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DIARY FOR MARCH.

1 Tuesday — Chancery Ex. Term, Hamilton and Ottawa, com. Last day for return of Collector's Rolls where time extended by Mun Council.
3. Thursday... Last day for notice of Trial for County Court.
5. Saturday.. Chancery Examination Term, Hamilton and Ottawa, ends.
6. SUNDAY .. *Quinquagesima.*
8. Tuesday .... Shrove Tuesday. Chancery Exam. Term, Barrie and Cornwall, commences. Quarter Sess. in each Co. and County Ct. sittings.
9. Wednesday Ash Wednesday.
12. Saturday... Chancery Examination Term, Barrie and Cornwall, ends.
13. SUNDAY .. *1st Sunday in Lent.*
15. Tuesday .. Last day for service of Writ for Toronto Spring Assizes.
20. SUNDAY .. *2nd Sunday in Lent.*
25. Friday ..... Last day for declaring for Toronto Spring Assizes.
27. SUNDAY .. *3rd Sunday in Lent.*
28. Monday..... Last day for notice of Hearing, Chancery.

"TO CORRESPONDENTS."—*See Last Page.*

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

MARCH, 1859.

COUNTY CROWN ATTORNEYS.

On all sides we learn that the appointment of County Crown Attorneys, or local Crown officers, is proving a public benefit.

Crime is an injury to the public, and its prevention an object of public importance.

This being the case, a due regard to the machinery used for the prevention of crime is an object of national importance. The law attaches certain punishments to certain offences, and courts are constituted for the trial of offences, but a superintending power is required, not only to see that the guilty are punished, but that the innocent are not punished as guilty.

The name of the Queen has we fear been too often invoked for the gratification of malice or the indulgence of private feelings of the worst kind. Oppression there has been in the name and dignity of a public prosecution, and all for the gratification of spite. This brings us to the fact that a controlling power is requisite, as much for the institution of criminal procedure as for watching it when instituted.

In different countries, though different machinery exists, the effect is substantially the same. In Ireland, in each county a local Crown Solicitor is appointed; his salary is small; his duty is, among other things, to conduct at Quarter Sessions prosecutions cognizable by that Court. At the Assizes the Crown business is also, we believe, entrusted to Crown Solicitors and Crown Counsel—the former being paid by salary and the latter by fees. In Scotland, private prosecutions are almost unknown to the law. Attached to every Sheriff's Court there is an officer called the Procurator Fiscal, whose duty it is to attend to public prosecutions, and whose remuneration is by fees; among other duties he is required to receive information of offences, to prosecute suspected persons before a magistrate, and to arrange if necessary for prosecution before a higher tribunal; in the latter case the whole of the evidence is reported to the Crown Counsel in Edinburgh, by whom all further proceedings are conducted. At the head of the Crown Counsel is the Lord Advocate, or supreme public accuser.

The system in France partakes more or less of each of the foregoing. The chief public prosecutor is the Procureur General or Attorney General; under him there are avocats genereaux, or deputies. Attached to tribunals of simple police there are officers called commissaries of police. The great difference between the French, the Scotch, and the Irish organizations is this, that in France whenever the public prosecutor becomes aware of a crime he is bound to bring the offender to justice, but in Scotland and Ireland a discretion may be exercised.

Our reference to the systems prevailing in European countries makes prominent one feature on which a difference of opinion exists, and that is the mode of remuneration, whether by fixed salary or by fees. When payment is certain the temptation to neglect is great, but when payment is made to depend on the number of cases disposed of or amount of work done, the temptation to the prosecution of trifling offences is also great; each mode may be attended with evils, and neither is wholly free from objection.

It only remains for us to glance at the system prevailing in Upper Canada, and to see how far it stands comparison with the systems we have noticed.

The public prosecutor here is the Attorney General. As he cannot be present everywhere at the same time, and as Courts of Oyer and Terminer are opened in several places on the same day, he has the appointment of substitutes, or Crown Counsel. These counsel are not salaried officers, but paid by fees; nor are they permanent officers, but appointed *pro hac vice*. In each county there is now a County Crown Attorney; he is subject to the Attorney General, and is in fact his local representative. His duties are manifold; such as to receive informations, depositions, &c.; to examine the same; to prosecute at Courts of Quarter Sessions; to watch private prosecutions at the Sessions; to assist, if required, the Crown Counsel at Courts of Oyer and Terminer; and in the absence of Crown Counsel to conduct the Crown business at the Assizes; to institute and conduct certain proceedings be-

fore magistrates; to advise and instruct magistrates; and to receive from Deputy Clerks of the Crown, Clerks of County Courts and Registrars of Surrogate Courts, fees due to the Fee Fund.

The remuneration partakes of the character of a salary and of fees. There is a per centage on moneys received on account of the Fee Fund, and fees for prosecutions at Quarter Sessions, but no fees for assisting Crown Counsel, for advising magistrates, or for prosecuting cases before magistrates, or for other services which we need not notice.

While approving of the mode of compensation—that is, part salary, part fees—we cannot help thinking that a greater state of efficiency would be attained if some remuneration were provided for every duty imposed. Human nature is human nature all the world over, and a lawyer cannot be expected to work without pay more than any other specimen of humanity; besides, it is to be remembered that the time required to be given to the performance of a public duty is time taken from private practice, and ought accordingly to be paid for. The result is simply this, that work for which no compensation is allowed will be shirked, and is shirked.

The remedy is the application of compensation or a fair remuneration for services performed. The per centage on fee fund money is no more than a fair allowance for the responsibility enjoined; the fees for prosecutions at Quarter Sessions are only moderate allowances for services performed, and very moderate when it is considered that the County Crown Attorney is debarred the privilege of accepting defences against the Crown. And why should duties as important as either of the foregoing—such as that of advising magistrates, who greatly need advice; of prosecuting offences before magistrates where the attendance of trained skill may be greatly needed, and of getting up cases for Crown Counsel at the Assizes, who, not being residents, much need the assistance—be without compensation?

We think something ought to be done by the Government or by the Legislature towards remedying this defect. Until done, we feel satisfied that the organization of the County Crown Attorney system in Upper Canada will not be either as efficient or as complete as might be. Hitherto the institution has been upon its trial. It has been tried and is approved. Grand Juries have made presentments in its favor, and the common sense of the country supports it. If then good and useful, why not make it thoroughly efficient, and, as far as human wisdom can foresee, complete? We believe that to give moderate fees for all services performed by County Crown Attorneys is the only mode of obtaining that state of efficiency and completeness which we desire, and that a proposal to do so would be at present met in a spirit of moderation and candour.

PROBATE AND ADMINISTRATION.

DIVISION COURT CLERKS.

Our attention has been directed to a means of securing further facilities for Probate and Administration.

It is sugested that the clerks of Division Courts can act as auxilaries in the Procedure under the Act of last session, by which the whole law in relation to probate and administration was recast, and the Surrogate Courts placed on a footing so advantageous to the public. The principle of that law—to secure administration in the several localities without compelling parties to resort in a variety of cases to Toronto—we agree may be largely extended through the agency of Division Court clerks, so that all non contentious business can be done literally at any man's door, and a considerable saving both in time and money be thus effected.

Nor will this interfere with the profession; for in ordinary cases a professional man is not employed, the business being usually done on direct application of the parties to the Registrar of the Surrogate Court.

The way in which Division Court clerks may be beneficially used is obvious enough. Each county is separated into five or more divisions for Court purposes, each division having a resident clerk. Now if parties found the Clerks of Division Courts sufficiently instructed to assist them, instead of making application personally to the Registrar of the Surrogate Court at the County town for probate or administration, the whole matter might be transacted without the loss even of a single day to executors, administrators, witnesses or bailsmen. In the majority of cases the applicants are not men of business habits, and in very many cases they are illiterate men, and we ourselves have known instances of persons travelling forty or fifty miles to the County town to obtain information of how they were to proceed to prove a will, and even after receiving full information sending back the papers in an incomplete state.

Our aim will be to lay such information before the clerks as may enable them to assist the public, and we venture to say also, save the Registrars of the Surrogate Courts much trouble in correspondence and otherwise.

Clerks are generally well educated men, and very competent for the undertaking. Most of them are commissioners for taking affidavits; those who are not would doubtless be appointed on the recommendation of the County Judge, and to secure the full benefit of what is suggested it is necessary that they should be commissioners.

The suggestions following we shall endeavour to make as plain and practical as possible, so as best to accomplish the object we have in view, to benefit the public and clerks by one and the same means.

APPLICATIONS FOR A PROBATE OF A WILL.

Let us suppose a case,—say in the County Court of Simcoe. A party dies leaving a will by which he appoints an executor of full age. This will contains no alteration or obliteration, and is duly attested by subscribing witnesses. The executor seeks the assistance of the nearest Division Court clerk who may set down in the following form the necessary information, which will serve either for the Registrar, or for a lawyer, if the party desires to employ one in obtaining probate:

A. Name and addition of deceased—John Doe, Carpenter.
B. Place of his death—Township of Mono.
C. Time of his death—18th October, 1858.
D. His fixed place of abode at time of his death—Township of Mono.
E. Value of personal estate and effects which deceased died possessed of or entitled to—$1,400.
1. Date of Will—17th October, 1858.
2. Names, residence and additions of witnesses to will—James Doe, of Mono, yeoman, Richard Roe, of Mono, school teacher.
3. Name and addition of executor—William Doe of Mono, Esquire.

The information thus obtained is forwarded to the Registrar of the Surrogate Court by letter, prepaid, and registered with a sum towards the fees. In due time the Registrar if so requested, will transmit the form of petition and affidavits to the clerk filled in according to the instructions sent. Upon these papers the Clerk's services again come into play. In the case put there will be the petition from the executor, which is to be signed by "William Doe," after the blank for date has been filled in. Then the affidavit by one of the witnesses to the will, which affidavit is to be first affixed to the will by wafer or other adhesive matter, and then sworn to by the deponent. The other affidavits will be also annexed and sworn to in the usual manner before the clerk as a commissioner, for it is only as a commissioner that he will have authority to administer the oaths.

The will should be marked as follows:—"This is the will referred to in the affixed affidavits," and be signed by the executor and by the commissioner who swears him. When all is thus completed, the papers may be transmitted by mail to the Registrar at the County Town. There is of course *some* risk in sending by mail, but under the present excellent postal arrangements the loss of a letter properly registered is indeed a rare occurrence. The executor ought on no account omit to *register* the letter enclosing the papers, and to take from the post-master the usual receipt. The Registrar should be instructed as to whether he is to send the probate by mail, or keep it till called for.

This course would require the co-operation of Registrars to work satisfactorily, and we doubt not they would willingly co-operate in a method that would be so beneficial to to the public, and would entail no additional responsibility on them, whilst it would be the means of facilitating very much the discharge of their own duties. A Clerk would be entitled to charge 1s. as commissioner for each affidavit sworn, and this on an average would give 5s. in each case.

We intend to continue this subject next month by taking up administrations in ordinary cases, and then address ourselves to cases out of the ordinary course, and furnishing some general information applicable to all cases. In the mean time we shall be glad to hear from Clerks or Registrars on the subject.

ABUSE OF THE GRAND JURY SYSTEM.

As the law now stands, parties instead of going before a Magistrate and lodging information for an alleged crime, may go directly before a grand jury without any notice or preliminary investigation, and a presentment is made, an indictment founded, a Bench Warrant issued, and the first intimation a party has of the charge, is when he finds the constable's grasp on his shoulder.

This mode of proceeding affords great facilities for gratifying private malice under the form of a public prosecution—more particularly in perjury, conspiracy, and obtaining goods under false pretences.

The Recorder of Falmouth thus illustrates by an instance in the case of a charge for perjury—"You have an action in the Courts. You and your opponent are both examined upon oath. You assert something which he denies. He is defeated. Without giving you any notice whatever, in your absence without your knowledge, without an opportunity being allowed to you to be heard, on the statement of your accusers alone, a bill of indictment for perjury is preferred against you by the grand jury. It is found of course. You are subjected to the painful imputation of having an indictment for perjury against you; you are subjected to the anxiety and cost and shame of a trial; you are acquitted of course; but your adversary has had his revenge in full measure by the mental pain and expenses he has put you to."

Since the institution of the office of County Crown Attorney in Upper Canada, there are some checks on malicious proceedings of the sort at the Quarter Sessions, but there is very little protection from injury at the Assizes, and in practice as a general rule, parties allowed as of right to go before a grand jury with their charges. We have always regarded the practice as exceedingly objectionable, and the power of the law officers of the Crown is scarcely adequate to arrest the evil.

Lord Campbell, to whom the public are already indebted for many valuable law reforms, proposes to remedy the evil by a law requiring that no bill of indictment for perjury,

conspiracy, or false pretences, shall be preferred to a grand jury without a preliminary investigation and committal by Magistrates, as is the course with other crimes, and to prevent any possibl. miscarriage of justice through errors on their part, power is also to be given to any judge of the Superior Courts, or to the Attorney or Solicitor-General to direct an Indictment.

Such a law might with great advantage be introduced into this country and made we think of general application —at all events to cover charges of forgery of private documents, and other charges growing out of and partaking as much of civil inquiries as public offences.

TRIAL BY JURY.

We notice that the Hon. Mr. Patton has again introduced the bill to dispense with the necessity of an unanimous verdict in Civil cases.

The question has been debated for several years in England, and it is announced that Lord Campbell has prepared a measure on the subject, which adopts the often urged proposition, that the agreement of nine jurors shall suffice for the verdict. Lord Campbell further proposes, that a jury shall not be locked up for more than six hours, and that they shall be then discharged if nine do not agree, unless they ask further time, in which case they may have six hours more. He also proposes, that by consent of parties another jury may be empanelled at the same assizes or sittings so as to save the expense of bringing up the witnesses again—and this last, even under the present law, would certainly seem a most desirable improvement.

We have been unable to see any adequate benefit in the change proposed in this country, and we very much fear it would pave the way for extending the same rule to Criminal cases,—an alteration which would be fraught with danger to public liberty and individual safety. No doubt there is much that may be said *pro* and *con* in reference to the unanimous verdict, but that which has existed for ages should not be disturbed unless it be shown affirmatively that the practical result of the rule is injurious—and those who advocate a change deal only in generalities and abstract arguments.

We venture to say that if the opinions of the Judges of Upper Canada—both of the Superior and Local Courts—were obtained, not one out of every ten would be in favor of the change.

The alteration in the jury Act of last Session we have reason to know, will effect a great improvement in the law. It will secure men of more intelligence—a better class of Jurors in every sense of the word. Why not wait to see the effects of this alteration?

This constant change of the law is a great evil—there is too much impatience for legislation in the country.

Upon Lord Campbell's measure we may expect the question will be fully examined and debated, and even if the circumstances in Upper Canada were the same as in England, which they are not, it would be prudent to wait and see the action of the Imperial Parliament.

On the grounds mentioned, we hope Mr. Patton may be disposed not to urge his bill this session.

HARRISON'S C. L. P. ACTS IN ENGLAND.

The testimony borne to the merits of this work by the law periodicals of England has been strong and unanimous.

There was first the review of the *Jurist*, in which the work was noticed at length and in terms of unmixed praise.

Next there was the review of the *Solicitor's Journal*, in which the work was noticed at still greater length, and, if possible, in still more flattering terms.

In this number we are enabled to reproduce the recent review of the *Law Times*, wherein the profession in Canada is congratulated "on the possession of so accomplished a legal writer as Mr. Harrison."

We remember no Colonial law book that has ever been noticed in any one of the law periodicals of the mother country; and when we find one noticed, and noticed in terms most complimentary by *all* of them, there is much cause to congratulate ourselves as the *Law Times* says "in the possession of so accomplished a legal writer" as the author of it.

Whether Mr. Harrison is pecuniarily a gainer or loser by his edition of the Common Law Procedure Act, we must congratulate him on the enviable reputation which both in England and here he has acquired through his works,—a reputation which we hope will, at no distant day, result in rewards of a substantial kind.

THE EDITOR OF THE LAW TIMES.

E. W. Cox, Esquire, the talented editor of the English *Law Times*, we see by our papers of last mail, has been presented by the Solicitors of England and Wales with a magnificent testimonial "in recognition of his unwearied and successful endeavours as the editor of the *Law Times* to promote the mental, moral, and social advancement of their branch of the legal profession."

It is a large silver centre piece consisting of a richly chased vase, standing on a square plinth, with four panels for the inscription and armorial bearings. It is supported by four heraldric horses in frosted silver.

Mr. Cox deserves well of the profession at large. The *Law Times* needs no commendation at our hands. The

learning, the courage, the talent, and the discreet management of its editor has placed it among the first of the legal periodicals of Great Britain. We tender Mr. Cox, upon this public recognition of his services, the hearty congratulations of fellow labourers in Upper Canada.

CALLS TO THE BAR.

It was provided by statute 10 & 11 Vic. cap. 20, that graduates of certain Universities might be called to the bar after having been three years on the books of the Law Society, although the degree were conferred during the term of three years.

So the law continued without question until the passing of the Hon. Mr. Patton's Act (20 Vic. cap. 23), and so the law continues, notwithstanding the passing of that act. Mr. Patton's Act applies only to attorneys, and it repeals, notwithstanding the impression to the contrary, only so much of section 1, and so much of section 3, "as relates to attorneys or solicitors."

Omitting so much of section 3 of the 10 & 11 Vic. as applies to attorneys, the remainder of the section is in force, and reads as follows:—"And be it enacted, that it shall and may be lawful * * * * * for the said Society aforesaid [Law Society] to admit as barristers any person or persons who shall have taken any of the degrees aforesaid at King's College, Queen's College, or Victoria College, in this Province, and shall have been three years * * * * standing on the books of the said Society, * * * notwithstanding that such person or persons shall have * * * been admitted upon the books of the said Society before taking any such degree, as aforesaid."

HISTORICAL SKETCH OF THE CONSTITUTION, LAWS, AND LEGAL TRIBUNALS OF CANADA.

(Continued from p. 30.)

Reports of English Crown Law Officers—Guy Carleton, Governor General—Francis Maseres, Attorney General—William Hey, Chief Justice—Recommendations of Governor General Chief Justice, and Attorney General, as to the English Law—Constitution of New Courts.

In this state of confusion the Attorney General (Yorke) and Solicitor General (De Grey) were, in 1776, called upon for their opinion, and in April of that year reported that the criminal laws of England were almost the only laws introduced, and that the laws of England relating to descent, alienation, settlements and incumbrances of real estate, and to the distribution of personal property in case of intestacy, were not in force in Canada. The Report was characterized by much learning and sound discretion. Though acknowledging there was no maxim more certain than that a conqueror had a right to change the laws of the conquered, it pointed out that to change at once the laws of a settled country would be attended with hardship and violence, and recommended a gentle change to be effected more by conviction than compulsion.

On 7th April, 1766, Guy Carleton was appointed Lieutenant Governor of Quebec. In case of the death or during the absence of the Governor-in-Chief, his duty was to exercise all the powers contained in the commission of the Governor-in-Chief. Notwithstanding the power to summon representatives of the people, it would seem that up to this time no assembly had been called. All laws were passed by the Governor and Council; and though their legality was often doubted, they appear never to have been quashed by the Courts of Justice or any other authority.

On 25th September, 1766, George Suckling, the first Attorney General of Quebec, having resigned, Francis Maserès, afterwards cursitor Baron of the English Exchequer, a very able man, was appointed Attorney General of the Province. He was the author of "The Canadian Freeholder," and other works of Canadian interest and usefulness, now out of print. His appointment was, on 27th of September, 1766, followed by that of William Hey, to be Chief Justice of the Province. He, too, was a man of much ability, and said to be the author of a clever paper entitled "View of Civil Government and Administration of Justice in the Province of Quebec, while subject to the Crown of France."

On 12th April, 1768, Guy Carleton became Governor-in-Chief, and shortly afterwards, with Chief Justice Hey and Attorney General Maserès, was called upon to report, for the information of His Majesty, the state of the laws in Canada, and to recommend improvements. The Governor-in-Chief recommended that the English law as to criminal matters should be continued, but that the French law with respect to civil matters should be formally recognized. From this recommendation both the Chief Justice and Attorney General dissented. While agreeing as to the recommendation in respect to criminal law, they differed as to the expediency or propriety of recognizing the French law. Both as to civil and criminal matters they advocated the complete introduction of the English laws. They each sent separate reports embodying their views, which, with the report of the Governor-in-Chief, when received by the Privy Council, were, on 14th July, 1771, referred to the English Law Officers, viz: King's Advocate, Attorney and Solicitor General. By an order of Privy Council, dated 31st July, 1772, it was directed that each of the three Crown Law Officers should make a separate report. On 6th December, 1772, the English Solicitor General, Wedderburne, made his report, coinciding rather with Guy Carleton than the Canadian Crown Law Officers. On 22nd

January, 1773, the English Attorney General, Thurlow, also reported, and his report was much to the same effect as that of his colleague the Solicitor General. Shortly afterwards the Advocate General, James Marriott, made his report, in the main agreeing with those of the Attorney and Solicitor General.

While all these discussions were taking place, and reports being made, loud complaints were levelled against that portion of the ordnance of 1764 which permitted Justices of the Peace to hear and determine matters of private property. So loud did they become and so just were they acknowledged to be, that in the month of February, 1770, an ordinance was passed making it unlawful for any Justice of the Peace "to hear, examine or determine any matter of private property between party and party; or to make, pronounce or deliver any judgment, sentence, order or decree, or to do any judicial act whatsoever touching the same."

The same ordinance afterwards recited that the providing an easy, plain and summary method of proceeding for the recovery of small debts, with a due regard at the same time to a certain degree of solemnity and deliberation which ought ever to accompany the administration of public justice, very much contributes to promote industry and to encourage useful credit; and proceeded to establish a new mode of recovery for small demands. Jurisdiction over all manner of disputes for any sum not exceeding twelve pounds currency was transferred to the Judges of the Common Pleas. They were authorized to hear and determine all such disputes as to them should seem "just in law and equity." The times of sitting of the Courts of Common Pleas were by the same ordnance altered.

These Courts were ordered to be constantly open to the suitor at all times throughout the year, except on Sundays, and three weeks at seed-time, a month at harvest, and a fortnigh' at Christmas and Easter, and except during such vacation as might be appointed by the Judges for making their circuits throughout the Province. The Circuits were authorized to be held twice in every year. The Judges were, however, required to issue process and "to do and execute all and every other matter touching the administration of Justice, without regard to terms or any stated periods of time as limited by the ordnance of September, 1764." Different times were to be set aside for the exercise of superior and of inferior jurisdiction—that is, demands over or under twelve pounds. For the former, it was necessary for the Judges of Quebec and Montreal to sit at least one day in every week, Sundays excepted, the particular day being appointed by the Judges. For the latter, the day Friday was appointed by the ordnance. In order that parties prosecuting demands not exceeding twelve pounds might proceed "with despatch, certainty, and moderation of expense," the steps in the cause were made few and simple. Beasts of the plough, implements of husbandry, tools of trade, and one bed and bedding belonging to the debtor were in great part privileged from execution. Lands and growing crops were, however, in default of goods and chattels, liable to be seized and sold. The crops "at the proper season immediately after the reaping or mowing of the same," were sold upon the land in satisfaction of the execution debt.

When it was shown to the satisfaction of the Judge that the defendant was in "distressed circumstances," an order might be and was issued to levy the demand by instalments extending over a period not longer than three months. But if it appeared that the defendant, after service of the writ of summons, had conveyed away or secreted his goods, "in order to defeat the plaintiff," an execution for the arrest of the defendant was issued, under the direction of the Judge. These provisions applied more particularly to suits for claims under twelve pounds brought in the Districts of Quebec and Montreal. For the determination of claims of a still inferior nature—that is, under three pounds—Commissioners resident in remote parts of the Province were appointed; they had jurisdiction whenever the title to land was not brought in question, in as full and ample a manner as the Judges of Quebec and Montreal in demands under twelve pounds.

The law of execution was at this time as now, in Lower Canada, very different to what it is in Upper Canada; there was no priority of execution. The Provost Marshal, bailiff, or other person having the execution of process, upon receiving several writs sold the whole of the defendant's real and personal estate, and after deducting his own costs out of the proceeds divided them "amongst the several plaintiffs in proportion to the amount of their several judgments." This is still the law of Lower Canada. In Upper Canada, on the other hand, "first come is first served," and the creditor under whose execution the seizure is first made is entitled to be paid in full, without any reference to other execution creditors.

DELIVERY OF JUDGMENTS.

The following are the days appointed for the delivery of judgments in the Courts of Queen's Bench and Common Pleas.

Queens Bench.....	Monday, 7th March,	12 o'clock.
	Saturday, 12th March,	2 o'clock.
Common Pleas.....	Monday, 7th March,	2 o'clock.
	Saturday, 12th March,	12 o'clock.

SPRING CIRCUITS, 1859.

EASTERN CIRCUIT.

THE HON. MR. JUSTICE McLEAN.

BROCKVILLE	Tuesday,	5th April.
PERTH	Tuesday,	12th April.
OTTAWA	Tuesday,	19th April.
L'ORIGNAL	Tuesday,	3rd May.
CORNWALL	Monday,	9th May.

MIDLAND CIRCUIT.

THE HON. MR. JUSTICE BURNS.

WHITBY	Monday,	21st March.
COBOURG	Monday,	28th March.
PETERBOROUGH	Monday,	11th April.
BELLEVILLE	Friday,	15th April.
PICTON	Wednesday,	27th April.
KINGSTON	Monday,	2nd May.

HOME CIRCUIT.

MILTON	The Hon. Mr. JUSTICE BURNS	Monday,	14th March.
NIAGARA	The Hon. Mr. JUSTICE McLEAN	Tuesday,	15th March.
WELLAND	The Hon. Mr. JUSTICE McLEAN	Tuesday,	22nd March.
HAMILTON	The Hon. CHIEF JUSTICE DRAPER	Thursday,	31st March.
CAYUGA	The Hon. CHIEF JUSTICE DRAPER	Wednesday,	4th May.
BARRIE	The Hon. Mr. JUSTICE RICHARDS	Tuesday,	3rd May.
OWEN SOUND,	The Hon. Mr. JUSTICE RICHARDS	Tuesday,	10th May.

OXFORD CIRCUIT.

THE HON. CHIEF JUSTICE DRAPER.

GUELPH	Monday,	14th March.
BERLIN	Monday,	21st March.
STRATFORD	Friday,	25th March.
WOODSTOCK	Monday,	18th April.
BRANTFORD	Tuesday,	26th April.
SIMCOE	Tuesday,	10th May.

WESTERN CIRCUIT.

THE HON. MR. JUSTICE RICHARDS.

LONDON	Tuesday,	15th March.
ST. THOMAS	Tuesday,	29th March.
CHATHAM	Tuesday,	5th April.
SANDWICH	Tuesday,	12th April.
SARNIA	Tuesday,	19th April.
GODERICH	Tuesday,	26th April.

TORONTO.

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., CHIEF JUSTICE.

Monday, April 11.

U. C. LAW JOURNAL IN ENGLAND.

We cannot but feel gratified by the favorable notice of this journal which appears in the columns of an English contemporary holding the highest position as an organ of those Courts to the benefit and advancement of, which in Canada we have ever given our best efforts, and devoted a large portion of our space.

The *County Courts Chronicle*, (edited by George Harris and Charles John Plumptre, Esquires, gentlemen whose ability and learning the reputation and extensive circulation of that periodical, has most fully established), needs no praise from us. We are constantly indebted to its columns for much valuable reading and information, and we do not hesitate to express our gratification at being able to place before our readers an opinion from a journal of such recognized ability.

Speaking of the late numbers of the *Law Journal*, it is said:—

"They are, as usual, excellent in material, and the leading articles full of interest to the English reader. There is one article in the November number, which is valuable to the profession, alike from the historical learning it displays, as from its plain and practical character, viz., '*The Right of an Attorney to Costs.*' The December number is, of the two, however, more generally interesting, in the subjects discussed in its pages, to the English practitioner; and, at a time when so much discussion is taking place on the legality and policy of '*Trade Protection Societies*,' we strongly recommend to the attention of all members of the profession the article bearing this title. As usual, the Reports are admirably condensed; and now that the publication is entering on the fifth year of its existence, we cordially wish it a still further sphere of usefulness."

LAW SOCIETY, U. C.—TRINITY TERM, 1858.

EXAMINATION FOR CALL.

REDDIE'S ENQUIRIES.

1. What are the two great objects in the internal private law of a state?
2. What is the origin of positive law?

STOREY'S EQUITY JURISPRUDENCE.

1. How are assets divided; what are the principal differences in the administration of these two species of assets by a court of equity?
2. In what cases will a bill of peace lie?
3. When will a court of equity open a stated account?
4. In what cases will a settlement made by a married woman after the conclusion of a treaty of marriage, and without the privity of the intended husband be set aside?
5. Is there any, and what distinction observed by courts of equity in dealing with trusts executed and trust executory?
6. How is an equitable mortgage by deposit created?
7. Mention some cases in which courts of equity will order instruments to be delivered up and cancelled?
8. Will a court of equity in any and what cases order the specific delivery up of chattels.

WILLIAMS ON REAL PROPERTY.

1. If by a deed of bargain and sale A. seised in fee conveys to B. and his heirs to the use of C. and his heirs, in whom does the Statute of Uses vest the legal estate?
2. In what cases does a use result to a feoffor?
3. Can a man in any and what manner convey to himself?
4. What is the distinction between the covenants for title entered into by a vendor of real estate, and those entered into by a mortgagor of the like property?
5. Can a tenant in tail bar his issue without barring those in reversion or remainder, and if yea, give an instance in which this may occur?
6. Can real property settled to the separate use of a married woman be rendered for any and what length of time inalienable by her?
7. By what statute were estates tail as they now exist originally established?

BLACKSTONE'S COMMENTARIES.

1. What are three sorts of colonial governments mentioned by Blackstone?
2. What are the three great heads of the rights of British subjects?
3. What are the constitutional parts of a Parliament under the British constitution?

TAYLOR ON EVIDENCE.

1. What is a latent and what a patent ambiguity in a deed, which may be explained by parol evidence?
2. Give some instances of evidence excluded on the ground of public policy.
3. Are there any, and if so, what cases in which more than one witness is required?
4. What is the meaning of *ante litem motam?*—does it mean a suit actually commenced?

6. What amount of religious belief is necessary to render a witness competent?

6. What exceptions are there to the presumption that the date of a letter or other writing is correct?

SMITH'S MERCANTILE LAW.

1. What is a total loss? In what cases is the insured entitled to abandon,—and what is the effect of abandonment?

2. If one partner sells the goods of the firm as his own, can the firm sue the vendee, and if so, under what restrictions?

3. What is requisite to a good tender?

4. Where there are different debts between the parties, to what debts, and within what time, can the creditor appropriate a payment not appropriated by the debtor at the time of payment?

5. Is a sleeping partner, on retiring from the firm, bound to take any step to free himself from future liability of the firm, and why?

ADDISON ON CONTRACTS.

1. Need an agreement, which may or may not, according to circumstances, be performed within the year, be in writing?

2. Is there any, and what distinction, between a promise to pay the debt of another, when made to the creditor or the debtor himself?

3. Can money, paid on an illegal contract, be recovered back; does it make any difference in this respect whether it is paid to the other contracting party or a stakeholder?

BYLES ON BILLS.

1. Can a bill be either drawn or accepted for the payment of a sum of money on condition? If there is any distinction in this respect between drawing and acceptance, state the reason.

2. In what cases will delay to present a bank cheque for payment discharge the drawer?

3. What is an indorsement in full, and in blank, and what effect have such indorsements respectively?

4. According to the rate of interest, in which country, is the interest on a foreign bill, to be calculated against the acceptor and drawer respectively?

5. Are bills payable at sight, or on demand, or either of them entitled to days of grace?

6. What parties to a bill are entitled to notice of dishonour, and within what time?

7. Is want of consideration a good defence against a *bona fide* holder of a bill, who has taken it when overdue?

STATUTE LAW AND PRACTICE.

1. Is there any and what statutory provision in Upper Canada as to the liability of purchasers from trustees to see to the application of the purchase money?

2. In what cases is the Court of Chancery in Upper Canada authorized to order the sale of an infant's real estate?

3. Will a registered judgment prevail over a prior unregistered deed?

4. Upon the death of a tenant in tail in possession, having in his lifetime entered into a valid agreement for sale, will the Court of Chancery enforce specific performance of the contract against the issue? Is there any and what statutory provision as to this?

5. In what cases will an Infant be entitled to a day to shew cause in the decree?

6. What course should a receiver take if he is resisted in acquiring possession of property which he claims under the order?

7. When the plaintiff in a foreclosure suit dies before decree, what is the course of proceeding to revive the suit?

8. What matters of account can the master investigate without a special reference?

9 State the practice as to motion for decrees.

10. What is the effect of a plaintiff dismissing his own bill after the cause is set down for hearing?

11. Where a party pleads, and demurs to the same pleading, in what order are the issues of law and fact to be disposed of?

12. How many days' notice of trial is now necessary?—has there been any change in this respect?

13. At whose instance can a new trial, in criminal matters, be granted?

14. Where a commission is issued to examine witnesses in a foreign country, how must the answers to the interrogatories be returned?

15. What is the power of a judge at *nisi prius*, with regard to adjourning the trial?

16. In what cases will an order be granted for the inspection of documents in the possession of the opposite party?

CONSOLIDATION AND CODIFICATION.

Rational advocates of law reform have more to fear from the extravagance of their friends than from the hostility of opponents or the indifference of constituted authorities.—If any practicable scheme is proposed, it is straightway caricatured by visionary projects, which serve only to cast ridicule on the whole subject, and to arm objectors with arguments which it is difficult to answer. This has been especially the fate of all attempts to reduce our cumbrous statute-book to some reasonable compass. No sooner is consolidation brought under discussion than it is capped by the wild project of codifying the whole of the unwritten law, or (to adopt the phraseology of a paper lately read before the Law Amendment Society) consolidating the 1200 volumes of reported decisions. No one who looks soberly at the great obstacles which present themselves in the way of the most modest scheme of consolidation, can doubt that the only chance of success is to narrow the enterprise within manageable limits. The mere legal and literary difficulties of reducing the statute law into a code of moderate extent are serious enough. What is to be done with the phraseology of old statutes, which by a long series of judicial decisions have acquired a definite meaning very different from that which the mere letter of the law would convey? Is the old inadequate language to be retained, and to be interpreted, as it now is, by the light of the reports, or is an attempt to be made to modify familiar clauses by introducing, in explicit terms, all the law which legal implications and refinements have grafted upon them? These and a multitude of similar difficulties would render the task of a commission, armed with sovereign powers, sufficiently trying. But, besides all this, we have a still more formidable obstacle to surmount, in the jealousy with which Parliament is disposed to regard any attempt to alter a tittle of the law, under the pretext of consolidation. We do not doubt that such obstacles might be surmounted, if the task were only undertaken in earnest and prosecuted with a consistent sagacity which the existing commission has not yet displayed; but we are quite satisfied that, if the undertaking is to be complicated by embracing the reports as well as the statutes within the scope of the consolidation, it is doomed to certain failure.

Mr. Webster, the author of the paper to which we have referred, reproduces all the hackneyed arguments in favor of a consolidation of the judge-made law of the reports, but they really amount to little more than this—that decisions are sometimes conflicting, or uncertain, in which case they ought to be superseded by the authoritative voice of a code pronouncing clearly on one side or the other; and that, even where the law is absolutely settled, it would be better to have it recorded once for all in a code, than buried in volumes with which none but lawyers, and not all

of them, are familiar. Reasoning of this kind assumes two things, neither of which can be admitted. One is that the unwritten law could be reduced to a simple code, without introducing more uncertainty by the imperfection of its language than it would cure by the settlement of open questions. The other assumption is, that such a code, when prepared, would be allowed to pass without alteration through the two Houses of Parliament.

Whatever may be thought of the first of these difficulties the idea that Parliament will delegate to any body of men the power of arbitrating, as it were, between all the conflicting judgments that have ever been given is utterly absurd. And if there be not such unqualified delegation of authority the code must go, in the usual course, into committee, and would come out of it filled with contradictions and absurdities, compared with which the existing uncertainty, which has been so much exaggerated, would be a very trifling inconvenience. Our objection to Mr. Webster's scheme is, that it is to a great extent unnecessary and altogether impossible. It would secure no imaginable purpose to stuff out a code with the universally accepted doctrines of the common law. If the first article were gravely to enact or declare that the eldest son was his father's heir-at-law, would any one be the better for the publication of the platitude? Mr. Webster gives in his paper some specimens of the sort of dogmas which he would put into his consolidated book of the common law. Here is one example—

A legal mortgagee is not to be postponed to a prior equitable mortgagee, upon the ground of the legal mortgagee not having the title deeds, unless there be fraud, or gross and wilful negligence, on the part of the legal mortgagee.

It is impossible to conceive anything more utterly useless than a formal enunciation of such a dogma as this. The difficulties which present themselves now in the contests for priority, to which such a clause would apply, are in determining what circumstances constitute the "fraud or gross and wilful negligence" referred to, and Mr. Webster would find it very difficult to suggest any set of circumstances under which a decision would be more easily arrived at by the aid of his proposed clause than it may be at present. The very nature of such questions (and a large proportion of our entire equity jurisprudence is precisely of the same character), precludes the possibility of codification. Words of vague general import, like fraud, negligence, acquiescence, undue influence, notice, and a host of others, which would form the essential language of the code, have really no precise and definite meaning apart from the circumstances of particular cases. They are terms involving distinctions, not of kind, but of degree, and no acuteness on the part of jurists would enable them to frame an explicit code, capable of interpreting itself, without the aid of decided cases. After all the head-notes of all the reports had been revised and arranged, and reduced into the shape of a statute, nothing of a practical kind would be done; for it would be just as necessary then, as it is now, to refer to the facts of the reported cases, in order to interpret, with any approach to exactness, the general propositions of law, of which such a code would consist. A compilation of legal platitudes in ambiguous language would afford but little assistance, either to the profession or the bench; and though it might, doubtless, be desirable to introduce more precision into some rather hazy districts of the law, it is exactly in this part of its task that a commission for the consolidation of the reports would be certain to get into conflict with Parliament, if not within itself, and to end by abandoning its functions in despair. Where the unwritten law is settled, a code is not wanted; where it is unsettled, the formation of a code would be impracticable

With a singular inversion of ordinary reasoning, Mr. Webster argues that, "if under arbitrary Governments the laws had been codified, so as to command respect, much more easily could a code be framed for a nation governed by its own intelligence." With all deference to Mr. Webster, we should have thought that an absolute governor, with only his own will and pleasure to consult, could impose a code of laws more easily than a commission, who have not only to satisfy themselves on a thousand difficult points, but to induce the 660 representatives of the "national intelligence" to accept, without inquiry, the projected alterations of the law. Even if the statutes alone are dealt with it is only to probable that the whole scheme may be defeated by the reluctance of Parliament to take the wisdom of the consolidators for granted, and pass their code without debating and altering it clause by clause. But by including the settlement of all the remaining uncertainties of the common law among the objects of the consolidation, the chance which there now is of seeing the work completed would be utterly destroyed.

Mr. Webster, and those who think with him, are not the first persons who have courted failure by forgetting to keep their enterprises within the bounds of possibility; and we hope that no encouragement will be given by the Law Amendment Society to a project which will render vain the exertions which have already been devoted to the more practical though sufficiently arduous business of statute law consolidation.—*Solicitors' Journal.*

COMMON CARRIERS.

One of the most important and fundamental doctrines of our law with regard to common carriers, as distinct from private carriers, and carriers under special agreement, is, that they are insurers, and liable for all damage accruing to goods during their carriage, unless it is caused by the act of God or the Queen's enemies, notwithstanding the conduct of such common carriers has been entirely free from negligence. (*Forward* v. *Pittard*, 1 T. R. 27; *Hyde* v. *The Trent and Mersey Navigation Company*, 5 T. R. 389). Thus says Holt, C. J., in his luminous judgment in the case of *Coggs* v. *Bernard*, (Raym. 917), with regard to a delivery to carry, or otherwise manage, for a reward to be paid to the bailee, "Those cases are of two sorts—either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events; and this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged, 26 Car. 2, in the case of *Moss* v. *Slew*, (Raym. 220; 1 Vent. 190, 238). The law charges this person, thus intrusted, to carry goods against all events, but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him,

nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon, in that point." And again, Best, C. J., in *Riley* v. *Horne*, (5 Bing. 217), says, "When goods are delivered to a carrier," (meaning a common carrier), "they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they would not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer; the carrier is only to be relieved from two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, the act of God and the king's enemies."

Now, first, let us inquire what is meant by "the act of God." Sir William Jones contented that "the act of God" was the same as "inevitable accident;" but Lord Mansfield, in the case of *Forward* v. *Pittard*, (1 T. R. 33), denied this, and decided that a common carrier was liable for what might well be called "an inevitable accident," and laid down that "the act of God" must be a "natural necessity," as distinct from a mere inevitable accident; and gave, as examples of his meaning, "winds," "storms," and "sudden gusts of wind." And in the late case of *Oakley* v. *The Port of Portsmouth and Ryde United Steam-packet Company*, (11 Exch. 618), "an act of God" was defined by Martin, B., to mean "something of an overwhelming nature, something sudden and visible, such as lightning or tempest—not a mere misfortune occurring in the course of transit." And it has been decided, (*The Proprietors of the Trent Navigation* v. *Wood*, 4 Dougl. 287), that where a ship ran against an anchor which had been left in the bed of a river by another ship, and was thereby lost, this was not a loss by the act of God. And again, that where goods were destroyed by an accidental fire, although it originated a considerable distance off the place where the goods were, (*Forward* v. *Pittard*), this was not such a loss. But where the loss was caused by the freezing of a canal, that was considered a loss by the act of God, and the carrier was held exempt. (*Bowman* v. *Teall*, 23 Wend. 306). And again, where the defendants (common carriers by water) were conveying the plaintiff's goods for hire in a boat towed by one of their steam-packets, and as the packet approached a pier to take in passengers, the captain stopped its course to allow another vessel to leave the pier, (a proper act of the captain), and the day being boisterous, with a good deal of sea running, though the weather was not unusual, the effect of the stoppage was to drive the tow-boat against the packet, and it and the plaintiff's goods were thereby damaged; in this case (in which Martin, B., used the expressions above alluded to) it was held that there was no loss by the act of God. But when it is said that the carrier is exempt if the loss happens by the act of God, it must be borne in mind that the act of God must not only have contributed to the loss, but have been the proximate cause; and it was held on this ground, viz., that the act of God was not the proximate cause, that the carrier was liable where a bank in a river, formerly good anchorage ground, had been altered and made unsafe for anchorage by a sudden flood, and a vessel had been lost on it, and her mast floating, but attached to her, drove a second vessel (the vessel whose loss was in question) against the bank, and she was lost, though she would not have been lost if the bank had continued in the old state. In some American cases it seems to have been supposed that "perils of the sea" meant exactly the same thing as "the act of God;" and if this were so, a long line of shipping cases would have an important bearing on the point we are discussing; but we apprehend that such a doctrine is not tenable; for, to take one instance, it has been decided, that if one vessel run down another by misfortune, (*Buller* v. *Fisher*, 3 Esq. 67), or by gross negligence, (*Smith* v. *Scott*, 4 Taunt. 126), this is a loss by perils of the sea; whereas it is clear, according to the cases above cited, that it could not be held to be a loss by the act of God.

By the "Queen's enemies" is meant public enemies with whom the nation is at open war, and not merely robbers, thieves, or other private depredators, however much they may be deemed, in a moral sense, to be at war with society; and therefore losses which are occasioned even by rioters and insurgents are not such. (Story's Bailm. s. 526). It has been, however, sometimes suggested that pirates came within the definition of "Queen's enemies," as being general enemies of mankind; but it is apprehended that there is no sound distinction between them and other robbers, and that a loss by pirates is not a loss by the Queen's enemies, but by perils of the sea. (*Pickering* v. *Barkley*, 2 Roll. Ab. 248).

Up to this point it will be observed that we have treated of the liability of the common carrier as an insurer without any reference to any peculiarity in the nature of the goods themselves: we will now proceed to examine whether this makes any difference in the liability; and if it does, to what extent.

On turning to that portion of Mr. Justice Story's treatise on Bailments which treats of the liability of common carriers, we find that he lays down that a common carrier will not be liable for injuries accruing from ordinary wear and tear and chafing of goods in the course of their transportation, or from their ordinary loss or deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect or wrong of the shipper thereof. Thus, for example, he says, "The carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruit in the course of the voyage, from their inherent infirmity or nature, or from the spontaneous combustion of goods, or from their tendency to effervescene or acidity, or from their not being properly put up and packed by the owner or shipper: for the carrier's implied obligations do not extend to such cases." (Sect.

492 a). And again—"A carrier may also shew in his defence that the goods have perished by some internal defect, without any fault on his side; for his warranty does not extend to such cases. And if from the nature of the goods carried they are liable to peculiar risks, and the carrier takes all reasonable care, and uses all proper precautions, to prevent injuries, and if, notwithstanding, they are destroyed by such risks, he is excusable. Thus, if horses or other animals are transported by water, and in consequence of a storm they break down the partitions between them, and by kicking each other some of them are killed, the carrier will be excused, and it will be deemed a loss by peril of the sea." (Sect. 576). That there should be some limitation of this kind is only reasonable, for it would be monstrous to hold that because, in the natural course, and entirely apart from the carriage, wine fermented or fruit decayed during their transit, the carrier was liable. Besides, the very reason which is given for holding common carriers liable as insurers (viz. that the damage may have accrued from their fraudulent or improper mode of dealing with the article carried) fails in a case where the nature of the injuries renders it clear that they did not result from fraudulent or improper treatment by the carrier—the maxim, "Cessat ratio cessat lex," applying most fully. Though as we apprehend, even in this case the onus would lie on the carrier to shew that the injury did arise from the inherent nature of the article, and not from the carriage—an opinion which is countenanced by the case of *Hawkes* v. *Smith*, (Car. & M. 72), where the contention was as to the loss of weight in certain bones during carriage, and as to whether the loss accrued from natural causes or not. The case was tried before Lord Cranworth, and he seems to have assumed, that if the loss arose from natural causes, the carrier would not be liable, and decided that the onus of shewing that the loss did so arise was on the carrier.

An injury, however, may popularly be said to arise from an internal defect or peculiar risk in the article itself, either when it arises therefrom, utterly irrespective of the carriage, or when that defect or peculiarity is brought into play by the act of carriage; and further, the defect or peculiarity may or may not be known to the carrier. Now, for an injury arising from an internal defect in the article, utterly irrespective of the carriage, as we have already stated, we apprehend that a common carrier would not be liable; and this we maintain for the reasons we have given, and because we think that the fair deduction from the doctrines set forth in the commencement of the article, and from the reason of the thing, is, that a common carrier is an insurer only in cases where *extraneous* causes conduce to the injury. (See also *Hudson* v. *Bazendale*, 2 H. & Norm. 575). But where the internal defect or peculiar risk is excited or produced by the carriage, however careful that carriage may, be, or by what may arise to the article from external causes (not, of course, including in such category the natural effect of the atmosphere, &c., apart from the carriage) during its transit, we are inclined to think that the carrier is liable; at all events, Mr. Justice Story, we submit, has stated the full extent of the common carrier's non-liability, and that such carrier can only exempt himself by shewing that the injury must have accrued, however careful the carriage was. For if this were not so, a door would immediately be opened for an inquiry into whether the carrier was negligent or not—an inquiry into which, we submit, on the authorities we have cited, that a common carrier is precluded from entering. The carrier may protect himself by refusing to carry without special conditions, which in such case he is entitled to require, (1 Smith's L.C. 101 b)—a position which is illustrated by the following extract from the judgment of Parke, B., in the case of *Carr* v. *the Lancashire and Yorkshire Railway Company*, (21 L. J., Ex., 261):—"Before railways were in use the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried on railways; and horses, which were used to draw vehicles, are now themselves the objects of conveyance. Contracts, therefore, are now used with reference to the new state of things, *and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks* to which they are in modern times exposed. Horses are not conveyed by railways without much risk and danger, and the rapid motion, the noise of the engine, and various other matters, are apt to alarm them, and to cause them to injure themselves. *It is therefore very reasonable that carriers should protect themselves against loss by making special contracts.* The question here is, whether they have done so."

And with regard to the knowledge of the common carrier, we may cite a passage from the judgment of the same learned judge in the case of *Walker* v. *Jackson*, (10 M. & W. 169)—a case where the defendants were not charged as common carriers, which makes the obervations unfavourable to the carrier à fortiori applicable to the question we are discussing. "If anything," he says, "is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions as may be necessary; and if he ask no such questions, and there be no fraud, to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is." But the carrier has no right to ask the person who brings a package, in all cases, what the contents are. *Crouch* v. *The London and Northwestern Railway Company*, 23 L. J., C. P., 73). And we may also refer to the important case of *Brass* v. *Maitland*, (6 El. & Bl. 471.; 3 Jur., N. S., part 1, p. 710; 26 L. J., Q. B., 49), where an action was brought by the owner of a general ship against a shipper for shipping dangerous goods, by which the other goods on board his ship were damaged, and where it was held, that though a carrier has no right to accept any communication respecting the nature of the goods, where he may easily discover it, yet the shipper ought to communicate their nature, where the shipowner has no means of knowledge of the dangerous nature of the goods, or of defective packing, which increases the danger. From which case, though certainly not in point, we may perhaps be allowed to infer, that, if the case ever came before the Courts, they would decide that the owner of goods should communicate internal defects or peculiar risks to the carrier, where he cannot easily discover them, or where the circumstances are not such as would prompt him to make inquiries which would lead to such discovery. Besides, if we are correct in thinking that a common carrier is liable for injuries to goods, when their peculiar properties or risks have been brought into play by the carriage, (although careful), and that he should make a special contract to protect himself, it would seem to follow, as a natural consequence, that he should have reasonable means of ascertaining the nature of the article.—*Jurist.*

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

LONDON, February 15th, 1859.

GENTLEMEN.—Your opinion on the following, in the next number of your Journal would much oblige. Suppose a merchant send a pedler into the country to sell goods, and for such goods he takes notes payable at the office of the merchant. Can such parties be sued at the Division in which the notes are made payable?

In the Division Court Act of May 30th, 1855, clause number 1, it is stated that cases may hereafter be brought and tried in the Division in which the cause of action arose. Does not the cause of action arise where the default is made in payment of the note?

I beg to remain,
Your obedient servant,
JAMES SMITH.

P.S.—In a great many copies of the Division Court Act of May 30th, 1855, in the clause above mentioned, the words "in which the cause of action arose," has been left out by some error of the printers, from which cause I suppose the difference of opinion has arisen.

[As a general rule, the cause of action arises where the goods are sold and delivered. If the notes taken were made specially payable at the particular place, "and not otherwise or elsewhere" the action might probably be brought in the Division in which such place was situate.—EDS. L. J.]

To the Editors of the Law Journal.

LONDON, C.W., February 15th, 1859.

GENTLEMEN,—Having frequent communications with the several Division Courts in the transmission of summonses and transcripts, and returns thereon, I find fees charged that are not in the table of fees. You will please to state if the following fees can, in your opinion, be sustained; and whether as a general rule, any fee not expressed in the schedule can be charged, even though the service be performed.

CLERK:

	s.	d.
1. Returning *foreign* summons, in addition to fees for receiving, service, and affidavit	0	3
2. Transmitting papers, such as applications for new trials, &c., to Judge	1	0
3. Administering oath, or swearing witness	1	0

BAILIFF:

4. Mileage on summons *not* served, but actually travelled.
5. Mileage on *same* execution, every journey bailiff goes to defendant to effect a settlement.
6. Poundage, in addition to fees for levy and mileage on executions where *there is no actual sale*, but a stay from plaintiff, or settlement between the parties, or amount paid to the bailiff in cash.
7. Fees for a bond, when it is an agreement to receipt or deliver property when required.
8. Fees for notices of sale under *executions*, and not on attachments.

Your inserting the above with your opinion thereon will oblige, A CLERK.

[Where a service is required by statute to be performed by an officer and no fee is attached, the service, as a general rule is to be performed gratuitously.

1. We know of no authority for this charge.
2. Nor do we know of any authority for this one.
3. The Clerk as a Commissioner is entitled to a fee of 1s. for swearing affidavits to be used in the Court,—*e. g.* affidavits for a new trial.
4. No mileage can be charged except service be effected.
5. Not allowable.
6. There is no poundage unless upon the amount realized, but this *may* attach without an actual sale.
7. The agreement may in effect be a bond, but the prudent officer would obtain payment at the time for procuring any instrument to make himself safe.
8. We think that such a fee may be fairly charged.—EDS. L. J.]

To the Editors of the Law Journal.

PRESTON, 18th February, 1859.

GENTLEMEN,—Among the many differences of opinion respecting the fees chargeable on suits, one has lately occurred which I beg to submit to you:—

The question is: whether a fee for "*hearing*" is chargeable on a judgment summons suit, on which the defendant has been "*examined*" by the judge, according to summons.

At the last sittings of this Court, a professional gentleman asked me whether I charged a hearing fee on such suits, and upon answering the question in the affirmative, he told me that I was wrong. The reasons he gave are, that because the defendant had been *compelled* to attend and give answers to certain questions, under a penalty of being committed if he failed to attend and give such answers, this did not constitute a "*hearing*" in the meaning of the Act, and that therefore it would be wrong to charge a hearing fee.

With due deference to that gentleman's superior knowledge of the law, I must confess that I did not see the force of his argument.

The tariff has a fee in fees chargeable for undefended hearings and for defended hearings, and as the taxing officer, I cannot call an examination of a defendant under a judgment summons any thing else but "*a hearing.*"

The questions asked of the defendant and answered by him are heard by the judge, and according to them the judge gives his order, which in my opinion constitutes a hearing, and if the defendant denies or contradicts statements made by the plaintiff respecting the matter at issue, then it might be construed "*a defended hearing.*"

To omit charging a fee for hearing in any suit brought before the judge in the Court, would in my opinion be incorrect, it being a fee belonging to the fee fund over which the taxing officer has no controul, and since, on a judgment summons suit, the fees for entry, summons, service, mileage, &c., are charged; I see no reason for omitting the fee for hearing. In rule 27, it is even laid down that on withdrawal in open court, a hearing fee shall be charged unless otherwise ordered.

However notwithstanding my present opinion, I am always open to conviction, being aware that laymen frequently err in construing the statutes, which when interpreted by professional gentlemen have a very different meaning, and I therefore beg to ask your opinion on this subject.

With reference to the Bailiff's fee for attending to swear as mentioned by your correspondent, J. H., page 33, of last number, I beg to state, that in Vol. II, page 42, there *is* an opinion expressed and in Vol. III, page 177, your correspondent, M. P. E., mentions his practice.

This fee of one shilling for attending to swear has been the subject of correspondence between several clerks, and I have had an opportunity of hearing the views of others.

The words in the tariff: "*out of the division*" are generally interpreted to mean "out of *the division of the Bailiff*" but from this opinion, I have always differed; my construction is "out *of the division from which the summons was issued.*" Ac-

cording to this interpretation, I have allowed the Bailiff of this division, the above fee on all those summonses served by him, that were "*sent*" to this office for service, whether the defendant happened to be served in this division or not, and also on all those summonses issued by this Court, and by him served out of this division.

The several clauses in the Division Court Acts relating to service out of the division, appear to me to show that the Legislature entertained the view that Bailiff's, strictly speaking, are only made Bailiffs for their respective divisions and not for the whole County or Province; but that in cases of emergency or for facilitating the business of the Court, and for the more effectual operation of the Acts, they are also allowed to effect service beyond the limits of their respective division. The last Act, (1855) distinctly states in section 2, that a Bailiff shall not be required to travel beyond the limits of the division for which he is Bailiff, which I think confirms my view. If then it was supposed by the Legislature that, as a general rule, Bailiffs do not travel beyond the limits of their respective divisions, but that suits entered, where defendant resides in another division, are sent to that division for service; and for attending to swear to such service the Bailiff shall receive a fee; then the meaning of "*out of the division*" does not allude to the *Bailiff* but to the *Summons*. If the Bailiff serves a summons without the limits of the division for which he is Bailiff, and such summons has been issued in another Division, then he is certainly entitled to the fee, as long as it remains in the tariff, (whether he performs an extra duty or not is not for the taxing officer to investigate,) for that summons is served not only out of the division from which it was issued, but also out of the division for which he is Bailiff. On a "*foreign summons*," if served by him, he is entitled to the same fee, since it was issued in another division, and it is but reasonable that a fee be allowed to him since these summonses often require his immediate attention. He has often for one single summons to attend at the clerk's office to make affidavit of service. These summones sometimes come at a time when he is otherwise engaged for his own Court, and for his extra trouble and loss of time he should be paid, and I think the Act fully authorizes the fee.

Owing to a difference of opinion on this subject, between several of my correspondents and myself, I asked the question in the *Law Journal*, Vol. II, page 41, to which (on page 42) the answer was given, which slightly differed with my own practice. In the spring of 1857, the same question again came up and was submitted to the judge who ruled:

That the Bailiff be allowed the fee of one shilling for the attending to swear to every affidavit of service of summons, when such summons had been served out of the division from which it had been issued.

Respectfully yours,

——— Otto Klotz.

[Our correspondent thinks before he writes and understanding his subject, expresses himself well and to the point. Indeed he leaves us little to say. We have no doubt at all that a hearing fee is chargeable. There is a hearing and a very important one too. The 93rd section of the Division Courts Act, even speaks *in terms* of a hearing. The words are the judge "before whom such summons shall be *heard*."

To the Editors of the Law Journal.

Gentlemen,—Your opinion on the following will oblige.

CASE No. 1.

A. is Bailiff of a Division Court, and an execution is placed in his hands against the goods and chattels of B., and under it he seizes property which he leaves on the premises of B., taking a bond that the same would be delivered up when demanded. In the meantime the Bailiff advertises the property for sale; and on going to the defendant's premises it is given up to him. The Bailiff exposes the property to sale; but for want of bidders postpones it and re-advertises it, leaving it still in the defendant's possession. A. then, in pursuance of his last notice, goes again to the premises and effects a sale under the execution.

Quære. Is the Bailiff entitled to mileage taxable against the defendant for *going to sell*, and for mileage going to sell after the postponement?

CASE No. 2.

A. is Bailiff of a Division Court, and an execution is placed in his hands against the goods and chattels of B., and under it he goes to B.'s premises to make a seizure, but finds no property, it being concealed, and place of concealment unknown to the Bailiff. A. is afterwards informed where the property is, and effects a seizure and sale.

Quære. Is the Bailiff allowed mileage for *going to make* a seizure which he did not effect, as well as for going to make the seizure which he effected: and in short is a Bailiff entitled to mileage for *going to sell* in any case?

A County Judge.

CASE No. 1.

[The fair reading of the law seems to us to warrant the construction that mileage necessarily travelled to *enforce* an execution may be allowed.

Suppose a defendant reside ten miles from the Clerk's office; the Bailiff goes to this house to enforce the execution, and finds in the defendant's possession property which it would be difficult to remove, or the removal and keep of which to the day of sale would eat up half the property available. It would certainly be serving both plaintiff and defendant to allow the property to remain in the possession of the latter till the day of sale; and in practice the Bailiff usually does so, upon being properly secured for its forthcoming.

At the time of seizure the Bailiff puts up advertisments for sale and leaves for the performance of his duty on other matters elsewhere. When the day of sale arrives he must of necessity be present to sell the property and in doing so he is acting in the enforcement of the execution.

In the case put our opinion is that the Bailiff would be fairly entitled to mileage for his three trips—all necessary to enforce the process of execution.

CASE No. 2.

We think the Bailiff is not entitled to mileage, as against the defendant for going to make the seizure which he did not effect. The latter part of the query is answered in case No. 1.—Eds. L. J.]

THE MAGISTRATES' MANUAL.

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Continued from page 35, Vol. V.

Supplement—Summary Trials—Committal.

If the person charged confess the charge, or if the Recorder or Police Magistrate after hearing the whole case for the prosecution and the defence, find the charge to be proved, then he may convict and commit the offender to the Common Gaol or House of Correction, there to be imprisoned with or without hard labour for any period not exceeding three calendar months. *

Form of Conviction.—The conviction may be in this form:

—— ——, To wit:

Be it remembered that on the —— day of —— in the year of Our Lord —— at ——, A. B., being charged before me the un-

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* 20 Vic., cap. 27, sec. 1.

dersigned ——, of the said City, and consenting to my deciding upon the charge summarily, is convicted before me, for that he the said A. B, &c., (*stating the offence, and the time and place when and where committed*); and I adjudge the said A. B., for his said offence, to be imprisoned in the —— (and there kept to hard labour) for the space of ——

Given under my hand and seal, the day and year first above mentioned, at —— aforesaid.

J. S. [L. S.]

Dismissal.—On the other hand, if he find the offence not proved, he is to dismiss the charge, and make out and deliver to the person charged a certificate under his hand, stating the fact of dismissal. †

Form of Certificate.—The certificate may be in this form:

—— ——, To Wit:

I, the undersigned, ——, of the City of ——, certify that on the —— day of —— in the year of Our Lord ——, at —— aforesaid, A. B., being charged before me and consenting to my deciding upon the charge summarily for that he the said A. B., &c., (*stating the offence charged, the time and place and when and where alleged to have been committed,*) I did, having summarily adjudicated thereon, dismiss the said charge.

Given under my hand and seal, this —— day of ——, at —— aforesaid.

J. S. [L. S.]

Discretionary power.—If the person charged do not consent to have the case heard and determined, or if it appear that the offence is one which owing to a previous conviction of the party charged, is by law a felony; or if the Recorder or Police Magistrate be of opinion that the charge is from any other circumstances fit to be made the subject of prosecution by indictment, rather than to be disposed of summarily, he instead of summarily adjudicating thereon may deal with the case ministerially—that is commit the accused for trial in a higher tribunal. So if upon the hearing the Recorder or Police Magistrate be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, he is empowered to dismiss the person charged without proceeding to a conviction ‡

Duty when accused pleads guilty.—When any person is charged before any Recorder or Police Magistrate with simple larceny, (the property alleged to have been stolen exceeding the value of five shillings) or stealing from the person, or larceny as a clerk or servant, and the evidence when the case on the part of the prosecution has been completed is in the opinion of the Recorder or Police Magistrate sufficient to put the person charged on trial for the offence with which he is charged, it is the duty of the Recorder or Police Magistrate if the case appear to him to be one which may be properly disposed of in a summary way, to reduce the charge into writing and to read it to the person, and then ask him whether he is guilty or not of the charge. If he say guilty, the Recorder or Police Magistrate is thereupon to cause a plea of guilty to be entered upon the proceedings, and to convict him of the offence and commit him to the Common Gaol or House of Correction, there to be imprisoned with or without hard labour, for any term not exceeding six calendar months. It is, however, also the duty of the Recorder or Police Magistrate before he asks guilty or not guilty, to explain to the person charged that he is not obliged to plead or answer before him at all, and that if he do not plead or answer he will be committed for trial in the usual course. *

Form of Conviction.—When there is a plea of guilty, the conviction may be in this form:

—— ——, To wit:

Be it remembered that on the —— day of —— in the year of Our Lord ——, at —— A. B., being charged before me the undersigned ——, of the said City, for that he the said A. B., &c., (*stating the offence, the time and place when and where committed*) and pleading guilty to such charge, he is thereupon convicted before me of the said offence; and I adjudge him the said A. B., for his said offence, to be imprisoned in the —— (and there kept to hard labour) for the space of ——

Given under my hand and seal, the day and year first above mentioned, at —— aforesaid.

J. S. [L. S.]

Jurisdiction when not dependent on consent.—In the case of any person charged within the Police limits of any city in the Province with therein keeping or being an inmate or habitual frequenter of any disorderly house, house of ill fame, or boarding house, the jurisdiction of the Recorder or Police Magistrate is absolute, and not made to depend on the consent of the party charged nor is it necessary to ask the party whether he consents to be tried. †

Privileges of accused.—In every case of summary proceedings, the accused is to be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney. ‡

* 20 Vic., cap. 27, sec. 1. † 20 Vic., cap. 27, sec. 1.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law.*

TRINITY TERM, 1858.

SIMPSON v. THE GREAT WESTERN RAILWAY COMPANY.

20 Vic., ch. 12—Construction of—Horse killed on railway.

The plaintiff, as constable, seized a horse under a distress warrant, and put him in the stable of an inn The horse escaped to the road, and having got upon the railway owing to defects in the cattle-guards, was killed at some distance from the point of intersection.

Held, that under the 20 Vic., ch. 12, the horse was unlawfully upon the highway, and having got thence upon the track the company were not responsible, notwithstanding the defect in the cattle-guards.

Held, also, that although the horse was upon the road without the plaintiff's knowledge or permission, yet he was nevertheless there unlawfully, for the statute obliged the plaintiff to *prevent* him from being there.

Semble, that the statute does not take away the right of action in those cases only where the animal is killed at the very point of intersection

Semble, also, that the plaintiff had sufficient property in the horse to entitle him to sue.

On appeal from the county court, the proceedings must be certified, *and the case set down for argument*, in the term after delivery of judgment there.

Appeal from judgments given by the judge of the county court of the county of Lincoln. 1st. Upon a demurrer. 2ndly. In disposing of a rule *nisi* for a new trial on the law and evidence, and for misdirection, which rule was discharged with costs, and the verdict given for the plaintiff for £25 was allowed to stand.

Irving, for the appellant. *W. Eccles*, contra.

In addition to the cases referred to in the judgment, the following were cited: *Wallis* v. *Manchester*, &c., R. W. Co., 14 C. B. 213; *Dovaston* v. *Payne*, 2 H. Bl. 527; *Cort* v. *The Ambergate*, &c., R. W. Co., 17 C. B. 126.

The facts of the case sufficiently appear in the judgment.

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

* 20 Vic., cap. 27, sec. 4. † 22 Vic., cap. 27, sec. 2, sub sec, 1.
‡ 20 Vic., cap. 27, sec. 3.

The appeal from the judgment given upon the demurrer the court were inclined to think was not in time, according to the statute (see *Ru'tan* v. *Vandusen*, 10 U. C. R. 620), and they therefore dismissed the appeal, with costs, remarking that the failure of the appeal from that judgment was of no consequence as regarded the merits of the case, for that the same point that was presented by the demurrer came up also upon the rule.

The facts, as proved at the trial, are thus stated by the learned judge of the county court in his judgment: "The plaintiff, as a constable, seized the horse in question for school rates, under a warrant issued against the personal property of one Jabez Wills, and removed the animal to the stable of a public innkeeper, where it was secured in the usual manner, and remained until the day following. On the latter day it was discovered that the animal was gone, and the plaintiff went in search, and on the next day after missing the horse his dead body was found on the defendants' railway, about one-quarter, or one-third of a mile to the westward of the intersection of the town line between Louth and Clinton townships, which town line runs north and south, and the railroad east and west. Two legs of the horse were broken, and the body was fifteen or twenty feet from the track, down a small embankment.

"The cattle-guards, at the intersection of the town line road with the railroad, at the east and west sides of the public road, were not sufficient, particularly on the west side, and cattle could cross from the main road to the railway track, in consequence of earth recently excavated by labourers in the work, which covered the cattle-guard, and made a passable track for persons and cattle. No foot track appeared of any animal on this crossing or earth track, but the marks of horses' feet were followed up near to it.

"The animal escaped from the stable of the innkeeper, and was not at large by any act of his, or of the plaintiff, but had broken away.

"Cattle and horses are not allowed to run at large in Louth, but are prohibited by municipal regulations."

"In the declaration it is not charged that the accident arose from any wilful misconduct or negligence of the defendants in driving their railway train; but the complaint is, that the defendants neglected to comply with the duty imposed upon them by the statute, of fencing in their track, and making proper cattle-guards to prevent cattle straying from the highway upon the railway track at the point of intersection, and that in consequence of that omission the plaintiff's horse escaped from him "without his permission or default, and being then lawfully upon the said highway, without th[illegible]intiff's permission, near to the defendants' railway at the point aforesaid (*i. e.*, at the point of intersection), strayed and escaped from the said highway upon the line of defendants' railway off the said crossing and point of intersection of the railway with the highway, and was, whilst on the line of the said railway beyond the said point of intersection, run against and over, and killed by the locomotive and carriages of the defendants then passing on and along the said railway."

The defendants pleaded—1. Not guilty.

2. That the plaintiff was not possessed of the horse.

3. That the plaintiff's horse was not at the time lawfully upon the highway at or near the point of intersection, but was then unlawfully at large upon the highway at the point of intersection, and not in charge of any person to prevent his loitering and stopping upon the highway at the point of intersection, contrary to the provisions of the statute in that behalf—namely, the 20 Vic., ch. 12, sec. 16.

The plaintiff joined issue upon these pleas.

It was objected by the defendants' counsel at the trial, that the plaintiff, being merely in charge of the horse as bailiff, and having no interest in the horse, was not the person who should have sued for t[illegible] injury: that Miller, the owner of the horse, should have bro[illegible] the action. And the plaintiff's counsel objected, that the evidence shewed that the plaintiff did not *permit* the horse to be at large on the highway contrary to the statute, for that the horse got out of the stable in the inn without his knowledge, and without any negligence on his part, wherefore he contended the plea was not proved.

The judge overruled both these objections. He said he should for the time determine that when the statute 20 Vic., ch. 12, sec. 16, provided "that no horses, &c., shall be permitted to be at large upon any highway," it did not merely mean that no one should designedly turn his horse loose upon a highway near a a railway crossing, or should knowingly allow him to go there; but that the act made it his duty to take care that his horse should not be permitted—that is, *suffered*—to get upon the highway. And as to the plaintiff's right to bring the action, he considered that the horse being by the plaintiff's seizure of him in his custody and possession, he had a special property in him sufficient to entitle him to sue.

The learned judge of the the county court, *Mr. Campbell*, then, *in an elaborate judgment, which is before us*, took a view of the case upon the merits; and, with a degree of care and ability which entitles his opinion to much weight, reviewed the many cases which have been decided in England, and in this country, arising out of injuries received by horses or cattle upon railways; and his examination of the several decisions brought him to the conclusion, that, unless they were protected by the recent statute 20 Vic., 12, sec. 16, the defendants, under the circumstances of the case, must clearly be liable, on the principle affirmed in the English case of *Lawcett* v. *The York and North Midland R. W. Co.* (16 Q. B. 610), and acted upon in several cases in our courts; namely that the defendants not having fenced in their track from the highway, and not having constructed proper cattle-guards at the crossing, the horse was on the road lawfully as against the company, and escaped thence in consequence of their neglect of the duty which the law had imposed upon them.

He considered, therefore, that the only question he had to determine was whether the statute placed the defendants in any better situation, and he held that the 16th clause of the statute would not protect them, because it applied only to cases where the cattle, &c., *are killed at the point of intersection*. This was the view he took of the effect of the statute, having only its language to guide him, for it is a peculiar provision in our Railway Act, and no decision had yet taken place on it; and taking such view he determined that the defendants were liable, and he sustained the verdict.

We believe the learned judge was correct in supposing that the question he had to deal with was a new one, though the same point as to the effect of the late statute 20 Vic., ch. 12, in cases of this kind had been presented to us in the case of *Ferris* v. *The Grand Trunk Railway Company*, in this court, which was argued in the same term, and in which we have given judgment against the plaintiff's, and for reasons which equally apply in the present case.

We do not take the question to be merely whether the statute 20 Vic., 12, sec. 16, deprives the plaintiff of his right of action by these words, "And no person, any of whose cattle so at large shall be killed by any train at such point of intersection, shall have any action against any railway Company in respect to the same being so killed." It is necessary, we think, to look further. The whole object of the act was to secure the public as much as possible against accidents that might happen to Railway trains from collision or otherwise. It could be of no consequence in a case like the present, if the train had been thrown off the track by meeting the plaintiff's horse, whether the animal was met upon the track at the point of intersection or elsewhere upon the line. The legislature, when they were passing the act, were no doubt aware that at every intersection of a highway with a railway track there would be cattle guards, because the law had provided for that, and they would naturally infer that if an animal getting on a railway from a highway should be caught by a train, it would be upon the road at the point of intersection; and we dare say they used the words which we have just quoted from the act, meaning no more by them than this—that if any animal shall be permitted to be at large upon a highway near a railway crossing, and not being in charge of any person, shall get from the road upon the railway at a crossing, and be killed, the owner shall have no action. On the other hand the language of the clause in this part is perfectly plain and explicit, so much so that we do not think it can be said to take away the right of action in terms, except in the case where the animal is killed at the point of intersection.

But that, it seems to us, is not the whole question, for still the statute has the effect of making it unlawful for cattle to be permitted to be at large upon any highway within half a mile of the intersection of such highway with a railway or grade, unless the

same shall be in charge of some person. Against that the prohibition is positive, and we agree with the learned judge that the word "*permitted*" as used in the act, does not mean that the owner of the animal shall not voluntarily and designedly permit it to be on the highway, but that at his peril it must not be permitted to be there under such circumstances. It makes no difference that this plaintiff, who sues as having a special property in the horse, having charge of him at the time, did not turn him out on the road, or let him out of the stable, intentionally or carelessly, for he was bound to take care that the horse should not be suffered to get upon the highway near a railway crossing—in other words, it was his duty to *prevent it* for the safety of persons travelling along the line.

Then the statute, it is to be considered, amounts to a direct and positive prohibition against any such animal being found upon a road in such a situation without some one being in charge of him, and the plaintiff's horse clearly violated that prohibition, for he got from the road upon the railway at the crossing. Having so got upon the railway he was there unlawfully, and his owner must take the consequences of any accident that happened to him from the movement of the trains, where no wilful misconduct or negligence in managing the trains is complained of.

There is no room in this case for such doubts as were expressed by the judges in *Fawcett v. The York and North Midland R. W. Company* (16 Q. B. 610), as to whether the animal was or was not lawfully upon the highway from whence he got upon the railway.

If this horse had wandered from the road into an adjoining farm, and had got from thence upon the railway for want of a sufficient fence between the track and that farm (such farm not belonging to the owner of the horse), his owner would have been disabled from recovering, because the company would be entitled to say to him, "It is no excuse for you that we have no fence between our railway and that other man's farm. Such a fence would be required for keeping in his cattle, but was not necessary for protecting your horse at that point of our line, for he had no business to be where he was." It can be no stronger reason in support of the plaintiff's right to recover (to say the least), that if the company had had a perfect cattle-guard that could not have been passed, his horse could not have been killed just where he was, though he might have been killed at the point of intersection, if being left to his own guidance he had not continued to wander along the highway instead of taking to the railway track.

On the part of the defendants it may be urged that the cattle-guard was not made specially to confine the plaintiff's horses or cattle, but to keep the railway clear from any animal that might be passing lawfully or unlawfully along the road which crosses it: that the plaintiff's horse was unlawfully on the road, and must therefore have been unlawfully on the railway track, having gone upon it from the road. He had no business on any part of the track more than any person would have to go into his neighbour's yard because he sees the gate open, and the horse being on the railway, was not excused by any defect in the cattle-guards of which the plaintiff had a right to complain more than the rest of the public.

The ... aggression of the law, which brought the horse to the point of intersection, was not done away with by his having passed the cattle-guard, if the evidence had been clear to shew that he did so; that only enabled him to get further upon the road. If the horse had crossed from the plaintiff's field to the railway for want of a fence which the Company was bound to keep up between themselves and the plaintiff, then it might have been held that the horse was lawfully on the railway track as regarded the Company. But being first unlawfully in the road within half-a-mile of the crossing, where he had no right to be unattended, he got from that road to the Company's railway; and upon the principles of the common law, as laid down in the case of *Ricketts* v. *The East and West India Docks, &c., R. W. Co.* (12 C. B. 160), it could be no excuse to his owner, that if there had been a good cattle-guard, the horse could not have advanced to that part of the railway on which he happened to be killed. As was said in that judgment, "No man can be bound to repair for the benefit of those who have no right."

In the circumstances of this case, it appears to us that the language of the court in *Sharod* v. *The London and North Western Railway Company* (4 Ex. 580) is precisely applicable. In the latter part of Baron Parke's judgment he thus states the principle, "If in the present case the plaintiff's cattle *had a right to be on the railway*, the plaintiff has a remedy, by an action on the case against the Company for causing the engine to be driven in such a way as to injure that right.* * If the cattle were altogether wrong-doers, there has been no neglect or misconduct for which the defendants are responsible. If the cattle had an excuse for being there, as if they had escaped through defect of fences which the Company should have kept up, the cattle were not wrong-doers; they had a right to be there; and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case."

If this was correctly said, then, *mutatis mutandis*, it determines the present case. If the horse was lawfully on the road at the point of intersection, and had strayed from there upon the railway because the cattle-guard was defective, his owner would have been in as favourable a position as he would have been if his horse had escaped from his own field upon the railway track for want of a fence between such field and the railway which it was the duty of the Company to keep up; but being in the road, and unattended at the point of intersection, in direct violation of an act of Parliament, and straying from thence upon the railway over the insufficient cattle-guard, his owner is in no more favourable position than he would have been if the horse had broken into his neighbour's farm and had wandered from thence upon the railway by reason of there being no fence kept up by the Company between their track and that neighbour's farm.

For all that it appears the railway was well inclosed from the adjacent lands. It is clear that the horse strayed on the track from the highway, where he had no right to be, and he could not have been on the track at all if he had not been first in the highway, contrary to the act of parliament.

We are of opinion, therefore, that the plaintiff has no right of action, not because the express words of the 16th clause extend to this case, where it says that the owner of an animal killed at the point of intersection shall not under such circumstances have an action, but because upon the principles of the common law that consequence follows, on account of the horse having got upon the railway from a place where he had no right to be, and had therefore no excuse for being on the railway at any point, and was as wrongfully there on one side of the cattle-guard as he would have been upon the other.

In our opinion, therefore, the judgment should be reversed, and a new trial granted without costs.

Judgment below reversed.

THE MUNICIPALITY OF THE TOWNSHIP OF SARNIA v. THE GREAT WESTERN RAILWAY COMPANY.

Injury to Highway—Action by Municipality—Pleading.

The plaintiffs, a township municipality, in their declaration alleged that they were proprietors of a certain public road between the fourth and fifth concessions of said township, and complained that the defendants, in constructing their railway, so negligently and unskilfully made certain drains that great injury was thereby occasioned to the plaintiffs' said road, and they were compelled to expend large sums of money in repairing the same.

Held good, on demurrer, as showing a special injury to the plaintiffs sufficient to sustain the action; for though as a municipality they were not proprietors of the road, yet it might have been purchased by them from some joint stock company, or otherwise.

The declaration alleged that the plaintiffs were the proprietors of a public road and highway, in the township of Sarnia, in the County of Lambton, and situate between the fourth and fifth concessions of the said township, and passing from the eastward to the westward, between the said concessions; and that the defendants were the proprietors of a certain railway, called the Great Western Railway, situate and extending also from the eastward to the westward, across, the said township, to the south of the said road of the plaintiffs: that there was a certain drain or water-course along the south side of the said railway, which was filled and supplied with water from the adjoining swamps: that there was a certain other drain or water-course made by the plaintiffs along and near the south side of the said road of the plaintiffs, by means of which the said road was, and of right should have continued to be drained, and rendered free of stagnant water: that there was certain swamps or pieces of land covered and overflowed with water be-

tween the said road of the plaintiffs and said railway of the defendants, the water whereof had always remained and flowed in and through said swamps, *without overflowing or injuring in any* way the said road of the plaintiffs, or any part thereof, &c. Yet the defendants, well knowing, &c., and contriving, &c., maliciously, unlawfully, negligently and unskilfully, made and caused to be made certain other drains and water-courses, out of and from the said drain lying alongside the said railway as aforesaid, and cut, extended, and opened the same, and still keep the same open, through and across the swamps and lands overflowed with water last aforesaid, and until they reached the said drain of the plaintiffs, and joined and intersected the same, and by and through the said drains so made by the defendants as last aforesaid, large quantities of water, which before then had flowed in the said drain of the defendants alongside the said railway, were caused to run into the said drain of the plaintiffs; and also, and by means of the said drains of the defendants, the waters of the said swamps were diverted and carried from, and prevented from running and flowing in their natural courses, as they otherwise would have done, and were carried into the said drain or water-course of the plaintiffs, so that the waters in the said last mentioned drain were raised, and by the means aforesaid caused to overflow the said road of the plaintiffs for a long space of time, and by reason of the waters so brought down and discharged by the said drains of the defendants, the said road of the plaintiffs was rendered wet and soft, and unfit for travel, and was greatly injured; and the plaintiffs were compelled to expend, and necessarily expended large sums of money in repairing the said road, and repairing the injuries which had been done thereto, and in rendering the said road fit to be used and travelled upon as a highway, as it before had been used and travelled upon; and also were compelled to expend a large sum of money in enlarging their said drain, in order to carry off the water so discharged upon their said road by the said drains of the defendants as aforesaid, and in order to preserve the said road from being injured by the said water so discharged, and to prevent the said water from coming and continuing upon the said road.

The defendants demurred, assigning for causes of demurrer:

1. That the plaintiffs show no special injury to themselves, apart from the injury to the public in general.

2 That the cause of action stated is the subject of an indictment only, and not of an action of damages.

Connor, Q. C., for the demurrer, cited Streetsville Plank Road Co. v. Hamilton and Toronto R. W. Co., 13 U. C. R. 600.

Prince contra, cited 16 Vic., ch. 190, sec. 25.

ROBINSON, C. J.—I do not find any such provision in our statutes respecting concession lines or other public allowances for roads in townships, as is contained in the statute 13 & 14 Vic. cap. 15, respecting public roads within cities and incorporated towns: that is, vesting the roads in the municipality, and making it their duty to keep them in repair, and providing a remedy for the neglect of that duty.

The only objection taken to the declaration by the defendants is, that the injury complained of is of such a nature that the only remedy is by indictment for nuisance, for that the plaintiffs show no special damage accruing to them in a particular manner, which should give them a greater right to sue in a civil action, than all persons having occasion to use the road would have. I think that objection to the declaration does not lie, for that the plaintiffs do show a peculiar damage to them from the injury complained of, for they allege the road to be their own, and that they were compelled to expend large sums of money in order to repair the road and secure it against further injury from the water, which they say the defendants brought upon their road from the wrongful, negligent, and unskilful manner in which the defendants constructed their rail ay.

That certainly is a damage sustained by the plaintiffs in particular, and not in common with all the other inhabitants of the county.

The plaintiffs aver the road to be theirs, and that they were obliged to make the repairs spoken of. All this they would have to prove upon the trial; that is, if the defendants chose to traverse their statements.

If we could say that the averments could not be true, then of course the declaration would be bad on demurrer; but we cannot hold that the plaintiffs' statement is on the face of it untrue, for *we cannot tell that the road spoken of may not be one of those* roads made under the Joint Stock Road Company Act, 16 Vic. cap. 190, or the previous statutes, and now owned by the municipality of Sarnia, in which case the municipality would be bound to keep it in repair; and so they have suffered a special damage, if the defendants have, by their misconduct in acting upon the powers given by their charter, occasioned unnecessarily the injury complained of.

Judgment must, I think, be given for the plaintiffs, but the defendants may amend by pleading within a fortnight on payment of costs.

MCLEAN, J.—The plaintiffs complain of an injury to a road, of which they are *proprietors;* and if they are in fact the *proprietors* of the road, they certainly in their declaration show a good cause of action. We cannot assume that they are not proprietors, though we are aware that the municipal corporations are not proprietors of the several roads which they are bound to repair and keep in order. *The road stated in the declaration, for aught we can* at present know about it, may be a plank or macadamized road, made by a joint stock company, and since purchased by the municipality. In such a case I incline to think that the municipality could sue for any injury as the proprietors of the road, in the same manner and to the same extent as the company by which the road was originally constructed.

If the road is in fact an ordinary road on the concession line between two concessions, and the plaintiffs have no interest in it in any other way than as representing the township, and exercising a general superintendence over the public roads, the defendants can put in issue the right of property of the plaintiffs, and prevent their recovery. At present I think the declaration discloses a good cause of action, and that the plaintiffs are entitled to judgment.

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for plaintiffs on demurrer.

STANDLEY AND THE MUNICIPALITY OF VESPRA AND SUNNIDALE.

By-law—Delay—Refusal to quash.

Upon an application to quash a by law establishing a road, where two years had been allowed to elapse, and money had been expended under it, the objections not being clearly established, the court refused to interfere.

Quære, as to the power of the court to quash for objections not appearing on the face of the by-law.

D'Aarcy Boulton obtained a rule on the municipality of Vespra and Sunnidale, to show cause why their by-law No. 87 should not be quashed. Firstly, because, the said by-law being passed for the establishment of a road in the township of Sunnidale, no notice was given of the intention to pass it, by posting up notices to that effect, as the statute requires; secondly, because the road passes through the orchard and barn-yard of the applicant, which is contrary to law.

The by-law was passed on the 26th of July, 1856, and it laid out the road established by it, by courses and distances, definitely and precisely.

Read showed cause, and cited *Lafferty and The Municipal Council of Wentworth and Halton*, 8 U. C R. 232.

Boulton, contra, cited *Dennis* v. *Hughes et al*, 8 U. C. R. 444; *Hodgson and The Municipal Council of York, &c.*, 13 U. C. R. 268.

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

We have read the affidavits filed on both sides. There is nothing wrong on the face of the by-law. Looking at it, therefore, without the aid of any extrinsic information, we cannot say that it is either wholly or in part illegal, and therefore subject to be quashed by this court under any power expressly given to us by the municipal acts. But the applicant complains that it is nevertheless illegal, by reason of something extrinsic and not appearing on the face of the by-law.

It was passed, he alleges, without the requisite notice being given of the intention to pass it, and moreover it runs through his orchard and barn-yard. He must have known both those objections at the time, yet he has allowed two years to pass without complaining, and in the mean time expense has been incurred by

the council and by individuals in opening the road established by the by-law.

As to the notice, it is sworn by many persons, and not denied by himself, that he knew well of the application, and was present in the council when the measure was discussed, and the by-law in progress, and that he was heard upon it. There is proof, moreover, that notice as required by law was given; and what is stronger than all against his application, that he was himself one of the applicants for the very line of road as it has been established, signed the petition for it, and pointed out to the surveyor the course which he desired it to take in passing through his land, which course the surveyor adopted. That also puts an end to all pretence of complaint on his part as to the road passing through his orchard or barn-yard, for though that could not be done against his will, it clearly could be done with his consent. It seems also that so far as the orchard is concerned, there was none there when the road was surveyed. It may be, as the complainant asserts, that he gave his consent as he did under the expectation that there would be a railway station fixed at a certain point, which the proposed road would have led to, and that this would have made it a very desirable road for him; but that this expectation has been disappointed, and the railway station placed elsewhere.

The council or the surveyor had nothing to do with his reasons for assenting; and if he has been disappointed in that respect, his case is not an uncommon one.

It cannot be said, after reading all the papers before us, that his consent was given upon any condition expressed by him. There are several circumstances in this case which would prevent our quashing this by-law upon a summary application, supposing our power to do so on any such ground as is assigned in this case to be without question, which we do not say it is. If no legal notice was given of the by-law, or if the road was laid out through the complainant's barn-yard or orchard contrary to his will, and if these facts, or either of them, make the by-law void, the complainant can urge that in his defence against the indictment for nuisance in stopping up this road, which it seems has been preferred against him.

We discharge the rule, with costs, to be paid by the applicant.

Rule discharged.

CHAMBERS.

(Reported by C. E. ENGLISH, Esq., Barrister-at-Law.)

COMMERCIAL BANK v. WILLIAMS.

Practice—Attachment of debts—Assignments.

A debt due to a judgment debtor who is dead cannot be attached without reviving the judgment against his personal representatives.

Qu.—Can a debt be attached in the hands of an assignee for the payment of debts, prior to a dividend having been declared by such assignee.

26th January, 1859.

English applied for the usual garnishee order in this case, against one John Young, on an affidavit of the plaintiff's attorney, first,—stating the recovering of the judgment, the amount due thereon and that the defendant had died while the writ of execution was in the sheriff's hands. 2nd, that he was told by the defendant in his lifetime, that he (the defendant) had a claim against the firm of Knight & Co., which firm sometime since made an assignment of their estate for the benefit of their creditors, to John Young, Esq., of Hamilton. 3rd, That he was informed that the said defendant came into the assignment as creditor for the sum of £164 18s. 5d., and that his dividend has not yet been declared, but Mr. Young expects when it is, the amount will be 12s. 6d. in the pound.

There was also evidence that the defendant had died intestate, and that no letters of administration had been taken out.

DRAPER, C. J. C. P.,—Refused the order on the ground that the defendant being dead, there were no parties to the suit as against whom this judgment could be attached, and doubted the practicability of attaching such a claim at all before the assignee had regularly declared a dividend, and referred to Bayard v. Simmons, 5 E. & B. 69; Jones v. Thompson, 4 Jur. p. 338; Power v. Butler, 4 Jur. p. 614.

Order refused.

COMMERCIAL BANK v. JARVIS ET AL.

Practice—Attachment of debts—Rent.

Rent to become due at a future time is not a debt due or accruing due within the meaning of sec. 194 C. L. P. Act, 1856, so that it can be attached to satisfy a judgment.

10th February, 1859.

The plaintiffs in this case applied for the usual order to attach debts due or accruing due from Messrs. Watson & Hestie to Jarvis one of the defendants, on an affidavit made by their attorney, stating that judgment had been recovered and was still unsatisfied; and that Messrs. Watson & Hestie were tenants of the said Jarvis of a store in the town of Stratford, at the annual rent of $600; that the rent had been paid up to the month of May next and no longer, and that after that time it would be payable to Jarvis as aforesaid.

DRAPER, C. J. C. P.,—Refused the order on the ground that no rent was shewn to be overdue, and that any future rent might never become due to Jarvis, and therefore was not a debt accruing due within the meaning of C. L. P. Act, 1856, sec. 194.

Order refused.

CHANCERY.

(Reported by THOMAS HODGINS, Esq., LL.B, Barrister-at-Law.)

MACDONALD v. MACDONALD.

Writ of Ne Exeat—Alimony—Plaintiff out of jurisdiction—Domicile.

The Writ of *Ne Exeat* granted after filing a bill in an alimony suit, remains in force after decree; and it is no objection that the wife resides out of the jurisdiction, as during coverture the domicile of the husband is the domicile of the wife.

29th January, 1859.

In this case the Bill was filed by a married woman for alimony. The parties were married in Nova Scotia in 1850—the defendant being then under age. Shortly afterwards he left her and went to Scotland, from whence he came to Upper Canada; and she removed to Lower Canada where she still resides. The Bill was filed in October, 1858, and a writ of *ne exeat* for £1000 bail obtained; and on the 21st December, 1858, a consent decree for permanent alimony was made.

Strong now moved to discharge the writ. The statute authorises the Court to exercise a discretion which before it could not: on filing a bill for alimony to issue a writ of *ne exeat*, until decree, and by the same Act the decree binds the same as a judgment. It was not the intention of the statute to continue the writ after the decree. On another ground, the writ should not continue, the Plaintiff resided without the jurisdiction of this Court, and should have applied to the Court within whose jurisdiction she resided, or where the marriage took place. Daniel's Ch. Pr. (last ed.) 1284. Smith's Ch. Pr 758; *Atkinson* v. *Leonard*, 3 Bro. C. C. 218; *Hyde* v. *Whitfield*, 19 Ves. 342; *Smith* v. *Nethersole*, 2 R. & Myl., 450.

Blake, contra. The original ground of the issue of the writ was that of custom, Beames on *Ne Exeat* 26. Here, however, there is no custom, but a discretion untrammelled by rules. The intention of the Legislature was to secure the defendant to the Province during the continuance of the alimony. In this case, the decree could not bind as the defendant had no real property. In *Hyde* v. *Whitfield*, both parties resided out of the jurisdiction, and the writ was refused on other grounds; and in *Smith* v. *Nethersole*, it was not stated that the Plaintiff lived out of the jurisdiction.—But this application was too late; from the analogy of Common Law, it should have been made on knowledge of the irregularity. Harrison's C. L. P. A. 49, 83 *et seq.* The decree is enrolled and was made by consent, and the cause is now out of Court.

THE CHANCELLOR delivered the judgment of the Court. This is an application for the discharge of a writ of *ne exeat*. Mr. *Strong's* objections are two-fold. 1. That the writ fell when the decree for permanent alimony was pronounced. 2. That it had issued irregularly owing to the Plaintiff residing without the jurisdiction.—I do not think there is any ground for the first objection. The object of the Act was to remedy disabilities under which married women labored, and was not intended only as a partial remedy. Under the large language of the Act, conveying so wide a discretion, we must suppose that the writ was intended to apply to cases of both interim and permanent alimony.

In regard to the second objection, we cannot see why a writ should not issue for one out of the jurisdiction. In *Hyde* v. *Whitfield*, the transactions had occurred in the West Indies, and it was argued if the writ continued, how the account could be taken, and accordingly the writ was discharged. In *Smith* v. *Nethersole*, the reason of the discharge was that the plaintiff came into England colorably. But here there are no such questions, there is no account, and no duty, save the duty of the writ, and why the fact of the wife being out of the jurisdiction is urged for the discharge of the writ, I cannot understand.—Looking also at the peculiar nature of the jurisdiction, and the words used in the Act, "any wife." I am of opinion that they apply to those residing out of the province as well as those within.—Whenever the husband goes away from his domicile, no power of the Court can follow him. The domicile of the wife is the domicile of the husband, and she has no other as long as the marriage holds. The writ of *Ne Exeat* was originally founded upon a debt due, and if that could not be found, no writ could issue. But here there is no proof of debt required. It is a new power given the Court to provide a married woman with some security for maintenance, by virtue of the writ, and not as it was first intended as a security for a debt. The motion, therefore, is discharged with costs.

IN BANC.

COTTON v. CORBY.

Dismissal of Bill—Appeal—Suspension of Decree.

The Court has full power, notwithstanding the Error and Appeal Act of 1857, to suspend the operation of its decree, so as to allow an appeal to be made to the Court above. 29th January, 1859.

The Court having given judgment this day, dismissing the plaintiff's bill, the defendant was about to proceed with his execution to place the same in the sheriff's hands before night. The plaintiff immediately on the delivery of the judgment intimated his intention of appealing to the Court of Error and Appeal, and asked that the operation of the decree might be suspended until the writ of appeal could be obtained and the bonds filed.

A. Macdonald, for the plaintiff, asked that the operation of the decree be suspended. The plaintiff would if directed pay the money into Court.

S. Richards, Q. C. for the defendant, opposed the suspension of the decree. The plaintiff's bill had been declared improperly filed, and the defendant should not now be further restrained from proceeding at law. Besides the Court had no power further to injoin him. He referred to the Error and Appeal Act and Rules.

THE CHANCELLOR delivered the judgment of the Court.—There is no doubt but this Court has full power over its decrees as to the time of their operation. In England, it was competent to the House of Lords in cases of appeal to suspend proceedings. And the Court of Chancery there has at all times full power over its own decrees to suspend their operations, and has frequently exercised it, owing to the great delay which formerly occurred in carrying out the appeal.

In the case of the *Mayor of Gloucester* v. *Wood*, 3 Hare, 150, Vice Chancellor *Wigram*, though he dismissed the bill, refused to allow the money to be taken out of Court, until the appeal could be made. In this country the legislature has laid down the reverse rule from that in England, that not staying proceedings in appeal should be the rule, and staying them the exception.

I take it to be clearly our duty to stay our decree, as otherwise irreparable injury may be the result—as in the case of an ejectment for instance. In the present case, execution may be put in, and the whole state of things may be altered before the appeal can be made; and it is therefore a much more reasonable course to stay the decree. I cannot agree to the doctrine that because of the late Error and Appeal Act, this Court cannot exercise jurisdiction This Court has all the power it ever had, and the new law regulating the power of appeal has not altered our practice. We determine on the equity of the Act—as the case now before us scarcely comes within it—and as irreparable mischief might be done were the decree not suspended. On paying the money into Court and giving security the decree is to be stayed until the appeal be entered.

BABY v. WOODBRIDGE.

Practice—Master's Office—Notice to Mortgagor.

Under the orders of February, 1858, relative to foreclosure suits, where the bill is taken *pro confesso* against the mortgagor, it is not necessary to serve him with the notice set forth in Schedule B to said orders

(17th December, 1858.)

This case coming up on further directions, and it appearing that the Mortgagor had not been served in the Master's office with the notice set out in Schedule B of the orders of the 6th February, 1858, relative to foreclosure suits, and the bill having been taken *pro confesso* against him, it was *held* by

ESTEN & SPRAGGE, V. CC., (THE CHANCELLOR *dissentiente*), That when a bill in suits for foreclosure or sale, is taken *pro confesso* against the mortgagor, it is not necessary to serve him in the Master's office with notice under the orders of February, 1858.

[*Note by Reporter.*—The same judgment was given in the case of *Murney* v. *McLellan*, decided on the same day.]

(CHAMBERS.)

DEXTER v. COSFORD.

Lis Pendens—Discharge—Registry of Decree.

Where after certificate of *lis pendens*, the Bill is dismissed, it is sufficient to register the decree dismissing the Bill, as a discharge of the *lis pendens*.

(5th February, 1859.)

In this case the Plaintiff's Bill had been dismissed after the certificate of *lis pendens* had been registered, and application was now made for an order to discharge the certificate.

SPRAGGE, V. C., All that could be done with the order to discharge would be to register it, and as you have your decree dismissing the Bill, you can register it, and that will be a sufficient discharge of the *lis pendens*.

GORDON v. WEAVER.

Practice—Married women's answer—Affidavits.

Where a married woman is interested in an estate and no joint answer is put in by herself and her husband within the time limited, application may be made to allow her to put in an answer separate from her husband, the affidavits to state why her answer is required.

25th October, 1859.

This was a motion for an order that a married woman put in answer separate from her husband. The Bill was filed on the 15th October, 1858, and in support of the motion an affidavit was read stating in general terms, that the answer was required for the promotion of justice.

ESTEN, V. C. The practice is, if the inheritance is the wife's, to serve the husband and wife and let them put in a joint answer.—Or when the time for answering has expired, to make application to allow her to put in an answer separate from her husband. The affidavits must state the grounds on which her answer is sought for.

HURD v. ROBERTSON.

Defective title as to part of estate.

The purchaser of an entire estate which has been divided into shares, is not bound to accept, if the title to one share is defective.

In a case for the investigation of a title, after disposing of several objections it was observed by

ESTEN, V. C. I need not say that a purchaser contracting for an entire estate cannot, if it has been divided into shares, and the title to one share is defective, be compelled to accept the title to the remaining shares.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

WARDSVILLE, February 3rd, 1859.

GENTLEMEN,—As a subscriber to the *Law Journal*, I wish to put a few queries for your advice, and my guidance, and being at a considerable distance from where I can procure a sound legal opinion, I take the liberty of putting the following

queries should you consider them worth notice in your Journal:—

1st.—Is a Deputy Returning Officer at an election for a Member of Parliament, entitled to administer the oath of residence and allegiance to a voter according to the 43 section of the 12th Vic., cap. 27, such voter having been only five or three years in the province; and is he entitled to all the privileges of a British subject, by taking such oaths, without any further formality?

2nd.—At the election of a Reeve in a Township which is entitled to a Deputy Reeve, is it *legal* for such Reeve on being elected, to qualify, and take his seat as such, before a Deputy Reeve is elected; or should the Deputy Reeve be elected, before he (the Reeve) assumes his seat as head of the Council?

3rd.—Is it legal to elect the Reeve and Deputy Reeve in one motion or by two distinct motions?

Your attention and answer to the above queries will much oblige,

Gentlemen,

Your obedient servant,

A. H.

[1st.—An alien, not resident in this Province on 10th Feb., 1841, or 10th Feb., 1848, is not in our opinion entitled to enjoy all the rights and capacities of a natural born subject until he shall have resided in the Province for three years, have taken the oaths or affirmations of residence and allegiance, *and have procured the same to be filed on record* as required by 12 Vic., c. 197, secs. 4, 5, 6. Aliens resident here on 10 February, 1841, or 10 February, 1848, and coming within sec. 2 and 3 of the act, need not, to become naturalized, do more than take the oath or affirmation of allegiance A Deputy Returning Officer during the time that his authority continues may administer the oath or affirmation of allegiance to such last mentioned aliens.

2nd.—We do not think it necessary for the Reeve in order to qualify to wait for the election of a Deputy Reeve.

3rd.—It is provided by sec. 66, sub-sec. 4, of the Municipal Act, that the Council of every Township shall consist of five councillors, one of which councillors shall be Reeve; and if the Township had the names of 500 resident freeholders and householders, then one other of the councillors shall be Deputy Reeve; and by sec. 132, that the members elect of every Council, &c., shall at their first meeting, "and after making the declaration of office and qualification when required to be taken, organize themselves as a Council by electing one of themselves to be Reeve, &c." The Reeve and Deputy Reeve may be elected by two separate motions or by one—it matters not.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—As your valuable Journal is open to questions for useful information, will you please answer the following:—

1. If a person that is disqualified by law, (such as innkeepers), to sit in a Municipal Council, move or second a resolution or by-law, can the by-law be enforced; or if he move or second the election of Reeve or Deputy Reeve, is such election lawful?

2. Is a constable allowed to sell property seized by virtue of a chattel mortgage at public auction; or is the mortgagee allowed to sell such property at public auction?

By answering the above, you will greatly oblige a subscriber.

M. McP.

Vroomanton, 17th Feb., 1859.

[1. We do not think that the election to office of municipal councillor of a disqualified person is void. When such a person is elected, an application ought to be made to unseat him, and that application by sec. 128 of the Municipal Act, is required to be made within six weeks after the election, or one calendar month after the acceptance of office. If the application be not made within the time limited, it cannot be made afterwards, and thus the election may become in some degree unassailable. The acts of a councillor, though disqualified, whose election is not in any way moved against, are, we think, good; and we think moreover that the acts of a councillor, while *de facto* councillor, are valid, though he be afterwards unseated.

Such is the rule with regard to persons elected to serve in Parliament, and in our opinion with regard also to persons elected to Municipal offices.

2. The mortgagee of chattels may after default, sell the goods mortgaged by public auction or otherwise.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—Will you favour me with your opinion in the following case:—

A. is the owner of a tavern which has been conducted by himself for the last three years. It is the intention of A. to take out a license for the year 1858, but owing to the neglect of the Inspector, he does not do so up to August of that year. About the beginning of that month the Inspector grants his certificate to A. upon which A. is entitled to obtain a license, but A previously to demanding a license becomes aware that an Act has been passed preventing tavern keepers from acting as Municipal Councillors. Now A. having been in the Council in '58 and being desirous of going into the Council in '59 determines that he will not take out a license at all; but having a stock of liquors in hand continues to sell, for which he is fined in November following. He then quitted selling. On the 24th Dec. following he makes a "*bona fide*" lease of his tavern for eighteen months, receiving half the rent in advance, and reserving in the lease rooms for the use of himself and family until such time as he can get other accommodation. A. and the lessee then proceeded to the Clerk of the Township, produced the Certificate given to A. by the Inspector, and paid in the amount required by the township for a license, but not the Imperial duty, consequently no license is or can be issued. At the time the money is paid in they get the Clerk to write on the certificate, "To be transferred to B." (that is the lessee). A. then becomes Candidate for township Councillor and is returned. Now I wish to have your opinion as to whether A. has a right to retain his seat? I may mention that A. has not removed his sign from the premises, and that his name still remains over the bar; and also that he has sold liquor

on two or three occasions, since making the lease, but simply as agent for the lessee; and further that no license has issued to any one.

Yours, X.

Under the facts mentioned by "X" we are inclined to think that A. would not be disqualified, but if his right to sit were contested he would have to give undoubted proof that the lease of the premises to B. was *bona fide* and that he retained *no present interest* in the concern, for the facts of his name remaining over the bar and of his having sold liquor there would tell strongly against him.—EDS. L. J.]

To the Editors of the Law Journal.

OWEN SOUND, 3rd February, 1859.

GENTLEMEN,—A decision was given at the last sittings of the Division Court here, which I think is of some importance to defendants; it is as follows:—

In April, 1857, a summons was issued to John Mills, a Bailiff of this Court, (1st Division Court, Grey), for service on William White, of Arran, defendant. Plaintiffs were R. W. Patterson, and W. Patterson of Toronto. Summons was handed by Mills to —— ——, a worthless fellow, sometimes employed by him to serve summonses. —— served the summons on 17th April, 1857. Judgment by default followed in due course; and after some months, execution and seizure.

In the meantime, a Court had been established at Southampton, County Bruce, and it was the Southampton Bailiff who made the seizure. Defendant then procued a receipt from ——, dated the 18th April, 1857, for the nett amount of the claim, and assured the Bailiff (and afterward myself) that —— assured him his orders were to remit all *costs*, if defendant thus paid the claim.

Defendant had therefore considered the case as settled, till the Bailiff's visit with the execution.

On the 19th January, 1859, application was made by the plaintiffs to the Court, for advice as to whether Bailiff Mills was to pay the amount, or execution to proceed against defendant.

The order of the Court was in the following words "execution to issue for amount unpaid to plaintiffs or to clerk: the Bailiff or Deputy having had no authority to receive monies."

This being so, surely some means should be used to put defendants on their guard. What say you, Messrs Editors?

Yours, &c.,

WM. SMITH, *Clerk.*

[The appearance of Mr. Smith's communication will, to a great extent, have the effect desired "to put defendants on their guard."

The party —— would seem to have made himself amenable to the law, in a way he did not probably suppose;—such conduct as his deserves appropriate punishment.

The practice of Bailiffs handing over papers to unauthorized persons for service, is very reprehensible and such persons are not entitled to fees.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. HOLIDAY v. MORGAN. *Nov.* 2.

Warranty—Unsoundness of a horse—definition of Congenital defect.

It is a breach of warranty of the soundness of a horse, if such horse at the time of sale, had so defective a vision that he was not fit for the ordinary uses to which he might be put, and that whether such defect arises from disease or be congenital.

At the trial the learned Judge told the jury, that if the shying *of the horse arose from a deficiency of vision arising from natural* malformation of the eye, it would be an unsoundness. And the jury found a verdict for the plaintiff. And the charge was held to be well founded.

[It is not to be supposed that the purchaser, unless it were his calling or business, could have had the requisite knowledge to enable him to provide against such an imposition; and therefore neither of the legal maxims *caveat emptor* or *qui vult decipi decipiatur* could be applied to this case.—EDS. L. J.]

Q. B. GOODE v. JOB. *Nov.* 3.

3 & 4 *Wm. IV. c.* 42, *s.* 14—*Statute of limitations—Acknowledgment by answer to bill in chancery.*

An acknowledgment of the plaintiff's title contained in an answer to the plaintiff's bill in chancery, by the defendant in possession of land is evidence of acknowledgment in writing within sec. 14 of 3rd & 4th WM. IV., ch 27, sufficient to avoid the effect of the statute of limitations. A former defendant admitted the plaintiff's title in answer to a bill filed in chancery against him. The present defendant, claiming through the former sought to bring the case within the operation of the statute of limitations. But it was held that the answer of the former defendant, was an answer to a question put by plaintiff or by his direction, and not to a third party. It was in writing and signed by the person in possession, and was held to be an acknowledgment within s 14, of 3rd & 4th Wm. IV. ch. 27, sufficient to avoid the effect of the statute of limitations, and that the plaintiff was entitled to recover.

Q. B. HEMMINGS v. GASSON. *Nov.* 4.

Slander—Inuendo meaning of—may charge several allegations, but only one need be proved.

Where in action of slander, the inuendo alleges that the defendant meant to imply the commission by the plaintiff of several offences punishable by law it is sufficient if the plaintiff prove that the defendant meant to imply the commission of any one of the offences charged by the inuendo.

And so the ruling at the trial that if several offences had been charged and one only were proved, that would be sufficient.

EX. COLLIS v. BOTTHAMLEY. *Nov.* 9.

Contract—Statute of Frauds—What contract must be in writing—Hiring—Service for more than a year.

By a parol agreement the defendant agreed with the plaintiff to serve him for a year from a future day and that the service thenceforth should continue subject to be determined by three months notice. After the expiring of the year the defendant quitted the plaintiff's service without notice.

Held, that the plaintiff might maintain an action for this breach of the agreement, notwithstanding the Statute of Frauds.

[If this case simply depended on the parol agreement, it would be voidable. But the defendant having at his option chosen to continue in the service of the plaintiff after the year, a new agreement would be implied, the terms of which it is competent to gather from the original parol agreement.

As in the case of an interest in or from lands demised if not by specialty still if possession be had by virtue of agreement it will be received in evidence as to the terms under which the possession was held though of itself giving no right to possession.—EDS. L. J.]

C. P. EDWARDS v. EDWARDS. *November* 17.

Common Law Procedure Act 1854—*Compulsory reference to County Court Judge—Costs—On what scale to be taxed.*

In case of a compulsory reference to a County Court Judge under the Common Law Procedure Act 1854, the cause is still a cause in the superior court and the costs are to be taxed according to the scale of the superior court.

This was a rule calling on the defendant to show cause why the Master should not review his taxation having taxed according to the County Court scale.

The Court were of opinion, costs ought to be taxed according to the scale of the Superior Court.

EX. HILL v. FROST. *November* 10.

Interpleader Act—Application by Sheriff—Under Sheriff—Attorney for claimant—Statute 1 & 2 *Wm. IV., ch.* 58, *sec.* 6.

The circumstance that the under sheriff acted as attorney for the claimant will not unless he so acted as to prejudice the execution creditor, induce the court to refuse the sheriff relief under the Interpleader Act.

The following cases were cited on behalf of the execution creditor. *Dudden* v. *Long*, 1 *Bing., N C* 299. *Jale* v. *Balue*, 2 *D & L* 718. *Crump* v. *Day*, 4 *C B*, 760. *Ridgeway* v. *Fisher* 3 *Dowl*, 567.

WATSON, B.—In *Dudden* v. *Long*, the under sherif was not only connected as an attorney with the execution creditor, but he so acted as to prejudice the claimant. Nothing of the sort is shown here.

EX. FISHER v. HINDER. *November* 20.

Withdrawal of writ—Notice to bailiff.

A letter was addressed to the defendant who held a warrant to arrest the plaintiff, by the attorneys who had issued the writ, informing him that the action was arranged, and that notice had been given to the plaintiff's attorney of the withdrawal of the writ.

Held, that this was under the circumstances, a sufficient notice to the bailiff not to execute the writ of *Ca. Sa.*, and that in this particular case it was not neccessary to shew that the notice had actually reached the Sheriff, it being the defendants duty as his agent to communicate it to him. Two questions discussed in this case were—Did the defendant stand in the position of agent to the sheriff so as to make the notice to him? And was the notice itself sufficiently explicit to make it the duty of defendant to inform the sheriff?

Both were decided in the affirmative.

EX. WILLIAMS v. GREAT WESTERN RAILWAY CO. *Nov.* 12.

Jury—Interested juryman—Cause of challenge—New trial.

The court will not set aside a verdict in favor of a joint stock company merely on the ground that a shareholder was upon the jury, and was not challenged in consequence of the circumstance not being known when he was called.

The Court in delivering judment said:

Had there been any arrangement to procure such a person to be on the jury to influence the other jurymen, the court might interfere, or without any arrangement or manœuvering of any sort, if the court perceived that injustice had been done, they might interfere, but *per se* it is no cause for disturbing the verdict.

C. C. R. REGINA v. AARON LYONS. Nov. 20.

Arson—setting fire to goods in a house in the prisoners occupation with intent to defraud—Pleading—Fire Insurance—14 & 15 *Vic. c.* 19, *s.* 8—7 *Wm.* 4, *and* 1 *Vic. c.* 89, *s.* 3.

It is a felony, under 14 & 15 Vic. c. 19, s. 8, coupled with 7 Wm. 4, & 1 Vic. c. 89, s. 3, for a man to set fire to goods in a house in his own occupation, with intent to defraud an Insurance Company by burning the goods.

One of those Acts makes it felony to set fire to a house with intent to defraud. The other, felony to set fire to good in a house, the setting fire to which house would be felony.

If the intention to defraud is meant to extend to the defrauding of any person who may be defrauded by the effects in the house being destroyed, then, in this case it would be felony to set fire to the house; but setting fire to goods in a house, the setting fire to which house would be felony—is felony.

C. C. R. REGINA v. HILTON AND MCEVIN. *Nov.* 22

Pleading—Indictment charging previous conviction—6 & 7 *Wm.* 4 *c.* 3—*Evidence of receiving—Principal in second degree.*

Where an indictment for felony lays a previous conviction, notwithstanding that when the prisoner is given in charge to the jury, the subsequent felony must be read alone to them, in the first instance it is no objection to the indictment, that the previous conviction is laid at the commencement.

Upon an indictment against E. H., and another for stealing and receiving, it was proved that H. was walking by the side of the prosecutrix, and E. was seen just previously following her. The prosecutrix felt a try at her pocket and found her purse gone, and on looking round saw H. walking with E. in the opposite direction, and saw H. handing something to him.

The jury were directed, that if they did not think from the evidence that E. was participating in the actual theft, it was open to them on these facts to find a verdict of receiving. The jury found H. guilty of stealing, and E. of receiving. *Held*, that upon the finding of the jury, E. was not a principal in the second degree as the jury had not found that he was acting in concert with the other prisoner in the theft, and that the conviction was right.

Held also, that the direction to the jury was right.

It was objected, that upon the facts proved, the jury should have been told to find McEvin guilty of stealing or of no offence. Upon the facts he was a principal in the second degree, aiding and abetting, present, and near enough to afford assistance; Archibold's Criminal Pleading. Williams, J, that is not enough to constitute a principal in the second degree, there must be common purpose and intention. Wightman, J., thought that they, the jury, might very well have inferred concert but they had not done so.

L. J. WALL v. COLSHED. *July* 6, 7.

Will—Construction—Conversion.

A testator gave the rents of his real and personal estate to his wife for the support of her and her children, till the youngest attained 21, and then devised certain part of his real estate to his daughter E., for life, and after her death to his trustees, upon trust to sell and divide the proceeds among E.'s children equally. The testator gave other real estates in the same terms, to his son W., for life, and after his death to his trustees upon similar trusts for sale, for the benefit of his children; and he gave the residue of real and personal estate to his daughters E., and A., equally. And he declared that in case either of his children should die under 21, his or her share should go to the survivors or survivor of them for life, and after the death of the survivor, he gave such shares to the trustees upon trust to sell for the benefit of the issue of the deceased children. E., and W., attained 21, and died without issue, and the question arose whether their shares belonged to the real or personal estate of the testator.

Held, on the whole construction of the will, that the trusts for sale did not depend on E. and W. having issue: but that their shares were absolutely converted into personalty.

L. J. DAVIS v. NICHOLSON. *July*, 9, 10.

Specific legacy—Liability to debts—Assent of Executor.

A testator made a specific bequest of a leasehold estate. The executor administered the testator's estate without the assistance of the Court, and assented to the bequest and assigned the leasehold to the legatee. Afterwards a creditor filed a bill for the administration of the estate.

Held, that the leasehold was liable to the debt, notwithstanding the assignment by the executor, and that it was not incumbent on the creditor first to shew that the residuary personal estate was insufficient.

Gillespie v. *Alexander*, 3 Russ. 180, distinguished.

V. C. W. JONES v. PEPPERCORN. *Nov.* 12, 13, 15, *Dec.* 3.

Lien—Deposit of Securities.

Foreign bonds were deposited by the owner with B. (a banking firm,) for safe custody, B was in the habit of obtaining advances from C., his broker, upon the deposit from time to time of various securities. A's. bonds were deposited by B. with C., these bonds were sold by C. and produced more than enough to satisfy the advances which had been made upon their security.

Held, that C.'s lien in respect of the general balance due from the estate of B. attached to the surplus proceeds so that as against it C. was entitled to retain these surplus proceeds in satisfaction of what might be due to him upon the result of the account of his general dealings with B.

Evidence was given by brokers to the effect of a general lien by lenders on the borrowers securities, until the balance due on every account was paid. Those securities were deposited for a a specific purpose in the first instance, but when that was satisfied nothing hindered the general lien attaching. As laid down by Lord Campbell, (12 C. & Fin. 806 9,) the special contract is only exclusive of the general lien, when the general lien is inconsistent with the special contract.

EX. EASTWOOD v. LAINE & ANOTHER. *Nov.* 11.

Action—False representation—Damages—Bill of Exchange.

In an action against directors of a joint stock company, for a false representation that they had authority to bind the company by their acceptance of a bill of exchange drawn on the company, it is incumbent on the plaintiff to show that he sustained damage, and an action is not therefore sustainable by the indorsee of such a bill, unless he shew that he gave value for it or was otherwise damnified.

The first count was against the defendants as acceptors, on which they were not liable, having no legal authority to contract as directors of the company, and it was not, nor did it profess to be their acceptance in any other capacity. As said by Lord Tenderden, no one can be liable as an acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor—Second Count. False representation of authority to contract to plaintiff, under which it was incumbent to show special damage which was not done.

It was remarked, that the plaintiff was not privy to the fraud in this case, unless it was to be considered that the representation was made to any person to whom the bill might come.

V. C. K. HENDERSON *v.* COOK. *July* 19 *&* 20.

Demurrer for want of equity—Ore tenus—Review.

Where a plaintiff files a bill of review on new facts, discovered since a decree, he must first obtain leave of the Court, because the Court must be satisfied that such new facts were not known when the decree was made, or could not without reasonable diligence have been known.

Where a bill of review is filed with leave of the court, it is necessary to state that fact on the face of the bill.

A general demurrer for want of equity does not include on the record a demurrer *ore tenus*, that leave of the Court to file the bill was not stated on the face of the bill. A defendant demurring for the want of equity is not precluded from demurring *ore tenus*.

L. J. HEDGES v. BLICKE. *July* 14, 15, 24, 26, 31.
HEDGES v. HARPAR.

Will—Construction—Annuity, whether for life or perpetual—"Dying without issue"—Vesting.

A testator gave to each of his five daughters £400 per annum, during their lives, and after their respective decease, he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share; and in case of either of his daughters dying without issue, then he directed such annuities to cease and fall into the residue of his estate.

Held, having regard to the context of the will, first, that the annuities given to the children were perpetual, and not for their lives only.

Secondly, that the words "dying without issue," in the limitation over, did not enlarge the gift to the daughters to an absolute gift.

Thirdly, that no interest vested in children of the daughters who died in the lifetime of their parents.

V. C. K. LEE v. LEE. *July* 27 *&* 28.

Will—Construction—A description—Transfer of Stock.

Where a testator gives a sum of stock, which after the date of his will is transferred into his own name, and so stands at the time of his death, that is not ademption.

Where a sum of stock standing in a testator's name at the time he makes his will, is afterwards sold out by him and cannot be further traced, that operates as an ademption.

Ademption is a destruction or cesser of the thing given.

M. R. IRBY v. IRBY. *July* 24.

Trustee—Set-off—Lis pendens.

A. being entitled to a share under a settlement, the funds of which had been lent to B., on his covenant, and partly secured by a mortgage, became executor of B. A suit was instituted to recover the trust funds out of B's. estate, and generally for administration of his will. After a decree for accounts, A. assigned his share, with notice of the suit, and was subsequently found to be indebted as executor to B's. estate beyond the amount of his share. By the order, on further directions, A's share had been declared liable to make good his debt.

Held, that the creditors of B. were entitled to be paid out of the estate in priority to the assignees of A's share.

M. R. BYRNE v. BLACKBURN. *July* 30.

Will—Construction—Gift to parent for benefit of children.

On a bequest upon trust for a married woman for her separate use for life, and then upon trust to pay the income to her husband for life, "nevertheless to be by him applied for or towards the maintenance, education, or benefit of the children."—Held, that the husband was entitled absolutely to the income for life.

V. C. K. VORLEY v. JERRAM. *July* 7.

Practice—Subpœna duces tecum

Where the examination of a witness is closed, and it is necessary that he should produce certain books, &c., at the hearing, the Court may require him to do do so by a *subpœna duces tecum*.

An application for *subpœna duces tecum* may be made before the hearing.

REVIEWS.

THE LOWER CANADA JURIST.—Montreal: J. Lovell.

The January number of this unpretending yet really valuable periodical, contains a full report of an interesting will case which has been in litigation for upwards of thirty-seven years. The case was argued in 1822, in the King's Bench, and the Judgment then rendered was reversed by the Court of Appeals, the decision of which was set aside by the Privy Council. A new trial being then ordered, the case after a further delay of a quarter of a century, has been finally set at rest by the unanimous decision of the Judges in favour of the validity of the

will, a rather unique document that must have tested the acumen of the Privy Council. The following is a verbatim copy of the bequeathing clause:

De sei amei auran Des Bon receive mon name ge Don a Challe Dorion la goiyan de tous les fon que ge posede ausei Bein com lin terre de toutes les argants aveque les yanfan qui la desa darnier fame, que toutes les yanfan qulora aveque elle auseito que mon frère cera mor, ei reteiron tout les profei intere s'aquira toute qu'a seuse qui porteron le nom De Dorion ausito que sa feigue cero mareiaté sa cera feinei le garson De sa fame reteiron tout le reveneu gatan."

THE UNITED STATES INSURANCE GAZETTE & MAGAZINE, *January* 1859—New York E. E. Currie.

This Journal we regard as the most available source of information relative to American Insurance Companies accessable. The present number contains the latest financial statements of the leading U. S. companies. An attentive perusal of its contents would very likely profit those who contemplate insuring in any of these institutions.

THE GREAT REPUBLIC.—Leonard Scott & Co., New York.

We have to acknowledge the March number of the "Great Republic," one of the best New York Monthlies.

A glance at its varied contents gives promise of some pleasant reading for an idle hour. "The Seven Travellers at Niagara," is a fresh and lively sketch of a first visit to the mighty cataract; and "a Night on the Llanos" in a few pages, gives but too true an idea of the convulsed state of society in South America.

THE LONDON QUARTERLY.

This Review is amongst the ablest of the many periodicals which visit this country.

The present January number fully sustains its wide and well deserved celebrity, for deep research, comprehensive thought, masculine and brilliant style. We have always been at a loss to comprehend why it is that the trashy frivolous publications of the neighbouring States are in such request here, when works of such high ability as the four Quarterlies emanating from the first minds of Great Britain, are so easy of access to the reading public.

The leading article of the London Quarterly—"*Difficulties of Railway Engineering*" will repay an attentive perusal. It is a history—relieved by splendid illustration—of the ability, the enterprize, the indomitable courage which marked the dawn of the Railway Spirit in England, and which have followed it apace in its progress to the grand success of the present day.

We regret that our limited space precludes a further notice of this valuable periodical. The lovers of Smollet, will be delighted with a capital paper on the foibles and virtues of their favorite author; those who are of a more serious mood will find matter for reflection in a well digested article on "Church Extension."

THE COMMON LAW PROCEDURE ACT, THE COUNTY COURTS ACT AND THE NEW RULES OF COURT, WITH NOTES OF ALL DECIDED CASES &c. By ROBERT HARRISON, Esq., Barrister-at-Law. Toronto, 1858.

A short notice of a colonial law book may not be without interest for the English lawyer, although it treats exclusively of colonial practice; for the Canadian Procedure Act was based upon our own, and Mr. Harrison has been enabled to illustrate his excellent edition of it by extensive reference to the decisions of the English courts. But he has not contented himself with mere notes of cases; he has attempted that which we do not remember to have seen in any of our own books of practice—to extract and define some *principles* of practice. The general belief among lawyers in England is, that practice is purely arbitrary; that it is governed by no principles, and that it would be vain to attempt the reduction of practice to a system. Mr. Harrison thinks otherwise, and in his preface he thus explains his views:

No case, whether early or late, should, if possible, be viewed otherwise than as controlled by some governing principle. In matters of practice, certain principles may be discovered which are of intristic value as the key-notes of a great variety of cases. When it is laid down in general terms, that he who endeavours to upset an opponent upon some ground of irregularity must be strictly regular himself, we have before us a principle applicable to every case of irregularity. When we are informed that the law favours the liberty of the subject, we reasonably conclude that, in a proceeding to restrain the subject of that liberty, there must be no irregularity. When the court sets aside an arrest, because the affidavit to hold to bail does not state that the debt is "due," we know that it is set aside, not merely because there is an authority in point, but because that authority is consistent with reason, and accords with the general principle that the liberty of the subject is to be favoured. The court, in effect, decides that the affidavit omits to make out a good case for depriving the subject of his liberty.

We should like to see the scheme, thus suggested, elaborated by some competent pen among ourselves. If such a work can be accomplished, there is no question as to the utility alike to the law student and to the practitioner. Practice is so difficult to learn and to remember, because it appears to be arbitrary and incapable of reduction to principles. If principles lurk at the bottom of it, and any young English lawyer has the patience and ability to extract them, we can promise him both reputation and profit. It is at least worth the trial, for the effort would be an education in itself.

We congratulate the Profession in Canada on the possession of so accomplished a legal writer as Mr. Harrison, and a book of practice so invaluable to them as this must be.

APPOINTMENTS TO OFFICE, &c.

COUNTY CROWN ATTORNEY.

GEORGE ROBINSON VANNORMAN, Esquire, Barrister at Law to be County Attorney County of Brant.—(Gazetted, February 19, 1859.)

CORONERS.

WILLIAM S. HEWAT, Esquire, M D., and WILLIAM C. SHAW, Esquire, Associate Coroners for the County of Wellington.

CHARLES ROLLS, Esquire, M.D., and HENRY HANSON, Esquire, M.D, Associate Coroners for the County of Middlesex.—(Gazetted, Feb. 5, 1859.)

TRUEMAN RAYMOND, Esquire, Associate Coroner for the County of Welland.

EDWARD ALLEN, Esquire, Associate Coroner for the County of Simcoe.—(Gazetted, Feb. 19, 1859.)

JAMES PEPPER LYNN, Esquire, M.D, Associate Coroner for the United Counties of Lanark and Renfrew.—(Gazetted, Feb. 26, 1859.)

NOTARIES PUBLIC.

CHARLES HENRY WHITEHEAD, of Woodstock, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, Feb. 5, 1859.)

WILLIAM F. BULLEN, of the Village of Delaware, Esquire, to be a Notary Public in Upper Canada.

HENRY TAYLOR, of Ingersoll, Esquire, to be a Notary Public in Upper Canada.

ANDREW MILROY, of the City of Hamilton, Esquire, to be a Notary Public in Upper Canada.

WILLIAM McKENZIE JOHNSTON, of Strathroy, Esquire, to be a Notary Public in Upper Canada.—(Gazetted Feb. 19, 1859.)

WILLIAM B. CLARK, of the Town of Sarnia, Esquire, to be a Notary Public in Upper Canada.

JAMES BLACK, of the City of Hamilton, Esquire, to be a Notary Public in Upper Canada.

DUNCAN DUFF McGILLIVARY, of the Town of Port Hope, Esquire, to a Notary Public in Upper Canada.—(Gazetted, Feb. 26, 1859.)

TO CORRESPONDENTS.

JAMES SMITH, A CLERK. OTTO KLOTZ, A COUNTY JUDGE—Under "Division Courts."

A. H., M. McP., X., and WILLIAM SMITH—Under "General Correspondence."

Messrs. L. & P., Guelph—Have mislaid the *Lower Canada Jurist* containing the case you mention.

A MORSE, Smithville—Too late for this number, will receive attention in o next.

JOHN TILT, Derry West—Ditto.