DIARY FOR JULY.

1. Sat. *Dominion Day.* Long Vacation begins. Last d. for Co. Coun. to equ. assessm. rolls. Last for Co. T. to cer. taxes due on occup. lands.
2. SUN. *4th Sunday after Trinity.*
3. Mon. Co. Court Term (ex. York) begins. Heir and Devisee Sittings commence.
4. Tues. Last day for notice of trial for Co. Court, York.
8. Sat. County Court Term (except York) ends.
9. SUN. *5th Sunday after Trinity.*
11. Tues. Gen. Sessions and County Ct. Sittings of York. Last d. for Master and Reg. in Chan. to remit fees to P. T.
15. Sat. *St. Swithin.*
16. SUN. *6th Sunday after Trinity.*
18. Tues. Heir and Devisee Sittings end.
23. SUN. *7th Sunday after Trinity.*
25. Tues. *St. James.*
30. SUN. *8th Sunday after Trinity.*

THE

Canada Law Journal.

JULY, 1871.

LAW OF EVIDENCE IN ONTARIO.

A great change in the law of evidence has been made in this Province, and, so far, the result seems to have been, on the whole, satisfactory. It is to be hoped that the evils which were anticipated by many will not necessitate what could only be looked upon now as a retrograde movement; but it is perhaps too soon to form any opinion on the subject from the little light as yet given by the experience of the working of the act in this country.

The advance has been in the direction of abolishing all exceptional cases, and making the admissibility of all evidence the rule, and leaving the credibility of that evidence to constitute the true test of its value. The technical rules as to amount of interest are no longer in force. Being a party upon the record is no longer an objection. Plaintiffs and defendants may examine themselves and their opponents, their co-plaintiffs and their co-defendants to the hearts' content of each and all of them. There seems good hope that in the long run the cause of truth and justice will be served by the late legislative action, which has been taken in the direction indicated.

There are yet, however, five classes of exceptions, preserved by the Ontario Act, 33 Vic. chap. 13 sec. 5, as to some of which we propose to make a few observations—but do so only on the assumption that the change has been a step in the right direction, which however we do not propose further to discuss.

Sub-division *a* provides that nothing in the Act shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. In other words, the law, as it stood before this statute, is not interfered with. And that law was the old common law rule that neither husband nor wife is competent to give evidence for or against the other, that other being a party, plaintiff or defendant. This rule was avowedly founded on principles of public policy. It was to secure, as has been well said, "the maintenance of peace and union in domestic life, whose quiet would be disturbed, and whose whole order and economy would be overthrown, if the confidences that exist between man and wife were to be rudely dragged before the public eye." The rule was well expounded by Mr. Serjeant Best in arguing *Monroe* v. *Twisleton*, Peak. Add. Cas. 219, "When two persons are placed in the situation of man and wife, the law precludes every inquiry from either, which might break in upon the comfort and happiness of the married state, and therefore it will not suffer one to give evidence which may affect the other, because such evidence might, as Lord Hale expresses it, create implacable quarrels and dissensions between them."

This rule, however, has, of late, been infringed upon in England to this extent, that husband and wife are now competent witnesses for or against the other except in so far as regards *communications* between them during coverture, which are held privileged. This may, perhaps, be the correct limit of the rule so far as it is founded on reasons of public policy, and the further extension of the privilege may be of doubtful propriety. A subsequent Parliament of Ontario may possibly re-consider the point whether it is necessary for us to retain the rule as at common law; thereby rendering the husband or wife of a party in any suit a totally incompetent witness for such party in that suit.

It has been held at common law that the disability to give evidence as to matters occurring during coverture continues, even after the marriage has been dissolved by death. Thus in *Doker* v. *Hasler*, 1 Ry. & Moo. 198, Best, C.J., held that in an action by an executor, the testator's widow could not be called for the defendants to give evidence of a conversa-

tion between herself and her husband. So in *O' Connor* v. *Marjoribanks*, 4 M. & Gr. 435, where in an action of trover for goods by the husband's executor, it was held that his widow was not admissible as a witness to prove that she had pledged the property in question with the defendant by her husband's authority. So it has been held under the old law that if a woman, who was once legally the wife of a man be divorced *a vinculo matrimonii* by Act of Parliament, she cannot afterwards be called as a witness against him to prove any fact which happened during coverture, though she is competent to give evidence of transactions, which took place subsequent to the divorce. See *Pea. Evid. p.* 183, *Munroe* v. *Twisleton*, Peak. Add. Cas. 221.

These authorities shew the precise value of another exception in the Ontario Statute. We refer to sec. 5 sub-div. *c*:—"Nothing herein contained shall render any husband compellable to disclose any communication made to him by his wife during coverture, or shall render any wife compellable to disclose any communication made to her by her husband during coverture." This clause cannot refer to any period during the continuance of the coverture, for then it is to embraced in the more extensive language of sub-div. *a* of this section. It must mean that after the death of either husband or wife, the survivor (widow or widower) is competent to give evidence of communications made during the coverture, but is not compellable to do so, and as to such communications may plead privilege in respect thereof. This clause will, no doubt, be held to apply also to a case of divorce. If our intepretation be right, then husband or wife, after death, or divorce, or either, may be compelled to give evidence of matters that occurred during coverture, where the knowledge of such matters does not arise, from any communication between husband and wife.

The sub-sections we have referred to afford a curious illustration of the compromise character of this statute. It is, we think, a sort of transitional Act of Parliament, half-way between the retention and the abolition of privilege in matters of evidence. Sub-division *a* maintains the old rule of common law; sub-division *c* greatly encroaches thereupon, and in so far assimilates our law to that of the present statute law of England.

Similar uncertainty of principle obtains as to the last sub-division of this section; whereby it is provided that parties to actions by or against personal representatives of a person deceased, are not competent witnesses as to any matter occurring before the death. To be consistent the Legislature should have extended the prohibitions to actions by or against the real representatives as well. But here again it is a matter for grave consideration whether the best course is not, as in England, to erase this clause from the statute book and let the evidence be given for what it is worth. The Courts in England have laid down a rule which perhaps, if we agree to the principle of the change, affords a sufficient safeguard here in cases within this sub-section: namely, that no one shall take a benefit or succeed against the estate of any deceased person upon a case resting solely on his own unsupported testimony.

SELECTIONS.

THE ECCLESIASTICAL COURTS.

Supposing that I had exhausted the humorous phases of the law, I have been for several months cultivating a spirit of dullness and heaviness that has evoked praise from our English legal cousins. But these transatlantic friends must not complain at any breaking out again, like the last words of the late Dr. Baxter, for, in this instance, their own peculiar laws and law reports furnish the occasion.

I know of no more humorous reading than the reports of the ecclesiastical cases, as given in the columns of the Law Journal Reports by those facetious gentlemen, George H. Cooper and George Callaghan, Esquires, barristers at law. We have nothing like them among ourselves, owing to the infidel separation of church from state, which prevails to some extent in this country. Let it not be understood, however, that we are without the blessings of ecclesiastical councils. We have them, but they are a law unto themselves, and our law courts are forced to get on as well as they can without the presence or countenance of the clergy. Perhaps our immunity is not to be regretted, for, of all the assemblies of mankind upon the face of the earth, from the earliest days down to the present time, the most reckless and unregardful of the laws of God and man is an assembly of clergymen. An assembly of women is conservative in comparison. Even a moot court of school boys has more regard for the rules of evidence. And for ingenious malice, tricky evasions and a cruel spirit of rivalry, I imagine that nothing on earth affords a parallel. If I were a clergy-

man, and should have to be tried for any imaginable offence, I should prefer a tribunal of the Camanches, or even the Sioux, to one composed of my fellows, for the injustice inflicted by these Indian tribes would not be perpetrated under the forms and pretence of religious charity.

The recent advent of ritualism in the English church has given rise to considerable interference on the part of the ecclesiastical courts, and I am not sure but that it has demonstrated the utility of such institutions. It is certain that a court of law cannot be imposed on by such evasions as would succeed in a clerical court; and it is controlled by legal rules of evidence and interpretation. Consequently, those English clergymen who have lately gone into the millinery business, and have been evincing an undue fondness for the ways of the scarlet woman, are having a hard time of it before the Lord High Chancellor and those other lords who constitute the Privy Council, to say nothing of the clear and inexorable logic of Dr. Phillimore, Dean of the Court of Arches.

The Reverend Alexander Heriot Mackonochie, clerk in holy orders in the church of England, and incumbent of the parish of St. Albans, seems to be a tough customer. He was charged by a round head fellow, named John Martin, with having, during the prayer of consecration in the order of the administration of the holy communion, knelt or prostrated himself before the consecrated elements, and also with using lighted candles on the communion table during the celebration of the holy communion, when such candles were not needed for the purpose of giving light; also with elevating the paten and the cup above his head, with using incense, and with mixing water with his wine. The court below "monished" him in respect of all the enormities, save the kneeling and the candles, but declined to give costs. 37 L. J. R. (N. S.) Ec. Cas. 17. From the refusals to monish, the puritan Martin appealed to the Privy Council, mainly, it is to be suspected, on the question of costs. The report of the decision on appeal is full of good reading. 38 L. J. R. (N. S) Ec. Cas. 1. The court held, first, that the priest is intended by the rubric to continue in one position during the prayer of consecration, and not to change from standing to kneeling, or *vice versa;* and that he is intended to stand, and not kneel. Second, that the candles, as a ceremony, are unlawful, having been abrogated. Thirdly, that the lighted candles are not ornaments, within the meaning of the rubric. Counsel struggled hard for the candles, claiming that they had been used ever since the year 1100, but the court held the doctrine of ancient lights inapplicable to the case. And their lordships, with due regard to the dignity of the law, advised Her Majesty that the clergyman should pay the round head's costs.

One would suppose that the Rev. Alexander Heriot Mackonochie was now pretty stringently tied up, but, "for ways that are dark and for tricks that are vain," this particular clergyman is "peculiar." He ceased to "elevate the elements above his head," but merely elevated them as high as his head: he put out the candles just before communion, still allowing them to stand; and, instead of kneeling, he bent one knee, occasionally touching the ground with it. The hard-headed Mr. Martin followed him up, and moved the privy council to enforce obedience to their monition. 39 L. J. R. (N. S.) Ec. Cas. 11. The ingenious reverend gentleman made a very pretty argument, in person, in his own defence, which deserves rehearsing, as to the kneeling, at least. He says: "It is defined in Bailey's Dictionary, 'to bear oneself upon the knees.' I maintain, as regards the charge of kneeling, that kneeling is a distinct posture. The body must rest upon the knees. It is true, Dr. Johnson gives a different definition, but all his four examples fall within Bailey's definition; 'to perform the act of genuflexion,' 'to bend the knee.'

'When thou dost ask my blessing, I'll kneel down,
And ask of thee forgiveness.'—*King Lear.*

'Ere I was risen from the place that shewed
My duty, kneeling, etc.—*Ibid.*

'A certain man kneeling down.' Matt. xvii, 14. 'At the name of Jesus every knee should bow.' Phil. ii. 10. Bowing the knee is a distinct act from kneeling. Bishop Taylor says, 'As soon as you are dressed, kneel down.' *Guide to Devotion.* In every instance, in the prayer book, 'kneeling' is used to express the going upon the knees. Two things are necessary to a kneeling, first, that the body should rest upon the knees; secondly, that it should be for an appreciable time." He did not claim that his genuflexions were the result of any weakness in the knees, but boldly said, "I bend the knee as an act of reverence." This, of course, put the matter beyond any doubt, and, in respect to the kneeling, the court held that his peculiar evasion left him but one leg to stand on in physics, and none at all in law, and monished him not to do so any more. In respect to the candles, they expressed their disapprobation of the trick, but held that the reverend blower-out was, technically, within the monition. As to the elevation of the elements, the same may be said, the court holding that the point was not perfectly before the court, but declared that they should hold, if it ever became proper for them to do so, that "any elevation, as distinguished from the raising from the table," is unlawful. One would suppose that, having cornered him on the charge of kneeling, the court would have shown some respect for their own decrees by punishing the infringement, but this clerical flea was not so easily caught. He had, like the prudent man, foreseen the evil, and hidden himself behind an affidavit that "he had never intentionally or advisedly,

in any respect, disobeyed or sanctioned any practices contrary to the provisions of the monition;" *i. e.*, he supposed he had successfully evaded them. Their lordships thought themselves bound, as christian gentlemen and lawyers, to give the affiant the benefit of this christian-like and gentleman-like, if not lawyer-like, affidavit, and so declined to punish him further than "to mark their disapprobation of such a course of proceeding"—to wit, the kneeling—"by directing that he should pay the costs of the present application," which, after all, I dare say, is no light punishment in England. This ingenious clergyman, who thought to evade the decree of the court against kneeling by bending one knee only, should have remembered the fate of "Peeping Tom," of Coventry, that

> "one low churl, compact of thankless earth,
> The fatal by-word of all years to come,"

who, when Lady Godiva was riding by, "clothed on with chastity," risked one eye at an auger hole, and whose

> ——"*eyes*, before they had their will,
> Were shrivelled into darkness in his head,
> And dropt before him."

But if he had possessed that acquaintance with the scriptures which I have (through the medium, in this instance, of Webster's Unabridged Dictionary) he would, on leaving the presence of this tyrannical court, have hurled at them this parting text: "And he *kneeled down* and cried, with a loud voice, Lord, lay not this sin to their charge." Acts, vii, 60.

But we have not yet done with the reverend caviller. In November, 1870, the Privy Council were invoked to punish him for fresh disobedience to the monition, in respect to prostration and elevating the paten and cup. It was alleged and admitted that he had removed the wafer bread from the paten, and elevated the bread, instead of the paten; and it appeared that the upper part of the cup was elevated above the head. The accused claimed that the elevation was accidental and unintentional; but, as he admitted that he had carefully scanned the monition with the determination to yield only a literal obedience to its precise letter, the court held that he must suffer for even a literal violation, on the principle that they that take the sword shall perish by the sword. The accused, also, having met with such bad fortune in his genuflexions, notified his curates that he intended thenceforth to bow without bending the knee, at that part of the prayer of consecration where he had formerly knelt, and so, instead of kneeling, he made a low bow, and remained in that position several seconds. This the court held to be an unlawful prostration of the body. He was amerced in costs, and suspended from office for three months, and thus left with nothing to hold up but his hands, and with full liberty to bow his head if he had any shame left.

In January, 1870, "the office of the judge was promoted"—whatever that may be—"by the bishop of Winchester against the Rev. Richard Hooker Edward Wix, vicar of St. Michael and All Angels, Swanmore, in the Isle of Wight." The vicar was charged with ecclesiastical offences, namely, with having caused two lighted candles to be held on either side of the priest, while reading the gospels, and with having lighted candles on the communion table, or on a ledge or shelf immediately above it, having the appearance of being affixed to and forming part of it, during the celebration of the holy communion, at times when they were not needed for light; also, with using incense, etc., etc. In respect to the first charge, the vicar admitted and defended the practice, but the court held it unlawful, and "monished" him. In regard to the second charge, Wix becomes a dangerous rival to Mackonochie, in the science of evasion, for, although he admits the lighted candles, yet, he says they were not on the communion table, on the ledge or shelf behind it, but on a separate table, called a re-table, not appearing to form a part of the communion table. I think, on the whole, he is rather superior to Mackonochie, for the latter had to put his candles out just before communion, but Wix defiantly kept his burning by means of the convenient re-table. But, it appearing in evidence that the re-table was placed directly behind the holy table, and had a shelf or ledge, which looked like a mantel-piece over the holy table, the court held that this would not answer, and so Wix and his candles were put out. As to the incense, Wix claimed that the censing was done only during the interval between morning prayers and communion, accompanied by processions and tinkling of bells, and that the censing was not within the prohibition of the law, because it was not done during any service. But the court thought there was no sense in this argument; Wix might as well claim that a slice of ham is no part of a sandwich, because it is between two slices of bread; and he was monished against this practice also, and condemned to pay costs, which last probably incensed him most thoroughly. 39 L. J. R. (N. S.) Ec. Cas. 25.

In the same report, at page 28, is found the case of *Elphinstone* v. *Purchas*, in which the matters of vestments, mixing water with the wine, administering the bread in form of wafers, etc., were gravely and elaborately considered. The defendant did not appear, and so the plaintiff, who was a colonel in the army, had a clear field. After eleven pages of discussion and examination, Dr. Phillimore concludes that Mr. Purchas might wear all the regalia which he was accused of wearing, except "a cope at morning or at evening prayer; also, with patches, called apparel; tippets of a circular form; stoles of any kind whatsoever, whether black, white or colored, and worn in any manner; dalmatics and

maniples." The "biretta" or cap appeared to the doctor "as innocent an ornament as a hat or a wig, or as a velvet cap." Processions and incense were pronounced illegal. Blessing the candles was forbidden. So, as to announcing "a mortuary celebration for the repose of a sister," and interpolating a prayer for the rest of her soul. Wafers were not disapproved of, nor was mixing water wine so long as it was not done at the time of the celebration. Placing on the table a veiled crucifix, and unveiling it and bowing, and doing reverence to it, was deemed objectionable. But flowers on the holy table were approved. It was held, for the sake of protestantism and good manners, that the priest must not turn his back on his people, except during proper prayers. It only remains to remark, that placing a figure of the infant Saviour, with two lilies on either side, and a stuffed dove, in a flying attitude, over the credence and the holy table, respectively, was reprehended. All this occupies twenty-five double-columned pages of the report. But, on appeal, all the "eucharistic vestments," including the innocent "biretta," were held unlawful, and the clergy were restricted to the poverty of cope and surplice; the use of the mixed chalice and wafer bread was also pronounced illegal.

So much for rites and ceremonies. But, when we come to the efforts of the courts to keep the ritualists straight in doctrinal matters, we are lost in amaze. Take the case of *Sheppard* v. *Bennett*, for instance. 39 L. J. R. (N. S.) Ec. Cas. 68. The charge was, that the defendant inculcated the doctrine of the visible presence of our Lord in the elements, and the adoration of the elements themselves. The language used was: "Who myself adore and teach the people to adore Christ, present in the sacrament, under the form of bread and wine, believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ." The language at first was, "to adore the consecrated elements, believing Christ to be in them," but this was corrected as above. The court held that this amended language does not necessarily imply a belief in the actual presence, and an adoration of the elements themselves. The words by which it is preceded, however, would seem to render this judgment extremely charitable, to say the least: "I am one of those who burn lighted candles at the altar in the day-time; who use incense at the holy sacrifice; who use the eucharistic vestments; who elevate the blessed sacrament."

If, after believing and doing so much, he does not believe what he is accused of, he must be remarkable. If a man should tell us, "I am copper-colored; I go nearly bare and paint my body, and wear rings in my lips and nose; I live in a wigwam; I sail in a birch-bark canoe; my weapons are bow and arrow, knife and club; I am in the habit of scalping my enemies, and of getting intoxicated on whisky; but I am not an Indian,"—the natural inquiry would be, What are you, then? And if you should believe him, for the reason that a great many other Indian disclaimants had told you the same story, you would use exactly the reasoning that Dr. Phillimore uses to arrive at his conclusion, at the end of fifty-three pages of fine print, in double columns. Peter, the patron saint of all these credulous theologians, persisted in denying *his* Master, although his "*speech* bewrayed him." The learned Doctor hopes that nothing that he has said may further tend to

——"make this banquet prove
A sacrament of war, and not of love."

He says he does not sit "as a critic of style, or an arbiter of taste, or a censor of logic," and has "not to try Mr. Bennett for careless language, for feeble reasoning, or superficial knowledge." And he concludes that Bennett is saved from harm by the fact, that, in sentencing him, he should be passing sentence "upon a long roll of illustrious divines who have adorned our universities and fought the good fight of our church, from Ridley to Keble; from the divine whose martyrdom the cross at Oxford commemorates, to the divine in whose honour that university has just founded her last college." And he showed his leniency toward freedom of religious opinion by making no order as to costs. I must do the doctor the justice to say that he does not seem to regret his enforced decision, and even cites the decision of the privy council, that the words "everlasting fire" might be treated by a clergyman as not denoting the eternity of punishment.

But the humour of the matter consists in the necessity of having a court to adjudge what religious opinions a man may or may not teach, and what rites and ceremonies he may or may not observe. Of course, it is the theory of government that renders this necessary, but the humour of it is none the less apparent on that account. If *our* clergymen take leave of their senses, we soon find a way to restore their wits—we cut off their temporal supplies. If we disagree with *our* clergyman, we dont let him turn us out—we turn him out. Our theory is that the clergy and the Sabbath are made for man, not man for the clergy and the Sabbath. All judicial inquiries into one's religious opinions and ceremonial preferences strike us oddly. We do not see, of course, why the lord high chancellor should not be just as well invoked at the complaint of the Royal Geographical Society, to monish a man against saying and publishing that the world is flat, or, at the instance of Mr. Froude, to warn a rival historian against pretending that Henry VIII was not a conjugal saint. In short, affairs proceed in this country upon the principle of the menagerie-keeper, who, when asked whether a certain animal was a monkey or a baboon, replied: "Whichever you please—you pays your money, and you takes your choice."—*Albany Law Journal.*

THE ELECTION BILL AND THE PROFESSION.

The ballot makes personation easy and detection difficult; it vastly facilitates the process of bribery, by removing the fear of discovery and punishment.

Bribery will not be prevented by merely moral influences—that is proved by all experience. No party hesitates to resort to it when necessary to success. No man, however virtuous in profession, was ever known to vote against his party because they were winning by corruption; he is content to share the spoils of victory and ask no questions. In very truth, nobody really looks upon it as a crime or upon a man who gives or takes a bribe as he views a thief. Everybody would prefer to win an election by honest means, but he would prefer to win by bribery rather than be beaten. Nothing but fear of the penalties really operates to deter, and even they go no further than to introduce more contrivance and caution in the conduct of the business. Whatever reduces the risk of discovery enormously increases the temptation alike to give and to take bribes.

It is scarcely denied that the ballot makes bribery comparatively easy and safe; but its advocates contend that, though it will not make men less willing to take bribes, it will make them less ready to offer bribes, because they cannot secure the fulfilment of the corrupt contract. Voters, it is said, will accept bribes from all, and promise all, and can only give to one; a man who will take a bribe will not hesitate to break his promise. This argument, however, assumes much that is not true in fact. The truth is, as our readers very well know, the great majority of the voters who take bribes perform their contracts faithfully. There is a strange point of honour among electors in this matter. They do not look upon the taking of a bribe as a moral, but only as a legal, offence; in their estimation there is nothing wrong in it, and it is only a question of safety from penalty. They think it very wrong to break a promise, and not one in twenty of those who accept a bribe without shame and without the most severe pricking of conscience vote otherwise than they had agreed to vote for the consideration given.

It must not, therefore, be hoped for that bribery will be dimished under the ballot, because the buyer will be unable to secure the vote he has bought. Even if individual votes could not thus be counted on, another form of bribery, practised largely in America, will certainly be adopted here. Wherever the ballot exists, bribery is conducted thus: Clubs, workshops, societies of men, sell themselves, not individually, but in the mass. The negotiation is conducted between a trusted man on both sides. It is intimated that the society will vote together; what one does all do; little is said, but much is understood; signs are more expressive than words: under a stone in a field, in a hole in a hedge, the representatives of the society after the conference with the Man in the Moon find a certain sum of money. It is divided among the members, and the ballot of all is for the same man. If it be asked how they can be trusted, the answer is, that they well know that if they were to prove false they would soon spoil the market. But if there is a fear of such a consequence, the last resort is to buy conditionally that the buyer is returned,—the purchase-money not being paid till after the election.

This is not a theoretical evil, but one rampant at every election in the United States, and as familiar to the people there as was the head money to the electioneerers of twenty years ago in this country.

The ballot will practically extend the area of corruption by providing facility for concealment of the facts. It will create a new and large class of corrupt voters.

Our readers experienced in elections are well aware that there are many voters who would gladly take a bribe, but dare not do so for fear of discovery. They have been partisans their lives through; they are connected with some church or chapel; they have always worn one colour, or called themselves by one name; and they know well that, if they were to vote against the party they had been associated with, all the town would be assured, as if it had been done before the eyes of all, that they had been bought. But these men, and they are many, would gladly put money into their purses if they knew that they could do so without discovery, and this the Ballot will enable them to effect without possibility of danger.

But it is said the penalties for bribery will continue as before; why should they be less effective to deter or to punish?

For this reason—that the means of detection are immensely diminished. Bribery is usually discovered now by this; that certain persons who had promised one party, or who were usually attached to one party, are seen to vote for the other party. It is then well known what was the inducement, and every detective engine is set in motion to obtain proof of the fact. But where the vote is not known, this is impossible; the clue to the act of bribery is lost, and in practice there is perfect impunity.

This, too, is confirmed by the experiences of the Ballot in all countries. If bribery is to be employed, the Ballot makes it easy and safe, as, indeed, its advocates do not deny; they assert merely that no man will think it worth his while to spend money in purchasing votes which he cannot secure. The answer to this is given above, and as it is contended it will be here so is it actually found to be in the United States.

Thus we encourage increased bribery and extended personation, for what?—to prevent one elector in a hundred from being influenced

to vote against his will. To protect one coward twenty honest men are demoralised. Surely this is paying dear for a trifling benefit.

We have already shown that the much desired object of the promoters of the Ballot—the exclusion of the profession from the conduct of elections—is impracticable. The considerations here suggested with respect to the encouragement and protection it will provide for bribery, fully support that view.—*The Law Times.*

The bill for legalising marriage with a deceased wife's sister has been again rejected by the Lords, although carried repeatedly by large majorities, in the Commons. Surely this is a question on which the opinion of the constituencies ought to prevail. It is merely permissive. It does not compel any person to do anything to which he or she objects; it only enables those who wish to do something, and who have no such objection, to do it if they please. Because some persons have religious scruples upon it, they have no right to impose their creed upon others who have no such scruples. The alliance is simply a question of taste, for the consideration of the parties alone, and to prohibit them from an act harmless in itself is a violation of the liberty of the subject. The alleged social objections are merely pretences, for the law is of very recent date, and no such evils as are prophesied were found to exist before the change to the present prohibition. Previously to the existing statute such marriages were voidable only, and not void; but, inasmuch as nobody cared to take the proceedings necessary to avoid them, they were practically legalised—were largely adopted, and not one mischief was ever found to result from them. It should be well understood that the real opposition comes from a party who object on ecclesiastical grounds, and who, on that account, ought personally to abstain from such an alliance. But there is no reason why they should impose their creed upon others who hold a different opinion.—*Law Times.*

Mr. Wickens is to be the new Vice-Chancellor, and will be sworn in on Monday. Like Mr. Justice Hannen, Mr. Wickens has never "taken silk." Of his appointment there is little more to be said than that it will give general satisfaction, except perhaps to a few Queen's Counsel who would have preferred a selection from among the silk-gownsmen, because it must have set afloat a certain amount of senior business. Mr. Wickens is one of the soundest lawyers at either bar, besides being unusually versed in equity pleading, and he cannot fail to make an excellent Vice-Chancellor. Like Sir W. M. James, he gave great satisfaction as judge of the Lancaster Chancery Court.

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

WEST TORONTO ELECTION CASE.

(Armstrong v. Crooks.)

Controverted elections Act, 1870, 32 Vic., Cap. 21, Sec. 52—Return to writ—Time for filing petition—Holidays—Form of petition—Treating.

Held, 1. That the twenty-one days limited for filing an election petition after the return of the writ are to be reckoned from the time of the receipt of the return by the Clerk of the Crown in Chancery, and not from the time of mailing by the returning officer.

2. Good Friday and Easter Monday are holidays within the meaning of the Act, and they are not to be reckoned in computing the twenty-one days.

3. The joint effect of Stat. Ont. 32 Vic., cap. 21, and the Ontario Interpretation Act, 31 Vic., cap. 7, sec. 1, is, that when the word "holiday" is used it includes the above days as "set apart by Act of the Legislature."

4. The word "treating" refused to be struck out of the petition though not specifically prohibited by the Act

[Chambers, May 17, 1871.—*Hagarty*, C. J., C. P.]

The respondent was the member elect for the West Riding of the City of Toronto. On the 4th April the returning officer mailed his return to the Clerk of the Crown in Chancery, under sec. 52 of 32 Vic. cap. 21; and on the following day this return was received and filed by that officer. On the 1st May the petition was filed, which in general terms charged the respondent or his agents with bribery, treating, and undue influence, following the form recited in the case of *Beal* v. *Smith*, L. R. 4 C. P. 145.

Bethune, on behalf of the respondent, obtained a summons calling on the petitioner to show cause why the petition should not be struck off the files, on the ground that it was filed after the period of twenty-one days from the return to the writ of election; or if filed in time, to amend it by striking out the allegation of "treating" or otherwise, so as to state an offence contrary to the statute in that behalf.

The points mainly relied on were:—that the twenty-one days commence to run from the date of the return, or from the date of mailing: that the first and last of the twenty one days are inclusive, and that Good Friday and Easter Monday, which intervened during that period, are not holidays within the meaning of the act, not having been "set apart by the Legislature."

R. A. Harrison, Q. C., showed cause.

The intention of the Legislature was to give twenty-one clear business days within which to file the petition.

The time runs from the receipt by the Clerk of the Crown in Chancery, and not from the date of or from the time of mailing the return. If never received in the Chancery, great difficulties would arise from holding that the mere mailing of the return was sufficient.

The day on which the return was made is to be excluded: *Pugh* v. *Duke of Leeds*, Cowper, 714; *Wilson* v. *Pears*, 2 Camp. 294; *Ammerman* v. *Digges*, 12 Irish C. L. Rep. Appendix I; *Isaacs* v. *Royal Insurance Co*, L. R. 5 Ex. 296; *Pegler* v. *Gurney*, 17 W. R. 316; *Ib*, L. R. 4 C. P. 235.

As to holidays, the Ontario Interpretation Act and the Election Act must be read together. The latter excludes days set apart as public holidays by the Legislature of Ontario, and in

the former the word "holidays" includes, among other days, Good Friday and Easter Monday.

As to striking out the allegation of treating, see *Beal* v. *Smith*, L. R. 4 C. P. 145; Rogers on Elections, 8th edn.; Clarke on Elections.

Crooks, Q. C. (in person), and *Bethune*, supported the summons:

Rule 166, under the Common Law Procedure Act, should apply, and both days are included: *Morell* v. *Wilmot*, 20 U. C. C. P. 378; *Morris* v. *Barrett*, 7 C. B. N. S. 139. Proceedings on a petition are similar to suits, and the rules applying to the latter should apply to them. As to the rule of computation at common law, see *Regina* v. *Justices of Derbyshire*, 7 Q. B. 193; *Regina* v. *Justices of Middlesex*, 2 Dowl. N. S. 719; *Rex* v. *Justices of Middlesex*, 17 L. J. M. C. 111.

The returning officer was *functus officio* from the time he made his return, and had completed a perfect act as soon as he executed the return. The Clerk in Chancery was not a public officer, and was under no obligation to show his papers or to give any information; and the public and the candidates would not be injured by the returning officer failing to send the return to the clerk, as the returning officer had to file his returns also in the Registry office, and had to send a copy to each candidate.

As to the holidays, the statute is explicit, and our Interpretation Act should not be referred to except in case of doubt or the silence of the particular act. The act excepted public holidays "set apart" by the Legislature of Ontario. No such holidays, and in fact no holidays, had been so set apart; and these words, "set apart," mean *hereafter* to be set apart. What was meant was a non-working day—a day like Sunday. Coke, 2 Inst. 264, shows that there is a distinction between the kinds of holidays; and the Legislature had this in contemplation when in the one act they declared Good Friday and Easter Monday "holidays" merely, and in the other act they excepted "public holidays." And see Tomlin's Law Dictionary, "Holiday," Lush's Prac. 352.

Hagarty, C. J., C. P.—It is first contended, for respondent, that the twenty-one days are to be reckoned from the time of the returning officer making or mailing his return, and not from the time of its being received by the Clerk in Chancery. This depends on the meaning of section 6 of the Controverted Elections Act of 1871. The words are: "The petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery of the member to whose election the petition relates," &c. By section 52 of the 32 Vic. cap. 21, the returning officer, as soon as he receives all the poll-books, adds them up, &c., "and shall within ten days thereafter make and transmit his return by mail to the Clerk of the Crown in Chancery; and he shall also, upon application, deliver to each of the candidates or their agents, or if no application be made, he shall within the same period transmit by mail to each candidate a duplicate of such return, which duplicate shall stand in lieu of an indenture." Section 56 provides that "the returning officer shall forward to the Clerk of the Crown in Chancery, with his return to the writ of election, the original poll-books and lists of voters used at that election, duly certified as such by him."

The respondent contends that when the returning officer makes and mails his return, his duty is completed; that the return has then been made to the Clerk in Chancery, and that the twenty-one days then begin to run. I am of opinion that the time is to be reckoned from the return, *i. e.*, the actual return into the Clerk in Chancery's office or custody, and that the mere act of the returning officer in making his return and mailing it to the Clerk is not what is meant by the words used. It appears to me that the idea is, that the return under section 52, and the original poll-books and lists of voters, are to be finally placed on record, as it were, in the Clerk's office, where all such records are to be collected and kept; and when it is said "after the return has been made to the Clerk of the Crown in Chancery," it is the same as if the words were "after the writ of election and return thereto, &c., have been returned into Chancery," which latter words I think must clearly mean, then actually being in the Clerk's custody.

The respondent argues that there is no provision for inspecting the records in the Clerk's office, and the petitioners have no legal right to search there. Be that as it may, I do not think it can affect the decision. If the returning officer making and duly mailing the return commences the twenty-one days, then if by a post-office blunder the papers went astray and did not reach the Chancery till the lapse of twenty-two days, the time would have expired, and the return had never been actually made to the Clerk in Chancery in the sense of giving that officer custody of the record. If we were speaking of a writ of execution, and either by statute or rule of court a party to a suit had the right to take some further proceeding within twenty-one days after the return of such writ made by the sheriff to the court from which the writ issued, my strong impression is that the twenty-one days would certainly count from the actual receipt of the returned writ into the court, and not from some day when a sheriff in Ottawa or Sandwich wrote his return and put it into the post office properly addressed to the clerk of the court, even though, as here, he was by law directed to make and mail such return to the court. If the writ or return here had been lost or destroyed in transmission, and never reached its address, there would of course be a remedy, and another return must be made, as best could be done, and the twenty-one days would count from the actual receipt in Chancery of the substituted return. The provision in section 56 for the simultaneous return of the original poll-book, &c., to the Clerk in Chancery, affords another reason, I think, to show that the time should count from the actual depositing of all these records in the proper department, where any objection apparent on their face could be properly examined.

I notice in the Controverted Elections Act of Canada, Con. Stat. Can cap 7, sec. 3, a provision that "if the day on which the return upon such election is brought into the office of the Clerk of the Crown in Chancery is a day on which Parliament is not in session, or is one of the last fourteen days of any session, then the petition shall be presented within the first fourteen days of the session of Parliament commencing and held next

after the day on which such return has been so brought into the office of the Clerk in Chancery," &c. The preceding statute had provided for the returning officer making an indenture with the electors as to the return, and section 70 provided for his transmitting the original poll-books with the writ of election and his return to the Clerk of the Crown in Chancery. I cite this as merely illustrative of the meaning Parliament has placed upon somewhat ambiguous words. My opinion on this point is against the respondent.

It is next objected that the petitioners have no right to exclude Good Friday and Easter Monday from the twenty-one days. Section 52 of our late act says, "In reckoning time for the purposes of this act, Sunday and any day set apart by any act of the Legislature of Ontario for a public holiday, fast or thanksgiving, shall be excluded." The respondent contends that the Legislature has never in fact set apart any day for a public holiday. This is true in terms; there has been no specific setting apart of any such day. But the petitioners rely on the Ontario Interpretation Act, 31 Vic. cap. 1. Section 7 says, "Subject to the limitations in the 6th section (which provides that 'unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction,' &c.), in every act of the Legislature of Ontario to which this section applies, * * * (13thly,) the word 'holiday' shall include Sunday, New Year's Day, Good Friday, Easter Monday and Christmas Day, the days appointed for the birthdays of her Majesty and her Royal successors, and any day appointed by proclamation for a general fast or thanksgiving." Now, as it appears to me, the weight of respondent's objection is that our late act says "any day set apart by any act of the Legislature, &c., for a public holiday;" and that, as a matter of strict construction, the Legislature never has in terms set any day apart. Had the words been "Sunday and any public holiday, fast or thanksgiving," I do not think there could be any serious question but that the Interpretation Act would require us to read it so that the word "holiday" should include Good Friday, Easter Monday, &c. If respondent's contention be right, there can be no holiday in Ontario on this Election Act, unless and until an Act be passed expressly setting certain named days apart. We must of course read the two clauses together. It would then read in popular language thus, "Whenever we, the Legislature use the word 'holiday,' we declare that by that we mean Good Friday, Easter Monday, &c., and any further days appointed by proclamation, &c. Then we tell you in the Election Act, in reckoning time, not to include any day which we, the Legislature, set apart as a public holiday, fast or thanksgiving. We have already declared that by holiday it means these days in question."

It is to be noted that the "fast or thanksgiving" is not fixed or to be fixed by Act of the Legislature, it is by proclamation. So that by respondent's argument a proclaimed fast or thanksgiving could not be excluded from the reckoning, as it was not so set apart by any Act of the Legislature. But I consider the "setting apart by Act of the Legislature" has in this cause been already defined in the case of a fast or thanksgiving, where it shall be proclaimed as such. I think in the same manner the words "public holiday set apart by Act of the Legislature" is answered. The joint effect of the two clauses read together is that when the word "holiday" is used, it includes these two days as being set apart by Act of the Legislature.

I observe in the Election Act of 1868-9 the word "holiday" does not occur, but section 30 declares that the day of polling shall not be a Sunday, New Year's Day, Good Friday, Christmas Day, First of July or Birthday of the Sovereign. In the Interpretation Act of Canada, 22 Vic. ch. 5 sec. 12 defines what the words "holiday" shall include—Sunday, New Year's Day, Epiphany, Annunciation, Good Friday, &c., omitting Easter Monday and any day appointed by proclamation, &c. In the Dominion Interpretation Act, 31 Vic. ch. 1 sec. 15, it says the word "holiday" shall include Sunday, Good Friday, &c., &c., Easter Monday and any day appointed by proclamation. It should be observed that in these interpretation Acts the word is "holiday," not "public holiday." I do not consider the respondent has succeeded in making any valid distinction between the words for the purposes of this application.

I decide against the objections. I think, in so doing, I obey the directions of our Interpretation Act in giving the words before me, "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment according to their true intent, meaning, and spirit"

The remaining questions are as to amending the petition by striking out the allegations of "treating" or otherwise so as to state any offence contrary to the statute. The petition is drawn in the widest and vaguest terms. It charges simply "bribery, treating and undue influence." This general form seems sanctioned by the English Practice (See *Beal* v. *Smith*, L. R. 4, C. P. 145), where the allegations seemed precisely similar. Bovill, C.J., in giving judgment, says:—"It seems to me that it sufficiently follows the spirit and intention of the rules, and no injustice can be done by its generality, because ample provision is made by the rules to prevent respondents being surprised or deprived of an opportunity of a fair trial by an order for such particulars as the Judge may deem reasonable."

Our statute does not specifically prohibit "treating" by name, and certain provisions in the English Acts as to giving meat or drink to individuals are omitted. Our statute, section 61, prohibits the furnishing of entertainment to any meeting of electors assembled for the purpose of promoting such elections, or pay for, procure or engage to pay for, any such entertainment, except at a persons residence. Now, I do not feel at liberty to insist in an alteration in the form of the petition, as possibly under the general term of "treating" some matter may be gone into, coming within our law.

*Summons discharged.**

* From the above judgment the respondent appealed to the Court of Queen's Bench, but the decision was upheld.—Eds. L. J.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Damer et al. v. Busby.—Black v. Wigle.

Capias—Setting aside order to arrest—Discharge of prisoner—Relative powers of Court and Judge—C. S. U. C. c. 22 s. 31, c. 24 s. 4.

Applications having been made to set aside two orders for arrest, with the writs and subsequent proceedings, on the ground that the affidavit to hold to bail in one case was untrue and insufficient, and in the other case was not entitled in any Court, and was insufficient in substance, and because there was a variance between the original writ and the copy served.

Held, 1. (following *Ellerby* v. *Walton*, 2 Prac. Rep. 147) that the affidavit to hold to bail is not irregular, though not entitled in a Court.

2. That a Judge in Chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge the prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity in this respect.

The variance between the writ and copy was corrected by amending the former, so as to conform to the latter.

Semble. The Judge to whom application is made for an order to arrest, has only to be satisfied of the existence of a cause of action, etc., and an intention on the part of defendant to abscond with intent, etc. The affidavit to hold to bail may be entitled in a court or cause, or one of them, or it may be altogether without a title; and it is sufficient to say that deponent "is informed and believes," if the source of his information be given.

The order itself can be rescinded only by the Court, but after arrest defendant may apply for his discharge on the ground of non-existence of the debt, or otherwise upon the merits, to any Judge in Chambers, or to the County Court Judge who granted the order. Such an application is not an appeal from the order to arrest, and new facts must be shewn to warrant the discharge of the prisoner, unless it be granted on account of manifest and vital defect in the original material.

Either of these orders may be discharged or varied by the Court, which possesses over the original order to hold to bail,

(1) a general appellate jurisdiction on the identical material which was before the Judge,

(2.) an express statutory jurisdiction to rescind the order upon a motion made to discharge the prisoner.

In addition to this, the Court has also co-ordinate jurisdiction with a Judge in Chambers, or the County Court Judge who granted the first order, to discharge the prisoner upon merits appearing in the affidavits of both parties.

[Chambers, May 15, 1871.—*Gwynne, J.*]

Damer et al. v. Busby.

The defendant having been arrested and being in close custody under a writ of capias issued upon an order dated the 6th day of May instant, made by Hagarty, C.J. C.P., directing the defendant to be held to bail in the sum of $214.90 at suit of the plaintiffs, obtained a summons from the same Chief Justice on the 10th instant, calling on the plaintiffs to shew cause why the fiat or order for the writ of capias issued in this cause, the said writ of capias, the copy and service, and the arrest of the defendant thereunder, or some or one of them, and all subsequent proceedings had by the plaintiffs herein, should not be set aside with costs as irregular and void, on the following grounds:—

1. That there were no or not sufficient facts and circumstances disclosed by the affidavits filed in support of the said order or fiat, to warrant the same being made or granted, in that the same do not follow the Act of Parliament in shewing that the defendant was justly and truly indebted to the plaintiffs at the time of the making of the said affidavit.

2. That in fact the papers filed, purporting to be such affidavits, were not and are not in fact affidavits.

3. That the same were not and are not, styled or entitled in any court.

4. That the said fiat or order, and the precipe for the said writ, or either of them, are not and were not styled or entitled in any court or cause.

5. That it is not shewn by the said affidavits that the plaintiffs had good reason to believe and did verily believe that the defendant was immediately about to leave or quit Canada with intent and design to defraud them of their just debts, and the omission of the words "for money payable by the defendant to the plaintiffs" in the said affidavit, renders the same insufficient to warrant the granting the said order or fiat.

6. That it is not alleged in the said affidavits, that the plaintiffs or person or persons making the said affidavits or either of them, had good reason to believe that the defendant was immediately about to leave Canada with intent and design to defraud the plaintiffs of a just debt, and the said affidavits filed in support of the said order or fiat are wholly insufficient to warrant the granting thereof.

7. That the paper purporting to be a copy of the said writ of capias, served on the defendant after his arrest, is not a true copy of the said original writ of capias, and in fact that the defendant was never served with a true copy o the said original writ.

8. That at the time of making the said affidavits there was no debt due by the defendant to the plaintiffs, for which he was, under any circumstances, liable to be arrested or held to bail.

9. That the affidavit of the plaintiff King in support of the said order or fiat does not shew his true place of abode;

And on grounds disclosed in the affidavits and papers filed in support of this application.

This application was supported by the affidavits of the defendant and of others, stating matter offered to displace matter contained in the affidavits upon which the order to hold to bail was granted, and for the purpose of establishing that the defendant had no idea or intention of leaving Canada at all, and also for the purpose of establishing that the defendant was not indebted to the plaintiffs in any sum, upon the allegation that the goods which he had purchased from the plaintiffs were purchased on a credit which had not yet expired.

Verified copies of the affidavits upon which the order to hold to bail had been granted were filed, and also verified copies of the original writ of capias, and of the copy served upon the defendant.

Upon the return of the summons, the plaintiffs' attorney asked to enlarge the summons in order to answer upon affidavit the special matters contained in the affidavits filed by the defendant in support of his application. In order to dispense with this enlargement, counsel for the defendant agreed to waive all grounds of application except such as consisted in the insufficiency of the affidavits upon which the fiat was granted, and the variance between the original writ and the copy served. Upon these points only, therefore, the case was argued, the

plaintiffs' attorney having upon this suggestion of defendant's counsel, abandoned his application to enlarge the summons. The effect of the above arrangement was to exclude from consideration wholly the 8th ground of objection above stated, and all the special matters alleged in the affidavits filed by defendant.

Upon the argument it appeared that in truth the 1st, 5th, and 6th, of the above objections were identical, for the alleged defect in the affidavit stated to exist under the 1st objection turned out to be that the affidavit of John Dwight King, one of the plaintiffs, alleged the defendant to be justly and truly indebted to him and his co-partners (naming them) in the sum of $214.90 for "goods sold and delivered by me, and my said co-partners to the said Busby at his request"—whereas it was contended that the affidavit should have stated Busby to be indebted to King and his co-partners in the sum of $214.90 "*for money payable* by Busby to King and his co-partners for goods sold and delivered, &c., &c., &c.; and also because the affidavit alleged that the deponent King had "*just*" reason to believe, instead of "good" reason; and that he did believe that Busby was immediately about to quit Canada, "*for the purpose of* defrauding me and my co-partners as well as his other creditors of their just debts," instead of "*with intent and design to defraud*," &c., &c.

The 2nd and 3rd objections appeared to be but one, the reason for which it was contended under the 2nd head that the papers filed as affidavits were not affidavits, being that they were not entitled in any court as stated in the 3rd head.

The variance between the original writ and the copy thereof served, pointed at by the 7th objection, was that in the original the plaintiffs were styled, "W. Damer, J. Damer and J. D. King," whereas in the copy served they were styled, "William Damer, John Damer and John D. King."

The defect or irregularity pointed at by the 9th objection appeared to be that King's affidavit ran thus—"I, John Dwight King, of the city, in the county of York, merchant, make oath and say," there being no city named.

Mr. Richie (Morphy & Morphy) shewed cause: The decision of the Judge in granting the order to arrest can only be reviewed by the Court. No single Judge can set it aside and render liable to an action of trespass those who have acted under it; *Burness* v. *Guiranovich*, 4 Ex. 520. If this were true, a County Court Judge, who has by C. S. U. C. c. 24 s. 4, concurrent powers with the Superior Court Judges, might set aside the orders of the latter, which was never intended. *Terry* v. *Comstock*, 6 U. C. L. J. 235; *McInnes* v. *Macklin*, *Ib.* 14; *Allman et ux.* v. *Kensell*, 3 Prac. Rep. 110.

The affidavit need not be entitled until filed with the Clerk of the Process: *Ellerby* v. *Walton*, 2 Prac. Rep. 147; *Molloy* v. *Shaw*, 6 C. L. J. N. S. 294. The word "may" is permissive not imperative: C. S. U. C. c. 2 s. 18 s. s. 2. The words "money payable" are not necessary here, as the form used in the affidavit clearly shows a debt *in præsenti*: *Lucas* v. *Goodwin*, 4 Sc. 502, 3 Hodges 32.

The Court cannot enquire into the existence of a cause of action: *Brackenbury* v. *Needham*, 1 Dowl. 439; unless defendant clearly shew that there is none: *Shirer* v. *Walker*, 2 M. & G. 917. The affidavit sufficiently shows plaintiff's place of abode; there is only one city in the county of York, and defendant could not be misled.

Blevins, contra.

Black v. Wigle.

On the 20th April the defendant obtained a summons from Hagarty, C.J.C.P., calling upon the plaintiff to show cause why the order of the Judge of the County Court of the County of Essex, bearing date the 8th day of April, 1871, the writ of capias ad respondendum issued thereon, and all other proceedings in the cause, should not be set aside with costs on the following grounds:—

1. That the affidavit on which the said order was made and the said writ issued, is not entitled in any court or in the court in which this action is brought.
2. That the said writ of capias issued out of the Court of Common Pleas, while the said affidavit, if entitled at all, is entitled in the Court of Queen's Bench.
3. That no cause of action against the defendant is disclosed upon the said affidavit.
4. That the said affidavit does not disclose any sufficient grounds for making the said order.
5. That the said defendant is not and was not when the affidavit was sworn, about to leave Canada.

This summons was obtained upon a verified copy of the affidavit upon which the order to hold to bail had been obtained, and several affidavits were offered to show that the defendant has not, and in fact never had any idea or intention of leaving Canada, one of the persons making such affidavit being a person named Adams, referred to in plaintiff's affidavit as one source of his information that defendant was immediately about to leave Canada with intent to defraud him unless he should be arrested.

The summons had been enlarged from time to time until the 11th May. At the argument the defendant's counsel abandoned the 1st objection as already decided, and the 2nd also. The plaintiff, in answer to the defendant's affidavits, filed several affidavits, for the purpose of showing that the defendant's intention was and still is to leave Canada with intent and design if he can thereby defeat the plaintiff's recovery in this action, and explaining away the effect of Adams' affidavit, and tending to establish that the plaintiff had good reason to believe and that there is good reason to believe that the defendant would have absconded if not arrested.

It appeared that the defendant was not in close custody, but that he had given bail to the Sheriff.

The defendant's counsel rested his argument chiefly upon the alleged defect in the affidavit to hold to bail, in not disclosing, as he contended a sufficient cause of action. The point of the objection is that although the affidavit alleged positively that the defendant had seduced the plaintiff's daughter, and that on the 30th day of

March, his daughter, only 16 years of age, was delivered of a child, whereby plaintiff had lost and was deprived of her services, and had incurred expenses in and about nursing his said daughter, and in and about the delivery of her said child, and that plaintiff has a good cause of action against the said Alexander Wigle the younger, of over one hundred dollars, to wit $2,000 *in respect of such loss of services and expenses aforesaid;* yet the affidavit did not allege that Alexander Wigle, the younger, was the father of the child of which plaintiff's daughter had been delivered; and for the absence of this allegation, it was contended that the affidavit disclosed no cause of action.

Spencer shewed cause:—The omission of the Court from the title of the affidavit is not an irregularity: *Ellerby* v. *Walton*, 2 Prac. Rep. 147; *Molloy* v. *Shaw*, 6 C.L.J.N. S. 294. Even if it were, the objection being merely technical, leave would be given to amend: *McGuffin* v. *Cline*, 4 Prac. Rep. 134; *Cunliffe* v. *Maltass*, 7 C. B. 701; and this notwithstanding the proceedings are by way of arrest: *Swift* v. *Jones*, 6 U. C. L. J. 63; *Fround* v. *Stokes*, 4 Dowl. 125; *Primrose* v. *Baddely*, 2 Dowl. 350; *Sugars* v. *Concanen*, 5 M. & W. 30.

If the arrest is set aside on this ground, leave should be given to re-arrest: *Perse* v. *Browning*, 1 M. & W. 362; *Talbot* v. *Bulkeley*, 16 M. & W. 193.

As to the 2nd objection, that the cause is in the C. P., while the affidavit to hold to bail is sworn before "a Commissioner in B. R."—see Con. Stat. U. C. c. 39, secs. 1, 6 & 8. The words of the affidavit sufficiently disclose a cause of action, and the decision of the Judge who granted the order cannot be reviewed here: *McGuffin* v. *Cline*, *ubi supra*; *Terry* v. *Comstock*, 6 U. C. L. J. 235; *Palmer* v. *Rodgers*, *Ib.* 188; *Hargreaves* v. *Hayes*, 5 E. & B. 292; *Runciman* v. *Armstrong*, 2 C. L. J. N. S. 165.

Osler, *contra*.

May 15.—Judgment in both cases was now delivered by

Gwynne, J.—In *Hopkins* v. *Salembier*, 5 M. & W. 423, A.D. 1839, the application was made to the full court, and it was for a rule to shew cause why the capias should not be set aside, and the bail bond given up be cancelled, on the ground that the affidavits were insufficient, and also upon affidavits denying that the defendant was about to leave the country. The rule was discharged upon the sole ground that the rule *nisi* should have asked to set aside or rescind the Judge's order, and not to set aside the capias; for if that should be set aside the Sheriff would be made a trespasser; and the court held that where the application is rested upon the insufficiency of the affidavits upon which the Judge's order to hold to bail is made, it should be to set aside the order.

In *Sugars* v. *Concanen*, 5 M. & W. 30, A. D. 1839, the application was to the court, and the form of the rule *nisi* was to shew cause why the bail bond executed by the defendant should not be delivered up to be cancelled on his entering a common appearance, upon the ground of an irregularity in the copy of the capias served, which stated the writ to be returnable within four calendar months instead of one; but the rule was discharged, the court intimating that applications grounded on irregularities ought to be made within the time for putting in bail, which that application had not been.

In *Walker* v. *Lumb*, 9 Dowl. 131, A. D. 1840, the application was to the Practice Court and the rule *nisi* was to set aside the Judge's order for arresting the defendant upon affidavits meeting the affidavit upon which the order had been granted as to the intention of the defendant to leave the kingdom, and denying that he had any such intention, and shewing that he had applied monies realised from a sale of goods towards payment of his creditors. That was held to be an application on the merits and not for irregularity, and that therefore the application was not too late, although made after the expiration of the time for putting in bail. The case of *Sugars* v. *Concanen* upon points of irregularity was approved, and the court adopted the language of Mr. Lush in his practice, viz, that "when the complaint is founded on an irregularity, the application must, as before, be made within the time allowed for putting in bail, and before any fresh step with regard to these proceedings has been taken, but where it is founded on a material defect in, or, as it would seem, on the falsity of the affidavit, the defendant may *perhaps* apply at any time while the suit is pending." The rule in that case was made absolute, because the order had been granted on the ground of an assertion attributed to the plaintiff, to the effect that he intended leaving the kingdom when he should sell certain machinery, and the defendant upon affidavit fully met this, not only denying that he had any intention of leaving the kingdom, but shewing that he had sold the goods, and had applied the proceeds in paying his creditors, and the plaintiff offered no affidavits in reply to this affidavit.

In *Schletter* v. *Cohen*, 7 M. & W. 389, A. D. 1841, the application was to rescind an order of Rolfe, B., directing the issue of a capias for arrest of defendant, upon the ground of an alleged defect in the affidavit to hold to bail, viz., that the affidavit which was made before the suing out of a writ of summons was *not* entitled in the cause, but the court held this to be no defect.

In *Needham* v. *Bristowe*, 4 M. & Gr. 262, A. D. 1842, the application was to the full court, having been referred there by Wightman, J. from Chambers, but for what reason does not appear. The form of the rule *nisi* was to show cause why an order made by Lord Denman, C.J., at Chambers, dated 15th March, for holding the defendant to bail, should not be set aside, why the writ of capias issued in pursuance of the same should not be set aside for irregularity, and why the bail bond given should not be given up to be cancelled. The irregularity complained of in the capias was in the endorsement thereon, which was issued by the plaintiff in person; wherein he described himself as "of the Fleet Prison in the parish of St. Bride in the city of London." It was held that this was no irregularity, so that the objection to the capias failed. The decision in effect was, that as to setting aside the Judge's order, the application was in the nature of an appeal, and that the court could give no judg-

ment upon that point in favor of the applicant, as he had failed to bring before the court the materials used in Chambers upon which that order had been made; but as to setting aside the bail bond the application might be entertained under the 6th section of the Act, as a motion to discharge the prisoner. Tindal, C. J., says, "although the defendant in this case may not be in a condition to set aside the order, he may be entitled to insist on his discharge under the 6th section of the Imprisonment for Debt Act, (1 & 2 Vic. c. 110). *The proper form of the rule in that case would be to call on the plaintiff* to shew cause why the defendant should not be discharged out of custody or why the bail bond should not be delivered up to be cancelled; but we can decide that now." To this counsel replied, "the only authority the court has under that section, is to discharge the defendant out of custody, but there is no such application in this case." To which Tindal, C. J, replied, that he thought the rule might be made absolute *for cancelling* the bail bond, on the merits disclosed in affidavits.

In *Gibbons* v. *Spalding*, 11 M. & W. 173, A. D. 1843, it was decided by the full court that an order for the arrest of defendant under 1 & 2 Vic. ch. 110 sec. 3, may be made on an affidavit of the plaintiff *that he has been informed and believes* that the defendant is about to leave England, provided it state the name and description of the person from whom he received such information. Parke, B., says, "it is every day's practice to make orders on such evidence. There is, however," he says, "this limitation to hearsay evidence, that no judge ought to make an order of this description merely upon the plaintiff's swearing that he is informed and believes that the defendant is about to leave the country. The plaintiff should be required to state in his affidavit the name of the person giving him that information. The Judge then has before him information which the defendant has the means afterwards of explaining or denying, and if he can do so he will be of course discharged." In that case B. Gurney, had made the order for holding the defendant to bail. An application was subsequently made to him in Chambers under and in the terms of the 6th section of the Act "*for the discharge of the defendant*," but that summons was discharged. The application to the court was for a rule to rescind the above orders on the ground of the insufficiency of the affidavit upon which the order to hold to bail was made. The rule *nisi* was refused upon this ground, but was granted on the merits appearing in affidavits filed in Chambers upon the application *for the discharge of the defendant* The form of the rule would seem to have been to shew cause why the defendant should not be discharged, and the order in Chambers refusing that discharge rescinded. Fresh affidavits, which had not been used in Chambers upon that application, being offered on behalf of the plaintiff on shewing cause to the rule, Thesiger interposed, and contended that fresh affidavits could not be read, "inasmuch as the present application was merely in the nature of an appeal from the decision of the learned Judge under the 6th section of the Act," but the Attorney General, *contra*, insisted that the admission of fresh affidavits was altogether for the discretion of the court: that they might have been used "if *the defendant had applied to the court instead to a Judge at Chambers for his discharge*, and therefore that they would properly be admitted in the present case;" and Parke, B., says "the party who seeks to detain the defendant in custody is certainly at liberty to use other affidavits than those which were brought under the consideration of the Judge;" and Alderson, B., says, "I entertain no doubt that both parties are at liberty to use fresh affidavits. The object of the court must be to ascertain all the facts correctly, that they may determine on satisfactory grounds whether the Judge's order is to be set aside or not."

In *Heath* v. *Nesbitt*, 2 Dowl. N. S. 1041, A. D. 1843, the form of the rule was to show cause why two orders of Gurney, B., one directing defendant's arrest under 1 and 2 Vic. ch. 110, and the other refusing his discharge, *should not be rescinded, and the defendant discharged out of custody.* The rule had been obtained upon fresh affidavits, and those which had been used in Chambers in support of the application for the defendant's discharge were not brought before the court. Hereupon Watson contended that "as the present application was in the nature of an appeal from the decision of the Judge, the affidavits used before him should be brought before the court, in order that they might see whether or no the Judge's discretion had been properly exercised," and it was held by the whole court, consisting of Lord Abinger, C. B, Parke, Gurney and Rolfe, B.B., that although additional affidavits may be used (as decided in *Gibbons* v. *Spalding*), still that those upon which the learned judge *refused to discharge* the defendant should also be before the court, for otherwise it would be impossible to determine whether he had decided correctly or not *in refusing the discharge.*

In *Graham* v. *Sandrinelli*, 16 M. & W. 191, A. D. 1846, the form of the rule which was granted by the court was simply *to show cause why the defendant should not be discharged out of the custody of the sheriffs of Middlesex.* The defendant had been arrested by an order of Erle, J. Upon being arrested the defendant on affidavits of himself and other persons that he intended to remain in England, applied to Platt, B. to set aside the order of Erle, J., and all subsequent proceedings. The learned Judge refused to make any order, whereupon the application was made to the court as above, and was supported by further affidavits besides those used in Chambers. Martin, in showing cause to the rule, contended that it was incorrect in point of form; that it ought to have been a rule to set aside the order of Platt, B., not merely a rule to discharge the defendant; that under section 6 of the Act, the proper course was for the party arrested to apply in the first instance to a judge, or to the court, for an order or rule on the plaintiff to shew cause why he should not be discharged out of custody; that in substance that was the application made to Platt, B., who in effect made an order refusing to discharge the defendant, and that then the subsequent jurisdiction of the court is only to discharge or vary such order made by a judge, on application made to the court by a party dissatisfied with

the order; that the defendant, according to the true construction of the 6th section, can appeal at once; that he may under that section apply to another Judge, or he may come to the court at once, but that he cannot do both. On the other hand it was contended that wherever authority is given to a judge at chambers, it is impliedly given subject to the exercise of it being reviewed by the court, and that the court out of which process issued had always a right by virtue of their general jurisdiction, to relieve the party against it, if they thought the judge had allowed the process to issue upon insufficient materials, or had exercised an improper discretion in doing so.

In giving the judgment of the court, Parke, B. says, "It is clear from the terms of this (6th) section that notwithstanding the judge's order to arrest, the court from which the process issued, upon an application to it, has a power to discharge; and we think there is nothing in the Act to take away the general control previously possessed by the court over a single judge, if we think the materials before the judge insufficient, or that he exercised an improper discretion acting in any matters pending in the court; and consequently where an application is made to us, we may interfere, either by virtue of our general jurisdiction, or that given by the statute; and further, the party arrested may, by the statute, use affidavits to contradict or explain those on which the order was granted, either by denying the intention to depart, or shewing that the debt was not due, a course which was not permitted by the old practice of the court; and those affidavits may be answered by the plaintiff on shewing cause. *In addition to this*, a right is given to the person arrested to take the opinion of another judge *as to the propriety of his discharge*, this opinion being again subject to be reviewed by the court above."

He proceeds to say: "Two questions here arise—first, whether, if the judge secondly applied to should differ from the first on the same state of facts, he has *power* or *right* to order the prisoner's discharge as upon an appeal to the court; and, secondly, whether, if it should appear on the fresh affidavits that the person arrested was about to quit England at the time the *affidavits* were made, though it is not clear that he was, or or even though it be shewn that he was not, when the *order* was made, the court ought to discharge him or his bail, or direct money deposited instead of bail to be refunded. *We are not all agreed upon the questions*, and it is not now necessary for us to decide them, though the points are of practical importance." With reference to the proceedings before Platt, B., the judgment proceeds: "After the defendant was arrested, he applied to my brother Platt to set aside the order to hold to bail, and all subsequent proceedings, upon his own affidavit and the affidavits of other persons as to his intention to remain in England. The learned judge refused to make the order. The affidavits did not disclose any new matter against the defendant. *In the form in which the summons was taken out*, my brother Platt was certainly right in not granting an order to the full extent asked, because the writ of *ca. sa.* certainly ought not to have been set aside. Whether he was right or not in refusing to *make an order to discharge only, on this summons*, is not material *now*, for we are all of opinion that we may consider that my brother Erle's order and the affidavit in support of it are before the court, and that under our *general* jurisdiction we have a power to give the defendant relief. We all think he was wrong in making the order to arrest upon such an affidavit. The order, therefore, having proceeded on insufficient grounds, we think that the defendant should be discharged out of custody, *and we may say nothing respecting the order of Baron Platt.*" The defect in the affidavit was that the plaintiff swore that he was informed and believed that the defendant was about to leave England without stating from whom the deponent obtained the information.

Talbot v. *Bulkeley*, 16 M. & W. 193, was before the court at the same time as *Graham* v. *Sandrinelli*. The rule was to shew cause why an order of Pollock, C.B., dated 11th August, 1846, should not be rescinded, and why the capias issued in pursuance thereof should not be set aside, and why the sum of £126 18s., deposited by the defendant with the Sheriff of Middlesex in lieu of special bail, should not be returned. The affidavit upon which the order for defendant's arrest had been made was objectionable upon the same ground as that in *Graham* v. *Sandrinelli*. After defendant's arrest he applied to the Chief Baron *for his discharge*, upon an affidavit negativing his intention to leave England. His Lordship refused to make any order, and thereupon the defendant lodged £126 18s. in lieu of special bail.

On the part of the plaintiff, in answer to the rule, it was sworn that on the 7th November, the deponent called at defendant's lodgings, and was informed by a female servant there that his goods had been distrained upon for rent on the 20th October, and that on that day he had given up his apartments, and left for the purpose of going to France, and had never been there since that time. It was contended upon this affidavit that it shewed sufficiently reasonable ground to apprehend that the defendant would go abroad and defeat the plaintiff of his debt if he should be relieved from the effect of the Lord Chief Baron's order, or indeed that he had already gone, and that, this being so, the court would not set the order aside, or direct a return of the deposit. It was contended in answer that the original affidavit upon which the arrest took place was clearly insufficient, and that therefore the question was, whether it sufficiently appeared that, *when the defendant was arrested*, he had any intention of going abroad, that at all events the question must be determined with reference to the period when the original order was confirmed by the Chief Baron on the 17th August, and that subsequent facts ought not to be taken into consideration except in so far as they might show that the defendant at that time intended to go abroad. In reply to this contention Rolfe, B., says:—"I very much doubt whether the question is whether he intended to go abroad at the time of the actual arrest. The Judge may issue a capias at any time during the progress *toties quoties*, and if the court be satisfied that the defendant *now* intends to go abroad, it would be

absurd to discharge this order, merely to substitute another of the present date," and in giving judgment the court say, "We have carefully perused all the affidavits, and think that if it were not for the matter disclosed on the affidavits used on shewing cause, the defendant would be entitled to have the deposit returned, but those affidavits raise a question on which the defendant has not had any opportunity of being heard, viz., whether he has not since the arrest, broken up his establishment and gone to reside abroad, and whether this be the fact the court wish to ascertain, before they decide on the question, whether the deposit ought to be returned," and that question was therefore referred to the Master.

In *Pegler* v. *Hislop*, 1 Ex. 437, A. D. 1847, the form of the rule was to shew cause why an order of Williams, J., for the arrest of the defendant, and under which he had been arrested, and had given bail to the sheriff, should not be rescinded, and why the bail bond should not be given up to be cancelled. The affidavits in support of the rule denied the existence of the debt, and also that the defendant was about to quit England for a period of two months. It being objected that the question of the existence of the debt could not be gone into, and that the only point open was as to the intention of the defendant to quit England, Parke, B., says:—"I think the words of the statute leave the whole matter at large, and the defendant is not precluded from disputing, at this stage of the proceedings, either the cause of action or other matters which the plaintiff's affidavits contain. It must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere." The decision in the case was, that as the court was of opinion that the intention of the defendant to go abroad was not made out, *the bail bond should be cancelled*, but the judge's *order and the capias were undisturbed.* That was a decision of the full court, consisting of Pollock, C.B., and Parke, Alderson and Rolfe, B.B.

In *Burness* v. *Guiranovich*, 4 Ex. 520, A. D. 1849, Lush obtained a rule in full court, calling upon the defendant to shew cause why so much of an order of Talfourd, J., of the 15th September, as set aside a former order made by the same learned Judge on the 1st of September, should not be rescinded. On the 1st September, an order had been made for the arrest of the defendant. After the arrest a further application was made to the same Judge upon additional facts, and he made the order of the 15th September, as follows:—"I order that my order to hold the defendant to bail, dated the 1st day of September instant, and all subsequent proceedings, be set aside with costs to be taxed, and that the defendant be discharged out of the custody of the sheriff of the city and county of Bristol." On the argument it was contended that the judge, upon the occasion of the second order, had exercised his discretion in a matter which was proper for his discretion, and that the court ought not, therefore, to interfere by setting the second order aside. To this, Parke, B. says:—"The defendant still may have his remedy by an action on the case," and Alderson, B. says:—"The *statute* (1 & 2 Vic. ch. 110) *says nothing about setting aside the writ: the proper course is to order the discharge of the party out of custody.* The order of the learned Judge cannot be revoked. *Can the defendant show* any instance of such an order being revoked?" The learned Baron here plainly refers to the first order as the one which was revoked, but which he considered could not be. Counsel replied that "where an order has been obtained by fraud, the learned Judge may revoke it by reason of his general jurisdiction *quia improvide emanavit*," to which Alderson, B., answers, "As long as the order exists, the person who obtained it is not a trespasser. *If the party has obtained the order by fraud*, the other party has a remedy against him by an action upon the case," and the judgment of the court is given in these words, "*the proper course was to apply to discharge the defendant out of custody.* The rule must be made absolute to set aside the order of the 15th September *so far as it relates to rescinding the order of the 1st of September.*"

In *Cunliffe* v. *Maltass*, 7 C. B. 695, A.D. 1849, an order to hold the defendant to bail in the sum of £1.050 had been made by Patteson, J. Upon the defendant being arrested, he applied to the same Judge under the 6th section of the Act, and obtained a summons calling upon the plaintiff *to shew cause why he should not be discharged out of custody*, upon the ground that the affidavit to hold to bail, which stated several causes of action, was defective as to the statement of one for £500, which, however constituted part of the £1,050. The learned Judge being of opinion that this cause of action for £500 was defectively stated, declined to discharge the defendant, but made an order reducing the amount for which the defendant should be held to bail to £550. The defendant afterwards perfected special bail for the lesser amount, namely, $550, and applied to the full court for, and obtained a rule calling upon the plaintiff to shew cause why the two orders of Patteson J., should not be rescinded, why the writ of capias issued in pursuance of the first order should not be set aside, and why the recognizance of the defendant's special bail put in and perfected, should not be vacated, or why an *exoneretur* should not be entered on the bail piece on the defendant's entering a common appearance. Wilde, C. J., in giving judgment in that case, after stating the facts, including the application made by defendant for his discharge after arrest, says:—"I apprehend that the defendant is not now in a situation to make an application different from that which he made before the Judge at Chambers. The motion is founded on the 6th section of the statute, which enacts that 'it shall be lawful for any person arrested upon any such writ of capias to apply at any time after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have commenced, for an order or rule on the plaintiff in such action to shew cause why the persons arrested should not be discharged out of custody; and it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such order therein as to such judge or court shall seem fit, provided that

any such order made by a judge may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order.' When, therefore, the parties come before the court, the court is to make such order as it conceives the justice of the case to require. Now, justice requires that we should deal with the case as it was presented before the judge." Coltman, J., says:—"By the 3rd section of the Act, two matters are referred to the Judge—the one, whether the plaintiff has a cause of action against the defendant to the amount of £20, or has sustained damage to that amount; the other, whether there is probable cause for believing that the defendant is about to quit England. When the judge makes an order to hold the defendant to bail for a particular amount, *he is doing a judicial act.* The question is, what is the mode of relief where the judge has directed a defendant to be held to bail for a larger sum than is warranted by the affidavit? The remedy is pointed out by the 6th section, which provides that *any order* made by a Judge may be *discharged* or *varied by the court* on application made thereto.

In *Gadsden* v. *McLean*, 9 C. B. 283, A. D. 1850, the application was to the full court, and the form of this rule was to shew cause why the Judge's order to hold the defendant to bail, and the capias issued in pursuance thereof should not be set aside, and why the bail bond should not be delivered up to be cancelled on the ground that the affidavit to hold to bail disclosed no cause of action. Wilde, C. J., in giving judgment says:—"The court is of opinion that the affidavit upon which the order for the capias in this case issued, does not disclose any good cause of action. Upon the whole we think that remedy enough will be given to the defendant by ordering the bail bond to be delivered up to be cancelled without costs."

In *Bullock* v. *Jenkins*, 20 L. J. Q. B. 90, A. D. 1850, the application was to the Bail Court, and the form of the rule was to shew cause why an order of Platt, B. to hold the defendant to bail, should not be rescinded, or why the defendant should not be discharged out of custody. After having been arrested, the defendant upon affidavits that he had no intention of leaving the country, applied to Platt, B. for his discharge. His Lordship dismissed that application, but made an order reducing the amount of the bail. It was contended that the defendant, having applied to Platt, B., for his discharge, was not entitled to come to the court by way of appeal from his decision. Patteson, J., in giving judgment, says:—"The application is divided into two parts; the granting or refusing the first part must depend upon whether the order was rightly made in the first instance, and that again will depend upon whether the affidavit upon which it was founded was sufficient to justify the learned judge in making the order. I take it to be quite clear, that on a motion to set aside an order of a judge warranting the arrest of a party, it is not competent for the party making the application to produce affidavits as to collateral facts not submitted to the notice of the judge. In considering, then, whether the order of Platt, B., ought to be set aside I must confine myself to looking at the affidavit on which the order was made." After reviewing the affidavit the first part of the rule was discharged. He then proceeds:—"Then as to the second part of the application, which is for the discharge of the defendant out of custody, it appears *that an application to discharge the defendant* had been made to the learned judge, but that the latter had refused it. It is competent nevertheless for the defendant to come to this court and ask for his discharge. The application is not by way of appeal, but is a substantive application, and therefore new facts may be introduced." Now this case seems to warrant the conclusion that the application to a judge which the 6th section of the Act authorises to be made *after the arrest*, is not by way of appeal from the order authorising the arrest. It may be made to the same Judge as the one who ordered the arrest, or to any other judge, and if by way of appeal no new matter could be introduced; and moreover the decision of the judge made under the 6th section, does not exclude an *appeal* to the *court* against the *first* order to hold to bail, without taking any notice of the order of the judge to whom the application had been made after the arrest.

In *Hargreaves* v. *Hayes*, 5 El. & B. 272, the application was to the full court, and the form of the rule asked was to set aside the order of Erle, J., directing the defendant to be held to bail. The grounds of the motion were alleged defects in the affidavit to hold to bail. The court there sustained the order, notwithstanding the objections, and refused to grant a rule, holding that the affidavit to hold to bail was sufficient, which alleged that the defendant was indebted to the plaintiff in a stated sum for railway shares *sold* by the deponent to him without adding *and delivered*, and that the entitling the affidavit in a court, and with a style of cause, although made before writ of summons issued, did not vitiate the affidavit.

In *Stammers* v. *Hughes*, 18 C. B. 527, A. D. 1856, the plaintiff had most grossly imposed upon a Judge by swearing that the defendant was indebted to him in £63, and had thereby obtained an order to hold the defendant to bail, and, upon arrest, the defendant being about to sail for America, deposited with the sheriff the full amount of the alleged debt. Afterwards upon affidavits denying the existence of the debt, and shewing the contract, by which it appeared that no debt or claim did or could be alleged to exist against the defendant, and although the plaintiffs claim was so utterly devoid of foundation as a induce the learned judge to characterize the conduct in swearing to the debt, and thereby obtaining the order for arrest and the capias, as a gross abuse of the process of the court, and another learned judge to say that he had no hesitation in saying "that the plaintiff had not a shadow of claim," and another that "the plaintiff's claim is wholly unfounded," still the form of the rule was merely calling upon the plaintiff to shew cause *why the money deposited with the sheriff should not be restored to the defendant.*

In *Stein* v. *Valkenhuysen*, El. Bl. & El. 65, A. D 1858, the form of the rule is not precisely stated, but as the whole proceeding was a gross abuse of the process of the court, the order, capias and arrest, all appear to have been set aside.

In *Burns* v. *Chapman*, 5 C. B. N. S. 481, an order to hold the defendant to bail was made by Hill, J., on the 8th October, 1858. After the defendant was arrested under a capias issued upon that order, and had deposited the amount sworn to with the sheriff, and £10 in lieu of bail, he made an application upon affidavits to the same Judge for and obtained a summons, the form of which, as appears by the report, was, calling upon the plaintiff *to shew cause why the order of the 8th October should not be rescinded.* The summons was opposed upon affidavits, and the learned judge refused to make any order, but whether he so refused for the reason of the form of the summons, or on the merits, does not appear. On the first day of the following term a motion was made to the court for a rule to shew cause why the order of the 8th October should not be rescinded, *and* the writ of capias issued thereunder set aside, and why the money paid in lieu of bail should not be repaid to the defendant. The rule was moved upon two grounds: first, that the affidavit upon which the order for the writ of capias was obtained contained a statement of a cause of action, which, when the circumstances came to be investigated, the plaintiff could not sustain; secondly, that the Court of Common Bench had no jurisdiction over the subject matter of the action. The court refused to grant any rule. As to the first point, Cockburn, C. J., giving judgment, says:—"All that is required under the statute, 1 & 2 Vic. ch. 110, is, that *the Judge* should *be satisfied*, that there *is a cause* of action. I entertain a strong opinion, *that if the judge be satisfied* that *a* cause of action exists, it is not for him to enquire into the particular form of the action; and even if it should appear to him that the plaintiff is about to pursue a mistaken or erroneous course of proceedings, I think it is no part of the Judge's duty to entertain that question. *If satisfied* that the plaintiff has *a* cause of action, all he has to do is to afford him the remedy pointed out by the statute. Of course the court will not stand by and see its process abused. It was upon that principle that this court proceeded in *Stammers* v. *Hughes*. *Being satisfied that there was no cause of action* at all, and that its process was being abused for the purpose of oppressing and harassing the defendant, the court thought fit to interfere for her protection. So, here, if the court were satisfied that this action was causelessly brought, and the arrest of the defendant vexatious, and an abuse of its process, it would not be slow to interfere to prevent injustice," and Williams, J., says:—"I entirely concur in what has fallen from my Lord. All I wish to add is, that in refusing this rule we are not in any degree departing from the principle upon which this court acted in *Stammers* v. *Hughes*. *The court will not interfere unless it clearly appears that the plaintiff has no* good cause of action, *and* that he is using the process of the court for the purpose of oppression and annoyance."

In *Barker* v. *Lingholt*, 11 W. R. Q. B. 68, it appeared that on the 23rd September, 1862, the defendant had been arrested. On the 26th September, defendant applied to Bramwell, B., upon affidavits, for his discharge. The learned Baron refused to discharge the defendant. On October 23rd, he again applied for his discharge to Mellor, J., upon a further affidavit. Upon this application the learned Judge discharged defendant, but the plaintiff forthwith obtained from him another order for defendant's arrest, founded upon another affidavit. The defendant being again arrested, applied *for his discharge* to the court in term, upon affidavits setting forth all the above proceedings. The application was made partly on the ground of the double arrest, and partly on account of inconsistency in the affidavits and their unsatisfactory character. The defendant in his affidavits denied the cause of of action, and it was contended for him that he could controvert the debt, and that the court or a judge has a discretion on the whole of the circumstances. To this, Cockburn, C. J., says:—"Not a general discretion—supposing a *prima facie* case is made on which the judge or the court is satisfied that there *is a* cause of action, that is, a real *bonâ fide* question to be tried. No doubt if it be clear that there is not, then he cannot be satisfied that there is a cause of action so far as to allow of the arrest. In giving judgment, he says: "The cause of action must no doubt be shewn to the satisfaction of the judge, but it is so shown when it is sworn to in an affidavit of the plaintiff, and there are only, on the other side, affidavits which leave the question in doubt. That is so here. It is left doubtful by the defendant whether there is or is not a cause of action [the question depended upon what the foreign law was, which governed the case, as to which there was no clear evidence], but it is positively sworn to by the plaintiff. There is not enough to shew any wilful abuse of the process of the court, or any wilful falsehood in the affidavits." The court refused to discharge the prisoner, but the defendant's counsel being satisfied with the reduction of the amount of bail, and the plaintiff not resisting, the rule was made for reduction of bail.

In *Delisle* v. *Legrand*, 6 U. C. L. J. 12, before Draper, C. J., in Chambers, the form of the summons was to set aside the order of the County Judge of the county of Essex for defendant's arrest, and the writ of capias, with costs, *and to discharge defendants from custody*, on the ground that the affidavit to hold to bail was insufficient, inasmuch as the plaintiff had no cause of action to the amount of £25, and because the facts and circumstances to satisfy the judge that there was good and probable cause to believe that the defendants, unless forthwith apprehended, were about to leave Canada with intent to defraud the plaintiffs, were untrue. The learned Chief Justice upon the authority of *Stammers* v. *Hughes*, 18 C. B. 52, entertained the question as to the existence of the debt, and the intention to quit Canada with intent, &c., upon affidavits filed by defendants and others filed in answer thereto, and, notwithstanding the form of the summons nothing in fact turned upon any defect or insufficiency in the affidavits to hold to bail, but the case proceeded wholly upon new matter, and the summons was discharged.

In *Terry* v. *Comstock*, 6 U. C. L. J. 235, before Draper, C. J., the summons called upon the plaintiff to shew cause why the writ of capias issued in the cause, the arrest of the defendant thereunder, and all proceedings subsequent

thereto, should not be set aside, on the ground that both the plaintiff and defendant were at the time of the issue of the writ citizens of a foreign country; or why the arrest should not be set aside, *and the defendant altogether discharged from custody*, on the ground that the defendant had not, either at the time of the making of the affidavit to arrest, the issue of the writ of capias thereon, or the arrest of the defendant thereunder, any intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose. Draper, C. J., in giving judgment, says:—"In this application to set aside the defendant's arrest and discharge him from custody, the only point for decision raised is, that the defendant had not at the time of the granting the order, the issuing of the capias, or the making of the arrest, any intention of quitting the Province of Canada with intent to defraud. *It was not pressed upon me to review the decision of the learned Judge who made the order for the arrest, upon any suggestion of the insufficiency of the affidavit before him to sustain such an order.* The application was based entirely on the new matter disclosed upon affidavits. *Had the former course been taken I should have referred the matter to the full court.*"

In *McInnes* v *Macklin*, 6 U. C. L. J. 14, the application was by summons to shew cause *why the defendant should not be discharged from custody* and the bail bond be cancelled "on the ground that the affidavit on which the order had been obtained did not disclose the name of the party from whom the plaintiff received the information that defendant was going to New Caledonia, *and upon grounds disclosed in affidavits and papers filed.*" These affidavits, which were very numerous, were offered for the purpose of shewing the dealings between the parties, and that, although defendant was going from Canada, it was but for a short time on business, and that he was leaving his family here, and negativing all intention to defraud. Hagarty, J., after referring to these affidavits, and to *Graham* v. *Sandrinelli*, and the points there stated as undecided, says:—"*It is not necessary further to discuss the question of my jurisdiction in Chambers, as I dispose of this case upon my view of the merits.*"

In *Swift* v. *Jones*, 6 U. C. L. J. 63, the application was in Chambers for a summons to shew cause why the order of the Judge of the County Court of the County of Brant, the writ of capias issued thereon, the copy and service thereof, and the arrest of the defendant under the said writ, should not be set aside with costs, for (among several grounds stated,) the following, which was the only one held to be tenable, namely—that the writ was issued out of the Court of Common Pleas, and one of the affidavits on which it was issued was entitled in the Court of Queen's Bench. Richards, J., giving judgment in that case, says:—"The case cited from 5 E. & B. 272 (*Hargreaves* v. *Hayes*) seems to me to be a strong one in favor of the plaintiff, and there would always be great reluctance to set aside the order of a judge directing the arrest, when there are strong grounds from which he might draw the conclusion that the defendant was about to leave the Province of Canada. At all events I am not prepared, *even if I had the authority so to do*, to set aside the arrest on the ground that the learned Judge of the County Court ought not to have ordered it, from the insufficiency of the affidavits placed before him." The learned Judge, however, was of opinion that the not having the head of "In the Queen's Bench" erased when the affidavit was filed in the Common Pleas, and the title of the Court of Common Pleas inserted, was the act of the plaintiff and an irregularity, and for that reason he set aside the arrest. He says:—"One of the affidavits here is entitled in the Court of Queen's Bench and the other is not entitled at all. It may be argued that the affidavit might now be entitled, which has a blank for that purpose; but that would not get over the difficulty as to the other, and *both* affidavits are necessary to justify the arrest. I have seen no case which goes so far as to decide that a plaintiff is not guilty of an irregularity when he entitles his affidavit in one court, and uses it in another. I think, independently of the question of irregularity in using the affidavit entitled in one court for the purpose of issuing bailable process out of another, that our statute was intended to provide expressly for the mode in which affidavits to hold to bail were to be sworn and entitled when used in either of the courts. The plaintiff, not having followed that course, is, I think, clearly irregular in his proceeding." I would infer from the same learned judge's decision in *Molloy* v. *Shaw*, 6 C. L. J. N.S. 294, that he would not have made use of his language if *Ellerby* v. *Walton*, 2 Prac. Rep. 147, which was a decision of the full court, had been cited, and which in *Molloy* v. *Shaw* he followed. It is singular that neither in *Swift* v. *Jones* nor in *Allman et ux.* v. *Kensel*, 3 Prac. Rep. 110, nor in *Palmer* v. *Rodgers*, 6 U. C. L. J. 188, was *Ellerby* v. *Walton* cited.

In *Allman et ux.* v. *Kensel*, the application was in Chambers to *set aside* the order for the defendant's arrest made by the County Judge of Essex, with the writ and arrest, on various grounds, viz., the insufficiency of statement of any good cause of action, and the absence of any facts indicative of an immediate departure from Canada, the absence of any heading to the affidavit shewing what court it was in, and other minor grounds. Hagarty, J., following *Swift* v. *Jones*, set aside the arrest upon the ground of irregularity in the title of the court not having been inserted in the affidavit when it was filed on process issuing, but he adds, after referring to *Terry* v. *Comstock* and *McInnes* v. *Macklin*, "I desire to be understood as expressing no opinion as to my right to review the County Court Judge's decision in a case like the present."

In *Palmer* v. *Rodgers*, 6 U. C. L. J. 188, the form of the summons was *to shew cause why the defendant should not be discharged from custody*, and the order to hold to bail, the capias, the arrest of the defendant thereunder, and subsequent proceedings had thereon, set aside upon several grounds, among which was the following:—"4th. Because there was not at the time of making such affidavit to hold to bail or said order, or the issuing of such writ of capias, a good and probable cause for the plaintiff believing that the defendant unless he should be forthwith apprehended was about to quit Canada

with intent to defraud his creditors generally or the plaintiff in particular." As to this objection, Richards, J., disposes of it by saying:—"I am uncertain whether I ought to set aside the arrest on this ground or not. I have doubts as to the propriety of doing so, *and stronger doubts as to my authority as a Judge in Chambers to do so.*"

In *McGuffin* v. *Cline*, 4 Prac. Rep. 135, the summons was to shew cause why a County Court Judge's order to hold to bail in a superior court action, and the arrest, &c., should not be set aside, on the ground that the affidavit was insufficient, that the reasons assigned for the plaintiff's belief were insufficient, untrue and unfounded, because defendant was not about to quit Canada, &c., or why the amount for which defendant was held to bail should not be reduced to $500. Many affidavits were filed on both sides on the merits. Hagarty, J., giving judgment, says:—"I at once say that I should not have ordered the defendant's arrest on such an affidavit as seems to have satisfied the County Judge. But I have several times had occasion to express my difficulty in assuming the right to review the exercise of the Judge's discretion in a matter clearly within his jurisdiction. I draw," he says, "a broad distinction between the case of an order based on affidavits clearly deficient in certain statutable requirements, and those which state facts from which differently constituted minds may in good faith draw different conclusions. I think I should await the positive judgment of the court in *banc* before taking on myself to set aside a Judge's order, merely because the statements on which it was granted failed to bring my mind to the same conclusion as that of my fellow Judge," and in support of this view he refers to *Howland* v. *Rowe*, a case under the Absconding Debtor's Act before himself in Chambers, and in the Queen's Bench in 25 U. C. Q. B. 467.

The two questions stated in *Graham* v. *Sandrinelli*, in respect of which the court were not agreed, and therefore gave no decision, do not appear, so far as I have been able to discover, ever yet to have received judicial solution.

The clauses of our Act, 22 Vic., ch. 96, which are consolidated in the Consolidated Statutes of Upper Canada, ch. 22 sec. 31, and ch. 24 sec. 4, are in substance identical with the clauses of the Imperial Act, 1 and 2 Vic. ch. 110, so that the decisions under that Act are express decisions governing the cases arising under our Acts.

With a view to enable the parties in these two cases, one of which is in the Queen's Bench, and the other in the Common Pleas, to bring the matters before the courts if so advised, I have perused all the cases I have been able to find upon the subject, and I have thought it best to enter at large into the question, and to state explicitly the opinion which I have formed. The point involved is one of great importance, and one which should not be permitted to remain any longer in doubt.

Arrest upon civil process since the passing of 22 Vic. ch. 96 is no longer the act of the suitor as it was formerly—the order authorising the issue of the writ of capias, the writ issued thereunder, and the arrest made in virtue of such writ, are all judicial acts, deliberately sanctioned by the decision of a Judge satisfied of the existence of a cause of action wherein a plaintiff has sustained damage, and of an intent on the part of the defendant of leaving the country with intent to defraud the plaintiff in particular or his creditors in general. The whole proceeding down to and including the arrest is judicial, except in so far as the arrest itself may be vitiated by any illegal or irregular procedure in the control of the party or his agents subsequent to obtaining the judicial order, but in that case the order and the writ, unless there be some defect in their form, still remain judicial acts. To the Judge to whom the application for an order to hold to bail is made, is confided by the Legislature the duty of *satisfying himself* of those matters which the law requires him to be satisfied of before he shall grant the order, as the sole condition of the making of the order. To his judicial mind are submitted all points, as well of form as of substance, which the law requires to be supplied before the order shall be made. The Legislature, I think, was well satisfied that this precaution afforded ample security that every requisite preliminary should be substantially complied with before an order for the arrest of a party should be made, and for any purely technical irregularity which may have escaped the observation of a Judge, or which he may have deemed to be too trifling to interfere with his making an order, it was never, as it appears to me, contemplated to be capable of being brought up before any other tribunal by way of appeal.

The Act providing that it was the mind of the Judge to whom the application was made that should be satisfied of the propriety of making an order authorising the issue of a capias, the exercise of that Judge's judgment and discretion never could have been brought in question before another Judge sitting out of court for any suggested error in judgment without an express statutory provision giving such jurisdiction to a single Judge. The court in the general exercise of its jurisdiction over the acts of a single Judge sitting out of court could set aside the order without any statutory provision, but no single Judge sitting in Chambers could, in my opinion, exercise any such jurisdiction without express statutory provision. The arrest then of a party under a capias issued upon an order made by a Judge (there being no intervening irregularity in *the procedure* between the issuing of the order, and the making the arrest) being a judicial act, and no longer the act of the party, it is not expedient that either the order, the capias, or the arrest, should be *set aside* by another Judge for any suggested irregularity in point of form or insufficiency in point of substance in the material laid before the Judge as the foundation for the order. Any such irregularity or insufficiency must be regarded as the oversight of the Judge, and therefore after the order is acted upon, and the party arrested, that judicial act should be only called in question by a superior tribunal, which should exercise its jurisdiction in such a manner as not to make persons who acted in the arrest or applied for the order, trespassers by reason of any miscarriage of the Judge in grant-

ing the order when in the judgment of the superior tribunal he should not have done so. A single Judge then having no jurisdiction, as it appears to me, over the judicial act of another Judge without statutory provision giving such jurisdiction, we have to look to the Act to see whether any such jurisdiction is given, and there we find that after the arrest a particular jurisdiction is given, which may be exercised by the Judge who granted the order, even by the Judge of a County Court who may have granted an order for arrest in a superior court case, or by any other Judge, or by the court out of which the process shall have issued upon the order; and the particular form in which this jurisdiction shall be exercised is defined, namely, by an order or rule on the plaintiff *to show cause why the person arrested should not be discharged out of custody*. This is the only form in which, as it seems to me, the jurisdiction given by the statute to a single Judge can be exercised. Doubtless an application may be made to a Judge to set aside the writ of capias, and also *the arrest*, for any irregularity or defect in the writ of capias itself or in the mode, time or place of effecting the arrest and for non-compliance with the rules of practice or procedure subsequent to the making of the order for the issue of the capias, but that would be an application to the general jurisdiction of the Judge in Chambers over procedure, and not an application under the special jurisdiction conferred by the Act; for such an application, it is plain, being upon a point of procedure independent of any judicial act, must be made according to the ordinary practice regulating procedure in causes pending in the superior courts, and could not be made to *the Judge of a County Court*, although the Judge who may have made the order for arrest. The application authorised by the Act to be made to the court or Judge after the arrest, is, as it seems to me, plainly an application founded on new matter for the purpose of shewing that the matters laid before the Judge upon the application for the order, (which was necessarily *ex parte*), are capable of clear explanation, or can be shewn to have been either intentionally or through mistake misrepresented to the Judge. In such a case provision is made that upon both sides being heard, the court or a Judge to whom the application may be made, may *discharge the prisoner from custody*, leaving the judicial act which authorized the arrest to remain unaffected as a security to all parties engaged in the arrest; and in this respect a difference is made between the jurisdiction of the court and that of a Judge, for it is expressly provided that the *court may discharge or vary the Judge's order*. This being so expressed in the clause, the conclusion is irresistible that the Legislature had no intention that a single Judge should have power to discharge or set aside the order of another Judge, and the case of *Burness* v. *Guiranovich*, 4 Ex. 520, is conclusive upon this point. The observations also of the several learned Judges in *Needham* v. *Bristowe*, *Gibbons* v. *Spalding*, *Heath* v. *Nesbitt*, *Graham* v. *Sandrinelli*, *Pegler* v. *Hislop*, *Cunliffe* v. *Maltass*, and *Bullock* v. *Jenkins*, lead, I think, to the same conclusion. The result, as it appears to me, upon a consideration of the Act itself, and to be deduced from a comparison of all the cases, is, that the court out of which the process issues has general jurisdiction, independently of the statute, over the acts and decision of the Judge granting the order, to revoke the order, or to discharge the prisoner, proceeding upon the same identical material that was before the Judge. The court out of which the process issues, has, after the arrest, by the statute, concurrently with the Judge of any of the superior courts sitting in Chambers, and with the Judge of a County Court who may have made the order for the arrest in a superior court case, jurisdiction upon new matter to entertain the question whether upon both sides being heard, not the *order itself* authorising the arrest, but *its effects*, may be modified as justice may require, *by an order for the discharge of the prisoner*; and beyond this jurisdiction so given by the statute to a Judge co-ordinately with the court, the court has given it by the statute the superior jurisdiction proper to be entertained by the court, though not by a single Judge, that upon such application to discharge the prisoner being made to the court, *it* may *discharge*, if it thinks fit, the *original order*, the court, therefore, has its original jurisdiction over a Judge's order which it may exercise *by appeal* upon the original matter before the Judge without more; and it has also an express jurisdiction, by statute, enabling it to discharge the Judge's order, and it has, concurrently with the Judges of the Superior Courts singly in Chambers, and with the Judges of County Courts in the special case of an order for arrest in a superior court case made by such Judge, *original* jurisdiction to entertain the question of the discharge of the prisoner, upon the merits presented, upon both sides being heard. No appellate jurisdiction whatever, as it seems to me is given to a single Judge. It is hardly to be conceived that the Legislature contemplated giving to a County Court Judge in a superior court case, an *appellate* jurisdiction (merely upon the original materials) over *his own* order for arrest made in the case; and the jurisdiction which the statute gives to any single Judge is that given to a County Court Judge where he has himself made the order. When appellate jurisdiction is exercised, the judgment proceeds wholly upon the original material, which must be brought into the appellate tribunal. The court never acts as an appellate tribunal without compliance with that condition. Now the material laid before a Judge for an order for arrest is filed in the court out of which the process issues: when it issues, that material so filed can never be removed from the court to be transferred to a Judge in Chambers, but it is *in the court itself* to enable it to exercise jurisdiction over it as justice may seem to require, and this, as it seems to me, is what is meant by the observation of Baron Parke in giving the judgment of the court in *Graham* v. *Sandrinelli*, viz.: "but whether the learned Baron (Platt) was right or not in refusing to make an order to discharge only this summons, is not material *now*, *for* we are all of opinion that we may consider that my brother *Erle's order* (authorising the arrest) *and the affidavit* in support of it, *are before the court*, and that under *our general* jurisdiction we have

power to give the defendant relief, and we all think he was wrong in making the order to arrest upon such an affidavit," and so the court ordered the prisoner *to be discharged*, but did not set aside the order or the capias.

Now in neither of the cases before me is the summons framed in the shape which, as it appears to me, is required by 22 Vic. ch. 22 sec. 31, although in both cases new affidavits are filed. The summonses in both cases call upon the plaintiffs respectively to show cause why the judicial act of the Judge making the order should not be set aside. This, as above stated, appears to me to be an error, and I shall not assume a jurisdiction which I think I have not, to set aside the Judge's order or the capias issued thereunder for any defect or insufficiency (if any there be) in the material upon which the Judge making the order in each case exercised his judicial functions or for any other cause.

In *Damer* v. *Busby*, all the new matter introduced by affidavits was expressly waived and withheld from my consideration, the defendant electing to rest upon the alleged insufficiency of the material used before the Judge, and the variance between the copy of the capias and the original and the fact that neither affidavits or fiat are entitled in any court, in preference to the plaintiff obtaining an enlargement to meet the affidavits filed on defendant's behalf. With respect to this case, I wish to observe, however, that I am of opinion, that there is nothing whatever in the objections contained in the heads of objection in the summons above numbered 1, 5 and 6, and I have been authorised by C. J. Hagarty to say that he refused to grant the summons upon the suggestion of insufficiency in the statement of the debt, and that he was surprised to find his name to a summons involving that objection. *Ellerby* v. *Walton*, 2 Prac. Rep. 147, lately followed in *Molloy* v. *Shaw*, 6 C. L. J. N. S. 294, by Richards, C. J., is an answer to the 2nd, 3rd and 4th objections. It appears to me to be as much the duty of the Clerk of Process, (who alone can determine out of which court the process is to issue,) as it is of the plaintiff, to see that the affidavit is entitled in the proper court when filed on the process issuing, and I cannot see any good reason why he should not entitle the affidavit without any order, upon the omission being discovered. As to the order itself, when made, it could not be determined in what court to entitle it, nor does the statute say that it shall be entitled; and in the present case, being endorsed *on the* affidavits, I see no occasion for its having any separate title from that contained in the affidavit, when that is inserted. As to the 7th objection—the variance between the copy and the original capias, doubtless if the objection be sufficient, the *arrest* may be set aside, notwithstanding the opinion I have expressed as to my having no jurisdiction to review the decision of the Judge who granted the order upon the materials before him. In *Macdonald* v. *Mortlock*, 2 D. & L. 963, where a defendant was described in a capias as "Mortlock," and in the copy as "Mortlake," it was held that the *copy* might be amended. In a subsequent case, *Moore* v. *Magan*, 16 M. & W. 95, where the defendant was arrested under a capias addressed to the *Sheriffs* instead of the *Sheriff* of Middlesex, the Court of Exchequer held that the writ itself might be amended, but that the *copy* could *not*. If I had to choose between these seemingly conflicting cases I should have no hesitation in adopting *Macdonald* v. *Mortlock*; but it is not necessary, for two reasons,—first, because both of these cases were before the C. L. P. Act, and are not, I apprehend, of much weight as limiting the powers of the court or a Judge as to amendments since the passing of that Act; and secondly, that assuming *Moore* v. *Magan* to be still a binding authority, it is sufficient for the purpose of the case before me, for the writ being amended to conform to the copy, all objection is removed, and indeed the copy is the more perfect of the two, as containing the Christian names of the plaintiffs instead of the initial letters of their names. I think that there is no doubt that both the Judge's order and the capias may in this respect be amended, to conform to the copy served. In *Folkard* v. *Fitzstubbs*, 1 F. & F. 376, Hill, J., refused to set aside a writ of summons and also a writ of capias upon the ground of irregularity in that the summons was wrongly tested, "Thomas Lord Campbell," and the capias "Thomas Lord Campbell, Knight."

The result therefore is, that in *Damer et al.* v. *Busby* the summons must be discharged, but I shall not give the plaintiff any costs, for I have no desire to countenance or encourage the carelessness displayed, both in the description of the residence of the deponent King in one of the affidavits, and in not taking the precaution of comparing the original capias with the copy before handing it to the sheriff for execution.

In *Black* v. *Wigle* the summons must also be discharged for the reason already stated, viz., that the frame of the summons asks that the judicial act of the Judge who made the order shall be *set aside*, and does not ask the relief indicated in the Statute, 22 Vic. ch. 22 sec. 31.

Had the frame of the summons been different, I should have held in this case that the plaintiff's affidavits in reply to defendant's, so displace in my judgment the substance of the latter, that I could not have discharged the prisoner upon the ground contained in these affidavits; and as to the objection that no cause of action is stated sufficiently, my objection to review the decision of the Judge who made the order would have been the same as it now is, even though the frame of the summons had been in the words of the Act, for the discharge of the prisoner from custody. The only case in which, as it seems to me, the Judge to whom an application to discharge the prisoner from custody is made under the provisions of the Act, upon the same material only as was before the Judge making the order, should assume the right of discharging the prisoner, would be the case of a manifest *defect*, appearing *in the material necessary to be supplied to call the judicial function into action*. For example, the statute, 22 Vic. ch. 24 sec. 5, requires that the causes upon or in respect of which a Judge may act, shall be presented to him *upon affidavit*. Now if a paper purporting to be an affidavit, containing abundant matter to warrant the making the order if the affidavit had been sworn, be presented to a Judge, but it in fact should contain no jurat, or no commissioner's or other person's name as having adminis-

tered the oath, and this defect should escape the Judge's observation, and he should make the order, and after arrest the defendant should apply for his discharge for this defect,—in such a case it may be said that the jurisdiction of the Judge *had not attached for want of an affidavit*, and that therefore any Judge might properly discharge the prisoner from custody.

Between a cause of action not technically stated in an affidavit, and an affidavit shewing clearly that no cause of action does exist there seems to me to be a marked difference. As to the sufficiency of the statement of the cause of action in this case I express no opinion, but as the averment, the omission of which is insisted upon as vitiating the proceedings, seems supplied in some of the affidavits now filed, if the case should come up before the court, it will be necessary to consider the case of *Stammers* v. *Hughes* as explained and referred to in *Burns* v. *Chapman*, as also the case of *Barker* v. *Lingholt*, and the observations of Rolfe, B., in *Talbot* v. *Bulkeley*. The summons will be discharged without costs.

Both summonses discharged without costs.

ENGLISH REPORTS.

COMMON PLEAS.

Broderick and another v. Scale.*

Sufficiency of affidavit under 17 & 18 Vict. c. 36 (Bills of Sale Act), as to description of witness.

A bill of sale was attested by one T. S., described as "clerk to W. F.;" the affidavit required by the Bills of Sale Act was made by T. S., described as "gentleman." *Held*, that the affidavit was insufficient, and the bill of sale therefore void as against an execution creditor.

[19 W. R. 386.]

Interpleader issue.

The plaintiffs were grantees of a bill of sale. The defendant was an execution creditor. The bill of sale dated 6th of July, was attested by John Shaw, described as "clerk to William Flavell." The affidavit, dated the 21st of July, began with the words "I, John Shaw, &c., Gentleman," and concluded with the words, "I further say that the name or signature, J. Shaw, subscribed to the said indenture and bill of sale as the attesting witness to the execution thereof, is in my own handwriting, and that I am gentleman, &c."

The case was tried at the Surrey Summer Assizes, and a verdict found for the defendant, with leave reserved to move to enter it for the the plaintiff if it should be considered that the affidavit complied with the provision of the statute 17 & 18 Vict. c. 36.

A rule *nisi* having been obtained,

Day, now (Jan. 11.) showed cause.—The affidavit is insufficient; the description of the witness is inconsistent with that given in the bill of sale; *Foulger* v. *Taylor*, 8 W. R. 279, 5 H. & N. 202; *Tuton* v. *Sanoner*, 6 W. R. 545, 27 L. J. Ex. 293; *Allen* v. *Thompson*, 4 W. R. 506, 1 H. & N. 15.

Ribton and *Bromley*, in support of the rule.

Jan. 12.—Bovill, C. J.—I should be very desirous of supporting this bill of sale, as there was clearly no intention to deceive creditors, but the Act requires something definite—viz., the oath of the attesting witness as to his residence and occupation, and we have no power to dispense with this provision. Now, it has been considered that this description must apply to the time of the making of the bill of sale. The question, then, is whether such a description has been verified on oath. The description in the affidavit is in these words "I, John Shaw, Gentleman." In fact he was an attorney's clerk, and, therefore this description is incorrect. In some cases the affidavit has been considered sufficient where there has been clear reference to the description in the bill of sale, but here there is no such reference. The rule, must therefore, be discharged.

Willes, J.—I am of the same opinion. The case arises upon the validity of a bill of sale which a creditor has taken by way of security upon his debtor's goods, leaving the goods in the apparent possession of the debtor till another creditor comes with an execution, and then the bill is set up. The Legislature having had its attention called to cases of fraud occurring under such circumstances has imposed certain restrictions and conditions upon the making of such bills of sale, and in the event of such conditions not being complied with, a bill of sale is declared to be void. I take the language of the Legislature and put upon it a natural meaning, not dispensing with what it considers necessary, and agreeing with what Williams, J., said in *London and Westminster Discount Company* v. *Chace*, 10 W. R. 698, 31 L. J. C. P. 314. The 1st section enacts (His Lordship read 1st section of 17 & 18 Vict. c. 36).

The question, then, is whether the description there required was well given by the bill, and it was insisted that that was sufficient; but it was decided in *Hatton* v. *English*, 7 E. & B. 94 that it is the affidavit which must contain the description of residence and occupation of the grantor, and not the bill only, and on that point no doubt was entertained. The question whether the attesting witness is to be also so described, depends on whether the words in the section just read, applying to bills given under execution, are to be read parenthetically or not. It is clear that these words exhaust themselves upon the case of bills given under execution, and that they must be read parenthetically. The words following, then, "and of every attesting witness," must be applied to bills of sale of all sorts. It is, therefore, obvious, that according to the conclusion first come to, the description of the witness also must be given in the affidavit. Then was the description so given? The cases show that it must be true, and the case of *The London and Westminster Discount Company* v. *Chace* decides that the description must be true of the witness at the time of the making of the bill. This affidavit describes the witness as "Gentleman." That was not true; the term meaning a person of no particular occupation, whereas, this person had a distinct occupation; and he does not say that the description of him contained in the affidavit is true. As to the case in the Exchequer, *Banbury* v. *White*, 11 W. R. 785, 32 L.

* *Coram*—Bovill, C.J., Willes, Smith and Brett, JJ.

J. Ex. 258, what Pollock, C. B., there said does not apply to this case, for there the affidavit contained a description by reference of the attesting witness, and further said that it was true; here there is no reference. I therefore think the affidavit insufficient, and the rule must accordingly be discharged.

Smith and Brett, JJ., concurred.

CHANCERY.

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

Attree v. Attree.

Will—Construction—Gift of "all the rest."

Gift of "all the rest," following a list of bequests of sums of money.

Held, to pass real estate.

[19 W. R. 464—Feb. 9, 1871.]

The holograph will of Ann Tourle Attree, dated July 12, 1851, contained a list of gifts of sums of money to divers persons, amongst which there appeared a bequest of a leasehold house at Torquay, and concluded with the words "all the rest to be divided between the daughters of F. T. Attree, son of William Attree, late of Brighton."

This suit was instituted for the purpose of administering the testator's estate, and the question was whether certain real estate to which she was entitled passed by the gift of "all the rest."

Jessel, Q.C., and *Freeman*, for the daughters of F. T. Attree.—The gift of "all the rest" must mean "all the rest of my estate." In *Huxstep* v. *Brooman*, 1 Bro. C. C. 437, a gift of "all I am worth" was held to pass real as well as personal estate. *Bebb* v. *Penoyre*, 11 East, 160, which will be relied upon by counsel for the heir-at-law, was incorrectly decided. In *Davenport* v. *Coltman*, 12 Sim. 588, where the words were "whatever I may die possessed of," and in *Wilce* v. *Wilce*, 7 Bing. 664, where the words were "everything I die possessed of," real estate was held to pass. They also referred to *Re Greenwich Hospital Improvement Act*, 20 Beav. 458.

Sir R. Baggallay, Q.C., and *Balmer*, for the heir-at-law.—The words "all the rest" are not sufficiently large to pass real estate. *Bebb* v. *Penoyre* (*sup.*) has never been overruled. In *Huxstep* v. *Brooman* there was no doubt as to the testator's intention. The decision of *Davenport* v. *Coltman* turned upon the fact that "possessed" is an apt word to express the seisin of real estate, and in *Wilce* v. *Wilce*, on the introductory words of the will "as touching the worldly property, &c."

Jessel replied.

Feb. 9.—Lord Romilly, M.R.—I think that "all the rest" means "all the rest of my property" and includes the real estate which belonged to the testatrix. It is as if she were giving instructions for her will, and said that she meant to leave all the rest to a particular person, meaning everything she had not disposed of. I will make a declaration that the real estate passed by the will.

Vernon v. Vernon.

Newspapers—Publication of proceedings—Contempt.

Where proprietors of newspapers publish an account of and comments on pending proceedings, they are guilty of contempt of Court; but a motion to commit them at the instance of a party to the suit, when it can be proved that in one case he had supplied the materials with a view to an article being written, and, in the other, that every reparation possible had been made, will be refused.

[19 W. R. Chy. 404.]

The plaintiff in this suit, John Vernon, a farmer, living at Doddenham, claimed, by right of descent, certain estates, known as the Hanbury Hall Estates, which had been in the possession of the defendant, Harry Foley Vernon and his family, for upwards of 100 years. He alleged that his title was an equitable one, and that he was, therefore, not barred by lapse of time. Notice of these proceedings was taken in the local press, and particularly in two papers—namely, *Berrow's Worcester Journal*, of which C. H. Birbeck was proprietor, and the *Worcestershire Chronicle*, of which Knight was the proprietor. The plaintiff complained that certain articles contained unfair comments upon the matters in litigation, calculated to prejudice the Court, and prevent witnesses favourable to him from coming forward. He now moved for the committal of Messrs. Birbeck and Knight for contempt of Court.

The articles referred to in the argument were two of the *Worcester Journal*, dated the 22nd and 29th of October, 1870, respectively, and one of the *Worcestershire Chronicle*, dated the 26th of October, 1870. The article of the 29th of October said that, without questioning the plaintiff's good faith, it seemed to the writer improbable that the defendant could ever be disturbed in the possession of the Hanbury demesne. The article of the 26th commenced with the words, "It is common enough for people to be possessed with the idea that they are rightful heirs to property which is held by some one else, especially if there is any affinity of blood or identity of name. We often have people coming to inquire about advertisements for heirs-at-law and next of kin, or of a large estate awaiting a claimant by birthright or descent. Not uncommonly the hallucination ends in confirmed monomania, and the unfortunate victim of guileful fancy, revelling in some shadowy sphere conjured up by his own imagination, believes in the reality of the phantoms he has peopled it with, and becomes unfitted for the duties of ordinary life." The article then proceeded to discuss the plaintiff's claim.

Birbeck's defence was, that in 1868 the plaintiff and a man named Millage, whom he was employing to collect evidence, called at the office and requested the insertion of a short article on the plaintiff's claim. It was inserted. In October, 1870, Millage, who was clearly acting as the agent of the plaintiff, called again with a print of the bill, which he showed to Birbeck, that the nature of the claim might be noticed in the journal. The result was the article of the 22nd of October. With this article the plaintiff had expressed himself pleased. After the article of the 29th had appeared, and been complained of, no more articles had appeared. There had not been the slightest wish to injure the plaintiff's cause.

Knight's defence was, that the facts mentioned in his article were not taken from the *Journal* but were taken from *Nash's County History* and the *Annual Register*. As soon as complaint was made, he sent to the plaintiff for approval an apology, which he proposed to publish in his paper. No answer being returned, he published it in a prominent part of his paper, and offered to pay any costs he had incurred in the matter up to that time. A bill of £32 had, however, been presented to him, and, thinking that sum beyond all reason, he had declined to pay it.

Both Birbeck and Knight tendered their apologies to the Court for their unintentional contempt.

Willcock, Q. C., and *Terrell* for the plaintiff, did not press now for committal, but asked that Birbeck and Knight might be ordered to pay the costs of these proceedings. On the question of contempt of Court and prejudice to the plaintiff, they referred to *Daw* v. *Eley*, 17 W. R. 245, L. R. 7 Eq. 49; *Tichborne* v. *Mostyn*, 15 W. R. 1072, L. R. 7 Eq. 55 n; *Re Cheltenham and Swansea Railway Carriage and Waggon Company*, 17 W. R. 463, L. R. 8 Eq 580; *Matthews* v. *Smith*, 3 Hare, 331; *Cann* v. *Cann*, *ib.* 333 n.

Kay, Q. C., and *Stallard*, for Birbeck, argued that such an article as that of the 29th of October was no ground for committal, and that, as far as the plaintiff was concerned, he alone was responsible for what had occurred. They also referred to *Daw* v. *Eley*.

W. Pearson, for Knight, argued that in the article of the 26th there were neither misrepresentations nor remarks calculated to prejudice the public mind against the plaintiff. He referred to Lord Hardwicke's judgment in *Roach* v. *Hall*, 2 Atk. 469. [The Vice-Chancellor referred to *Ex parte Jones*, 13 Vesey 237.]

Willcock in reply.

Bacon, V. C., said that as this motion had been opened with the disavowal of any wish to obtain an actual committal, the contest was really as to the costs. The law of the Court was perfectly clear. It was undoubtedly a contempt to publish an account of any proceedings pending the hearing, or to make any comments upon those proceedings likely to prejudice the parties in the litigation, or to interfere with the course of justice. There was no need to discuss the cases; for, as a matter of form, the articles complained of did infringe the rule of the Court. Apart from the question of contempt, however, —which there was no need to criticise beyond saying that there was clearly no malevolence on the part of either Birbeck or Knight—was the question whether the plaintiff was entitled to complain. The remarks of the Master of the Rolls in *Daw* v. *Eley* were most pertinent, to the effect that a person, submitting to have his affairs discussed in a public paper, could not afterwards complain of its being done. The plaintiff or his agent Millage supplied the materials for the article of the 22nd of October; and he could not be heard to say that he had thereby bought the partiality of the editor, and interdicted him from writing in any other interest or according to the dictates of his own judgment. As to the article of the 26th, considering the cirtumstances under which it was written, it was clearly within the principle laid down in the case of *Tichborne* v. *Mostyn*, where the *Pall Mall Gazette*, having published what was a contempt of Court, two other newspapers, which merely adopted what the *Pall Mall Gazette* had said, were held to be blameless, and were not ordered to pay the plaintiff's costs, though each had committed contempt. The same remarks applied to the article of the 29th as to that of the 22nd. Could anything excuse what took place afterwards? It was not hinted that there was any fear of Birbeck's repeating his offence. As to Knight's action in the matter, the explanation he gave of his article was not only sufficient in itself, but accompanied by the offer of the amplest apology, which apology was accordingly published at the earliest opportunity. The plaintiff neverthelesss determined to go on with proceedings in that court against the two respondents, because he had a technical hold upon them. Such conduct the Court would not countenance. Though, therefore, the case of contempt was clearly made out —for it was unjustifiable in any newspaper to publish statements of the pleadings or proceedings in a pending suit, with or without comment, and especially so if there were comments which might be injurious to either side—the plaintiff himself had no right to complain, and no order would be made on this motion.

NOTES OF RECENT DECISIONS IN THE PROVINCE OF QUEBEC.

Common Carriers.

Held, that the verdict of a jury, which is contrary to law and evidence, will be set aside, and a new trial granted.

2. That the respondent was not responsible for the loss of a trunk said to contain a large sum of money, which the appellant left in charge of the baggage-keeper, contrary to the advice and instructions of the captain of the steamer, who indicated the office as the proper place of deposit; the appellant stating at the time, in answer to the captain, that he would take care of the trunk himself.—*Senecal and the Richelieu Company* (in appeal), 15 L. C. Jurist, 1.

Compounding Felony—Consent obtained by threats null.

Held, 1. A signature to a note having been obtained from an old woman by threats, that if she did not sign, her son would be arrested for stealing money, an action *en garantie* will lie against the person who used the threats and extorted the note, to protect the signer from a judgment obtained by a third innocent *bona fide* holder.

2. A son having acknowledged to have stolen $25 from M., the latter, threatening to have the son arrested, induced the mother and son to sign a note in his favor for $400. *Held*, The note under the circumstances being signed by the mother, under the influence of

fear for her son, that there was violence, and no consent or legal consideration, and the mother could not be held liable.—*Macfarlane* v. *Dewey*, (In App.), 15 L. C. J. 85.

Contempt—Jurisdiction.

Held, 1, That a judge of the Court of Queen's Bench, whilst sitting alone in the exercise of the criminal jurisdiction conferred upon that Court, has no jurisdiction over an alleged contempt, for publishing a libel concerning one of the justices of the Court, in reference to the conduct of such justice while acting in his judicial capacity, on an application to him in Chambers for a writ of *habeas corpus*, the matter being only legally and properly cognizable by the full Court of Queen's Bench.

2. That the issuing a rule for contempt, by the judge himself, against whom the contempt is alleged to have been committed, without any evidence that the party charged had committed the contempt, is most irregular.

3. That an admission in writing, by the party charged, at the instance of the judge, for the purpose of settling the dispute between them, must be held to have been written without prejudice, and cannot avail as evidence in support of the rule for contempt, in case the judge refuses to accept it as a sufficient apology.

4. That a fine imposed by the judge under such circumstances will be remitted.—*Ex parte Thomas Kennedy Ramsay, Q. C.* (on appeal to the Privy Council), 15 L. C. Jurist, 17.

Contract—Delivery and Payment.

Held—That the payment of freight and the delivery of the cargo are concomitant acts, which neither party is bound to perform without the other being ready to perform the correlative act, and therefore, that the master of a vessel cannot insist on payment in full of his freight of a cargo of coals, before delivering any portion thereof.—*Beard et al* v. *Brown et al.* 15 L. C. J. 136.

Criminal Law.

Held, that where a party undergoing imprisonment, on conviction of felony, has been released on bail, in consequence of the issue of a writ of error, and such writ of error is subsequently quashed, he may be re-imprisoned, for the unexpired term of his sentence, on a warrant of a judge of the Court of Queen's Bench (Crown assize), signed in Chambers, and granted in consequence of the court having ordered process to issue to apprehend such party and bring him before the court, "or before one of the justices thereof, to be dealt with according to law."—*Ex perte Edward Spelman*, 14 L. C. Jurist, 281.

Foreign Corporations.

Held,—1. That by the laws of the Province of Quebec corporations are under a disability to acquire lands without the permission of the Crown or authority of the Legislature.

2. That a foreign corporation which had purchased lands in the said Province without such authority, and was evicted, had no action of damages against the vendor.—*The Chaudiere Gold Mining Company* v. *George Desbarats, et al.*, 15 L. C. J. 44.

Insolvent Act.

Held, that the right to petition to quash a writ of attachment in compulsory liquidation, under the Insolvent Act of 1864, is purely personal to the debtor, and cannot be exercised by a person to whom he has made a voluntary assignment. (Act of 1864, sec. 8, subsec. 12; Act of 1869, sec. 26.)—*Watson and City of Glasgow Bank* (in appeal), 14 L.C. Jurist, 309.

Insolvency—Promissory Note—Composition.

This was an appeal from a judgment rendered in the Superior Court by Torrance, J., a report of which will be found at p. 21 of Vol. 14, L. C. *Jurist.*

Held—1. Where the endorser of a note became insolvent, and compounded with his creditors including the holder of said note, who, however, reserved his recourse against the other parties to the note, and the maker also became insolvent, that the endorser cannot rank on the note against the estate of the maker so long as the holder has not been paid in full.

2. Where a claimant in insolvency has received as holder of a note a compisition on the amount of his claim from the endorser, in consideration of which he has released the endorser, reserving his recourse against the other parties to the note, that whatever the claimant has received from the endorser must be deducted from his claim against the maker's estate.—*In re Bessette et al.*, Insolvents, 15 L. C. J. 126.

Insurance.

Held, 1, That a *bonâ fide* equitable interest in property, of which the legal title appears to be in another, may be insured, provided there be no false affirmation, representation or concealment on the part of the insured, who is not obliged to represent the particular interest he has at the time, unless inquiry be made by the insurer.

2. That such insurable interest in property, of which the insured is in actual possession, may be proved by verbal testimony.—*Whyte es qual.* v. *The Home Insurance Co.*, 14 L. C. Jurist, 301.

Insolvency—Procedure.

In a contestation of a claim before an assignee, the assignee having first verbally fixed upon a convenient day for hearing and taking evidence, the contestant inscribed the matter with due notice, and all the parties interested, including the assignee, appeared on the day fixed, and shewed their acquiescence as to the regularity of the proceedings by allowing the assignee to give an award without objection.

Held—The proceedings were irregular, because under sec. 71 of Insolvent Act of 1869, the day for proceeding to take evidence should have been fixed by the assignee in writing, and the assent of the parties to the above mode of proceeding could not waive the irregularities.

Semble. In such cases it would be irregular for either party to inscribe the case. *In re Richard Davis*, Insolvent, 15 L. J. C. 131.

Municipal Law.

Held, that where a by-law of a municipal council of a county appointed a committee to acquire land, and contract for the construction thereon of a "court house, registry office and fire-proof vault," such committee exceeded its powers in contracting for the construction of a "*public hall*, court house, registry office and fire-proof vault," even though the cost stipulated in the by-law was not exceeded; and no action will lie against the corporation on such contract, the corporation having notified the contractor that they would not hold themselves responsible for any work done under the contract.—*Fournier dit Perfontaine* v. *La Corporation du Compté de Chambly*, 14 L. C. Jurist, 295.

Promissory Notes—Statute of Limitations.

When a promissory note was made in a foreign country, and payable there, and the debtor, about the time of the maturity of the note, absconded from his domicile in such foreign country, and came to Lower Canada, and his domicile was discovered by the creditor, after diligent search, only about the time of the institution of the action, and it appeared that under these circumstances the plaintiff's recourse on the note would not be barred by the Statute of Limitations of the foreign country where the note was made, and where it was payable: *held*, that the action was not barred by the statutory limitation of Lower Canada, though more than five years had elapsed after the maturity of the note before the action was brought.—*Wilson and Joseph Demers* (in appeal), 14 L. C. Jurist, 317.

Sale of Goods.

Held, that where a party sells a moveable to two different persons, the one of the two who has been put in actual possession is preferred, although his title be posterior in date, provided he be in good faith.—*Maguire* v. *Dackus et al*, 15 L. C. Jurist, 20.

Telegraph Company.

Held, 1, That sec. 16 of C. S. C. cap. 67, which declares it a misdemeanor in any operator or employee of a telegraph company to divulge the contents of a private despatch, does not apply to the production of telegrams by the secretary of the company, in obedience to a *subpœna duces tecum*.

2. That telegrams which have passed between a principal and his agent are not privileged communications, in a suit in which that principal is a party.—*Leslie* v. *Hervey*, 15 L. C. Jurist, 9.

CORRESPONDENCE.

Taxation of Costs in Chancery.

To the Editors of the Law Journal.

Dear Sirs—Would you kindly, in the interests more especially of country practitioners, draw to the attention of the Chancery Judges, the injustice and delay of the present system of taxation of costs now prevailing in the Court of Chancery. After taxation by a country master, a so called revision takes place, which properly speaking is a second taxation instead. The master at Toronto, after a bill has been taxed by the master in the country, before whom all the proceedings have been had, and who exercises a discretion as to the proper costs, after hearing the arguments on both sides and inspecting the papers, puts the bill through what may be called a riddling operation, although having no papers before him, and knowing nothing of what reasons have been urged before the deputy master and given force to.

No doubt the intention of the Judges in ordering a revision, was that the master at Toronto should judge, by looking at the bill, whether the principles which govern taxations were adhered to with respect to the bills sent him for revision, but it is absurd to suppose the

Judges meant that every item should be examined into, not merely to ascertain if properly allowed on principle, but to have the master's discretionary power reviewed, or to have a portion of an item struck off. The object perhaps primarily aimed at, namely the uniformity of taxation, has no doubt now been attained, and those taxing officers who did not understand the rules have now had quite enough time to learn them from inspecting revised bills; the reason ceasing let the system cease also.

A much fairer way would be to allow either party to have costs revised on payment of the fee, instead of making it compulsory.

Yours, &c.,

Solicitor.

REVIEWS.

The Law of Negligence, being the first of a series of practical law tracts. By Robert Campbell, M. A., Advocate (Scotch Bar), and of Lincoln's Inn, Barrister-at-law, late fellow of Trinity Hall, Cambridge. London: Stevens & Hayres, Law Publishers, Bell Yard, Temple Bar; 1871.

There is no end to the law-made-easy books of this generation. Every conceivable subject is treated by some barrister, newly fledged or otherwise, who thinks it his mission to enlighten the public on legal matters.

The readers sought after in general are not those who wear the long robe, or those who provide the latter with briefs; but rather are such little books written for the supposed benefit of outsiders, who are flattered with the thought that by means thereof they will become wiser in their generation than those who apply at the fountain head. But let it not be imagined that we would speak slightingly of those who therein employ their spare time, whether indeed they really think they can say something which has not been said before, or at least say it better than others, or whether they only write to bring themselves before their professional brethren and the public by what is looked upon in England as legitimate advertising. Far otherwise—they deserve all praise for their energy and industry, and the good they do, even though they may multiply chaff instead of wheat by their labours.

But whilst the title page of the book before us, humbly calling itself a "practical law tract," leads to the foregoing train of thought, it would be a great mistake to suppose that Mr. Campbell's effort is a mere sketch, such as we have alluded to, and this any candid reader must admit. The author says in his preface that "the substance of the following essay was composed in the form of lectures or readings for pupils to relieve the dryness of our studies on the law of real property," the endeavour being to review the latest phase of judicial opinion on a familiar subject, and so to harmonise the law that so far as possible new decisions might seem to illustrate old principles, or that the extent and direction of the change, introduced by each decision might be correctly estimated.

The author commences by defining the the terms he uses in expressing his meaning, and remarking upon the terms which were used by the classical jurists and modern civilians, and those which are in general use at the present time (and often very incorrectly used) in connection with the subject on which he treats.

His sympathy is with the civil lawyers whose views are modelled upon those of the great Roman jurists, as we may see in the following remarks. After comparing the rules stated by Professor Erskine in his great Treatise on the Law of Scotland, which are virtually identical with those of the Roman Law, he says:

"I, myself, prefer to adhere exactly to the language of the classic jurists themselves, which savours of their great practical experience, and which will be found singularly to harmonise with the modern decisions of our own Courts. Indeed our modern decisions, even more than the learned discourses of Holt and Sir W. Jones (to be touched on presently) reflect the language and modes of thought of the classic jurists."

The author writies well, laying down his propositions in clear and easy language, and his authorities are the most recent, and this, though of course to be expected in any work where modern law is discussed, is especially necessary in a subject which has had so much light thrown upon it by decisions in the past few years.

In speaking of what is classed as the lowest degree of responsibility, namely, "that were more than ordinary negligence is requisite to constitute injury, "or what is more popularly known as gross negligence, after referring to the leading case of *Giblin* v. *McMullen*, L. R. 2 P. C. Ap. 319, decided on appeal from the

Supreme Court of Victoria to the Judicial Committee of the Privy Council, the author thus comments:

"In the judgment delivered by Lord Chelmsford as the judgment of the Court in this case, the expression "gross negligence," as used by Chief Justice Holt and since misapplied by others, is criticised, and in a qualified manner defended. But the criticism, as well as the defence of the expression, is misdirected. For it fails to point out that while Holt used the word technically as translating the technical expression *culpa lata* (aequiparata dolo), his successors applied it not only loosely, but in a manner grounded on misconception, as I have already pointed out. In this case (of *Giblin* v. *McMullen*), therefore, the expression gross negligence might well have been employed in an exact and technical sense to indicate the kind of negligence which the Roman lawyers were wont to equate to intention. Note also that in this case of *Giblin* v. *McMullen*, much weight is given to the circumstance that the bank kept the securities as they kept their own of the like nature. And this circumstance seems to have been thought sufficient to rebut any inference of gross negligence which might have been drawn from the mere fact of loss, and to have necessitate some positive evidence of negligence. The weight given to the circumstance of the bank keeping the goods with the same care as their own is in exact accordance with the principles of the Roman law above referred to."

Altogether it is a most readable book, containing sound law, and one well suited to students, for whom, as we have said, it was at first written.

The index is particularly good, and of course adds much to the value of the book—would that many others more intended for reference than this volume, possessed this most necessary adjunct.

TRIAL OF ELECTION CASES.

The Judges on the rota have fixed the days on which the remaining trials are to take place.

East Toronto, at the Court House, Toronto, Saturday, 2nd September.

West Toronto, at the Court House, Toronto, Thursday, 7th September.

Prince Edward, at the Court House, Picton, Tuesday, 26th September.

Russell, at the Court House, Ottawa, Wednesday, 23rd August.

West York, Queen's Bench, Osgoode Hall, Tuesday, 5th September.

North York, Newmarket, Tuesday, 22nd August.

South Grey, Court House, Owen Sound, Tuesday, 12th September.

Monck, Dunville, Tuesday, 22nd August.

Welland, Court House, Welland, Monday, 9th October.

North Simcoe, Court House, Barrie, Monday 16th October.

The trial in the Stormont case is enlarged until the 12th September next, and the Brockville petition stands until the 9th of January, 1872.

We cannot say for certain, as yet, how the work will be divided, but it is thought that the Chief Justice of Ontario will try the two Toronto and the Prince Edward petitions; Chief Justice Hagarty, Russell, and West and North York; Vice-Chancellor Mowat, South Grey, and Monck; and Vice-Chancellor Strong, Welland, and North Simcoe. But nothing can be said with certainty as to this at present.

AUTUMN CIRCUITS, 1871.

Eastern Circuit.—*The Chief Justice of Ontario.*

Pembroke	Wednesday	Sept.	13
Perth	Monday	"	18
Brockville	Thursday	"	21
Kingston	Tuesday	"	26
Ottawa	Monday	Oct.	9
L'Orignal	Wednesday	"	18
Cornwall	Tuesday	"	24

Midland Circuit.—*The Chief Justice of the Common Pleas.*

Napanee	Monday	Sept.	18
Picton	Thursday	"	21
Belleville	Monday	"	25
Whitby	Tuesday	Oct.	10
Peterborough	Monday	"	16
Lindsay	Friday	"	20
Cobourg	Monday	"	30

Niagara Circuit.—*Mr. Justice Morrison.*

Milton	Thursday	Sept.	14
Owen Sound	Tuesday	"	19
Barrie	Monday	"	25
St. Catharines	Tuesday	Oct.	17
Welland	Monday	"	23
Hamilton	Monday	"	30

Oxford Circuit.—*Mr. Justice Wilson.*

Brantford	Monday	Sept.	18
Cayuga	Wednesday	"	27
Simcoe	Monday	Oct.	2
Berlin	Monday	"	9
Stratford	Thursday	"	12
Woodstock	Monday	"	23
Guelph	Monday	"	30

Western Circuit.—*Mr. Justice Gwynne.*

London	Monday	Sept.	11
St. Thomas	Wednesday	"	20
Walkerton	Wednesday	"	27
Goderich	Monday	Oct.	2
Sarnia	Wednesday	"	11
Sandwich	Monday	"	16
Chatham	Monday	"	23

Home Circuit.—*Mr. Justice Galt.*

Brampton	Tuesday	Sept.	19
Toronto	Tuesday	Oct.	17