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DIARY FOR JUNE.

25. Monday..... Recorder's Court sits. Last day for notice of Trial for Co. Ct.
26. Tuesday ..... Chancery Sittings Cornwall.
3. SUNDAY..... *1st Sunday after Trinity.*
5. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
24. SUNDAY ..... *2nd Sunday after Trinity.*
10. SUNDAY..... *3rd Sunday after Trinity.*
23. Thursday . .. Sittings of Court of Error and Appeal.
17. SUNDAY .... *4th Sunday after Trinity.*
19. Tuesday ..... Last day for Co. Coun. finally to revise Assess. Rolls, and for application by C.S.S. Chief Sup. to report state of Gram. Sc.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

JUNE, 1863.

A BANKRUPTCY LAW REQUIRED.

If all men were able to pay their debts, and honestly disposed to do so, there would be no need of a bankruptcy law. But when, in a community, many persons are found unable, from some cause or other, to pay their debts in full, it becomes necessary that there should be such a distribution of a debtor's effects among his creditors, that there shall be no preference or priority—that all shall share alike—that after a lawful and equitable distribution, the debtor shall be protected in the enjoyment of future acquired property.

The property of the debtor is the fund to which the creditor looks for payment. So long as that fund is sufficient to pay all demands upon it, the ordinary remedy by action is all that is required; but when ascertained that the creditor's fund is insufficient for the payment of his debts, so that some creditors are likely to be paid in full at the expense of others less fortunate, and that the debtor himself, for all time to come, is likely to have the millstone of debt about his neck, something more than the ordinary remedy by action is needed.

The creditors have their rights. The debtor has his rights. It is an object of solicitude so to dispose of the debtor's effects, and of the debtor himself, as not to trench upon the rights of either. For that purpose our present law of insolvency is, and for a long time past has been, utterly insufficient.

That which should be managed under the well regulated provisions of an act of Parliament, applicable alike to all persons and all cases, is left to the caprice of debtors or the caprice of creditors, to the certain injury and loss of the one party or the other. As the law stands, an insolvent debtor either honestly gives up all that he has for the benefit of his creditors, or, under pretence of an assignment for the benefit of his creditors, makes a dishonest assignment for the benefit of himself, and protection of his effects as against the demands of his creditors; but the latter, we are sorry to say, is too often the case.

It is a mistake to allow the debtor to dictate on what terms his creditors shall have his effects. It is a mistake to allow these effects to be assigned, as is often the case, to the son, the brother, or brother-in-law of the debtor, whose interest is not that of the general body of the creditors, but rather that of the debtor, his relative. It is a mistake to allow the effects from year to year to be tied up under the assignment, so that none but the debtor himself and his chosen assignee shall derive any benefit from the assignment. It is a mistake to allow the debtor himself to decide upon his own insolvency, and perhaps, under plea of insolvency, so make away with his property as to place it beyond the reach of his creditors, and yet have the full enjoyment of it, as if no assignment were made.

These are all dishonest but too common practices; and the law (to our shame be it said) rather encourages than discourages them. If a debtor, disposed to be honest, really strips himself of all that he has, he is left without support and without protection. Through misfortune, he finds himself so embarrassed that it is necessary to compound. Some creditors, whose demands are small, but whose expectations are large, will not release without payment in full. Payment in full is impossible. The consequence is, that the future earnings of the debtor are subject to be pounced upon to satiate the demands of a few hard-hearted creditors. He sees before him men prepared to dispute the very bread that enters his mouth for his daily sustenance and support. He sees before him, as the reward of honesty, a life of penury; and not merely so, but a life of turmoil with greedy creditors. He sees around him debtors, once insolvent like himself, who, notwithstanding assignments for the benefit of creditors, live in affluence, and who appear to grow richer and richer after each assignment. He has a family to support. The choice is between honesty and penury, or dishonesty and plenty. The law favors the latter, and the latter is his choice.

Now, this should not be. The law which tolerates it is defective. The law which encourages it is disgraceful. But such has been the state of our law for many years. No one has been found able or willing to make the necessary amendments. All admit the necessity of them, but none has the courage to make them. The country suffers for the want of a legislative doctor, possessed of sufficient

skill to apply the remedy. The seat of the disease is well known, but there is not one equal to the task of grappling with it and destroying it.

During the late sitting of the Legislature, our hopes were raised, owing to reports that reached us, of a measure introduced by the late Solicitor-General of Lower Canada, Mr. Abbott, by and with the sanction of the Government of which he was a member. It was introduced, read twice, referred to a special committee, by whom it was amended, and prematurely killed off, owing to the dissolution of Parliament. Though for the present lost, its language is still preserved, and we hope to find it revived during the next session of the Legislature.

A copy of the bill, as amended by the special committee, is before us. We cannot say that the bill is perfect. Perfection is not to be had in anything human. The existing law must be amended, and amendments must be from time to time made, as needed, according to the teachings of experience. Rome was not built in a day. We do not expect in a morning to wake up and find a perfect law of insolvency placed on the statute book. Still we welcome the bill before us, not because it has any claim to perfection, but because it is a step in the right direction—an earnest of something more to be done.

One feature of the bill, which gives it a strong claim to our regard, is, that it is intended to apply equally to Upper and Lower Canada. Another is, that its aim is to combine as far as possible economy with sound administration of law. The latter aim is, of all aims in the preparation of insolvency laws, the most difficult to be attained. The Bankruptcy law of 1843 was found to be too expensive, and for that reason was allowed to die a natural death. The danger now is that the Legislature will be driven to the opposite extreme—economical but beggarly management. Time alone can prove the worth of a bankruptcy or insolvency law. It is impossible to please every one. No bill can be so framed that some one will not find fault with it. Even the Bankruptcy Act of England, the ripe fruit of ages of experience, collected and classified under the superintendence of the present Lord Chancellor, is, by some, heartily condemned. But we are at present disposed to think that any reasonable bill would be better than no bill. In despair we welcome any measure of reform. Let us give it a trial. If found wanting, amend it; if incapable of improvement by amendments, repeal it. Let us have something. Cowardice has long enough had its sway. The do-nothing policy, in respect of insolvency, has been the policy of successive Governments. It is time that such a policy should be reversed. We want measures, not men. We care not what the legislators call themselves—Reformers or Tories, Grits or Conservatives—so long as they prove themselves capable of sound legislation on this all-important subject.

Mr. Abbott's bill, as introduced to the Legislature, was carefully drawn. It was carefully and judiciously amended by the special committee to whom it was referred.

The bill first provides for voluntary assignments, and then for compulsory liquidations.

First, as to voluntary assignments. The bill enables any person unable to meet his engagements, and desirous of making an assignment of his estate, to call a meeting of his creditors at his usual place of business. The debtor, at such meeting, is to exhibit statements showing the position of his affairs, containing the names and residences of all his creditors, and the amount due to each, distinguishing between those amounts that are actually overdue, or for which he is directly liable, and those for which he is only liable indirectly as indorser, surety or otherwise; the statements to show the amount due to each creditor, and the amount and nature of his assets. He must at the same time produce his books of account, and all other documents and vouchers, if required to do so by any creditor. Each notice of the meeting, sent by post, is to be accompanied by a list containing the names of all creditors whose claims exceed $100, and the aggregate amount of those under $100. At the meeting the creditors are to name an assignee, to whom the assignment is to be made. If no assignee be named at the meeting, or if the assignee refuses to act, it is to be in the power of the debtor to assign his estate to any solvent creditor resident within the Province not related, allied or of kin to him, and being a creditor for a sum exceeding $500. Provision is made for the settlement of disputes, if any, in regard to the right to vote at the meeting of creditors. The deed of assignment is to be in a given form; if executed in Upper Canada, to be in duplicate. The assignment is to be held to convey to and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, all moneys and negotiable paper, stocks, bonds and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and all other his assets and effects, excepting only such as are exempt from seizure and sale under execution. Upon the execution of the deed, the assignee, if appointed in Upper Canada, is to deposit a duplicate thereof in the office of the proper Court. If real estate be passed by the assignment, then provision is made for its registry in the proper register office. If the deed be executed in Upper Canada, according to the form of execution of deeds prevailing with us, it is to have the same force and effect in Lower Canada as if executed there, and *vice versa*.

Second, as to compulsory liquidations. It is declared that a debtor shall be deemed insolvent, and his estate subject to compulsory liquidation, 1st, if he absconds or is immediately about to abscond from the Province with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process, or if, being out of the Province, he so remains with a like intent, or if he conceals himself within the Province with a like intent; 2nd, if he secretes, or is immediately about to secrete any part of his estate and effects with intent to defraud his creditors, or to defeat or delay their demands or any of them; 3rd, if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them; 4th, if with such intent he has procured his money, goods, chattels, lands or property to be seized, levied on or taken under or by any process or execution having operation where the debtor resides or has property, founded upon a demand in its nature proveable under the act, and for a sum exceeding $200, and if such process is in force and not discharged by payment or in any manner provided for by law; 5th, if he has actually been imprisoned or upon the gaol limits for more than thirty days, in a civil action founded on contract for the sum of $200 or upwards, and and still is so imprisoned or on the limits; or if in case of such imprisonment he has escaped out of prison, or from custody, or from the limits; 6th, if he wilfully neglects or refuses to appear on any rule or order requiring his appearance, to be examined as to his debts, under any statute or law in that behalf; 7th, if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or any part of them; 8th, if he wilfully neglects or refuses to obey or comply with the order or decree of the Court of Chancery, or of any of the judges thereof, for payment of money; 9th, if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this act.

If a trader cease to meet his commercial liabilities generally as they become due, any creditor for a sum exceeding $200 may make a demand upon him in a given form, requiring him to make an assignment of his estate and effects for the benefit of creditors If the trader on whom the demand is made, contends that the claim of the creditor does not amount to $200, or that it was procured in whole or in part for the purpose of enabling him to take proceedings under the act, or that the stoppage of payment by the trader was only temporary, and not caused by fraud or fraudulent intent, or by the insufficiency of the assets of the trader to meet his liabilities, he may within five days from demand present a petition to the judge, praying that no further proceedings be taken upon the demand. Provision is then made for the disposal of the prayer of the petition.

In Upper Canada, in case any creditor, by affidavit in a given form, of himself or of any other individual, shows, to the satisfaction of the judge, that he is a creditor of the insolvent for a sum of not less than $200, and also shows by affidavit such facts and circumstances as satisfy the Judge that the debtor is insolvent within the meaning of the act, and that his estate has become subject to compulsory legislation, the judge may order the issue of a writ of attachment in a given form against the estate and effects of the insolvent, and other subsequent proceedings, with a view to compulsory liquidation. If the Board of Trade in the county in which is situate the place of business of the debtor, has appointed official assignees, as hereafter mentioned, for the purpose of the act, the sheriff is to place the estate and effects attached in the custody of one of the official assignees; but if not, the sheriff is to appoint as guardian such solvent and responsible person as may be willing to assume the guardianship.

Authority is given to the Board of Trade at any place, or the Council thereof, to name any number of persons within the county in which the Board exists, or within any county adjacent thereto in which there is no Board of Trade, to be official assignees for the purposes of the act, and at the time of nomination to declare what security for the due performance of his duties shall be given by each of such official assignees before entering upon them. The powers and duties of an official assignee are then detailed. His remuneration is to be fixed by the creditors, at a meeting called for the purpose; but if not fixed before final dividend, it is to be put into the dividend sheet at a rate not exceeding 5 per cent. upon cash receipts.

Dividends are not, as at present, to be lost sight of, or otherwise conveniently forgotten. Upon the expiry of the period of two months from the first insertion of the advertisement giving notice of an assignment, or the appointment of an official assignee, or as soon as may be after the expiration of such period; and afterwards, from time to time, at intervals of not more than six months, it is made the duty of the assignee to prepare and keep constantly accessible to the creditors accounts and statements of his doings as such assignee, and of the position of the estate, and at similar intervals prepare dividends of the estate of the insolvent. The creditors entitled to rank in the estate are carefully described. Clerks and other persons in the employ of the insolvent in and about his business or trade are to be collocated on the dividend sheet by special privilege for any arrears of salary or wages due to them at the time of the

execution of the deed of assignment, or of the issue of the writ of attachment under the act, not exceeding three months of such arrears. All dividends remaining unclaimed at the time of the discharge of the assignee, are to be left in the bank where deposited for three years; and if at the expiration of that period still unclaimed, are to be paid over by the bank, with the interest accrued thereon, to the Provincial Government; and if afterwards duly claimed by persons entitled thereto, are to be paid over to such persons with interest at the rate of 3 per cent. per annum from the time of receipt by the Government. If any balance remain of the estate of the insolvent, after payment in full of all debts due by him, such balance is to be paid over to the insolvent, upon his petition to that effect, duly notified to the creditors by advertisement, and granted by the judge.

Strict provision is made against fraud, and fraudulent preferences of every kind. It is unnecessary here to detail them. Suffice it to say that they are such provisions as one would expect to find in an act of the kind, including some of those now in existence. Many of them are traceable to the English Bankruptcy Act, and so far the parentage is no disgrace to them. They are both wise and necessary.

Finally, provision is made for the discharge and protection of the debtor, under certain circumstances. A deed of composition and discharge, signed by the majority in number of his creditors for $100 and upwards, and who represent at least three-fourths in value of the liabilities of the insolvent, is to have the same effect with regard to the remainder of his creditors as if they also were parties to it. The operation and effect of the discharge is all that can be expected, and such as usual in such cases. Every discharge obtained by fraud or fraudulent preference, or by means of the consent of any creditor, procured by the payment to such creditor of any valuable consideration for such consent, is declared to be null and void.

The burthen of the administration of the law in Upper Canada is to be thrown upon the county judges. This, no doubt, is owing to motives of economy. We cannot say that we approve of it. The county judges have quite enough to do to discharge effectually the duties properly appertaining to their office. The jurisdiction of their courts has of late been much increased, and their labour and responsibilities in proportion augmented. In addition, the Legislature has of late years cast many duties upon them which, strictly speaking, appertain to the judges of the superior courts. The fact is, there is too strong a disposition to throw work upon the county judges, without previously considering what has already been cast upon them. They are looked upon as "legislative conveniences," upon whom may be thrown as much or as little work as the Legislature in its humour may see fit to impose. It will not do to crowd them to the earth with the burthen of official duties. We think the last straw that can be safely placed on their backs, has already been placed there. The addition of these new duties will be too much for them. Its effect will be to cause them either to neglect their duties proper, or the intended new duties, or perhaps both. In any view, the step is a false one. This we regard as the most objectionable feature of Mr. Abbott's bill. It is the penny-wise and pound-foolish system in all its hideousness. It is false economy to require judges of county courts, already sufficiently burthened, to administer a new system of insolvency law. Better far to leave that system to be carried out by specially organized tribunals, possessed of sufficient ability, and having sufficient leisure, to do the system justice. Money so spent will be well spent; and this, we feel satisfied, will be the only mode of securing for the new bill, in the event of its becoming law, a hearty and popular support, without which it will in a short time go the way of its predecessors.

We are aware that a cry for economy is now rampant, and perhaps not without reason; but there is nearly as much danger in yielding to it a blind obedience, as there is in neglecting it. If a system of insolvency law is to be had at all, we should have it properly administered; and we are satisfied that the proposed system will not be properly administered by the machinery devised by Mr. Abbott. New machinery is needed. The cost of it will be of no account, compared with the benefits to be derived from a healthy administration of the proposed law. Better far to have no law at all, than to have it so administered as to be a curse instead of a blessing. It is a great mistake to have too few judges for the administration of law. It is no less a mistake to pay them inadequately. The only way to secure a sound administration of law, is to have enough of judges, and the best men that can be had for the purpose. The only way to secure the best men, is to pay them enough to tempt them to leave the foremost ranks of the profession.

EASTER TERM, 1863.

During this term Hon. Adam Wilson was sworn in, and took his seat as a puisne judge of the Court of Queen's Bench.

During the same term the following gentlemen were called to the bar, Edward Boyd, LL.B.; Herbert S. McDonald, M.A.; Carydon J. Mattice, M.A.; James Miller, A.B.; Joseph Donovan; J. Downey; J. Wetenhall; and J. Shaw Sinclair.

During the same term the following gentlemen having

passed their final examination, were admitted to practise as attorneys at law, J. Hoskins; Joseph Wright; A. H. Stuart, LL.B.; T. C. Patterson, B.A.; J. Edwin O'Reily, M.A.; R. Forsyth; Herbert S. McDonald, M.A.; Edward Morgan; C. S. Mattice; Peter Brown; James Caufield; James A. Miller, B.A.; P. S. Martin; S. Kneeshaw; George S. Philip; A. Boultbee; M. J. Hickie; E. B. Haycock; W. J. Hayward; D. G. Hatton; A. Hudspeth; James Heap.

LAW SCHOOL.

Books to be read for the scholarships of the Law School:

1st Year—Stephen's Blackstone; vol. 1.
Stephen on Pleading.
Williams on Real Property.
Story's Equity Jurisprudence; from the beginning to section 440.

2nd Year—Williams on Real Property.
Best on Evidence.
Smith on Contracts.
Story's Equity Jurisprudence; 2 vols.

3rd Year—Real Property Statutes relating to U. C.
Stephen's Blackstone; book 5.
Byles on Bills.
Hayne's Outlines of Equity.
Coote on Mortgages.

4th Year—Burton's Real Property.
Russell on Crimes.
Common Law Pleading and Practice.
Smith's Mercantile Law.
Dart on Vendors and Purchasers.
Mitford on Pleading; and
U. C. Equity Pleading and Practice.

GENERAL NOTE.

In each year the examination may comprise questions on the Canadian Statutes affecting the prescribed subjects, when the text is varied by such statutes.

The examinations during last term were closed in the following order—the minimum mark being 240.

R. Walkem, 320; J. Hutt, 302; G. Kennedy, 273; G. Holmstead, 263; J. S. Stephens, 262.

JUDGMENTS.

The days appointed for the delivery of judgments in the Queen's Bench and Common Pleas are as follow:—

Queen's Bench—Monday, June 15, 10 o'clock.
Saturday, June 20, 2 o'clock.

Common Pleas—Monday, June 15, 2 o'clock.
Saturday, June 20, 10 o'clock.

SELECTIONS.

THE OLD ABRIDGMENTS.

Statham's Abridgment of the Law, folio.

In French, without title, date, or pagination. This work the first of the Abridgments of the Law, and the first English law book ever printed, is a kind of digest, containing most of the titles of the law, arranged in alphabetical order, and comprising under each head adjudged cases from the reign of Edward I. to the end of the reign of Henry VI., concisely abridged from the Year Books, together with many original cases not extant in the Year Books of those reigns. It has served as a model for others in later times, but was superseded by the Abridgment of Fitzherbert, which was published about the same period. There is only one edition, which is in folio, without date, and is supposed to have been printed by W. Tailleur, at Rouen, for Pynson; at the end of the Table are the words: "Per me, R. Pynson," and at the end of the volume is Tailleur's device. This Abridgment consists of 380 pages, and is a chef-d'œuvre of splendid typography, the singular beauty of which has rarely been exceeded in modern times. "The paper is of a very firm, silky texture," says Judge Story, "forming a strong contrast to the sleazy linen and cotton of our day; the ink is of a bright jetty and unfaded black; the type, though small, and partly composed of abbreviated characters has a sharp and distinct face; and the mechanical execution is so exact, that scarcely a letter exhibits a blur, and the surface of every page presents a uniform appearance, putting to shame many of the standard volumes of our times."

In Fuller's Worthies, published in 1862, * is the following account of our author sub nom., John Stathom:—

"He was born in this county [Derbyshire,] in the reign of King Henry the Sixth; and was a learned man in the laws, whereof he wrote an 'Abridgment,' much esteemed at this day for the antiquity thereof: for otherwise lawyers behold him (as soldiers do bows and arrows, since the invention of guns) rather for sight than service. Yea, a grandee in that profession hath informed me that little of Stathom (if any at all) is law at this day; so much is the practice thereof altered: whereof the learned in that faculty will give a satisfactory account; though otherwise it may seem strange, that, reason continuing always, the same law grounded thereon should be capable of so great alteration. The first and last time I opened this author I lighted on this passage: Molendinarius de Matlock tollavit bis, eó quod ipse audivit Rectorem de eâdem villâ dicere in Dominicâ Ram. Palm. Tolle, tolle.† 'The miller of Matlock took toll twice, because he heard the rector of the parish read on Palm Sunday, Tolle, tolle, *i. e.* Crucify him, crucify him.'‡ But if this be the fruit of Latin Service, to encourage men in felony, let ours be read in plain English."

Fitzherbert's Grand Abridgment of the Law.

This is one of the most ancient and authentic legal records, containing a great number of original authorities, quoted by different authors, which are not extant in the Year Books, or elsewhere to be met with in print. It has also the advantage of being a very copious and useful common-place or index to the Year Books, down to the twenty-first year of the reign of Henry the Seventh.

In the Library of Lincoln's Inn there is a beautiful copy of the first edition of this work, which is a very correct edition, printed in 1516, presented by Ranulph Cholmeley, and as there seems to be some uncertainty respecting the date of the first edition, some bibliographers having stated that it was printed in 1514, we give a description of this copy by Mr. Spilsbury, the accomplished librarian of Lincoln's Inn.

* We print from the edition of 1811. † Stathom, Tit. Toll, last case of the Title.
‡ It is the Gospel appointed for the day.

"This edition is in three parts, each having a frontispiece. Prefixed to the first part is a woodcut of the king on his throne, crowned, and holding sceptre and mund, and over this cut are the words: Prima pars hujus libri. To the second part is prefixed a woodcut of the royal arms, crowned, supported by a dragon and greyhound, with a portcullis on each side of the arms: above, two angels, bearing scrolls with an inscription encircling a rose; and over this cut are the words: Sequitur secunda pars. The third part has the same frontispiece as the second, and over it the words:

Ultima pars hujus libri.
¶ The price of the whole boke (XLs.) which boke conteynyth iii grete volumes

At the end is the following colophon:

Finis tocius istius operis finit XII die December,
A Odni Millecimo quingentesimo sextodecimo.

"Beneath the colophon is a cut of the royal arms, but of smaller size than the former, and with some variations.

"From the evidence of the woodcuts, the same having been used in the 'Fructus Temporum' printed by Wynkyn de Worde in 1515, Mr. Herbert concludes that the work was either executed by that printer, or printed for him in France. It is worthy of notice, however, that the same type is used by John Rastell in the Tables to this Abridgment printed by him in the following year, 1517, the smaller letter being used in the Prologue, and the larger chiefly in the Tables. A copy of this work was also presented to the Library by R. Cholmeley. In a notice of an edition of the Abridgment supposed to have been printed by Pynson 1514, Mr. Herbert says there is a copy in Lincoln's Inn Library. This is erroneous; for it is the edition of 1516, as just described, which is in that Library; nor can an edition of 1514 be traced in either of the Libraries of the Inns of Court, the Bodleian Library, or the British Museum. There is a copy at Holkham of the edition of 1516.

"The copy in Lincoln's Inn is bound in three volumes in a modern binding. On the inside of the covers of the first and second parts is pasted a paper label with the inscription of the donor: Ex dono Ranulphi de Cholmeley, &c.; and on one of the fly-leaves of the second part is the following quaint inscription: 'Of your charity pray for the soul of Robert Crawley sometime donor of this book which is now worm's meat, as as another day shall you be that now art full lustye, that remember, good christian brother. Farewell in the Lord. 1534.' At the end of the third part, also on one of the fly-leaves, is a Latin inscription in the same handwriting, nearly to the same effect."

The Abridgment was again printed by R. Tottell in 1565, two vols. folio: and with additional general Table by J. Rastell, in 1577, 4to.

Of this author old Fuller wrote:—

"Sir Anthony Fitzherbert, son of Ralph Fitzherbert, Esq., was born at Norbury in this county [Derbyshire]. He was first the King's Serjeant at Law; and was afterwards, in the fourteenth of King Henry the Eighth, made one of the Justices of the Common Pleas; so continuing until the thirtieth year of the said King, when he died. He wrote the excellent book 'De Naturâ Brevium,' with a great and laborious 'Abridgment of the Laws,' and a Kalendar and Index thereunto; monuments which will longer continue his memory, than the flat blew marble stone in Norbury Church under which he lieth interred."

"Mr. Fitzherbert," wrote Fulbecke in 1599, "must needs be commended for great pains, and for well contriving that which was confusedly mingled together, in many Year Books; but he was more beholden to nature than to art, and whilst he laboured to be judicial, he had no precise care of methodical points; but he was in conceit slow, so he was in conclusion sure; and in the treatises which be of his own penning, he sheweth great judgment, sound reason, much reading, perfect experience, and in the whole conveyance of his discourses giveth sufficient proof, that he sought rather to decide than devise doubtful questions."

Brooke's Grand Abridgment of the Law.

In this work which is disposed under more titles than that of Fitzherbert, many readings are abridged which are not now extant, except in a work entitled Brooke's New Cases. Of this author in comparison with Fitzherbert, Fulbecke says: "Mr. Brooke is more polite, and by popular and familiar reasons hath gained singular credit, and in the facility and compendious form of abridging cases, he carrieth away the garland. But where Mr. Fitzherbert is better understood, he profiteth more, and his abridgment hath more sinews, though the other hath more veins; but I am loath to make them countermates, and therefore leave the judgment thereof to others."

Sir Robert Brooke was Chief Justice of the Common Pleas in the reign of Philip and Mary. The first edition was printed in 1568, 4to; it was reprinted in 1568, and in 1570; in 1573 it was printed in two vols. royal folio, by R. Tottell, and again in 1580.

In Fuller's Worthies is the following note:—

"Reader, be charitably pleased that this note may (till better information) preserve the right of this county [Suffolk] unto Sir Robert Broke, a great Lawyer, and Lord Chief Justice of the Common Pleas in the reign of Queen Mary. He wrote an Abridgment of the whole law, a book of high account. It insinueth to me a probability of his birth herein, because (lawyers generally purchase near the place of their birth) his posterity still flourish in a worshipful equipage at Nacton, nigh Ipswich, in this county."

"The character of the Abridgments of Fitzherbert and Brooke," says Judge Story, * "may be summed up in a few words. They are mere Indexes under general heads, of the principal adjudged cases up to their own times, in which the points are accurately stated, but without any attention to order or any attempt at classification. As repositories of the old law, they now maintain a very considerable value, and may be consulted with advantage. Whoever examines them (for a thorough perusal of them will be a mere waste of time) will probably feel inclined, when he can, to ascend to the original sources; but if these should not be within his reach, he may rely with confidence, that these learned judges have not indulged themselves in a careless transcription, or a loose statement, of the law. In our own practice we have frequently found them the safest guides to the old law, and particularly to the contents of the Year Books. At the times when these Abridgments were originally published, they must have been very acceptable presents to the profession. But many of the titles are now obselete; and the works lie on the dusty shelves of our libraries rarely disturbed, except upon some extraordinary inquiry, touching the feudal tenures, or the doctrine of *seizin*. The modest motto prefixed to both of them deserves to be remembered: *Ne moy reproves sauns cause, car non extent est de bon amour.*"

Rolle's Abridgment of Cases and Resolutions in the Law.

According to Lord Campbell, Rolle, while a student at the Inner Temple, London, "composed that wonderful Digest which, with additions and corrections made by him in after-life was given to the world under the title of 'Rolle's Abridgment,' and which shows not only stupendous industry, but a fine analytical head for legal divisions and distinctions." And when this work was cited at the bar in a case in the King's Bench in 1670, two years after it was published, Twisden, J. remarked: "That was his opinion, it may be, when he was a student. You have in that work of his a common-place which you stand too much upon; but otherwise it is nothing but a collection of Year Books, and little things noted when he made

* Miscellaneous Works, pp. 384, 385, ed. 1852.

his common-place book. His private opinion must not warrant or control us here."* There is a preface addressed to young students in the law of England, by Sir Matthew Hale, which has been reprinted in the first volume of the Collectanea Juridica. Lord Hale says: "Though it is of excellent use and worth, yet it comes far short of the worth and abilities of him, that compiled it, and therefore is an unequal monument of him."

Mr. Hargrave speaks of this work as excellent in its kind, and in point of method, succintness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of the law.† Judge Story says the chief advantage that it possesses over the earlier compilations is in a more scientific arrangement of the materials, and a greater subdivision of the general heads, so as to bring together matters of the same nature or relative to the same branch, instead of heaping them up in one undistinguishing mass.

Henry Rolle was Chief Justice of the Upper Bench during the Usurpation. The work was printed in 1668, in two volumes, folio, in French.

The preceding works constitute the principal of the old Abridgments. We have purposely passed over, as of no account, Hughes's, which was published in 3 vols. 4to. 1660-1663; and Sheppard's, which was printed in 1675 in 3 vols. 4to; and also Nelson's, which is chiefly, and very inaccurately copied from Hughes's and published in 1725 in 3 vols. folio. D'Anvers's Abridgment, which extends only to title "Extinguishment," is a translation of Rolle's with the addition of more modern cases. The second edition was printed in 3 vols. folio, in 1725, 1732, 1737.—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(In the County Court of the County of Lambton, before CHAS. ROBINSON, Judge.)

LUCAS v. ELLIOTT.

Division Courts—Jurisdiction—Detinue.

Held, That the Division Courts of Upper Canada have jurisdiction in actions of detinue.

Where therefore plaintiff sued in a County Court, and the value of the article detained was found to be $1, and no certificate for full costs was obtained from the judge who tried the cause, plaintiff was restricted to the recovery of Division Court costs only, and so much of defendants costs between attorney and client as exceeded the whole costs of defence that would have been incurred by the defendant in the Division Courts were allowed to be set off against the amount of plaintiff's costs and verdict.

(May 24, 1863.)

This was an action of detinue. Verdict for plaintiff $1.

The value of goods detained was found by the jury to be $1. The clerk taxed the plaintiffs costs on entering judgment at full County Court costs.

Mr. Pardee thereupon took out a summons to shew cause why the clerk should not be directed to revise the taxation and be directed to tax Division Court costs only, and why so much of the defendants costs taxed as between attorney and client as exceeded the taxable costs of defence that would have been incurred by the defendant in the Division Court should not be set off by the said clerk against the plaintiff's Division Court costs, and verdict upon the following grounds, viz.: That the said action was a suit of the proper competence of a Division Court, and that only Division Court costs should have been taxed by the clerk to the plaintiff, there having been no certificates granted by the judge, as required by the 328th sec. of Con. Stat. U. C. cap. 22, and why the said judgment should not be set aside or amended according to said revision.

F. Davis showed cause.

ROBINSON, County J.—The question for me to decide is, whether, under the provisions of the Division Court Act, the Division Courts have jurisdiction over actions of detinue.

The 54th and 55th sections of the Division Court Act (Con. Stat. U. C. ch. 19) define the jurisdiction of the Division Courts.

Section 54 carefully enumerates the cases in which they shall not have jurisdiction, viz.:

1. Actions for any gambling debt.
2. For liquors drunk in any tavern or ale house.
3. On notes of hand given wholly or partly in consideration thereof.
4. Actions of ejectment, or in which the right or title to any corporeal or in-corporeal hereditaments, or any toll, custom, or franchise comes in question.
5. In which the validity of any devise, bequest, or limitation under any will or settlement may be disputed.
6. For malicious prosecution, libel, slander, criminal conversation, seduction, or breach of promise of marriage.
7. Actions against a Justice of the Peace if he objects to it.

By sec. 55 the judge of every Division Court may hold plea of and may hear and determine, in a summary way, for or against persons, body corporate, or otherwise.

1. All personal actions, when the debt or damages claimed do not exceed forty dollars.
2. All claims and demands of debt account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100. And he may make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience.

If detinue is to be considered an action ex-contractu, it would come within the 2nd sub-section; but I hardly think it was the intention of the Legislature that detinue might be maintained when the value of the chattel detained was $100, while trover could only be brought to the amount of $40; besides, in the forms of pleading given by the Com. Law Pro. Act, detinue is classed among the actions on wrongs.

I shall therefore treat it as coming under the 1st sub-section of sec. 55.

It has been argued that the words "debt" or "damages" claimed, limit the meaning of the words "all personal actions," and exclude the action of detinue; because the object of that action is not to recover debt or damages but the specific recovery of a chattel. But, if that argument is a sound one, the County Courts would not have jurisdiction over this action any more than the Division Courts. The Act respecting County Courts (Con. Stat. U. C. cap. 18. sec. 17) confers jurisdiction in the following words, subject to the exceptions contained in the preceding section:—"The County courts shall have jurisdiction and hold plea in all personal actions where the debt or damages do not exceed the sum of $200." The language of the two Acts in reference to personal actions, it will be seen, is precisely the same, but the Com. Law Pro. Act (Con. Stat. U. C. sec. 300) takes it for granted that the County Courts have such jurisdiction, by directing that the County Court judges may order execution for the return of the chattel detained, without giving the defendant the option of retaining the chattel. Clearly then the argument founded on the wording of the section of the Division Court Act, conferring jurisdiction, fails.

It has, however, been urged, that the plaintiff in all cases of detinue is entitled to the benefit of the section of the Com. Law Pro. Act last cited, and therefore that the Division Courts can have no jurisdiction in such actions, as there is no provision that the Division Court judge may order execution as provided in that section, and that it is clearly against the meaning and provisions of the Division Court Act, that a Division Court Bailiff should enforce a writ against lands. Such is undoubtedly the case, for it has been provided that where a judgment has been recovered in the Division Court and an execution returned *nulla bona*, and the sum remaining unsatisfied amount to $40, the plaintiff or defendant

* *Osborne* v. *Walleeden*, 1 Mod. 273. † Notes on Co. Lit. *a* 9.

may obtain a transcript and file it with the Clerk of the County Court, and he is then entitled to the same remedy as if the judgment had been originally obtained in that court. I should certainly not think that I was empowered as a Division Court judge to order the execution to issue under the 390th sec. of the Com. Law Pro. Act, notwithstanding that the 69th sec. of the Division Court Act provides, "that in any case not expressly provided for by that Act, or by existing rules, or by rules made under that Act, the county court judges may in their discretion adopt and apply the general principles of practice in the superior courts of common law in actions and proceedings in the Division Courts."

If the powers conferred on the Division Court Judges by the section just cited and the wording of the section as to jurisdiction, gives the Division Courts jurisdiction over detinue, (and I find it impossible to come to any other conclusion,) the subsequent conferring of additional powers on Superior and County Court judges and not giving them to Division Court judges, can hardly be construed to take away that jurisdiction.

A stronger argument against the existence of such jurisdiction is the silence of the rules and forms of the Division Court Act. No execution in detinue is provided by them, and the forms of claims though they make mention of trover leave out detinue. Now by the 66th section of the Division Court Act the rules and forms shall have the same force and effect as if they had been made and included in that Act, so that they should be read as if incorporated in that Act. They become then material in their bearing on the construction of the Act. But it would be too strict a construction to hold that such an omission would take away the power conferred generally by the Act, more especially when the statute seems to anticipate omissions of this nature by giving the judges powers to supply them by reference to the practice of the Superior Courts.

In *Taylor* v. *Addyman* 22 L. J. C. P. 94, where the words "debt" and "damages," as used in the English County Court Act, were held to include detinue, the objection of want of machinery was not allowed to prevail. It certainly would impair the utility of the Division Courts if plaintiffs can be allowed in all cases of detinue, no matter how small or trivial, to sue in other courts and heap costs on defendants. I cannot think that this was the intention of the Legislature.

I therefore am of opinion that this action is of the proper competence of the Division Court, and that the order should be made absolute for revising the taxation of costs.

Summons absolute.

CORRESPONDENCE.

SIMCOE, *25th April*, 1863.

SIRS,—I wish to know if Bailiffs of Division Courts are or are not entitled to a fee on executions when returned *nulla bona?*

Please look at "Act respecting Division Courts" of 1859, sections 52 and 53, cap. 19, and give your opinion and oblige,

Yours truly,

Eds. *Law Journal*, Barrie, C. W. N. PEGG, *Bailiff.*

[We think that they are not. There is nothing in the tariff of fees to warrant the charge, and we do not think there is enough in the above sections to authorize it in the absence of an express provision, although they seem to give some ground on which to rest an argument in its favor.

We are aware that the fee is allowed to be charged in some counties; but we think the better opinion is that it is unauthorized, and that for a special and very obvious reason it was not intended to be allowed.—EDS. L. J.]

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

IN THE MATTER OF SHERIFF DAVIDSON AND THE COURT OF QUARTER SESSIONS IN AND FOR THE COUNTY OF WATERLOO.

Jury Law—Con. Stat. U. C. cap. 31, secs. 84, 87, 105, 161, sub-secs. 1, 2, 4; sec. 164 sub-sec. 87, c. 84, sec. 161, sub-secs. 1, 2, 4; sec. 164—Sheriff's fees

Held, 1. That a sheriff is not entitled to be paid for certificates alleged to be furnished to persons under and pursuant to s. 105 of the Jury Act, without proving that the persons to whom the certificates were given requested the same

2. That no appeal lies from the decision of the Court of Quarter Sessions as to the amount which a sheriff is entitled to receive for mileage to serve jurors, and therefore that the court will not at the instance of the sheriff, grant a mandamus to compel that court to revise its decision in such a matter.

3. That the sheriff is entitled to be paid for copies of County Court Jury Panels furnished to the Superior Courts of Common Law for Upper Canada at Toronto

[Easter Term, 1863.]

In Easter Term, 1862, *R. A. Harrison* obtained a rule calling on the Court of Quarter Sessions in and for the county of Waterloo, on notice to their chairman, to shew cause why a mandamus should not issue commanding them properly to audit the accounts of the said sheriff, laid before said court at the sittings in October and March last, by allowing to the sheriff certain items deducted from the October account, viz:—

111 miles to serve jurors, at 8c.	$8 88
2 copies of juror's panels for Court of Assize	2.00
6 copies of same for Court of Quarter Sessions and County Court	6.00
125 certificates to jurors served, and certain items deducted from his account, rendered to said court in March, 1862	25 00
17 miles to serve jurors	1.36
6 copies of panels of grand and petit jurors for Quarter Sessions and County Court	6 00
21 certificates to grand jurors	4 20
	$53 44

And to order payment of the accounts, including said items, on the ground that the sheriff having performed the services is in law entitled to be paid for them, and that the disallowance thereof by said court is contrary to law, &c., &c.

In Michaelmas Term last *M. C. Cameron* shewed cause. He objected that the rule should be to the magistrates in Quarter Sessions and not to the court. That the court had audited and had acted in their discretion. That they had rejected the claim for mileage, considering the evidence insufficient. He filed several affidavits.

R. A. Harrison supported his rule.

HAGARTY, J.—I shall first notice the charges disallowed.

Of certificates of exemption to jurors.

Apart from any technical questions as to our right to review the decision of the Court of Quarter Sessions, I am not prepared to say with certainty that I think their view erroneous.

The whole question seems to turn on two clauses of the Juror's Act—

Sec. 105 says "Every juror who has attended, shall, upon application by him made to the sheriff or deputy sheriff before he departs from the place of trial, receive a certificate testifying his attendance, &c, and the sheriff or deputy sheriff shall give such certificate upon demand."

Sec. 161 provides a tariff of sheriff's charges "For the respective services performed by him under this act."

Sec. 5 "For every certificate given to any juror, of his having served (to evidence his exemption from serving again until his time for doing so returns in its course) the sum of 20 cents."

As I understand the disputed point it is this, the sheriff makes a certificate for every juryman, and has it ready and presents it to each or leaves it at the treasurer's office for each, whether the juryman asks for it or not. The Court of Quarter Sessions insist that unless the juryman expressly requires it, the sheriff should not prepare or charge for it.

I am hardly prepared to say that the latter view is not the true one.

The certificate seems certainly intended by parliament for the benefit of the jurymen, and the sheriff is compelled to give it upon demand. That the latter officer may not be compelled to work for nothing he is allowed 20 cents for every certificate given to any juror of his having served.

The juror is not bound to ask for it, nor is the sheriff I think bound to provide it unless asked for.

It would seem an unsafe principle to introduce into practice that whenever the law allows a party to get a certificate in a cause, or in any thing connected with legal proceedings, that the official who is bound to give it if required, may always take it for granted that it will be required, prepare it beforehand, and require payment from some public fund on which the burden is cast by law, if the officer be required to do the work.

I think the applicant fails on this part of his case.

I now turn to the disallowed mileage items.

The case made by the sheriff is that he put in the affidavits of his bailiff, stating the number of miles travelled to make such service.

He gives copies of them, he states that the Quarter Sessions examined them, that the bailiff examined them, that his evidence was to the same effect as his affidavits, but the court decided on striking off from one account 111 miles, and from another 17 miles, not specifying how many miles were taken from each service.

He also produces affidavits from two of the justices in Quarter Sessions advocating his view of the reasonableness of his claim.

His counsel rested chiefly on section 164 of the Jury Act, which is as follows:—

"Upon proof by affidavit, &c., of such several services having been executed, or in the case of the sheriff of such travel having been necessarily performed in going to effect the service of such summonses, the affidavits being accompanied with a detailed account shewing the number of miles actually and necessarily travelled in going to serve each juror, (so that at the end of the service the officer summoning the jury shall only be entitled to mileage for the number of miles actually travelled,) and upon the account being properly audited, and an order of the Court of Quarter Sessions being made for the payment thereof, the treasurer shall pay," &c.

It is conceded that the auditing of the sheriff's account justly pertains to the Court of Quarter Sessions. I assume that in making such audit the court acts judicially and not merely ministerially. As an inferior court we can of course compel them to audit, but where they do actually audit, examine, and pass judgment upon the account, disallowing part of the mileage claimed, and allowing the rest, I cannot see my way to the right to review their discretion. To do so would be of course to transfer the duty of audit, that is of any audit in which any discretionary power rested from the Quarter Sessions to this court.

The very statements made by the applicant of the kind of proof he offered, and the course taken by the court in orally examining his bailiff as to the services, to my mind justify the action of the Legislature in vesting in a local court, presided over generally by the county judge, and required to have a certain number of members always present, the duty of examining into the accuracy of the claims made by officials on a public fund. The members of such a court, from local knowledge, ought to be specially qualified to sift each claim for mileage, and to ensure due protection to the country treasurer.

I cannot enter into any discussion as to the peculiar accuracy or inaccuracy of the disputing parties, in disposing of the question.

No principle of law is suggested to be involved in the decision.

Assuming that the Court of Quarter Sessions act judicially in auditing these accounts, I must further express my regret at the production of affidavits from two of the functionaries there presiding, to aid an application against the decision of their coadjutors.

This part of the claim also, in my opinion, fails.

It remains for me to consider the charges for copies of panels.

No explanation has been offered in the papers before us, of any grounds on which these items were rejected.

Two copies are demanded for the Court of Assize, six copies for Courts of Quarter Sessions and County Courts, and in another account six copies of panels of grand and petit jurors for Quarter Sessions and County Courts.

Hardly aware of the view taken by the Court of Quarter Sessions on these claims, I must merely express my opinion, formed from the statute.

Under section 59 of the Jury Act, the Courts of Assize and Nisi Prius, and Sessions of the Peace and County Court, issue precepts to the sheriff for a competent number of grand and petit jurors. By section 60, the sheriff may return the same panel of petit jurors for the Quarter Sessions and County Court, when the same day is appointed for their sitting. By section 75, the sheriff shall to each precept return a panel of the names of the jurors contained in the proper jury list for the year, whose names shall be drafted from the list in manner after provided. Section 84 directs the sheriff, on his return to venn. fac. on precept, under authority of which the panel is drafted, to annex a panel to said writ or precept, containing the names, &c., of those drafted in such panel, and shall transmit one copy thereof to the office of the clerk of the peace for the proper county, and another to the clerk of the crown and pleas in her Majesty's Court of Queen's Bench at Toronto, or to the deputy clerks of the crown, as the case may be.

Then section 161, giving the tariff of sheriff's fees, provides for each panel of jurors, whether grand or petit, returned and summoned by him in obedience to any general precept for return of grand or petit jurors for any sittings, &c., of Assize and Nisi Prius Sessions of the Peace, or County or Recorder's Court, respectively, under this act, $4.

Sub-section 2. For *copies of such panel*, to be returned to the offices of the Superior Courts of Common Law at Toronto, each $1.

It seems to me that the propriety of the charges must rest on these clauses.

A difficulty occurs from the relative wording of clauses 84 & 161.

By the first clause (84), having annexed the panel to the precept (apparently without reference to the court from which it issues), the sheriff is to send one copy to the clerk of the peace of the proper county, to the clerk of the Queen's Bench at Toronto, or to the deputy clerk of the crown, as the case may be.

Now, if this clause stood alone, it might be assumed that only two copies of each panel annexed to a precept should be returned by the sheriff—one to the office of the clerk of the peace for the county, and if in York and Peel to the clerk of the Queen's Bench, and if in an outer county to the deputy clerk of the crown.

In no other way can I understand the peculiar wording, "as the case may be."

But the tariff (section 161), after allowing the sheriff $4 for every panel, grand or petit jurors, returned to any general precept for either superior or inferior courts, proceeds thus:

"For copies of such panel, to be returned to the offices of the Superior Courts of Common Law at Toronto, each $1."

Now, these words would appear to intimate that a copy of every panel for Assizes and Quarter Sessions, and County Court and Recorder's Court, is to be sent to the Queen's Bench and Common Pleas at Toronto.

It is not easy to understand the object of the Legislature in making any such provision for the inferior court panels, even if considered necessary as to the assize panels.

This reading, if adopted literally, would compel the sheriff, on every panel, from whatever court, to send one copy (under clause 84) to the clerk of the peace, and one to each of the superior courts, or three copies of each panel. But the only fee allowed by the tariff for copy of panel, is for copies to be returned to the offices of superior courts in Toronto, and his right to charge any fee whatever must depend on the language of the tariff.

At the Assizes there are two panels for grand and petit jurorrs. Thus he would seem to be entitled to one dollar for a copy of each for the Queen's Bench and Common Pleas in Toronto—$4 in all.

The same fees for copies would be allowed in the Quarter Sessions and County Court jury panels, as there would be three panels—thus, six copies.

As the act is drawn, I hardly see any other manner in which I can construe it.

EX PARTE POUSETTE AND THE COURT OF QUARTER SESSIONS OF THE COUNTY OF LAMBTON.

Clerks of the Peace—Their fees—Tariff 1862

Con Stat. U C, cap. 24 sec. 145; Con. Stat. U.C, cap. 31 sec. 78; Con Stat U C. cap 19, sec 6, 8, 15.

Held, 1. That clerks of the peace are entitled only to payment for one general quarterly return of all convictions which have taken place before any justice or justices or before the court of quarter sessions and not to payment for separate returns of the convictions had before each individual justice of the peace—in fact to payment for only four lists or schedules annually.

2. That the proceedings required under sec 78 of the Jury Act for drafting the panel from the jury list, are not to be considered tantamount to a "special sessions of the peace," so as to entitle clerks of the peace to make a charge therefor.

3. That clerks of the peace are not entitled to charge for filing orders fixing the times and places of holding division courts, or for communicating the same to the clerks of the respective courts, but only for orders of session arranging, fixing or altering the limits of division courts, or other acts of the court of quarter sessions

(Easter Term, 1863)

Christopher Robinson in Hilary Term last obtained a rule *nisi* calling upon the Court of Quarter Sessions in and for the county of Lambton to shew cause why a writ of *mandamus* should not issue, commanding them to allow the following charges made in Mr Pousette's account as Clerk of the Peace:

Drawing up quarterly returns of convictions from 18 lists of justices, for each list, $1	$18 00
Attending special sessions of justices to draft jurors for September sessions	2 50
Filing order for the times and places of holding division courts in the month of June	0 08
Entering above order in the book of orders	1 00
Copy for Provincial Secretary	1 00
Copies for clerks of seven courts	7 00

R A. Harrison shewed cause, contending—1. That the clerk of the peace was entitled to charge only for one general return, and not for a separate return of the convictions of each magistrate, as charged. 2. That the meeting of justices to draft jurors is not a special session within the meaning of the tariff, and so charge therefor properly rejected. 3 That clerks of the peace have nothing whatever to do with the times and places of holding division courts, and so all charges in respect thereof properly disallowed

Christopher Robinson supported the rule.

The statutes referred to in the argument are mentioned in the judgment of the court.

HAGARTY, J.—I do not feel any reasonable doubt as to the construction to be placed on cap. 124 Consolidated Statutes Upper Canada.

Every justice of the peace is by section 1 bound to make a return of every conviction to the next ensuing general quarter sessions, (and when two justices act the return is to be immediate) and he is also to make return of monies paid to him thereon, which return the clerk of the peace is to file with the records of his office.

Sec. 4 enacts that the clerk of the peace shall, within seven days after adjournment of the quarter sessions publish such returns, and also fix in his office for public inspection "a schedule of the returns so made by such justices," to remain up for a specified time; and for every schedule so made and exhibited by the said clerk of the peace, he shall be allowed in his accounts $1, besides expense of publication.

Sec 5 directs the clerk of the peace within twenty days after the end of the quarter sessions to transmit to the Minister of Finance "a true copy of all such returns made within his county." Cap. 23 Consol. Stats. Canada, sec. 36, directs all clerks of the peace to return to the Board of Registration and Statistics, in triplicate, lists of all convictions had before either courts of quarter sessions or before individual magistrates in their respective counties.

I have no doubt that the act first cited merely contemplates one general schedule to be periodically prepared by the clerk of the peace, embracing all the returns made by the justices to such period, and that the sum of $4 is his fixed fee therefor.

We were referred to the Tariff of Fees settled by the judges in 1862.

No. 57 of that tariff allows a fee of $1 for making out and transmitting to the Inspector General a return or schedule of all convictions which has taken place before any justice or justices or before the court, each list $1.

This, I think, means each list sent by him, as directed by the statute, within twenty days after some court of quarter sessions —in fact only four lists or schedules annually.

I cannot consider the proceedings on drafting of the panel from the jury list, under sec. 78 of the Jury Law, cap. 31 U. C. Con. Stats, as tantamount to "a special sessions of the peace." The sheriff attends according to public notice at the office of the clerk of the peace, and in presence of the clerk of the peace and any two justices proceeds to draft. By sec. 83 he draws a ballot and declares the number, whereupon the clerk of the peace, or one of the justices of the peace present, declares the number aloud, and by sub-sec. 3 the sheriff marks down the name corresponding thereto, and, when all is done, the names of the sheriff or deputy and of the clerk of the peace and justices present, or at least of two of them, shall be entered in the book and attested by them, &c.

Nothing herein seems to indicate the acts of a court, nor is the clerk of the peace as such directed to record anything as the act of a court.

It remains to consider a class of charges made by Mr. Pousette, such as—"Filing order for times and places for holding division courts in month of June; entering that order in the book of orders; copy for Provincial Secretary; and copies for clerks of seven courts"

The point in dispute seems to stand thus. After each division court the judge names the time and place for the ensuing court, and the charges are all made in reference to this. The magistrates urge that unless some change be made by them in the limits of the division courts the charges are improper.

In the schedule of services performable by the clerk of the peace, attached to chapter 120 Consol. Statutes Upper Canada are several items:—

"Making up books and orders of sessions declaring the limits of division courts, and entering the times and places of holding the courts."

"Making out and transmitting copies (with letter) to the clerk of each division court of the divisions made by the quarter sessions."

"Drawing orders of sessions for altering limits of division courts."

"Making out and transmitting copies of such orders to the Government."

"Making out and transmitting copies of such orders to each division court affected by the alteration."

The items in the tariff of 1862, Nos. 38, 39, 40, 41, 42, 43, fixing fees for such services, describe them exactly as in the statute.

I am of opinion that these charges refer to the cases of fixing or altering the limits of division courts by the court of quarter sessions, under the authority vested in them by cap. 19 U. C. Consolidated Statutes known as the Division Courts Act.

Sec. 8 gives the power, and sec. 15 directs the clerk of the peace to record the divisions declared and appointed, and the time and place of holding the courts, and the alterations from time to time made therein, and he shall forthwith transmit to the Government a copy of the record.

Sec. 6 directs that a court be held in each division once in every two months, or oftener, in the discretion of the judge, and the judge may appoint and from time to time alter the times and places within such divisions, when and at which such courts shall be holden.

I cannot believe that the legislature intended to impose the duty on the clerk of the peace of notifying the Provincial Secretary and each of the seven clerks of division courts every two months of the days appointed by the judges for holding the ensuing courts.

It seems to me his duty is confined to recording and notifying to the Government and to the different clerks every act done by by the court of quarter sessions, under the authority of the statute, as to the arranging, fixing or altering the limits of the different courts.

Both statute and tariff seem to me clearly so to indicate.

It is quite true that in the list of services attached to the statute

there are the words—"Making up books and orders of sessions, declaring the limits of the division courts, and *entering the times and places* of holding the courts," and the tariff adopts the same words; and sec. 15 of Division Court Act, already cited, directs him to record the divisions declared and appointed, and the times and places of holding the courts. But we cannot, I think, avoid the conclusion, that to entitle him to do the work and charge therefor the fees prescribed by the tariff, he must shew that the appointments or orders for times and places of holding the courts, which he sends to the Government and the different clerks, are orders or acts of the court of quarter sessions.

This he cannot do, and I think he must therefore fail.

Per cur.—Rule discharged without costs.

Regina v. Shuttleworth.

Negligent escape—Conviction—Evidence.

One W was brought before magistrates in the custody of defendant, a constable, to answer a charge of misdemeanor, and after witnesses had been examined he was verbally remanded until the next day. Being then brought up again, and the examination concluded the justices decided to take bail, and send the case to the assizes. He said he could get bail if he had time to send for them and the justices verbally remanded him till the following day, telling defendant to bring him up then to be committed or bailed. On that day defendant negligently permitted him to escape, for which he was convicted

Held, that W. was in custody under the original warrant, and the matter still pending before the magistrates, until finally disposed of by committment to custody or discharge on bail, and that the conviction was proper.

Criminal Case Reserved.

At the Court of Oyer and Terminer and General Gaol Delivery for the county of Oxford, begun and holden in the town of Woodstock, on Tuesday, the twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two, and continued by adjournment until Saturday, the twenty-fifth day of the same month, James Shuttleworth, a constable of the said county, was indicted, tried, and convicted by a jury of his country of a misdemeanour, in permitting one Jesse Williams Woodward, charged with committing a rape on one Ellen Jane Carrol, to escape from his custody as such constable, after having been committed to his custody to be safely kept for further examination

From the evidence given at the trial, it appeared that Woodward was on Thursday, the twenty-first day of August, 1862, brought before two of the justices of the peace for the county of Norfolk, under the said charge, on a warrant issued by one of the justices; that an examination of witnesses was had on that day, and Woodward was verbally remanded to the custody of the defendant until the next day, then to be brought before them for further examination.

On the next day, Friday, the twenty-second day of August, the defendant brought Woodward before them, and having finished the examination of the witnesses on that day, the justices concluded to admit Woodward to bail, and to send the matter to the assizes.

The prisoner stated he could procure bail if he had time to send for them, and the justices informed him that they would remand him for a day, and if the bail arrived in the meantime they would take it; and the defendant was verbally directed to bring Woodward before them the next day, to be committed or bailed as they thought fit. The next day Woodward escaped from defendant's custody, and was not brought before the justices; he escaped by defendant's negligence.

On the trial the defendant's counsel objected:

1. That Woodward was in the custody of the defendant only for the purpose of enabling him to procure bail, he having been remanded to defendant's custody by the magistrates to enable them either to bail him, if he could procure bail, or commit him if he could not obtain bail: that such remanding being illegal, defendant was not bound to detain Woodward, and he could not therefore be legally convicted of a misdemeanour for his escape.

2. That the allegations in the first count of the indictment are, that the defendant arrested Woodward on the charge of rape, and brought him before the justices, and that they remanded him to defendant's custody for twenty-four hours, and that he escaped whilst defendant had him in custody under such remand: that the evidence shewed that Woodward was really in custody on a second verbal remand, for the purpose of enabling him to procure bail, and therefore he was not in custody as alleged in the indictment; and that there being a variance, he ought to be acquitted. And further, that he was in custody under the second verbal instructions to enable him to procure bail after the justices had decided to commit him for trial: that such last instructions were illegal and not justified by the statute, and therefore defendant could not be properly convicted of an escape as Woodward was not legally in his custody.

It was left to the jury to say, as a matter of fact, if defendant negligently allowed Woodward to escape, and they found him guilty.

In consequence of the objections raised, the court, in the exercise of its discretion under the statute, reserved the question if defendant could be properly convicted, on the objections taken, and on the evidence, for the consideration of the justices of her Majesty's Court of Queen's Bench for Upper Canada, and postponed the judgment on the conviction until such question shall have been considered and decided, which said question is hereby referred to the consideration of the said Court of Queen's Bench.

It was held that the second count of the indictment could not be sustained, and the defendant was bound over to appear at the next sittings of the Court of Oyer and Terminer and General Gaol Delivery for the County of Oxford, to receive judgment. The indictment and copy of the evidence at the trial are herewith.

All of which is hereby certified to the Court of Queen's Bench aforesaid, pursuant to the statute in that behalf.

W. B. Richards,

Presiding Judge at the aforesaid sittings of the Court of Oyer and Terminer and General Gaol Delivery.

W. H Burns for the Crown, cited Burns' Justice, titles "Arrest" and "Warrant;" *Wright* v. *Court*, 4 B. & C. 596; Hale P. C, vol. ii, p. 120; Archbold's Snowden's Magistrates' Assistant, 4th ed. p. 73

D. G. Miller, for defendant, cited Consol. Stats. C., ch. 102, secs 25, 40, 43; *Rex* v. *Fell*, 1 Salk, 272; Russell on Crimes, vol. i, p. 423.

Hagarty, J.—The first count in substance alleges that defendant being a constable, &c, brought one Woodward before the justices, and he was then charged on oath with felony, and the justices duly adjourned the examination, and remanded the prisoner from 21st of August to the 22nd of August, (being under three days,) and verbally ordered defendant to keep the prisoner in custody, and have him before them on the 22nd of August, and that the defendant so having him in custody negligently permitted him to escape.

The second count alleges that Woodward was charged on oath with felony, and a warrant duly delivered to defendant, a constable, to apprehend and bring him before justices; that he arrested and had him in custody, and allowed a negligent escape.

The facts were, that being brought up on the 21st of August, the justices adjourned to next day, remanding the prisoner. On the 22nd the examination was resumed, and the justices announced that they had resolved to send him to the assizes, but would take bail. The prisoner asked for time to send for bail. They agreed to remand him to next day for that purpose, and he escaped before being brought up next day on the remand.

My very strong impression is, that the defence urged is not open to the defendant, if the facts be sufficiently stated.

It appears to me that the prisoner was in custody on the original warrant till finally disposed of, by either commitment for trial or discharge on bail. Till disposed of finally by the justices, I think the custody on the warrant continues. The form of warrant given by our statute is to apprehend and bring before the said justices, &c, "to answer unto the said charge, and to be further dealt with according to law." I therefore do not see why the second count should not support a conviction. We have not to deal with any question as to an illegal remand for a longer period than the statute allows

Nor can I accede to counsel's argument, that as the evidence was fully taken and the justices had made up their minds to send him to the assizes if he could not obtain bail, an adjournment for a day at the prisoner's instance, and for his accommodation, to enable him to send for bail, rendered the custody illegal, so that

the prisoner could lawfully escape by force if necessary; and it may well be doubted if defendant can justify a negligent escape on any such presumed illegality. See *Rex* v. *Fell*, (1 Ld. Raym. 424.) It would be throwing a needless difficulty in the way of administering justice so to hold. Till the final decision of commitment to gaol or discharge on bail, I think the matter may fairly be considered as still pending before the justices.

The only difficulty I feel is as to the counts. If I cannot refer to the second count, the first may seem not to meet the facts exactly as they occurred. In that count only one remand is alleged, while two remands or adjournments took place Unless we may consider the last day's delay simply as a continuance of the custody, as if the constable, instead of a formal remand, kept the prisoner, as it were, all the time before the justices awaiting their decision, which depended on the success or failure of the attempt to procure bail.

The verdict is general, and the only question of fact left to the jury was, whether defendant negligently allowed Woodward to escape, not depending on the particular form of the charge in either of the counts.

That he remains in custody under the original warrant, I refer to Burns' Justice, vol. vi., p. 368: "And when he hath brought him to the justice, yet he is in law still in his custody, till the justice discharge, or bail, or commit him," referring to 2 Hale, 120, where it is said: "When he hath brought him to the justice, yet he is in law still in his custody till either the justice discharge or bail him, or till he be actually committed to the gaol by warrant of the justice."

Per cur.—Conviction affirmed.

MYERS v. CURRIE.

Slander—Evidence of plaintiff—Rule refused—General bad character—Leave to appeal.

Held, that in an action for slander, evidence of plaintiff's general bad character previous to the speaking of the words, is not admissible, even in mitigation of damages

Held also, that where evidence offered at a trial and rejected, affects only the amount of damages, and the amount of damages assessed is small, the court in the exercise of the discretion vested in it by the Error and Appeal Act (Con. Stat. U. C. cap. 13, *s.* 24,) will refuse leave to appeal

[Easter Term, 1863.]

This was an action for slander, tried before RICHARDS, J., at the last assizes for the county of Lambton.

The declaration contained four counts. The first, was for falsely and maliciously speaking the words "Myers stole James' four barrows and took them to the Oil Springs and sold them." The second, was for the use of the words "As soon as Andrew Clinton comes home I will put Myers through for stealing James' hogs, &c" The third, was for the use of the words "Myers stole James' hogs and took them to the Oil Springs and sold them, and left him with only two little pigs" The fourth, was for the use of the words "If Myers took James up he would miss it, for I believe it was Myers and Rueben Booth, and nobody else, that took James' hogs"

The only plea on the record was not guilty.

The defendant offered evidence of plaintiff's general bad character previous to the speaking of the words in mitigation of damages, but the learned judge rejected it.

The jury found a verdict for plaintiff $15 damages.

R. A. Harrison moved for a rule *nisi*, calling upon plaintiff to shew cause why the verdict should not be set aside, and a new trial had between the parties, upon the ground of misdirection and rejection of evidence. He cited Tay. Ev. 2nd edn., pp. 314 and 315; *Bell* v. *Parker*, 11 Ir. Com. L. Rep. 418.

HAGARTY, J.—In this case we refuse the rule. Though there are dicta in text books to shew that evidence such as tendered at the trial was admissible, we think the weight of authority is against the reception of such evidence in an action for libel or slander.

Wilson, J, concurred.

Per Cur.—Rule refused.

R. A. Harrison then, pursuant to s. 24 of the Error and Appeal Act, (Con. Stat. U. C. cap. 13,) applied for leave to appeal, submitting as the matter complained of was misdirection, the court should grant the leave asked, although the damages assessed were small.

WILSON, J., on a subsequent day, said that as the evidence offered affected only the amount of damages, and as the damages were only $15, the court had come to the conclusion in the exercise of the discretion vested in the court by the Error and Appeal Act, to refuse leave to appeal.

Per Cur.—Leave refused.

COMMON PLEAS.

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

BISHOP OF TORONTO v. CANTWELL.

Ejectment—Prescription—Conveyance of right of entry.

The claimant set up title under deed from patentee of the Crown, dated 16th March, 1842 The defendant claimed 21 years' possession.

It was proved for the defence that defendant and his father had worked on the lot in question since 1833; that they put up a house on the lot in 1840 or '41; that previously they had been in possession and claimed it as defendant's land. It was a wild lot when they took possession thereof. defendant's father bought it at a government sale at Hamilton, stating he bought it for his son.

In reply, a letter was proved from the defendant to T. C. dated 22nd May, 1836, in which he stated he would not lease or leave the land in question until he was paid for his improvements, complaining of the value put upon the lot.

It was proved T C. was assistant secretary of the Church Society, and had since died. Also, that plaintiff first knew the defendant was in possession in 1845.

The jury found for the defendant. On motion for new trial, *held*, that the defendant, being in possession at the date of the deed to the plaintiff, (16th March, 1842,) nothing passed to the plaintiff by that deed, as the statute of this province, Con. Stat. U. C., authorizing the conveyance of a right of entry, was not then passed.

[M. T., 26 Vic.]

Ejectment for the northerly half of lot No. 14. 3rd concession of Puslinch. Writ issued 24th of February, 1859. Defence for the whole. The claimant set up title under a deed from the Reverend George Mortimer, dated the 16th of March, 1842. The defendant claimed by twenty years' possession before the commencement of this suit.

The case was tried at Guelph, in November, 1862, before Richards, J. It appeared that on the 23rd November, 1835, the Crown, by letters patent, granted this half lot to the Rev. George Mortimer in fee. And by deed dated the 16th of March, 1842, the grantee conveyed the same in fee to the claimant, in trust as an endowment for the "See of Toronto," and for the benefit, maintenance, and support of the bishop of such see for the time being, and his successors in office for ever.

On the defence it was proved by a witness that he knew defendant and his father since April, 1833. That the father lived on lot No 13, and the defendant on No. 14, and that they chopped, logged, built houses and barns ever since he could remember; that he first saw them working on the premises in question in 1834; that it was about 21 or 22 years ago, less or more, since they put a house on the premises; they had 15 or 20 acres cleared. Defendant and his father were in possession claiming it before that as defendant's land. There are now 50 or 60 acres cleared and a house and barn on it. It was a wild lot when they first took possession. Defendant bought it at an auction sale at Hamilton. This witness never heard of any other title than that got through the sale at Hamilton. Another witness swore that defendant's father made improvements on lot No. 14, to the best of his knowledge as much as 26 years ago, and put up the house over 22 years ago. That the defendant was in possession ever since anything was done upon the place. He got it from his father, who said he had bought it for his son. It was unimproved when they went there. Two other witnesses proved to the same effect, carrying the building of the house back to 25 or 26 years; and one of them said he was at Hamilton when the defendant's father bought the right, as the witness understood at Hamilton.

In reply, a letter written by defendant to Mr. T. Champion, dated the 22nd of August, 1846, was proved and put in, in which the defendant expressed his desire to know whether he shall have a deed to get from the proper authorities in course of time, "in case he takes a lease," and proceeding, "As every other settler is at present settling about their land I would wish to do so in like manner, as I am still improving on it. I should like to know for what? but I do not intend to lease it or leave it until I

am paid for my improvements, if I do not get this liberty such as the settlers of the township" The letter goes on to complain of the value set upon the lot, and requesting an early answer. It was proved that Mr Champion was at that time assistant secretary of the Church Society, and was since dead. Mr. Saunders, the clerk of the peace, proved that a note shown to him, dated the 18th of December, 1845, was written and given by him to defendant. It was as follows:

"Sir,—The bearer, Patrick Cantwell, is the person living on lot No. 14, 3rd concession Puslinch township, (the north half,) about which I wrote to you on the 2nd instant. He is about to go to Toronto and will see you there respecting said lot. I can recommend him as a trusty person." Signed, &c, and addressed to Thomas Champion, &c. An entry was also proved in a book kept for the Church Society: "Cash due to sundries, to lands, P. Cantwell, on account of north half of No 13, in the 3rd concession Puslinch, 15s." This was proved to be the book in which Mr. Champion made his first entries The same charge was carried through the books. The society did not own No. 13, but 14, in the 3rd concession, Puslinch A witness proved that he called on defendant in 1855. and in 1858, about it; and that he did not then claim the land as proprietor. The plaintiff first knew the defendant was in possession in 1845.

The learned judge asked the jury to say whether at the time the conveyance was made to the plaintiff (16th March, 1842) the defendant, or those under whom he claims, were in the actual possession of this lot claiming to be owner, or at all events, claiming the right to maintain possession of the land. If the jury were satisfied that the defendant entered as a purchaser from the Crown, and the Crown afterwards granted to the party under whom the plaintiff claims, the title and the possession would be in harmony with each other. That the land being wild land, and no knowledge of the defendant being in possession being brought home to the plaintiff earlier than 1845, the Statute of Limitations would not affect the right to recover.

The jury found for defendant

In Michaelmas Term *Galt, Q C*, obtained a rule *nisi* for a new trial without costs, the verdict being contrary to law and evidence, and the learned judge's charge.

M. C. Cameron shewed cause He contended that under the statute H. VIII, (the Statute of Bracery,) the defendant being in possession claiming as owner, nothing passed to the plaintiff by the deed of 16th November, 1842, as the statute of the province which authorised the conveying of a right of entry was not then passed. He cited *Doe Dunn* v. *McLean*, 1 U. C. Q B 151; *Doe Bonter* v. *Savage* 5 U C. Q B 223; *Doe Peterson* v. *Crank*, 5 U. C Q. B. 135; *Doe Beckett* v. *Nightingale*, 5 U. C Q B 518; *Doe Clark* v. *McInnis*, 6 U. C. Q B. 28; *Doe Simpson* v. *Molloy*, 6 U. C. Q B 302.

Galt, Q C, contra, referred to *Bonns qui tam* v. *Eddie*, 2 U C Q B. 280. He also contended that under the act respecting limitations of actions and suits relating to real property, Con. Stat U. C, ch 88, sec. 3, which was first passed in 1834, the statute of H. VIII. would not apply, unless the true owner had notice that the land was in the actual possession of another person.

DRAPER, C J —The statute of 32nd H. VIII, ch. 9, has been repeatedly held from very early times to have been only in affirmance of common law. The section of our statute of 1834, to which Mr Galt refers, extends only to preventing the lapse of twenty years being a bar to an action to recover any land or rent under certain specified circumstances It cannot be construed to give effect to conveyances of land, which at common law and under the statute H. VIII were void

The principle contended for on the part of the defendant is too well established to be questioned, until the statute was passed which legalized the conveyance of a mere right of entry into and upon lands whether immediate or future, vested or contingent. Till then the law was settled that while one person was in actual and exclusive possession of land which he claimed as his own, another, though the true title might be vested in him, could not make a conveyance of property so held adversely to him, which would have the effect of passing the fee. The possession must certainly be adverse in its character. If the defendant in this case claimed by any privity with the plaintiff, or had acknowledged him to be the owner; still more if he admitted his seisin, then the principle does not apply: and if the defendant had entered under a contract to purchase, or as a tenant under the Rev G Mortimer, he could not dispute his title or right to convey But the evidence very clearly shows that he or his father took possession before the grant to Mr. Mortimer claiming independently of every one except the Crown. For all that appears, they were intruders upon Crown lands, and continued to be in possession as such intruders when the Crown patent issued. Then as to the grantee, the defendant was in adverse possession. There was, however, some evidence of letters and acts from which, had the jury found an acknowledgment of the plaintiff's title and right to possession, and found thereupon a verdict for the plaintiff, it may be questionable whether we should have disturbed it. But that evidence was left to the jury, and with a direction of which the plaintiff's counsel does not and could not with reason complain

Looking at the length of the defendant's possession—at the extent and value of his improvements—at the lapse of time since it was known, the defendant was in occupation until the action was brought, while the defendant's letter of 1845, showing as it does a consciousness of the weakness of his own title, yet contains a refusal to accept a lease, or to give up possession unless on his own terms, I am not surprised that the jury leaned strongly on the defendant's side, putting on any doubtful circumstances a construction in his favour And I should anticipate that in the event of another trial the same result would follow. I do not think under such circumstances it would be a sound exercise of discretion to grant a new trial.

Rule discharged.

FRASER v HICKMAN.

Railway Clauses Consolidation Act—Railway Company—Stockholders of—Liability for amount of unpaid stock—Execution against company—Return of "nulla bona"

Declaration, under Railway Clauses Consolidation Act against defendant as a shareholder of the Port Hope, Lindsay, & Beaverton Railway Company, setting out the Recovery of a judgment against said railway company; return of writ "*nulla bona*," that the defendant holds 25 shares of stock in said company unpaid.

Pleas —1. Never indebted 2 Never was or is a shareholder in said company. On the trial, among other things, plaintiff proved a judgment against the company for £3000, that a *fi. fa* had been issued and returned "*nulla bona*" also that defendant had signed the stock-book of company for 25 shares and paid 2½ per cent, £6 5s.

The jury having found for plaintiff, on motion for nonsuit, on several grounds, among them that on the trial it appeared that the words "twenty-five" had been written over the word "ten," opposite the defendant's name, and that the alteration should be accounted for Also 9thly, that the contract under which plaintiff recovered his judgment was illegal, being for a loan at a usurious rate of interest *Held* that the first objection was rebutted by the facts proved at the trial as the defendant had paid the sum, £6 5s being the correct sum to be paid on the first call on 25 shares of £10 each, being 2½ per cent And as to the ninth objection *held* that if defendant wished to impeach the plaintiff's judgment on the grounds of fraud or collusion, he should have raised the defence by his plea

Semble, that the court will intend the judgment to be right and well founded in all respects, until the contrary be shewn

The several grounds taken, on motion for nonsuit, not above referred to, have been decided by previous cases in this and the Court of Queen's Bench, as by reference below will appear

The plaintiff declared under the Railway Clauses Consolidation Act, against the defendant as a shareholder of the Port Hope, Lindsay & Beaverton Railway Company, setting out that he recovered judgment against the company; that he has issued a *fi. fa*, which has been returned *nulla bona*; that defendant holds 25 shares of stock on which nothing has been paid

Pleas —1 Never indebted. 5 That defendant did not become nor is he a shareholder in the company.

The trial took place at the assizes for York and Peel, in January, 1862, before *Burns*, J.

The plaintiff proved that he was a judgment creditor of the Port Hope, Lindsay & Beaverton Railway Company for upwards of £3000, and that he has issued a *fi. fa.* against goods which had been returned *nulla bona* It was also proved, independently of the return of the *fi fa* made by the sheriff of Northumberland and Durham, that the Company had no goods or chattels anywhere. The defendant was one of the persons named as forming one of original company, incorporated by the act of 9 Vic., ch. 109 He was also proved to have signed the stock book for 25 shares, and

to have paid a call of 2½ per cent., made in 1847, amounting to £6 5s., the shares being £10 each. In 1853, two acts were passed, relating to the company extending the time for commencing the work, &c, &c. In the latter of these, 16 Vic., ch. 241, sec. 4, there is a provision, that no subscriber to the stock book, under the original act of incorporation, should be held to be a stockholder or responsible as such, if he should within one month from the passing of the act signify in writing to the president of the company his intention of withdrawing therefrom. Several of the original subscribers took advantage of this proviso, but there was no direct evidence that the defendant did so, and that was some evidence to the contrary. After the act 16 Vic., the defendant's name was omitted from lists made out of stockholders, which the secretary for the time being prepared, and notices of elections of directors, &c, were not sent to him as to others who were treated as stockholders. There was an new book made out in 1853, containing a list of shareholders, in which the defendant's name did not appear, but it always remained in the original stock book. The name of the company was changed by the act 18 Vic., ch. 36, but it was specially provided that the change of name should not be held to make the company a new incorporation, or to impair the effect of any former act relating to the company.

At the close of the plaintiff's case it was objected, 1. That the proceedings should be by *sci. fa.* 2. That the return to the *fi fa.* was not valid, because, as it was proved, the sheriff of Northumberland and Durham was at the time he returned the writ of *fi fa.* a director of the company, though at the time he received it he was not. 3. That the defendant was not shewn to be a shareholder, the book entry being only an agreement to take shares. 4. The agreement is not with the company, there being a variance in the name. 5. The company was not shewn to have gone legally into operation, as it was necessary to shew that five per cent. was called and paid in. 6. The words "twenty-five" in the stock book, opposite defendant's name, have been written over a word "ten" This alteration should be accounted for. 7. The original act had become dead for *non-user*, and the subsequent acts do not revive it so as to make the defendant liable. These objections were overruled, leave being reserved to move the court above for a nonsuit.

The learned judge left it to the jury to say whether the defendant had relinquished his stock, though the notice in writing addressed to the president of the company cannot now be found or proved. In considering this question, he drew the attention of the jury to the fact of the omission of the defendant's name from the new list of shareholders in 1853, and the lists subsequently made out. The jury found for the plaintiff.

In Hilary Term, *Hector Cameron* obtained a rule nisi for a new trial, on the ground that the verdict was against evidence, or for a nonsuit on the leave reserved, and on the further objection, that 8th, the original act having expired, the defendant's liability was at an end, and the revival of the company by the new act did not revive defendant's liability; and, 9th, that the contract on which the plaintiff recovered judgment was illegal and void, it being a loan of money by a director of the company at illegal interest, and contrary to the provisions of the statute in that behalf.

In the Michaelmas Term following, *John Paterson* shewed cause. He referred to *Smith* v. *Spencer*, 12 U. C. C. P. 277.

Moss, contra, urged that the plaintiff being a director of the company, the defendant might be permitted to go behind the judgment and shew that the dealing between plaintiff and the company was void on the ground of usury. If the judgment was fraudulent and collusive between the plaintiff and the company it ought not to be effectual against the defendant.

DRAPER, C. J.—The first objection is answered by the fact that actions of this character have been repeatedly upheld in the Queen's Bench and in this court; and further by the fact, that the statute when declaring that each shareholder shall be individually liable to the creditors of the company, in respect of the amount unpaid upon his stock, declares also that he shall not be liable *to an action* before an execution against the company has been returned unsatisfied in whole or in part. I have no doubt if a *sci. fa.* had been brought, it would have been contended with equal force and more reason, that an action was the proper mode of proceeding.

The cases of *Ray* v. *Blair*, 12 U. C. C. P. 257, and *Smith* v. *Spencer*, 12 U. C. C. P. 277, answer the second objection. The sheriff was not made a director until after he received the writ and it was not proved he was a shareholder when he received it.

The case of *Smith* v. *Spencer* also disposes of the third objection, and the defendant here actually paid an instalment.

The case of the *Toronto & Lake Huron Railway Company* v. *Crookshanks*, 4 U. C. Q. B. 369, meets the fifth objection. The later act in this case goes as far as the reviving act in that, to recognise the company as legally existing.

The sixth objection is rebutted by the evidence of facts subsequent to the subscription. The amount paid by the defendant is consistent with a subscription for 25 shares.

The seventh objection is disposed of by the case of the *Toronto &c., Lake Huron Railway Company* v. *Crookshanks*.

The eighth is answered by the case of *Smith* v. *Spencer*, and by the 4th sec. of the 16 Vic., ch 241.

The ninth objection was not taken at the trial, nor is there a word on the learned judge's notes to sustain it. No evidence is given that there was illegal usurious interest contracted for when the plaintiff lent his money to the company. No affidavit of the fact alleged has been offered. This, like the second objection in the case of *Ray* v. *Blair*, is an attempt to get behind the judgment against the company. If the defendant desired to impeach this on any ground of fraud or collusion between the plaintiff and the directors or officers of the company, he should have raised the defence by plea. The court will intend the judgment to be right and well founded in all respects, until the contrary be shewn, and shewn in a proper manner. I continue of the opinion I expressed in *Ray* v. *Blair*, and think that the defence, if true, in fact, was not open to the defendant on the pleadings, and there is nothing before us to shew that it has the slightest foundation in fact.

I think therefore, there is no ground to order a nonsuit, nor yet for a new trial. The weight of evidence tends in my opinion to sustain the verdict, though defendant may, and most probably did think that he was relieved from liability by the company not going into operation under the first act. Before the case of the *Toronto & Lake Huron Railroad Company* v. *Crookshanks* was decided, a good many people shared his error in opinion. Perhaps it would have been as just to people in his position, if the legislature, instead of providing that no subscriber to the original stock book shall be held to be a stockholder, if within a fixed time he signified his intention to *withdraw*, they had said, unless he signifies his intention to *continue*. But they have adopted the former course, and we must follow their direction in determining the rights and liabilities of parties.

Per cur.—Rule discharged.

FISHER v. JAMESON.

Dower—Marriage settlement—Infancy of wife—Lower Canada—Contract for payment after death of husband—Binding in Lower Canada, not in Upper.

In an action of dower the tenant set up as a defence a marriage settlement entered into by the demandant with her husband, to which her father and mother were parties, she being at the time under the age of twenty-one years, in Lower Canada, by which it was agreed that she should receive £300 upon the death of her husband, and £100 per annum in sums of £50, half yearly, alleging also that these respective sums had been paid her during her widowhood. It was proved in evidence that this contract was a binding one in Lower Canada, and by registration there became the first charge upon the estate of the demandant's husband, whether owned at the time or acquired after marriage.

Held, that such a settlement was not binding in Upper Canada, and was consequently no bar to the action.

[M. T., 26 Vic.]

DOWER, claiming as widow of John Fisher, deceased.

Pleas.—1. On equitable grounds. That before demandant's marriage to John Fisher, *i. e.*, on the 26th of October, 1821, a marriage contract was entered into at Quebec between the said John Fisher and demandant, which is a good and valid marriage contract and settlement according to the laws of Lower Canada, whereby it was agreed that the goods and chattels, lands, and tenements, which each then had or thereafter should acquire during marriage, should be the property of the one by whom they were so acquired And in case demandant survived John Fisher, she should not be entitled to dower in the lands of John Fisher, or of those of which he should be seised during the marriage; and demandant did thereby renounce all claim thereto for the future.

And John Fisher agreed, that in the event of demandant surviving him, she should take by title paramount beyond what should belong to herself, all such effects, clothes and linen which should then be there found, with her watches, rings and jewellery; and that he should give her £300 in cash, and £100 per annum, payable half-yearly, with which payment John Fisher charged his lands, tenements, goods and chattels. That John Fisher and demandant were duly married, and John Fisher after the marriage, during his life-time, bargained and sold the tenements in the plaint mentioned to the Commercial Bank, and afterwards died. That demandant, after the death of John Fisher, took and received the goods and chattels, land and tenements, which by the marriage contract were agreed to be her proper goods, &c., and after the death of John Fisher, took and received the £100 annually of the moneys of the said John Fisher, in the hands of his personal representatives, year by year, from the day of the death of John Fisher, hitherto, and the said sum of £300, and the clothes, linen, watches, &c.; and that the contract and acceptance are a sufficient jointure and release of dower, and that demandant elected to take the same in lieu of dower.

2 On equitable grounds. That John Fisher, after his marriage with demandant, was seised of the lands in the plaint mentioned, and during his life-time sold the same, by Deed of bargain and sale by way of mortgage, to the Commercial Bank for £1361 7s 7d., with covenant for quiet enjoyment, without the let, suit, or incumbrance of the said John Fisher, or any one claiming under him. That the tenant is seised in fee simple of the premises, and derives his title by deed from the Commercial Bank, made after John Fisher had conveyed to them. That John Fisher died, having first made his will duly executed, and thereby devised to demandant all the revenue to be derived from his estate in full of all benefit to be derived from his estate, not exceeding £500 per annum; that demandant, after the death of John Fisher, received the £500 annually, from the death of John Fisher, hitherto, and that demandant claims title to dower through John Fisher, and not otherwise, and thereby hath elected to take the same in lieu of dower.

Demandant takes issue on the first plea, and replies that at the execution of the marriage contract, and at the marriage of the demandant to John Fisher, she was an infant under the age of twenty-one years; that by the contract no good and sufficient jointure binding on the demandant, being an infant, was provided, and that she has never, since the death of John Fisher, accepted of any of the provisions made by the contract for her, nor hath she elected to take any provision thereby made in lieu of dower. On this the tenant takes issue.

Demandant takes issue on the second plea.

The demandant was called as a witness for the defence. She proved her marriage at Quebec, on the 27th of October, 1821, the day after the execution of the marriage contract. She was born on the 16th of January, 1802. John Fisher died on the 16th of January, 1858, in Montreal; he left a will. At the time of the marriage, John Fisher had no lands or houses. He bought the farm mentioned in his will after the marriage, and sold it during his life-time. He also bought a house in St. Antoine street, Montreal, in which he and demandant lived together, and which demandant has occupied since his death. At the time of his death, John Fisher left no property, except the house in Montreal, and the furniture therein. The demandant has not received the sum of £300, nor the annuity of £100 since his death, nor any other part of her deceased husband's property. An inventory was taken of the effects in the house, and they remain there still. John Fisher died in embarrassed circumstances. The widow continued to live in the house, making use of the furniture. It was proved that by the law of Lower Canada the marriage contract was binding on the demandant, though she was a minor when she executed it, as her parents were parties to it, and the contract would give her the first claim for the amount settled on her, and the house and farm would be subject to this claim. The marriage contract operates as a mortgage, if registered, and therefore, if this contract was, as was assumed, registered, it bound the farm, unless demandant released it. Whether she had or not did not appear.

The question for the court is whether on these pleadings and facts the defence is established

Jellett, for plaintiff, referred to *Carruthers* v. *Carruthers*, 4 Brown Chy. Rep. 500; *Neve* v *Hollands*, 16 Jur 933; *Dyke* v. *Randell*, 2 DeGex McN. & G. 209; *Tinney* v. *Tinney*, 3 Atk. 8; *Foster* v. *Cook*, 3 Brown Chy 347.

C. S. Patterson, for the defendant, cited *Drury* v *Drury* 3 Brown, Par Ca. 497; *Boynton* v. *Boynton*, 1 Brown Ch. R. 445; *Barrow* v. *Barrow*, 4 Jur. N. S. 1049.

DRAPER, C. J.—The first plea presents the question whether the marriage contract was binding on the demandant, as she was an infant when it was entered into If the answer were to be given according to the law of England, there would be no doubt. Cockburn, C. J., says, "I take it to be quite clear that neither at law nor in equity can an infant enter into a contract," excepting for necessaries, &c., *Bartlett* v *Wells*, 8 Jur. N. S 762.

A general rule of law is stated by Lord Eldon, in *Male* v. *Roberts*, 3 Esp N. P. Ca 163, that the law of the place where the contract is made must govern the contract. And the present case is so far stronger than *Male* v. *Roberts*, that here, all the parties to the contract were resident in Lower Canada when the contract was made. According to the evidence given, this marriage contract is valid and binding by the law of that part of the province on the demandant, though she was a minor when it was entered into. Assuming the law to be as thus proved, then according to what was said by the Master of the Rolls, in *Carruthers* v. *Carruthers*, 4 Bro. Ch. C. 512, that an adult female "may take a provision out of the personal estate, or even a chance," in satisfaction of dower, acting with her eyes open; the demandant must be deemed as bound by this contract, whatever may be its legal construction and effect.

No question can arise, under the circumstances, as to the jointure. One consideration for the demandant's agreement to renounce dower would seem to have been the husband's contract, that she should be paid a gross sum of £300, and an annuity of £100, both depending on her surviving him. But the consideration for the husband's contract is stated to be the agreement previously set forth, that there should be no community of goods between them, while the renunciation of dower is not stated to form any part of the consideration for the contract to pay demandant these sums of money. The evidence, however, shews, that according to the law of Lower Canada, this charge would attach upon the after acquired real estate of the husband, and therefore, upon the farm and house in Montreal, and there seems to be no reason to doubt but that the renunciation of dower was, according to the law of Lower Canada, valid and effectual.

At the time of the marriage, and for some time after, the demandant could have had no inchoate right of dower, for her husband had no real estate. Still, the contract, that there should be no community of goods, took effect, and by it the husband was debarred from acquiring any right to or power over the demandant's after acquired property. There can be nothing inequitable in the contract, that on her part she should have no right to dower,

The question I have hesitated upon, is what effect we should give to the words of the contract, "Il n'y aura aucun douaire coutumier ou prefix ou conventionel, chacun des dites John Fisher et Margaret Hunter futures epoux renoncant, par ces dites presentes au dites douaires et a chacun d'icieux." It has been argued that the word "coutumier" (which has been translated "customary") cannot be considered applicable to the right of dower existing under our law, and that neither the word "prefix" (which is not translated) nor the word "conventionel" (which is translated "stipulated") are more applicable; that the renunciation is of these specific kinds of dower only, whatever they may be, and does not amount to a general renunciation of all and every kind of dower. The maxim *expressio unius*, &c., is invoked in aid of this argument.

The popular meaning of "coutumier" is probably as different from from its legal signification, as the legal and popular meaning of the word customary are with us. If a word of art, it is not expounded by the evidence, nor is it stated whether it is used as a word of art or in a popular signification. It would be, I presume, clearly wrong to apply any technical interpretation which we might give to the word customary, to the French word coutumier.

In the absence of such evidence, I think we should view the contract as referring to the law of Lower Canada, and intended to operate on real property, and on the rights of dower recognised and governed by that law, a conclusion which I feel fortified by the consideration, that according to that law the money covenanted to be paid to the widow forms a charge or lien on the real estate of the husband situate in that part of the province.

I therefore conclude that the plea itself, if all proved, would not afford an answer to the demandant's claims for dower out of land in Upper Canada, and the latter part of the plea is actually disproved. The defence is pleaded on equitable grounds, but unless a different construction than the one I have adopted be given to the contract, the defence would no more be available in equity than at law.

The second plea is certainly disproved.

In my opinion, the postea should be delivered to the demandant.

RICHARDS. J.—I concur in the construction placed on the marriage contract, and that by its terms it does not deprive the demandant of her dower in lands situate in Upper Canada, even if it were held to be binding and in force here.

Considering the way in which the instrument was executed, and the fact that the demandant was a minor at the time of its execution, as well as the effect it might have by the law of Lower Canada to bind the after acquired property of the intended husband, if duly registered there, I am not prepared to decide that such a contract can be considered as binding so far as relates to real property situate in Upper Canada, whatever may be its effect on personal property in this part of the province.

Per cur.—Judgment for demandant.

WESTBROOK v. CALLAGHAN.

Assault and battery—Conviction—Appeal—Certificate of acquittal—Chairman of quarter sessions—Has no power to give—Con. Stat Can, ch. 91.

In an action for assault and battery the defendants pleaded that the assault took place after the passing of Con S.at. of Canada, ch 91, and that the plaintiff summoned them before two justices, who convicted the defendants, who thereupon appealed to the quarter sessions, and they were, upon such appeal, acquitted, and the justices then presiding, upon request, gave each of them a certificate of such acquittal in accordance with the 37th section of the act. Upon exception to the pleas

Held, that the certificate must be obtained from the convicting justice on first hearing of the case, and that a certificate given by the chairman of the court of quarter sessions upon an appeal was no bar to the action.

Held, also, that the plea should allege that the party aggrieved prayed the magistrate to proceed summarily under the act.

(M. T., 26 Vic)

The declaration alleged that the defendants assaulted and beat the plaintiff, whereby the plaintiff became sick and wounded, and was for a long time unable to transact his business, and incurred expense for nursing and medical attendance.

Plea of defendant, John Callaghan the elder, that the trespasses in the declaration mentioned were committed after ch. 91, of the Consolidated Statutes of Canada had come into force and effect, and amounted to no more than an unlawful assaulting and beating within the meaning of section thirty-seven, of the said act, and that afterwards, and before the commencement of this suit upon complaint of the plaintiff, the defendant, John Callaghan the elder, was summoned to appear, and did appear, before E T. Bodwell and Charles G. Cody, Esquires, two of her Majesty's justices of the peace, in and for the county of Oxford, (the same being the county in which the said offence was alleged to have been committed,) and thereupon the said justices, after hearing the plaintiff and defendant, John Callaghan the elder, did convict the defendant, John Callaghan the elder, of the alleged assaulting beating, and which is the same grievance in the declaration leged, and the said defendant being dissatisfied with the said judgment, and feeling himself agrieved thereby, appealed to the first general quarter sessions of the peace. And at the said court the said appeal came on to be tried before the said court, and before a jury, who upon oath found him not guilty of the matter in the said information and conviction charged. Whereupon, by an order of the said court duly made in that behalf, the said conviction was quashed, set aside, and annulled, and thereupon the justices holding the said court, to wit, Henry Birkett Beard, Esq., Chairman of the said sessions, and William Gray, Esq., one of the justices of the peace for the said country, and sitting as a justice of the peace at the said court did, according to the said statute, forthwith and at the request of the said John Callaghan the elder, make out a certificate of the fact hereinbefore stated, and did deliver the same to the defendant, John Callaghan the elder, whereby and by force of the said statute the defendant, John Callaghan the elder, became released from the matters in the declaration mentioned.

The defendant J. Callaghan, jun., pleaded a similar plea.

Plea of Peter Callaghan was similar to that of the other two defendants.

The plaintiff replied to these pleas, and the defendants demurred to the replication.

The plaintiff also took an exception to the pleas on the grounds that the said pleas do not allege that the facts charged in the said complaint were enquired into or evidence taken thereon at the said sessions, and that the said Henry Birkett Beard, and William Grey, had no authority to give the certificates in the said pleas mentioned, and that the verdict of the said jury should have been to quash the conviction, or to affirm it, and not to find the defendants not guilty of the matters complained of in the information.

The case was argued by *D. G. Miller*, for the demurrer, and *Freeman, Q. C.*, contra.

DRAPER, C. J.—I am of opinion the pleas are bad.

They rely in the first instance on sec. 37, of ch 91, Consolidated Statutes of Canada, and aver that upon complaint of the plaintiff each defendant was summoned to appear, and did appear, before certain justices of the peace therein named, and were, by the said justices, convicted of unlawfully assaulting and beating the plaintiff, which is the same identical grievance alleged in the declaration, whereupon each defendant appealed to the Quarter Sessions, and the appeal came on to be tried before the said court, or a jury who had acquitted each defendant, whereupon the court directed that the conviction should be quashed, and thereupon the justices holding the said court did, according to the said statute forthwith, and at the request of each defendant, give to each defendant a certificate of the facts aforesaid, whereby and by force of the said statute, each defendant became released from the matters in the declaration mentioned.

The 39th sec of ch. 91, Consol. Stat. Canada, enacts that if any person unlawfully assaults or beats any other person, any justice of the peace, upon complaint of the party aggrieved, "*praying him to proceed summarily under this act,*" may hear and determine such offence. It is not averred that the plaintiff, when he made his complaint, did pray that there might be summary proceedings. But assuming that this apparent omission is cured by the subsequent allegations, or has been waived by the plaintiff there remains the question, whether the certificate pleaded is a bar to this action.

Mr Miller, for defendants, relied on ch. 114, of the Consolidated Statutes of Upper Canada, sec. 1, 2, and 3, as giving the appeal treating the accusation as not one of crime. It is not worth while to discuss the question whether the appeal is under that statute or under ch. 99 of Consolidated Statutes of Canada, sec. 117, 118, 119. Neither of these acts give to the court of quarter sessions power to grant the certificate relied on. That power is conferred by the 42nd sec. of ch. 91, already referred to which provides that, "if the justice, upon the hearing of any such case, deems the offence not proved, or finds the assault or battery justified, or so trifling as not to merit any punishment, he shall dismiss the complaint with or without costs in his discretion, and shall forthwith make out a certificate under his hand" stating the facts of such dismissal, and shall deliver such certificate to the party against whom the complaint has been preferred. And then by sec. 44—if the person against whom such a complaint has been preferred for a common assault or battery obtains such certificate as aforesaid, he shall be released from all further or other proceedings, civil or criminal for the same causes. I think the power of granting such a certificate is confined to the justice or justices, before whom the complaint of the party aggrieved was made, and who has been prayed to proceed summarily under the act

In my opinion the plaintiff should have judgment on the demurrer.

Per cur.—Judgment for plaintiff.

COMMON LAW CHAMBERS.

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

KEEP v. HAMMOND ET AL.

Award—Full costs—Certificate—Referring back to enable arbitrator to certify.

Held, 1. That a certificate for full costs signed by arbitrators after they had made their award, and after they had finally separated, and at a time when not all together, could not be supported as entitling plaintiff to full costs of suit.

2. That the words "costs of suit," as used in an award, have no reference to any particular scale of taxation, and so cannot *per se* be relied upon as entitling plaintiff to full costs of suit in a case where the amount awarded is within the jurisdiction of an inferior court

3. That the meaning of arbitrators where an award is made, is not to be gathered from affidavits or from any other source than the award itself

4. That after entry of judgment by plaintiff, it is too late to ask to be allowed to set aside the judgment and have cause referred back to the arbitrators to enable them to certify for full costs in proper form, assuming that the omission to certify in proper form is a ground for so doing, but as to which *quære*.

(Chambers, May 4, 1863.)

Plaintiff entered into a contract with the defendants for the building of a church.

The church was built, but not within the time specified in the contract. Plaintiff thereupon sued defendants on the common counts, claiming $1,272 as the contract price for erecting the church, and $480 for extra work. Defendants pleaded never indebted, payment, and set-off.

The cause was entered for trial and a verdict taken for plaintiff for £250, subject to a reference with power to the arbitrators to certify for full costs, if necessary.

On 17th August, the arbitrators signed the following:—

"Award for plaintiff and $92 damages and costs of suit, and also costs of reference, $152—each party to pay their own witness fees.

(Signed) "A B, "C D, "E F, } *Arbitrators herein.*"

The result was arrived at in the following manner:—

Claim for extras		$480 00
Set-off allowed defendant in consequence of non-completion of church within time limited by contract	$315 00	
Payments not acknowledged	29 00	
		344 00
Balance		$136 00
Less one-third, costs of reference		44 00
Award		$92 00

On 19th August, the arbitrators signed the following certificate:

"We certify that this is a fit cause to be withdrawn from the Division Court and tried in one of the Superior Courts of law."

(Signed) "A B, "C D, "E F, } *Arbitrators herein.*"

Plaintiff thereupon treating the memorandum of 17th August as an award, and the certificate of 19th August, if not the award, as entitling him to full costs of suit, entered final judgment in Goderich for the amount of the award and full costs of suit.

Defendant then appealed to the principal office in Toronto, where the taxing officer held plaintiff not entitled to full costs of suit, and so revised the bill of costs.

James Paterson thereupon obtained a summons, calling on defendants to shew cause why the taxation of costs should not be revised, and why the master should not, on the revision of taxation allow plaintiff full costs of suit.

1. On the ground that the arbitrators to whom the cause was referred having certified for full costs of suit, in pursuance of the power given them by the order of reference, and such full costs having been taxed by the Deputy Clerk of the Crown, the master on revision cannot disregard the certificate without a judge's order to do so

2. On the ground that the arbitrators, before making their award, considered the question of costs, and decided in giving the plaintiff full costs, and that the order in the award that the defendant should pay costs was intended by them to mean, and did mean, full costs, and that the formal certificate signed by them thereunder being merely to carry into effect their decision or award, is a legal and sufficient certificate.

3. On the ground that at the taxation of costs before the Deputy Clerk of the Crown, no objection was made to the certificate, or that the plaintiff was not entitled to full costs in the cause, and that therefore the master, on a revision of costs under a notice, could not properly raise or entertain that question.

Or why full Common Pleas costs should not be allowed to the plaintiff, on the ground that he was entitled to the same on the merits.

Or why the plaintiff should not be at liberty to waive his judgment and the same be set aside, and an order made that on re-entering the same the master do tax to plaintiff full Common Pleas costs of suit, on the grounds that the plaintiff's claim having been reduced be set-off, the cause was a fit and proper one to be withdrawn from the Division Court and County Court and brought into the Court of Common Pleas, and that plaintiff is therefore entitled to such full costs on the merits.

Or why, the judgment being so set aside, it should not be referred back to the arbitrators to make a proper award according to their decision and intention, and that the time for making the award be enlarged.

Or why such other order should not be made in the premises as may appear just.

And on grounds disclosed in affidavits and papers filed.

Amongst other papers filed there was an affidavit of each of the arbitrators that he meant and intended by the award to give plaintiff full costs of suit, and that the certificate subsequently signed by them was designed only to carry out that intention.

S. Richards, Q. C., showed cause. He argued—

1. That the award without the certificate did not entitle plaintiff to full costs of suit, and that the certificate having been given after the making of the award was a nullity. *Spain* v. *Cadell*, 8 M. & W. 129; *Geeves* v. *Gorton*, 15 M. & W., 186; *Smith et al* v. *Forbes*, 8 U. C., L. J., 72; Russell on Awards, 2 edn. p. 390.

2. That power to certify having been delegated to the arbitrators, and not duly exercised by them, neither court nor judge will afterwards interfere. *Richardson* v. *Kensett*, 6 M. & G., 712; *Bury* v *Dunn*, 1 D. & L., 141; Russell on Awards, 2 edn. p. 390.

3. That neither court nor judge has power to examine affidavits or otherwise look outside of the award, to gather the intention of the arbitrators. *Caswell* v. *Grucutt*, 10 W. R., 91; *Holdgate* v. *Killich*, 10 W. R., 19; S. C., 5 L. T. N. S., 358.

R. A. Harrison supported the summons. He argued,

1. That there was no formal award made, but only a memorandum for an award. *Williams* v. *Squair*, 10 U. C., Q. B., 24; *Jones* v. *Reid*, 1 U. C., Pra. R., 247.

2. If an award, that it on the face of it gave plaintiff a right to full costs of suit; that the words used were capable of bearing that meaning if so intended; and that each of the arbitrators swore he so intended.

3. That if so intended, but not sufficiently expressed, the court was at liberty to look at the certificate of 19th August, made for the purpose of carrying out that which had been previously decided as to plaintiff's right to full costs.

4. If not, that an order for full costs should be made on the merits; that there was power to make such an order (*Elmore* v. *Coleman*, 4 U. C., O. S., 321); that its exercise was a matter of discretion; that the discretion is exercised almost as a matter of course when plaintiff's claim is reduced by set-off (*Moore* v. *Teetzel*, 1 U. C., Pra. R., 375: *Woodburn* v. *Newham*, 7 C. B., 64: *Beswick* v. *Copper*, 7 C. B., 669); that the fact of the power having been delegated to the arbitrators was no argument against the exercise of it by the court or a judge in a case where it is shown to have been intended to be exercised by the arbitrators but ineffectually done. *Sharp* v. *Everleigh*, 20 L. J., Ex. 282, *Caswell* v. *Groucutt*, 6 L. T., N. S., 290.

5. If no relief, as matter stands, then that award and subsequent proceedings should be set aside and reference back to the arbitrators, to enable them to certify in proper form (*Caswell* v. *Groucutt*, 6 L. T., N. S., 290) which reference may be made as well in vacation as in term, (Con. Stat., U. C., cap. 22, s. 161) and for that purpose the submission may be made a rule of court in vaca-

tion. *In re Taylor*, 5 B. & A. 217; Russell on Awards, 2 Edn. p. 560.

DRAPER, C. J.—I am of opinion the arbitrators have not exercised effectually the power given to them by the rule of reference to certify for costs as a judge at *nisi prius*.

The certificate itself appears to have been made after the award and after the arbitrators had finally separated, and they were not together when it was signed.

The award itself is in these words—"Award for plaintiff, and $93 damages, and costs of suit and also costs of reference $132, each party to pay their own witness fees."

By the terms of the submission it was ordered "that the costs of the said cause shall abide the event," and it is urged that the words "and costs of suit" in the award will have no effect unless treated as a certificate for the costs of the superior court. Admitting this consequence, I cannot hold that the words "and costs of suit" have reference to any particular scale of taxation.

I do not feel at liberty to gather the meaning of the arbitrators from any other source than the language used in the award.

Then as to the remaining part of the application. The plaintiff has entered judgment, and he seeks to set it aside, and asks for an order to tax full costs, or to refer back the award, and to enlarge the time for making it, in order that the arbitrators may make an award which shall give full costs in express terms. The case of *Caswell* v. *Groucutt*, 10 W. R. 91, Exch., is the nearest I have seen to the present, and it appears to me adverse to the application.

I would have followed any authority which established the principle contended for, but I have found none, and in the absence of any decision, I must say that I do not think the error and omission, assuming their existence, is of such a character as to justify setting aside a judgment virtually annulling an award by referring it back, and enlarging the time long since expired, in order to enable the arbitrators to make a new award. There must, I think, be something more than a question of the difference between the costs of the superior and inferior courts to justify such a procedure.

Summons discharged but without costs.

SAULTER v. CARRUTHERS.

Chattel Mortgage—Statement on renewal—Sufficiency of—Con. Stat. U. C. ch. 48, sec. 10

Held, that the statement set out below, filed upon the renewal of a chattel mortgage, sufficiently complied with the requisites of the statute.

[CHAMBERS, May 9, 1863.]

Interpleader by sheriff of United Counties of York and Peel.

Tilt for execution creditor; *D. McMichael* for claimants, Cameron and Fraser; *Osler* for the sheriff.

HAGARTY, J.—The parties appear on an interpleader summons, and the execution plaintiff and the claimants Fraser and Cameron, agree to take the judgment of the presiding Judge in Chambers on the only point which they admit arises in this case, viz: the sufficiency of the statement and affidavit filed on renewing a chattel mortgage, and which reads as follows, "I, J. H., of &c., the duly authorized agent of F. & C., mortgagees named in the chattel mortgage, of which the hereunto annexed copy of chattel mortgage is, I verily believe, a true copy, do hereby state, that I am well acquainted with all the circumstances connected with the said original chattel mortgage, and that the said F. & C. claim interest in the property claimed and described in said chattel mortgage as mortgagees thereof, and that the whole principal sum of £—— named in said mortgage, is still due to said mortgagees, and unpaid, together with £50 for interest from, &c., to date, making in all £——, and said mortgagor has made no payment on account of either principal or interest Dated, &c."

Annexed was an affidavit of J. H. that the above statements were true, and that said chattel mortgage had not been kept on foot for any fraudulent purpose.

The parties admit that the principles laid down in the recent case of *O'Halloran* v. *Sills*, 12 U. C. C. P. 465, must govern this controversy.

Tilt, for execution creditor, objects—

1st. That the interest of the mortgagees is not sufficiently shewn.

2nd. That the amount stated to be still due is not stated to be due on the mortgage.

The Chief Justice says, in the case referred to, "The statute requires a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof, and a full statement of the amount still due for principal and interest thereon, and of all payments made on account thereof"

Apart from this case I should at once consider the statute reasonably complied with by the claimants in this matter.

I am only anxious that the judgment I now give shall not be any way contrary to the judgment of the court.

I think the statement here clearly shews that "the claimants claim interest in the property claimed and described in the chattel mortgage as mortgagees thereof;" and these words I think rebut any presumption that they have assigned their interest.

I also think the words "and that the whole principal sum of £—— named in said chattel mortgage, is still due to said mortgagees and unpaid, together with £——for interest from 7th July, 1858, to this date, making in all £——, and the said mortgagor therein named has made no payment on account of either principal or interest," sufficiently comply with the requirements of the statute as expounded by the Court of Common Pleas

If this statement be sufficient, then the affidavit verifying it seems to me to be according to the statute.

I am not prepared to carry the law any further at present than *O'Halloran* v *Sills*, and I think the statement before me is free from several defects in the statement in *O'Halloran* v. *Sills*

I therefore decide on the best opinion I can form of the case, that the objections fail, that the usual order be made, the sheriff to withdraw from possession; no claim to be brought by either party against him, or against each other, in respect of seizure or entry by sheriff, or his officers; and that the execution creditor pay the sheriff's costs of interpleader and the claimant's costs on this application.

Order accordingly.

COUNTY COURT CHAMBERS.

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

HALLEY v. STAUNTON ET AL.

Con. Stat. U. C., cap. 22, ss 60, 85.

A declaration filed under and pursuant to s. 60 of Con. Stat., U. C., cap 60, and not showing at its commencement date of issue of writ as required by s. 85 of the same act, is irregular, but on application to set same aside for irregularity—the copy served having been produced by defendant—the judge ordered declaration filed and copy served, upon payment of $2 costs, to be amended.

(June 1st, 1863.)

Geoffrey Hawkins obtained a summons on the part of defendant Staunton, calling upon plaintiff to shew cause why the declaration filed in this cause, the copy thereof served, and all proceedings subsequent thereto, should not be set aside for irregularity with costs, upon the ground that the declaration filed and copy served omitted to give the date of issue of writ of summons.

The action was brought against the defendant Staunton as the maker, and defendant Smith as the endorser of a promissory note for $350 overdue.

Defendant Smith allowed judgment to go by default, but Mr. Hawkins appeared for defendant Staunton.

Plaintiff thereupon under and pursuant to Con. Stat. U. C., cap. 22, s. 60, signed judgment against defendant Smith, and declared against defendant Staunton, stating, by way of suggestion, the judgment against defendant Smith.

The declaration, which was in the form given in Chit. F., 7 Edn., p. 78, commenced as follows:—

(*Venue*) William Halley, by J. P., his attorney, sued out a writ of summons (not giving date of issue) against J. H. Lynch Staunton and Francis E. Smith, &c.

The objection relied upon was non-compliance with s 85 of Con. Stat. U. C., cap 22, which enacts that "Every declaration shall commence as follows or to the like effect:

(*Venue*) A B, by E F, his attorney, sues C D, who has been summoned by virtue of a writ *issued on the day of A.D., one thousand eight hundred and* or," &c.

The words in italics are not to be found in s. 59 of C. L. P. A., 1852, with which s 85 of our C. L. P. A is supposed to correspond, and hence the impropriety of relying upon the English form given in Chitty's Forms.

R. A. Harrison shewed cause, and filed an affidavit of Mr. Spencer, showing that the form of declaration used was not only that given on p. 78 of Chitty's Forms, but the form in general use in both the Superior Courts of Common Law for Upper Canada, at Toronto. He argued that notwithstanding the omission of the date of issue of writ, the declaration filed "in effect" complied with 85 of Con. Stat. U. C., cap. 22, and that the part omitted (date) was immaterial.

Hon. S. B. Harrison held that the declaration, by reason of the omission complained of was irregular; but as the copy of declaration served was before him, ordered that plaintiff, upon payment of $2 costs, should be at liberty forthwith to amend declaration filed and copy served.

Order accordingly.

LOWER CANADA REPORTS.

SUPERIOR COURT.

(From the Lower Canada Jurist)

SWEETAPPLE v. GWILT.

Held:—That although there is no community of property, according to the Custom of Paris, between parties married in Upper Canada, their then domicil, without any ante nuptial contract, yet an action *en séparatum des biens* will be maintained in favour of the wife, by reason of the insolvency of the husband, since their removal to Lower Canada.

[Montreal, 24th December, 1862.]

The plaintiff, by her declaration, alleged that on the 8th March, 1855, at the city of Toronto, she was lawfully married to the defendant.

That they then resided and thereafter continued to reside at or near Toronto, and the defendant administered the estate of the plaintiff. That they removed to Lower Canada in the month of July, 1859, and moved to Lachine, where they continued to live and reside: and the plaintiff, after alleging the insolvency of the defendant, prayed for a *séparation des biens*, in the terms mentioned in the following judgment:

The court having heard the plaintiff by her counsel, the defendant having made default, examined the proceedings and proof of record and deliberated thereon. It is considered and adjudged that the said plaintiff shall and may, from the date of her *demande*, to-wit, from the sixth day of November, 1862, (Date of service of process in this cause,) hold, possess, use, administer and enjoy separately and apart from the said defendant, all and every her estates and property, real and personal, moveable and immoveable, as well as those which belonged to her before her marriage with the said defendant, as those which have accrued or shall hereafter accrue to her, and to which she is now and may hereafter become in any way entitled, without molestation, trouble or hindrance, by or on the part of the said defendant or any person whomsoever; and the court doth adjudge and condemn the said defendant to guarantee, acquit and idemnify the said plaintiff from and against all and every the debts, sum or sums of money for which he may have caused the said plaintiff to be jointly with him liable or responsible, and to pay to the plaintiff the costs of this action.

J. A. Perkins, jr., attorney for plaintiff.

EX PARTE MOGE, PETITIONER FOR A WRIT OF CERTIORARI v. ROY, PROSECUTOR IN THE COURT BELOW.

(Coram—BADGLEY, J.)

Held:—That upon a writ of Certiorari to remove the proceedings had and conviction made in pursuance of Chap. 6 Cons. S. L C, such conviction being for "keeping a house of public entertainment;" will be quashed, inasmuch as it is no offence unless qualified within the terms of the said Statute.

[Sorel, 19th February, 1863.]

Per curiam:—The petitioner was prosecuted under the provisions of the Act respecting Tavern Keepers and the sale of intoxicating liquors, for "having kept a house of public entertainment." This allegation constitutes no offence and the proceedings had were not therefore in pursuance of the said act.

It is necessary to qualify the keeping of such a house of public entertainment, *by alleging that* it is for the reception of travellers, and others The simple allegation of keeping a house of public entertainment is not sufficient to bring this suit within the provisions of Chap. 6, Cons. S. L. C., as it may have been a Circus or a Theatre, which are also houses of public entertainment.

Conviction quashed.

Oliver & Armstrong, attorneys for petitioner.
Pitch, for respondent.

EX PARTE ROY, PETITIONER FOR A WRIT OF CERTIORARI.

(Coram—BADGLEY, J.)

Held:—1o. That the return of the notice of motion for a writ of *Certiorari* made by a bailiff is sufficient.
2o. That such a return need not be proved upon oath.

[Sorel, 19th February, 1863.]

In this case the prosecutor in the court below having appeared when the motion for a writ of *Certiorari* was made, objected to the granting of the motion upon the ground that the return of the notice of such motion was insufficient not being proved under oath, as required by the Imperial Statute 13, Geo. II, ch. 18, sec. 6, regulating proceedings upon *Certiorari*.

The respondent contended: That it was the proper time to take advantage of this defect, as it would be too late afterwards.

Paley, on Convictions, edition of 1856, p. 360.

That the Imperial Statute, which required that the six days' notice should be "duly proved on oath," had not been repealed by the Provincial Act, ch. 89, sec. 2, sub-sec. 2, Cons. Stat. L. C., which latter Statute applies only to the returns of the different proceedings had after the granting of the writ of Certiorari That this reasoning had been applied in several instances by the Superior Court in Montreal, in 1850 and 1851, in the following cases;

No. 96, *Ex parte Pierre Chicoine*, 7th October, 1850.
No. 153, *Ex parte Hiram Waite*, 3rd December, 1850.
No. 146 " " " 7th January, 1851.

In those cases the proof of service of notice of motion having been made by the return of a bailiff, the Court decided that the English Statute and the rules which obtained in England, required proof of service by affidavit.

Per curiam.—The practice now followed in the District of Montreal is different and requires no proof of service by affidavit.

Motion granted.

Olivier & Armstrong, attorneys for petitioner.
Germain, attorney for respondent.
Lefrenaye, counsel.

EX PARTE, COUSINS FOR A WRIT OF CERTIORARI AND RAPHAEL BELLEMARE, PROSECUTOR IN THE COURT BELOW.

(Coram—MONK J.)

Held:—That in a prosecution for selling liquors without a license, the information need not be under oath.

[Montreal, 31 March, 1863.]

In this case the information and conviction were for the offence of selling liquor without a license. On the 27th March 1863, the petitioner moved the Superior Court for a writ of *Certiorari* to issue upon several grounds contained in his affidavit of circumstances amongst others the following: Because no information under oath was ever exhibited to Charles J. Coursol, Esquire, judge of the Sessions of the Peace for the City of Montreal, previous to the issuing of the writ of Summons in the said prosecution; because in lieu of being under oath, the said information was merely signed by the said Raphaël Bellemare and not sworn to. Vide ch. 6 Con. Stat. Lower Canada, s. 43.

Per curiam—The provisions of the act respecting tavern-keepers, do not require that such an information be made or laid on oaths but on the contrary that act gives all the forms which are to be followed in such prosecutions; so that the Section 24 of Ch. 103 of the Consolidated Statutes of Canada do not apply to such cases.

Application refused.

Kerr and Nagle, attorneys for petitioner.
Lafrenaye, attorney for Bellemare.

ENGLISH REPORTS.

PRIVY COUNCIL.

[*Present Lord* CHELMSFORD, *Sir* J. L. KNIGHT BRUCE, *and Sir* J. T. COLEBRIDGE.]

(*From the Jurist.*)

THE GREAT WESTERN RAILWAY OF CANADA. Apps., JANE FAWCETT, Resp.

THE GREAT WESTERN RAILWAY OF CANADA, Apps., MARGARET M'KAY BRAID, Resp.—*Feb.* 21.

Railway Company—Negligence—Construction of the line—Onus probandi—Misdirection

Where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *primâ facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it

A railway company, in the formation of their line, are bound to construct their works in such a manner as to be capable of resisting all violence of wheather which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur.

In an action against a railway company to recover compensation for injuries resulting to a passenger from an accident caused by the giving way of a portion of the company's railway, it was proved, on behalf of the company, that they had always employed skilful engineers in the construction of their works, and that the giving way of the company's railway was caused by a storm of unusual violence The judge in directing the jury, never explained to them the effect of such evidence upon the question of negligence *Held*, that the jury ought to have had their minds distluctly and pointedly directed to this question.

These were two appeals from the judgment of the Court of Error and Appeal of Upper Canada. The causes of action in both cases arose out of an accident which happened on the appellants' railway on the 19th of March 1859 In each case the action was brought by a widow as the personal representative of the husband, to recover compensation for the benefit of herself and children. In the first case an action was brought by Jane Fawcett to recover compensation for the loss sustained by the death of Thomas Fawcett, which took place whilst travelling on the appellants' railway on the 19th March 1859, when a part of the embankment on which the railway was laid gave way during a violent storm which then occurred; the engine of the railway train was thrown into the breach thus created in the embankment, and Thomas Fawcett was killed. The deceased was travelling as a passenger for hire, and it was alleged by the respondent, that the accident was attributable to the appellants having their railway, and the switches, bridges, embankments, culverts, drains, and gutters thereof unskilfully and improperly placed, built, and constructed of insufficient materials and size, and to negligence, and want of skill and caution, in the carrying and conveying the deceased, and in conducting, managing and directing the carriage in which he was a passenger, and the train to which the carriage was attached, and the locomotive whereby the train was drawn. The defence was, that there was no such breach of duty, or want of skill and care, on the part of the appellants, as alleged. The cause was tried at Hamilton on the 31st October, 1859, before Sir J. B. Robinson, C. J., of Upper Canada. It was admitted that the deceased, Thomas Fawcett, was a passenger in the train from Paris (in Canada) to St. Catharines and was killed by the accident which happened on the 19th March, 1859, in that part of his journey which lay between Hamilton and Copetown. It appeared by the evidence, that the railway between Hamilton and Copetown at the place where the accident happened and for some distance in both directions, is carried along an embankment raised on and running along a mountain side, the mountain on the upper or north side of the embankment, rising to a height far above the top of the embankment, the level of which was about twenty-five feet above the ground on its north side, and about sixty feet above the ground on its south side. On the morning of the 19th March, 1859, at about two o'clock A. M., the train in question, travelling at about ten miles an hour from Copetown to Hamilton, reached the place of the accident. The embankment to within about twelve feet from the ground on the north side, had previously given way, and fallen over to the south side, leaving a gap of about forty five yards, into which the engine fell and so Fawcett was killed. Loaded trains had passed safely over the place of the accident, one within a hour of the time when it took place, and two others within the two or three hours preceding. At those times all appeared safe, and there was nothing to attract attention. The weather had been wet for two or three days previously, the winter's frost was coming out of the ground, the night in question was very stormy, and from six o'clock in the evening of the 18th March there had been an excessively heavy rain. The witnesses on both sides agreed that the rain caused the embankment to give way, but in what manner it acted was left entirely to conjecture and uncertainty. No evidence was given of any negligence, or want of caution, care, or skill in carrying or conveying Fawcett, or in conducting, managing, or directing the carriage train or locomotive, or of defects in the materials used in the construction of the embankment or railway works; but the respondent called witnesses for the purpose of proving negligence or want of skill in the construction or maintenance of the works. At the close of the respondent's case it was objected, on behalf of the appellants, that as the evidence shewed that the appellants employed competent engineers, the negligence charged against them was negatived. But the learned judge ruled, that the question of negligence or no negligence must go to the jury, and that the question was, whether a ditch was necessary at a certain part, and whether such a ditch was either never made, or, if made, was not properly maintained, so as to protect the embankment from water; and that the engineers employed by the appellants were not exclusively the judges of the matter; that they, like other servants of the appellants, might fail in doing their duty; and if they did, the appellants must answer for injuries occasioned to others by such neglect. The judge having so ruled, the appellants called witnesses on their behalf, for the purpose of shewing that there was no want of care or skill in the construction of the railway and embankment; that the culverts and drainage were sufficient; that the appellants employed competent and skilful engineers, and spared no expense in the construction and maintenance of the railway; that the railway had been used for about four years, without any suspicion of insecurity, and was considered perfectly safe by first-rate engineers, and that it was inspected daily; that the embankment was repeatedly inspected by competent surveyors and engineers, and that all precautions had been taken to provide against such dangers as could reasonably foreseen, and that the storm which occurred about the time of the accident was of a most extraordinary and unprecedented character. The jury found a verdict for the respondent, with damages 5000 dollars. In the following term the counsel for the appellants obtained a rule *nisi*, in the Court of Common Pleas for Upper Canada, for a new trial, on the ground of misdirection, and on the ground that the verdict was against law and evidence. In Hilary Term cause was shewn against the rule, and it was discharged; but the Chief Justice of the Court of Common Pleas was of opinion that the verdict was against the weight of evidence; and in that respect he differed from the other two judges who heard the case. Judgment was on the 27th March, 1860, entered for the damages and costs, being 5419 dollers and 16 cents. Against that judgment, the then defendants appealed to the Court of Error and Appeal for Upper Canada. The appeal came on to be heard before the Court of Error and Appeal on the 27th December, 1860, and on the 23rd January, 1861, judgment was delivered to the effect, that the Court was of opinion that the directions were proper, that the verdict was supported by evidence, and that the majority of the Court were of the opinion that the judgment was not against the weight of evidence. The judgment appealed from was therefore affirmed. The appellants having obtained leave from the Court of Error and Appeal to appeal to her Majesty in her Privy Council, and, having complied with the terms on which the appeal was allowed, now appealed accordingly.

In the second case, an action was brought by Margaret M'Kay Braid, the widow and personal representative of Alexander Braid, for the loss sustained by the death of the said Alexander Braid, which occured while travelling on the appellants' railway, at the same time, and under the same circumstances alleged in the former case; but in this latter case a defence was also set up, that the deceased was travelling on the railway gratuitously, or else that he was wrongfully travelling on the terms of a free pass ticket, which though expired, he used for the purpose of avoiding payment of railway fare, and by the terms of which he took upon himself all risk of accidents. The cause was tried at Hamilton,

on the 31st October, 1859, before Sir J. B. Robinson, C. J., of Upper Canada. It was admitted that the deceased Alexander Braid was in the train from London (in Canada) to Hamilton, that he was in the sleeping car, and was killed by the accident which happened on the morning of the 19th March, 1859, about two o'clock A. M. It appeared by the evidence that the deceased had been a railway officer in the employ of the appellants, and had a free pass in each of the years 1856, 1857, and 1858, and had improperly retained in his possession the two passes for 1857 and 1858, and that in 1859, after he had left the service of the appellants, he had claimed of the conductors and servants on the line a right to travel free, presenting one of his old passes, and on some occasions had been allowed to do so, and on others (as many as two) he had paid; and on one occasion had told one of the conductors (not the conductor on the night of the accident) that he was the only conductor who made him pay. The two pass tickets for 1857 and 1858 were found on him after his death. The conductor on the journey in question supposed that he had a free pass and when examining the tickets of others sitting near Braid, was told in his presence that Braid had a free pass ticket, and Braid was not asked for his ticket. No evidence was given of any other ticket than the two free pass tickets being found on him, nor was any other evidence of his having paid his fare given. It was proved that persons travelling with free pass tickets take upon themselves all risk of accidents and damages. The judge summed up the case to the jury. The jury found a verdict for the respondent, with damages 4000 dollars; and being asked at the suggestion of the appellants' counsel stated that they concluded that the deceased had paid his fare on the 18th, as it had been proved he did on two other occasions recently before, and that he was not travelling under a free ticket. In the following term (Michaelmas 1859), the counsel for the appellants obtained a rule *nisi* in the Court of Common Pleas of Upper Canada for a new trial, on the ground of misdirection and want of direction, and on the ground that the verdict was against law and evidence. In the following term (Hilary, 1860), cause was shewn against the rule, and it was discharged; but the Chief Justice of the Court of Common Pleas was of opinion that the verdict was against the weight of evidence, and his Lordship differed from the other two judges in that respect. Judgment was, on the 20th March, 1860, entered for the damages and costs, being 4240 dollars 68 cents. Against that judgment the then defendants appealed to the Court of Error and Appeal for Upper Canada. The appeal came on to be heard before the Court of Error and Appeal on the 27th December, 1860, and on the 23rd January, 1861, judgment was delivered, to the effect that the Court was of opinion that the directions to the jury were proper; that the verdict was supported by evidence; and that the majority of the Court were of opinion that the judgment was not against the weight of evidence. The judgment appealed from was therefore affirmed. The appellants having obtained leave from the said Court of Error and Appeal to appeal to her Majesty in her Privy Council, and having complied with the terms on which the appeal was allowed, now appealed accordingly.

Manisty, Q. C., and *Rew*, for the appellants, in both cases, contended that there was no evidence of negligence, or want of care or skill in the construction of the railway, or in repairing or maintaining the same, which occasioned the accident; that the judge misdirected the jury in telling them there was evidence of culpable negligence in the construction or maintenance of the embankment which, it could be said without doubt, occasioned the accident; that it was at least as consistent with the evidence, that the giving way of the embankment arose from inevitable accident, or a cause which the appellants could not reasonably anticipate or guard against, as from any negligence or want of care or skill in the construction or maintenance of the embankment; that the judge ought to have given the jury some instruction or direction as to what constituted culpable negligence in the construction and maintenance of the embankment, and to have explained to them under what circumstances and in what manner the appellants would be liable for the consequences of the storm.

Matthews for the respondent in all cases.—There was no misdirection on the part of the judge. The question whether the verdict was against the weight of the evidence is not now in issue. The jury were justified, on the evidence, in finding a verdict for the respondents.

The following authorities were referred to:—*Withers* v. *The North Kent Railway Company* (27 L. J., Ex., 417); *Bligh* v. *The Birmingham Water Works Company* (11 Exch. 781); *Toomey* v. *The London, Brighton, and South-coast Railway Company* (3 C. B., N. S., 146); *Carpue* v *The London, Brighton, and South-coast Railway Company* (5 Q. B. 747); *Skinner* v. *The London, Brighton, and South-coast Railway Company* (5 Exch. 787); *Ruck* v. *Williams* (27 L. J., Ex., 357); *Smith* v. *Sheppard* (Abb. Ship 382); *Ford* v. *Lacey* (30 L. J., Ex., 451); *Bird* v *The Great Northern Railway Company* (28 L. J., Ex., 3); and the Act of the Canadian Legislature, 22 Vict. c. 13, s 57.

Lord CHELMSFORD delivered the judgment of their Lordships: These cases come before us by appeals from judgments of the Court of Error and Appeal of Upper Canada, affirming judgments of the Court of Common Pleas in two actions brought against the Great Western Railway Company of Canada. As the actions arose out of the same accident, and in each of them the same ground of negligence is alleged against the company, the principal questions to be determined are the same in both. There are two points, however, which are peculiar to *Braid's case*, to which it may be necessary shortly to advert. The first of these, which was properly abandoned on the argument, arose upon two pleas of the company, which alleged in substance, that Alexander Braid, the deceased, was travelling on the railway under circumstances which released the company from all liability to answer for his death; and it was admitted that if the onus of the proof of their pleas rested upon the company (of which there could be no doubt), it would be hopeless to attempt to disturb the verdict of the jury upon these issues. The other is an objection which has been urged against the right of appeal, on the ground of the damages being of insufficient amount. This objection depends upon an act of the Canadian Legislature (22 Vict. c. 13, s 57), which enacts "that the judgment of the Court of Error and Appeal shall be final where the matter or controversy does not exceed the sum or value of 4000 dollars." The damages in *Braid's case* were exactly of this amount; but it was contended, on behalf of the appellants, that the costs which were the consequence of the verdict, ought to be added to the damages, and that thus the matter in controversy would exceed the limited sum or value. As the judgment of their Lordships will be in favour of the respondents upon the other grounds of appeal, they think it unnecessary to express any opinion upon this objection; but nothing which was thrown out by them in the course of the argument must be considered as any indication of their assent to the proposition, that in estimating the matter in controversy the costs incurred by the losing party may be taken into account. Having adverted to the questions which are applicable only to one of these appeals, we now proceed to those which are common to both. The actions were for damage alleged to have been sustained by the plaintiffs in consequence of the deaths respectively of Thomas Fawcett and Alexander Braid, occasioned by the want of care and skill of the company in constructing their railway, and in repairing and maintaining the same. The part of the railway where the accident occurred was carried over an embankment, made on the slope of a mountain, and had been in use for four or five years without any injury having happened. Early on the morning of the 19th March, 1859, after an unusually heavy fall of rain, the embankment gave way to the extent of forty-five yards in length on the line of the track. Trains had gone over the place where the accident occurred during the preceding night, and a train with thirteen cars had passed the same spot at ten minutes past one on the morning of the 19th March. The train in question arrived at the part of the embankment which had given way about two A. M., and was immediately precipitated into the breach, the deaths of the two persons in respect of which the actions were brought being the unhappy consequence of this accident. In support of the verdicts which in both the actions were against the company, it was insisted by the learned counsel for the respondents that the mere proof of the embankment having given way would have been quite sufficient to establish a case of negligence; and in support of this position he cited the cases of *Carpue* v *The London and Brighton Railway Company* (5 Q. B. 747) and *Skinner* v. *The London, Brighton and South-coast*

Railway Company (5 Exch. 787). There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *primâ facie* evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. However, the plaintiffs did not rest their case solely on the fact of the falling in of the embankment, but called witnesses to give their opinion as to the cause of the injury. It was objected by the learned counsel for the appellants that this evidence amounted only to theory and conjecture, and that the jury ought not to have been permitted to act upon it. To this it may be answered, that although the circumstances which occasioned the accident were facts to be proved, yet the causes which produced this state of circumstances were necessarily matters of opinion and judgment. But then it was said that the witnesses ascribed the accident to different causes, that their theories were conflicting and mutually destructive, and that consequently at the close of the plaintiff's case there was nothing to go to a jury. The difference of opinion in the witnesses, however, refers merely to the mode in which the water must have operated upon the embankment, but they speak, almost with one voice, as to the defective character of the drainage. It was assumed that at the close of the plaintiff's evidence in each case there was an application by the defendants for a nonsuit; but this seems to be a misapprehension. The notes of the learned judge who tried the cause appear to be merely the heads of the defence set up. The first ground of defence in both cases, that the company had always skilful engineers, and therefore could not be held to have been negligent, even if the work were not judiciously constructed, would have been prematurely urged as matter of nonsuit at that stage of the trial, as no proof had then been given of the employment of such engineers by the company. The language of the note in *Braid's case*, "it being proved," must be understood "upon its being proved," and must be taken as a short mode of stating the intended defence. The other defence mentioned to have been raised in *Braid's case* only, was clearly for the jury, even if the unusual state of the weather had been proved in the course of the plaintiff's case. Although no mention is made of this ground of defence in the notes of *Fawcett's case*, it is fair to assume that it was urged on behalf of the company in that case also, not only from the nature of the evidence, but also from the circumstance, that when, on the application for the new trial, misdirection was imputed to the learned judge in this particular, it was never objected that no question of the kind had been raised. The defence in both cases, therefore, was substantially the same, being founded upon proof of the proper construction of the railway, of the daily inspection of the line, and of the violence of the storm of rain, which carried away the embankment. As far as we can collect from the learned judge's note of his charge to the jury, he does not appear in *Fawcett's case* to have adverted to the company's defence arising upon the extraordinary and unforseen state of the weather immediately before the accident; nor, in *Braid's case*, to have mentioned it otherwise than in an incidental manner. In neither case does he appear to have explained to the jury the effect which would be produced upon the question of negligence, by satisfactory proof that the storm which destroyed the embankment was of such an extraordinary description that no experience could have anticipated its occurrence. Their Lordships think that the jury ought to have had their minds distinctly and pointedly directed to this question, and that without some definite instruction upon the subject, they were likely to have omitted it from their consideration. If, therefore, there had been any miscarriage on the part of the jury in consequence of this non-direction, and a verdict against the evidence had been produced by it, their Lordships would have felt themselves compelled to send the case to a new trial. But upon a careful examination of the evidence, they have come to the conclusion that the verdict ought to have been the same even if the question of negligence had been left to the jury, accompanied with a direction as to the circumstances under which the company would have been exonerated from liability. In the construction of works of a permanent character, such as a railway, the amount of precaution which ought to be taken to guard against any external violence to which it may be exposed cannot be the subject of any precise rule, but must necessarily vary according to the varying local circumstances of each case. The difficulty of extracting any principle from decided cases which may be applied with certainty to questions of this description, is strongly exemplified by two judgments of the Court of Exchequer, which were delivered within three weeks of each other. In *Withers* v. *The North Kent Railway Company* (27 L. J., 417), which was an action against the railway company for an injury occasioned by their keeping and maintaining their railway in an insecure state, it appeared that the railway had been constructed five years, and ran through a marshy country subject to floods; that it was constructed on a low embankment composed of a sandy sort of soil likely to be washed away by water; and that the culverts were insufficient to carry off the water. Evidence was given that on the day of the accident an extraordinary storm occurred, accompanied for sixteen hours with very violent rain, and that in consequence of this, a stream, near to the spot at which the accident had occurred, had been swollen to a torrent, and washed away a bridge, and poured down with great force upon the line; that the water had by midnight worn the earth away under the sleepers on some places, leaving the rails unsupported and exposed. A verdict was given for the plaintiff, but the Court set it aside, and granted a new trial; Pollock C. B., saying that the company was not bound to have a line constructed so as to meet such extraordinary floods; and Bramwell, B., observing that the very existence of the line for five years, notwithstanding that the district was subject to floods, tended to negative the only negligence which was set up." There is some difficulty in reconciling this remark with the language used by the same learned judge in the other case of *Ruck* v. *Williams* (27 L. J., Ex., 357). That was an action against commissioners of sewers for negligence in constructing a sewer in a defective and improper manner, and keeping it in that state, whereby it burst and damaged the plaintiff's premises. It appears that the sewer was constructed in April, 1853. In the year 1855 two severe storms occurred, one on the 13th July, which occasioned the bursting of the sewer, and another on the 26th July, before the repair of the sewer was completed, at which time the injury was done to the plaintiff. It was stated in the report of the commisioners' surveyor, that the storm of the 26th July was without its precedent for violence. The Court held that the plaintiff was entitled to recover. Bramwell, B., in answer to the argument for the defence of the commissioners arising out of the extraordinary violence of the storm, which occasioned the damage, said, "he called it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen;" and he added "therefore, it seems to me that the commisioners, who ought to have put down a flap or penstock of a permanent character, in order to guard against a thing likely to occur, not only in a short time, but at all times, may well be said to be guilty of negligence relatively to the probable event of a storm happening in fifty years." Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purpose of their judgment in these cases, to say that the railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps, rarely, to occur. Now, the evidence, fairly considered, shews nothing beyond this in the character and degree of the storm which destroyed the embankment. The night of the accident is described by various witnesses to have been "very severe;" one says it was a "bad night, very bad;" another, in the usual style of exaggeration, that "it was the worst night he ever saw;" it is stated by others that the rain "washed away bridges and portions of the road;" and two of the plaintiff's witnesses describe the storm, one as being "a very unusual one," the other "an extraordinary storm." In the whole of this evidence, there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur. It must also be borne in mind, that although the embankment had stood firm for five years, and had possibly not been exposed to any storm of equal violence to that before which

it gave way, yet it was evidently not constructed, or at least not maintained, in a manner to enable it to resist any unusual pressure. It appears that there was a ditch made for the purpose of carrying off the water that came down from the hill, but it was either imperfectly constructed from the first, and of insufficient dimensions, or it was suffered to be obstructed and choked up, so that when an unusual quantity of water flowed into it, it was unequal to the occasion. The company's engineer says in his report, "It appears from the levels that there is a depression of two feet in one place. The ditch is an imperfect one. If that depression of two feet had been filled in, I question whether that accident would have occurred." And afterwards, "The cause of this accident can be overcome, and must be, to prevent the recurrence of such an accident again." It is true that he adds, "*No* engineer could possibly have foreseen such an accident as this." But whether he means that it was impossible to have anticipated such a storm as occurred, or from the manner in which the embankment was constructed, it could not have been expected to give way is not easy to determine. Whatever his meaning may be, it is evident that the embankment was insufficiently provided with means of resisting the storm, which, though of unusual violence, was not of such a character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions. Even supposing, then, that the learned judge omitted to explain to the jury what amount of *vis major* would exonerate the company from the charge of negligence, yet their Lordships are of opinion that had this direction been given, and had the jury been led by it to find for the company, their verdict would have been wrong; and they adopt the language of the Court of Exchequer in *Ford* v. *Lacy* (30 L. J., Ex., 351), that "non-direction is only a ground for granting a new trial where it produces a verdict against the evidence;" and they will, therefore, humbly recommend to her Majesty that the judgments in these cases be affirmed, with costs.

GENERAL CORRESPONDENCE.

Articled Clerks—Contract of Service, how satisfied—Con. Stat. U. C., cap. 35, *s.* 3, *sub-s.* 1.

To the Editors of The Upper Canada Law Journal.

Toronto, 15*th May*, 1863.

Gentlemen,—You will confer a favour, not only on the writer, but on many students-at-law, by giving your opinion on the following question.

An articled clerk serves in an attorney's office for three years, and, at the end of that time, leaves the office without cancelling his articles, and employs himself for two months in teaching school. At the expiration of the two months he returns to the law office and serves two years more under the same articles under which he originally served.

Is the above such a service of the period of five years, required by statute, as will entitle the clerk to admission as an attorney?

On page 412 of Con. Stat., U. C., the first sub-section of section three provides that the student seeking admission as an attorney must have, during *the term specified in his contract of service*, duly served thereunder, and during the *whole of such term* been actually employed in the proper practice or business of an attorney or solicitor by the attorney or solicitor to whom he has been bound, &c.

Now this would seem to mean that he must not merely serve for five years, but for *the particular five years mentioned in his contract of service*, and have been employed in the proper practice or business of an attorney or solicitor during the whole of *those particular five years*. The effect of this would be that, if he leaves the office and engages, even for a week, in some other business, he renders it impossible for him to serve during the whole of the five years mentioned in his articles, and consequently, though he may have served faithfully in an attorney's office for four years and six months, yet his absence of a week in some other employment, under a strict construction of the statute, reduces him to the same position as if he had not served a day.

It is very difficult to see the sense or justice of such an enactment, and in reality I think it is not strictly enforced, but would be much obliged if you would, in the next number of the *Law Journal*, give your opinion on the effect of that clause of the statute and the interpretation put upon it in practice.

Yours truly,

A Law Student.

[A strict interpretation of the enactment to which our correspondent refers would probably have some such effect as that to which our correspondent adverts; but we are glad to say that having submitted his letter to the Treasurer of the Law Society, we are authorised by that gentleman to state that such is not the interpretation given to the enactment by the Benchers of the Law Society.—Eds. L.J.]

Municipal Law—Assessment—Court of Revision—Court of Appeal.

To the Editors of the Law Journal.

On the 6th of April, the township of A. accepted the resignation of their clerk, and on the same day appointed another clerk, but he did not subscribe the declaration of office until the 4th of May following.

The assessor made the return of the roll to the old clerk, and subscribed the same before him, on the 24th of April.

Parties applied to the new clerk to see the roll, but it was not in his hands up to the day of meeting of Court of Revision, after which court, when the roll was finally passed, numerous errors appear.

Have the rate-payers any means of compelling the roll to be amended on account of a copy of the same not having been put up, in accordance with s. 50 of c. 55 of the Con. Stat. of U. C., by the clerk, if the new clerk appointed was the clerk at the time; or have the rate-payers power to appeal in general terms to the judge of the County Court against the validity of the roll; and has such judge the power to order the said roll to be put up for fourteen days, and re-open the Court of Revision; or in fact have they any and what remedy? Your valuable opinion on the above question would be esteemed a great favour.

Ignis Fatuus.

[It was the duty of the new clerk, before entering on the duties of his office, to take the oath to which our correspondent refers. Not having done so, the roll appears to have been delivered to the old clerk, who was acting until his successor should qualify. Though not so stated by our corres-

pondent, we presume the old clerk in good time caused a copy of the roll to be put up in good time as required by law. But whether this was so or not, we are at a loss to see in what manner the Court of Revision can now interfere. All the duties of the Court of Revision are required to be completed, and the rolls finally revised before 1st of June in each year. And we do not think the remedy by appeal to the county judge can now be successfully invoked—first, because the appeal clauses do not seem to us to apply to such a case as put by our correspondent; and secondly, because the time for serving the written notice of appeal has long since expired.—EDS. L. J.]

C. L. P. A.—Time for Pleading—Computation.

TO THE EDITORS OF THE LAW JOURNAL.

SARNIA, 5th June, 1863.

GENTLEMEN,—On what day can judgment as for want of a plea be signed under the following circumstances?

A writ of summons is served on the 13th May, and declaration and notice to plead on Saturday the 23rd May.

Now, as between counsel for plaintiff and defendant, comes a wide difference of opinion: one holding that Saturday, the 30th May, is the last day for pleading; the other that the day of service of declaration is not inclusive, and that consequently Sunday being a *dies non*, the defendant has the whole of Monday to file his plea, and that judgment cannot be signed until the office is legally open on Monday morning.

Defendant proceeds to file his plea at the opening of the office on Tuesday morning (10 o'clock) and finds that judgment has been signed an hour previously.

Authorities seem conflicting: hence the enquiry of

LAW STUDENT.

[Plaintiff is, we think, right in his contention. In computing the time for pleading to a declaration, the first and last days are inclusive. We refer to *Moore* v. *The Grand Trunk Railway Co.*, 4 U. C. L. J. 20.]—EDS. L. J.

MONTHLY REPERTORY.

COMMON LAW.

C.P. SPENCE v. SPENCE.

Will—Construction—Decree of freehold—Trustees, extent of estate of—Rule in Shelley's case.

The testator, by his will, after directing his debts and funeral and testamentary expenses to be paid, devised to trustees all that his freehold messuage, public house, and premises, situate in L. street S, now in the occupation of W. C.; also all those his freehold messuages, dwelling-houses, shops and premises situated in B. street and S. street; and also all and singular other his real and personal estate and effects, goods and chattels, whatsoever and wheresoever; in trust as to his said freehold public-house and premises situate in L street aforesaid, to pay the rents and proceeds thereof as and when the same shall come to their hands, unto his son J. S, for and during the term of his natural life and from and immediately after the death of the said son, in trust for the right heirs of him the said J. S. forever.

The trustees were also appointed executors.

Held, that J. S, jun., took the equitable fee simple.

C.P STAGG v. ELLIOTT.

Bill of exchange—Acceptance per proc—Duty of indorsee.

The duty of an indorsee of a bill of exchange expressed to be accepted *per proc*, is to ascertain that the person so accepting had exceeded his authority; and if he omits to do so, he takes the bill at his peril.

Q.B. GALLAGHER v. HUMPHREY.

Permission to use way—Negligence.

Where the owner of the soil permits others to pass over it, he is liable for an accident caused by the negligence of himself or his servants to a person lawfully availing himself of such permission; though he would not be liable for an accident caused by the ordinary risks attaching to the nature of the place, or the business there carried on.

Semble, per Crompton, J., that the fact that the injured person was upon the premises unlawfully would not excuse negligence on the part of the owner, though it would be an element in determining what acts amounted to negligence.

EX. C. DURRELL v. EVANS AND OTHERS.

Contract of sale—Statute of Frauds (29 Car. 2, cap. 3, sec. 17)—Signature of buyer's name by seller's factor—Authority to make a binding contract—Evidence of agency.

In an action for not accepting hops, it was proved that the plaintiff sent some samples of the hops to N., his factor, with instructions for sale. The defendant called on N., and the samples were shown to him. On the same day he met the plaintiff, and after some conversation about the hops went with him to N.'s office, and there made an offer. The plaintiff, in the presence and hearing of the defendant, asked N. if he should accept the offer, and was advised to do so. N. then wrote out a sale note in duplicate. The notes were dated the 19th October, but at the defendant's request N. altered the date to the 20th October, in order to allow a longer time for payment, and gave one of the notes so altered to the defendant, who took it away with him. The note given to the defendant was torn from a book containing the counterfoil: it commenced "Messrs. Evans, bought of J. T. & W. Noakes," &c. (the words "Messrs. Evans" being written by N.), and was not otherwise signed by the defendant. The counterfoil was retained by N.

Held, that there was some evidence that it was the intention of the parties that N. should act as the agent of both to make a binding record of a contract of sale; and that as it was to be inferred that such was their intention, the writing by N. of the defendant's name at the commencement of the note was a sufficient signature to bind the defendant under the Statute of Frauds.

Judgment of Exchequer reversed.

EX. CARY v. CARY.

Outgoing and incoming tenant—Assessment—Tenant right or tillage—Administration.

An outgoing tenant, administratrix of the late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of a debt due to him, all her goods and effects, and all stock, corn, grain, &c., on the farm, and all her estate and interest thereon and therein.

Held, that this comprised tenant right or tillages on the farm.

EX. MAYALL v. HIGBY.

Detinue—Wrongful use of property—Injunction.

A person lending prints or photograps to another, who, with his consent, takes and sells copies, can not only sue in detinue for the originals, but also the copies, and can likewise sustain a count for an injunction, to prevent the sale of any copies remaining, and this quite apart from copy-right, and although there has been a publication.

EX. KIRKWOOD AND ANOTHER, *re* CHEETHAM AND ANOTHER.

Contract—Partners, holding out as Principal and Agent.

Where a trader arranged with his paid servant to set him up in the name and style of a supposed firm as a merchant, and there was evidence to show that the latter had an interest in the concern.

Held, that whether or not they were partners or not, they might be jointly liable as contractors, for goods ordered by the servant in the name of the supposed firm, in the way of its apparent business,—the employer as the real principal, the servant as holding himself out as partner.

EX. TURNER v. MUCKLOW.

Goods sold—Defence to action for price—Implied warranty—Specific article—Raw commodity.

On the sale of a specific article, the refuse of a raw commodity used in a manufacture, there is no implied warranty that it is fit for any purpose; and in an action for the price it is no defence that it is not so; and the only question is, whether the article on commodity really bargained for, was delivered?

EX. BOTTOMLEY v. FISHER.

Promissory note signed by secretary of a building society—Personal liability in.

Two trustees and the secretary of a building society having signed a promissory note, for money lent to the society by a third party, not a member,

Held, that the secretary, as well as the trustees, were personally liable thereon, and that the rules of the society did not effect the rights of the lender—a stranger.

C. P. *Re* THE EBA LIFE ASSURANCE SOCIETY.

Winding-up—Official Manager—Creditors' representative—Costs.

As a general rule, where the creditors and contributories have common and equal interests, the creditors' representative ought not to appear upon applications to the court, but should leave the case in the hands of the official manager.

Where, therefore, claims against the estate were being urged, the official manager was more interested in resisting them than the creditors' representative, and the costs of the latter, who attended the proceedings, were (in agreement with the decision of Wood, V.C.) disallowed by the Court of Appeal:

But *secus* where any question arises between creditors and contributories:

And, *semble* also, where the interest of the creditors is greater than that of the contributories.

CHANCERY.

M. R. ELWELL v. CROWTHER.

Easement—Right to water—mineral workings beneath watercourse—Subsidence of bed—Loss of supply water—Injunction—Acquiescence—Costs.

The plaintiff was entitled to a supply of water for the purpose of his mill, by means of a watercourse or aqueduct, passing through the adjoining lands, which belonged to the defendant. In consequence of the working by the latter of a mine under the watercourse, the level of the bed thereof was depressed to the extent of four feet for some distance. To prevent the water from overflowing the banks, the defendant had erected a stone wall and embankment. No actual diminution in the supply of water to the plaintiff's mill was proved in the cause.

Held, in an injunction suit, that the plaintiff was entitled in consequence of the subsidence which had already taken place in the level of the bed of watercourse, to obtain the influence of the court, in order to force the defendant so to work his mines for the future, that no loss of water should accrue to the plaintiff, but as the defendant had taken steps to prevent any such loss from happening, the court gave him the opportunity of entering into an undertaking, instead of making a hostile decree for an injunction against him—reserving liberty for the plaintiff to apply, if there should be occasion.

M. R. A——— v. B———
B——— v. A———

Practice—Exceptions for scandal—Passages inflicting moral stain on defendant—Materiality.

The defendant, to a foreclosure suit, a father and his two daughters filed a cross bill, praying to be relieved from the effect of the mortgage deed, upon the ground (amongst other reasons) that the mortgagee had voluntarily advanced the money, in order to place himself in the position of a creditor, and by continuing his visits to the family to effect his object, which, the bill alleged, was the seduction of one of the mortgagors.

Held, on exceptions for scandal to the passages in the bill containing these statements, that as the court could not say they would be immaterial at the hearing of the cause, they could not be struck out; and the exceptions were disallowed with costs.

L. J. FENWICK v. CLARKE.

Executor—Appropriation of legacy—Loss by failure of bank—Liability of Executor.

Where an executor, after payment of certain immediate legacies, deposits in a bank a sum sufficient to meet certain deferred legacies, with a view to an interest on mortgages, and a loss occurs by the failure of the bank, which renders the remaining assets insufficient to meet the unpaid legacies.

Held, that the unpaid legatees must bear the loss, and could not call on the executor or the paid legatees to contribute. *Held*, also, that the executor was entitled to file a bill for the purpose of taking the account.

M. R. SALTMARSH v. BARRETT.

Executor—Trustee—Replacing trust fund paid away by mistake—Interest.

Where an executor or trustee is ordered to restore a trust fund, paid away by him to a person not entitled thereto, if he has so paid it away under a *bona fide* mistake as to the legal rights of the parties, the court will not charge him with interest upon the amount ordered to be repaid.

M. R. FRITH v. FORBES.

Mercantile law—Consignment of cargo—Bills of lading—Bills of exchange drawn by consignor against cargo—Liability of consignee—General lien of consignee—Priority.

Where a merchant abroad consigns a cargo of goods to a merchant in England, sending him the bills of lading, and at the same time informs him that he has drawn upon him against such cargo a bill of exchange in favour of a third person, the receipt, and subsequent realisation of the cargo by the consignee, does not create an obligation on his part to pay the bill of exchange out of the proceeds in priority to the general lien to which, by the custom of trade, he is entitled on the cargo for the general balance due to him from the consignor. Such general lien attaches, by the law merchant upon the goods immediately on their arrival, and can only be postponed in favour of another claim but by some assent, express or implied, on the part of the consignee. The mere fact of his receiving and realising the cargo does not amount to an assent on the part of the consignee to the payment, out of the proceeds thereof of the bills of exchange, drawn by the consignor against it, in favour of third persons, although he may have notice of them before the cargo arrives.

L. C. JAMES v. HOLMES.

Trustee—Constructive trust—Money advanced by a woman to a man during co-habitation—Bill for an account—Interest—Maintenance.

A and B co-habited together. A having money of her own advanced the same to B upon trust, as she alleged, for her benefit. B invested the money in the purchase of leasehold property. After living together for ten years, B put an end to the connection. A filed her bill, seeking to charge B as a trustee with the moneys received by him on her account. B admitted the advance of the money and its application, but denied the trust.

Held, that the denial in this answer did not displace the allegations in the bill; that the fiduciary relation existed between them and that B was liable to account to A, for the moneys received by him, with interest at five per cent. and that he was not entitled to any allowance for the maintenance of the woman during co-habitation, nor for that of their illegitimate child.

L. C. NORTCLIFFE v. WARBURTON.

Lien in respect of costs—Sale of land after decree and before registry.

By a decree, W was ordered to pay defendants costs of a suit After the decree, but before taxation or registry, W. sold his real estate, which was the whole of his property, to I, who had notice of the suit. The purchase money was received by A, who was W's solicitor, and who retained a considerable part of it to pay his costs in the suit.

On a bill filed by the defendant in the former suit against W, A. and H, seeking to set aside the sale and to charge the costs on the estate,

Held (reversing a decision of V. C. Stuart,) that the sale was not fraudulent within the statute of the 13 of Elizabeth, and that the decree not having been entered pursuant to the provisions of the 1 and 2 Vic. c. 110, s. 19, till after the sale, the court has no jurisdiction to make the costs of the former suit a lien on the estate.

V. C. K. PARSONS v. COKE.

Will—Construction—Accumulations—Maintenance.

Where there is a gift of a fund to a class for life, and a direction to accumulate, and after their decease equally between such of their respective issues as shall survive them, and attain twenty-one, that being a gift of capital, no part of it can be applied for their maintenance; although it might be so applied or the accumulations intercepted, in case there was no gift over

V. C. S. JESSOP v. BLAKE.

Divorce—Post Nuptial Settlement.

The plaintiff by a post nuptial settlement, appointed and conveyed certain property to trustees upon trust for herself for life, for her separate use, and after the decease of herself or her husband upon trust, if she should survive him, for her heirs, executors, administrators, and assigns: and if he should survive her, then she should appoint, and in default of appointment to those who would have been entitled under the statute, had she died unmarried. She obtained a divorce. On a bill filed by her, during the husband's lifetime, the court ordered the trust moneys to be transferred to her.

V. C. W. HOOPER v GUMM.

Production of documents—Agent—Plaintiff residing abroad.

Letters written by a party to a suit, resident abroad, to his agent in England, for the purpose of being communicated to his legal advisers in this country, will be protected from production, as also letters between the solicitors and the agent; it not being necessary that a party resident abroad should communicate directly with his solicitor in England. But *quære* as to letters from the agent to the principal, not stated to have been written in consequence of any communication with the solicitor.

L. C. TWYNAM v. HUDSON.

Agreement—Advance of part only of sum agreed to be advanced—Lien.

M having contracted to construct a railway, and being in want of money, applied to H to advance him £60,000, which he agreed to do, and by a memorandum, in consideration of H advancing that sum, M agreed to cede to him one-third of the profits to be derived from the contract, and proposed that the contract should be a security for the same, and agreed that he should sign an agreement on the terms therein referred to. In the transactions which followed, M failed to fulfil his engagement, but advanced certain sums, for less than the stipulated amount, for the payment of a part only of the bills which he had accepted for H, others of which he never paid. The plaintiff, who had taken an assignment from H, of his interest under the memorandum, filed a bill, praying an account of the money so received by M, from H, and that it might be a charge on the profits of M's contract.

Held, (reversing a decision of V. C. Stuart,) that as the agreement had not been fulfiled, neither H nor the plaintiff as his assignee, was entitled to any benefit from it in a court equity.

L. C. PARSONS v. HAYWARD.

Partnership—Articles—Continuation of business after expiration of term—Account of profits.

Where a partnership business for a term is carried on after the expiration of the term, although either party may put an end to the relation in the manner prescribed by articles, yet if nothing is done to mark a dissolution and to render it effectual, and the business is carried on without variation, the law infers an agreement that the relation shall continue on the footing of the antecedent contract.

A and B were partners for a term of seven years under articles which provided that the business should be carried on in the name of B, who should reside at the business and act as managing partner, and that at the expiration of the term the assets should be realised, sold, and divided. After the seven years had expired, the business was carried on by B, as before, the capital of A still remaining in it, B having claimed the whole profits since the expiration of the term, A filed his bill for a dissolution, and the usual accounts upon the footing of the partnership articles.

Held, that as B had continued the business after the expiration of the term, and as neither party had done any act which implied any disclaimer of the tacit agreement imputed by the law from the contract of the parties, that the partnership should continue, the plaintiff was entitled to an account and to his share of the profits upon the footing of the partnership articles, from the expiration of term to the time when the business was sold.

L. J. RE PANTREGUINEA FUEL COMPANY. (Limited)

Statute of frauds—Agreement not to be performed within a year.

C contracted with P to take a certain amount of coals daily, on certain terms, for three years. Before the expiration of two years C transferred his business to P. F. C; and P continued to supply coals to P. F. C. on the same terms as had been supplied to C, but no agreement in writing was entered into between P. and P. F. C.

Held, that a new contract must be implied between P. and P. F. C and as it could not be performed within a year, it was within the statute of frauds.

M. R RICHARD v. ROBSON.

Will — Construction — Charity—Gift to keep tombs in repair—Perpetuity.

A gift to the churchwardens of a parish of a sum of money to be invested in government or real securities, and the interest applied in keeping up the tomb of the testatrix herself, and also those of a number of her relations, was held void, as tending to a perpetuity.

Such a gift is not charitable within the meaning of the statute of Elizabeth.

M. R. STEVENSON v. ABINGTON.

Will—Construction—"Cousins"—"Issue"—State of family.

A gift was made by will to "my cousins (descendants from my father and mother's brothers and sisters) living at my death," sons at twenty-one, daughters at that age or marriage, "and such of the issue living at my death of any cousins of mine (descendants as aforesaid) who shall have died in my lifetime leaving issue living at my death;" males at twenty-one, and females at twenty-one, or marriage, "such cousins and issue if more than one to take equal shares *per stirpes*, so that the issue of any cousin dying in my lifetime shall take only the share the parent of such issue would have taken, if living, at my death, and attaining twenty-one, or being a daughter, attaining that age or marrying.

The testator made a codicil, by which he provided by name for all his first cousins who were alive at the date of the will, and excluded them from taking anything under the will.

Held, that the state of the family did not vary the construction to be put upon the will, and that the *primâ facie* meaning of "cousins"—namely "first cousins"—must be adopted, "issue" read "children."

L J. STOTT v. MEANOCK.

Practice—Claim—Petition of appeal—Evidence—certificate—Executor—Infant—Liability to account.

Appeals from orders made on claims are governed by the order of 12th July, 1858, and must be prosecuted by petition of appeal, and not by motion.

Where the chief clerk, by his certificate, has reserved for the consideration of the court, the construction to be placed on certain facts proved before him, and found by his certificate, the court will look at the evidence adduced before the chief clerk. An executor is not liable to account for personal estate of the testator, received by him during his infancy.

M. R. BENTLEY v. MACHAY.

Deed—rectification—Mistake—Testimony of parties seeking to be relieved—Evidence—Communication of effect to volunteers—Consideration—Separate Solicitor.

Two ladies agreed with several of their brothers to execute a deed, whereby the sum of £200 a year, a-piece, was to be secured to be paid by them for the benefit of another brother, who had not been so well provided for under their father's will. By the deed which was executed, carrying out such intention, the annual payments were directed to be paid during the lives of the donors, for the benefit of the wife and children of the brother, as well as of the brother himself. The annual payments were made to the brother for upwards of 14 years, when he died. Upon his death the two ladies discovered, as they alleged in their bill for the first time, that, by the terms of the deed, the annual sums were to be continued during each of their lives, in favour of their brother's widow and children; and, thereupon, they instituted this suit, praying to be relieved from the further operation of the deed, upon the ground that each of them, when they executed it, intended to allow the annuities in question, merely, during the joint lives of herself and her brother, and not for any longer period. The view of the intention of the parties, when the deed was executed, was not borne out by the evidence of other parties to the transaction.

Held, that there being no fraud and undue influence, the court could not relieve the plaintiffs from the effect of the terms of the deed.

The court will not, especially after it has been acted upon for a number of years, set aside a voluntary deed, or restrain its future operation on the ground of mistake in the parties who executed it, upon no other testimony than that of the persons who are bound by it, and who will benefit by its being destroyed or altered. Where a voluntary deed is executed in favour of persons, to whom its contents and effect is communicated by the donors or their agents and by them it is acted upon, the court cannot afterwards set it aside upon the ground that the donors did not intend it to operate to the full extent of its terms.

Where a deed is executed to carry out a family arrangement it is not material, upon the question of mistake as to its full effect on the part of the persons executing it, that no separate solicitor was engaged for them in connection with the transaction.

A deed carrying out a contract between A and B, that they will each grant an annuity to C (a volunteer)—*Query*, whether a purely voluntary deed?

L. J. LUCAS v. WILLIAMS.

Administration—Bill given by executor—Liability de bonis propriis.

Where an executor gives bills or incurs liabilities in respect of his testator's estate, and a suit is instituted for the administration of the estate, the court will not by a motion in the suit, restrain an action against the executor, in respect of such bills or liabilities.

M. R. CLARK v. MALPAS.

Vendor and purchaser—Health of Vendor—Undervalue—Haste—Absence of professional adviser—Pleading—Plaintiff no interest—Cross-interrogatories.

A purchase of freehold property, for an inadequate consideration, by a person who did not hold a fiduciary relation to the vendor, was set aside on the ground of haste, and the absence of independant professional advice and protection on the part of the vendor, an illiterate old man, the deed being executed by him only thirty-six hours before his death, and the consideration expressed in the deed being a weekly sum and a house to live in during his life, and the payment of a sum of money after his death to any person to whom he should appoint the same. Where a defendant has reason to believe that the plaintiff had before the institution of the suit, parted with all his interest in the subject matter, he should file cross-interrogatories to ascertain the fact, and if he simply takes the objection by answer, and no evidence is brought forward upon it, the court will not take notice of the objection.

REVIEWS.

NOTANDA IN LAW, EQUITY, BANKRUPTCY, ADMIRALTY, DIVORCE AND PROBATE CASES. By Tenison Edwards, Esq., of the Inner Temple, Barrister-at-law. London: Printed and Published by T. F. A. Day, 13 Carey Street, Lincolns Inn, W. C., 1863.

This promises to be a useful publication. Its object is to assist the practical lawyer in "noting up cases," and so at all times save him the necessity of "hunting up cases" through the many annual Digests since Harrison's Digest.

In the present state of the law it is unsafe to advise without reference, not only to standard text works, but to decided cases. If the question in hand is one bearing upon any well understood branch of law, reference is at once made to the standard text book which discusses that branch of law, but as no text work is 'put through" yearly editions it becomes necessary also to consult the annual digests subsequent to its date of publication. This is a task which year by year is becoming more laborious.

The real design of the publication before us is from time to time to furnish to the lawyer notes of late cases, so published that he can at once transfer them to his text book or copy of statutes according as the decision relates to a subject treated of in a standard text book, or has reference only to the construction of a statute perhaps of modern date. It is intended therefore that "Notanda" shall be "cut up" without compunction by every subscriber who desires to keep himself "posted up" in decided cases. The subscriber who regularly cuts up his copy and transfers the notes to the appropriate places indicated on the face of the notes, will save himself a

world of trouble when necessary to look for decided cases. Time is saved: first, in having a note not simply of the name of the case but of what it decides, so that reference to the report of it may or may not be necessary according to the bearing of the subject in hand. Secondly, in having the pith of the decision printed in small but legible type, so as to save the necessity of transcribing it in writing. By carefully carrying out the design of the compiler, old editions of text books will be nearly as valuable as new, and so a saving of expense besides the actual learning acquired by from time to time transferring such notes to the places intended for them.

The subscription price will be 12s. 6d. sterling per annum, —adhesive copies 2s. 6d. extra. Payment in advance is required. It is expected that there will be ten, possibly twelve, issues in the year, each of eight pages, containing in the year's issue from 3,000 to 4,000 notes. W. C. Chewett & Co., King Street East, Toronto, will receive Canadian subscriptions.

THE NORTH-BRITISH REVIEW for May is received. New York: Leonard, Scott & Co.

Disentegration of Empires, is the name of the first article in this number. It is really most instructive and interesting. The writer points to four notable instances where this process, either of political solution or of actual dismemberment is going on in our view, and each of these is noticed in regard to consequences affecting other nations far and near. The remaining articles are headed—Danish Literature, Past and Present; Kinglakes' Invasion of the Crimea; Vegetable Epidemics; Shell Tribes in India; Modern Preaching; M. Saisset and Spinoza; British Intervention in Foreing struggles.

THE WESTMINSTER for April. New York: Leonard, Scott & Co., is also received.

Contents: Austrian Constitutionalism; Reformation Arrested; The Resources of India; The Jews of Western Europe; Lady Morgan; Truth versus Edification; The Antiquity of Man. The last article is a bold one. It ridicules the idea that man was created in the year 4004 before the birth of Christ. The writer asserts that this statement is a baseless fiction. He argues that it is quite impossible to reconcile the Mosaic Cosmogony with the verities of science, and states that well informed men have long since ceased endeavouring to harmonize the successive days of creation (elongated into indefinite periods of time) with the Azoic, Palæozoic, Secondary, Tertiary, and Post-Tertiary epochs in Geological Science.

THE LONDON QUARTERLY. New York: Leonard, Scott & Co.

A writer in this number deals hard blows to sensation novels. He shows that works of this class manifest themselves as belonging, some more, some less, but all to some extent, to the morbid phenomena of literature, indications of a wide-spread corruption, of which they are in part both the effect and the cause, called into existence to supply the cravings of a deceased appetite, and contributing themselves to foster the disease and to stimulate the want which they supply. The remaining articles are headed: Industrial Resources of British India; The American War; History of Cyclopœdias; The Salmon Question; Biblical Criticism; Poland; and Kinglake's Crimea.

THE EDINBURGH REVIEW for April. New York: Leonard, Scott & Co., is also received.

Contents: Kinglake's Crimea; Horsley's translation of the Odyssey; Tithe Impropriation; Simancas; Records of the Reign of Henry VII.; The Black Country; India under Lord Canning; The Bible and the Church; Alcock's Japan; Huxley on Man's Place in Nature; The Greek Revolution.

BLACKWOOD, for April. Same publishers, is also received.

It contains, besides the ordinary light reading, a very sensible article on the late Sir James Graham, showing that the deceased though not a foremast was a remarkable man. Many incidents of his life are given, and upon the whole justice is done to the memory of the deceased Baronet. Catonia is still continued. The concluding paper, which is headed "Marriage Bells," discourses on the recent marriage of the Prince of Wales, and refers in terms of affectionate loyalty to his widowed mother, our much beloved Queen.

GODEY'S LADY BOOK for June is received.

It contains four fashion plates, furnished by the house of A. T. Stewart & Co., the celebrated importers of fashionable goods in New York. The fashions are up to the latest dates, and will be invaluable to those ladies who are about to prepare for watering places and other fashionable resorts. These are in addition to the colored fashions, which contain six figures, three of them very recherche childrens' dresses. The number is a superb one, replete with much that is useful, and a great deal that is not merely useful but entertaining.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Honorable ADAM WILSON, Q. C., of Osgoode Hall, Barrister-at-Law, to be a Puisne Judge of her Majesty's Court of Queen's Bench for Upper Canada, in the room and stead of the Honorable Skeffington Connor, deceased.—(Gazetted May 16, 1863.)

SOLICITOR GENERAL.

The Honorable LEWIS WALLBRIDGE, of Osgoode Hall, Q. C., to be Solicitor General in and for that part of the Province of Canada called Upper Canada, in the room and stead of the Honorable Adam Wilson, Q. C., resigned.—(Gazetted May 23, 1863.)

CORONERS.

ALEXANDER A. McLAUGHLIN, Esq., THOMAS BEALL, Esq., WILLIAM A. BLACK, Esq., M.D., and GEORGE A. NORRIS, Esq., M.D., to be Coroners for the county of Victoria.—(Gazetted May 2, 1863.)

MOSES H. AIKIN, Esq., M.A., C.S.L., to be Associate Coroner for the United Counties of York and Peel. (Gazetted May 2, 1863.)

NELSON McGARVIN, Esquire, M.D., Associate Coroner, County [of Halton. (Gazetted May 23, 1863.)

JAMES JUDGE, Esquire, Associate Coroner, County of Simcoe. (Gazetted May 23, 1863.)

NOTARIES PUBLIC.

ROBERT SWANTON APPELBE, of Oakville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 2, 1863.)

EWEN McEWEN, of Kingston, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 2, 1863.)

ARTHUR LINDSAY, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

ABRAHAM DIAMOND, of Belleville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

WINTRINGHAM CLIFTON LOSCOMBE, of Bowmanville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

ANDREW WILSON BELL, of Douglass, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

ALEXANDER R. ROBERTSON, of Windsor, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 23, 1863.)

ADAM SAMPSON, of Streetsville, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 23, 1863.)

TO CORRESPONDENTS.

N. PEGG—Under "Division Courts."

A LAW STUDENT—IGNIS FATUUS—LAW STUDENT—Under "General Correspondence."

A LAW STUDENT—Your letter on the subject of books for the Law School was duly received, and the information you require will be found published in the editorial columns of this number. The letter itself, though intended by us to be published, has been accidentally mislaid. We shall be glad to hear from you whenever disposed to write to us on topics of interest to the Profession. Many besides yourself approve of the Law Association proposed by a writer in the last number, but "that which is everybody's business is nobody's business," and so nothing is done.