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DIVISION COURTS.

OFFICERS AND SUITORS.

Clerks and Bailiffs.—The late Act, while increasing the remuneration of officers, comes also laden with additional duties imposed upon them. But of this we are sure, officers will not complain: their language has always been—"Give us as much to do as you like, but pay us for the labour imposed." And now that the Legislature has commenced the good work, we trust the final issue will be to place the D.C. officers on as good a footing, in proportion to the time and labour given, as other like officers in the administration of justice in the Superior Courts. The Courts they are connected with are of great and growing importance to the public; and speaking from a very general personal knowledge of the Clerks of Division Courts, we assert that the great body of them are, in point of intelligence, education and social position, at least equal to other officers who draw, direct from the State, salaries in amount more than double the emolument which D.C. Clerks generally enjoy.

Clerks will see that we have noticed in the editorial one point in relation to the late Act, to which we refer them. The 3rd section requires Clerks to keep books in which transcripts of judgments from other Counties are to be entered. If we were to take the language literally, the section might seem to require an entry of the transcript at length, but it is added, "and the amount due on such judgment according to such certificate." If the meaning of the clause was to require the transcript to be copied at length, it was unnecessary to add this, for the transcript would shew the amount due: we think, therefore, a note of the substance of it will be sufficient to satisfy the requirements of the clause. Clerks must make up books for the purpose, which may be denominated "Transferred Judgments Book," or by any other significant name. We would recommend this book to be ruled in columns, with the following heads: 1st, the name of the plaintiff; 2nd, the defendant's name; 3rd, the county and division in which judgment given; 4th, the nature and amount of judgment; 5th, the date of judgment; 6th, when execution, if any, sued out; 7th, amount paid, and when; 8th, amount remaining unpaid on the judgment; 9th, a column for remarks. Or it may be made out after the manner of Lawyers' Dockets; in which case the entry might be in this way:—

A.B., Plt.
vs.
C.D., Dft.

1855.

August 1st.—Received transcript of Judgment in this cause from ——— Division Court of the County of ———, showing that on the ——— day of ———, A.D. 1854, Judgment was rendered in the said Court in favor of above Plaintiff for £ ; that an Execution was sued out thereon in the said Court on the ——— day of ———, and that £ now remains unpaid upon the said judgment.

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The second and latter part of the third clause of the Act impose additional duties on both Clerks and Bailiffs. In acting under these clauses, Clerks should keep a book to make the necessary entries: it may be called the "Foreign Summons Book," (in contradistinction to Summonses issued from their own Courts). This book should shew the style of cause—the nature of process—when received—when delivered to Bailiff—when returned—and the amount of fees.

Bailiffs should also keep corresponding books in which to make their entries. All entries respecting papers received for service from another Division should be kept separate from the entries of papers belonging to the Officer's own Division.

We fear a difficulty will be found as to the Bailiffs' fees. The Clerk who transmits the papers for service will not usually be able to say the amount he should take from the party to cover the charge for mileage; but as it is probable he would be held answerable for the fees to the Bailiff who make the service, he should take amply sufficient, according to the best of his information, as a deposit, returning the overplus, if any, when it is ascertained what the mileage will be.

The limits of the several D.C. Divisions in U.C., and the names and post-office address of the Clerks for each Court, are now matters requiring to be known generally, with a view to working out the provisions of the late Act. If the Clerks in each County would so arrange as that one of their number would forward to us (post free) a corrected table giving this information, we would endeavour to find space for it in the *Law Journal*, month by month, till the whole was inserted, or otherwise throw it into the shape of an office sheet for reference—in the latter case charging officers requiring it a sum barely sufficient to cover the cost, say 2s. 6d. per dozen.

SUITORS.—As every claim sued on in a Division Court must be brought in the proper Court, or the plaintiff will be non-suited, the question "What D.C. a party having a cause of action is to bring his suit in" is an important one for intended plts. to determine. We will first speak of suits against dfts. *residing in the County* in which the action is brought. The D.C.E. Act of 1853 requires, in general, that an action should be brought in the Court holden for the Division in which the cause of action arose, or in the Court holden for the Division in which the dft., or where there shall be

more than one dft., wherein one of the dfts. shall dwell or carry on his business at the time when the action is brought. Sec. 8. In the case of officers, it is provided that where a Clerk or Bailiff, either by himself or jointly with another person, is liable to be sued, or may sue for a demand within the jurisdiction of the Court, in every such case the Clerk or Bailiff may sue or be sued in any next adjoining D.C. for the same County. D.C. Act of 1850, sec. 62.

Where a case is commenced by suing out an attachment against a deft. as an absconding debtor, the proceedings in the suit may be conducted to judgment and execution in the D.C. holden for the Division in which the warrant of attachment was issued. D.C. Act of 1850, sec. 64.

Where an intended deft *does not live in the Division or County* in which the plt. wishes to bring his action, the D.C. Acts have provided for two distinct cases; 1st, where the suit is to be brought in the Court holden for the Division in which the cause of action arose; 2nd, where it is more convenient and less expensive to bring the action in a particular D.C. than in the one adjoining, (whether in the same or another county) in which the deft. resides. In the former case the plt. may, as a matter of right, enter his suit in the Division in which the cause of action arose—taking care to enter it so as to give ample time for service, from twenty to thirty days—according to the distance from the place where the deft. resides. In the latter case he must obtain an order from the Judge for leave to bring his action in an adjoining Division. This leave is obtained either on a written affidavit which the Clerk will draw, or on personal application to the Judge at any sitting of the Court. D.C.E. Act, secs. 8 & 9; D.C.E. Act of 1855, sec. 1.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 64.)

THE NAME AND STYLE OF JUSTICES BEFORE WHOM INFORMATION LAID, AND THE DATE AND PLACE OF EXHIBITING IT.

The information or complaint should contain the name and style of the Justices before whom it is laid, that it may appear he is one having authority in the County or locality, and over the subject matter of the complaint; (1) and also that he is one having authority to take the information under the particular statute, for, as before observed, the jurisdiction for summary conviction is sometimes qualified with respect to the numbers or description of Justices to whom it is committed, and when so qualified must be exercised in conformity with the directions in the statute conferring it. (2) Stating the Justice to be one "for" instead of of "in and for" a County has been held to be bad. (3)

It is to be observed that under the 16th Vic., ch. 178, one Justice is competent to receive the information or complaint; sec. 25 of this Statute thus enacting on the subject:—

"That in all cases of Summary proceedings before a Justice or Justices of the Peace out of Sessions, upon any information or complaint as aforesaid, it shall be lawful for one Justice to receive such information or complaint, and to grant a Summons or Warrant thereon, and to issue his Summons or Warrant to compel the attendance of any witnesses, and to do all other acts and matters which may be necessary, preliminary to the hearing, even in cases where by the Statute in that behalf such information and complaint must be heard and determined by two or more Justices, and after the case shall have been so heard and determined, one Justice may issue all Warrants of Distress or Commitment thereon; and it shall not be necessary that the Justice who so acts before or after such hearing, shall be the Justice or one of the Justices by whom the said case shall be heard and determined: Provided always, that in all cases where by Statute it is or shall be required that any such information or complaint shall be heard and determined by two or more Justices, or that a Conviction or Order shall be made by two or more Justices, such Justices must be present and acting together during the whole of the hearing and determination of the case."

The day and year on which the information is laid should properly be stated, that it may appear it was so laid subsequent to the commissioner of the offence, and within the time limited by the Statute. (4) And the place where laid should be inserted, that it may appear the Justice is acting within the limits of his jurisdiction; (5) for though in general it is not necessary to prove the place exactly as laid, yet it must be shown to be within the jurisdiction of the Magistrate.

THE NAME, &C., OF THE DEFENDANT.

The full name of every deft. should be accurately stated when possible. Stating a number of dfts. as Messrs. H. "and Company" was held bad, Lord Kenyon saying, in *Reg.* v. *Harrison*, 8 T.R. 508:—"It is impossible that a conviction of such an one and *Company* can be supported." If it be impossible to ascertain the name of a party offending, his description should be stated, and at the hearing his proper name can be ascertained. Where two or

(1) Reg. v. Johnson, 1 Str. 261.—Rile and Lane's case, 1 B. & C. 101—Re Peerless, 1 Q.B 113.

(2) See *ante* page 24. This is certainly a material distinction between information and a conviction, and it may be that if *in fact* the information is laid before the *proper* Justice it would be sufficient, although his exact authority was not stated in the information. Yet as the conviction is founded on and should pursue the information, the regular course is to show in the latter the Magistrate's authority.

(3) Reg. v. Stockton, 2 New Sess. cas. 16. 14 L. J. 126 M. C., but the effect of the 1st sec. of 16 Vic., ch. 178, on the rule laid down in this case is to be regarded.

(4) See *ante* page 24, Stat. 16 Vic., ch. 178, section 3, enacts that variations as to the time when offence, &c., alleged to have been committed shall not be deemed material if the information was in fact laid within the time limited by law; but as a wrong statement of this kind is calculated to mislead, an error might entail expense on the informant, so accuracy on this point is material.

(5) See page 24 and the reference in Notes (o) and (p).

more persons of the same name reside in a settlement, care should be taken to distinguish the one intended; at all events the officer having the execution of the process should be instructed in this particular.

OF THE NATURE AND DESCRIPTION OF THE OFFENCE, AND THE TIME AND PLACE AT WHICH IT WAS COMMITTED.

The complaint or information should contain an exact and a legal description or statement of the offence, and with the same certainty as in an indictment, in order that the deft. may know what he is called upon to answer, and also be entitled to defend himself against a second accusation; and that the Justices may be aware of the precise nature of the charge, and from the statement of it perceive that the offence comes within their jurisdiction by the Statute under which it is laid. (6)

It was formerly the practice to insert several different Counts in the information or complaint, much in the same manner as in an Indictment; but now under the 16th Vic., ch. 178, every complaint must be for one matter of complaint only, and every information for one offence only—sec. 9 enacting that every complaint upon which a Justice of the Peace is authorised by law to make an order shall be for one matter of complaint only, and not for two or more matters of complaint, and that every information for any offence punishable on summary condition shall be for one offence only and not for two or more offences. But since the deft. cannot (see 1st sec. of same statute) take any objection to the information for defects therein, there seems to be no necessity for varying the statement of the offence. Sec. 9 limits the complaint as one *matter* only, but does not seem to disable a complainant from joining several parties, if jointly concerned in the subject matter of complaint.

As the provisions of the Statute 16th Vic., c. 17, s. 2, that no objection shall be allowed to any information, &c., for any alleged defect in substance, (7) or in form, or for any variances between the information and evidence, will in general apply to proceedings for summary conviction, it will suffice briefly to mention what has been decided respecting a *description of the offence*. For though Magistrates, before the passing of this Act, would be obliged to give effect to such objections, they have now, in cases within the operation of the Statute, ample power to amend a defective information.

Facts must be stated in a direct and positive manner, (8) and not in the alternative. (9) The description of the charge must include in express terms every ingredient required by the Statute to constitute the offence, nothing being left to intendment, inference, or argument. (10) Where the gist of the offence is a guilty knowledge, its existence must be directly averred, (11) The information should not state the legal result of facts, but *the facts* themselves; (12) and this although the words of the Statute are general, stating merely the legal effect. (13) It is not necessary to use the actual words of a Statute, provided those words are equivalent. (14)

(6) Ex parte Pain 5 B. & C. 251. Re Elmy and Sawyer, 1 Ad. & Ell. 843. Reg. v. Marsh, 4 D. & R. 207

(7) See note 1, page 108 ante.

(8) Reg. v. Bradley, 10 Mod. 156; Reg. v. Fuller, 1 Ld. Raym 509; Reg. v. Pereira, 2 Ad. & Ell. 278.

(9) Reg. v. Middlehurst, 1 Burr. 399; Reg. v. Morley, 1 You. & Jer. 22; Reg. v. Marshall, 1 Mo. C. C. 158—2 Hawk, c. 25, s. 56.

(10) Reg. v. Turner, 4 Bnld. 510; Reg. v. Daman, 1 Chit. Rep. 152; Reg. v. Jukes, 8 T.R. 536; Reg. v. Trelawney, 1 T. R. 222; Reg. v. Pereira, 2 Ad. & Ell. 275; Charter v. Greame et al., 11 L.J. 73 M.C.; 13 Q.B. 216.

(11) Reg. v. Slewellyn, 1 Show 48; Reg. v. Jukes, 8 T.R. 536; Reg. v. Marsh, 2 B. & C. 717; Chaney v. Payne, 2 Q. B. 712; Ex parte Hawkes, 2 B. & C. 21.

(12) Reg. v. Sperling, 1 Str. 497; Reg. v. Daman, 1 Chit. Rep. 147; Reg. v. Rowe, 3 Q.B. 180.

(13) Reg. v. Jarvis, 1 East 642, n; Reg. v. Neild, 6 East 417; Reg. v. Ridgway, 5 B. & Ald. 527. Reg. v. Daman, 2 B. & Ald. 379, Fletcher v. Calthrop, 16 L.J. 16 M.C.

(14) Stamp v. Sweetland 2 New Sess. ca. 30 8 Q.B. 13

ON THE DUTIES OF CORONERS.

(CONTINUED FROM PAGE 123)

II.—PROCEEDINGS IN RELATION TO INQUESTS.

The Depositions.—As far as possible it is desirable that the Coroner should take down the evidence in the very words used, and afterwards read it over to the witness, in order that he may make corrections or explanation if he has been misunderstood, and so that when the evidence is deliberated upon, no misapprehension may exist on the part of the Jury as to his meaning. The following form may be used:—

County of ———, } Information of the Witnesses severally
To wit: } taken and acknowledged on the behalf of our Sovereign Lady the Queen touching the death of H. H. at the dwelling house of N. N., in the Township of ———, in the County of ———, on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, before A. B., Esquire, one of the Coroners of said County of ———, on an Inquisition then and there taken on view of the body of the said H. H., then and there lying dead, as follows, to wit:—

J. C. of the Township of ———, in the County of ———, Yeoman, being Sworn, saith that, &c.

After the examination is fully taken down it is carefully read over and signed by the witness. The Coroner then adds:—"Taken and acknowledged before me, the day and year and at the place above named," and signs his own name as Coroner. If several witnesses are examined, the same attestation is made at the end of each.

WHERE INQUEST ADJOURNED.

Power to adjourn.—Where the witnesses are not all present and sufficient has not been elicited to

close the investigation, or where time is required to bring up such witnesses as may have been summoned and have not attended, the Coroner can adjourn the Inquest to another day, and name such hour and place as he may see fit, (usually, however, at the same hour and place) but must take the Juror's recognizances for their appearance at the time and place specified. The following form is used:—

Form of Recognizance.

"Gentlemen, you and each of you acknowledge yourselves to owe to our Sovereign Lady the Queen the sum of Ten Pounds to be levied on your goods and chattels for Her Majesty's use, *upon condition* that you and each of you do personally appear here again [*or* at——] on ——, the —— day of ——, A.D. 18 , [*or* on to-morrow] at the hour of —— o'clock in the forenoon, then and there to make further inquiry on behalf of our said Lady the Queen, touching the death of H. H., of whose body you have already had the view; are you all content?"

Addressing the Jurors, the Coroner then charges them, under pain of forfeiture of £10 to appear punctually at the time, place, and hour named in the recognizance; thus:—

"Gentlemen, the Court doth dismiss you for this time; but requires you severally to appear here again [*or* at——] on the —— day of —— inst., [*or* on to-morrow] at —— o'clock in the forenoon, upon pain of forfeiture of £10, as in your recognizance declared."

The Constable, by the Coroner's order, next proclaims the adjournment, and in so doing uses a form almost similar to that in force at the Quarter Sessions:—

Oyez—Oyez—Oyez,

"All manner of persons who have anything more to do at this Court before the Queen's Coroner for this County, may depart hence, and give their attendance here again [*or* at——] on the——day of——, instant, [*or* on to-morrow] at —— o'clock in the forenoon, precisely—God save the Queen.

BURYING THE BODY.

When body may be buried.—The Stat. 4 of Edward I. provided that the body should be buried after the Inquest held, but the Coroner usually issues his warrant to bury the body in cases of adjournment, as well as where Inquest completed. We give a general form of Warrant:—

Warrant to Bury Body.

County of—— } To the Churchwardens of——, and all
To wit: } others whom it may concern:

Whereas I, with my Inquest, the day and year hereunder written, have taken a view of the body of H. H., who not being of sound mind, memory and understanding, but lunatic and distracted, shot himself, [*or agreeably to the finding of the Jury*] who now lies dead in your Township, and have proceeded therein according to law. These are therefore to certify that you may lawfully permit the body of the said H. H. to be buried; and for so doing this shall be your warrant and authority.

Given under my hand and seal this —— day of ——, A. D. 18

A. B., [L.S.]
Coroner,

PROCEEDINGS AFTER ADJOURNMENT.

The Verdict.—When an adjournment has taken place and the Jury meet at the appointed time, the formalities of opening the Court are gone through as at the opening of the Inquest, and the Jurors' names are called in order that they may be relieved from their recognizances. Additional testimony is then taken, and the whole evidence offered being read over it is left to the Jury to pronounce their verdict. Should the Jury desire time for deliberation they withdraw to an adjoining private apartment, accompanied by a Constable sworn to take care of them.

Oath to Constable.

"You shall well and truly keep the Jury upon this Inquiry without meat, drink or fire; You shall not suffer any person to speak to them, nor speak to them yourself, unless it would be to ask them whether they have agreed upon their verdict, until they shall be agreed—So help you God."

It is the Constable's especial care to see that no one interferes or attempts to interfere with the deliberations of the Jury; when agreed upon their verdict they return to the Court-room, and the Coroner then enquires of the Foreman, "How say you that H. H. came to his death, and by what means?" In reply the Foreman hands in (written on paper) the "finding" agreed to by the Jurors.

THE INQUISITION.

What the Inquisition should show.—The Jury having delivered their verdict, the Coroner draws up the Inquisition, causes each Juror to sign his name and affix his seal, and if any of the Jurors unable to write their names, make their mark. Each signature should be verified by an attestation. [*a*] The Coroner must also sign and seal the Inquisition after all the Jurors have signed. It was formerly held necessary that the Jurors should each sign his name in full—not by the abbreviation of the christian names peculiar to most signatures,—but that is not now required where the names are set out at length in the body of the Inquisition. [*b*] The Inquisition should be on parchment and contain the following particulars:—1st, the county; 2nd, the place where,[*c*] so as to bring it within the Coroner's jurisdiction; 3rd, the time when[*d*]; 4th, the Coroner's name, with his title of office; 5th, the view of the body; 6th, that the oath was taken by all the Jurors; 7th, that the Jurors were good and lawful men of the county;

(a) Rex. v. Bowen, 2 Car. & P. 602; Regina v. Stockdale, 8 Dowl. 817.
(b) Rex. v. Bennett, 6 Car. & P. 178.
(c) Reg. v. Grand Junction Railway, 2 Per. & D. 67; 11 Ad. & Ell. 223 n.
(d) Reg. v. Brownlow, 2 Per. & D. 52; 11 Ad. & Ell. 119; 8 Dowl. 167; 4 Jur. 103.

8th, that they were charged to inquire; 9th, the verdict, or finding; and lastly, the attestation.[e]

(TO BE CONTINUED.)

U. C. REPORTS.

GENERAL LAW.

REGINA v. ROSE.

Boundary line commissioners—1 Vic., ch. 19; 3 Vic., ch. 11—Form of judgment—Omission to file.

Held, That the minute of the boundary line commissioners, produced in this case, could not be considered a judgment within the meaning of the 3 Vic., ch. 11, and that the defendant should therefore have been permitted to give evidence contradicting such minute.

That second section of this act, which provides that every such judgment shall be filed, is directory only, and the omission to file will not affect the validity of the judgment.

[12 U. R. 559.]

NUISANCE.—The indictment charged that the defendant Silas Rose, on the 1st of May, 1854, in the Township of Oxford, in the county of Grenville, obstructed a certain road, called the side-line road, between lots 20 and 21 in the first concession of the said township, the road being a common highway, and by obstructions placed across the road prevented the same from being used.

The case was tried at the last assizes held at Brockville, before *McLean, J.*, and the evidence to sustain the charge was as follows:—In 1842 one Jehiel Hurd complained to the Board of boundary commissioners for the District of Johnstown, and requested that they should hear and determine all matters in dispute between himself and certain persons, of whom the defendant was not one named by him, touching the line between lots No. 20 and 21, in the first concession of Oxford, and also the line in the centre of lot No. 20. A parcel of papers were produced, shewing that the commissioners had a meeting upon the notice and requisition, and had taken evidence upon the subject of the line between the lots 20 and 21; and a memorandum of minutes of what the commissioners called a judgment was made on the 22nd of July, 1842. These papers were not produced from the registry office of the county of Grenville, but were said to have been left at the registry office for the county of Leeds, though not filed or entered of record in the latter office.

The minutes of the commissioners was in the words and figures following:—

"*Minutes of the Judgment.*

"Find post between 20 and 21, marked 20 on west side, an original post; find the line running thence to rear of concession, parallel with boundary line of township, to be the boundary between lot 20 and allowance for road on east thereof; stone monuments to be placed at front and rear of said line, also at centre of lot 20, and at the rear of said centre; following costs reasonably incurred and awarded as within.

"*Kemptville, 22d July*, 1842.

O. R. G.
J. B.
R. F. S."

Mr. *Steel*, the commissioner who was examined, stated that the parties were heard and the commissioners came to a conclusion, and signed a paper, of which the foregoing is a copy, with their initial letters, intending afterwards to draw up a formal and extended judgment. Evidence was adduced to show that stone monuments had been placed under the directions of the commissioners, and that the road between lots 20 and 21 had been laid out on the east side of the line so said to be established by the commissioners. Statute labour had been done for some six or seven years, and the road had been used by the public for some twelve years, until the month of May last, when the defendant obstructed it by fencing it up.

The objections raised by the defendant at the trial were as follows: First, that there was no evidence to shew that the boundary commissioners were required to ascertain the lines in question by any one who owned the land, and who had authority by law to ask their interference in establishing a line. Secondly, that the instrument produced is not a decree or judgment of the commissioners. Thirdly, that there is no decision where the western limit of 21 is. These objections were overruled by the learned judge, and then the defendant tendered evidence to show that the allowance for road was on the west side of the line ascertained by the commissioners as the east line of lot No. 20, which the learned judge rejected, considering that the commissioners had determined the matter, and that such determination was binding, unless appealed against; and he therefore directed a verdict of guilty to be entered; and reserved the considerations of the case upon the objections made for the judgment of this court, and also further, whether the evidence tendered should have been received.

The case was argued by *Freeland* for the crown and *Richards* for defendant.

BURNS, J., delivered the judgment of the court.

The statute 1 Vic., ch. 19, as amended by 3 Vic., ch. 11, is the statute which governs this case, so far as the same is to be governed by the decision of the boundary commissioners. The second section of the latter act enacts that the judgment and final decision of the commissioners shall be filed with the registrar of the county where such boundary commissioners shall be situate. We do not not consider it necessary to the validity of the judgment that it should be filed with the registrar of the county. We cannot but see the legislature intended it should operate as a notice in some way, for some purpose, and in that way the provision with respect to filing it in the registry office has importance. The first section of the first mentioned act enacts that the acts, orders, judgments and decrees of the commissioners shall be final and conclusive between the parties, their heirs and assigns, except in case of appeal to be be brought within the time limited. By the 17th section an appeal lies to the Court of Chancery, or the Court of Queen's Bench. All these provisions shew that it is necessary that the judgment or final decision of the commissioners should shew upon the face of it who were parties litigating the dispute, that it may be seen who are to be bound, also whether the parties who are to be bound appeared, or were summoned and made default. The judgment to be filed with the registrar should be so drawn up in form as that either the parties named in it, or some person whose rights would be affected by it, could bring the matter befote the courts named, to be heard upon appeal. Now when we look at the memorandum herein set out, not one of the requisites which would be expected to be found in a final judgment or decree of a court, or board of commissioners acting as a court, is to be found. In order to understand the meaning of it, even as regards the signatures, or to know who the commissioners are, parol evidence must be resorted to. The township is not stated or mentioned in which the line is determined, and resort must be had to other documents and parol evidence to connect those documents with what is said to be a judgment. The legislature never surely meant, if a person desired to appeal from a judgment or final decision of the commissioners, that he should be obliged to furnish the court with evidence as to the meaning of the initials, such as O. R. G., and J. B., and R. F. S., and also how to apply the different figures and contradictions in the minute set forth. Suppose such instrument as furnished in the present case to be properly filed, it may well be asked what information would be derived from it, as to what township the line was

(e) 2 Hale, P. C. 174.

in which Messrs. O. R. G., and J. B., and R. F. S., professed to settle, or between what parties, or whether the parties appeared or made default. It is quite too absurd to suppose the legislature ever intended that such a document as produced should be final and conclusive, and bind the rights of parties to whom it affords no information whatever. We cannot hold this to be a judgment or decree within the meaning of the act.

There was evidence offered at the trial, independent of what was considered to be the decision of the Commissioners which might have been sufficient *primâ facie* for the purpose of calling upon the defendant to prove why and wherefore he interfered with a road which had been a travelled road for a number of years, and upon which statute labour had been done. When the defendant offered to prove the line to be as he contended for, his evidence was rejected. The case has not been heard upon the merits, and possibly it may be that the defendant, by his conduct or acquiescence, has dedicated the piece of land in question for the road. The matter has been assumed against the defendant upon the idea that a judgment of the boundary commissioners bound his rights, or prevented him from asserting what he now contends for. Without meaning to say the opinion which the commissioners endeavoured to perfect into a judgment may not be quite correct, and that perhaps the defendant may be liable to be indicted for obstructing a road which his own acts and acquiescence may have dedicated to the public, it is sufficient to say that, as he was prevented from going into evidence on the ground that he was bound by a decision which, in our opinion, was not such a judgment as the statute contemplates, we cannot support the conviction.

The same course should be taken as was done in Regina *v.* Spence, (11 U. C. R. 31) viz., the judgment must be arrested, so that a fresh indictment may be preferred if the parties be so advised.

Judgment arrested.

Ferrier v. Moodie.

Boundary—Right by possession according to division line agreed on—Extent of such right.

If two parties owning respective halves of a lot agree to a division line which is not the true boundary, and one party clears a portion of land according to such line, and obtains a right by possession to such portion, this will not give him any right by constructive possession to the whole as if this line were carried out.

The jury having found a general verdict for the plaintiff, though the defendant was in fact entitled to the part he had cleared:—

Held, that this was not ground for a new trial, but for an application to restrain the plaintiff from taking possession of such part.

[12 B. R., 379.]

Ejectment for the west half of lot No. seven in the tenth concession of the township of North Burgess.

The defendant did not limit his defence, but defended generally for the whole of the half lot.

The plaintiff gave notice that he claimed damages as mesne profits, &c.

At the trial, before *Richards, J.*, at the last spring assizes, held at Perth, it appeared that the plaintiff was, by patent dated 10th April, 1824, the owner of the west half of the lot in question, and the defendant claimed the north-east half of the lot by deed from the grantee of the Crown for that portion, which was granted to one Alexander McMillan on the first of March, 1824. The dispute between the parties was as to the boundary between the respective portions of the lot. The plaintiff gave a good deal of evidence to establish the bearing of the side lines of the lot as they should be run according to the course of the town line of the township. The weight of evidence appeared to establish this course, as also the front angle of the lot in question upon the tenth concession, to the satisfaction of the jury. The defendant gave no evidence to controvert or to cast any doubt upon this part of the plaintiff's case, and no question was made on the argument of this rule upon the correctness of the view the learned judge took of that in submitting the case to the jury. The plaintiff proved by a surveyor that he ran the division line between the plaintiff's and defendant's land according to the data so established, and found that the defendant had in possession within his fences five and a half acres belonging to the plaintiff. The land through which the division line ran was not cleared from the front to the rear of the lot, and the five and a half acres was the quantity cleared which the defendant had included within his fences. The remainder of the land was still in a state of nature, not fenced in by either party. A portion of the land included within the defendant's fences was cleared and fenced by him more than twenty years before the commencement of the action, and a portion of it had been cleared and fenced within that time.

The defendant relied upon establishing that in the year 1825 the plaintiff and he had agreed that a surveyor should run a division line, and that such a line was run between their possessions accordingly from front to rear of the lot, and marked by trees being blazed, and that the land cleared and fenced in by the defendant was according to that line, both as respects what was cleared more than twenty years ago and what had been cleared within that period.

The plaintiff gave evidence to show that he had assented (by a verbal arrangement, as must be supposed, for nothing in writing was produced or alluded to in any way) to a line being run between the respective halves of the lot, but that the surveyor employed used only a compass for the purpose—each party was to pay half of the expense: that after the surveyor had run half through the concession something went wrong with his compass, and the line was never completed; and because it was not completed the plaintiff would not pay any part of the expenses, but said he would do so if the survey should be completed, but which in fact he contended had never been done. The defendant in 1849 assented to a line being run, because he said that if he lost land on the plaintiff's side of his lot he should gain upon the other side; but subsequently he receded from this, and stated he could rely upon his length of possession.

The learned judge left it to the jury to say what portion of the west half of the lot had been in possession of the defendant for twenty years before the commencement of this action; and as to such portion he told them the defendant was entitled to succeed. Then they were directed to ascertain what portion of the west half of the lot the defendant had included within his fences, and of which he had not had the actual possession for twenty years; and as to such portion the plaintiff was entitled to recover, and the jury should assess such damages per acre for six years past as they thought reasonable for the profits. The learned judge expressed to the jury his opinion that the plaintiff was not to be deprived of such portions of the west half of the lot as might be upon the defendant's side of the conventional line spoken of, by any constructive possession which might be supposed to arise from a protraction of that line from the land of which the defendant was in the actual possession, to the front and rear of the lot.

The jury gave a general verdict for the plaintiff, and assessed damages for two and a half acres of the land in possession of the defendant at £7 10s.

Philpotts obtained a rule to show cause why the verdict should not be set aside and a new trial granted, on the ground that the verdict was contrary to law and evidence, and for misdirection. He cited Doe dem. Hill *v.* Gander, 1 U.C.R. 7; Doe dem. Cuthbertson *v* McGillis, 2 C.P. 124.

Richards shewed cause, and cited Doe dem. Taylor *v.* Proudfoot, 9 U.C.R. 503.

Burns, *J.*, delivered the judgment of the court.

The defendant's counsel contends that the learned Judge misdirected the jury in telling them that there must be an actual possession on the part of the defendant, and that there could not be a constructive possession to deprive the plaintiff of the land up to the conventional line spoken of. It is contended that the agreement between the parties to run such a line, and their subsequently holding according to that line in such portions of the land as were actually cleared and fenced more than twenty years ago, in law and in fact establishes the line, and the possession of the parties respectively will be determined according to such line. If any agreement in writing had been shewn between the parties, which would in law and in fact amount to a transfer and conveyance of the land according to a line to be run under an agreement to that effect, then it might perhaps be argued that a constructive possession might exist and follow such an agreement. Constructive possession will only be inferred where nothing militates against it in favour of the true title, and will not be inferred against the true owner in favor of one who shews no shadow or claim of title. Without examining the merits of the case upon the question whether there was in truth a parol agreement established that the parties should hold by a particular line,—and upon which the jury, it would seem, had arrived at a proper conclusion,—there can be no question the learned Judge stated the law correctly. The defendant could not rely upon the agreement alone, if there were in fact one established to run a line between the parties, and that such a line was designated more than twenty years ago, without also shewing some visible occupation or possession of the land. The mere agreement and designating the line would not of themselves establish an actual possession of the land. Would they be sufficient to establish a constructive possession? I do not think they would. The kind of possession required successfully to defend an action of ejectment must be such as would enable an action to be brought. If the plaintiff, after such an agreement made and the line designated, had nevertheless ascertained the true line and cleared and fenced up to it, the defendant could not, on any idea that the effect of the agreement and designating the line transferred to him a constructive possession, maintain an action of ejectment against the plaintiff. Then does the fact that the defendant has taken possession of a part, and kept it for twenty years, establish a conventional line throughout the lot between the parties? No case can be cited to establish such a proposition; and it appears contrary to reason to say that twenty years' actual possession of a part is necessary to confer title, and yet that constructive possession of another part will be sufficient. The only way in which the defendant can possibly argue the proposition is, that the actual possession of part carries with it the constructive possession of the whole. The answer to that is, that such presumption is never made except in favour of one claiming under colour of title; and, further, it is a proposition inapplicable to a question of boundary, in which case the possession ought to be unequivocally indicated, and according to law must have so remained for the space of twenty years before the commencement of the suit.

The verdict for the plaintiff is quite right according to the legal effect of the evidence. The defendant, however, contends further that the jury should have found a verdict in favour of the defendant for such portions as he had cleared and fenced for twenty years before the commencement of the action, because he says, as it now stands upon the verdict, the plaintiff may take possession of all the land proved to be part of the west half of the lot, as there is no restriction in the verdict, and the judgment and execution would be according to that finding. The eighth section of the new Ejectment Act, 14 & 15 Vic., ch. 114, declares that upon a finding for the claimant, judgment may be signed and execution issued as at present in the action of ejectment, "and the said judgment having the same, and no other, effect than at present." According to the law as it then stood, in an action of ejectment, if the plaintiff proved himself entitled to any part of the premises mentioned in the declaration he was entitled to judgment generally. The judgment in an ejectment determined nothing as to the *quantum* of land; and if the declaration mentioned more than the plaintiff proved title to, the course of the defendant was to apply to the court for relief.—See Doe dem. Drapers' Company *v.* Wilson (2 Stark N. P. C. 477); Roe dem. Saul *v.* Dawson (3 Wils. 49); Fausset *v.* Carpenter (5 Bligh N. S. 75.)

The defendant's rule must therefore be discharged. (*a*)

Shields *v.* DeBlaquiere.

Action for prosecuting false claim to land—Heir and devisee commission, false affidavit used before.

An action will not lie for knowingly prosecuting a false claim before the heir and devisee commission, to the plaintiff's injury and with knowledge of his claim.

One M., in 1839 having a right of purchase of a lot from the Crown, mortgaged to DeB. to secure payment of a sum by instalments, the last of which would fall due in 1849. Soon after this mortgage, M. gave to D a bond for a deed on certain conditions to be fulfilled by B., who took possession. In 1850 the plaintiff went in under an agreement for purchase from B., who had not fulfilled the conditions of his bond. In 1851 the defendant took an assignment of DeB's mortgage, and in the same year he claimed before the heir and devisee commission, making the usual affidavit of ignorance of any adverse claim, and obtained a patent.

The plaintiff thereupon brought an action on the case, alleging in the first and second counts of his declaration, that the defendant, maliciously contriving and intending to injure him, represented himself as assignee of the original nominee of the Crown, and claimed as such before the heir and devisee commission, and in order to defraud the plaintiff and not having himself any well founded claim, and knowing the plaintiff's claim, made affidavit that he was not aware of any adverse claim and procured his own claim to be allowed, whereby, &c.

The third and fourth counts, founded on the statute 32 Henry VIII. ch. 9, were for buying M.'s pretended right the defendant being in possession claiming title.

Held, that on the evidence the allegations were not supported; and that, admitting them all to be true, no ground of action would be shewn.

[12 B. R. 286.]

The first and second counts of the declaration in substance charged—that the plaintiff was in possession of lot two in the fifth concession of Zorra, for which lot no letters patent from the Crown had issued; that the plaintiff claimed the said land as deriving a title or claim under and through the *original nominee of the Crown*, of which the defendant had notice:—that the defendant, maliciously contriving and intending to injure the plaintiff, represented and pretended himself to be assignee of the original nominee of the Crown, and claimed in that capacity before the heir and devisee commission; and in order to defraud the plaintiff, and to prevent the plaintiff having notice of defendant's claiming, or claiming for himself (the plaintiff), or resisting the defendant's claim, *and not having any well founded claim to the land*, and being aware of the plaintiff's claim, made an affidavit that his (defendant's) claim was just and well founded, and that he was not aware of any adverse claim: and produced and used such affidavit before the heir and devisee commissioners, and procured his claim to be allowed, and by virtue of such allowance obtained letters patent to himself for the lot—whereby, &c.

The third and fourth counts in substance charged—that the plaintiff had been in possession of the same lot more than a year, claiming right and title thereto: that the defendant purchased the pretended right of one Reuben Martin to this lot, although neither Martin nor any one under whom he claimed had been in possession of the premises, or of the remainder or reversion, nor had taken the rents or profits thereof for a year next before such purchase, nor had the defendant been in lawful possession by taking the yearly

(*a*) *Note.* The above decision is not intended to touch the question whether under the new rules the general issue in ejectment is distributable.

If there are different portions sought to be recovered which depend upon different titles, or one portion is clearly severable from the other, then the rule adopted and decided in Doe d. Bowman *v.* Lewis (13 M. & W. 241) would apply.

farm rents. The third count went on to state that through the purchase from Martin the defendant obtained letters patent from the Crown for the lot, and ejected the plaintiff. The fourth omitted the getting the letters patent, but stated that the plaintiff had been disquieted, &c., in the possession.

The defendant pleaded not guilty.

The cause was tried at Woodstock, in May last, before *Macaulay*, C.J.

The lot number two in the fifth concession of Zorra, a clergy reserve, appeared to have been sold on the 17th of January, 1835, by the commissioner of Crown lands to one Thomas Pearson.

At some time, when not appearing, he assigned, according to the notice of the heir and devisee commission put up and advanced by the defendant, to one Charles Griffith, deceased, who, according to the same notice, devised to certain parties in trust, who assigned to Reuben Martin, who assigned to defendant, who thereupon in 1851 claimed, was allowed, and got a patent in fee for this lot, making the usual affidavit of ignorance of any adverse claim.

But the title set up in this notice (and which must be taken to be correct, as the claim was allowed) seems at variance with documents put in evidence at the trial. The first document in point of date (*i.e.*, 1st January, 1839) was a mortgage from Reuben Martin to the Hon. Peter B. DeBlaquiere, reciting that Martin was desirous of borrowing £91 11s. 10½d., and that Mr. DeBlaquiere had agreed to advance it on getting security by mortgage of his interest in this lot, and then witnessing that in pursuance, &c., and in consideration of £91 11s. 10d., Martin bargains, sells, assigns, transfers, and sets over to DeBlaquiere this lot number two, together with, &c., *habendum* to DeBlaquiere, his heirs and assigns, for and during all the estate and interest of him (Martin) therein,—subject to a proviso for redemption on payment of £91 11s. 10½d., with interest, in five instalments of £18 6s. 4½d. each, payable on the 1st of January, 1845, 1846, 1847, 1848, 1849, with covenants by Martin for payment according to the proviso; for right to convey for the estate and in manner aforesaid; that on default DeBlaquiere, his heirs and assigns, might enter; and for further assurance to DeBlaquiere, subject to the aforesaid proviso; and that if Martin, his heirs or assigns, should take out the patent deed from the Crown for this lot before the last instalment was paid, he or they should mortgage the fee simple of the lot to DeBlaquiere to secure whatever might be due of the £91 10s. 11½d., and interest; that Martin should pay the instalments to government as they fell due, and on his default DeBlaquiere might pay them, and the land should be chargeable with all sums so paid, and interest: provided that until default, Martin, his heirs and assigns, might occupy, enjoy, &c., without interruption by the said Martin. This mortgage was registered on the 19th of May, 1841.

On the 7th of June, 1851, by indenture of that date, P. B. DeBlaquiere assigned this mortgage, the debt, and the land, to the defendant in fee, in consideration of £28 9s. 3d., subject to the equity of redemption in the mortgage, with a covenant that the said P. B. DeBlaquiere had not made, done, committed, &c., any act, &c., by means whereof "the said principal sum and interest, security and premises hereby assigned," "or the said piece or parcel or tract of land, hereditaments, and premises hereby released or intended so to be, or any of them, or any part thereof, are, is, can, or shall, or may be in anywise impeached, charged, assigned, discharged, affected or incumbered"—meaning, among other things, that the whole debt and interest is unpaid.

No claim was derived to the land through these two deeds in the defendant's notice before the heir and devisee commission.

B. deed-poll, dated 5th of December, 1850, Martin, in consideration of 5s., assigned, transferred, and set over to defendant all his right, title and interest in the lot, authorizing the defendant to pay government such sums as remain due, and to take such steps as may be required for getting the Crown patent to himself in fee.

It seemed that on the 27th of December, 1849, the defendant paid £28 9s. 3d., being the third instalment and interest due on the sale by government to Pearson. This payment appeared to have been made on some apprehension that the sale would be forfeited for non-payment of anything for so many years. On the 23rd of July, 1852, the defendant paid £215 5s. to the commissioner of crown lands, being the balance of the purchase money.

On the 13th of August, 1839, Martin gave his bond to the Rev. W. Bettridge in a penalty of £600, the condition being, that if Bettridge should pay whatever was due to government on the same lot, and pay to the Hon. P. B. DeBlaquiere £91 10s. 11½d., secured by a mortgage of Martin's interest in this lot, with interest, as the same should become due, and should also pay to P. B. DeBlaquiere five joint and several notes of hand, dated the 12th of September, 1838, drawn by Martin and his knowledge of Bettridge's interest,—the bond from Martin endorsed by Abraham Carroll, for £18 6s. 4½d. each, and payable the 1st of January, 1840-1-2-3 and 4, together with all rates and taxes on the lot, and pay Martin £50, one half down and one half on the 13th of September, 1839; then if Martin should, on request of Bettridge, execute a good and effectual conveyance in fee simple of the said lot to Bettridge in fee, free from incumbrances, and in the meantime, and until default be made in some of the instalments and interest, permit Bettridge peaceably to enjoy, &c.,—then the obligation should be void.

Martin gave up possession to Bettridge at or soon after the date of the bond, and had never had possession since. The defendant never had any possession. Bettridge, by his tenants, occupied until the sale by Bettridge to the plaintiff, making large and valuable improvements. According to the evidence, the plaintiff entered into possession about August, 1850. Bettridge gave him a receipt, dated the 17th of June, 1851, for £50, being part of amount of purchase. According to Bettridge's evidence, given on a commission, the plaintiff entered as tenant to make such improvements as he should think advantageous to himself or landlord, until they could make an arrangement as to the purchase. But he said he had verbally agreed to sell to the plaintiff for £400, out of which all incumbrances on the lot were to be paid, including defendant's £40. The payment to Bettridge of £50 was made by giving him credit on an account he owed him. The plaintiff also promised to pay £50 at the expiration of ten years, and there was a writing under seal. He swore he paid the five notes of Martin and Carrol to DeBlaquiere.

Mr. Richardson proved he drew the assignment from Bettridge to plaintiff in April 1852. After making the statement a paper was shewn him by the plaintiff's counsel in cross examination, and he said that was the paper he referred to; it was of the 3rd of May, 1852, but this paper was not put in.

Some evidence was given, extremely slight, from which it might be inferred that defendant may have known the plaintiff was in possession of these premises about two years before the trial—*i.e.*, May 1852. There was more evidence to shew to Bettridge was produced by him, and the payment of the notes of hand by Bettridge to the Hon. P. B. DeBlaquiere might have been known to him; though at the same time it must be remembered that the notes themselves were not proved to have been in any way connected with the purchase or mortgage of this lot by Martin. They were not secured on it to DeBlaquiere, though the payment of them was undertaken by Bettridge.

It was left to the jury to inquire whether the defendant knew that the plaintiff or Bettridge were possessed of the land, claiming it on some ground or other:—whether the defendant had reasonable or probable cause to assert his own claim, and deny adverse claim as he did:—was the defendant's affidavit *bonâ fide*, or was there *suppressio veri* or *suggestio falsi*?—were the commissioners imposed upon?—were they informed of all the material facts the defendant knew, and of which he ought to have informed them? The question of malice was left to them as a fact, and they found for the plaintiff—damages £350.

Freeman obtained a rule *nisi* for a new trial on the law and evidence, for misdirection, and for the reception of improper evidence, or to arrest judgment.

H. Eccles and *D. B. Read* shewed cause:—The plaintiff asserts that Martin's right was a mere pretended right. It is true the declaration shews the legal estate to be in the crown: but the 8th Vic. ch. 8, sec. 5, establishes a sort of equitable right in a party having made payments, and constitutes him in effect the owner in fee as against all other parties. The plaintiff claims under the nominee of the crown, and therefore comes under this provision. It will be argued that no legal damages can be recovered because the title is merely equitable; but this is not so: if an equitable title is interfered with, there is a remedy at law.

It is contended on the other side that the plaintiff is tied down to his rights under the statute of 32 H. VIII. ch. 9; but he may if he chooses bring his action on the case. The statute has made no alteration. It only declares what the law was and what it should continue to be, and annexes a penalty to any breach of it as thus laid down; but a plaintiff is not limited to his action for the penalty; that is only an additional remedy, and concurrent with that which existed before.—Com. Dig. "Action upon Statute," C.

The main question, however, is whether a sufficient ground of action is shewn. Supposing all the facts noted by the learned judge left to the jury and found in the affirmative, would they support an action? The authorities shew that they would. In Pasley *v.* Freeman, 3 T. R. 51, *Lord Kenyon* quotes from Com. Dig. "Action upon the case for a deceit," A. I., "An action upon the case for a deceit lies where a man does any deceit to the damage of another;" and he then goes on to consider and approve of this opinion. It is of no consequence whether the deceitful representation complained of is made to the plaintiff himself or to a third party, provided the result be the same. It is in fact stronger when it is made to a third party, because the plaintiff then has no opportunity of making inquiries to satisfy himself. Green *v.* Button, 1 Gale 349, 2 Cr. M. & R. 707, 1 Tyr. & Gran. 118, is more in point than the last case. There the cause of action was that the defendant represented himself to the sellers as having a lien on certain wood which the plaintiff had purchased, and the seller in consequence refused for some time to deliver it. That case is analogous to the present in this respect, that the representation was made to a third party. Foster *v.* Charles, 6 Bing. 396, shews that a person recommending an agent by statements which he knows to be false, is responsible, though no malicious motive or pecuniary interest is shewn: this case is much stronger, for the defendant had a clear personal interest—a wish to get the patent for himself. These cases, and Ley *v.* Madill, 1 U. C. R. 516, and Tennery *v.* Stiles, 5 U. C. R. 254, are sufficient to shew that in law the action is sustainable.

The non-production of the mortgage tells also against the deferdant. Knowing that his father had the mortgage, he founded no claim on it, but claimed as assignee of Martin. The mortgage never was before the commissioners, and the defendant seems to have got an assignment of it merely for a nominal consideration and in order to patch up his case afterwards.

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Vankoughnet, Q. C., and *Freeman* supported the rule. Here no legal title is outstanding in anybody, and the court has decided that when the crown grants land, the possession and right of possession are transferred to the grantee, notwithstanding there may be a squatter upon the lot.—Doe Fitzgerald *v.* Finn, 1 U. C. R. 70. The statute 14 & 15 Vic. ch. 7, sec. 5, allows the purchase of a right of entry, and therefore in effect repeals the 32 H. VIII.; but, admitting that act to be still in force, no case can be cited where an action has been brought under it for buying a pretended title, when that title is purely equitable. Besides, in the present case it is absurd to talk of a pretended title. When the defendant took the title from Martin he was buying the very title the plaintiff wished and intended to get, and therefore all relating to this charge is disposed of. The third and fourth counts are bad, because they shew clearly that the whole contest is about equitable titles only, and there is no precedent for an action with reference to such claims. Neither the statute nor common law were ever made to apply to such estates. As to the defendant's buying the mortgage, he had already an interest, and was only perfecting his own title. That is allowable, and has never been held as purchasing a pretended title. Where land has been twice sold, a court of equity in fact encourage a race for the legal estate, and whoever gets it first will prevail. Ross qui tam *v.* Meyers, 9 U. C. R. 284, and McKenzie qui tam *v.* Miller, M. T. 6 Vic., shew that a person may buy an outstanding title to protect himself.

As to the main question, there is no precedent for such an action as this; it is purely speculative, and if encouraged will introduce a new and numerous class of cases: for any step taken in a suit contrary to good faith, good practice, or the duty of a party to the court, must be held to form as good a right to sue as is stated here. If, however, the action could be sustained, the declaration is much too loose. It does not allege that the plaintiff had any right from the nominee of the crown, or any title, but only that he claimed to have it. There is no direct averment that the plaintiff really had any *bonâ fide* claim or any interest. His complaint in effect is "Because I said I had a claim, therefore you should have given me notice, and whether my claim was good or bad makes no difference." Now notice is quite immaterial unless the declaration shews *some* interest which the court would have protected. He may have been merely a squatter for all that is alleged. The authorities shew that in actions like those referred to on the other side, it must be averred clearly what the interest is. [Robinson, C. J.—Does the declaration mean more than, For that whereas the plaintiff professed to own?] No, that is the precise meaning. An action cannot be brought for depriving a man of property to which he alleges no title. Cotterell *v.* Jones, 11 C. B. 713, shews that no action will lie unless damage is sustained, and therefore it is necessary to shew exactly what the interest was in order to estimate the damages. This action fails too on the principle of Davis *v.* Minor, 2 U. C. R. 464; for, if the interest amounts to anything, the plaintiff could have enforced his rights in equity by making defendant his trustee. Suppose the power of granting a patent in this case had remained in the crown instead of being vested in the heir and devisee commission, and a similar deceit had been practised on the crown, would any one imagine that an action could lie? If the plaintiff has a clear equitable right he must go to a court of equity; and if he has no such right, then there is clearly no right of action at law.—Cotterell *v.* Jones, 11 C. B. 713.

As to the omission to give the notice required by the 8 Vic. ch. 8, sec. 5, that is no ground of action, for there is nothing as between the plaintiff and defendant to make it obligatory, though the commissioners may insist upon it if they choose. The defendant might have made his claim as well as the plaintiff, and the plaintiff did nothing to prevent him. This action is in fact brought simply because the plaintiff neglected

to supply the court with evidence of defendant's claim, and if that is actionable the suborning a witness by either party to a suit would be more so. [ROBINSON, C. J.—Suppose a plaintiff brings ejectment as on a vacant possession, concealing a lease which he has made, and turns the defendant out and drives him to his ejectment; or suppose a plaintiff sues on a promissory note, concealing the fact of payment, and serves the process on an agent who is ignorant of such payment.] The charge is merely that by false evidence the defendant induced the court to arrive at a wrong conclusion. Take a case where payment is denied on oath and a receipt afterwards found; even if the plaintiff had sworn on motion for new trial that no payment was made, no action would lie. The case may be adjudicated upon when the receipt is found, but that is the only remedy. Then, as to the heir and devisee commission: the applications to them are all published; every one knows of the claim being preferred. [ROBINSON, C. J.—Is there any allegation that Shields did not know of DeBlaquiere's proceeding?] No, nothing of the sort. Purton v. Honnor, 1 B. & P. 205, and Longmeid v. Holliday, 6 Ex. 761, shew that the action cannot be rested on the ground of deceit, but it must be on the ground that defendant had a right to notice: there can be clearly no action for deceiving the court. Saville v. Roberts, 2 Salk. 15; Johnson v. Sutton, 1 T. R. 544; Hollis v Goldfinch, 1 B. & C. 205; Graham v. Sandinelli, 10 Jur. 1061; De Medina v. Grove, 10 Q. B. 152; Roret v. Lewis, 5 D. & L. 371; Francis v. Brown, 11 U. C. R. 558; and Williams v. Mostyn, 4 M. & W. 145; are also cases which tend to shew that the action cannot be maintained.

As to the evidence, it does not shew clear notice to defendant of the plaintiff's claim. The fact of the plaintiff being on the land and defendant knowing it, would not shew a claim; and there is really no evidence that he knew of the plaintiff being in possession, but only that some one was. That is no proof of an adverse claim. There may have been enough to put the plaintiff on enquiry, but that is not sufficient to ground an action like this, of an almost criminal character.

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

We do not perceive any solid distinction between the defendant and the mortgagee from whom he derived title at first.

The right and interest of Martin stand admitted, as both plaintiff and defendant derived their claims under him, treating him as entitled as a purchaser from the crown.

Then Martin makes a mortgage on the 1st of January, 1839, to secure a sum of money with interest by instalments, the last of which becames payable on the 1st of January, 1849. On the 5th of December, 1850, the mortgagee having been paid nothing, either principal or interest, the defendant obtains a release from the mortgagor of all his interest in the mortgaged premises. The mortgagor had in the meantime given a bond with a penalty, to make a (legal) title to a third party on being paid a certain sum of money, and on this party also satisfying this very mortgage, neither of which conditions this third party had fulfilled, nor had he taken any steps to do so, though notified, as Martin swears, that he was about to make an absolute conveyance to the mortgagor, and though he had in the meantime made valuable improvements.

Now if the estate of Martin had been a legal estate, and the foregoing had been the true state of the transaction, even with the addition of a disputed fact, that the mortgagee had the fullest notice of the bond, and of the entry and possession under it, would the obligee, on being evicted, have any cause of action against the mortgagee?

Then, does the fact that the defendant is assignee of the mortgagor make any difference? It is quite true that the release and conveyance from Martin to him is dated in December, 1850, and that the assignment of the mortgage is not made until the 7th of June, 1851. But we think there is no room for reasonable doubt that the defendant purchased from Martin with the privity and assent of his father, the mortgagee—very possibly for him. The defendant had paid £28 9s. 3d. to the agent of the commissioner of crown lands on the 27th of December, 1849, being for the third instalment on this lot; and the consideration for the assignment of this mortgage is that very sum of £28 9s. 3d., apparently connecting these two transactions, and giving to the obtaining the intervening conveyance from Martin, when coupled with the conversation which he proves took place with defendant respecting the mortgage money, a clear character of connection with the other two transactions; and therefore we look on the defendant as standing in every respect in the position of the original mortgagee.

In what view, then, can it be said that the getting this release from Martin, assuming notice of Bettridge's claim and possession, was a wrong, a malicious injury to the latter? If Martin had been able, and had mortgaged the legal estate, and had given the self-same bond to Bettridge, would not the mortgagee have had a complete right of entry to oust Bettridge from the possession; and also, whether before or after such ouster, to get a release of the equity of redemption from his mortgagor?

Or, if he had filed a bill to foreclose, taking no notice whatever of Bettridge or of his possession, and a decree of foreclosure were obtained—the court being kept in ignorance of Bettridge and his claim—would an action lie against the mortgagee by Bettridge for a malicious wrong?

I can only say that as yet I have met with no authority which would enable me to answer the question affirmatively. Nor is it to be overlooked that Bettridge took no assignment from Martin, only a bond to convey when certain things were done by him, which are yet undone. If a wrong were done to Bettridge by the release of December 1850 to defendant, who is apparently the principal wrong-doer—Martin or the defendant? It would seem an anomaly that the defendant should through that release become liable to Bettridge, and that Martin should not. And yet I cannot see how an action could be brought against Martin by Bettridge, who has failed entirely in fulfilling the conditions of his purchase, for any act done after such failure, by which Bettridge lost the purchase; and if not against Martin, *a fortiori*, as would seem to me, not against the defendant.

Then the plaintiff's claim is derived under Bettridge, and this cannot, we apprehend, strengthen it. It is not clear *when* the plaintiff entered as a purchaser; but it is clear he acquired all his claims by his bargain with Bettridge, and equally clear that Bettridge could give him no higher or better claim than he had himself. There is evidence to shew that the plaintiff occupied in 1850; but it is, we think, very questionable if he entered as a purchaser. If there was a written assignment not made until 1852, it would go far to lead to the conclusion that the purchase was concluded on later than the time of his entry. If he purchased when he entered, he knew then that Bettridge had failed in the conditions which entitled him to call for a conveyance. He knew what payments Bettridge had to make and to whom, but he did no more than Bettridge had done towards fulfilling them.

But, assuming this in the plaintiff's favor, it should be made out, in order to sustain this action, that the injury complained of was a malicious wrong to the plaintiff; and to warrant the finding of malice in fact, there must be some evidence connecting the acts complained of with an intent to plaintiff's injury. The only evidence given for this purpose was—first, some vague generalities, that the witness or witnesses considered the claim was generally known; and, secondly, that the plaintiff's mother had seen defendant pass the place about two years before the trial, which would be

about May, 1852. Now all the matter charged as wrongful, and which led to the obtaining the patent, took place before or at the meeting of the heir and devisee commission of July, 1851. On what principle is it that the defendant's knowledge or notice of plaintiff's possession acquired in May 1852 can reflect back upon and give a malicious character to defendant's actions on or before July 1851?

We have hitherto taken no notice of a fact on which the plaintiff's counsel has placed the strongest reliance—viz., that the defendant made an affidavit, which was produced and used before the heir and devisee commissioners, that he believed his own claim to be just, and was not aware of any adverse claim. It was admitted this affidavit was made and used.

We have examined the case, without reference to this affidavit, to see if, apart from it, the action would be sustained, and cannot satisfy ourselves that it is. Without reference for the moment to the frame of the declaration, we do not think the facts disclose a cause of action. Does the affidavit make any difference, if untrue, and do the facts proved shew it to be untrue?

Such an affidavit was indispensable to the allowance of the claim, but equally so is an affidavit of debt to the issuing of a *capias*. Actions for malicious arrest on such writs are common enough; but it is no part of the doctrine of the courts that a declaration not setting forth such an affidavit, or stating that it was made in order to procure the issuing of the writ, would be bad, or that the action could not be sustained without such an affidavit were proved. And we do not see that the making the affidavit here complained of has any greater or more direct bearing on the adjudication of the commissioners than the affidavit of debt has on the issue of the writ or the arrest made under its authority. The affidavit is necessary, to enable the commissioners to proceed—to give them, as it were, jurisdiction in the particular case,—but it forms no part of the proof of the claim advanced, nor aids in the disposal of it, so far as the actual facts and intrinsic merits are concerned. So far as we can see at present, if such an action be sustainable at all, it might, or rather must, be by other facts independent of the affidavit, but certainly not upon the affidavit, without proof of other facts in themselves establishing the cause of action. The statement in the affidavit that the deponent believes his claim to be just and well founded, does not procure, nor as evidence tend to procure, the decision of the commissioners that his claim as alleged in his notice is sustained. It is not the *per quod* the alleged injury was inflicted, though it may be a step ancillary to it. In our opinion, the proving such an affidavit, and proving it to be false, would not *per se* sustain such an action as the present.

Then, is it proved to be untrue? Take each member of it. Is it untrue that the defendant believed his claim to be just and well founded, when he was assignee of a mortgage long past due, and the mortgagor had released all right to him expressly because the mortgage was wholly unpaid, and after the mortgagor had referred to the person to whom he was bound to convey, without any result or action on his part? Is it untrue that defendant believed there was no other or adverse claim? Assume that he was fully aware of the precise nature of Bettridge's claim (which, as he produces Bettridges bond from Martin, should be assumed). He knew also that Martin had gone to Bettridge before signing the release of 1850, and got no satisfaction. He knew that the condition on which Bettridge would have had a right to call on Martin for a conveyance had not been fulfilled, though the time for its fulfilment expired on the first of January, 1849; and he knew that up to the date of his making this affidavit (June, 1851,) nothing had been said or done implying that they meant to fulfil the terms and pay the money (unless holding the possession acquired by Bettridge in 1839 could be deemed such an act). May he not, even though erroneously, have assumed that this long and continued default operated as an extinguishment of the claim, which, in strictness, he might think never was a claim on the land, but on the liability of Martin to the penalty? We are not prepared to say that upon all the facts the defendant's affidavit must or ought to be considered as made *malâ fide*.

Then, looking at the frame of the first and second counts (for if the plaintiff fails on these, he has, we think, no ground to recover on the third and fourth), do they, coupled with the proof, establish a right for the plaintiff to recover. We put all considerations derived from any supposed analogy with the statute of bracery out of the question; and the facts of the case negative the application of any such principle. The possession of the mortgagor, or others holding under him, is consistent with the right of the mortgagee; for, whatever the rights of subsequent holders, they must be subservient to the prior incumbrance; and therefore, as to any notice of plaintiff's title, as assignee of the nominee of the crown, which the plaintiff's possession could give, we think it goes for nothing, because we know the true state of the case. This possession, and the notice inferrible from it, form the inducement. Then the averment that the defendant, maliciously intending, &c., represented and pretended himself to be, is, we suppose, intended to mean a false representation and pretence—either false because he had no claim whatever, or because his claim was acquired under such circumstances that, as against the plaintiff, he was disabled from setting it up as true. Can this be said to be the truth, when it appears that the defendant holds as assignee of a mortgage prior in existence to any claim which the plaintiff has, and when the defendant obtained a release from the mortgagor, as appears? It may be even admitted, as it seems to us, that the heir and devisee commission would not have allowed the plaintiff's claim had they known all the facts, or at least not without giving the plaintiff an opportunity of being heard; and yet it would not follow that this action is sustainable. We have already remarked upon the materiality and effect of the affidavit of defendant. The remaining averments are, that he procured his claim to be allowed, and took out the patent in pursuance of such allowance, which, without what precedes, would be immaterial. We do not see how it can be said that the defendant has procured the allowance of a claim which had no foundation—a fraudulent or pretended claim, the assertion of which was a wrong, to the injury of the plaintiff. We are not prepared to determine that, with all parties before them, the heir and devisee commission ought not to, and therefore would not, have allowed the defendant's claim, leaving the plaintiff to such remedy as he might have, if any, against third parties. In July 1851 there was due to the plaintiff, as assignee of the mortgage, about £160, about £30 for the third instalment paid by him in December, 1849; and, to get the patent out, some one must pay the seven remaining instalments and interest from 1835, a liability which in July 1852 amounted to £215 5*s*. If Mr. Bettridge sold to the plaintiff for £400 in May 1852, as seems the case from Mr. Richardson's evidence, the amount due to the defendant and to the Crown on this lot exceeded the price which the plaintiff agreed to pay for it with all its improvements up to the date of his agreement. Upon what legal principle the defendant should pay the plaintiff a further sum of £350 we are unable to discover.

In this declaration there is not a word about want of reasonable or probable cause. That there was no want of such cause to prefer the claim, the decision of the heir and devisee commission allowing defendant's claim, and his subsequently obtaining the patent, must, we apprehend, be conclusive evidence. The only other point upon which there could be a suggestion of want of reasonable and probable cause is as to the statement in the affidavit, that the defendant was not aware of any adverse claim. We are not by any means clear

that the declaration, as it is, can be sustained; and if we have the whole facts before us, we do not see that, as a matter of law, a judge could tell the jury that the plaintiff had not reasonable or probable cause for making such an affidavit; and even were it otherwise, the other objections on which we have remarked must on these facts present difficulties apparently insuperable to the plaintiff's recovery. We think there should be a new trial.

Rule absolute.

MUNICIPAL CASES.

(Digested from U. C. Reports.)

From 12 Victoria, chap. 81, inclusive.

(*Continued from page* 133.)

XXIII. *By-Law—What interest entitles non-residents to move for quashing—Must not be contrary to U.C. Assessment Acts—Certainty required in—Costs.* 12 Vic. ch. 81, sec. 155; 13 & 14 Vic. ch. 48.

Where in an application to pass a by-law passed by the municipality of a township, it was objected that the applicant was a non-resident: *Held per Cur.:* That as a freeholder of the township, the applicant had an interest in all by-laws passed by the Township Council sufficient to enable him to move to quash any of them.

Where the municipality of a township, acting under the Statute 13 & 14 Vic. chap. 48, for common school purposes, declared a rate upon the *resident* inhabitants of a school section only—*Held per Cur:* that under 13 & 14 Vic. ch. 48, as well as the U.C. Assessment and Municipal Acts, the by-law was invalid, because the rate should be levied on the *taxable property* within the section, whether of residents or non-residents.

Held, also, that in such case the Court has no discretion, but must quash the by-law with costs.

Quere.—Whether in the present case the rate and assessment to be levied were stated in the by-law with sufficient certainty. And ought not the by-law to have stated an application from the householders and freeholders of the school section for the rate declared.

In re. Dela Haye and The Gore of Toronto. 2 C. P. Rep. 317.

XXIV. A By-Law passed to indemnify a township councillor elect for the costs of a *quo warranto*, by which his election was set aside, is illegal.

In re. Bell and Municipality of Manvers. 2 C. P. Rep. 507.

XXV. *By-Law for payment of a debt must contain the rate to be levied, and specify the debt to be paid.* 12 Vic. ch. 81, secs. 41, 155.

A by-law for payment of a debt must contain on the face of it the rate authorized to be levied for making up the sum granted.

Such by-law is illegal if it direct a gross sum to be raised for the payment of the current general expenses of the county, and the liquidation of the debt due, not stating what debt, or of what amount.

Quere. Whether the provisions of 4 & 5 Vic. ch. 10, sec. 41, are to be regarded as applicable to by-laws passed under 12 Vic. ch. 81; or whether the court must determine on their validity according to other Statutes in force, and the Common Law.

The Canada Comp'y *v.* The Municipality of the County of Middlesex. 10 U. C. B. R. Rep. 93.

XXVI. *By-Law to take stock in Railroad, quashed.* 12 Vic. ch. 81, sec. 177; 13 & 14 Vic. ch. 132.

A by-law to take stock in the Bytown & Prescott Railway was quashed, 1st, because it appeared not to have been concurred in by a majority of the assessed inhabitants, as required by 13 & 14 Vict. chap. 132: 2ndly, because no sufficient rate was imposed for the payment of the debt and interest, as required by 12 Vic. ch. 81.

The defendants did not support their by-law, and the Court refused to hear counsel on behalf of the Railway Company, as the rule was not directed to them.

In re. Billings *v.* The Municipality of Gloucester. 10 U. C. B. R. Rep. 273.

XXVII. *Counties of Prescott and Russell—Rate imposed in Russell only for erection of Registry Office in Russell, whilst one of the united counties.* 12 Vic. ch. 81, sec. 41, sub-sec. 22; 9 Vic. ch. 34, sec. 19; 13 & 14 Vic. ch. 67, sec. 31; 14 & 15 Vic. ch. 110, sec. 6.

The Municipal Council of Prescott and Russell passed a by-law to raise a sum of money for building a registry office in the County of Russell; and they enacted that the rate should be levied only on the townships composing that county. This by-law was quashed on the ground that as the office, when built, would continue the property of the united counties until a separation should take place, the expense of erecting it must be borne by both counties in common.—Costs given of course.

Smith *v.* The Municipality of Prescott, &c. 9 U. C. B. R. Rep. 282.

XXVIII. *By-Law to remove registry office upheld—Entitling of affidavit.* 9 Vic. ch. 34, sec. 19; 12 Vic. ch. 81, sec. 41; 12 Vic. ch. 78, sec. 3.

The powers with respect to the removal of registry offices, given to the District Councils by 9 Vic. ch. 34, sec. 19, are now vested in Municipal Councils for counties. A by-law to remove registry office from the village of W. to the village of A. in the same united counties, but not until a proper building should be provided at A. upheld.

An affidavit in support of a motion to quash a by-law is sufficient, though not entitled in any court.

Frazer, Registrar &c., *v.* The Municipality of the United Counties of Stormont, &c. 9 U. C. B. R. Rep. 286.

XXIX. *Mandamus—Court of Revision—Taxation of property.* 12 Vic. ch. 81, sec. 170; 13 & 14 Vic. ch. 67, sec. 170; secs. 16, 17, 28, 31, 32.

The Court refused to interfere by mandamus to compel a municipal council to alter the assessment of the applicant's property, as settled on appeal by a court of revision.

They also declined to express any opinion as to the principle to be adopted in the taxation of property—whether the intrinsic value only should be regarded, or whether the amount which it could be or has been leased for, or what it does in fact produce to the proprietor, should be taken into consideration.

In re. Dickson *v.* The Municipality of Galt. 9 U. C. B. R. Rep. 395.

XXX. *By-Law—Pleading—Practice.* 12 Vic. c. 81, sec. 195.

In an action of debt on award made by arbitrators appointed to value the plaintiff's property, through which the defendants had by their by-law directed a road to be made:

Held, that the defendants having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal.

And *semble*, that although the Statute enacts that all by-laws made and passed shall be authenticated by seal, and signed by the person presiding, yet it is not necessary to set out these facts whenever a by-law is pleaded, but it is sufficient to aver that it was duly made and passed.

Wilson *v.* The Municipality of Port Hope. 9 U. C. B. R. Rep. 405.

XXI. *Illegal resolution of municipal council acted upon, and spent, therefore not rescinded.*

The Court refused an order to rescind a resolution of a municipal council, authorizing the reeve of the township to draw a draft on the treasurer, in favor of certain members of the council for their services as such up to 13 August, 1851,—because such resolution was spent and inoperative; and therefore, although illegal, no object could be gained or redress afforded by setting it aside.

Daniels *v.* The Municipality of Burford. 9 U. C. B. R. Rep. 478.

THE LAW JOURNAL.

AUGUST, 1855.

TRANSFER OF D. C. JUDGMENTS TO ANOTHER COUNTY.

Under the 55th sec. of the D.C. Act of 1850 it was necessary for the Judge in whose county a judgment was entered, to certify the judgment when execution was desired in another county; and this seemed to be contemplated only in cases where the judgment debtor had *removed* to another county without satisfying the judgment. Upon the production of the certificate so granted, the Judge of the D.C. of the county *to which the party had removed* was authorised to order an execution for the debt and costs appearing to be due on the judgment.

Sec 3 of the D.C.F. Act of 1855, if it does not virtually repeal sec. 55 of the D.C. Act of 1850, seems at least to render it a dead letter in practice. By the late Act the formalities of obtaining the Judge's signature to the copy of judgment (which was really a very useless requirement, and nothing but a matter of form), as well as the Judge's order for leave to issue execution, are rendered unnecessary, for a Clerk can now issue a transcript of any unsatisfied judgment attested by his signature and the seal of the Court; and the Clerk to whom same may be directed enters it, and thereupon proceedings may be taken to enforce it in the same manner as any other judgment. And moreover, under this, the 3rd sec. of the Act of last session, whether or not the dft. has moved out of the county is immaterial, as is also his place of residence.

As the whole responsibility now rests upon Clerks, great care is necessary in framing the transcript of judgment. The clause in question requires a "transcript of the entry of judgment," with "a "certificate at the foot thereof signed by the Clerk "and attested by the seal of the Court, stating the "amount unpaid upon such judgment, and the "date at which the same was recovered."

The Form No. 52 in the General Forms, prepared by the Commissioners, may be readily adapted for a certificate under the present law: it contains perhaps more than is necessary, but for many reasons we apprehend it will be found more convenient in practice to insert all it contains. The 55th sec. of the D.C. Act of 1850 did not require more than the 3rd clause of the late Act, and yet the Commissioners deemed it right to embrace all that is set forth in form No. 52; we think it will be the safest course to follow that form; and as it is required under another clause of the Act for another purpose, it will save unnecessary multiplicity of forms. There is one addition, however, that must be made—the address of the Clerk from whose Court execution is desired—for the Statute says "the certificate shall be addressed to the Clerk of the Division Court to whom it is intended to be delivered."

The operation of Rule No. 67 upon the clause in question is to be considered. The rule provides that no warrant of execution, &c., shall without leave of the Judge issue on a judgment more than a year old, unless an instalment has been paid on such judgment, or an execution, &c., issued thereon within a year from the time of obtaining judgment. Sec. 3 of the Act of 1855 makes it the duty of the D.C. Clerk to whom a transcript of judgment is delivered "to enter the transcript in a book;" and the clause goes on to say, "and all other proceed-"ings shall and may be had and taken for the "enforcing and collecting such judgment in such "D.C. by the officers thereof that can be taken "under the D.C. Acts upon judgments recovered in "any D.C. for the like purpose."

A judgment thus transferred to a particular Court can have no greater validity than a judgment originally recovered therein, and must be subject to like incidents. We think, therefore, that the Clerk of the Court to whom a transcript of judgment is delivered with a view to issuing execution thereon, must be governed by the 67th Rule of Practice, and that unless the transcript, on the face of it, shews that an instalment was paid, or that an execution, &c., was issued on the judgment within a year

from the time of obtaining the same, the Clerk should not issue execution without leave of the Judge first obtained in the usual manner.

COSTS IN ACTIONS IN THE SUPERIOR COURTS COGNIZABLE IN A DIVISION COURT.

UNTIL the Act of last Session, ch. 125, there were no means of bringing a party within the cognizance of a D.C. by action therein, unless he resided in the same county, or unless residing in an adjoining county leave was obtained from the Judge, which leave the plt. was not bound to solicit: it was usual therefore to bring the action in the County Court, and the plaintiff was entitled to his full costs. This Act enables cases to be brought and tried in the Division in which the cause of action arose, although dft. may reside in another county, (sec. 1), and gives an extended time for appearance, and provides the machinery for service of process.

The Practitioner's attention is called to this new jurisdiction as to place, and the 4th sec. of the Act in connection with it, which makes the provisions of the 13 & 14 Vic. ch. 53, and 16 Vic. ch. 177 (viz. sec. 78 of the former Act and sec. 2 of the latter), in reference to costs in any action brought in the Superior Court for a cause of action cognizable in a D.C. applicable to any action brought under the special jurisdiction given by the Act in question. If then a cause of action is, as to subject matter and amount, cognizable in a D.C., and could be brought by a plt. in the Division of the D.C. in which he resides, and in which the cause of action arose, it would appear that if brought in the Co. Court or Superior Court, the plt. could have no costs.

Questions will no doubt arise upon the 1st sec. of the Act of last session as to the meaning of the term "cause of action;" upon this we shall have a word to say hereafter. But in the meantime the questions may come up in the D.C.'s by challenge of the Judge's jurisdiction to proceed under the particular circumstances, or in the Co. Courts in reference to the right to full costs, and we would be glad to have notice of any decision on the subject.

The clause in question, we may remark, does not seem to touch the special jurisdiction given to D.C.'s under the Act 16 Vic. ch. 180, sec. 9, against Magistrates, when proceeded against under the authority of that clause.

SURROGATE COURT.

(Notes of English Cases in relation to)

PRIVY COUNCIL—*Anderson* v. *Lancuville*. Nov. 30.

Appeal from the Prerogative Court of Canterbury—Domicil—Will—Domicil held to be in France.

The Right Hon. Dr. LUSHINGTON, in his judgment, said: The decree is in these words: "The Judge, having maturely deliberated, by his final interlocutory decree, having the force and effect of a definitive sentence in writing, at petition of Rothery, pronounced, that William Anderson, the deceased in this cause, was, at the time of making and executing his last will and testament, bearing date the 26th January, 1848, and at the time of his death, domiciled in France." The sole question raised on the proceeding was this, whether the testator at the period of his death was domiciled in France or England? It is not necessary to consider why the learned judge, who then presided in the Prerogative Court, thought fit so to narrow this question, though one reason is apparent—that if the domicile turned out to be England, in that case the French will, not having been executed according to the statute, would have been altogether void, and there would have been an end to the whole contest. If, indeed, the domicil should be ultimately established to be a French domicil, then the Prerogative Court would know by what law to grant probate; what would be the form is another question, on which their lordships express no opinion. Now the leading facts of this case are these: what is called the domicil of origin of the testator was Ireland; he was born in Ireland of Irish parents. The domicil of origin was lost, and an English domicil acquired by long residence in England, principally in the county of Gloucester. It further appears, that the deceased became acquainted with Madame Lanouville sometime about the commencement of the French revolution. We shall not stop to consider whether the early history set forth in this case is true or is not; for his attachment to that lady, whatever be the cause, whether arising from her having rescued him at that period from impending danger, be true or not, is a fact proved beyond all controversy; it is admitted in this case and has been argued upon by both parties. In the year 1835 it appears that the testator, having been estranged from Madame Lanouville during the intervening period, again discovered her; that fact clearly appears from a letter in his own handwriting. He addresses her, "My dear, dear Catherine,—I have received your letter, and am now the happiest man in the world in knowing that you are well, alive, and I hope happy." Then he goes on to state a variety of other circumstances, which it is not necessary for me to recapitulate at present. At this period it appears that the testator was residing at Bedford-villa, Clifton, and immediately after having discovered her residence in Paris, he determined to visit her. Either in the end of 1835, or the beginning of 1836, he sells off his goods and quits his residence at Bedford-ville, Clifton, and after that—but at what precise period does not appear from any of the evidence that I have been able to discover in this case—after that and not before, he takes lodgings in Trinity-street, Bristol. For what period he was there, there is no evidence in this case. It is to be observed, that he was not permanently resident there. From that period 1836 until his death in 1845, he continues to reside in France, with the exception of such intervals as presently it will be necessary to notice. He remains in Paris till the year 1839, and after that he resides at a house at Nogent-sur-Marne, a few miles from Paris. Not to enter into a discussion of the particular form and manner in which the house was purchased and furnished, it is sufficient to say that he had a life interest in this house; that he visited England every year according to the evidence of Mrs. Price, and he remained seven or eight weeks at Trinity-street, Bristol; but all his letters show this, that he came there not from choice, but upon business, and was always anxious to return as quickly as possible after that business was disposed of to his residence in France. Here then is a residence in France from 1836 with only intervals of short duration, and they were for the purposes of business. I think that an observation was made by the L. C. in the case of *Bempde* v. *Johnstone*, 3 Ves. 201, which strongly applies to this case. Speaking of the deceased the L. C. said, "Wherever he had a place of residence that could not be referred to an occasional and temporary purpose, that is found

in England and nowhere else." So in the present case, so far as he had a residence of a permanent and not for an occasional and temporary purpose, that residence must be found in France and nowhere else. We apprehend, looking at the state of facts, *primâ facie* the domicil in England would be abandoned, and there would be enough to constitute a French domicil; though if this was properly speaking *to be called the domicil of origin*, it is necessary to have very strong facts to change such domicil. Looking at this state of things, what are the facts and what are the arguments which have been adduced in opposition to the conclusion which such a residence under such circumstances induces their lordships to come to? The facts were short, and the argument was this: it was contended that the testator intended only to remain during Madame Laneuville's lifetime. Assuming that to be the fact, assuming that he intended to quit when Madame Laneuville died, it does not at all follow that that will tend to establish the conclusion that he had not acquired a domicil in France, because what is it that takes off the acquisition of a domicil by long residence in a country? It is being there for a temporary purpose. It never can be said that, residing in a country till the death of a party, was a temporary purpose. Residence in India in the East India Company's service has long since been established to constitute domicil; yet there is in civil cases always the *animus revertendi* at some period though very remote: if the residence be merely of a nature temporary and not likely to last long, then it would not constitute domicil in itself. It has also been contended that all the property of the deceased was in this country. No doubt it was; the property was situated in this country; but that argument has been long disposed of. The learned judge who gave judgment in the court below has particularly adverted to the authorities, therefore it is not necessary to turn to them. With regard to any declaration made by the deceased, the court is not desirous of following these declarations in detail, because they are not entitled to great weight. In the case of *Stanley v. Bernes*, 3 Hag. Ec. 447, there was an ample number of declarations of the intention of the testator to return to this country. The delegates were clearly of opinion in that case that the declarations of the testator could not prevail against his domicil in a foreign land. We do not propose to enter further into a consideration of the evidence, though there are many parts of it tending strongly to the conclusion to which their lordships have come; we do not allude to it, because we are of opinion that the learned judge of the court below has stated the law with perfect accuracy. Their lordships are perfectly satisfied that all his conclusions were justly founded upon the facts and circumstances of the case. Approving, as we do, of the judgment *in toto*, we think it unnecessary to go further. The appeal must be dismissed with costs.

Decree affirmed.

PREROGATIVE COURT—*Shaw* v. *Neville*. Jan. 15. *Will—Due execution.*

The attesting witnesses to a will deposed that the testator did not sign the will in their presence, nor did they see any signature when they subscribed their names:

Held, that the will was not duly executed.

The deceased had left a testamentary paper, dated 18th Feb. 1854, which he clearly intended should operate as his will; it was all in his own handwriting, and signed by him at the foot or end. It contained a full testimonium, and also attestation, and also attestation clause, stating that the document was "signed, sealed, published and declared by the said C. J. T. (the testator) as and for his last will and testament, in the presence of us present at the same time, who, in his presence, at his request, and in the presence of each other, have hereunto signed our names as witnesses."

Then followed the names of two persons, servants of the deceased.

The deceased also left a will of previous date, Oct. 1836, wherein he had named his widow sole executrix and universal legatee. In the latter will of 1851 he had appointed his widow executrix and residuary legatee for life, and had substituted in the event of her death F. N.

F. N., in whose possession the last will was, was monished to bring it in and propound it, which was done in a formal allegation; whereupon the evidence of the attesting witnesses was taken. One of them, who was the butler of the deceased, deposed that "in the month of April last he entered the deceased's study in answer to the bell; that he saw the deceased sitting in his chair by the study table; a paper was lying upon a piece of blotting-paper on a writing-desk; it appeared to be folded in half or nearly so. That when he entered, the deceased's gardener, L. S., was there, standing at the further end of the room. As he entered the room, the deceased said, 'I want you both to sign your names to this paper.' That he then gave both to him and his fellow-witness a pen, and pointed out to them where to sign their names; that the paper was so folded crossways that he could not see if anything was written on the upper half; that there was no signature, nor any writing to be seen on the lower half whereon he and his fellow witness wrote their names; and that he was quite sure the deceased did not make any signature, or write in any way upon the paper whilst he was in the room." The other witness deposed to a similar effect.

Waddilove, in support of the will, submitted that there being a full testimonium and attestation clause, and the deceased being well aware what was necessary towards the due execution of the will, the presumption was that the signature of the deceased had been affixed before the witnesses were called, and that what was said and done by him in their presence amounted to an acknowledgment under the 9th section of the Wills Act. If the witnesses had been dead or not forthcoming, the will, being on the face of it duly executed, would have passed the seal of the court as a matter of course.

Twiss appeared in opposition to probate being granted. He was stopped by the court.

Sir JOHN DODSON.—I am anxious to put as liberal a construction on the terms of the Act of Parliament as I can; but there being no proof that the signature was affixed before the witnesses were called in, I cannot assume it as a fact; and if it was not, there could be no acknowledgment of it. I must pronounce against the will.

Waddilove asked for the costs out of the estate.

Sir JOHN DODSON.—Yes, you are, I think, entitled to your costs.

MONTHLY REPERTORY.

Notes of English Cases.

COMMON LAW.

C.P. COLEMAN *v.* RICHES. *May 2.*

Principal and agent—Scope of agent's authority—Fraudulent act of agent.

The plaintiff buys corn of L., which he employs the defendant, (a carrier by sea), to carry from B. to C. The defendant had been before employed in the same way by the plaintiff, and according to the usual course of business the corn would be delivered by the vendor at the defendant's wharf at B., where it would be put on board. The defendant's agent at B. would then sign a receipt for the corn, which the vendor would present to the plaintiff, and the plaintiff would then pay the price. On this occasion, the defendant's agent

at B., and L. (the vendor) conspire together, and although no corn is delivered the agent signs a receipt, which L. presents to the plaintiff in the agent's presence, the agent standing by and saying nothing: thereupon the plaintiff pays the money.

Held, that under these circumstances the defendant is not liable to the plaintiff, for the misrepresentation of defendant's agent.

Q.B. GARDNER *v.* WALSH. *April* 23, *May* 24.

Promissory note, joint and several—Vitiation of, by subsequent addition of name of third party.

Where after a joint and several promissory note has been made by two persons, and handed to the payee, the addition of the name of a third party to the note will vitiate it, although such addition be no detriment to the other makers. *Cotton v. Simpson*, 8 A. & E. 186, overruled.

Q.B. HARRISON *v.* BUSH. *May* 7, 21.

Libel—Privileged communication—Bona fides of defendant.

The defendant, with others, having presented a memorial to the Secretary of State for the Home Department, setting out certain acts done by the plaintiff, and complaining of his conduct, and requesting his removal from the office of a Justice of the Peace,

Held, in an action of libel by the plaintiff against the defendant, that the jury having found *bona fides* that the communication was privileged, since being addressed to the Secretary of State it was virtually an address to her Majesty for the removal of the plaintiff from his office, and must be taken to be done *bonâ fide* with a view of obtaining redress; and that the memorial was properly addressed to the Secretary of State, he having a corresponding duty to perform in the matter.

H. of L. FLEEMING *v.* ORR. *April* 3.

Case—Owner of dog—Liability for damage—Scienter.

A foxhound belonging to F. went into O.'s field, and worried O.'s sheep. O. sued F. for the damage, but did not aver that the dog was of vicious propensities which were known to F., and that F. negligently allowed it to be at large.

Held, this allegation was essential to the right to recover. Blame can only attach to the owner of a dog when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits.

C.C.R. R. *v.* FOSTER. *April* 28.

Uttering counterfeit coin—Evidence of guilty knowledge—Subsequent uttering of base coin of a different denomination—Improper reception of evidence.

Upon a charge of uttering counterfeit coin, in order to prove guilty knowledge evidence is admissible of the subsequent uttering by the prisoner of counterfeit coin of a different denomination.

The improper reception of evidence upon a criminal trial is not necessarily a ground for quashing the conviction, if the other evidence adduced be amply sufficient to sustain it.

Q.B. LIVINGSTON *v.* RALLI. *May* 30.

Agreement to refer to arbitration, breach of—Action.

Where there has been an agreement to refer differences to arbitration, an action will be for a subsequent refusal to refer. The doctrine that an agreement to refer is bad, because it ousts the Court of jurisdiction, is untenable if the promise be for a good consideration; for if applied, it ousts the Court of the power to enforce an action on an agreement, in which the promise is not unlawful, and the consideration valid. In this case there was a contract to deliver wheat, with the usual clause that any differences should be left to arbitration, &c., and it was held that, though the agreement to refer would be a bad plea, in bar of an action for breach of contract to deliver, the violation of it was a good ground of a substantive action.

Q.B. DEERCOURT *v.* CORBISHLEY. *June* 1,

Arrest—Justification of direction to—Private person—Constable—Breach of the Peace.

It is not actionable for a private individual to direct a constable to take a person into custody, which the constable accordingly does, where the circumstances are such as to justify the constable, although not the private individual himself, in arresting.

A constable may arrest any one for a breach of the peace committed in his presence, not merely to preserve the peace, but for the purposes of punishment.

Q.B. MOTLEE *v.* QUY. *June* 1.

Action for maliciously, and without probable cause, suing out a writ of summons and signing judgment for non-appearance, and arresting the plaintiff upon a ca. sa.—Legal damage.

No action lies for maliciously and without probable cause commencing an action, unless it be shewn that legal damage has been sustained; and where the declaration disclosed that the only damage arose from the plaintiff's own neglect in not appearing to the writ:—

Held, upon demurrer, that the declaration was bad, and the action could not be sustained.

EX. BARRETT *v.* MEREDETH. *June* 4.

Promissory note—Payable on demand—Demand previous to action.

A promissory note, payable on demand, does not require any demand to be made for payment of it previous to the bringing an action for the amount.

C.P. JONES *v.* ORCHARD. *June* 9, 11.

Illegal contract—Bail—Recognizance estreated for non-payment of prosecutor's costs. 5 & 6 Wm. & Mary, c. 11. *Implied indemnity.*

An indictment found against the defendant for conspiracy was removed into the Queen's Bench. The plaintiff had become the defendant's bail. The defendant not appearing, was convicted in his absence, and the recognizance estreated for non-payment of the prosecutor's costs, in consequence of which the plaintiff had to pay £40.

Held, that there was an implied contract on the part of the defendant to indemnify the plaintiff against this payment, and that plaintiff might recover the £40, under a count for money paid.

That supposing a contract by defendant to indemnify plaintiff against the consequence of defendant's not appearing pursuant to the recognizance to be illegal; (*semble* that it is), yet the court will not imply such contract.

EX. MORGAN v. FENNYHAUGH. *June* 12.

Practice—Costs of the day where the plaintiff does not proceed to trial—Default of defendant.

In order to entitle defendant to the costs of the day where the plaintiff makes default in proceeding to trial pursuant to notice, he must appear where the cause is called on.

In giving judgment, POLLOCK, C.B. said: Our judgment is upon this short ground, that it is, in reality, the consequence of the defendant's own fault, that he incurred costs which were fruitless and of no use; for if the defendant had been there he must have non-suited the plaintiff. He was not there, and the parties are in *pari delicto;* and the person who is equally in fault with the other cannot come to court and claim costs which are the consequence of the neglect in which he himself concurred; and which neglect and his concurring in it, was the cause of the mischief of which he complains.

Q.B. IN RE LORD v. LORD. *June* 12, 19.

Arbitration—Attachment—Validity of award—Appointment of umpire.

An affidavit shewing that the appointment of an umpire had been signed by arbitrators, separately, and not jointly, as it ought to have been, is admissible, and conclusive against the right to an attachment for disobeying the award made by the umpire.

CORRESPONDENCE.

To the Editor of the "Law Journal."

SIR,

The letter of your correspondent R. N., in your July issue, respecting attachments under the Division Courts Acts, reminds me of a point which has occasioned some doubt in my mind, and which, perhaps you or some of your correspondents may be able to throw some light on.

What is the meaning to be attached to the word "indebted," in the D. C. Act of 1850, sec. 64, and in form 22 in the General Rules and Forms." In the Absconding Debtor's Act, 2 Wm. 4, c. 5, s. 1, the word has reference only to *debts* properly so called. At least that construction is given by the Judges, who will not grant a fiat in case of unliquidated damages, but only for a *debt*. But the D. C. Act speaks of being *indebted* "for any debt *or damages* arising upon any contract *express or implied*." The form of affidavit (No. 22) rather seems to ignore any qualification of meaning in the word "indebted," by giving only the word "debt" at the end of the affidavit. How is a suitor to know in what case he is entitled to an attachment?

By the way, it strikes me on looking at the forms you give (p. 121) for the use of officers of Div. Courts, that you are unusually severe on the luckless jurors whom you condemn to deliberate in the dark.

I am, sir,
Your obedient servant
C. S. P.

August, 1855.

[We think attachments are issuable only in actions on contracts for sums popularly called Debts. This is the obvious meaning of the clause and the construction put on it by the Commissioners.

An error (at page 121) which escaped our proof-reader, C. S. P. has discovered. The form should read "or fire, candle *excepted;*" the omission of the last word has given an opening to C. S. P. to say a smart thing, and he has said it accordingly. We thank C. S. P. for pointing out the error. *Ed. L. J.*]

To the Editor of the "Upper Canada Law Journal."

SIR,

I think the following remarks, from a late number of the *Law Times*, may be re-published by you with benefit.

Your ob't serv't,
A. J.

"There is nothing that more forcibly impresses itself upon the mind of the practitioners, whether Barrister or Attorney, who has had any varied experience of juries, than their unsatisfactory character in local jurisdictions. It is extremely difficult to obtain justice from them. Local prejudices and interests influence them so strongly—perhaps, also, so unconsciously—that it is necessary to know the jury in order to shape the case. A remarkable instance of this has just occurred at the late Assizes at Cambridge. An action was brought by a tradesman of that town against one of the many victims to whose extravagant follies the tradesmen minister, not merely by selling, but by giving credit. The articles supplied were two gold breast-pins, a hunting-whip, and a gold signet ring, engraved; the defendant pleaded infancy, and the plaintiff replied that they were necessaries. The plaintiff admitted that he had made no inquiry of the tutor as to the youth's position in life. The father of the defendant proved that he was a clergyman, with an income of only £390 a-year—that he had allowed his son all reasonable expenses, but that at the end of the second term the foolish boy had run into debt to the amount of £500, whereupon he had removed him from College, and sent him into the army, and he was now on his way to Sebastopol.

Baron PARKE summed up strongly in favour of the defendant, and a portion of his argument is worth recording, as it may be useful in other cases. He said, that,

In order to enable the plaintiff to recover, he was bound to make out to the satisfaction of the law and of the jury, that the items of his bill, or some of them, were articles necessary to the real estate, condition and degree of the defendant in life, and not merely for that which he assumed when at the University. That was a question which did not depend on the amount of his allowance; but, taking the law from him as its exponent, the jury must say whether these articles were necessaries as above explained and understood, or were merely ornaments. In the one case the plaintiff would be entitled to their verdict, and in the other they ought to find for the defendant, who had a perfect right to defend this action, and whose father rather deserved approval than reprobation for coming forward to defend his son from the baneful system of credit into which some tradesmen in this town were but too ready to entrap the younger members of the University. The rule of law was, that an infant could not contract except for necessaries. These things which were purely ornamental an infant was not liable for; but then another question arose where the goods were not strictly of the ornamental class, for then they might become necessaries if they were such as that the infant would lose caste in society if he did not possess and use them. Now, as to the subjects of this bill, he had no hesitation in directing the jury that the hunting-whip was not a necessary, and as to the ring and the charge for engraving, it seemed to him perfectly idle to suppose that, considering the defendant's condition in life, they were necessaries. He might therefore withdraw those items from the hands of the jury, and the remaining questions were whether the two

"gold breast-pins" were necessaries, or ornaments purely, or ornaments without which the defendant would have lost caste in society. Now, those pins were only necessary or useful to fasten the scarf round the neck of the defendant; but if the scarf was unnecessary, so must be the pins, for the one depended on the other, and Mr. Kelson had proved that his son had gone to college with all necessary wardrobe, so that a scarf did not appear to be necessary. But if a scarf was necessary, it did not follow that a gold pin, still less that two, should be necessary for its use; for if the wearer wanted to fasten it, a common pin would answer the purpose as well as a gold one which cost 14s. 6d. or £1 10s.; and certainly if one was necessary, and not merely ornamental, surely the second could not be required, but must fall under the head of a "mere ornament." And as to the whip and ring, therefore, he might direct the jury to find for the defendant, and as to the two pins, he would leave the decision on the issue of "necessary or not necessary" to the jury, subject to the observations he had addressed to them.

The jury turned round, and after considering some time prayed leave to retire.

PARKE, B.—What is there to retire about? There is nothing to consider if you attend to the law as I have laid it down, and the obligation of your oaths.

Nevertheless the jury found a verdict for the plaintiff—it was a jury of Cambridge tradesmen. Could there be a stronger illustration of the mischief of local juries? The title of this case was *Wells* v. *Kelson*."

NOTICES OF NEW LAW BOOKS.

English Reports in Law and Equity; edited by EDWARD H. BENNETT and CHAUNCEY SMITH, Counsellors-at-Law, vol. XXVII: *Containing Cases in the House of Lords and Equity Reports, during the year* 1854. Volume XXVIII, *Containing Cases in the House of Lords, the Privy Council, the Common Law, Admiralty and Ecclesiastical Courts, during the years* 1854-55. Boston: Little, Brown and Company, 1855.

The first of these volumes should have been acknowledged in our last number; the second, together with the two next (volumes 29 and 30) to be published, contain the cases in the Courts of Common Law, from Michaelmas Term, 1854 to the close of the Legal year, 1855. The publishers remark that the two latter volumes "will be put to press very shortly, and issued before the close of the year, in order to lay the cases before the profession at the earliest moment, thus bringing them down to the very latest period, and henceforth the volumes will be published as soon as possible after the cases reach us from England.

"After the expiration of the present year, the number of volumes will not exceed four per annum, viz., three of Law, and one of Chancery. The three Law volumes will be published as rapidly as possible during the sitting of the courts. The Chancery volume will be published at the end of the year, embracing the cases for the year before the House of Lords, the Lord Chancellor, and the High Court of Appeals Volume 31 will contain the Chancery Cases for the period above stated."

THE STUDENT'S PORTFOLIO.

ADVOCATES—METHOD—STUDY. (a)

"Hurry and confusion result from the want of system; and the mind can never be clear when a man's papers and business are in disorder. It is recorded of the pensionary De Witt, of the United Provinces, who fell a victim to the fury of the populace in the year 1672, that he did the whole business of the republic, and yet had time left for relaxation and study in the evenings. When he was asked how he could possibly bring this to pass, his answer was, that "nothing was so easy; for that it was only doing one thing at a time, and never putting off anything till to-morrow that could be done to-day." "This steady and undissipated attention to one object," remarks Lord Chesterfield, in relating this anecdote, "is a sure mark of a superior genius." It is of the highest importance, also, that a lawyer should in early professional life, cultivate the habit of accuracy. It is a great advantage over opposing counsel,—a great recommendation in the eyes of intelligent mercantile and business men. A professional note to a merchant carelessly written will often of itself produce an unfavorable impression in his mind; and that impression he may communicate to many others. The importance of a good handwriting cannot be overrated. A plain legible hand every man can write who chooses to take the pains. A good handwriting is a password to the favor of clients, and to the good graces of judges, when papers come to be submitted to them. It would be a good rule, though at first perhaps irksome and inconvenient, never to suffer a letter or paper to pass from your hands with an erasure or interlineation. Make another copy. The time and trouble it may cost at the outset will be repaid in the end by the habit you will thereby acquire of transacting your business with care, neatness, and accuracy.

You cannot be faithful to your clients unless you continue to be a hard student of the learning of your profession. Not merely that you should thoroughly investigate the law applicable to every case which may be intrusted to you; though that, besides its paramount necessity to enable you to meet the responsibility you have assumed to that particular client, will be the subsidiary means of important progress in your professional acquisitions. "Let any person," says Mr. Preston, "study one or two heads of the law fully and minutely, and he will have laid the foundation or acquired the aptitude for comprehending other heads of the law."* But, besides this, you should pursue the systematic study of your profession upon some well-matured plan. When admitted to the bar, a young man has but just begun, not finished, his legal education. If he have mastered some of the most general elementary principles, and has acquired a taste for the study, it is as much as can be expected from his clerkship. There are few young men who come to the bar, who cannot find ample time in the first five or seven years of their novitiate, to devote to a complete acquisition of the science they profess, if they truly feel the need of it, and resolve to attain it. The danger is great that from a faulty preparation,—from not being made to see and appreciate the depth, extent, and variety of the knowledge they are to seek, they will mistake the smattering they have acquired for profound attainments. The anxiety of the young lawyer is a natural one at once to get business—as much business as he can. Throwing aside his books, he resorts to the many.

(a) From Judge Sharswood's *Professional Ethics.*

*Preston on Estates, p. 2.

means at hand of gaining notoriety and attracting public attention, with the view of bringing clients to his office. Such an one in time never fails to learn much by his mistakes, but at a sad expense of character, feeling, and conscience. He at last finds that in law, as in every branch of knowledge, "a little learning is a dangerous thing;" that what he does not know falsifies often in it actual application that which he supposed he certainly did know; and after the most valuable portion of his life has been frittered away upon objects unworthy of his ambition, he is too apt to conclude that it is now too late to redeem his time; he finds that he has lost all relish for systematic study, and when he is driven to the investigation of particular questions, is confounded and embarrassed—unable to thread his way through the mazes of authorities, to reconcile apparently conflicting cases, or deduce any satisfactory conclusion from them—in short, he has no greater aptitude, accuracy, and discrimination than when he set out in the beginning of his studies. No better advice can be given to a young practitioner, than to confine himself generally to his office and books, even if this should require self-denial and privation, to map out for himself a course of regular studies, more or less extended, according to circumstances, to aim at mastering the works of the great luminaries of the science, Coke, Fearne, Preston, Powell, Sugden, and others, not forgetting the maxim, *melius est petere fontes quam sectari rivulos*, and to investigate for himself the most important and interesting questions, by an examination and research of the original authorities. "He that reacheth deepest seeth the amiable and admirable secrets of the law,"* and thus may the student "proceed in his reading with alacrity, and set upon and know how to work into with delight these rough mines of hidden treasure.†"

It may be allowed here to commend to your most serious consideration, the remarks of a gentleman of our own bar, whose example, if he might be named with propriety, would enforce and illustrate their value:—"There are two very different methods of acquiring a knowledge of the laws of England, and by each of them, men have succeeded in public estimation to an almost equal extent. One of them, which may be called the old way, is a methodical study of the general system of law, and of its grounds and reasons, beginning with the fundamental law of estates and tenures, and pursuing the derivative branches in logical succession, and the collateral subjects in due order; by which the student acquires a knowledge of principles that rule in all departments of the science, and learns to feel as much as to know what is in harmony with the system and what not. The other is, to get an outline of the system, by the aid of commentaries, and to fill it up by desultory reading of treatises and reports, according to the bent of the student, without much shape or certainty in the knowledge so acquired, until it is given by investigation in the course of practice. A good deal of law may be put together by a facile or flexible man, in the second of these modes, and the public are often satisfied; but the profession itself knows the first, by its fruits, to be the most effectual way of making a great lawyer."

* Co. Litt. 71 *a*.
† 1 Ibid. 6 *a*.

Such a course of study as is here recommended, is not the work of a day or a year. In the meantime let business seek the young attorney: and though it may come in slowly, and at intervals, and promise in its character neither fame nor profit, still, if he bears in mind that it is an important part of his training, that he should understand the business he does thoroughly, that he should especially cultivate, in transacting it, habits of neatness, accuracy, punctuality, and despatch, candor towards his client, and strict honor towards his adversary, it may be safely prophesied that his business will grow as fast as it is good for him that it should grow; while he gradually becomes able to sustain the largest practice, without being bewildered and overwhelmed.

Be careful, however, not to settle down into a mere lawyer. To reach the highest walks of the profession, something more is needed. Let polite literature be cultivated in hours of relaxation. Lose not your acquaintance with the models of ancient taste and eloquence. Study languages, as well from their practical utility in a country so full of foreigners, as from the mental discipline, and the rich stores they furnish. Cultivate a pleasing style, and an easy and graceful address. It may be true, that in a "court of justice, the veriest dolt that ever stammered a sentence, would be more attended to, with a case in point, than Cicero with all his eloquence, unsupported by authorities," yet even an argument on a dry point of law, produces a better impression, secures a more attentive auditor in the judge, when it is constructed and put together with attention to the rhetorical art; when it is delivered, not stammeringly, but fluently; when facts and principles, drawn from other fields of knowledge, are invoked to support and adorn it; when voice, and gesture, and animation, give it all that attraction which earnestness always and alone imparts. There is great danger that law reading, pursued to the exclusion of everything else, will cramp and dwarf the mind, shackle it to the technicalities with which it has become so familiar, and disable it from taking enlarged and comprehensive views even of topics falling within its compass as well as of those lying beyond its legitimate domain."

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC IN U.C.

ALLAN JOHNSON MOORE, of Goderich, Esquire, Barrister-at-Law, to be Notary Public in Upper Canada.—[Gazetted 4th August, 1855.]

JOSEPH HUTTON, of Belleville, Barrister-at-Law, to be Notary Public in Upper Canada.—[Gazetted 11th August, 1855.]

DAVID RIDGEWAY MURPHY, of Trenton, Esquire, Attorney-at-Law; and ABRAHAM THOMAS HUTT BALL, of Niagara, Esquire, Attorney-at-Law, to be Notaries Public in Upper Canada.—[Gazetted 25th August, 1855.]

FALL CIRCUITS.

The Courts of Oyer and Terminer and General Gaol Delivery, and of Assize and Nisi Prius, in and for the several Counties of that part of the Province formerly Upper Canada, after the present Term, will be held as follows:

EASTERN CIRCUIT.

THE HON. JUSTICE MACAULAY, C.J.C.P.

Brockville	Tuesday, 25th September.
Cornwall	Monday, 8th October.
L'Orignal	Thursday, 18th "
Ottawa	Tuesday, 23rd "
Perth	Monday, 5th November.

MIDLAND CIRCUIT.

MR. JUSTICE DRAPER.

Cobourg	Friday, 21st September.
Peterborough	Tuesday, 9th October.
Kingston	Monday, 15th "
Picton	Thursday, 25th "
Belleville	Tuesday, 30th "
Whitby	Monday, 12th November.

HOME CIRCUIT.

MR. JUSTICE RICHARDS.

Barrie	Thursday, 20th September.
Sydenham	" 27th "
Niagara	Tuesday, 2nd October.
Milton	Wednesday, 10th "
Cayuga	Tuesday, 16th "
Hamilton	Monday, 22nd "

OXFORD CIRCUIT.

MR. JUSTICE MC'LEAN.

Stratford	Tuesday, 25th September.
Woodstock	Monday, 1st October.
Brantford	Tuesday, 9th "
Simcoe	" 16th "
Berlin	" 23rd "
Guelph	Monday, 29th "

WESTERN CIRCUIT.

MR. JUSTICE BURNS.

Goderich	Monday, 24th September.
London	Friday, 28th "
St. Thomas	Wednesday, 10th October.
Chatham	Tuesday, 16th "
Sandwich	" 23rd "
Sarnia	" 30th "

HOME SITTINGS.

THE HON. SIR J. B. ROBINSON, BART.

City of Toronto . . . . . Monday, 8th October.

Of which all Sheriffs, Magistrates, Coroners, Gaolers, and other Peace Officers, are requested to take notice.

By the Court,
CHARLES C. SMALL.
Clerk of the Crown and Pleas.

Trinity Term, 27th August, 1855.

LAW SOCIETY OF UPPER CANADA,

(OSGOODE HALL.)

Trinity Term, 19th Victoria, 1855.

During this present Term of Trinity the following Gentlemen were called to the degree of Barrister-at-Law:

On Monday the 27th August—

THOMAS CLARK,
SAMUEL ROWLANDS,
ALFRED BOULTBEE,
COLUMBUS HOPKINS GREEN,
ADAM FERRIE, Jun.,
ALFRED FRANCIS WRIGHT,
JAMES HARROLD DOYLE,
WILLIAM MARSHALL MATHESON,
JAMES FRASER, Junior,
JAMES BOYD DAVIS, Esquires.

On Saturday, 1st September—

WILLIAM MENDELL, Esquire.

On Tuesday, 4th September.

FITZWILLIAM HENRY CHAMBERS.
MAUNSELL BOWERS JACKSON.
JOHN ROBERT JONES.
JAMES BEATY.
PHILIP TURNER WORTHINGTON.
ROBERT CLEOBUREY STONEMAN.
ALEXANDER GEORGE FRASER, Esquires.

On Saturday, 8th September.

ROBERT SUTHERLAND, Esquire.

On Tuesday the 12th of June, in this Term, the following Gentlemen were admitted into this Society as Members thereof, and entered in the following order as Students of the Law, their examinations having been classed as follows, viz:

Senior Class:

Mr. WALTER ROSS MCDONALD.

Junior Class.

Mr. GEORGE LOUIS PHILIPPE CARRIERE.
" FREDERICK JOHN DIGNAN SMITH.
" JOHN MICHAEL TIERNEY.
" WILLIAM PENN BROWN.
" FREDERICK PROUDFOOT.
" WILLIAM MCKINLAY.
" JAMES ALEXANDER MCCULLOCH.
" SIMPSON HACKETT GRAYDON.
" WILLIAM HEPBURNE SCOTT.
" ALEXANDER DICKIE MCNAUGHTON.
" WILLIAM DUMMER POWELL.
" JAMES GREER.
" HENRY FREDERIC DUCK.
" WILLIAM DOW FOOTE.

Ordered—That the examination for admission shall, until further order, be in the following books respectively, that is to say—

For the Optime Class:

In the Phœnissæ of Euripides, the first twelve books of Homer's Iliad, Horace, Sallust, Euclid or Legendre's Geometrie, Hind's Algebra, Snowball's Trigonometry, Earnshaw's Statics and Dynamics, Herschell's Astronomy, Paley's Moral Philosophy, Locke's Essay on the Human Understanding, Whateley's Logic and Rhetoric, and such works in Ancient and Modern History and Geography as the candidates may have read.

For the University Class:

In Homer, first book of Iliad, Lucian (Charon, Life or Dream of Lucian and Timon), Odes of Horace, in Mathematics or Metaphysics at the option of the candidate, according to the following courses respectively: Mathematics, (Euclid, 1st, 2nd, 3rd, 4th, and 6th books, or Legendre's Geometrie, 1st, 2nd, 3rd, and 4th books, Hind's Algebra to the end of Simultaneous Equations); Metaphysics—(Walker's and Whateley's Logic, and Locke's Essay on the Human Understanding); Herschell's Astronomy, chapters 1, 3, 4, and 5; and such works in Ancient and Modern Geography and History as the candidates may have read.

For the Senior Class.

In the same subjects and books as for the University Class.

For the Junior Class:

In the 1st and 3rd books of the Odes of Horace; Euclid, 1st, 2nd, and 3rd books, or Legendre, 1st and 2nd books; and such works in Modern History and Geography as the candidates may have read: and that this Order be published every Term, with the admissions of such Term.

Ordered—That the class or order of the examination passed by each candidate for admission be stated in his certificate of admission.

NOTICE.—By a Rule of Hilary Term, 18th Victoria, students keeping Term are henceforth required to attend a course of Lectures to be delivered, each Term, at Osgoode Hall, and exhibit to the Secretary on the last day of Term, the Lecturer's Certificate of such attendance.

Lecturer next Term—O. MOWAT, Esquire.

Subject—Equity Jurisprudence.

Hour of Lecture—From 9 o'clock to 10 o'clock, A.M.

ROBERT BALDWIN,
Treasurer.

Trinity Term,
19th Victoria, 1855.