. he will hold for him under his writ. A summons is subsequently taken out in the suit of P. *v* F. to set aside the *ca. sa.* on the ground that no return had been made by the Sheriff to the *fi fa.*, under which sheriff then held; and an order is made by consent that F. shall be discharged out of custody, and that P. shall be at liberty to proceed on the *fi. fa.* under which the sheriff was in possession. W. was Attorney for F. in the action of P. *v.* F. and plaintiff in the action W. *v.* F.; and the order above mentioned was consented to by B. and R., London Agents of W. W. had not in fact, given his consent, but did not, on his knowing of the order, inform P. that he had given no consent, nor taken any steps to object to it.

Held, affirming the Judgment of the court of Exchequer, that independently of the question of the writ of *fi. fa.* at the suit of P. being withdrawn or not, W. had consented to the judge's order, and was bound thereby.

B C. EX PARTE WALLER (*an articled Clerk*). *June*, 11.

Attorney—Articled Clerk.

Admission of an articled clerk to practice as an Attorney allowed, although the usual entries had not been made in the books at Judge's chambers.

Ex. C. DESLANDES. v. MCGREGOR *and Another*. *June*, 15

Principal and Agent—Charter Party—Liability of Agent.

In a charter party it was agreed "between D. & Son, owners of of the ship A,, of the one part, and G. Brothers, as agents to F., of Anamaboo, merchants and charterers, of the other part &c" The voyage, &c., was then set out; the words merchants and charterers in the plural number were printed and continued in the plural throughout the whole charter party. It was signed "For D. & Son., of Jersey, owners; B. an agent, for F of Annamaboo; G. Brothers, as agents"

Held, affirming the Judgment of the Court of Queen's Bench, that G. Brothers were not liable on the charter party as principals.

C. P. LOCKWOOD v. SEVICK. *May*, 22.

Commission Agents—whether Commission to be paid only upon goods sold and delivered, or upon goods ordered and order accepted.

Where the plaintiff, who was a commission agent, agreed with the defendant to do business with him, upon the understanding expressed in a letter that he should receive a commission on all goods bought by houses whose accounts were opened through him with the defendant.

Held, that the plaintiff was entitled to receive his commission on all goods ordered, where the order had been accepted, whether the order had been accepted or not.

Ex. MACKAY v. FORD. *June*, 2.

Slander—Privileged Communication.

An action of slander cannot be brought for anything said in the regular course of a judicial proceeding; therefore, where an Attorney, in a speech for the defence in a police court, said that the prosecutor had plundered his master, and the prosecutor gained the verdict in an action for slander against the Attorney.

Held, that the matter alleged to be slanderous being relevant was privileged, and that a non-suit should be entered.

C. P. RICHARDSON v. DUNN.

Action for damages—whether too remote.

The defendant, by a representation which turned out not to be correct, induced the plaintiff to buy the good-will of a public house from C., and finding that the receipts did not come up to what had been represented by the defendant brought an action against C., without communicating with the defendant, C., at the trial, said that the defendant had no authority from him to make the statement he did; and the plaintiff failed in his action. He then brought an action against the defendant. and included in his demand the amount of costs sustained in the former action.

Held, that he could not recover the costs paid in the first action, the damage not being the natural and proximate result of the defendants act.

Ex. C. ABBOTT v. FEARY. *June*, 20.

Appeal to court of error—New trial—Common Law Procedure Act.

A Superior Court of Common Law has a discretion independently of the wish of the parties, to order a new trial upon any ground which appears to them sufficient, against which there is no appeal to a court of error.

Where, upon a rule obtained in the court below to show cause why a verdict entered for defendant should not be entered for plaintiff, or a new trial had, the court ordered a new trial.

Held, (WILLIAMS J., *dissentiente*) that there was no appeal to a court of error.

Ex. C GREENOUGH. v. MCCLELLAND. *June*, 15.

Promisory Note—Principal and Surety—Equitable defence—Giving time to Principal.

In an action on a promissory note defendant pleaded by way of equitable plea, that defendant and A. were joint and several makers of the note, but that defendant was surety for A, to the knowledge of plaintiff, who gave time to A.

Held, affirming the decision of the Court of Queen's Bench that the above constituted a good equitable defence, and that knowledge alone of the relation of principal and surety, at the time of giving the note, was sufficient, coupled with the giving time to the principal to discharge the surety without any express agreement betwen plaintiff and defendant to that effect.

Ex. C. MCDONALD *and another* v. LONGBOTTOM. *June*, 15.

Sale of Goods—Parol Evidence to explain written contract—Latent ambiguity.

The defendant, a wool-buyer, purchased of the plaintiff's, sheep farmers, a quantity of wool described in the written contract simply as "your wool." A previous conversation had taken place between the parties, in which the plaintiff had stated that, besides their own clip of wool, they had purchased the clips of four or five neighbouring farmers, whose names were specified, and that altogether the quantity amounted to "2,300 stones, a hundred stones more or less."

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

Held also (WILLIAMS, J., *dubitante*) that this conversation was not thereby made part of the contract, so that the quantity specified became an ingredient in the contract, and that the contract was performed by the plaintiff's sending all the wool which they then had amounting to 2,505 stones.

Judgment of the Queen's Bench affirmed.

CHANCERY.

V.C.K. THOMAS v. JONES. *May* 24.

Practice—Administration—Payment of a legatees' fund to trustees on their undertaking to distribute.

Where, in an administration suit some legatees are dead, the fund is insufficient, and an order has been made for distribution, the court will order payment of all legacies not originally exceeding £50 to the trustees, they undertaking to pay such sums to the parties entitled.

M. R. SECOMBE v. EDWARDS. *June* 22, *July* 2.

Will—Construction—"And," not read "or"—Gift over.

A testator by his will gave certain property to trustees in trust for the four children of his sister, and directed that "should one or more of them decease before marriage, and leave no issue, then their part or parts shall fall to the remaining brother or brothers, or their issue, share and share alike." Two of the children died unmarried, and without issue. Another died leaving several children. The remaining child died married, but without leaving any issue. *Held*, that the word "and" could not be changed into "or," and therefore that the gift over to the children of the deceased child did not take effect.

L.J. IN RE BURKE. *June* 5.

Lunacy—Idiot not so found by inquisition—Fund in Court—Payment of dividends to relatives of the idiot for his maintenance.

An idiot, aged 29, residing with his brother and sister, was entitled to £4,446 11s. consols, paid into court under the Trustees Relief Act, and also to other property, the whole income of which was under £300 a-year. Upon a petition presented in lunacy, and under the said act, an order was made for payment of the dividends of the fund in Court to the brother and sister of the idiot so long as he should reside with them, or their undertaking to maintain him.

V.C.S. *March* 10, 12, 13, 14, 15, *May* 26.

JENNER v. JENNER.

Mistake—Family arrangement—Rectification of settlement.

Real estate was settled on A. for life; remainder to B., his eldest son in tail. B. at A's. request joined with him in opening the entail to let in a charge. The estates were re-settled, and several years afterwards B. discovered that his estate tail had been cut down to an estate for life. B. stated that he had joined in opening entail on the understanding that subject to the charge and to certain modifications in A's. power of jointuring and charging portions, the estates should be settled precisely as they had previously been. A. stated that he had been under the same impression.

On evidence that the persons who prepared the re-settlement had explained the limitations to A. & B., a bill filed by B. to rectify the settlement was dismissed with costs.

L.C. & L.J. WHITE v. BAKER. *May*, 2, 26.

Will—Construction—Survivor.

Testator by will, after giving income of £5,000 stock to W. for her life, gave it after her decease to E. and A. in equal shares, and in case of the death of either of them in the lifetime of W., then upon trust, to pay the whole of the fund and interest unto the survivor of E. and A.

Held, that A. was entitled upon the death of E., living W., to a vested and indefeasible interest in the fund.

L.J. *Feb.* 27, 28, 29, *March* 1, 2, 5, *April* 26.

CONYBEARE v. THE NEW BRUNSWICK AND CANADA RAILWAY AND LAND COMPANY, LIMITED.

Joint Stock Company—Purchaser of shares—Representations by Secretary—Suit to rescind contract.

The purchaser of shares in a joint stock company limited, filed a bill to set aside his contract on the ground of alleged misrepresentations by the secretary in his interviews with him prior to the purchase.

Held, (reversing the judgment of Vice Chancellor Stuart) that the evidence showed that the purchaser was not sufficiently apprized by the Secretary, who was their agent for negotiating with the purchaser, of the position of the company, and that he had not the means of acquiring proper information about it, or of discerning the misrepresentation: that the company was bound by the acts of its secretary; that the purchase must be set aside, and the money repaid with interest.

M.R. HARRIS v. DARBY. *May* 22.

Solicitor—Execution—Professional services—Charges disallowed—Taxation.

Where a Solicitor who is appointed as executor, is authorized by the will to charge for his professional services, he is only entitled to charge for what are strictly "professional" services, and not for work done and services rendered, which ought to be done or rendered by an executor in a lay capacity.

If he accepts the office of executor, he must undertake its duties.

REVIEWS.

THE ECLECTIC MAGAZINE for July is before us, containing, with a historical portrait, the usual selections from the current foreign literature. The present number is fully up to the standard, having articles upon history, geography, and literary topics, of a character calculated to sustain the high reputation of this well known monthly.

BLACKWOOD'S MAGAZINE for June opens with a paper upon the "Book Hunter," treating of the divisions of that class whose literary instincts confine them to the collection and not the reading of books. "The Monks of the West" is a review of the popular work of M. de Montelambert, under the same title. The next article is a review of "Two Years in Switzerland and Italy," by Miss Bremer. The reviewer devotes a few well-written pages to a criticism of the peculiar theological opinions of the authoress, as shown in the anxious searches for her free church to be reared and animated by the genial spirit of benevolence by which she has been moved; and then continues with more general notes upon the very readable book under notice. Several other interesting papers fill the present number, which concludes with the "Memoirs of a Tory Gentlewoman," a paper of the class always entertaining, for they call to mind the earlier times of the mother country, and, in their notices of the brilliant men and beautiful women, give us a closer view of that history so glorious in its epochs.

THE MONTHLY LAW REPORTER (Boston) for May is in our hands. The leading articles are, an extended notice of the death of Chief Justice Shaw, of Massachussette; and a charge upon the Law of Piracy, with an especial reference to the privateering tendencies of the so styled Confederate States. The number is concluded with the reports of the Supreme Courts of several States of the Union and a few English decisions.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

JAMES F. BROWN, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted June 15, 1861)

CORONERS.

DAVID CAW, Esquire, M.D., to be an Associate Coroner for the County of Waterloo. (Gazetted June 15, 1861)

GEORGE PATON, Esquire, M.D., and HART A. MASSEY, Esquire, to be Associate Coroners for the United Counties of Northumberland and Durham. (Gazetted June 15, 1861.)

ROBERT HAWDEN, Esquire, M.D., to be an Associate Coroner for the United Counties of Lanark and Renfrew. (Gazetted June 15, 1861.)

TO CORRESPONDENTS.

"H. F., DUNDEE, SCOTLAND." Your letter of 12th June received, but not the pamphlet to which it refers. We shall be glad to receive a copy and so glad to hear from you occasionally. You deserve to be well and honestly supported in your endeavours. No. 5 of Vol. 6 mailed as requested to your address.

"CHARLES DURAND"—Under "Division Courts."

"LAW STUDENT"—"ENQUIRER"—Under "General Correspondence."