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DIARY FOR SEPTEMBER.

1. Thursday ..... Paper Day, Common Pleas.
3. Saturday ..... TRINITY TERM ends.
4. SUNDAY ..... *15th Sunday after Trinity.*
5. Monday ..... Recorder's Court sits. Last day for notice of trial for Co Ct.
11. SUNDAY ..... *16th Sunday after Trinity.*
13. Tuesday ..... Qr. Sess. and Co. Ct. Sitgs. in each Co. Last day for service for York and Peel.
18. SUNDAY ..... *17th Sunday after Trinity.*
21. Wednesday ... *St Matthew.*
23. Friday ..... Declare for York and Peel.
25. SUNDAY ..... *18th Sunday after Trinity*
29. Thursday ..... *St. Michael.* MICHAELMAS DAY.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

SEPTEMBER, 1864.

THE ACT RESPECTING INSOLVENCY.

A good system of insolvency is necessary in every mercantile community. Men there are, and always will be, who, through misfortune, fail in business, and become unable to pay their debts in full. Others there are, and always will be, who, through a pretence of insolvency or inability to pay their debts, fail, and fail, as it is said, with a full hand. The object of a good insolvency act is as much to protect the honest but unfortunate debtor, as to punish the dishonest or fraudulent debtor; and to do so as cheaply and expeditiously as is consistent with efficiency.

It is said that such is the aim of the Insolvency Act which became law during the last session of the Provincial Parliament. In some way or other an insolvency law, while much needed and really called for in Upper Canada, was either opposed or coldly supported in Lower Canada; and yet we are indebted to a Lower Canada lawyer for the measure which has now become law.

We have always maintained that it was the duty of the government, and especially of the Upper Canada section of it, to introduce and carry a cheap and efficient insolvency law. Year after year nothing was done. Men either had not the inclination or the ability to take the steps necessary for the purpose. Year after year men unfortunate in business were either compelled to drag out a life of miserable existence among us, or else migrate to places where the laws of debtor and creditor were in advance of ours. In this state of things the framer of the bill came to the rescue, and through good repute and bad repute, persevered till the end.

As usual there are various opinions as to the wisdom and efficiency of the infant legislative creation. It is too much to expect that all men should agree in their estimate of a measure of the kind. We never expected a perfect measure. Had we waited till some man could be found competent and willing to introduce and carry a perfect insolvency act, we should have waited till the end of time. We prefer to have a measure of some kind, however crude, upon which we can improve as instructed by the dictates of experience. In this spirit we awaited the birth of the measure now before us, in this spirit we receive it, and in this spirit we shall approach an examination, necessarily brief, of its provisions.

The act very properly commences by reciting that it is expedient that provision be made for the settlement of the estates of insolvent debtors, for giving effect to arrangements between them and their creditors, and for the punishment of fraud. Such, therefore, are the necessities recognized in the framing of the act, and such the objects which the Legislature had in view when framing the act. But who are insolvent debtors? A class of persons in the community whose state it is difficult to distinguish and define. It is not every man who, on the spur of a demand, is unable to pay his debts in full, that ought to be declared insolvent. Wealth assumes in the social scale many forms. It is not always to be found in the mere possession of money. Money is the medium of exchange, and one which most men, in defiance of laws against usury, endeavor to make as productive as possible. Some men prefer to invest their money in real estate—others in personal property—others in stocks—and each to his mind. Every man in business is, to some extent, at some time or other, indebted to others. The necessities of trade have given rise to bills of exchange and promissory notes—the representatives of pecuniary obligations. It is not every kind of property in Canada which is convertible into money at a moment's notice. A man may at a given moment be unable to pay his debts in full, and yet have assets equal to forty shillings in the pound on his indebtedness. Who, therefore, is to be the judge of a man's insolvency? If left to himself he may not determine the question until his creditors become more embarrassed than himself. If left to others, without rules to guide them, their fears or their interest may drive them to the ruin of a fellow man, as well-to-do as themselves. Still it is wise to allow a man who feels himself unable to meet his engagements, and really desires in good faith to make an assignment for the benefit of his creditors to do so. It is just as wise,

and still more necessary, to enable creditors, under proper restrictions, to compel a debtor unable to meet his engagements to assign his effects for the benefit of his creditors. The former, known as voluntary assignments, we have had for years in Upper Canada. The latter, compulsory liquidation, is the special object of bankruptcy or insolvency legislation.

In everything human there is a tendency to abuse. Interest often blinds men to the finest commands of common honesty. Of this of late years we have had numberless instances in Upper Canada, as between debtor and creditor. How many of the voluntary assignments made since the expiration of our former bankruptcy law to the present time have been carried into effect so as to benefit the creditors of the assignors? It is notorious that assignments have been more frequently made for the protection of the debtor than the benefit of the creditors. Why the selection as assignee of a father, brother, or pliant clerk? Was it that the estate assigned should be as speedily as possible wound up for the benefit of those really entitled to it? Was it not, rather, that the assignor might be secure against executions while in the enjoyment of his property, and so make his own terms with his creditors? In vain did the Legislature from time to time interfere by scrap legislation to mitigate so great and so growing a mischief. It is to be hoped that the Insolvency Act now under consideration will be found more effective.

The Act, of course, observes the distinction between voluntary assignments and compulsory liquidation. It enables any person unable to meet his engagements, and desirous of making an assignment of his estate, to call a meeting of his creditors; makes it his duty at the meeting to exhibit statements showing the position of his affairs; enables the creditors at the meeting to name an assignee to whom the assignment shall be made; provides for the choice of an assignee if not chosen at the meeting; stipulates that the assignee shall not be related, allied or of kin to the assignor; gives a form of deed of assignment; enacts that no particular description or detail of the property or effects assigned need be inserted in the deed; declares that the assignment shall be held to convey and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, all moneys and negotiable paper, stocks, bonds and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and moveable and unmoveable property, debts assets and effects, excepting such as are exempt from seizure and sale under execution by law. So in regard to compulsory liquidation. The circumstances under which the estate of a debtor becomes liable to compulsory liquidation are defined. Thus—If he absconds or is immediately about to abscond from this Province with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process, or if being out of the province he so remains with a like intent, or if he conceals himself within this province with a like intent; if he secretes or is about to secrete any part of his estate or effects, with intent to defraud his creditors, or to defeat or delay their demands or any of them; if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of any of his property, with intent to defraud, defeat or delay his creditors or any of them; if, with such intent, he has procured his money, goods, chattels, lands or property to be seized, levied on or taken under or by any process or execution, having operation where the debtor resides or has property, founded upon a demand in its nature proveable under the act, and for a sum exceeding two hundred dollars, and if such process is in force and not discharged by payment or in any manner provided for by law; or if he has been actually imprisoned or upon the gaol limits for more than thirty days in a civil action founded on contract for the sum of two hundred dollars or upwards, and still is so imprisoned or on the limits; or if, in case of such imprisonment, he has escaped out of prison or from custody or from the limits; if he wilfully neglects or refuses to appear on any rule or order requiring his appearance to be examined as to his debts under any statute or law in that behalf; if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or any part of them; if he wilfully neglects or refuses to obey or comply with the order or decree of the Court of Chancery, or of any of the judges thereof, for payment of money; or if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by the act.

If a trader ceases to meet his commercial liabilities generally as they become due, any two or more creditors for sums exceeding in the aggregate $500 may demand an assignment for the benefit of creditors. The debtor, if disputing his obligation to make an assignment, or the right of the creditors to demand it, may by petition appeal to the judge. If the petition be rejected the estate of the debtor becomes liable to compulsory liquidation under the act. But a proceeding to place the estate of an insolvent in compulsory liquidation must be taken within three months next after the act or omission relied upon as subjecting the estate thereto.

In case any creditor in Upper Canada, by affidavit of himself or of any other individual, shows to the satisfaction

of the judge that he is a creditor of the insolvent for a sum of not less than $200, and also shows by the affidavits of two credible persons such facts and circumstances as satisfy the judge that the debtor is insolvent within the meaning of the act, and that his estate has become liable to compulsory liquidation, the judge may order the issue of a writ of attachment against the estate and effects of the insolvent. The sheriff upon receipt of the writ publishes a notice to all persons having in their possession, custody or power any portion of the assets of the insolvent, or in any way indebted to him. The estate and effects are, when seized, to be placed by the sheriff in the custody of the official assignee appointed by the Board of Trade, and if none such, then in the hands of such solvent and responsible person as may be willing to assume the guardianship. It is the duty of the person so placed in possession of the estate and effects to make an inventory. The inventory must be filed in court on the return day of the writ. The insolvent may *within five days from the return day of the writ*, appeal to the judge against it. Immediately upon the expiration of the five days, if no petition be filed, provision is made for a meeting of the creditors. The judge at the meeting, upon the advice of creditors, appoints an assignee. The guardian, upon the appointment of an official assignee, delivers to him the estate and effects attached. The whole of the estate and effects, seized or not seized, vest in the official assignee by virtue of his appointment.

The choice of assignee in case of insolvency is a matter of much moment. Everything in a measure depends upon the choice of an honest, able and discreet man. It is not safe to allow such a selection to depend upon chance. Power is therefore given to the Board of Trade at any place, or the council thereof, to name any number of persons within the county in which the Board of Trade exists, or *within any county adjacent thereto in which there is no* Board of Trade, to be official assignees for the purposes of the act. The persons appointed must give security for the due fulfillment of the duties of the office. It is made the duty of the assignee to call meetings of creditors, whenever required in writing so to do by five creditors, whenever required by the judge so to do, or whenever he shall himself require instructions from the creditors. All powers vested in any insolvent which he might legally execute for his own benefit are vested in the assignee. The assignee may sue for the collection of debts, and under certain circumstances may be sued. If the assignee, after having acted with due diligence, find that debts remain, the attempt to collect which would be more onerous than beneficial to the estate, he may report the same to a meeting of the creditors duly called for the purpose. Such debts may under a given state of circumstances, be sold by auction. The purchaser may sue for them in his own name. So the assignee may sell the real estate of the insolvent, but only after advertisement thereof. If the price offered for real estate be, in the opinion of the assignee, too small, he may withdraw the real estate from sale, and afterwards sell it under such directions as he may receive from the creditors. The sale in Upper Canada is to have no greater effect than if made by a sheriff. Special provision is made in regard to leases. The assignee is made subject to the summary jurisdiction of the court or judge, in the same manner and to the same extent as the ordinary officers of the court. So before dividends declared, the assignee may be removed by the judge upon proof of fraud or dishonesty in the custody or management of the estate, in which case power is vested in the judge to appoint his successor After dividends declared the assignee may be removed by a resolution of the creditors present or represented at a meeting duly called for the purpose, in which event they *have the power of appointing his successor. The remune*ration of the assignee is to be fixed at a meeting of the creditors called for the purpose. If not so fixed before the declaration of a final dividend, it is to be placed in the dividend sheet as a rate not exceeding five per cent. upon cash receipts.

Important as is the service of an able and reliable assignee, no less so is the speedy declaration of dividends. The one is a means to an end, which is the other. Hitherto, dividends under voluntary assignments were so rare as scarcely to be named. Settlement upon his own terms, not dividends according to the nature of his estate, was the main object of an assignee, in days which we hope we can now call bygone. The machinery is at length at hand for enforcing dividends, so long as there is an estate out of which to draw them. Upon the *expiration of two months from the first insertion of the* advertisement giving notice of an assignment, or of the appointment of an official assignee, or as soon as may be after such period, and afterwards from time to time, at intervals of not more than six months, it is made the duty of the assignee to prepare and keep constantly accessible to creditors, accounts and statements of his doings as such assignee, and of the position of the estate. It is also made his duty at similar intervals, to prepare dividends of the estate. In the preparation of the dividend sheet, due regard is to be had to the rank and privilege of every creditor. If the insolvent owe debts both individually and as a member of a copartnership, the claims against him, of course, rank first upon the estate by which the debts they represent were contracted, and only rank upon the other after the creditors of that other have been paid in full. The creditors may allot to the insolvent by way of allow-

ance any sum of money, or any property they they think proper, and the allowance so made must be inserted in the dividend sheet. So costs incurred in suits against the insolvent after due notice of an assignment, or of the issue of a writ of attachment in compulsory liquidation has been given according to the provisions of the act, are to rank upon the estate of the insolvent; clerks and other persons in the employ of the insolvent in and about his business and trade, are privileged for arrears of salary or wages, at the time of the assignment or issue of writ of attachment; but no arrears beyond three months are to be allowed. So soon as the dividend sheet is prepared, notice thereof must be given by advertisement. Dividends not objected to are to be paid after the expiration of six judicial days from the day of the last publication of the advertisement. The assignee may, under certain circumstances, reserve dividends for creditors who have not proved their claims before the declaration of the first dividend; but, if such claims be not filed before the declaration of the last dividend, the dividends reserved become part of the last dividend. Provision is made for the trial, by the assignee, of disputes in regard to dividends. All dividends unclaimed at the time of the discharge of the assignee, are to be left in the bank where deposited for three years. If then unclaimed, they are to be paid over with interest, to the Provincial Government; but if afterwards duly claimed, the Government is required to pay them over, with interest at the rate of three per cent. to the persons entitled thereto. If any balance remain of the estate of an insolvent, after payment in full of all debts due by the insolvent, the balance may be paid over to the insolvent upon his petition to that effect duly notified to the creditors by advertisement, and granted by the judge.

The assignee is not made the sole judge without appeal in matters referable to his determination under the act: there may be an appeal to the judge from the award of the assignee. So, if any of the parties are dissatisfied with the decision of the judge, there may, in Upper Canada, be an appeal to either of the superior courts of common law, or to the Court of Chancery, or to any one of the judges of these courts: the latter appeal is regulated both as to time and mode. So the procedure on the appeal is declared; but we have not space in this review of the act, to dwell upon mere procedure. The costs in appeal are in the discretion of the court or judge to whom the appeal is made.

An Insolvency Act would be incomplete without some legislation against frauds and preferences. Accordingly, we have in this act a declaration that all gratuitous contracts or conveyances without consideration, or with a merely nominal consideration, made by a debtor afterwards becoming insolvent within three months next preceding the date of assignment, or issue of warrant of attachment; and all contracts by which creditors are injured, obstructed or delayed, made by a debtor unable to meet his engagements, and afterwards becoming insolvent, with a person knowing of such inability, or having probable cause for believing such inability to exist, or after such inability is become public and notorious, shall be presumed to be made with intent to defraud creditors. So a contract or conveyance for consideration, by which creditors are injured or obstructed, made by a person unable to meet his engagements, with a person ignorant of such inability, and before it has become public and notorious, but within thirty days next before the execution of the deed of assignment or issue of writ of attachment, is declared voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of the contract, as the court may order. Contracts or conveyances made, and acts done by a debtor, with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done, and intended with the knowledge of the person contracting or acting with the debtor, and which have the effect of impeding, obstructing or delaying the creditors in their remedies, or of injuring them, or any of them, are prohibited, and are null and void, notwithstanding that such contracts, conveyances, or acts be in consideration or in contemplation of marriage. If any sale, deposit, pledge, or transfer, be made by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any goods, effects, or valuable security be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment is declared to be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before the attachment, it shall be presumed to have been so made in contemplation of insolvency. Every payment made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment, by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, is void, and the amount paid may be recovered back by suit, in any competent court, for the benefit of the estate; but if any valuable security be given up in consideration of such payment, such security, or the value thereof, must be restored to the creditor before the return of such payment can be demanded. Any transfer of a debt due by the insolvent, made

within thirty days next previous to the execution of a deed of assignment or the issue of a writ of attachment, or at any time afterwards, to a debtor knowing or having probable cause for believing the insolvent to be unable to meet his engagements, or in contemplation of his insolvency, for the purpose of enabling the debtor to set up by way of compensation or set-off the debt so transferred, is declared to be null and void as regards the estate of the insolvent; and the debt due to the estate of the insolvent is not to be compensated or affected in any manner by a claim so acquired; but the purchaser thereof may rank on the estate in the place and stead of the original creditor.

Deeds of composition are, to a certain extent, favoured by the act. It is declared that a deed of composition and discharge executed by the majority in number of those of the creditors of an insolvent who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the insolvent, subject to be computed in ascertaining such proportion, shall have the same effect with regard to the remainder of his creditors, and be binding to the same extent upon him, and upon them, as if they were also parties to it. Such a deed may be validly made either before, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent; the discharge therein agreed to is to have the same effect as an ordinary discharge obtained as already provided. If the insolvent procures a deed of composition and discharge to be duly executed, and deposits it with the assignee pending the proceedings upon a voluntary assignment or for compulsory liquidation, the assignee, after the period hereinbefore fixed as that after which dividends may be declared has elapsed, must give notice of such deposit by advertisement. If opposition to such composition and discharge be not made by a creditor within six judicial days after the last publication of such notice, by filing with the assignee a declaration in writing that he objects to such composition and discharge, the assignee must act upon the deed of composition and discharge according to its terms. But if opposition be made thereto within the said period, or if made, be not withdrawn, then he must abstain from taking any action upon such deed until the same has been confirmed, as hereinafter mentioned. The consent in writing of the proportion of creditors to the discharge of a debtor after an assignment, or after his estate has been put in compulsory liquidation, absolutely frees and discharges him from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and proveable against his estate, which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent, previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee, whether such debts be exigible or not at the time of his insolvency, and whether direct or indirect. If the holder of any negotiable paper unknown to the insolvent, the insertion of the particulars of such paper in such statement of affairs, with the declaration that the holder thereof is unknown to him, brings the debt represented by such paper, and the holder thereof, within the operation of this section. A discharge under the act is not to operate any change in the liability of any person or company secondarily liable for the debts of the insolvent, either as drawer or endorser of negotiable paper, or as guarantor, surety or otherwise, nor of any partner or other person, liable jointly or severally with the insolvent for any debt; nor is it to affect any mortgage, *hypothèque*, lien, or collateral security held by any creditor as security for any debt thereby discharged. Nor is a discharge under the act to apply, without the express consent of the creditor to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by the act, nor to any debt due as damages for personal wrongs, or as a penalty for any offence of which the insolvent has been convicted, or as a balance of account due by the insolvent as an assignee, tutor, curator, trustee, executor, or public officer; nor shall such debts, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have done, or consented to any act matter or thing under the act; but the creditor of any debt due as a balance of account by the insolvent or assignee, tutor, curator, trustee, executor, or public officer, may claim and accept a dividend therein from the estate, without being in any respect affected by any discharge obtained by the insolvent.

Provisions are made for the confirmation of the discharge, or for contesting it, which it is unnecessary for us here to consider in detail. Every discharge or composition, or confirmation of any discharge or composition, obtained by fraud, or fraudulent preference, or by means of the consent of any creditor, procured by the payment to such of any valuable consideration for the consent, is declared null and void.

One thing more is necessary to the completeness of the act, and that is some provision for the examination of the insolvent and compulsory disclosure of property and effects whenever and so often as requisite, to the winding up of the estate. We are glad to find that the legislature has not been unmindful of this requirement. Immediately upon the expiry of the period of two months from the first

insertion of the advertisement giving notice of an assignment, or of the appointment of an official assignee, it is made the duty of the assignee to call a meeting, by advertisement, of the creditors, for the public examination of the insolvent, and to summon him to attend the meeting. At the meeting, the insolvent may be examined on oath, sworn before the assignee, or on behalf of any creditor present, in his turn; the examination is to be reduced to writing by the assignee, and signed by the insolvent. Any questions put to the insolvent at the meeting, which he shall answer evasively, or refuse to answer, must also be written in such examination, with the replies made by the insolvent to the questions. The insolvent must sign the examination. If he refuse to sign it, his refusal is to be entered at the foot of the examination, with the reasons of such refusal, if any, as given by himself. The examination is to be attested by the assignee, and filed in the office of the court. The insolvent may also be from time to time examined as to his estate and effects upon oath, before the judge, by the assignee or by any creditor, upon an order from the judge, obtained without notice to the insolvent, upon petition, setting forth satisfactory reasons for such order. He may also be examined in like manner upon a *subpœna* issued as of course without such order, in any action in which a writ of attachment has been issued against his estate and effects; which *subpœna* may be procured by the plaintiff, or by any creditor intervening in the action for that purpose, or by the assignee. The insolvent may also be examined by the assignee or by any creditor, on the application of the insolvent for a discharge, or for the confirmation or annulling of a discharge, at any stage of such proceeding or upon any petition to set aside an attachment in the proceedings for the compulsory liquidation of his estate. Any other person who is believed to possess information respecting the estate or effects of the insolvent, may also be from time to time examined before the judge upon oath, as to such estate or effects, upon an order from the judge to that effect, which order the judge may grant upon petition, setting forth satisfactory reasons for such order, without notice to the insolvent or to the person to be so examined. The insolvent must attend all meetings of his creditors, when summoned so to do by the assignee, and must answer all questions that may be put to him at such meetings touching his business, and touching his estate and effects; and for every such attendance, he is to be paid such sum as shall be ordered at such meeting, but not less than one dollar. Any person summoned for examination or under examination, is made subject to proceedings and punishments similar to those which may be taken against or inflicted upon ordinary witnesses. On application, the judge may at his discretion order an allowance to be made to persons so examined, of a like amount to that allowed to witnesses in civil cases, and order them to be paid such allowance out of the estate or otherwise.

We have now, we believe, stated briefly all the provisions of the act necessary to a fair understanding of it We have omitted all reference to mere procedure. On a future occasion, that may form the subject of some further remarks under the act. There is not much in the act with which we are at present disposed to find fault. But one thing we cannot pass without objection. The burthen of the administration of the system organized by the act is thrown upon county judges in Upper Canada. This is a great mistake. These judges have already enough to do in discharging the duties strictly appertaining to the administration of their high office, and with which they are more or less familiar, without throwing upon them the working of a new system, alien to the duties properly appertaining to their office and the success of which must in a great measure depend upon its uniform and effective administration. This could have been much better done by a tribunal or tribunals created for the purpose. Judges so appointed would have both time and inclination to study and to work out the provisions of the new act. The result would be a vigorous and a uniform system of administration, by men whose hearts were in the work. We frankly admit that we scarcely expect such a result under the present system. Judges are only men. The human machine is capable of only a limited amount of work. If more work be given to any one man than nature ever designed him or any other man to perform, some of his work must be inartificially done or wholly neglected. The county judges, before the passing of this act, had work enough for ordinary men. The addition of work designed by this act will, we fear, be too much for them, and the result something like what we have depicted. Why was it that a new tribunal or new tribunals were not created?—Because of the expense. Now, what is worth doing at all is worth doing well. This cry of expense is not at all times to be heeded. It is often raised by men who have no ideas beyond the dread of expenditure—by men who know as little of the requirements of a good insolvency law as of the administration of justice in Timbuctoo. It is often the cry of the demagogue—a cry which too often causes statesmen to quail. We believe in moderation in all things; but we do not believe in imperilling the success *of a measure so much needed as the Insolvency Law*, through fear of the expenditure of the money necessary to provide the machinery for its due administration. County judges are too much in the nature of legislative conveniencies: whenever a tribunal is required, which the legisla

ture have not the courage to create, it is become the fashion to substitute county judges. We protest against such legislation; its limit has long since been reached: and the sooner the legislature is made to know and to feel that such is the case, the better for the courts, the judges, and the country.

LAW SOCIETY OF UPPER CANADA.

Trinity Term, 28th Victoria.

CALLS TO THE BAR.

John Coyne, Brampton; E. J. Denroche, LL.B., Ingersoll; J. F. Dennistown, Peterborough; Lyman English, LL.B., Oshawa; George M. Evans, M.A., Toronto; J. E. Farewell, LL.B., Oshawa; The Honorable M. H. Foley, Guelph; W. W. Hamilton, M.A., Picton; W. J. Hayward, Belleville; John Idington, LL.B., Galt; Beverley Jones, LL.B., Napanee; Wm. Laidlaw, Milton; H. H. Loucks, Peterborough; T. F. Nellis, Woodstock; George Nicol, Toronto.

ATTORNEYS ADMITTED.

Henry M. Andrews, Berlin; Wm. Boys, LLB., Barrie; S. C. B. Deane, Port Hope; B. L. Doyle, Goderich; A. T. Drummond, LL.B., London; Hubert L. Ebbels, Toronto; John Idington, LL.B., Galt; T. T. Irving, London; Beverley Jones, B.A., Napanee; W. C. Loscombe, Bowmanville; H. H. Loucks, Peterborough; Gordon McLeod, Hamilton; Robert McGee, B.A., Waterdown; A. G. McMillan, Toronto; Lewis Moore, Goderich; James Morrow, Barrie; T. F. Nellis, Woodstock; F. Tyrrell, Morrisburg.

APPOINTMENTS.

Salter J. Vankoughnet, Esquire, Barrister-at-Law, was on Saturday, 27th August last, at a very full meeting of Benchers in convocation assembled at Osgoode Hall, elected Reporter to the Court of Common Pleas, in the room of E. C. Jones, Esquire, resigned. It is said that the Judges of the Court have not as yet approved of the appointment.

Thomas Moss, Esquire, Barrister-at-Law, was on same day appointed Equity Reader, in the room of Adam Crooks, Esquire, Q.C., resigned.

JUDGMENT DAYS.

QUEEN'S BENCH.

Monday, 19th September next, 10 o'clock, A. M.
Saturday, 24th " " 2 o'clock P. M.

COMMON PLEAS.

Monday, 19th September next, 2 o'clock P. M.
Saturday, 24th " " 10 o'clock A. M.

JUDGMENTS.

ERROR AND APPEAL.

Monday, 22nd August, 1864.

Beatty and the Bank of Upper Canada.—Appeal from the Court of Chancery allowed, and decree of the court below varied.

Smith and Harvey.—Appeal from the Court of Chancery allowed and bill dismissed. (The Chancellor and Vice-Chancellor Spragge dissenting.)

Hopkins and the Bank of Montreal.—Appeal from the Court of Chancery allowed. (The Chancellor dissenting.)

Sheriff and Holcomb—Appeal from the Court of Common Pleas dismissed with costs.

QUEEN'S BENCH.

Saturday, 27th August, 1864.

Gossage v. *The Canada Landed Credit Company.*—Postea to plaintiff.

Clarke v. *Stephenson.*—Rule absolute for new trial without costs (Hagarty, J., dissenting).

In the matter of the Corporation of the County of Waterloo and the Corporation of the County of Brant.—Award set aside.

Ham v. *Lasher et al.*—Rule *nisi* discharged.

AUTUMN ASSIZES, 1864.

EASTERN CIRCUIT.

THE HON. CHIEF JUSTICE RICHARDS.

Kingston	Thursday	29th Sept.
Brockville	Monday	10th Oct.
Perth	Thursday	13th "
Ottawa	Wednesday	19th "
L'Orignal	Wednesday	26th "
Cornwall	Monday	31st "

MIDLAND CIRCUIT.

THE HON. MR. JUSTICE MORRISON.

Whitby	Monday	10th Oct.
Cobourg	Monday	17th "
Belleville	Monday	24th "
Picton	Monday	31st "
Lindsay	Tuesday	8th Nov.
Peterborough	Monday	14th "

HOME CIRCUIT.

THE HON. MR. JUSTICE ADAM WILSON.

Owen Sound	Wednesday	28th Sept.
Milton	Monday	3rd Oct.
Barrie	Monday	10th "
Hamilton	Monday	17th "
Welland	Thursday	27th "
Niagara	Monday	31st "

OXFORD CIRCUIT.

THE HON. THE CHIEF JUSTICE OF UPPER CANADA.

Cayuga	Monday	26th Sept.
Brantford	Thursday	29th "
Guelph	Monday	10th Oct.
Berlin	Friday	14th "
Stratford	Wednesday	19th "
Woodstock	Tuesday	25th "
Simcoe	Monday	31st "

WESTERN CIRCUIT.

THE HON. MR. JUSTICE HAGARTY.

Goderich	Monday	26th Sept.
Sarnia	Monday	3rd Oct.
Sandwich	Thursday	6th "
Chatham	Tuesday	11th "
St. Thomas	Wednesday	26th "
London	Monday	31st "

CITY OF TORONTO AND COUNTIES OF YORK AND PEEL.

THE HON. MR. JUSTICE JOHN WILSON.

City of Toronto	Monday	26th Sept
York and Peel	Monday	10th Oct.

IN MEMORIAM.

A well merited tribute of respect has been recently paid to the memory of the late William Alexander Campbell, an old member of the profession, and formerly Clerk of Assize at Toronto, in the erection of a handsome tombstone over his grave in St. James's Cemetry.

To render the tribute as general as possible, the subscription was purposely placed at a small sum and was shared by almost all the local members of the profession; and we are informed by the committee who took the kind work in hand, that they found their task a very easy one, the immediate and universal reply to their application being—"Most cheerfully will I subscribe to mark poor Campbell's grave," with the addition, in many cases, "I should have been pained had I not been asked."

The following is the inscription:

Sacred

TO THE MEMORY OF

WILLIAM ALEXANDER CAMPBELL,

BARRISTER-AT-LAW,

GRANDSON OF THE LATE SIR WILLIAM CAMPBELL, KNIGHT,

FORMERLY CHIEF JUSTICE OF UPPER CANADA.

HE HELD FOR THE LONG PERIOD OF THIRTY-SIX YEARS THE OFFICE OF

MARSHALL AND CLERK OF ASSIZE, AT TORONTO,

AN APPOINTMENT WHICH BROUGHT HIM INTO INTIMATE ACQUAINTANCE WITH

THE TORONTO BAR.

WHO, AS A MARK OF AFFECTIONATE REMEMBRANCE,

HAVE PLACED THIS STONE TO MARK HIS RESTING PLACE.

He died at Toronto 16th May, 1861, aged 61 years.

27 & 28 VICT., CAP. 25.

An Act to amend section forty-one of chapter twenty-four of the Consolidated Statutes for Upper Canada, relating to arrest and imprisonment for debt.

(Assented to, June 30th, 1864.)

Whereas it is expedient to amend the forty-first section of chapter twenty-four of Consolidated Statutes for Upper Canada, relating to arrest and imprisonment for debt. Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. The words "In case any party has obtained a judgment *in any Court in Upper Canada*," as used in section forty-one of chapter twenty-four of the Consolidated Statutes for Upper Canada, shall, from and after the coming into force of this Act, for all the purposes of the said cited Act, be taken to mean, as well a party defendant as a party plaintiff, and to extend to all judgments, whatever the cause of action for which the same may have been or may be recovered.

2. This Act shall come into force upon, from and after the first day of August next.

27 & 28 VICT., CAP. 29.

An Act to amend the third section of the eighty-eighth chapter of the Consolidated Statutes for Upper Canada.

(Assented to, June 30th, 1864.)

Whereas it is expedient to amend the third section of the eighty-eighth chapter of the Consolidated Statutes for Upper Canada, intituled *An Act respecting the limitation of Actions and Suits relating to real property, and the time of prescription in certain cases*:—Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. The third section of the said eighty-eighth chapter of the Consolidated Statutes for Upper Canada shall be so amended as to read as follows:—

"3. In the case of lands granted by the Crown of which the grantee, his heir or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shewn that such grantee or such person claiming under him while entitled to the lands had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained: Provided always, that no such action shall be brought or entry made after forty years from the time such possession was taken as aforesaid."

2. This Act shall take effect from the first day of January, in the year of Our Lord one thousand eight hundred and sixty-five.

3. Provided always, that nothing herein contained shall be construed to affect any suit or action actually pending at the time of the passing of this Act.

4. This Act shall apply to Upper Canada only.

27 & 28 VICT., CAP. 30.

An Act to afford a more expeditious remedy as regards Tenants overholding wrongfully in Upper Canada.

(Assented to, June 30th, 1864.)

Whereas it is expedient to provide a less expensive and more expeditious mode of proceeding against tenants overholding wrongfully, than is provided by chapter twenty-seven of the Consolidated Statutes for Upper Canada: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. In case a tenant, after the expiration of his term (whether the same was created by writing or parol) wrongfully refuses, upon demand made in writing, to go out of possession of the land demised to him, his landlord, or the agent of his landlord, may apply to the County Judge of the county or union of counties in which such land lies, in term or in vacation and wherever such judge may then be, setting forth, on affidavit, the terms of the demise, if by parol, and annexing a copy of *the instrument containing such demise, if in writing, and also* a copy of the demand made for the delivering up of possession, and stating also the refusal of the tenant to go out of possession, and the reason given for such refusal (if any were given) adding such explanation in regard to the ground of refusal, as the truth of the case may require.

2. If upon such affidavit it appears to such county judge that the tenant wrongfully holds over without colour of right, such judge shall appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term which has expired, and whether he does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise.

3. Notice in writing of the time and place so appointed by the county judge for holding such inquiry, shall be by the landlord served upon the tenant, or left at his place of abode

at least three days before the day so appointed, if the place so appointed be not more than twenty miles from the tenant's place of abode, and one in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles, to which notice shall be annexed a copy of the affidavit on which the appointment was obtained, and of the papers attached thereto.

4. If at the time and place appointed as aforesaid, the tenant having been duly notified as above provided, fails to appear, the county judge may issue a precept to the sheriff, in the Queen's name, commanding him forthwith to place the landlord in possession of the premises in question; but if the tenant appears at such time and place the county judge shall, in a summary manner, hear the parties and examine into the matter, and shall administer an oath or affirmation to the witnesses adduced by either party, and shall examine them; and if after such hearing and examination it appears to the county judge that the case is clearly one coming under the true intent and meaning of the first section of this Act, then shall he issu such precept as aforesaid to the sheriff, commanding him to place the landlord in possession of the premises; otherwise he shall dismiss the case; and the proceedings in any such case shall form part of the records of the county court.

5. When any such precept has been issued by a county judge, either of the superior courts of common law for Upper Canada, may, on motion, before the end of the second term after the issue of such precept, command such county judge to send up the proceedings and evidence in the case to such superior court, certified under his hand and seal, and may examine into the proceedings, and if they find cause may set aside the same, and may, if necessary, issue a precept to the sheriff commanding him to restore the tenant to his possession, in order that the question of right, if any appear, may be tried as in other cases of ejectment.

6: The judges of the superior courts of common law for Upper Canada may, from time to time, make such orders respecting costs in cases under this Act as to them may seem just; and the county judge before whom any such case is brought may, in his discretion, award costs therein, according to any such order then in force, and if no such order is in force, reasonable costs, in his discretion, to the party entitled thereto; and execution may issue out of the county court for such costs as in other cases in the county court.

7. The county judge may cause any person to be summoned as a witness to attend before him in any such case, in like manner as witnesses are summoned in other cases in the county court, and under like penalties for non-attendance, or refusing to answer, or willfully swearing or affirming falsely in such case.

8. Nothing herein contained shall prevent any landlord from proceeding under the sixty-third and ten next following sections of the Act respecting ejectment, chapter twenty-seven of the Consolidated Statutes for Upper Canada, if he thinks it advisable to proceed under the said sections, or shall in any way affect the powers of any judge or judges of the superior courts under the same, or shall prejudice or affect any other right of action or remedy which landlords may possess in any of the cases herein provided for.

9. This Act is a Public Act, and shall apply to Upper Canada only.

27 & 28 VICT., CAP. 34.

An Act to extend the Jurisdiction of Police Magistrates in Towns in Upper Canada.

(Assented to, June 30th, 1864.)

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. From and after the passing of this Act, the Police Magistrate in any Town in Upper Canada shall have the same summary jurisdiction and powers, and use the like proceedings, in all cases as the Recorders in cities in Upper Canada under the provisions of the Act, chapter one hundred and five of the Consolidated Statutes of Upper Canada, intituled "An Act respecting the prompt and summary administration of Criminal Justice in certain cases.

27 & 28 VICT., CAP. 36.

An Act to compel Informers suing for Penalties, in certain cases, to give security for costs.

(Assented to, June 30th, 1864.)

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. If any action or suit shall be brought or commenced, after the passing of this Act, in which action or suit the Plaintiff sues as an Informer, or seeks to recover any penalty given to any informer or person or persons who shall sue for the same as aforesaid, under any Statute or Law, in which any penalty or penalties are or shall be given to any person or persons who shall sue for the same, either for his or their sole benefit, for for the benefit of the Crown, or partly for his or their benefit and partly for the benefit of the Crown, it shall and may be lawful to and for the person or persons so sued, or his or their agent or agents, attorney or attorneys, to apply to the Court in which such action or suit may be instituted or pending, for security for costs, upon an affidavit made by the defendant, shewing to the Court that such action or suit is brought to recover a penalty, and that in the belief of the deponent, the plaintiff or informer is not possessed of property sufficient to answer the costs of the suit in case a verdict shall be given or judgment rendered in favor of the defendant, and that he (the said defendant) has a good defence to such action or suit upon the merits, as he is advised and believes, and it shall be lawful for the Judge or Judges of the said Court, in his or their discretion, to make an order that the plaintiff or plaintiffs, informer or informers, in any such suit or action, shall give security for the costs to be incurred in such suit or action, in the same manner and in accordance with the practice in cases where the plaintiff or plaintiffs reside out of the Province, and such order shall be a stay of the proceedings in the case, until the proper security is given as aforesaid.

2. This Act shall apply to Upper Canada only.

27 & 28 VICT., CAP. 37.

An Act to amend chapter fifty-four of the Consolidated Statutes for Upper Canada, intituled: An Act respecting the Municipal Institutions of Upper Canada.

(Assented to, June 30th, 1864.)

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. The following proviso is added to and shall be read and construed as if it originally formed a part of the fifty-first section of the fifty-fourth chapter of the Consolidated Statutes for Upper Canada, intituled: *An Act respecting the Municipal Institutions of Upper Canada*:

"Provided always, that nothing herein contained shall prevent the sheriff of any such senior county from proceeding upon, and completing the execution or service within the junior county of any writ of mesne or final process in his hands at the time of such separation, or of any renewal thereof or of any subsequent or supplementary writ in the same cause, or in the case of executions against land, from executing all necessary deeds and conveyances relating to the same; and the acts of all such sheriffs in that behalf shall be and be held and construed to be legal and valid in the same manner and to the same extent as if no such separation had taken place, but no further."

2. The following proviso is added to and shall form part of the seventy-third section of the said Act

"Provided always, that no person shall be held to be disqualified from being elected a member of the council of any municipal corporation, by reason of his being a shareholder in any incorporated company, having dealings or contracts with the council of such municipal corporation."

SELECTIONS.

LAW REPORTING.

The Report of the Committee of the Bar on Law Reporting is now before the profession, and the scheme which was agreed to by the majority has to be considered before the adjourned meeting of the Bar in November. The scheme proposed is simply for an amalgamation of the existing reports, and their publication in future under the control of a council, having the management of the financial department, and the selecting of a competent staff of editors and reporters.

Should this proposition bring a sufficient subscription list, one great step would be made towards an improvement on the present costly and unsatisfactory mode of preparing our law reports. The Committee, however, have not at present recommended any alteration of our *system of law reporting;* which leaves the rules of law laid down in Westminster Hall to be collected only from notes, not only unauthentic, but confined to those matters which appeared to the reporter at the moment of taking them adapted for publication, affording no guarantee against the omission altogether of decisions of the greatest importance, but which the carelessness or want of judgment of the reporter may have kept out of his note-book.

The serious evils so often described as resulting from these defects of our law reporting system, may, for anything in the proposed scheme, remain unabated; and it is certainly remarkable that the Committee, with ample material before them, did not deal with such an important part of the subject referred to them.

The Committee, we are told, before entering upon the consideration of any scheme of amendment to be suggested by any of its members, resolved to issue a circular to the profession inviting observations and suggestions; such circular was as follows:—"The Committee are anxious, in order the better to discharge the duty entrusted to them, to collect the opinion of the profession upon the subject of LAW REPORTING; and for that purpose the Committee are desirous of receiving any observations which you, either alone or in conjunction with others, may be so obliging as to make upon what, in your opinion, are the advantages or disadvantages of the present system, and also any suggestions, either as to the principle or details of any amendment of the existing system which you may think desirable."

This circular was sent to the judges, and extensively distributed among both branches of the profession. In reply, the Committee received numerous and valuable observations and suggestions. Although these exhibited differences of opinion as to the proper mode of amending the existing system of law reporting, they exhibited, at the same time, a very general desire for amendment; and the Committee have been greatly assisted in the discharge of their duties, by the observations and suggestions thus received.

The Committee, also, before entering upon the consideration of any plan of their own, appointed a Sub-Committee (consisting of the Hon. George Denman, Q. C., Mr. Serjeant Pulling, Mr. Henry Matthews, Mr. Quain, and Mr. Westlake) to inquire into the mode of recording and reporting judicial decisions in the various European States, and in the United States of America.

The Sub-Committee undertook these duties, and reported as follows:—"The Sub-Committee thus appointed have received valuable communications from a number of competent foreign jurists, and other gentlemen professionally or officially connected with the chief tribunals of the countries embraced in the inquiry, and thus conversant with the subject-matter of the reference.

The Sub-Committee have by this means obtained information which they recommend to the Committee as worthy of their attention.

To begin with the system adopted in France. Every judicial decision is required to be in writing, and to be *motivé, i.e.*, to disclose on the face of it the grounds and reasons on which it is founded; and when the signature of the President of the Tribunal has been affixed to those solemn judgments, it is the business of the *Greffier* to see them entered on the register of the courts, and only one version of them can therefore ever legally appear.

The records of the tribunals thus containing an authentic version of every decision, the legal profession and the public have at all times access to the register to ascertain what has from time to time been decided, and it is competent for any one to make from the register a selection of such decisions for publication. The collections of decisions by Sirey and Dalloz, and Ledru Rollin, have been thus prepared. Though these works are deservedly held in esteem, they are not official publications, any more than any series of English law reports.

In Norway and Sweden the judgments of the ordinary tribunals are always given in writing, and in every case entered on the protocols of the courts; and in the supreme courts of appeal, when the votes of the judges are given separately, it is the business of the registrar of the court to enter on the records of the court, not only the final judgment or conclusion, but the ground and reasons of the decision of each judge. Here, as in France, therefore, the records of the courts supply ample materials for the preparation of books of reports or collections of decisions, and such publications are left wholly to free trade.

In Denmark, though it is competent for any one to take down, print and publish reports of cases and decisions of which he has himself taken notes, the only authentic version of judicial proceedings is the *dombistocol* under the hand of the judge; containing not only the conclusion itself to which the court has arrived, but the facts and reasons and grounds of the decision; and from these, selections of cases which may serve for precedents are made by the direction of the courts, though it would seem that other selections made by competent private publishers would be received with equal attention.

In Italy all judicial decisions, whether civil or criminal, must be read aloud in open court, with the grounds in fact or law set out at length; and authentic minutes of the judicial opinions so pronounced are duly entered in the register of the court; and compilations of the principal decisions of the four superior courts of cassation at Milan, Florence, Naples, and Palermo are published by voluntary editors, whose province it is to make a proper selection of cases for publication, to give an analysis of them in the head and marginal notes, and to explain or illustrate them in other annotations. These compilations only so far receive the protection of the State that a certain number of copies are subscribed for out of the public treasury. The compilation entitled "La Legge Romana" is a journal of judicial and administrative proceedings for the Kingdom of Italy, published at short intervals (the judicial three times a week) and containing in an abridged form notes taken from the minutes in the registers of all the important cases disposed of.

In the United States of America there is no law requiring either written decisions or a record or register of the grounds and reasons of the decisions; but the judgments are generally in writing, and in most of the States, and in the Supreme Court of the United States, there are now official reporters, remunerated by salary as well as by a portion of the profits

of the publications. These reporters are generally appointed by the State, and are always removable at the discretion of the appointing power, but enjoy in the performance of their duties the same freedom as the authors of our own law reports. In the superior court of the City of New York, the judges publish the reports of their own decisions, choosing an editor from among themselves. As a rule, the official reports omit the arguments of counsel, and give only a narrative of the facts and the copy of the written judgments. The official publication rarely appears for many months after the judgment is pronounced, and until that time publications called the *Law Reporter* and *Law Journal* are referred to, but do not profess to give more than the most important cases. No suggestion is made that the official reporters are less efficient or more dilatory than their predecessors under the voluntary system, nor is it found that they are subject to any improper influence in the discharge of their duties; and in the State of New York the official reports are required by law to be sold at a much smaller price."

The Committee, with the information they now had before them, proceeded to consider proposals for amendmen..

The first proposal discussed by the Committee was a joint proposal by Mr. Serjeant Pulling, Mr. Joshua Williams, and Mr. Westlake, and was as follows:—"The present system has arisen from the default of proper records of their own proceedings being kept by the courts. The privilege which the Bar has of reporting comes to this, that any barrister may inform the court of that which the court might much better know from its own records. No remedy appears to us sufficient which does not strike at the root of the evil. It would be desirable that all judgments should be written; but this may be thought impracticable. We therefore propose as follows: —"It should be the duty of the registrar, in all cases in which judicial opinions are pronounced, to record the names of the parties, and of their counsel and attorneys or solicitors, the authorities cited, the judicial opinion or opinions delivered, and the formal judgment, order or decree; also the substance of the pleadings and the case, and the points relied upon by counsel, wherever a mere transcript of the judicial opinions actually delivered did not render any other summary of the case, pleading and points unnecessary.

Each registrar should be assisted by one or more short-hand writers, whose duty it should be to take down all remarks of the judges, especially their judgments, and any remarks by counsel which may be necessary to render them intelligible.

The short-hand writers should be allowed to furnish notes to applicants for their own profit.

The short-hand writer's notes should be written out as soon as possible, and furnished to the registrar.

It should be the duty of the registrar, from these notes and his own, with the assistance of the judges, the other officers of the court, and the counsel and attorneys or solicitors employed, to prepare such record of the case as aforesaid.

This record should be printed as soon as possible by the Queen's printers, on paper of a given shape, each cause being on separate paper, and transactions of each day being printed within a week at furthest.

The records so printed should be published and sold at a low price, with liberty to any person to reprint them.

The record so made should be amended by the court on sufficient evidence of its inaccuracy, and should be evidence in the same manner as the records of the courts now are.

All printed pleadings and evidence should be on paper of the same size and shape with that of the records, so that the printed documents relating to each cause might be bound up as these relating to Privy Council causes now are in Lincoln's Inn Library; and copies of all such printed documents should be furnished to the libraries of the Inns of Court and the Incorporated Law Society.

If a ministry of justice should be established, which we think very desirable, it might be charged with the preparation of an annual or semi-annual digest, and with supplying marginal notes to the records of cases, but so that such records might also be bought without such notes by those who might think it important to get them sooner.

Mr. Joshua Williams has, since the presentation of the Report of the Committee, given his own views on the subject as follows:—"I think it is due to the Bar that I should state my reasons for not concurring in the Report of the Committee on Law Reporting, of which I was nominated a member. The joint proposal of Mr. Serjeant Pulling, Mr. Westlake, and myself, mentioned in the Report, does not in every particular represent my views. I agreed to some alterations for the purpose of securing the co-operation of these gentlemen.

It appears to me that the essence of all that is practicable by way of amendment of the present system of law reporting is comprised in the three following propositions:—

1. That all judgments of the superior courts, should, as far as practicable, be written.
2. That all judgments of the superior courts, not committed to writing before delivery, should be committed to writing under the authority of the court as soon as possible after delivery.
3. That access to all the judgments of the superior courts should be afforded to every member of the profession as speedily and cheaply as possible.

I moved resolutions to this effect before the Committee, but the first thing being negatived, I withdrew the others.

The judgments of the courts make the law. This alone is a sufficient reason why their preservation should not be left, as at present, to the care of any reporter who may chance to be present.

Accuracy is evidently the first requisite. To secure this the best means should be adopted. Writing evidently secures accuracy better than speaking. But if a judgment must needs be spoken, a report of it, made by a practical short-hand writer and perused and signed by the judge, appears to me to be the next best means of securing accuracy.

Speedy and cheap access to the judgments when once they are accurately recorded, is evidently best obtained by their being printed as soon as possible, and published at the lowest price that will cover the expense of their publication.

Reporting as now used is a complex operation. It comprises an accurate statement of the judgment so far as the reporter's means and opportunities may allow; but it includes also selecting, digesting, and abstracting, so as to present in a readable form the decisions of such cases as the reporter thinks worthy of publication.

The great mass of materials is an evil that can never be overcome. No one can prevent two persons from going to law about any matter whatever; and, if they do, a decision more or less valuable must be the result.

I think that the present reporters exercise functions which ought to be separated. So far as they aim merely at an accurate report of the judgment, their functions appear to me to be such as would be more properly discharged by an official person. So far as they select, digest, and abstract, so far, I think, should their duties be open to competition. The records which form the sources of history are officially preserved; but history itself is written by individuals, whose success is proportioned to the ability they display in selecting and digesting.

The scheme recommended by the Committee proposes to unite functions which, I think, should be kept separate. The proposed incorporation of a new body by Letters Patent or Act of Parliament appears to me to involve a constitutional change far too important for the evils complained of. But my main objection is, that it does not strike at the root of the evil, which lies in the want of an accurate official record of every judgment pronounced by the courts."

It only remains to add that were the question now entertained of securing an official record of every judgment pronounced by the courts, many of the difficulties suggested to the proposition will be found to be more fanciful than real.

1. The annual surplus of the fees paid by suitors, after defraying all other charges, would suffice to cover, and be legitimately applicable to the cost of competent recorders or registrars of decisions, and indeed in the common law courts the constant presence of such an officer would serve in lieu of the attendance of the masters, so as to reserve the latter for their more urgent business out of court. 2. The services of short-hand writers could be secured at a very inconsiderable cost, if they were allowed also to supply copies or extracts from their notes for their own profit as at present. 3. If the books of the court contained such an accurate record of every judgment the business of subsequent publication could safely be left to free trade, which would soon supply the best selections at the minimum cost. The record of the decision would be authentic and accessible to all. The profitable work of publishing selections of cases with head and marginal notes and comments showing the principles which any decided case establishes, would not fail to find competent editors and ready publishers.—*Law Magazine and Law Review.*

DEMAND BEFORE SUIT.

The principles which govern the question of a demand before suit are not, we believe, clearly stated and collected together in any one work of recent date, and we presume, therefore, that an attempt of our own to reduce the decisions to the form of a series of rules upon the subject will be of some little service to our readers.

Our present article will be confined to the subject of a demand for the performance of contracts, leaving the necessity of a demand, before bringing an action upon a wrong, for future consideration.

As we understand the rules which govern the subject of demand before suit in cases of contract, they are as follows:

1. Where a party has agreed to perform any act other than the mere payment of money, he is not bound to perform without a demand, unless a time and place are fixed for performance, or in some other way a contrary intention is manifested. (*Boutwell* v. *O'Keefe*, 32 Barb. 634; *Moore* v. *Hudson River R. R. Co.*, 12 Barb. 156; *Lutweller* v. *Linnell*, Id. 612; *Lobdell* v. *Hopkins*, 5 Cow. 518; *Connolly* v. *Pierce*, 7 Wend. 129; *Bach* v. *Owen*, 5 T. R. 409.)

2. Where a party agrees to pay money, he is bound to pay without demand, unless a contrary intention is manifested. (*Lake Ontario, &c., R. R.* v. *Mason*, 16 N. Y. 364; *Gibbs* v. *Southam*, 5 Barn. & Ad. 911.)

3. Where one agrees to pay money in satisfaction of his own debt, even "on demand," the commencement of an action is a sufficient demand. (*Howland* v. *Edmonds*, 24 N. Y. 307; *Fairchild* v. *Ogdensburgh, &c., R. R. Co.*, 15 Id. 337; *Wenman* v. *Mohawk Ins. Co.*, 13 Wend. 267; *Waters* v. *Thanet*, 2 Q. B. 757: *Pierce* v. *Fotheryill*, 2 Bing. N. C. 167; 2 Scott, 334; *Norton* v. *Ellam*, 2 M. & W. 461: *Rumball* v. *Ball*, 10 Mod. 38.) But if the money is not payable until a certain time after demand, a demand must, of course, be made at that length of time before suit. (*Thorpe* v. *Booth*, 1 Ry. & Moo. 368; approved, *Howland* v. *Edmonds*; *Wenman* v. *Mohawk Ins. Co.*, *supra.*)

4. Where one agrees to pay the debt of another "on demand," a demand must be made before suit. (*Nelson* v. *Bostwick*, 5 Hill, 37; *Douglass* v. *Rathbone*, Id. 143; *Birks* v. *Trippet*, 1 Saund., 33 b.; see *Carter* v. *King*, 3 Campb., 459.)

5. Where one agrees in the alternative, to do a certain act, or pay a certain sum, a demand must be made before suit. (*Buks* v. *Trippet*, 1 Saund., 33 b).

6. Where one receives money or any other thing for the use of another, the latter must demand payment before suit *Reina* v. *Cross*, 6 Cal. 31: see *Phelps* v. *Bostwick*, 22 Barb., 314; *Halden* or *Walden* v. *Crafts*, 4 E. D. Smith, 490; 2 Abb., 301; *Baird* v. *Walker*, 12 Barb., 298; *Cooley* v. *Betts*, 24 Wend., 203; *Ferris* v. *Paris*, 10 Johns., 285; *Beardslee* v. *Richardson*, 11 Id. 25; *Brown* v. *Cook*, 9 Johns., 361; *Bushnell* v. *M'Cauley*, 7 Cal. 422; *Topham* v. *Braddick*, 1 Taunt., 572), unless the former has agreed to pay over without waiting for a demand, or is bound by usage of his business to do so (see *Lillie* v. *Hoyt*, 5 Hill, 396), or has, in violation of a duty resting upon him, concealed from the person entitled to such money the fact of its receipt (see *Stacy* v. *Graham*, 14 N. Y. [4 Kern.] 497), or has obtained it from its owner in some illegal manner (*Ruckman* v. *Pitcher*, 1 N. Y. [1 Comst.] 412), or by a mistake on the part of the owner (*Utica Bank* v. *Van Gieson*, 18 Johns., 485) of which the receiver was aware (see *Kelly* v. *Solari*, 9 M. & W., 58).

7. Where an obligation is created solely by implication of law, no demand of performance is necessary (see *Ruckman* v. *Pitcher*, 1 N. Y. [1 Comst.] 413; *Moss* v. *Shannon*, 1 Hilt., 175).

The demand is waived by a positive refusal to perform before any demand is made (*Carpenter* v. *Brown*, 6 Barb., 147; *Driggs* v. *Dwight*, 17 Wend., 71), or by a refusal to perform except on unwarrantable conditions (*Rider* v. *Pond*, 19 N. Y. 262). And it is not necessary to be made if the debtor has put it out of his own power to perform (*Sharp* v. *Whipple*, 1 Bos., 268; *Schroeder* v. *Hudson River R. R. Co.*, 5 Duer, 55, 62; *Clark* v. *Crandall*, 3 Barb., 612; *McNish* v. *Coon*, 13 Wend., 26; *Delamater* v. *Miller*, 1 Cow. 75; *Lovelock* v. *Franklyn*, 8 Q. B., 378; *Short*, v. *Stone* Id. 469; *Caines* v. *Smith*, 15 M. & W., 190; *Bowdell* v. *Parsons*, 10 East, 361).

When a demand is necessary to be pleaded, it should be stated with reasonable particularity (*Carpenter* v. *Brown*, 6 Barb. 147; *Bush* v. *Stevens*, 24 Wend., 256; *Bach* v. *Owen*, 5 T. R. 409). If the defendant had an option to perform either of two acts, the complaint must aver a demand for the performance of one or the other at his option, and not merely a demand for the performance of one only (*Lutweller* v. *Linnell*, 12 Barb. 512).

Where a demand has not actually been made, but has been waived or excused, the facts which justify its omission must be pleaded, and not a demand (*Garvey* v. *Fowler*, 4 Sandf., 665). For evidence in excuse of a demand will not be admitted under an averment of an actual demand (Ib.). If the omission of a demand is excused by a refusal of the defendant before the time at which performance is due, it must be alleged that such refusal was addressed to the plaintiff (*Traver* v. *Halsted*, 28 Wend. 66).—*N. Y. Transcript.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

NEW DIVISION COURTS ACT.

We transfer to our columns the following circular, addressed by his honour the Judge of the County Court of Elgin to the Division Court Clerks in his County, because it is of interest, not merely to them, but to Division Court Clerks throughout Upper Canada:

CIRCULAR.

St. Thomas, 26*th August*, 1864.

Dear Sir,—I beg to draw your attention to some important

changes which have been made by the Legislature at its last session, affecting the Division Courts.

By a reference to the August number of the *Upper Canada Law Journal*, pages 199 and 200, you will find two Acts of Parliament copied, to the provisions of which I wish to call your especial attention.

The first of these statutes affects the procedure of the Division Courts, and by its provisions the 72nd section of the Consolidated Statute on Division Courts, and Rules numbers 20 & 21, and Forms numbers 1 & 2, are virtually superseded.

You will observe that this new statute does not give a general jurisdiction over all causes and suits which are the proper subjects of litigation in the Division Courts. For instance: The Division Court of any one County has no such general jurisdiction conferred upon it that it has the right to entertain a suit when the cause of action has arisen, and the defendant lives in another County from the one wherein the Court is held, unless the Court be in the Division, and the sittings held at a place nearest in point of actual distance (as the crow flies) to the residence of the defendant or defendants. Nor are you to suppose that this new act alters the law in cases where there are more defendants than one, and one defendant resides in one County and one or more defendants in another or other Counties, unless the Court in the one County whence the summons issues is held nearest to the residence of all the defendants. Nor does this Act give the Division Court the power to entertain a plaint or cause against a defendant in an adjoining County, unless the cause of action arose in the Division wherein the Court is held, or unless the place where the Court is usually held is nearest to the usual residence of the defendant.

With regard to the service of the summons, the new act provides that in cases where a suit is entered in a Division Court nearest to the residence of the defendant, but in a different County, the bailiff of the Court out of which it issues is to serve it ten days before the return day, as provided before for ordinary service, and he may travel to serve in an adjoining County, and receive payment for doing so.

It is necessary that you should be very particular in this matter of extended jurisdiction of the Court, or otherwise you will get yourself and the bailiff involved in trouble, and perhaps have actions of trespass brought against you; for the act is so merely exceptional in its provisions, that many, no doubt from misunderstanding them, will be unwittingly led into committing illegal acts.

The great danger exists in the execution of writs, process, and proceedings under the Act, and enforcing executions and warrants of commitment; for although the first section enacts that any suit cognizable in a Division Court may be entered, tried, and determined in the Court, the place of sitting whereof is the nearest to the defendant, irrespective of where the cause of action arose, &c., the second section only authorises the service of the summons by the bailiff out of his own County, and does not authorise a bailiff to execute a writ of replevin in a County where the defendant resides, nor to seize goods under an attachment, nor to enforce any other writ before judgment.

It is quite clear that after judgment, executions against goods, &c., of the defendant, and all other writs, process, and proceedings to enforce the payment of the judgment (whatever these "*writs, process, and proceedings*" mean, I confess I do not) may be issued to the bailiff of the Court giving judgment, and be executed and enforced by him in the County in which the defendant resides, as well as in the County in which the judgment was recorded; but the power is limited to this provision, and the bailiff cannot seize goods of a defendant in a third or adjoining County, supposing goods were found there. It is often the case that three Counties border upon each other, and the bailiff must not allow himself to be tempted into the third County, although, under the peculiar circumstances, he is authorised to seize in either of the two Counties first referred to.

I apprehend that process of attachment and of replevin, not being to enforce the payment of a judgment, cannot be issued by the Clerk to another County, or executed by a bailiff therein, out of his own County, and that the law with regard to these processes stands as it did previously to the passing of this Statute. I also apprehend that the power to enforce executions against goods generally, is not enlarged from what was in existence before this Statute; beyond the simple case of enforcing a judgment against a defendant who has been summoned out of his own County to a Division nearest his place of residence, and judgment recovered thereupon, regardless of where the cause of action arose, under the provisions of the new Act.

The Commission of Judges who framed the existing rules and forms, if they ever sit again, may make some decisions under this new act, or may pass some rules for carrying out its provisions. In the meanwhile it would be better for you to exercise caution regarding it; for whilst I should be most anxious to render the act as effectual and beneficial as it was intended to be to suiters and others, for whose convenience it was intended, you must recollect that we have no right to assume powers, or override or outstrip the provisions of an Act of Parliament, or to endeavour to apply its provisions to persons for whom it was not intended.

In all cases which come within its provisions, when you summon a defendant from an adjoining County under this Act, the affidavit of the bailiff must run thus, viz.:—"I swear that this summons and claim annexed thereto were served by me on the —— day of ——, A. D. 186–, by delivering a true copy of both personally to the defendant."

(Or where the amount claimed is under $8)—

"By handing the same to and leaving them with the wife of the defendant," or "with the servant of the defendant," or "with A. B., a grown person, being an inmate of the defendant's dwelling or usual place of abode, trading or dealing," &c., as the case may be, (see section 77 of the Division Court Act,) "and I further swear that the place of sitting of this Court is the nearest to the residence of the defendant (or defendants as the case may be), who resides on Lot No. —— in the —— concession of the Township of ——, or at —— in the County of ——, and that I necessarily travelled, &c., —— miles to do so," &c.

With regard to the sending of transcripts of judgments, it will be as necessary to send them as heretofore as well to adjoining as to more distant counties, for all cases not coming within the perview of the new statute, for you will observe that the words in this statute "*and upon judgment recovered in any such suit,*" confines the power to issue and of the bailiff to execute an execution to the cases referred to in the act only, and not to all cases generally.

With regard to the power of the court to issue judgment summonses to enforce payment of judgments recovered under the act I have strong doubts; and I should doubt the power of the judge to order the commitment of a person summoned, who lives out of the county wherein the court is held, on account of the peculiar wording of the 160th section of the Division Court Act; I cannot regard the proceeding by judgment summons as a "*proceeding to enforce the payment of a judgment*" which may be "*issued to the bailiff of the court,*" and "*to be executed and enforced by him in the county in which the defendant resides, &c.*" I regard it as a proceeding independent of the judgment altogether, adopted to punish the defendant for not obeying the order of the court by paying the amount of the judgment or sum adjudged against him.

The second statute to which I have drawn your attention is that respecting the fees payable to the fee fund, being hereafter payable in stamps. I recommend you to a very careful perusal of its provisions, for there must be no carelessness whatever with regard to the stamps.

I do not know what provisions the government have made regarding the issuing of stamps. You will observe that it is not your duty to keep a supply of them; and every one who wishes a step to be taken in the court which requires a stamp must furnish you with the stamp first, before you are permitted to do any act or take any step; for instance, if a defendant wishes to give a confession, either through you or the bailiff, he must furnish a stamp of ten cents and affix it to the confession, and pay you your fee, or the bailiff his fee besides, for without the stamp the confession will be void, and either you or the bailiff will be punishable for taking it, and there is no reason for charging, nor have you a right in any case to charge this fee and stamp to the plaintiff.

There will be no fee (nor stamp) so low as five cents, nor any less than ten cents.

All fees for hearings will have to be stamped at the time the hearing is closed, and affixed either to the judges list after he has designated the result of the hearing on the list, and such fee as he may in disputed cases order, up to $2—or it should be ready to be placed upon the summons at the time of the hearing. The stamps for judgments or orders are to be affixed to the procedure book—or to the order whenever an order is given of a special nature—such as an order for a new trial, or to change the venue, or the like.

I recommend you to read this letter to, and attentively to peruse these two Acts of Parliament, in presence of the bailiff. I remain, dear sir,

Your obedient servant,

D. J. HUGHES, *County Judge.*

The Clerk of the Division Court at ——.

UPPER CANADA REPORTS.

ERROR AND APPEAL.

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

[Before the Hon. W. H. DRAPER, C. B, Chief Justice of Upper Canada; the Hon. P. M. VANKOUGHNET, Chancellor; the Hon. W. B RICHARDS, Chief Justice of the Court of Common Pleas; the Hon. Vice-Chancellor SPRAGGE; the Hon. Mr. Justice HAGARTY; the Hon. Mr. Justice MORRISON; and the Hon. Mr. Justice ADAM WILSON]

(ON APPEAL FROM THE COURT OF COMMON PLEAS.)

WILLIAM MCINTEE, APPELLANT, AND JOHN MCCULLOCH, RESPONDENT.

Slander—Privileged communication—Malice.

In actions for slander or libel it is the province of the judge to determine whether the occasion of uttering the slanderous words or writing the libellous matter complained of, was or was not privileged, and if privileged, *held*, reversing the judgment of the court below, that in the absence of evidence of malice, there is nothing to be left to the jury as to *bona fides* or otherwise.

This was an appeal from the judgment of the Court of Common Pleas in an action for slander, brought by the respondent against the appellant, refusing a rule to set aside a verdict in favor of the plaintiff, and enter a nonsuit.

The words for which the action is brought, and evidence taken at the trial are fully set forth in the judgment of the court below, reported in the 13th volume of the reports of that court, page 438. From that judgment the defendant appealed, on the ground that the words complained of were privileged by the occasion on which they were spoken, and, therefore, that the plaintiff could not recover without proving express malice; that there was no evidence of such malice, and therefore nothing to leave to the jury; that the absence of any evidence or admission of the offence charged by defendant against plaintiff did not take the case out of the general rule stated and approved of in the court below, or distinguish it from the authorities by which such rule is established.

The respondent contended that the judgment below was right, and ought to be affirmed on the grounds stated therein.

C. Robinson, Q.C., for appellant.

James Paterson for respondent.

In addition to the cases cited in the court below, counsel referred to and commented on *Gardner* v. *Slade*, 13 Q B. 796; *Campbell* v. *Spottiswoode*, 3 Fos. & Fin. 421; *Cooke* v. *Wildes*, 5 Ell. & B. 328; Selwyn's Nisi Prius, page 1255; Addison on Torts, page 708, and the cases there cited.

The judgment of the court was delivered by

VANKOUGHNET, C.—If the judge rule that the occasion justifies the use of the words, what is there to leave to the jury? It is said the *bona fides* of their use, but that is established when the privilege is admitted; for the truth of the words is assumed to support the privilege; or at least the defendant is not called upon to prove it, and that being so the *bona fides* is made out; for the mere fact of the man taking a malicious pleasure in the use of the words on a justifiable occasion gives no cause of action any more than in a case where a judge finds there is reasonable and probable cause for an arrest. Suppose, when the judge, having found that the occasion justified the use of the words complained of, proposes to leave it to the jury to say whether the defendant used the words *bona fide*, believing them to be true, and the defendant, to remove all doubt, offers to prove their truth, when it has been already necessarily ruled that he is not called upon for any such evidence, what will the judge then do? Will he then receive the evidence? Ought not the defendant to be allowed to offer it on the question of malice or *bona fides*, if that is to go to the jury. *See Jackson* v. *Hopperton*, 10 L. T. N. S. 529; *Nolan* v. *Tipping*, 7 U. C. C. P. 524; *Whitely* v. *Adams*, 9 L. T. N. S. 483; S. C. 10 Jur. N. S. 470.

Per Cur—Appeal allowed, and rule to be made absolute to set aside verdict for plaintiff and enter a nonsuit for defendant in the court below.

[Before the Hon. ARCHIBALD McLEAN, Ex-Chief Justice, President;* the Hon. W. H. DRAPER, C. B., Chief Justice of Upper Canada; the Hon. P. M. VANKOUGHNET, Chancellor; the Hon. W. B. RICHARDS, Chief Justice of the Court of Common Pleas; the Hon. Vice-Chancellor ESTEN; the Hon. Mr. Justice HAGARTY; and the Hon. Mr. Justice ADAM WILSON.]

(ON APPEAL FROM THE COURT OF COMMON PLEAS)

SAMUEL DICKSON, APPELLANT, AND JOHN H. AUSTIN, RESPONDENT.

Lessee of mill—Riparian proprietor—Pleading.

The lessee of a mill, situate near to a river and driven by water drawn in a channel from it, sued for damages sustained by him by reason of the obstruction of the flow of the stream, caused by the defendant throwing slabs and other waste stuff into the stream, and thereby obstructing the flow of water into the channel aforesaid. The lessor of the plaintiff was the owner of the land adjoining the stream, and also of the land surrounding the pond used for the working of the mill.

Held, affirming the judgment of the court below, that the lessee had a right to maintain such action; and that the declaration stating the plaintiff to be possessed of land and premises *near to* the river, and as such entitled to the use of the stream for the working of his mill, was sufficient.

This was an appeal from a judgment of the Court of Common Pleas, refusing a nonsuit in a cause pending in that court, wherein the respondent was plaintiff and the appellant was defendant. The case is reported in the eleventh volume of the Reports of that court, where the pleadings and evidence are so fully set forth as to render any statement of them here unnecessary.

From that judgment the defendant in the action appealed, on the following among other grounds:

1. That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, which gave him the right to have and enjoy the benefit of the waters of that river for the purpose of working his mills being upon the said lands and premises.

2. That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, which entitled him to the use and flow of the stream, for the benefit and enjoyment of the said lands with the appurtenances.

3. That the title which the plaintiff proved he had under the lease from Robert D. Rogers to the plaintiff and Jacob Vanalstine, and under the memorandum of agreement made between the plaintiff and Vanalstine, was not such a title as entitled the plaintiff to a verdict on the issues raised by the defendant in his second and third pleas; and the right of the plaintiff under such lease and agreement being but a limited right, and for a limited period, and being but a lease only, it was necessary for him, if he claimed to recover in respect thereof, to set the same forth, and how conferred, and he had no right to avail himself of the title and right of said Rogers as a riparian proprietor, to entitle him to recover under the allegations in the declaration and the issues raised thereon.

4. That the evidence at the trial was such as entitled the appellant to have had his rule *nisi* to enter a nonsuit made absolute.

The plaintiff contended that the judgment was correct, and ought to be affirmed for the reasons following:

1. Because the respondent, by virtue of the lease from Robert D. Rogers to him and one Jacob Vanalstine, and the assignment from Vanalstine to the respondent, became entitled to all the rights and privileges of the said Robert D. Rogers as a riparian proprietor in the use and enjoyment of the waters of the river Otonabee, for the purpose of working the mills demised to the respondent.

2. Because, by virtue of the possessory right acquired under the said lease from the said Rogers, the respondent became entitled to the enjoyment of the waters aforesaid; and it is in respect of such possessory right that the allegations of the declaration in that behalf are to be understood.

3. Because, whenever a possessory right is prejudiced or affected, it is unnecessary, so far at least as a wrong-doer is concerned, to set forth the manner in which the same is derived with any particularity, and any general allegation and proof of possession is sufficient to sustain the action.

4. Because the duration or limitation of the defendant's right of possession is only an element in the computation of damages, and cannot affect his right of action.

5. Because, during the existence of the lease to the respondent, the said Robert D. Rogers could not have maintained any action against the now appellant, save in respect of his reversionary interest, and the right, therefore, to sue for the intervening injury to the possession must be in his lessee, the now respondent.

6 Because the injury complained of is in violation of the provisions of the Consolidated Statutes of Upper Canada, chapter 47 (page 454), section 284.

Read, Q. C., for the appellant, referred to *Austin* v. *Snider*, 21 U. C. Q. B. 290. It is shown that Rogers, when erecting his mill, constructed the dam in such a manner that the slabs were prevented from floating down the stream, which they would have certainly done if left to the natural influence of the water.

The mill of the respondent is built at such a distance from the river, that it cannot be said that this is a reasonable use of the water. *Shears* v. *Wood*, 7 J. B. Moore, 345; *Moore* v. *The Earl of Plymouth*, 3 B. & Ad. 66; and *Bird* v. *Randall*, 3 Burr. 1345, show that a party having once received compensation for a wrong complained of, is precluded from seeking damages at the hands of another.

In this case, Austin must be looked upon as the author of his own mischief, as by the improper mode of constructing the pond and raceway adopted by him, the slabs and refuse are drawn into them.

He also contended that Austin, under the averments in his declaration, was bound to show that he was a riparian proprietor, which he failed to do, the fact being that land intervenes between him and the bank of the stream. *Fentiman* v. *Smith*, 4 East, 107.

Austin, in his declaration, alleges his right to the use of the water to be by virtue of his possession. The fact, as proved, is, that he claims by virtue of the grant. Claiming under a lease, he ought to have set it out, and not asserted a claim as proprietor. The right to the water in this case is personal, not appurtenant to the mill. An assignment of the mill would not carry as appurtenant a right to the water. In *Northam* v. *Harley*, 1 Ell. & B. 665, cited in the court below, the right was appurtenant, which is sufficient for the explanation of that case. In such a case, where all claim under the same deed, it is sufficient to allege title by possession as against such parties. *Embrey* v. *Owen*, 6 Exch. 353

A. Crooks, Q. C., for the respondent.

If the argument of the other side be acquiesced in, it would show that Rogers never had any right to construct the pond and raceway; but the law would appear to be different as enunciated by Lord Kingsdown in *Miner* v. *Gilmour*, 12 Moo. P. C. 131. Rogers, if in possession of and working this mill, could certainly have maintained this action, and so also can his lessee. Addison on Torts, pp. 10, 63 & 64; *Eddingfield* v. *Onslow*, 3 Lev. 209.

Here Austin stands in the place of Rogers, and can declare in the same form, *Tucker* v. *Paren*, 7 U. C. C. P. 269; *Laing* v. *Whaley*, 3 Hurl. & Nor. 675.

Even admitting that a natural right exists of throwing slabs, &c., into a stream, so as to injure a party making a reasonable use of the water, which will scarcely be contended for, the Legislature has excluded all considerations of that sort by prohibiting the very act which is here complained of.

Counsel also relied on the cases cited in the court below, and Con. Stat. U. C. cap. 48, secs. 3 & 13.

The judgment of the court was delivered by

ESTEN, V. C.—The evidence has not been given to us in this case; but the facts appear to be, that one Rogers owned the land forming the pond and around it, and through which the raceway was constructed, and on both sides of the river at this place, and the land and mills in question, and demised such land and mills, with the right of using a certain quantity of water, to the plaintiff and one Vanalstine, for the term of ten years; and that Vanalstine transferred all his interest in the lease to the plaintiff, that at this time a dam and pond and raceway existed, which conducted the water of the river to these and other mills, which dam, pond and raceway had existed for more than eight years; and that the owners of mills higher up the river, and amongst them the defendant, had been for many years in the habit of throwing slabs and

* Was absent when judgment was pronounced.

pieces and grindings of slabs into the river, which gradually accumulated in the pond about the mouth of the raceway, and prevented the water from entering the raceway and flowing to the different mills in the same, or in nearly equal quantities, as before. Under these circumstances the present action was brought. It cannot be doubted that the plaintiff is making a reasonable use of the water of the river in turning his mills, and that the defendant, in throwing a quantity of rubbish into the stream, so as to obstruct the flow of the water into the raceway, is a wrong-doer. It was objected that the plaintiff was not a riparian proprietor, because his premises did not extend to the bank of the river; but it cannot be doubted that Rogers himself, if he occupied these mills, could claim all the rights of a riparian proprietor; and can it make any difference that he has demised the mills to the plaintiff, reserving a narrow strip of land between the mills and the river? The plaintiff stands in the place of Rogers, and is entitled to the same remedies during the time that his interest continues.

It was also objected that the declaration was improperly framed, and the right of the plaintiff not correctly stated in it, and that a variance existed between the statement and the proof, inasmuch as the right was claimed in respect of the possession, whereas it appeared from the evidence to have been derived from a grant. But this appears to me to be a mistake; and it appears to me, although I express an opinion on the subject with much diffidence, that the declaration was framed with precise accuracy. The right created by the grant was not the subject of the action. The defendant, Dickson, could not be charged with a contravention of the grant, because he was not bound by it, or bound to give effect to it. Any riparian owner injured by his act could have complained of it. The plaintiff complains as a general riparian proprietor, and it is of no importance how he became such; whether by this lease, or by conveyance, or by devise. The lease in the present case seems to me to be only incidental, as showing how the plaintiff became a riparian proprietor, and so entitled to complain of the wrongful act of the defendant, which has inflicted injury on him in common probably with other mill-owners equally entitled to complain. It is strictly by virtue of his possession of the premises in question, that the plaintiff is entitled to complain of this injury. If he had become a riparian proprietor in any other way, he would have been equally entitled to complain of this act of the defendant, if it caused him injury. But even if the right created by the grant were the subject of the action, the case of *Northam* v. *Harley* shows that the declaration is properly framed. It appears from that case that where the easement is annexed by the terms of the grant to the land as appurtenant, it is sufficient, in seeking redress for an infraction of the very right, to claim it by virtue of the possession of the land. In the present case it cannot be doubted that the grant of the use of the water was to the lessees of the mills. The right is annexed as appurtenant to the land, and it is sufficient even in this view to claim the right by virtue of the possession of the land. Then, if this action were brought against Rogers, or any one claiming under him, for an infraction of the right given by the lease, it would have been sufficient to frame the declaration as it is framed. I think, therefore, that the judgment discharging the rule was right, and ought to be affirmed with costs. It was argued that the raceway was constructed in such an unskilful manner, that it was the cause of the mischief of which the plaintiff complained; but no evidence seems to have been offered in support of this position.

Per Cur. —Appeal dismissed with costs.

(On Appeal from the Court of Common Pleas)

Ponton v. Bullen.

Order for arrest by judge—Examination of defendant.

Held, affirming the judgment of the court below, that in proceeding to arrest and imprison a party for the insufficiency of his answers on an examination as to his estate and effects, conducted before any other functionary than the judge who orders the arrest, a summons to show cause should, in the first instance, be issued. *Also*, affirming the same judgment, that the fact of the judge who made the order to commit having authority to make such order, and that the same appeared to be regular on the face of it, was not a sufficient justification for the attorney of the party suing out such order in an action brought against the attorney and his clients for assault and false imprisonment.

This was an appeal by Wm. Hamilton Ponton, Hugh Matthewson, the younger, and William Smyth, the younger, from a judgment of the Court of Common Pleas, in a cause pending in that court, wherein William Henry Bullen was plaintiff, and the said appellants, together with Wedderburne Dunbar Moodie and Alexander Dunbar Moodie, were defendants.

The facts and pleadings are fully set forth in the report of the case in the thirteenth volume of the Reports of the Court of Common Pleas, at page 126.

From the judgment there reported the present appeal was brought, on the grounds, first, that there was error in law in the record and proceedings; second, that the pleas of Ponton, Smyth and Matthewson disclosed a good defence to the declaration and new assignment in the action.

The respondent contested the grounds of appeal, and asserted generally that the judgment was correct, and ought to be affirmed.

McMichael for the appellants.

Robert A. Harrison for the respondents.

The judgment of the court was delivered by

Vankoughnet, C.—I believe we all concur in affirming the judgment of the court below. The main question argued there, as here, was as to the right or power of the judge of the County Court to commit the respondent to prison, because of the insufficiency of his answers to interrogatories administered to him on a personal examination as to his estate and effects, without having first given him an opportunity of being heard, either by summons or otherwise, against the application for such committal. We think that the authorities cited and the reasons given in the judgment of the learned Chief Justice of the Common Pleas amply justified the decision pronounced by the court; and the recent case of *Cooper* v. *Wandsworth*, 8 L. T. S. 278, as well as the *Hammersmith* case, 4 Exch. 87 (not then before the court), fully sustain it. It was contended by Mr. McMichael, in appeal, that no judgment could be rendered against the appellant Ponton on the record, inasmuch as in the only plea pleaded by him there was no trespass confessed, and that therefore there must be a repleader ordered. For the moment I thought this objection formidable, but on carefully reading the pleadings I think it cannot be sustained. The appellant Ponton, in his plea, avers that he was the attorney for the plaintiff at whose suit the respondent was committed to prison on the judge's order above referred to; that he, as attorney for the plaintiff, procured the examination of the defendant, the now respondent; that on the *ex parte* order of the judge for the committal of the respondent was endorsed the following notice:

"To the Sheriff of the County of Hastings,

"J. W. Dunbar Moodie, Esquire.

"Sir,—You are at liberty to discharge the defendant, Wm. H. Bullen (the respondent), from custody, upon receiving from said defendant (the respondent) the sum of, &c. &c.

"(Signed) Wm. H. Ponton."

"This order was granted on motion of Wm. H. Ponton, of the town of Belleville, in the county of Hastings, attorney for the plaintiff." That the order so endorsed was delivered to the sheriff to be executed; and that the sheriff, by virtue of such order, imprisoned the respondent, which are the trespassers, &c. The appellant does not allege that he had ceased to be attorney for the plaintiff at the time the order for the committal of the respondent was obtained and endorsed, and delivered to the sheriff; while he avers that he, Wm. H. Ponton, was the sheriff's attorney in the suit. We cannot assume that there was any change of attorney, or two of the same name; but on the contrary, we think we must assume that the William H. Ponton who signed the endorsement on the order as plaintiff's attorney was, though not so expressly stated in the plea, the same attorney who had been previously acting for the plaintiff, and who is the appellant, as he himself alleges, and that he was thus instrumental in delivering the order to the sheriff and procuring the arrest of the respondent—acts which make him responsible for the illegal arrest, and the trespass thereby committed. We think, therefore, that the appeal must be dismissed with costs.

QUEEN'S BENCH.

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

Corbett v. Taylor.

Taxes—When in arrear—C. S. U. C. ch. 55, sec. 16.

Defendant conveyed land on the 13th of April, 1863, covenanting against arrears of taxes. The property was assessed in February, and the by-law fixing the rate passed in July. *Held* (reversing the judgment of the county court), that the taxes for the year could not be considered as in arrear at the date of the deed, for the amount had not then been ascertained, no rate having been fixed, and they therefore could not be paid.

"Arrears" means something behind in payment; it implies a duty and a default.

Sec. 16 of the assessment act is intended only to fix the fiscal year as regards taxes, and to provide that no matter when the by-law imposing the rate is passed, they shall be considered as imposed for the year; it gives no retrospective existence to the tax.

(Q. B., E. T., 27 Vic.)

Appeal from the county court of Frontenac, Lennox and Addington.

The declaration stated that by deed, dated 13th April, 1863, defendant conveyed in fee to the plaintiff lot number 412 in the city of Kingston, and covenanted for quiet enjoyment, freely and clearly acquitted of and from all arrears of taxes and assessments whatever due and payable upon and in respect of the said lands, &c., &c. *Breach*, that the lands while owned by the defendant were lawfully assessed: that at the time of the making of the said deed there was a legal assessment made and imposed on the said premises, and in consequence thereof the plaintiff was compelled and obliged to and did pay $133, being the taxes assessed, rated and imposed by the corporation of the city of Kingston on the said land for the year 1863; and that after the making of the deed, the said taxes being unpaid, and being a charge and incumbrance on the premises, defendant refused to pay them, and plaintiff then being the owner and in possession was compelled to pay.

Plea.—That the premises were not while owned by defendant lawfully assessed, charged and incumbered with the sum of $133, being the taxes, &c., for 1863.

The plaintiff proved the deed above stated. The city clerk produced the assessment book for Frontenac ward for 1863, containing entries shewing the plaintiff assessed as owner of this lot, and said that by a date in the book the assessment appeared to have been made on the 25th of February, 1863; and one of the assessors swore that the property was assessed on that day. The by-law fixing the rate was passed on the 21st of July, 1863. On the 31st of October, 1863, the plaintiff paid to the collector $133, the taxes due on this property. On the same day the collector drew a draft on defendant for $100, which was not paid, and the plaintiff had to pay it over and above the $133. The collector produced a letter, dated 28th October, 1863, to himself from the defendant, respecting the payment of $100 to himself on account of these taxes, but it was not among the papers sent up to this court.

At the trial, *Kirkpatrick*, for defendant, objected that there were no taxes in arrear at the date of the deed, and no legal evidence of an assessment having been made, that the roll should be returned, &c.

The objections were overruled. The plaintiff had a verdict, and a rule *nisi* obtained for a new trial was afterwards discharged. Against this decision the defendant appealed.

A. Kirkpatrick for the appellant.

Sir H. Smith, Q. C., contra, cited *Lewis* v. *Hillard*, Sid. 374; Petersdorff's Abr. "Covenant," vol. vii., p. 188. Rawle on Covenants for title, 113; Consol. Stats. U. C., ch. 55, secs. 16, 24, 107.

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

We do not think that the evidence established, either as a matter of fact or of law, that at the date of the deed containing the covenant on which this action was brought there was any arrear of taxes and assessments on the land in question.

We take arrears to mean something which is behind in payment, or which remains unpaid, as, for instance, arrears of rent, meaning rent not paid at the time agreed upon by the tenant. It implies a duty and a default.

In that sense, how can it be said that on the 13th of April, 1863, there were arrears of taxes and assessments on these lands. The 16th section of the assessment act, Consol. Stat. U. C. ch. 55, is relied upon as answering this question. It enacts that the taxes or rates levied or imposed for any year shall be considered *to have been imposed for the then current year*, commencing with the first day of January and ending with the thirty-first day of December, unless otherwise expressly provided for, &c.

The interpretation of this section argued for in the present case is, that the taxes imposed for 1863 by a by-law passed in July shall be considered to have been imposed as if the by-law had been passed on the first of January of that year. By thus giving an *ex post facto* existence to the tax it became due in the beginning of the year, and not having been paid was in arrear in April.

We do not so interpret this section of the statute, but read it as intended to fix the fiscal year for all the municipalities, for the purpose of rates and taxes, and as providing that no matter in what part of the year a by-law imposing rates and taxes may be passed, the taxes shall be considered as imposed for the whole current year.

The argument for the plaintiff, if pushed home, amounts to this—that on such a covenant, if entered into on the 2nd of January, the taxes for the current year would be in arrear on that day, if a tax or rate was imposed within the year; and in effect the covenant would thus be broken as soon as it was made, although when entered into no tax or rate had been imposed.

We are, moreover, in this case to construe the covenant, not the statute; and it appears to us to be contrary to the plain meaning of the words used to hold that taxes not imposed, the amount of which is not as yet ascertained, and which therefore cannot be paid, can be in arrear—in other words, that a tax the amount of which is fixed and which is imposed in July can be in arrear in April; nor does the 16th section of the statute in our judgment affect the construction of the covenant.

The fact that the premises were *assessed* in February can make no difference. The assessment, as respects real property, is the mode provided for ascertaining the actual or yearly value or rental thereof; unless it is followed by the imposition of a rate it creates no liability in respect of which there can be arrears. None of the methods pointed out by the statute for collecting and enforcing the payment of a rate can apply until it has been actually imposed.

Appeal allowed.

COMMON PLEAS.

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

In re Tremayne, an Attorney.

Attorney—Roll of court—Striking off.

A certificate of the clerk of the court in which an attorney has been struck off the rolls, and on which the application under the rule of court is made to another court to have the attorney struck off the rolls of that court, should shew the grounds on which he was struck off the rolls of the court from which the certificate was granted. The application should also be for a rule to shew cause and should not be moved for on the last day of term.

(C. P., E. T., 27 Vic.)

On the last day of the term, *McGregor* produced a certificate, signed by the clerk of the Crown and Pleas of the Court of Queen's Bench (and verified by the seal of the court), stating that an attorney, on the twenty-seventh day of May, 1863, had, by order of the Court of Queen's Bench, been struck off the roll of attornies of that court. On this he moved that the said attorney be struck off the rolls of this court.

The rule of Queen's Bench on the subject referred to in Draper's Rules, p. 8, provides, "that whenever an attorney shall be struck off the roll of attorneys by order of the court, the clerk shall forthwith certify such dismissal and the grounds thereof expressed in general terms under the seal of the court, and the court on any similar certificate from the Court of Chancery or the Court of Common Pleas, of any attorney or solicitor of either of the said courts respectively, having been struck off the roll of such court, shall thereupon take proceedings for striking such person, being an attorney of this court, from the roll of attorneys, according to the course and practice and in like manner, and under like cir-

cumstances observed in similar cases in the superior courts in England." A similar rule exists in this court.

RICHARDS, C. J.—I do not think we can grant the rule sought for on the materials now before us, nor without granting a rule *nisi*. The certificate produced on the motion does not express the grounds of the dismissal of the attorney as required by the rule of court, which would seem to be fatal to the application now made.

The practice in England, as I understand it, before the passing of Imperial Statute 23 & 24 Vic., cap. 127 and which existed when our rule of court was made, was to have a rule *nisi* issued in the first instance and served on the attorney before striking him off the roll, though his name might have been removed from the roll of attornies of another court. The case In re ———, gent., one, &c., reported in 1 Ex. 453, Michaelmas Term, 1847, decides expressly that the motion should not be made the last day of term, and inferentially that the rule should be to shew cause. Alderson, B., said, "this is the last day of term, he ought to have the opportunity of denying that he is the same person" Pollock, C. B., said, "this is the last day of term and the matter would hang over his head during the whole of the vacation. The motion should be made so as to give him an opportunity of answering it promptly."

It is true that *In re John Collins*, reported in Easter Term, 1856, 18 C. B. 272, the Court of Common Pleas struck an attorney off the roll of that court on the production of a rule of the Court of Queen's Bench, shewing he had been struck off the roll of that court for misconduct. Jervis, C. J., said, "out of deference to that court we do not enquire into the circumstances upon which they acted. The rule may go."

The case of *In re Hall*, 2 Jur. N. S. 1233, seems to be an authority, that the Queen's Bench in England, so late as Michaelmas Term, 1857, held that the rule to strike the attorney off the roll should be on a rule to show cause, and the case of *In re Sill*, of the same volume, p. 1232, shews that when an attorney has been readmitted in the court in which the initiative had been taken for striking him off the roll, the rule to readmit him in another court must be a rule *nisi*.

The 25th section of the Imperial statute, passed 28th August, 1860, to which I have referred, provides that the name of every person who shall be struck off the roll of attorneys of any of the superior courts of law at Westminster, by the rule of any of such courts, or off the roll of solicitors of the Court of Chancery, by order of any judge of that court, shall, upon the production of an office copy of such rule or order, and an affidavit of the identity of the person named therein, to the proper officer of every or any other of the said courts of which such person is an attorney or solicitor, be struck off the roll of such court; and when restored to the roll of the court from which he was first struck off, on production of the rule or order restoring him, with a similar affidavit of identity to the proper officer, his name shall be restored to the roll of the other courts.

Notwithstanding this enactment, the Court of Queen's Bench in England, in the case of *In re De Medina*, one, &c., 6 L. Times, N. S. p. 536, 17 June, 1862, when an attorney had been suspended from practice, by a rule of the Court of Exchequer, determined that they would look into the affidavits and exercise their discretion about suspending him from practice in that court.

In the case before us, the application must fail, as the certificate from the Court of Queen's Bench does not shew the grounds of the dismissal of the party applied against in the court, as required by the rule of court; as well as on the ground that the application was made on the last day of term, and is for a rule absolute in the first instance. Adam Wilson, J., and J. Wilson, J., concurred.

Per cur.—Rule refused.

IN RE CAMPBELL AND THE CORPORATION OF THE CITY OF KINGSTON.

Municipal Institutions Act, sec. 294, sub secs. 4 and 15—Harbour Dues—Firewood—Tolls thereon.

Held—That a clause in a by law which imposed tonnage dues on scows, craft, rafts, railway cars, &c., coming into the city of Kingston, containing firewood to be exposed or offered for sale, or marketed for consumption within the city, was illegal, and not authorized by sub-sec. 15 of sec. 294, of the Municipal Institutions Act, the toll or duty must be imposed upon the vehicle *in which* anything is *exposed* for sale in any street or public place

The fourth subsection of the same section only authorizes the imposition of reasonable tolls on vessels and other craft, for the purpose of cleaning and repairing harbours, and paying a harbour master, and does not sanction the levying such dues for the revenue purposes of the municipality to which the harbour belongs.

(C. P., E. T., 27 Vic.)

During Easter Term, *Kirkpatrick* obtained a rule on behalf of James Campbell, calling on the Corporation of the City of Kingston to shew cause why section 33 of the by-law passed on the 20th April, 1864, entitled, An Act to regulate the public Markets in the City of Kingston, should not be quashed, with costs, on the grounds:

1. That such section is in excess of any authority conferred by law on the said corporation.

2nd. It is not within the powers conferred on the said corporation by the 15th sub-section of sec. 294, of c. 54 of Con. Statutes of U. C., or any other clause or sub-section of the act.

3. Because it assumes to impose toll on all carriers of produce and articles therein mentioned to the city of Kingston, and does not confine such tolls to articles and produce exposed for sale or marketed in the city of Kingston. And,

4. Because it imposes a toll on the boats of private persons bringing such articles to the city for their own consumption.

The by-law was verified by the seal of the city and the certificate of the city clerk, and there was appended to it the affidavit of Campbell, stating that he was a wood-merchant, and carried on his business as such in the city of Kingston, and that he resided in the city. He also stated in his affidavit that he received the by-law annexed to it from the city clerk.

During the term, *Prince* supported the rule, and *D. B Read*, Q. C., shewed cause. He contended that though the section of the by-law complained of, could not be entirely sustained, under the 15th sub-section of sec. 294, but with the aid of sub-sec. 4, it might all be considered as good. He urged that the section might be good in part, and if so, the court ought not to give costs for quashing the part which was bad; and the good part ought to be sustained.

He referred to *Farquhar* v. *The City of Toronto*, 10 U. C. C. P. 379; *In re Smith* v. *The City of Toronto*, ib. 225; *Patterson* v. *The County of Grey*, 18 U. C Q B. 189; *Gibson* v. *The United Counties of Huron and Bruce*, 20 U. C. Q B. 111; *Tobacco Co.* v. *Woodroffe*, 7 B. & C. 838; *Poulters Co.* v. *Phillips*, 6 Bing N. C. 314; *Regina* v. *Elmonds*. 4 E & B. 993; *Tyson* v. *Smith*, 6 A. & E 745; *Lockwood* v. *Wood*, 6 Q B. 31; *Regina* v. *Everett*, 1 E. & B. 273; Grant on Corporations, 160.

RICHARDS, C. J —I think the 33rd section of the by-law bad, and it must be quashed. The by-law itself is entitled, A By-law to regulate the public Markets of the City of Kingston.

The 32nd section of the by-law provides that each and every waggon, sleigh, cart, truck, or other conveyance, containing firewood, lumber, shingles, laths or ladders, being exposed for sale or marketed for consumption, within the city, and all boats, rafts, cribs or railway cars, bringing to the city or into the harbour for delivery at, or consumption in the city, firewood, coal, charcoal, poles, lumber, potatoes, fruit, butter, cheese or vegetables, shall be subject and liable to a toll of twenty-five cents for every ton's capacity, and so proportionably; and the clerk of the maker, for the lessee of the market tolls, or his authorized assistant is thereby authorized and empowered to collect and demand payment of said toll, and all other tolls chargeable or collectable under that act from the owner or owners, or master or person in charge to the said boats or sailing craft aforesaid, and from the owner or driver of every waggon or other vehicle mentioned in the immediately preceding section of the by-law; and all and every person or persons refusing to pay such toll shall be deemed guilty of a breach of this by-law.

The 60th section of the by-law provides that any person violating the provisions of the by-law, or failing to observe them, shall be guilty of a breach of the by-law and shall be summoned before the mayor, police magistrate, or any alderman of the city, and if convicted, on testimony of one or more credible witnesses, should be fined a sum not more than fifty dollars, nor less than fifty cents; which fine and costs, if not levied forthwith, should be levied of the goods and chattels of the offender, if sufficient,

or in default of payment or of sufficient distress, the offender might be imprisoned in the common jail in the city, for any period not greater than 21 days, at the discretion of the convicting magistrate

Sub-sec. 4 of sec. 294 of the Municipal Institutions Act, in effect provides that the council of every city may pass by-laws for regulating harbours, for preventing the filling up or encumbering thereof; for erecting and maintaining the necessary beacons, and for erecting and renting wharves, piers, and docks therein, and also floating elevators, derricks, cranes, and other machinery suitable for loading, discharging or repairing vessels; for regulating the vessels, crafts and rafts arriving in any harbor; and for imposing and collecting such reasonable harbour dues thereon as may serve to keep the harbour in good order, and to pay a harbour master. This provision is under the head of "Harbours, Docks, &c."

Then under the head of "Markets," sub-sec. 15, "for regulating all vehicles, vessels and other things in which anything is exposed for sale or marketed in any street or public place, and for imposing a reasonable duty thereon and establishing the mode in which it shall be paid."

This 15th sub-section of the statute does not in my opinion authorise the imposition of tonnage dues on scows, crafts, rafts, railway cars, &c., coming into the city, merely because they contain firewood, though such firewood may have been brought into the city "for the purpose of being exposed or offered for sale, or marketed for consumption within the city." What the statute authorises is the regulating the vehicles, vessels, &c, *in which* anything *is exposed for sale* or marketed *in any street or public place*, and for imposing a reasonable duty thereon. When the commodity is exposed for sale in any street or public place, the power to impose the duty, if it is really given, arises, and if it be intended to impose the duty on the vehicle or vessel it must be on that in which the article is exposed for sale or marketed in any street or public place.

That part of the section of the by-law under discussion which declares that all boats, rafts, cribs or railway cars, bringing into the city or into the harbour, for delivery at or consumption in the city, firewood, coal, charcoal, &c., fruit, butter, cheese or vegetables, shall be subject to a toll of 25 cents for each tons capacity, is clearly bad.

There can hardly be a doubt that the 15th sub section of the statute which I have quoted does not authorise this. The wood or other articles may not be intended to be used or consumed within the city at all, yet coming within the market regulations the vessel bringing it there would be bound to pay this charge even if the wood were delivered at Kingston to be shipped on board a return vessel to be sent to Toronto, and the butter was delivered at the city to be forwarded to Montreal. The legislature, in my opinion, never contemplated that under pretence of passing a by-law to regulate the markets of the city, that city corporations should have the power of levying a tax on the general commerce of the country merely because a particular town or city happened to be the place where forwarders were in the habit of transhipping commodities from one description of craft to another, and where merchants frequently contracted that certain articles in which they dealt should be delivered in view of this very practice of transhipment.

I fail to see that the 15th sub-section of the statute in any way sustains this section of the by-law.

I think under the 4th sub-section it is equally bad. So far from that clause being intended to cover market regulations which this by-law is passed for establishing, it relates to the maintaining, supporting and preserving harbours, and to regulating the vessels, crafts and rafts arriving in the harbours, and the power to impose charges is limited to such reasonable harbour dues as may serve to keep the harbour in good order and to pay a harbour master.

It is not even suggested to us, much less shewn by affidavit, that any money is or has ever been expended to keep the harbour in good order, nor are we informed that there is any harbour master there for the payment of a salary to whom these charges could be properly imposed

It seems hardly necessary to discuss the question at much length to shew that we ought to hold that the 4th sub-section of the statute first quoted does not authorise the passing of the 33rd section of the by law The fact that the section itself does not seem to be framed with a view to regulate the harbour in any way, or to direct that vessels shall be under the control of a harbour master or harbour regulations, and that it applies only to vessels carrying peculiar kinds of commodities, most of them more the subject of market regulations than harbour regulations, would seem to indicate that it could not be intended to apply to harbour regulations. These, with the other circumstances already referred to, that there is nothing to shew that there is a harbour master or harbour regulations in Kingston, seem to me ample to sustain the view I take that the section complained of is bad. I should also incline to the opinion that unless it could be shewn there were some peculiar reasons justifying a special tax on the craft carrying the articles mentioned in this section of the by-law, the court would hold it was not reasonable to select that class of vessels only for the payment of harbour dues, when other vessels escaped which appear to be equally properly the subject of that kind of tax, and on that account a by-law framed expressly under the 4th sub-section would probably be quashed if the dues were only imposed on a particular class of vessels.

On the whole I think the 33rd section of the by-law should be quashed with costs.

Per cur.—Rule accordingly.

CHANCERY.

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

McCULLOCH v. McCULLOCH.

Alimony—How far the English rule as to allowing one-third of income is applicable to this country.

The defendant was the owner of real estate of the annual value of about £112 10s., but subject to a debt of £100. He had also household furniture and farm stock, and he worked his farm the plaintiff with her eight children, lived apart from the defendant, on account of his cruelty, and with no means of support, save such as might be obtained by way of alimony. On a reference to the master to fix permanent alimony, he allowed £37 10s. per annum. On appeal this sum was increased to £80 per annum.

The bill in this cause was filed by his wife against the defendant, who was a farmer, owning a farm of 150 acres, subject to a mortgage of about £100; also a village lot, renting at £4 10s. per annum, and farm stock worth more than £100. Interim alimony had been allowed at the rate of £37 10s. per annum

On a reference to the master at Whitby directed by the decree, he had fixed the same amount as permanent alimony. This would be about one-third of the annual value of the defendant's estate, making no allowance for the value of his labour.

On appeal, it was shewn that defendant's eight children, with the plaintiff, their mother, were forced by the defendant's conduct to live apart from him: that the eldest child was a girl of sixteen, the youngest an infant in arms; all of the eight are with their mother, dependant entirely upon the sum to be received as alimony for their maintenance, and that the sum allowed was insufficient for the plaintiff alone.

It was argued that the rule usually followed in England of assigning one-third of the annual income to the wife is not invariably to be followed, and though often a proper sum in England, where the husband's income is large, is not applicable to cases like the present, where the estate is small, and the personal industry of the husband is necessary for the family's support.

A. Crooks, Q C, for the plaintiff, who appeals.

Downey for the defendant.

The additional facts of the case, and the authorities cited by counsel, appear sufficiently in the judgment of

SPRAGGE, V. C.—The bill, which is for alimony, is taken *pro confesso*, and a decree for alimony, by reason of the cruelty of the husband, was pronounced on the 9th of February last. It appears that the wife, with her eight children, the eldest a girl of sixteen and the youngest a child a little more than a year old, left her husband's house on the 3rd of November last, and that they have since lived with her father, except that recently the eldest girl has left. The health of the wife is, as appears by the

evidence of her father, so bad as to render her helpless, and to require medical attendance. Of the children, two only are boys, one eight, the other six years old.

The defendant is a farmer, the proprietor of 150 acres of land in the township of Scarboro', of which about 110 are cleared and under cultivation, the whole farmed by himself. He has also horses, and farming stock and implements. He has also a cottage and small lot, worth, as he says, about $200, and which is worth, to rent, about $18 a-year. He appears to be in debt to the extent of about $400, or perhaps a little more. The annual value of his property appears to be somewhere about $450; the interest upon its value exceeds that amount. The master has allowed alimony for $150 a-year. This is complained of as too small, and I agree that it is so. It is suggested that the master has proceeded upon the principle of allowing for alimony a per centage upon the annual value of the husband's estate; it is said one-fifth, and it is conceded that what is allowed is about one-third. To proceed upon such a principle is, in my judgment, erroneous, and particularly so when the wife and family are in fact supported by the labour and skill of the husband; if any proportion were taken as the scale of allowance, the annual value of that labour and skill should be added to the annual value of the husband's property; in many cases it is the principal source of the income, and in many more it is the whole.

Regard must be had, as the decree expresses it, to the station in life and position of the parties, and also to the nature of the property of which the husband is possessed. A per centage upon the annual value of the husband's property will very rarely, in this country, form a just measure for the allowance of alimony; it has been discarded in numerous cases; among them is the case of *Severn* v. *Severn*, 7 U. C. Chan. R. 199, and is not followed in England, where the adoption of it would not do justice to the wife, or the wife and children. Two instances of this are the cases of *Whaldon* v. *Whaldon*, 5 L. T. N. S. 138, and *Wilcocks* v. *Wilcocks*, 30 L. J. Prob. 205. The court now proceeds upon the sounder principle of looking to what is just and reasonable under all the circumstances. The language of the decree furnishes a proper and safe guide for the discretion of the master.

The adoption of the rule I have observed upon operates with peculiar hardship in this case. The wife is forced, by the cruelty of her husband, to leave his house, and to seek shelter in that of her father, where, with seven children—herself sick and helpless—she is now living. For the support of herself and children the scant sum of $150 a-year is allowed, while to the husband, not burthened with the support of any children, double that sum is left, besides the house which, but for his misconduct, would have continued a shelter for all, and besides the value of his own skill and labour, as a farmer, to the benefit of which all are entitled.

It is a most unequal division, and, I apprehend, could only have been made by the master under the idea that he was bound to fix the amount of alimony by a scale measured by the annual value of the husband's property. I think the sum proposed to be allowed is very reasonable. The plaintiff's father says he thinks it would take £75 or £80 a-year to maintain herself and her family. I think the larger sum would be a moderate amount. It was suggested that I should fix the amount to be paid, instead of referring it back to the master. I therefore fix it at £80 a-year, to be paid from this date, and at the times mentioned in the master's report. Liberty will be reserved, as was done in *Severn* v. *Severn*, to both parties to apply to the court, as they may be advised, should the circumstances of the case alter, and the defendant must, in that case, pay the costs of the application.

What I see in this case leads me to remark that in cases of this nature the court looks to the possibility of the parties living again together. The husband, as I see by his affidavit, expresses an anxious wish that this should be the case. His cruel conduct is attributed to intemperance: he is described by two of his neighbours as kind, affectionate, and inoffensive in his disposition. A thorough reformation in his habits *may* lead to that reunion with his family which he professes so earnestly to desire.

McCALL v. FAITHORNE.

Specific performance—Compensation for deficiency in quantity of land sold.

A parcel of land having been surveyed and laid off into building lots, the same was afterwards offered for sale by public auction, when M. became the purchaser of two of such lots at an aggregate sum of £70. The plan, by which the property was sold, contained a memorandum on the margin that the same was drawn upon a scale of four chains to the inch. In reality the plan had been made upon a scale of three chains to the inch, which, however, was not discovered until after the conveyance had been executed, and the purchase money paid. Thereupon the purchaser M. filed a bill praying repayment of a proportionate amount of the purchase money, or a conveyance of a sufficient quantity of the adjoining land to make up the deficiency. The court, under the circumstances, considered that the plaintiff was not entitled to the relief asked, and dismissed his bill with costs; but

Semble, that if the conveyance had not been made, or the purchase money not fully paid, he would have been entitled to have been relieved in this court.

The bill in this case was filed by *David McCall* against *Robert F. Faithorne*, stating that in 1855 a parcel of land in the town of Sarnia, known as the Maxwell estate, and belonging to the defendant's wife, was surveyed and laid out in village lots by the defendant, and a plan of the property purporting to represent the premises in the proportion of four chains to an inch was made out and duly registered in the proper office. That the plaintiff and others attended an auction sale of the property, and bid for various lots as laid down on the plan. The plaintiff became the purchaser of two of the lots for the aggregate sum of £70. This sum had been since paid by the plaintiff, and a conveyance made to him; that upon measurement the plaintiff discovered that the plan was inaccurate, having been drawn on a scale of three instead of four chains to an inch, and the lots purchased therefore contained one-fourth less land than plaintiff was entitled to, but this had not been discovered until after the conveyance to the plaintiff had been executed and money paid as stated. The bill further alleged a demand made by the plaintiff to the defendant for repayment of one-fourth of the purchase money and his refusal to pay the same, and prayed that the defendant might be ordered to pay such sum, being £23 6s 8d., or make good the deficiency in the quantity of land by conveying a sufficient quantity of the land adjoining.

The answer set up that the plaintiff had already sued the defendant in the county court for damages caused by the alleged deficiency, in which suit a verdict had been given and judgment entered in favour of the defendant: that the words "scale four chains to the inch" were inserted by accident in the margin of the plan exhibited at the sale, but that the plaintiff was not thereby misled, as he otherwise knew the quantity of land contained in each lot. The defendant denied that there was any ground for equitable relief on the case stated by the bill, and alleged that it was at any rate within the jurisdiction of the county court.

Fitzgerald for the plaintiff.

Cruickmore for the defendant.

The authorities cited are referred to in the judgment of

SPRAGGE, V. C.—This bill is filed by a purchaser of real estate, who has paid his purchase money and received his conveyance, with usual covenants for title. The bill is for compensation, on on the ground of alleged deficiency in the quantity of land contracted to be sold; the sum claimed is £23 6s. 8d; and the bill prays that the defendant, the vendor, may be ordered to pay that sum, or, in the alternative, to convey more land to make up the deficiency.

The sale was by auction, and was of town lots according to a plan, noted upon the face of it to be upon a scale of four chains to an inch; in fact the lots were laid out and staked on the scale of three chains to an inch. The plaintiff was the purchaser of one lot on one street and another lot on another street, for the aggregate price of £70. It is not shewn that the defendant could make the lots of the size described in the plan—that he has now the adjoining land to do so; it is not alleged that he has, or that the contract was for anything but these particular lots. A money compensation, of which the amount claimed is the maximum, is all that can be had upon this bill.

I think the plaintiff cannot maintain a bill in equity for this purpose. The map which was distributed among the bidders at the sale is treated properly enough, I think, as a representation; and if the contract had not been executed—if the conveyance had not been made, or the purchase money not fully paid, I apprehend

the plaintiff would be entitled to relief in this court. But here the contract is fully executed, and the plaintiff's remedy is, I think, at law. In *Newham* v. *May*, 13 Price, 749, Chief Baron Alexander, while deciding against the plaintiff upon the evidence, expressed a strong opinion, upon clear and intelligible grounds, I think, against such a bill. The bill in that case was for compensation on the ground of untrue representation as to the annual rental of the estate sold. In that case, as in this, the bargain had been executed, and the purchase money paid; fraud was charged in respect of the representations made, as it is by this bill. The chief baron said, "The cases of compensation in equity have grown out of the jurisdiction of courts of equity, as exercised in respect of contracts for the purchase of real property, when it is often ancillary, as incidentally necessary to effectuate decrees of specific performance. This, however, appears to me to be no more than a common case of fraud by means of misrepresentation, raising a dry question of damages, in effect a mere money demand" I would refer also to the observations of Lord Eldon, in *Todd* v. *Gee*, 17 Ves. 273; and of Lord Cottenham in *Sainsbury* v. *Jones*, 5 M. & C. 1. Lord St. Leonards treats the law as settled that such a bill as this cannot be sustained; thus, "where the contract has been executed, a bill cannot be filed by the purchaser simply for compensation," (Sugden, V. & P.; 235 14 Ed.); and he gives *Newham* v. *May* as an example, and refers also to *Leuty* v. *Hillas*, 2 D. G. & J. 110, before Lord Cranworth

It is now settled that compensation cannot be prayed, as an alternative relief, in a bill for specific performance. I cannot see any sound distinction between such a prayer and a naked prayer for compensation after specific performance, on the ground of misrepresentation. It is put for the plaintiff that the whole contract has not been performed, inasmuch as a less quantity of land was conveyed than was contracted for. I do not agree in this: the subject matter of the contract was certain specific lots, and those lots have been conveyed; their *contents* was only matter of representation.

Upon these grounds I am of opinion that the plaintiff's bill ought to be dismissed. But, apart from the question of jurisdiction, I doubt if upon the whole evidence the case made by the bill is sustained. Of one thing I am satisfied, and I think that I ought in justice to the defendant to say so, that the fraud charged against him by the bill is disproved. The bill must be dismissed with costs.

Thompson v Luke.

Appeal from Master's report.

An appeal from the Master's report, after it has been absolutely confirmed by lapse of time, will not be entertained without leave first given on special application

Parties who have no further interest in the matter to which the Master's report relates cannot appeal from it.

This was an application made to change the priorities of incumbrancers found by a report of the master at London, on the alleged ground that a change as to their priorities had been made in engrossing the report after it had been settled.

S Blake for the incumbrancer who claimed priority.

Freeland contra.

Esten, V.C.—This application is in effect an appeal from the report after it has been absolutely confirmed by lapse of time, and should not be allowed without leave being first obtained on special application. It is also, I think, irregular, as being made in the names of parties who have no further interest in the matters to which it relates. I am sure it has been decided, and I think by the Vice Chancellor of England, although I have been unable to find the case, that if it appears that a suit is prosecuted in the sole name of a party who has transferred his interest, it will not be permitted to proceed. This is a sound rule. Either of these grounds would be sufficient to make it proper to refuse this application with costs If such a special application as I have alluded to should be made, it would be material to consider the effect of the lapse of time which, unexplained, would amount to evidence of acquiescence, sufficient to make it proper to refuse such application It would also be proper to ascertain the circumstances under which the schedule was amended, as mentioned in Mr Abbott's affidavit, since, if done with Mr. McDougall's consent, or with knowledge of or the means of knowing the circumstances, the parties whom he represents would be bound, and could not obtain any further alteration. As to Miller's judgment it would not be proper under any circumstances to make any change, inasmuch as it appears from the affidavit of Mr. Hamilton, uncontradicted, to have been paid by the parties liable under it, in which case it has become extinct, even if paid by a surety, and can form no longer a charge upon this estate. Should an order be made upon any further application as to the other judgment, it would be proper to include in it a direction for enquiry as to payments, so as to afford the parties interested an opportunity of contesting the claim.

COMMON LAW CHAMBERS.

(*Reported by* Robert A Harrison, Esq *Barrister-at-law*)

Grey v. Stacey et al.

Entry of appearance—What a sufficient entry.

Putting an appearance under the door of the office of a deputy clerk of the Crown during office hours, or handing it to him in the street, is not a due entry of the appearance. Such a practice is not to be encouraged under any circumstances.

(Chambers, April 16, 1864)

This was a summons calling upon defendants to shew cause why the judgment signed by defendants in this cause on the 22nd of March last, and the writ of *fieri facias* issued upon the judgment and all proceedings had thereon and subsequent thereto should not be set aside upon the grounds that the judgment was signed after the action had been discontinued by plaintiff; that defendants appeared to the writ of summons after notice not to appear, that the appearance was not properly filed before the entry of judgment, and that according to the judgment roll the appearance was entered on an impossible day, viz., 12th of December, 1864, and upon grounds disclosed in affidavits and papers filed.

It appeared that the writ of summons issued on the 7th of December, 1863, that notice not to appear was served on the 12th of December, 1863, "about" one o'clock in the afternoon of that day; that "about" the same hour the Deputy Clerk of the Crown closed up his office; that he was absent twenty-five minutes; that while absent the appearance to the writ had been pushed under the door of his office; that on his return to the office he found the appearance on the floor within the door of the office; that he filed the appearance on his return, but could not say "the exact hour or minute" he filed the appearance.

J B. Read shewed cause and contended that the appearance had been duly entered before notice not to appear had been served.

Robt. A. Harrison, in support of the summons, argued there was no pretence for contending that the appearance had been duly entered before notice not to appear was served, unless the placing it under the door was a due entry, which he denied. (Chit. Archd. 9 edn. 1388, Chit. F., 7 edn. 810; *Campbell* v. *Madden*, Dra. Rep. 2; Con Stat. U. C, cap. 22, sec. 53.)

Draper, C. J.—I think the right conclusion is that the appearance in this cause was not duly entered until after defendants had been served with notice not to appear.

I treat the putting the appearance under the door as not being an entry of appearance, any more than if it had been handed to the Deputy Clerk of the Crown in the street.

The practice of "putting in" papers in such a way is not to be encouraged. It is likely to occasion irregularity in more than one respect especially where, as in this case, the hour of the day when an act is done is brought in question.

I therefore will make an order to set aside the judgment of *non pros*, but under all the circumstances without costs.

Order accordingly.

Stuart v. Matheson.

Costs of rule where in part by the consent of one of the parties to the suit.

Where, in a question of damages, plaintiff claimed a certain amount of damages and in addition a certain other amount of costs as part of said damages but the judge ruled against him as to both, reserving leave as to the damages but not as to the costs, and on a rule to increase the verdict and for a new trial on the

ground of misdirection as to the costs, the court made absolute the rule to increase the verdict as to the damages, and unless defendant consented to add the costs, ordered a new trial without costs and defendant consented to the addition of the costs, it was *held* plaintiff was entitled to the costs of the rule.

(Chambers, April 18, 1864.)

This was an application by defendant for revision of costs taxed by the Master to plaintiff against defendant. The action was on a covenant for quiet enjoyment. The plaintiff had been evicted from a portion of the premises in respect of which the covenant was given at the suit of a doweress claiming her dower. At the trial the plaintiff claimed certain damages and costs of defending the dower suit. The defendant resisted his right to part of the damages as well as to the costs. The judge ruled with defendant, but reserved leave to plaintiff to move to increase his verdict as to the damages only—not as to the costs, in respect of which he ruled absolutely against plaintiff. The court afterwards held on the plaintiff's rule to increase his damages on the leave reserved, and for a new trial on the ground of misdirection as to the costs, that the damages should be increased, and as to the costs, that unless defendant consented to the costs also being added to the verdict there should be a new trial without costs.* The Master taxed to the plaintiff his costs of that rule, and against this taxation defendant appealed, contending that one cost of the rule should be disallowed.

Spencer for the appeal.

English contra.

DRAPER, C. J.—If there had only been the motion to increase the verdict which had succeeded after argument on both sides, the plaintiff beyond question would have had a right to tax against defendant these disputed costs as forming part of the costs in the cause. The defendant's erroneous resistance to the plaintiff's claim rendered the rule necessary. I do not see that the defendant's consent to the other branch of the rule, rather than have to pay his own costs of a second trial, alters the case. I think the Master was right.

Order accordingly.

DEMILL v. EASTERBROOK.

Arrest of Capias—Sufficiency of affidavits for—Facts and circumstances—Affidavits sworn before attorney in the cause—Jurisdiction of Judges to set aside each other's orders—New materials—Effect of order for discharge of prisoner.

Held—1. That the affidavit laid before a judge, under Con. Stat U C cap. 24, sec 5, for an order to arrest, must shew facts and circumstances to satisfy the judge that there is good and probable cause for believing that the debtor, unless *forthwith* apprehended, is about to quit, &c.

2. That an affidavit stating deponent's belief that the debtor, unless held to bail, would quit Canada, not saying when, or assigning any special reason for forthwith apprehending him, was insufficient

3 That the facts and circumstances laid before the county judge in this case, to satisfy him that the debtor had at any time an intention to quit Canada, were insufficient.

4. That in order to the rejection of affidavits alleged to be sworn before the attorney of the party in the cause on whose behalf the affidavit was made, it should clearly appear that he was attorney at the time the affidavit was sworn.

5. That a statement in an affidavit of a defendant applying to set aside an order for his arrest, that B and C are copies of the affidavits filed, on which the order to arrest was granted, &c., meant all the affidavits filed.

6 That one judge may rescind the order of another judge, even on the same material that were before the first judge; but whether the second judge will do so or not, must always be a question for himself according to the nature of the facts

7. That on an application, by a debtor arrested under a capias, for his discharge from custody, the judge to whom the application is made may receive affidavits denying the indebtedness of the defendant, or denying his intention to leave the province, or any other of the facts and circumstances relied upon in plaintiff's affidavits.

8. That in this case, it was unnecessary to set aside the order for arrest, as substantially the same object would be accomplished by merely discharging the debtor from custody, which was done.

(Chambers, June 1, 1864.)

Defendant obtained a summons calling on the plaintiff to shew cause why the order of James E. Small, Esquire, the Judge of the County Court of the County of Middlesex, ordering a writ of *capias* to issue, to arrest the said defendant Easterbrook, to be held to bail in the sum of nine hundred and eighty-four dollars, dated the fourteenth day of May, 1864, should not be rescinded or set aside, and why the writ of *capias* issued on the said order, and the copy thereof, and the arrest of the said defendant thereunder, and all proceedings had thereunder (if any), should not be set aside, and the defendant discharged out of the custody of the sheriff of the county of Kent, on the grounds that the affidavits on which the said order was granted were insufficient in this, that they did not state that the defendant was about immediately to quit Upper Canada, with intent to defraud the plaintiff of his said debt; or that the plaintiff, or any other person, had any good or probable grounds for believing that the said defendant was about to quit Upper Canada for that purpose; and on grounds disclosed in said affidavits and papers filed as aforesaid.

J. K. Kerr shewed cause.

The facts and argument of counsel sufficiently appear in the judgment of his lordship,

ADAM WILSON, J.—The plaintiff swears, "that he verily believes that unless the said W. W. Easterbrook is held to special bail, he will quit Canada, with intent to defraud this deponent of the debt so due and owing to him as aforesaid."

The statute is, that in case the plaintiff, by affidavit, shews such facts and circumstances as satisfy the judge "that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular," the judge may, by a special order, direct that the person shall be held to bail, &c.

The judge is only to interfere if there is probable cause for believing that the party, unless *forthwith* apprehended, is about to quit Canada: but the plaintiff does not swear that he thinks this will be so; for he only says that he believes, unless the party be held to bail, "he will quit Canada," not saying *when*, or assigning any special reason for *forthwith* apprehending him.

Then, again, the "facts and circumstances" set forth in the affidavit to satisfy the judge that the defendant is about to quit Canada, are:

1. That the defendant stated, when he sold to the plaintiff the first of exchange, that he had not the second or third parts of the bill of exchange, but would procure the same in time to be sent by the next mail, and would deliver the same to the plaintiff.

2. That within a few days after this, he was informed the defendant had absconded from New Brunswick [not shewing where these transactions had taken place, or that the defendant ever lived or had his residence in New Brunswick].

3. That the bill has been returned for non-acceptance.

4. That the plaintiff has ever since made diligent inquiry to ascertain the present residence of the defendant, but, until lately, without effect.

5. That the defendant is now resident in Chatham, in Upper Canada.

6. That the defendant is a married man, and his wife is resident, with her son, in some part of the United States.

7. That the plaintiff has been informed, and believes, the defendant came to Eastport, in Maine, during the summer of 1863, and that he there met a Mrs. T., a married woman, who went with him to Canada, and with whom he is now living in adultery.

8. That he has never seen the defendant since the purchase of the bill of exchange, and has had no opportunity of asking him for the second and third parts of this bill, and he has never received the same.

9. That on inquiry, Mr. Fraser (the second deponent), found the defendant at Chatham, where he seemed to keep himself aloof from other people, and no one appeared to know much about him.

10. That the sheriff informed Fraser the defendant was reputed to be from New Brunswick, and to be living with another man's wife.

11. That the sheriff informed Fraser the defendant had purchased no real estate that he knew of, and Fraser could not discover that the defendant had any property which would be likely to detain him in the country.

Now, of all these "facts and circumstances," the 2nd and 7th only are entitled to any consideration, as shewing that there is probable cause for believing that unless the defendant be forthwith apprehended, he will quit Canada. It may be that if the defendant absconded from New Brunswick, he may in like manner abscond from Upper Canada; but the affidavits of plaintiff do not shew the defendant was ever in New Brunswick, or at any rate, that he ever resided there; they do not shew that he ever did, in fact, abscond from New Brunswick, or that the plaintiff ever believed it; nor if

* *Stuart v. Matheson*, 23 U. C. Q. B. 135.—EDS. L. J.

he did, what it was he absconded from New Brunswick for. He may have absconded from New Brunswick for some reasons of which I am ignorant, but which may conclusively shew he will not at all be likely to abscond from this province. This fact and circumstance is very unsatisfactorily stated.

Then as to the 7th fact and circumstance, I cannot see much force in it; it is no more likely to make him abscond from this province, than that he had not paid his debts in Maine; in either case, is it likely the defendant will ever go back there? why should that be a reason for his running away from here? I think this fact and circumstance to be quite insufficient.

The grounds of the defendant's keeping himself aloof from other people, that others do not know much about him, that he has not purchased real estate, that he has not any property likely to detain him in this country,—are of that nature that might with propriety be alleged as grounds of suspicion against a very large proportion of the prudent and respectable people of this country. Why should he not keep himself aloof if he like it? and what right have others to know much or little about him if he do not wish it? As to his not purchasing real estate, it is, perhaps, as strong an indication that he means to abide here as that he means to leave, considering the number of large land holders who have left this country after making enormous purchases within it. It will be found that land purchases, however magnificent, are no tie to the country, unless the lands are unencumbered. If they are encumbered, they are more a provocation to flight than a security against it.

I therefore think the affidavits for arrest are quite insufficient to warrant the order that was made for arrest.

The defendant, in his affidavit, answers the 1st, 2nd, 7th and 9th grounds, and denies all idea of absconding from Upper Canada. He also says he is willing to do anything to procure the second and third sets of the bill of exchange, and that he has real estate in Carleton, in New Brunswick, worth £500, wholly unencumbered.

The sheriff also makes an affidavit, that he never told Fraser the defendant was living with another man's wife.

Duncan McNaughton makes affidavit that he is a merchant; that he has known the defendant for the past year; that the defendant did not secrete himself, &c.; and he does not believe the defendant had any intention of leaving Canada at present, but was going into a mining speculation on the north shore of Lake Superior.

Mr. T., husband of Mrs. T. above alluded to, denies that the defendant is living with his wife, as alleged. He says, he and his wife and family came to Upper Canada because business was dull in New Brunswick; that he has known the defendant for five years; that the defendant did not abscond from New Brunswick, and does not intend to leave Upper Canada.

The defendant's summons calls on the plaintiff to show cause:

1. Why the order for arrest should not be set aside.

2. Why the *capias*, &c., should not be set aside, on the grounds that the affidavits do not state that the defendant was about immediately to quit Upper Canada, &c.; or, that the plaintiff or any other person had any good or probable grounds for believing that the defendant was about to quit Upper Canada.

Mr. Kerr, for the plaintiff contends:

1. That no materials not laid before the Judge who made the order can now be used in rescinding his order; citing *Bullock* v. *Jenkins*, 1 L. M. & P. 645.

2. That all the affidavits filed by defendant are sworn before his attorney in the cause, excepting the attorney's own affidavit, and cannot therefore be received, citing *Rule No.* 114, Harrison's C. L. P. Acts, 644; *In re Gray*, 21 L. J. Q. B. 380; *Kidd* v. *Davis*, 5 Dowl. P. C. 568. And that the attorney's own affidavit cannot be received, because it professes to be sworn "at the city of Toronto, in the county of Kent," and that the commissioner had therefore no authority; *Sharpe* v. *Johnson*, 4 Dowl. P. C. 624.

3. That it does not appear that the affidavits now produced by the defendant, as having been before the judge when he made the order to arrest, were the only affidavits then used; citing *Brown* v. *Riddell*, 13 U. C. C. P. 460.

4. That the facts and circumstances were sufficient to satisfy the judge who made the order, and if he were satisfied, no other judge can interfere; citing *Swift* v. *Jones*, 6 U. C. L. J. 63; *Terry* v. *Comstock*, ibid. 235; *Hargreaves* v. *Hayes*, 5 El. & Bl. 272; *McInnes* v. *Macklin*, 6 U. C. L. J. 14.

That such order, if reviewed, can only be rescinded by the court; citing *Palmer* v. *Rogers*, 6 U. C. L. J. 188, *Terry* v. *Comstock*, *ubi sup.*

The first answer is not objected to, as the exceptions to the order rest only on the same materials which were laid before the judge who granted the order; but these materials do not appear to be sufficient.

The second answer is not objected to; but it does not entirely answer the application, for it is not shewn that Mr. Douglass was the attorney in the cause *at the time the affidavits were sworn*; *Kidd* v. *Davis*, 5 Dowl. P. C. 568; *Haddock* v. *Williams*, 7 Dowl. P. C. 328. As to Douglass' own affidavit, it is of no consequence that it should be wholly rejected, because it states no fact of any particular consequence.

The third answer made, I think, is *not* sustainable in fact; for it is stated that, "B. & C. are copies *of the affidavits filed*, on which the order to arrest was granted in the cause, with the order for the writ thereon copied." It is certainly not sustained by the reference made to the cause which is cited to support it, but it is very likely it is proper it should appear that all the proceedings acted upon should be produced in such a case, and I think it does sufficiently so appear, when it is stated that the annexed proceedings are copies of the affidavits (*i. e.* all the affidavits) on which the order to arrest was granted.

The fourth and fifth answers are very closely connected, and may be treated together. A judge may rescind the order of another judge. There are not wanting authorities to shew he may do so on the same materials and on a review of the case as already adjudicated upon; but whether he will do so or not must be a question for himself, according to the nature of the facts. No doubt when a judge has deliberately exercised his discretion as to the sufficiency of the facts and circumstances, and is satisfied with the same, another judge would not, for obvious reasons, interfere at all; but when we know as a fact that the same full consideration is not always given to *ex parte* applications which must be given to contested matters, no judge would feel or imagine any disrespect whatever was shewn to him by the reversal of his order by another judge, who had devoted to the question more attention than he was required to exercise, and after an argument before him which the other had never heard, and more particularly, in a case where it is probable the judge would, on reconsideration, rescind his own order. A judge, however, may certainly receive affidavits denying the indebtedness of the defendant, or denying his intention to leave the province, or any of the other facts and circumstances relied upon as leading to either of these conclusions; because these facts do not impeach the act of the judge, but impeach merely the *ex parte* statements of the plain affidavit upon which he induced the judge to act.

If it were necessary in this case, I should, perhaps, be obliged to set aside the order to arrest, but, as substantially the same object will be accomplished by discharging the defendant from custody, upon the ground that he has fully answered the affidavits on which the order was made, it will be better to adopt this course. I shall therefore order his discharge from custody.

Order accordingly.

In re John Smith.

Foreign Enlistment Act, 59 Geo. III., cap. 69—Sufficiency of Warrant.

Held 1st. That to charge a prisoner in a warrant of commitment, issued under 59 Geo. III cap. 69, *with attempting or endeavouring to hire, retain, engage, or prevail on to enlist, a soldier* in the land *or* sea service, for *or* under *or* in aid of Abraham Lincoln, President of the United States of America, and in the service of the Federal States of America," is sufficiently certain.

Held 2nd. That the foreign power was sufficiently *defined in the warrant*, and one whose existence the Court is bound judicially to notice, viz.: "The President of the United States of America"—the words relating to the Federal States being rejected as surplusage.

Held 3rd That *in such a warrant it is unnecessary* to allege that the accused is a British subject, the law presuming him to be such till the contrary appear.

Held 4th That it was unnecessary in the warrant to negative in the warrant a license from Her Majesty the Queen to do *the act or acts concerning* which the complaint was laid.

Held 5th. That the direction to the gaoler to keep the prisoner in the common gaol "until he shall thence be discharged by due course of law, *or* good and sufficient sureties be received for his appearance, &c." was sufficient, the latter words being read as surplusage.

Held 6th That "I," in the text of the warrant, might be read as "I and I," so as to read "Given under my and my" hand and seal, &c, it being presumed that both magistrates used one and the same seal.

(Chambers, June 16, 1864.)

This was an application for the discharge of a prisoner under a writ of habeas corpus.

The prisoner had been committed to gaol at Goderich on the twenty-eighth day of May, 1864, upon the following warrant of commitment:

PROVINCE OF CANADA, *United Counties of Huron and Bruce.* } To all or any of the constables, or other peace officers in the said united counties of Huron and Bruce, and to the keeper of the common gaol at Goderich, in the united counties aforesaid:

Whereas, upon information of one Elliott Hunter, stating that one John Smith, of the township of Greenock, in the said united counties of Huron and Bruce, did, at the township of Kincardine, in the county of Bruce aforesaid, on the fourteenth day of May last past, attempt or endeavour to hire, retain, engage or procure the said Elliott Hunter to enlist as a soldier in the land or sea service, for, or under, or in aid of, Abraham Lincoln, President of the United States of America, and in the service of the Federal States of America, and to go to Guelph, in the county of Wellington, in this Province of Canada, and in company with some thirteen other persons, whom he alleged had enlisted for the purpose aforesaid: and whereas the said John Smith has been brought before us, two of Her Majesty's justices of the peace in and for the said counties, namely, James Watson, Esq, and Alexander M. Ross, Esq; and whereas evidence has been brought before us as to the said offence, whereof the said John Smith stands charged, and statements and evidence were heard on the part of the crown and of the said John Smith, in his presence. After hearing counsel on both sides, and the statement of the said John Smith, it was ordered that the said John Smith be committed to the common gaol of these united counties until delivered by due course of law, or until good and sufficient sureties shall be given for his appearance at the next Court of Assize to be holden for these united counties. These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to take and convey the said John Smith to the said common gaol at Goderich, in the united counties of Huron and Bruce, and there to deliver him to the keeper thereof, together with this precept: and we hereby command you, the said keeper, to receive the said John Smith into your custody in the said gaol, and him there safely keep until he shall thence be delivered by due course of law, or good and sufficient sureties be received for his appearance at the next Court of Assize as aforesaid. Given under my hand and seal this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and sixty-four, at Goderich, in the counties aforesaid.

(Signed) JAMES WATSON, J. P.
(Signed) A. M. ROSS, J. P. [L. S.]

The prisoner had been brought before Mr. Justice Morrison, on a *habeas corpus*, and remanded, and also before Mr. Justice Hagarty, and remanded. He was subsequently brought before Mr. Justice John Wilson.

R. A. Harrison, on behalf of the prisoner, then objected to the warrant on the grounds following: 1st. No positive statement of any charge, but a mere recital, which does not state whether the service was to be on land or sea, but alleges it in the alternative, which would be bad on an indictment.

2nd. No foreign power men ioned, no intention of leaving the country, only to be taken to Guelph, which is within the Province.

3rd. Does not shew that the men he is charged with having procured to enlist were British subjects.

4th. Does not allege that prisoner was not authorized by license of Her Majesty.

5th. No amount of bail fixed.

6th The attesting clause is under "my" hand and seal, *i. e.*, of one justice only, two having signed the warrant.

He referred to *In re Martin*, 10 U. C. L. J., 130; Paley on Convictions, 140-1; Ib. 193; Ib. 213, *Rex* v. *Mullinson*, 2 Burr 679; *Dawson* v. *Fraser*, 7 U. C. Q. B., 391, 1 Hales, P. C., 583.

S. Richards, Q.C., shewed cause, referring to 59 Geo. III., c. 69.

JOHN WILSON, J.—The prisoner has been committed under the 59 Geo. III. cap. 69, sect. 6, which has been held to be in force in this Province in *Regina* v. *Schram*,* which *inter alia* enacts that if any person whatever, in any part of His Majesty's Dominions or colony subject to His Majesty, shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, retain, engage, or procure, any person or persons whatever to enlist, or to enter, or engage to enlist, or to serve, or be employed in any warlike or military operation by land or sea, as a soldier, sailor, or marine, in land or sea service, for, or under, or in aid of any foreign prince, state, potentate, colony, province, or part of any province, or people, any person or persons exercising, or assuming to exercise any powers of government, or to go, or agree to go, or embark from any part of His Majesty's dominions, for the purpose, or with the intent to be so enlisted, engaged, or employed as aforesaid, shall be guilty of a misdemeanor.

In the argument I am referred to what would be a legal charge of crime in an indictment, but considering recent legislation in this Province with regard to the form in which parties may be charged on indictments, I think I am bound to look more to the substance of what is charged than to the strict words by which the charge itself is made. This becomes the more necessary in this Province, for in its rapid settlement and growth we find kinds of crime and classes of criminals not naturally of its own production. We must have magistrates throughout the country, many of whom have, as yet, been of necessity taken from the uncultivated classes; but such as we have are quite able to perform their duties fairly and creditably. If judges were obliged to construe their proceedings with the strictness of special pleadings, few indeed would stand the test, and in many cases we should be obliged to discharge in a summary way and without trial men gravely charged with flagrant crimes. Speaking for myself only, I cannot say I can bring myself to look with favour on applications made on strictly technical grounds, where there is something substantial behind them.

The *habeas corpus* act, 31 Car. II. cap. 2, under which this prisoner has been brought up, and the writ of *habeas corpus* itself had not their origin in the desire to prevent those accused of crime from being detained for trial, but to prevent the crown from oppressing those obnoxious to it, or detaining them in prison on illegal charges or for an unreasonable time, without trial.

In dealing with this matter, I shall feel that I have accorded his due to the prisoner if I remand him, having first found him properly charged in contravention to this statute, 59 Geo. III. c. 69.

First, then, I find that in the warrant this prisoner stands charged with the offence that he did attempt or endeavour to hire, retain, engage or procure Elliott Hunter to enlist as a soldier in the land or sea service, for, or under, or in aid of, Abraham Lincoln, President of the United States of America.

Secondly, I find a foreign power mentioned whose existence I am bound judicially to notice, namely, the President of the United States of America, for, or under, or in whose aid Hunter was attempted to be enlisted. I reject the words Federal States as surplusage.

Thirdly, it is not necessary to allege that Hunter was a British subject. The law presumes he is until the contrary appears.

Fourthly, the statute justifies the person enlisting, if he has Her Majesty's license, but makes every person everywhere in Her Majesty's dominions guilty who acts contrary to the statute in regard to what is charged against the prisoner. The license mentioned in the statute is a license to enlist for the indemnity of him who enlists.

Fifthly, the warrant would have been good if the words "or until good and sufficient sureties shall be given for his appearance at the next assizes to be holden for these counties" had been omitted. It may be read as surplusage or read as good, for the magistrates having committed him for want of bail, it would be in the discretion of the magistrates or court ordering bail to fix the amount. It was not unreasonable to insert this clause, as shewing on its face that the justices had not refused or were unwilling to bail the prisoner. The amount of bail to be taken was not for them to specify.

Sixthly and lastly, the word "I" may be read "I and I" sign and seal this, if two do it. A note signed by two beginning with "I promise" is the promise of each of them. But the body of the warrant shews that the two were acting. There appears but one seal on face of the warrant, but it may have been sealed by both, and I shall presume that both used the same seal.

For these reasons I deny the application and remand the prisoner. Order accordingly.

* C. P., E. T., 1864, not yet reported.—EDS. L. J.

ENGLISH REPORTS.

V. C. K. CHANCERY.

Low v. Routledge.

Copyright— then—Work published in England.

An alien, resident in a dependency of the British Crown, first publishing in this country a work written by him, has a copyright therein

This was a demurrer to a bill filed by Messrs. Sampson Low, Son & Co., booksellers and publishers in London, praying for an injunction to restrain the defendants from publishing and selling a book called "Haunted Hearts," the copyright of which they alleged to be their property.

The bill stated that in April in the present year the plaintiffs agreed with Miss Cummins, a native of America, but who had been a resident in Montreal, in Canada, during the months of April and May, to purchase from her the copyright of the above-mentioned work; that they paid her the purchase money, receiving from her a receipt and authority to enable them to enter the work at Stationers' Hall, and accordingly on the 23rd May, 1864, they published it, having previously obtained a large subscription from the trade.

The bill further stated that on the 4th June, 1864, the plaintiffs caused proper entries of the proprietorship of Miss Cummins in the copyright of this book, and of the assignment of it to them, to be made at Stationers' Hall, in the book of registry and assignment.

It appeared that a few days afterwards, the plaintiffs having been informed that Messrs. Routledge & Co. (the defendants) were publishing this book, they wrote to them, stating that they presumed they were ignorant that the copyright of the work was legally secured to them. To this the defendants replied, that they did not understand on what grounds the plaintiffs could rest their claim to a copyright in a work written by an alien, a native of the United States of America, there being no law of international copyright subsisting between America and England, and that they could not therefore stop the issue of their edition. The plaintiffs having filed their bill, the defendants demurred to it for want of equity, on the ground that there was no international copywright, and also on the technical gaounds that the entry of proprietorship was not in accordauce with the Act of the 5 & 6 Vict. c. 55, as the date of publication was the 25th of May, when it was stated in the bill to be the 23rd, and also that the name of the firm in the entry was Sampson Low, Son and Marston, 74 Ludgate Hill, whereas in the bill it was called "Sampson, Low, Son, and Co."

Shapter, Q. C., and *Schomburg*, appeared in support of the demurrer.

Baily, Q. C. and *Hardy* contra. The following authorities were referred to in the course of the argument:—*Jeffreys* v. *Boosey*, 4 H. of L., Cas. 815; *Calvin's case*, 7 Coke Rep. 1, 6; Thomas' Universal Jurisprudence, 340; *Donegana* v. *Donegana*, 3 Knapp 85; *Memorandum case*, 2 P. Wms. 74; Dwarris' Stat. 995 2nd vol; Bac. Abr. "aliens," c. 2, 137, 8th edit; 3 & 4 Vic. c. 35; 5 and 6 Vic. c. 55; 8 and 9 Vic. c. 93; 24 and 25 Vic. c. 73; 25 & 26 Vic. ch. 68.

The Vice-Chancellor said that the main question raised was, whether an alien resident in a colony or possession of the British crown, and who, while so resident, first published in England a work composed by him, had, according to the law of this country, a copyright in that work. The defendants contended that, according to the true construction of the 5 & 6 Vic. c. 55, no alien, whether resident in America or in this country, who first published in this country, acquired a copyright. The plaintiffs contended that, by this Act, any alien, whether resident here or in a foreign country, first publishing an original work in this country, acquired a copyright. If it were an open question whether it was expedient or beneficial that the law should be, that an alien, whether resident here or not, by first publishing a work here, acquired a copyright, certainly strong arguments might be adduced in support of the affirmative of that proposition. Every copyright had for its end and object the encouragement of learning by holding out to men of learning and genius advantages to arise from composition and publication, the consideration being a monopoly, although a limited one, and the public feeling that, although such monopoly was *per se* an evil, it might be compensated for by the inducement held out to such men to produce works that should be useful. That being the *modus operandi* in every copyright act, if it were an open question whether it would tend to the object which the acts had in view that a foreign author not resident here should be encouraged to publish works in this country, it would seem that, if there were two works of equal value published simultaneously, one by a British subject here, the other by a foreigner living abroad, if it would be expedient to accord to a British subject such benefit, it would be equally expedient that a foreigner should have the like consideration. At this time of day, at least, it could hardly be contended that a British author ought to be protected from competition with a foreigner, for, in addition to the encouragement held out to learning and genius, there would be the collateral advantage of giving employment to paper-makers, typefounders, compositors, correctors of the press, bookbinders and booksellers, and trades having any bearing on the printing and publishing of books. These were general observations, the question here being, what was the true construction of the 5 & 6 Vic. c. 55; but in considering a difficult act of Parliament with such an object, the question what was, or was not, favourable in learning was not irrelevant, learning being a cause which it was the object of those acts to foster. Although the title of the act was merely the amendment of the law of copyright, the preamble contained the words "of lasting benefit to the world;" differing so far from the statute of Queen Anne which it repealed, in which act the word "copy" meant "copyright." In the 5 and 6 Vic. it was conceded that the word "publishing" meant "in this country," and the word "author" was without any restriction whatever, having a copyright for his life, and seven years after, not exceeding forty-two years in all, it being obvious that the term "author," *ex vi termini*, embraced foreign as well as British authors. It was suggested that the same term "author" occurred in both acts, and therefore must in both receive the same construction. The case of *Jeffreys* v. *Boosey* was referred to, in which the matter was fully and legally deliberated upon, the opinions of the judges being taken, of whom ten gave their opinion, and three noble and learned lords pronounced their decisions, one of whom was then L C, and the other two had been so. Now, with respect to the construction put on the term "author" by that decision, this must be borne in mind, that in point of fact in that case the precise point determined, which of course must be restricted by the facts of the case, was not the exact point arising here, although it was true that in the exclusive and exhaustive manner in which all the questions that could arise were then considered by the judges and their Lordships, points which did not arise in strictness were made the subject of expressions of opinion. There Bellini, being at Milan, had composed the opera called "Somnambula," which proving very attractive, he transferred certain portions of the opera, according to Milanese law, to Ricordi, and he assigned to a British subject, who published it. The question, therefore, was not only according to the facts whether if Bellini, though resident at Milan, had sent his composition to this country and first published it here, he would have acquired a copyright, but what was the effect of the assignment by him to Ricordi and by Ricordi to the British subject, so as to give him, or not to give him, a copyright in that work. But much wider questions were discussed, and elaborate opinions given upon them; but even when the question was not directly put to the judges, whether, if Bellini had sent his work to England and first published it here, he acquired a copyright—although of course that question was considered and opinions given upon it, and opinions were given on the question whether an alien resident in a foreign country and publishing here through agents acquired a copyright under the statute of Queen Anne, the only statute then existing except one of Geo. III., not in question—six of the judges were in favour of such copyright and four against it, and all the three lords sided with the minority. No doubt that opinion was extra-judicial, but having regard to the object of the acts and to that decision, the argument in favour of giving the 5 & 6 Vic. a wider scope was of very great weight. Then came the International Copyright Act, 7 Vic. c. 12, relating

to contentions between this and other countries for the mutual protection of authors, which it was said was confined entirely to works published abroad as to protecting the copyright in this country, and therefore if a copyright was not given to an alien author living abroad and publishing here, it put him in a worse predicament than if he had first published in his own country, it would therefore discourage learning, and that was an argument of no slight weight in favour of the act 5 & 6 Vic. receiving an interpretation so as not only to include foreigners resident here but in a foreign country. If the question were open, which it was not, he would be strongly disposed to hold that the 5 & 6 Vic. should receive that wider interpretation. But it was unnecessary, because this was the case of an alien resident in Her Majesty's dominions, in a dependency of the British crown, and the V. C. was clearly of opinion that such alien first publishing a work in this country had a copyright therein. The act of 5 & 6 Vic. extended to the colonies, which the statute of Queen Anne did not; but in *Jeffreys* v. *Boosey* every one of the judges, without exception, were of opinion that under the act of Queen Anne, a foreigner coming to this country, and here first publishing a work composed by him, did acquire a copyright; and therefore, if Miss Cummins had done so, whether it was composed in Canada or in any other quarter of the world, she would have had a clear copyright in it. Although a foreigner could not acquire an estate here, he might, by permanent or brief residence, acquire temporary and local privileges *quoad* his personality, and owed a local and temporary allegiance as a British subject, and as a compensation for that was entitled to the privilege of protection to the same extent. The act of 5 & 6 Vic. extended to all the British dominions, colonies included. No words could be more conclusive as far as related to copyright, the colonies being brought, as it were, within a ring-fence *quoad* that question. If under the act of Anne, *a fortiori*, under this act, an alien resident and publishing here acquired a copyright, there being only one species, not two species of copyright, and that could not be lost if he left this country; and by parity of reasoning the copyright extended to all the British dominions, whether he was here or in any other part of such dominions—in Canada or elsewhere—it was the same thing as a foreigner coming to this country and first publishing his work here. Miss Cummins, therefore, did acquire a copyright, and the demurrer on that ground could not be sustained. But there were other grounds. Under the 5 & 6 Vic. c. 55 s. 11, there must be a registration at Stationers' Hall, and the 13th section made it lawful, not imperative, that the proprietor of a copyright should make an entry of the title of the book, time of first publishing, name and place of abode, &c., of the assignee, and it was not necessary for him to assign by deed. But no proprietor should be able to sue without making such entry as was prescribed by the act, which was also necessary in order to enable him to assign, although he might assign by deed. The defendants argued that the entry of the proprietorship was not in accordance with the act, and therefore operated nothing, and that argument must prevail. It was a mere technicality, but it was not only one on which the defendants had a right to insist, but was of importance to carry out the real intention of the Legislature, who for good reasons no doubt thought fit to require strictly certain particulars to be complied with. It was in fact a concession of a certain means of assignment, upon conditions which must be performed in order to acquire the right of such assignment. First, the date of publication was the 25th of May, when it was stated in the bill to be the 23rd, it was the plaintiffs' own statement which must be taken for the purposes of the demurrer. It was said to be an error, but it was fatal. Another fatal ground, though not equally strong, was that the act requiring in the registry the name of the publishers, the entry was "Sampson Low, Son and Marston, 14, Ludgate Hill, London." If it professed to enter the name of the firm it must be the real name, which was not the name of the firm registered as publishing the work, for in the bill it was called "Sampson Low, Son & Co." It was a very technical point, but the thing required must be done, and therefore on that ground also there was no valid assignment by the subsequent entry, and the consequence was the demurrer must be allowed. As the decision was in favour of the bill on the main ground, ordinarily there would be leave to amend, but the court was precluded from doing that because the plaintiffs had no title when they filed the bill, and therefore the demurrer must be allowed *simpliciter*, and no leave to amend could be given.—*Law Times Reports.*

GENERAL CORRESPONDENCE.

Right of Canadian Barristers and Attorneys to practise in the West Indies.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—Could you say whether a barrister and attorney of this country can practise in the West Indies without going through any examination, &c. (or at all), and, if any, what?

If you would answer the above you would much oblige

Yours, &c., A Subscriber.

Clinton, July 27, 1864.

[We believe, so far as we can learn, that in most if not all of the Islands of the West Indies, the right to admission as an attorney, or call to the bar, is discretionary with the courts, and that attorneys and barristers from England are usually admitted or called upon certificate. The same, in all probability, would be done in regard to attorneys or barristers from Upper Canada.—Eds. L. J.]

Articled clerks—Filing of contracts of service and assignments.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—The last paragraph of section 11 cap. 35 Con. Stat. U. C. requires that every contract of service as an articled clerk, with the affidavit annexed, shall, within three months after execution, be filed with one of the clerks of the Crown and Pleas at Toronto.

Does the word "contract" used here include an *assignment* of articles? My impression is that it does *not*, as by the 5th section the Law Society are authorized to dispense with the production, in case of loss, of the "contract of service, affidavit and *assignment*."

Had it been the intention to include assignments in the 11th section as necessary to be filed in the clerk's office, is it not probable they would have been specially mentioned as in section 5? Or was it intended that they should be filed as well as the original contract, and is the omission to mention them particularly in the 11th section a mere clerical error?

In case of an assignment not being filed until nine months after execution, will that time be lost to the articled clerk?

Please answer in the *Law Journal*.

Yours respectfully, T. P. T.

St. Catharines, July 29th, 1864.

[Though in strict law we do not think that section 11 would be held to include assignments, we advise students as a matter of precaution, until such time as the point be determined either one way or other by the courts, to file assignments, if any, as well as the contract of service, in the manner directed by sec. 11 of Con. Stat. U. C. cap. 35. The English Act, 6 & 7 Vic. cap. 73 sec. 8, as well as ours, sec. 11, is silent as to assignments.—Eds. L. J.]

Law School—Books for reading.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—I am anxious to know whether it is Williams on Personal or Williams on Real Property that is to be read by students intending to compete for the first year's scholarship. I will feel much obliged to you for an early answer.

I have observed in the July, 1863, number of the *Law Journal*, that it is Williams on *Personal* Property, but as it is stated in subsequent numbers Williams on *Real* Property, I am at a loss which to prepare.

Yours truly,

Neill Malcolm Munro.

Cornwall, 5th August, 1864.

[It is Williams on *Personal* Property, as explained in 9 U. C. L. J. p. 172.—Eds. L. J.]

Registration of decrees of foreclosure in county registry offices—How effected.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—Under Con. Stat. U. C. cap. 89 sec. 40, every *decree* affecting any title or interest in land, may be registered in the county registry office where the land is situate, on a certificate given by the registrar or clerk of the court, stating the substance and effect of such decree, and the lands affected thereby.

Now, I think the meaning of this is clear, and the duty of the county registrar also, but a difference of opinion exists as to the same, and as your periodical extends through Canada, it might be as well to have the matter settled.

In my opinion, the registrar of the county, on having the decree brought to him, with the certificate named, and comparing them to see whether the latter does actually state the *substance and effect* of such *decree*, pursuant to the clause in the act recited, then should register the decree, and place thereon a certificate that it is done, to the same effect as is put on a deed when registered—the certificate of the Chancery registrar, stating the substance of the decree, answering, I consider, the place of a memorial to a deed.

The registrar—or rather his deputy—says he will not endorse any certificate *on the decree*, to the effect that the same has been registered, even if *paid* 2*s.* 6*d.* extra therefor, inasmuch that he *does not know that it is actually the decree*, but that he would make a copy of the certificate of the registrar of the court, and certify that it is a copy. Of course for this he would charge an extra fee.

Now, you will see how absurd it seems that such a plan should be pursued, instead of the manifestly simple one of endorsing on the decree a simple certificate of registration similar to that on a deed when registered. The language of the act is, every *decree* may be registered, not that every certificate given by the registrar of the court. Hence, I take it, that the decree must be produced and compared by the county registrar, and then, when he finds that it complies with the requirements of the clause referred to, he *registers the decree*, as he does a deed, by copying out the instrument which remains in his office. It looks very far fetched to say that the decree itself need not be produced to the registrar. I consider that he is bound to give back *some proof* that he has registered the decree, and that it is proper it should be done by a certificate of his endorsed on the same, so that the decree may remain as evidence of title in the hands of the party entitled to it.

Section 74 clause 6 fixes the fee for doing what the previous section authorises to be done.

Your views would be of service, and might cause a fairer course to be adopted in the matter. I think that the spirit of all laws should be carried out.

And, bye the bye, what remedy would a person have against the registrar if he neglected to record the certificate? He has no acknowledgement that any such was left with him, while endorsed on a deed or mortgage is an acknowledgment of the registration, and it might be impossible to prove it, and incalculable damage and injury and trouble might result.

Yours obediently,

Berlin, August 17, 1864. A Law Student.

[Section 40 of the Registry Act is not as explicit as it should be; and we have great difficulty in bringing ourselves to the conclusion that it intends the decree to be produced and copied in the registry books *verbatim*. It appears rather to us that what is intended to be copied is "the substance and effect of the decree and the lands affected thereby," as apparent from the certificate. This, when done for the purposes of the act, is to be taken as in law the registration of the decree, in the same manner that the transcribing of a memorial is in law the *enregistration* of the deed. We see nothing in the act to make it the duty of anybody to produce the original decree to the registrar for the purpose of having endorsed thereon a certificate or for any other purpose. It is true that section 30 of the act reads that "the registrar, &c., shall, upon the production to him of the instrument, or will, or probate thereof *and* of the memorial and affidavit, or declaration of execution, enter the memorial in the register book, and shall file the memorial and affidavit or declaration of execution, and immediately after such entry shall endorse a certificate on every *such* instrument, or will, or probate thereof, and shall therein mention the certain day, hour and time on which *such* memorial is entered and registered, &c.:" but we do not think a decree of foreclosure is an "instrument" within this enactment. In practice these certificates sometimes recite the decree in full, but more generally give the substance and effect of it, or of a part of it, as may be desired by the party procuring it. The certificate is under the seal of the court as well as the decree, and is complete in itself.—Eds. L. J.]

Issue of debentures—Debt.

To the Editors of the Upper Canada Law Journal.

Gentlemen,—I would trouble you to answer the following: Can a municipal (township) council issue a debenture or debentures in payment of a debt (for a roadway for instance) within its *ordinary* expenditure, supposing, at the *same time*,

that the county of which the township is a part is in debt (section 215, page 571, C. S. U. C.)

I am, your obedient servant.

A RATEPAYER.

Gloucester, August 22, 1864.

[The section to which reference is made does not appear to us to restrict the issue of debentures, as our correspondent supposes.—EDS. L. J.]

Right of Colonial Barristers and Attorneys to practise in England.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—It was in the preface to the "Law List" of 1862, compiled by Mr. Rordans, that I saw that colonial *barristers* may be admitted to be called to the English bar on payment of the fees, less the amount paid on call to the Colonial bar.

Most probably Colonial *attorneys* may be admitted to practice in England on the same terms?

Perhaps Mr. Rordans would be kind enough to communicate through your columns what he knows of the matter. The question might be of interest to many.

Yours obediently,

W. W.

August 24, 1864.

[We now find that in 1857 an act was passed in England (20 & 21 Vic. cap. 39,) to regulate the admission of attornies and solicitors of Colonial Courts in Her Majesty's Superior Courts of law and equity in England in certain cases.

It provides that all persons who have been or should hereafter be enrolled as attornies or solicitors in the superior courts of law and equity in any British colony where the system of jurisprudence is founded on or similar to the laws of England, and where a service under articles for five years and examination is required for the admission of a student, may be admitted and enrolled attornies in all or any of the superior courts in England.

This is subject, however, to certain conditions. Firstly—The person applying to be so admitted must submit to the examination required to be had in England by the Act, and produce a certificate from the judge of the court where he was admitted stating certain facts. Secondly—Her Majesty may from time to time, by order in council, direct the act to come into operation as to any of her colonies, and thereupon the act shall apply to duly admitted attornies and solicitors of such colony; but no such order shall be made until it be satisfactorily shewn amongst other things that the attornies and solicitors of the superior courts of law and equity in England are admitted as attornies and solicitors in such colony on production of their certificates of admission in the English courts *without* service or examination in such colony.

There is not that reciprocity extended to us which we consider we have a right to expect. No action therefore has been taken in this country under the above act, and it remains, so far as we are concerned, a dead letter. Nor have the Inns of Court in England accorded to the barristers of this country any of the privileges which our Law Society has extended to them. We find on enquiry that the remarks in Mr. Rordan's book to the contrary are not correct.—EDS. L. J.]

Law students—Books for reading.

TO THE EDITORS OF THE UPPER CANADA LAW JOURNAL.

GENTLEMEN,—In looking over the list of law books which are to be read by law students before they can obtain certificates of fitness, and be called to the bar, I find the 1st volume of Blackstone mentioned first. Now, there is, I believe, more than one edition of Blackstone published: the one which I have has the first two books in one volume. What I wish to know is, whether it is the 1st book of Blackstone's Commentaries that is required, or the 1st volume which contains two books.

I did intend, at first, to write to the Secretary of the Law Society about this, but on further consideration, I thought I would write to you, as there is some doubt among students on this point; and as the majority of students would never hear the answer to my question unless communicated to them by means of your widely circulated journal. By answering the above you will confer a great favor upon

A LAW STUDENT.

[The first *book* is intended.—EDS. L. J.]

APPOINTMENTS TO OFFICE, &c.

COUNTY JUDGE.

DANIEL HOME LIZARS, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court of the County of Perth, in the place of Read Burritt, Esquire, resigned (Gazetted 20th August, 1864.)

COUNTY ATTORNEY.

EGERTON FISH RYERSON, Esquire, to be Crown County Attorney in and for the County of Perth. (Gazetted 27th August, 1864.)

REGISTRAR.

ORMOND JONES, of Brockville, Esquire, to be Registrar of the County of Leeds, in the place of David Jones, Esquire, resigned. (Gazetted, 13th August, 1864.)

NOTARIES PUBLIC.

ALEXANDER NIVEN, of St. Mary's, Esquire, to be a Notary Public in Upper Canada (Gazetted 13th August, 1864.)

JAMES C. WILKES, of Mount Forest, Esquire, to be a Notary Public in Upper Canada (Gazetted 13th August, 1864.)

JOHN BUTLER, of the Town of Cobourg, Esquire, to be a Notary Public in Upper Canada. (Gazetted 20th August, 1864.)

JAMES HENRY BENSON, of the Town of Cobourg, Esquire, to be a Notary Public in Upper Canada (Gazetted 20th August, 1864.)

CORONER

DANIEL JAMES VANFELSOR, Esquire, M. D., to be Coroner for the County of Kent. (Gazetted 13th August, 1864.)

TO CORRESPONDENTS.

"A SUBSCRIBER"—"T. P. T."—"NEILL MALCOLM MUNRO"—"A LAW STUDENT"—"A RATEPAYER"—"W. W."—"A LAW STUDENT," under General Correspondence, page 252—"L. S."—"J. F. Lister," too late for insertion in this number.