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DIARY FOR JUNE.

1. Friday New Trial Day Q.B.
2. Satur. Easter Term ends.
3. SUN... 1st *Sunday after Trinity.*
4. Mon ... Recorder's Court sits. Last day for notice of trial
10. SUN... 2nd *Sunday after Trinity.* [for County Court.
11. Mon ... *St. Barnabas.*
12. Tues. .. Quarter Sess. and County Ct. sittings in each Co.
17. SUN... 3rd *Sunday after Trinity.*
20. Wed... Ascension of Queen Victoria, 1837.
21. Thurs. Longest Day.
24. SUN... 4th *Sunday after Trinity. St. John Baptist.*
27. Thurs. Sittings Court of Error and Appeal.
29. Friday *St. Peter.*
30. Satur. Last day for Co. Cl. fin. to rev. Ass. Roll. Last d for Co. Ct. to equalize Roll of Local Municipa

THE

Upper Canada Law Journal.

JUNE, 1866.

ENGLISH BANKRUPTCY AMENDMENTS.

Lord Westbury's reputation as a law reformer was partly built upon the efforts he expended in producing the English Bankruptcy law of 1861. It is said that during the few years of its operation, this Act has proved eminently unsatisfactory, being both tedious and costly. The law that is intended to take its place has come before Parliament, based upon the report of a select committee, laid before the House of Commons on the 21st of March, 1865.

The Attorney-General, in moving the second reading of the bill, traced the history of the law of bankruptcy from its introduction in in reign of Henry VIII., at which time and until 1705, it was highly penal in its character. At the latter period the principle of discharging bankrupts who conformed to the law was adopted. In 1825 a consolidation of the existing acts was attempted, and it was first provided that creditors might oppose the discharge. In 1831, alterations in the administration of the bankrupt law were made, a Court of Bankruptcy was established, and an official administration substituted for that of creditors. In 1844, a trader was allowed to make himself bankrupt. In 1849, an act was passed, by which a classification of certificates according to conduct was introduced, and the system of composition with creditors was enlarged. Then came the act of 1861, which abolished the distinction between non-traders and traders, and all were classed when the case arose as bankrupts; greater power was given to creditors, as distinguished from official assignees; a criminal jurisdiction was given to the Bankruptcy Court, new mercantile offences were created, which were punishable by imprisonment, and the system of composition deeds was expanded.

This committee has adopted much that has been found most successful in the Bankruptcy law of Scotland, deeming it safer to imitate what has proved to be workable, than to recommend original but untried schemes.

Among those examined before the committee was Mr. G. A. Esson, accountant in bankruptcy in Scotland. Mr. Esson's office is the principal one in Scotland, connected with this branch of the law, and his opportunities for acquiring a knowledge of the advantages and defects of the much admired Scottish system have not been lost. For the information of members of Parliament and lawyers, Mr. Esson has thrown together in pamphlet form some valuable "Notes on Scotch Bankruptcy Law and Practice, with reference to the proposed amendment of the Bankruptcy law of England;" which pamphlet we have now before us, and from which we have obtained considerable information.

The English systems of bankruptcy law have never been introduced into the Scottish courts. The independent people of that country contented themselves with improving upon their old laws, and devised rules which seemed likely to meet the exigencies of modern trade. These new laws have worked so successfully, it is contended, in comparison with the English statute, that England is now importing in the main what Scotland has long adopted. The mode of paying the trustee, who occupies the place of the creditors' assignee, is new to English law. His remuneration is by a commission on the assets he realizes, the rate of which is not to be fixed until after his work is done. From among the creditors there are also to be selected two unpaid inspectors, to act as a committee of general superintendence and advice. When the debtor has passed his examination, he may apply for his discharge, provided he has paid 6*s.* 8*d.* in the pound. It is proposed, in cases where so much cannot be paid, to grant a discharge after the lapse of six years, if the court thinks fit. This seems a long period of probation, and one would think that

it shows a tendency to return to the "good old times," when insolvency was considered a crime, and occasionally visited with a little hanging.

Whilst on the subject of the Scotch Bankruptcy laws, it may not be amiss, as it will be certainly amusing to many of our readers who never heard it before, to refer to the punishment inflicted upon the *dyvours* or bankrupts of early time. These unfortunates were obliged to wear in public a parti-colored garment, half yellow and half brown, as a distinguishing dress! We can easily fancy that many a thin-skinned trader would make an extra exertion to "liquidate" in full, rather than wear this prison garb. It is a pity that human laws are not sufficiently discriminating to enable us, even in these days, so to put a mark on *dishonest* insolvents.

This law was only relaxed in the case of innocent insolvents, the victims of misfortune, in 1688; and although the practice had long before fallen into disuse, it was not abolished by statute until 1836.

We have already referred to the proposed alteration of the English Bankrupt Acts, in an article in the *Local Courts Gazette** (copied, we notice, into one of the English legal periodicals), and in it noticed the apparent want of any adequate punishment for frauds on the part of insolvents. We hardly think that this most important part of a good and efficient Bankrupt Act will be omitted. Any Act which is not very explicit on this subject is defective.

It is rather a curious fact in connection with this subject, that the Americans are only now introducing a system of bankruptcy law into their country. The author of a bill recently introduced with this object in view, in closing the debate on the subject, made an able speech in favor of the measure, part of which it may not be uninteresting to publish.

In answering the first objection, that no law should be passed which authorizes the discharge of a debt without payment in full, or which conceals the object of a contract; and that all bankrupt laws on this principle would be pronounced inexpedient and unjust, he said:

"My reply is, that in the progress of civilization it has become repugnant to the consciences of enlightened nations that there should be any longer servitude for debt. There are two parties to every contract, and there are uncertainties with regard to the performance of it by each. All commercial nations have discovered that it is as necessary for the prompt transaction of business, the preservation of mercantile honor, and the encouragement of trade and enterprise, to provide a remedy for the honest, unfortunate debtor against the persecution of some grasping creditor, as to provide a remedy for the creditor against a fraudulent debtor. The security, even the life of trade, requires that the relief provided by the law should be mutual. Otherwise, honesty is confounded with fraud, and misfortune with crime.

"A well-adjusted system of bankrupt law provides the desired remedy; and while it strengthens rather than weakens the creditor's rights and powers, it rewards unfortunate honesty with emancipation. Hereafter, if this bill becomes a law, imprisonment for debt, that relic of barbarous ages which still lingers in some of the States, will cease to exist, and can never be restored. The energies of the unfortunate debtor will no longer be lost to his family and his country. The past, with its retrospect of embarrassment and misfortune, will no longer cast its baneful shadow over his mind, his future will no longer be uncheered by hope. The pursuit of happiness, the road to honor, a career of industry and enterprise, with its rewards, will again be opened to him, and he will enter anew, as a redeemed man, into the life and prosperity of the State."

The changes that we see going on in the bankrupt laws of England and other countries from year to year, must convince us that we ought always to be ready, after due deliberation, to alter and improve our own, when either the necessities of the trader or the experience of the lawyer demand it—not blindly copying a statute in force in another country, but taking therefrom what may seem to be beneficial to our own.

* 1 L. C. G. 33.

LAW SOCIETY—EASTER TERM, 1866.

The following rule, lately made by the Benchers, is worthy of notice:

"Ordered, that all monies paid to the Law Society shall be received by the sub-treasurer until two p. m. on every day, except Saturday, and on that day until twelve, noon."

The effect of this rule will not be much felt until next Michaelmas Term, when the annual certificates must be taken out. Much more promptitude on the part of the profession

than heretofore will then be necessary to enable them to do what is needful within the time limited, and it will not be the fault of the sub-treasurer if the rule is not strictly complied with.

CALLS TO THE BAR.

Out of twelve gentlemen who presented themselves for examination for Call to the Bar this term the six following passed—the answers of Messrs. Fleming and Stephens being so superior that they were not called upon for an oral examination:—James Fleming, Toronto; J. J. Stephens, Owen Sound; J. Farley, St. Thomas; H. M. Wilson, Brantford; A. F. Smith, LL.B., Brampton; L. C. Moore, Goderich.

ATTORNEYS.

Certificates of fitness to practice as attorneys in the courts, were, during the same term, granted to the following gentlemen:—Messrs. Wilson, Wright, McFayden, Maron, Nicol, Burns, Read, Morden, Denmark, Jacob, Smith, Holmested, Coyne.

Twenty-one gentlemen in all went up for examination for admission, out of whom thirteen were successful.

Mr. Coyne was highly complimented upon his answers to the papers. The same gentleman on a former occasion, when up for call, distinguished himself by the correctness and fullness of his answers, and was now as then passed without an oral examination.

OFFICE HOURS.

The following round-robin has been signed by nearly all the practitioners in this city:—

"We, the undersigned, Members of the Legal Profession, practising in the City of Toronto, hereby agree that our respective Offices be CLOSED AT THREE O'CLOCK, instead of the usual Office hours, during the ensuing Midsummer Vacation; and that our respective Offices be CLOSED for business at THREE O'CLOCK in the afternoon ON EACH SATUADAY throughout each year."

This is intended to carry out what was talked of and partly done last year. As we said then so say we now, we heartily approve of it, provided the intention is fairly and *bona fide* carried out. The majority of the offices in other places will probably follow the lead.

ACT SUSPENDING THE HABEAS CORPUS ACT.

AN ACT TO AUTHORIZE THE APPREHENSION AND DETENTION UNTIL THE EIGHTH DAY OF JUNE, ONE THOUSAND EIGHT HUNDRED AND SIXTY-SEVEN, OF SUCH PERSONS AS SHALL BE SUSPECTED OF COMMITTING ACTS OF HOSTILITY OR CONSPIRING AGAINST HER MAJESTY'S PERSON AND GOVERNMENT.

[Assented to 8th June, 1866.]

Whereas certain evil disposed persons being subjects or citizens of Foreign Countries at peace with her Majesty, have lawlessly invaded this Province, with hostile intent, and whereas other similar lawless invasions of and hostile incursions into the Province are threatened; Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. All and every person and persons who is, are or shall be within Prison in this Province at, upon, or after the day of the passing of this Act, by warrant of commitment signed by any two Justices of the Peace, or under capture or arrest made with or without Warrant, by any of the officers, non-commissioned officers or men of Her Majesty's Regular, Militia or Volunteer Militia Forces, or by any of the officers, warrant officers or men of Her Majesty's Navy, and charged;

With being or continuing in arms against Her Majesty within this Province;

Or with any act of hostility therein;

Or with having entered this Province with design or intent to levy war against Her Majesty, or to commit any felony therein;

Or with levying war against Her Majesty in company with any of the subjects or citizens of any Foreign State or Country then at peace with Her Majesty;

Or with entering this Province in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any act of Felony therein;

Or with joining himself to any person or persons whatsoever, with the design or intent to aid and assist him or them whether subjects or aliens, who have entered or may enter this Province with design or intent to levy war on Her Majesty, or to commit any felony within the same;

Or charged with High Treason or treasonable practices, or suspicion of High Treason, or treasonable practices;

May be detained in safe custody without Bail or mainprize until the eight day of June, one thousand eight hundred and sixty-seven, and no Judge or Justice of the Peace shall bail or try any such person or persons so committed, captured or arrested without order from Her Majesty's Executive Council, until the eighth day of June, one thousand eight hundred and sixty-seven, any Law or Statute to the con-

trary notwithstanding; provided, that if within fourteen days after the date of any warrant of commitment, the same or a copy thereof certified by the party in whose custody such person is detained, be not countersigned by a clerk of the Executive Council, then any person or persons detained in custody under any such warrant of commitment, for any of the causes aforesaid by virtue of this Act, may apply to be and may be admitted to bail.

2. In cases where any person or persons have been, before the passing of this Act, or shall be during the time this Act shall continue in force arrested, committed or detained in custody by force of a warrant of commitment of any two Justices of the Peace for any of the causes in the preceding section mentioned, it shall and may be lawful for any person or persons to whom such warrant or warrants have been or shall be directed to detain such person or persons so arrested or committed, in his or their custody, in any place whatever within this Province, and such person or persons to whom such warrant or warrants have been or shall be directed, shall be deemed and taken to be to all intents and purposes lawfully authorized to detain in safe custody, and to be the lawful Gaolers and Keepers of such persons so arrested, committed or detained, and such place or places, where such person or persons so arrested, committed or detained, are or shall be detained in custody, shall be deemed and taken to all intents and purposes to be lawful prisons and gaols for the detention and safe custody of such person and persons respectively; and it shall and may be lawful to and for Her Majesty's Executive Council, by warrant signed by a clerk of the said Executive Council, to change the person or persons by whom and the place in which such person or persons so arrested, committed or detained, shall be detained in safe custody.

3. The Governor may, by proclamation, as and so often as he may see fit, suspend the operation of this Act, or within the period aforesaid, again declare the same to be in full force and effect, and, upon any such Proclamation, this Act shall be suspended or of full force and effect as the case may be.

4 This act may be altered, amended or repealed during the present session of parliament.

SELECTIONS.

ASSIGNMENT OF RIGHTS OF SUIT IN EQUITY.

In classical antiquity, as well as in the early history of our own country, the right of calling another into judgment seems always to have been one in the exercise of which the state or public could never be considered as unconcerned. Inasmuch as the aggregate force of society is evoked by litigants, in order to arm the tribunals with the power to give effect to their determinations, on the subject matter of contention, to which their cognizance is drawn, we can understand why it should always have been deemed important that that kind of antagonism, which results from the relation of two persons in a state of juridical controversy, should not be entered upon with levity. The provisions of our own law in regard to the production of the *secta*, or suit, by the plaintiff, in order to raise such a *primâ facie* case as would require the defendant to answer (see 1 Reeves Hist. Eng. Law, 377), and the infliction of amercements on failure of the plaintiff to make good his claim, *pro falso clamore suo*, point to this principle, and mark the tendency of our ancient jurisprudence to check the temerity of litigants.

Considering the difficulties which must ever surround man in his exercise of the high and responsible function of a dispensator of justice, it is not surprising to find, among the civilized races, an avoidance of all that might tend to encourage litigious levity. Hence the rigid doctrines of our ancestors on the subject of maintenance and champerty. They seem, on this subject, to have been influenced by some such reasoning as this—"We have established tribunals for the decision of disputes between the subjects of the realm, and if such disputes arise and cannot be arranged without resorting to the courts, the parties appealing to the courts must have the best decision that can be procured. But these disputes are an evil in themselves, and not to be encouraged. If those persons whose fault or misfortune it has been to fall into this state of antagonism towards each other are unable to settle their differences, they shall at least carry on their contest under the full responsibility that, whichever may prove by his obstinate or unrighteous conduct to have necessitated an appeal to the justice of the realm, shall bear all the consequences of having set the machinery of the law in motion. Least of all will we allow extraneous persons to be introduced into the contest, to afford countenance or encouragement to either of the disputants, to foster the contention, or to multiply enmities by themselves becoming involved in the state of conflict which already exists between the original parties."

Such appears to be the light in which the subject was viewed by the founders of our juridical system, and for a long period there are evidences that these doctrines were enforced in all their strict and logical consequences. The statutes under which defeated litigants came to be visited with the costs of the suit have operated, as they were no doubt intended to do, as a penalty and check upon litigious temerity. The doctrines and practice of the common law on the subject of costs have, without furnishing an inflexible rule, been productive of a salutary imitation on the part of Courts of Equity, and have furnished to the latter a general guide for dealing with the question of costs.

The progress of society produced even at an early period some relaxation in the rigid doctrines which flowed from the strictness of the general principles which our ancestors had adopted. It seems to have been thought that in matters of mere *contract*, where the situation of the person on whom the obligation lay, would not be worsened by the transfer of the right to the benefit of the obligation, from the person originally entitled to another, such transfer might, in an indirect manner, and in substance, though not formally, be made. In a case as early as the time of Henry VI., the proposition was annunciated that "a debt which is certain can be assigned over by assent of the parties, but not damages in trespass, which are uncertain (Bro. Ab. Maintenance, pl. 8), and in the reign of Henry VII. we find a case admitting the assignment of a bond debt to be lawful (Bro. Ab. Chose in Action, pl. 3). The doctrine of these cases seems to have expanded into the now unquestioned right of a creditor to assign over his debt, either by specialty or simple contract, though, as between him and the debtor, the latter is only bound (except by statutory modification of the law in some instances) to answer, in a court of law, the personal demand of his original creditor or his legal representatives, from or to whom he is liable to receive or pay costs, according as the result of the legal suit may determine.

The doctrine of the common law in regarding rights founded on contract as less obnoxious to the strict rules against maintenance than those rights which involve antagonism, or the assertion of wrong in some other person, will often occur to the attentive student of our legal principles. One instance will illustrate this in a strong light. At the time when the doctrines of maintenances were constantly kept in view and referred to as the foundation of many of the important principles of our law, it seems to have been admitted that that kind of right which was gained by the owner of an *interesse termini*, which was nothing more than *a contract* for the possession of land, could always have been assigned during its executory state, but if the time had arrived at which its owner was entitled to the possession, and that possession had once been taken and an eviction had followed, then the inflexible rule against maintenance, which forbade the assignment of any rights of entry or action, was recognised in all its force, and no transfer of the right to recover possession could possibly be made (*Bruerton* v. *Rainsford*, Cro. Eliz. 15.)

Assignment of mere *choses in action*, so far as they were admitted by the common law, never gave, as between subjects, and do not at this day give, any other right to the assignee than that of suing in the name of his assignor and defraying the costs, which originally would have been maintenance, and therefore criminal.

The expansion of the equity system by bringing within its range subjects far more varied than those which fell under the cognisance of the common law has at various times raised the question how far a right of suit enforceable only in equity was capable of assignment. It is curious to find that so recently as the beginning of the present century, the consideration of how far the right existed to assign a contract for sale of an estate had to be seriously discussed before Lord Eldon, and it is fortunate that the great legal attainments of that eminent judge were brought to bear upon the subject, so as to lead to the settlement of the doctrine, by referring it to principles which set at rest any doubt on so important a question (see *Wood* v. *Griffiths*, 1 Swans, 55).

However, although the right to assign the benefit of a *contract* is now undoubted; by a case which was decided by Lord Abinger, when Chief Baron (*Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481), a principle was supposed to be established that a right of suit could not be assigned if it were of such a nature that it could not be deemed other than a hostile right to bring another person into a Court of Equity, for the purpose of oversetting a legal instrument, such as the right to vacate a deed on the ground of inadequate consideration or undue influence. A right of suit of this nature seeming to be incapable of existence, in legal contemplation, except on the assumption of wrong on the part of another person, from which the spirit of our law is averse, distinguishes this from a contract the existence of which may be assumed without imputing wrong to any one. Hostile rights of this nature, it was considered, ought upon grounds of public policy, to be enforced, if at all, by the parties presumably aggrieved; for it would be too wide a departure from the original principles of our own, as well as other systems of law, to permit rights which seem so necessarily to draw contention after them, and to present such an improbability of amicable adjustment, to pass to any person at the will of him to whom the alleged wrong was done, though at the death of the latter his power of disposing of such a right by will, which is obviously a very different matter, has been conceded (*Gresley* v. *Mousley*, DeG. and J. 78). The doctrine of *Prosser* v. *Edmonds* has been often referred to by the judicature with assent and approbation, and has been cited and approved by text writers, both here and in America (see Storey's Eq. Jurisprudence, S. 1040, g).

A case which seems to involve the same point was recently brought under the consideration of the Master of the Rolls, by a demurrer which was rested on the authority of this case. In *Dickinson* v. *Burrell*, 11 W. R. 413, the facts, in effect, appear to have been that a claimant of property, *pendente lite*, executed deeds by which he conveyed his interest in the subject matter of the suit for a valuable, but, as alleged, inadequate consideration, by way of absolute sale. After

the suit had terminated favourably for the claimant, he executed deeds by which he purported to convey all his interest in the subject-matter of the suit to trustees in trust (subject to certain payments) for himself, for life, and, afterwards, for the benefit of his children. The children, claiming under this deed, filed a bill to set aside the sale made by their father of his interest on the ground of inadequacy of price and undue influence, which bill was met by demurrer on the doctrine of *Prosser* v. *Edmonds*. Lord Romilly, though recognising the latter case, overruled the demurrer, having come to the conclusion that the cases were distinguishable.

Without intimating any opinion as to the legal inference which Lord Romilly drew from the facts of this case, some of the reasons which his lordship is reported to have given for his judgment appear to merit observation. He is represented as saying that "If Dickinson, after the sale of his interest to the purchaser, had sold his interest in the property to some one else, by a deed of sale, which recited that the prior sale was void, but that Dickinson was not inclined himself to take steps to set it aside, it could not be doubted that the second purchaser would have been entitled to take proceedings to set the prior deed aside." If Dickinson had, on the contrary, merely conveyed the bare right to set the transaction aside without granting all his estate and interest in the property, then, certainly, the assignee could not have maintained the suit." He added that the cases established a distinction between the assignment of a mere right of suit, such as that in *Prosser* v. *Edmonds*, and the assignment of the estate itself to which the right of suit passed as an accessory.

The observation that occurs on this is, that it does not appear that there was any substantial difference in the form of the assignment in *Prosser* v. *Edmonds*, and in the case before Lord Romilly. In both the assignors purported to convey all their right and interest in the respective subject matters; in neither is there anything which, in terms, implies the transfer of a bare right of suit as divested from the interest in the subject-matter. Lord Abinger did certainly not so understand the effect of the language of the assignment, in the case before him, which he spoke of as a "case where a party assigns his whole estate, and afterwards *makes an assignment generally of the same estate* to another person, and the second assignee claims to set aside the first assignment as fraudulent and void." In truth the difficulty in both cases would appear to be that, until a prior conveyance had been set aside, there was nothing which could be assigned, and, therefore, from the intrinsic nature of the circumstances, nothing but a bare right of suit could pass to the assignee. Both assignments therefore, if supported on the reasoning of the Master of the Rolls, must, it should seem, rest on that proposition for which Lord Abinger was unable to find any authority "that a man can assign to another a right to file a bill for a fraud committed upon himself."

With great deference both cases appear to furnish instances of the "introduction of parties to enforce those rights which others are not disposed to enforce, and the observations of the Master of the Rolls as to the validity of the assignment, notwithstanding the recital by the assignor of his own unwillingness to take proceedings to set the prior deed aside, can hardly be reconciled with the *ratio decidendi* in the case before Lord Abinger.

It is undoubtedly true that the cases do show a difference between the assignment of a right of suit simply, and the assignment of property, or a *contract*, to which that right of suit may be incident. This distinction was clearly pointed out by Sir J. Wigram, in the case of *Wilson* v. *Short*, 6 Hare, 384, where one Bright having entered into a contract for the purchase of iron, and paid considerable sums as deposits, assigned to the plaintiffs for valuable consideration, his interest *in the contract;* it was then discovered that the vendor had so acted as to be open to a suit for the rescission of the contract, and the return of the deposits, which suit the plaintiffs brought, as assignees of the contract from Bright, and in answer to the objection which was raised by the defendants, on the doctrine of *Prosser* v. *Edmonds*, the Vice-Chancellor said, "It proceeded upon a fallacy. If, as in *Prosser* v. *Edmonds*, the contract which the plaintiffs sought to enforce had been for the purchase of a litigated right, it might have prevailed, but that was not the case. As between Bright and the plaintiffs the contract was free from objection. A *subsequent* discovery of the fraud had shown that both Bright and the plaintiffs were deceived by the defendants. The plaintiffs only sought in that suit to enforce a right resulting from a lawful contract, of the benefit of which a fraud newly discovered had deprived them."

The distinction drawn by Vice-Chancellor Wigram shows in a clear light the difference between the assignment of a right, under a *contract* which can be considered without the imputation of fraud or wrong, and the assignment of a right which can have no existence unless the law has assumed, before there is any *constat* of the fact, that a fraud has been committed. It is submitted that the distinction is one founded on sound legal principle. The pernicious consequences of permitting rights such as those in *Prosser* v. *Edmonds* to be assigned by any person who may be himself unwilling to incur the responsibility of bringing them into legal controversy are too obvious to require reference, and were partly adverted to by Lord Abinger in his judgment in that case.

It may be permitted respectfully to doubt whether the distinction which the Master of the Rolls has drawn as to the legal effect of

the assignment in the case before him, and that in *Prosser* v. *Edmonds*, be more than a verbal one, even if, to that extent, there be such an appreciable difference as would sustain the *ratio decidendi* of Lord Romilly, consistently with saving whole the doctrine of *Prosser* v. *Edmonds*, the principle of which, lying high and dry above the merits of any particular case, it is submitted, may well be deemed worthy of preservation, if a consideration be had of the inconveniences and advantages which may be expected to result from its retention or overthrow.—*Solicitors' Jour.*

ON THE REPORT OF THE CAPITAL PUNISHMENT COMMISSIONERS.

The Capital Punishment Commission sat a certain number of days, asked and received answers to a great number of questions, obtained letters, reports, and documents of a very varied character; and, finally, has made a report in which the most notable thing is that the Commissioners could not agree upon the principal matters referred to them for consideration.

With all deference for the opinion of a contemporary upon this subject, we think this is a result neither to be wondered at nor regretted. The propriety of inflicting the punishment of death upon our fellow-creatures—and by the phrase we include the moral right, as well as the social expediency—is far too wide a subject, and fraught with too many sources of disagreement, to be adequately dealt with by a commission.

If, indeed, the commission had unanimously reported either in favour of or adversely to the continuance of capital punishment, we doubt very much whether such a report would have been at all more likely to settle the question than will the agreement by the Commissioners that they differ in opinion. Nevertheless, the evidence collected is valuable; and, though it may seem a paradox to say so, some of it is the more valuable since its utter worthlessness is admitted by those who have put it forward.

Thus we have a report from the Bureau Fédéral de Statistique at Bern, that Canton Freibourg had abolished capital punishment without any disadvantage to the security of life.

This, of course, is made much of by the advocates for the abolition of capital punishment. But, behold, Canton Freibourg itself intervenes, and reports its own dissatisfaction. It has tried the experiment, and, in the judgment of those interested in the success of it, the experiment has failed—so signally failed, that there is an agitation to return to the former law. Upon this, a correspondence ensues; and the result is an admission by the Bureau Fédéral de Statistique at Bern, that the returns prove exactly the reverse of what they had been wanted to prove, but, of course, with the proviso that both departments had been perfectly right. The letter from the statistical office at Berne is so instructive that we give it in extenso:—

Bureau Fédéral de Statistique,
Bern, 16 February, 1865.

Dear Sir,—In a letter dated from the 9th instant, Mr William Tallack writes our department to give you further explanations in relation to a discrepancy existing between the statement of the department and of the Canton Freiburg, with respect to the statistical consequences of the abolition of punishment of death in that canton, (1848).

After having ordered a new examination, a statistical abstract of the official court of law lists of the Canton Freiburg, in the 15 years before and the 15 years after the abolition of capital punishment lies before us—a statement of which a copy is at your disposal This statement confirms exactly the first account of the department.

"That crimes against life and health have not increased relatively (to the increasing of population) in the 15 years after abolition of capital punishment."

Nevertheless, the statement of Canton Freiburg is exact to crimes against life having, indeed, increased in number above the proportion of increasing population, as you can see from the following tabula:—

Crimes in general in the Canton Freiburg:—

From 1833—1847	984 by 1,023 persons.
" 1848—1862	1,091 by 1,135 "
Population of 1851	86,169
" 1850	99,805
" 1860	105,523

Crimes against life and health—

1833—1845	169
1848—1862	139

Crimes against life—

1833—1847	19
1848—1862	45

Of the last: kindsmard (infanticide) has increased from 8 to 15.

Tootschlag (meurtre) 5 to 15

Mard (assassinat) 1 to 5.

Notwithstanding you would be mistaken if you might attribute this increase to the abolition of capital punishment, as it has been merely accidental, Canton Freiburg being a very small canton. The third part of the criminals being foreigners to the canton, this example cannot be of any prejudice to the question.

I remain, dear Sir,
Yours most respectfully,
Dubs

Chief of the Department of the Interior.

James Henry Patterson, Esq.,
Secretary of Her Majesty's Royal Commission on Capital Punishment.

Thus two exactly opposite results are justly and logically deducible from the same figures, and both conclusions, although contradictory, are perfectly right—a most comfortable and satisfactory conclusion.

Nor is this the only instructive lesson to be learned from this excellent volume. Mr. Bright appears to attach great importance to

the history of Tuscany, and the alteration of its jurisprudence under Leopold I.; here the history is faithfully stated thus:—

Capital punishment abolished in..... 1786
Restored.....in 1790

It is added, indeed, that the restoration was the result of "the fears" of timorous ministers who re-established the ancient house and repudiated the doctrine of free trade of the same Leopold.

Extended in..... 1795
This continued till..... 1816

When, says the report, "violent robberies, extortions, and murders were frequent," and from that time a law inflicting capital punishment was in force from that epoch till 1847, when capital punishment was abolished, and finally re-established in 1852.

Now it may or may not be true that "fatal circumstances which troubled the normal state of society caused it (capital punishment) to be reinstated only as an exception," but to quote the example of Tuscany—"and we observe it is the example relied on as an example of the success of the experiment" is simply ridiculous. Furthermore, we must protest against the liberties taken with history and arithmetic. Let our readers refer to question 1983—where Mr. J. F. Stephens is cross-examined in the popular sense—that is, examined in a cross manner by Mr. Bright. With the historical report before us, which we have quoted above, it is a little astonishing to find, that for the most part of 80 years capital punishment has been abolished in Tuscany—but if that fact were established we should ask what was the population of Tuscany? What was its extent? Mr. Bright would probably make these inquiries himself if he were discussing the Reform Bill—why not in such an inquiry as this? But, as if that no element of weakness should be wanting, we read in the very same report, as applicable to Tuscany, and under the hand of M. Vacca, Minister of Grace and Justice—

"In order to supply the information asked for, I have had recourse to the President of the Court of Cassation, at Florence, since one of the pernicious effects of the (so to call it) autonomy which remains in Tuscany is the preservation also of the internal regulations for the transaction of business; among others, that of abstaining from sending periodical statistics to the ministry, as is done by all other judicial authorities.

"I have also been obliged to remark with disapprobation that in Tuscany no exact statistical annotations are established, and for that reason also in that matter of capital punishment I have not been able to obtain an exact prospectus of increase and decrease of crime, but only a table of some few cases of homicide in which the author has been discovered or prosecuted, whilst in other cases no record has been kept."

Now, our readers will observe this is no example related by us with the intention of undervaluing the force and magnitude of the experiment, but the favourite specimen upon which Mr. Stephens was examined in the manner we have pointed out.

We have said that the question is too wide for a commission to deal with; we say, also, that the question is not one upon which lawyers, however eminent, have any special knowledge that would justify them in dogmatising. They cannot judge better than other men what punishment deters and what does not. They may by their practice know more facts relevant to the question, but given the same facts before two men, one a lawyer and one not, we know no reason why the layman should not form as sound a judgment as the lawyer.

This is, perhaps, the most suitable place at which to consider the influence of capital punishment in deterring persons from the commission of murder.

In the abstract lawfulness of the institution it is almost superfluous to inquire. If it cannot be said to be so plainly enjoined as to create the obligation of inflicting it in cases of murder, it certainly is not condemned either by authority or by reason. If we admit, as we must, that for the practical management of the world we are entitled to risk death ourselves, to make others risk it, and, as in warfare, sometimes to inflict it, there is no denying that we may lawfully deal with it by means of our criminal jurisprudence. The same reasoning, drawn from the necessity of managing human affairs by general rules and in a rough practical way, applies to the argument that we must not inflict the punishment of death because it can never be recalled or compensated in case it should appear not to have been deserved. We are always liable to do and to suffer injustice which cannot be repaired. Risk is a condition of human life. It involves the chance of passing an erroneous sentence of penal servitude which may not be proved erroneous until the convict is dead, as well as the passing of a capital sentence upon a man whose innocence we may discover the day after he has been executed. It exists and is incurred deliberately in numberless situations. The case of capital punishment is therefore not logically separable from other cases. In one and all the only question is whether society and morality gain or lose by our braving the danger of making a mistake. We are thus led directly to try the whole issue by considering whether people are more frightened by the idea of being hanged or by that of being perpetually imprisoned.

Herein we are compelled to proceed deductively. The experiment of abolishing the death penalty for murder has not been tried on any scale or under any conditions which could make it instructive. The argument that convictions would follow murder more

surely if the consequences of their decision were made less awful to jurymen rests on two fallacies. In the first place, there is an error in fact, for there is really no great difficulty in obtaining a verdict of wilful murder when the evidence is such as to justify positive affirmative belief of the defendant's guilt. Few undoubted murderers escape receiving their proper sentence in court, though in two recent and exceptional cases fortune and ingenuity may have preserved them afterwards. If juries are more scrupulous in deciding upon capital charges it is only that the momentous nature of the issue renders them as careful for once as they ought to be always. The second fallacy consists in an assumption that jurymen on entering the box lay down their natural tendency to compare the crime with its punishment. No doubt, when sheep-stealing or forgery might send an offender to the gallows, men were slow to convict their fellow men of an act which was disproportionately punished. Human instinct revolted at the prospect, and instead of merely requiring sufficient evidence on which to convict, juries may even have been anxious in seeking an excuse for acquittal. But it does not follow that the same inclination would obtain in cases of murder; the tendency is rather to proceed as if blood could only be wiped out by blood.

In the absence of reliable experience we are driven to what may be called a theory touching the influence which the fear of death may exercise as compared with that exercised by the fear of any secondary punishment. But if the consideration be theoretical as regards the particular question under discussion, it is in other respects perfectly practical. It rests on the most familiar and certain of all knowledge; on knowledge of our own feelings, and of what we cannot help observing to be the feeling of all around us. "Skin for skin. Yea, all that a man hath will he give for his life," is contiually proved to be a truth. Bacon may have asserted that "revenge triumphs over the fear of death," and that "grief flieth to it," but he certainly never knew that it would have less effect than any specified minor evil in deterring persons from any forbidden course of action, though he saw that certain passions will sometimes bring those possessed by them to the most desperate risk, he would undoubtedly have endorsed the words of his great contemporary—deeper even than himself in knowledge of human nature.

> "The weariest and most loathed worldly life,
> That age, ache, penury, and imprisonment
> Can lay on nature, is a paradise
> To what we fear of death—"

express a fact which is daily illustrated. We know that, whether from religious awe or superstitious dread of the unknown, or from an instinct common to all forms of animal life, men will struggle through pain and want, will wish to live though bereft of every friend, will nerve themselves to undergo fearful surgical operations, will endure all known ills, rather than face that one ill which is unknown, of which no man can speak from experience, and over which there broods the horror of great darkness. If it were not so, the proportion of those who terminate a joyless existence by their own hands would be far larger than it is. The act, too, would be regarded differently. The common verdict of "temporary insanity" may spring partly from a reluctance to outrage the feelings of surviving relatives by the horrid circumstances of *felo de se*. But it also represents in a great measure the general sense that all the principles of human feeling must be overturned before death can be willingly incurred. When it is incurred voluntarily and deliberately, and in a good cause, we pay almost divine honours to the memory of those whose feeling of duty has achieved so vast a conquest over the weakness of humanity.

Compared with the fear of death the fear of perpetual imprisonment must be almost ineffective. The things to be compared here are not two sorts of suffering, but the influence which the prospect of each exercises. Grant that the days of a life-long imprisonment, if added up, would show a larger sum of misery than that endured by the culprit who suffers death at a month's warning. It is obvious that the former case can only be appreciated by those who have endured it, or a considerable part of it. Its essence must lie in the monotonous repetition of solitude and restraint, and can hardly be grasped by the imagination. But to be hanged, and hanged publicly, is a terror which any one can understand without effort. It is a defined and concentrated idea which the ordinary mind grasps easily. There is no need to project one's thought into the future, or to say "How should I feel after a year?" and "How after five years?" The dread is almost tangible. And this is evaded in a great measure by its familiarity. We understand what we have always studied, more or less. No one who is not likely to be prosecuted ever stops to think about the pain of imprisonment. But throughout life death stands before us as a thing to be avoided. It is a danger which the mind associates instinctively with almost every human act. It has all seasons for its own. It mixes alike with our labours and our pleasures, and though familiarty may harden us against particular modes of incurring mortal danger, it does not strip mortality itself of terror; on the contrary, it makes the dread more appreciable, and even old age, with all its visible decay, rather confirms than diminishes the fear of the ultimate inevitable defeat in our life-long struggle. Death which comes a week sooner than is necessary seems premature to the sufferer, and to have lived that week would have been to achieve a victory This tendency of mortal fear to rush like the atmosphere into every crevice of life can hardly

be too strongly insisted on in the present inquiry. For besides educating all sorts of men to feel its bitterness, it arms the State with a power indispensable to her ultimate authority. As there is in general no situation so dreary that life loses all its charms, so even in prison culprits cling to life and are amenable in consequence. They know that resistance would either end in their submission or [in being hanged for killing one of their custodians. On this account alone we could ill afford to throw away the weapon which the universal reluctance to die enables us to keep in reserve. But, after all, the general aspect of this influence is much the more important. It is a great security for all that the State should hold within her hands that fate which the most brutal learn to shudder at, and which the most acute minds cannot thoroughly distinguish from the idea of animal destruction. Nor do we doubt, as a matter of speculation, that the public association of capital punishment and murder causes the wickedness of the crime to be more thoroughly felt than it would otherwise be. All who can grasp the ideas of comparative punishment must be impressed by the coupling of death with death. It is this which constitutes the value of public executions, considered as a deterrent influence and compared with private executions. The bulk of the crowd around the gallows are probably very brutal persons. Indeed, some prison official has said that every murderer he ever knew had seen some other murderer hanged. The remark may be well founded and general, though it might as well have been made of any sight which is only pleasure to coarse tastes. But it goes no way towards showing that public executions are inefficient. The persons whom it is sought to influence are not a crowd, but the nation, into which the crowd is immediately absorbed. Every spectator of an execution relates his experience, and every one, as he does so, preaches unconsciously on the awful text, "Whoso sheddeth man's blood by man shall his blood be shed." That it may not be shed too profusely, either by the hand of the assassin or that of the public executioner, will always be the aim of a wise as well as of a merciful government; but there is the mercy that murders as well as the severity, and a poet has said of Robespierre—

"Once, as if sick of blood upon his brow,
He fled the judgment seat, lest there his breath
Should haply doom some criminal to death."

And history has told us what came of his extravagant sensibility. If the Commission had confined itself to "agreeing to differ," its labours would have been thrown away, and, at all events, it would have done no mischief, but, unfortunately, the temptation to justify their own existence was too strong upon them, and they recommend a verbal alteration in the law as to murder, but upon this verbal alteration important consequences are to attach. We are to have murder in the first degree as well as murder in the second degree. The first is to be capital, the second is not. Now we fear we are as little in favour of the report upon this subject as we are in favour of Mr. Fitzjames Stephen's new definition of murder, which that learned and very able gentleman, in a pamphlet recently published, considers will solve all the difficulties incident to administering justice according to certain fixed rules. Human language never can be used with sufficient precision to exclude the possibility of embracing by generality words differing widely in the degree of moral delinquency which they involve. We do not believe it is possible, by the most careful and deliberate consideration, so to frame your language as to adapt it to the infinite variety of human circumstances, nor do we think it desirable if it were possible. Take the ordinary case of killing in a quarrel or in hot blood upon provocation, would it be desirable to have marked out with the precision of a chemist weighing out his drugs, what circumstances of provocation, and how many of them, should reduce killing from murder to manslaughter? Where is the supposed mischief of leaving it to a tribunal to determine in each particular case the principle of the law being clear enough? Now Sir Michael Foster, in a treatise to which Mr. Stephen hardly does justice, has described the principle upon which the question of murder or manslaughter is to turn, in words which seem to us to require no commentary. In speaking of the malice aforethought, which is a necessary ingredient of murder, Sir M. Foster says—

"When the law maketh use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense, to which the modern use of the word malice is apt to lead one, a *principle of malevolence to particulars*; for the law by the term malice in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant, spirit."

"In the same latitude are the words malice aforethought to be understood in the statutes which oust clergy in the case of wilful murder. The *malus animus*, which is to be collected from all circumstances, and of which, as I before said, the court and not the jury is to judge, is what bringeth the offence within the denomination of wilful, malicious murder, whatever might be the immediate motive to it; whether it be done, as the old writers express themselves, "Ira vel odio, vel causâ lucri," or from any other wicked or mischievous incentive. And I believe most, if not all the cases, which in our books are ranged under the head of implied malice, will, if carefully adverted to, be found to turn upon this single point; that the fact that hath been attended with such circumstances as carry in them plain indications of a heart regardless of social duty, and fatally bent upon mischief.

If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact, and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter; not accidental death, because the act upon which death ensued was unlawful.

And it ought to be remembered that in all other cases of homicide upon slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill or to do some great bodily harm, such homicide will be murder. The mischief done is irreparable, and the outrage is considered as flowing rather from brutal rage or diabolical malignity than from human frailty; and it is to human frality, and to that alone, the law indulgeth in every case of felonious homicide." We think, besides being an authoritative exposition of the law, this is excellent good sense. Guided by such a criterion as Foster points out, what tribunal could be better adapted than a judge and a jury—the one to expound the law, and the other to find the fact, whether in each particular case a man has been guilty of murder? Mr. Stephen wants a vigorous inflexible verbal definition. The Commissioners, in effect, wish to remit a question of law to the jury.

Now observe how Mr. Stephen deals with the subject—

"1. Homicide is either accidental, or justifiable, or criminal. Accidental or justifiable homicide are sufficiently ascertained by the law as it stands.

"2. Criminal homicide is either murder or manslaughter.

"3. Murder is criminal homicide committed without provocation, and either with an intention to inflict bodily injury or violence likely to cause death, coupled with indifference whether death is caused or not.

"4. Manslaughter is criminal homicide committed without either of these intentions, or with either of these intentions, but under provocation.

"5. Provocation is conduct likely to cause uncontrollable passion in an ordinary man. Acts are said to be done 'under provocation' only if the person committing them is, in fact, thrown by them into an uncontrollable passion, and does the act while so deprived of self-control."

The reader will observe the words, uncontrollable passion, introduced into Mr. Stephen's definition; "uncontrollable passion" itself requires definition.

Is the passion to be the passion of an ordinary man, and the provocation such that an ordinary man could not resist the temptation to kill? If the amount of temptation to kill, and the tendency of ordinary men to yield to such a sad temptation, are to be elements in the consideration here, we have an alteration of the law, with a vengeance. If, on the other hand, Mr. Stephen means that such provocation only is pointed to as would provoke men who are ordinary in respect of their observance of moral law and social duties, his definition is an effort—and, we think, an unsuccessful effort—to fasten by the iron framework of a definition the spirit and vigour with which Foster describes a principle applicable to all circumstances, but incapable of being rendered into one sentence of definition. It is remarkable that in looking over foreign codes the distinction between murder and manslaughter is one which is arrived at by various modes of speech, varying in expression, but really pointing to the substance of Foster's description.—*Law Magazine.*

THE TRIAL OF THE PIX.

The trial of the pix at the Exchequer (says Mr. Lawson*) is very ancient and curious, and though carried on in an open court is yet little known. The practice of summoning the court is as follows:—Upon a memorial being presented by the Master of the Mint praying for a trial of the pix, the Chancellor of the Exchequer moves His Majesty in council for that purpose. A summons is then issued to certain members of the Privy Council to meet at the office of the Receiver of the Fees in his Majesty's Exchequer at 11 o'clock in the forenoon of a certain day. A precept is likewise directed by the Lord High Chancellor to the warden of the Goldsmith's Company, requiring them to nominate and set down the names of a competent number of sufficient and able freemen of their company, skilful to judge of and present the defaults of the coins, if any should be found, to be of the jury to attend at the same time and place. This number is usually twenty-five, of which the Assay Master is always one. When the court is formed the clerk of the Goldsmith's Company returns the precept, together with the list of names; the jury is called over, and twelve persons are sworn. The following is the form of the oath as administered to a jury in March, 1847:—You shall well and truly, after your knowledge and discretion, make the assays of those moneys of gold and silver, and truly report if the said moneys be in weight and fineness according to the Queen's standard in the Treasury for coins; and also if the same moneys be sufficient in alloy, and according to the covenants comprised in an indenture thereof, bearing date the 6th day of February, 1817, and made between his late Majesty, King George the Third, and the Right Hon. William Wellesley Pole. So help you, God." The above oath having been administered, the president gives his charge to the jury, that

*Lawson's History of Banking. Effingham Wilson.

they examine by fire, by water, by touch, or by weight, or by all or by some of them, in the most just manner, whether the moneys were made according to the indenture and standard trial pieces, and within the remedies.

The jury then retire to the court room of the Duchy of Lancaster, whether the pix is removed, together with the weights of the Exchequer and Mint, and then the scales which are used on these occasions are suspended, the beam of which is so delicate that it will turn with the merest trifle, when loaded with the whole of the weights, 48lb 8oz. in each scale.

The jury being seated the pix is opened, and the money, which had been taken out of each delivery and deposited therein, inclosed in a paper parcel, under the seals of the Warden, Master, and Comptroller of the Mint is given into the hands of the foreman, who reads aloud the indorsement, and compares it with the account that lies before him. He then delivers the parcel to one of the jury, who opens it and examines whether the contents agree with the indorsement. When all the parcels have been opened, and found to be right, the moneys contained in them are mixed together in wooden bowls and afterwards weighed. Out of the moneys so mingled the jury take a certain number of each species of coin to the amount of a pound weight for the assay by fire; and, the indented trial pieces of the gold and silver of the dates specified in the indenture being produced by the proper officer, a sufficient quantity is cut from either of them for the purpose of comparing with it the pound weight of gold or silver which is to be tried, after it has been previously melted and prepared by the usual method of assay.

When that operation is finished the jury return their verdict, wherein they state the manner in which the coins they have examined have been found to vary from the weight and fineness required by the indenture, and whether and how much the variations exceed or fall short of the remedies which are allowed; and according to the terms of the verdict the master's *quietus* is either granted or withheld.

As far back as there is any record of these proceedings, to the honour of those gentlemen who have held the important office of Master of the Mint be it told, there has never been a deviation from the appointed standard of value. —*Bankers' Magazine.*

Late one afternoon, about 1810, a lad entered a City banking house with a cheque, which he presented. He had been sent by his master, who in the hurry of business had forgotten to sign the document. The defect was immediately discovered on its presentation. "Take that back, my boy," said a benevolent but very business-like old gentleman, "and get it signed;" looking at the boy as though every word were a lesson to him for life. But to the inexperienced mind of the boy, who had just entered on his first place, and who was as guileless as he was untutored in finance, this seemed very unnecessary trouble; besides which he had been told to make haste, and he knew that his going back would prevent his master having the money that day. So, looking up innocently at the beaming face of the venerable gentleman, whose eyes twinkled over his spectacles, he asked "Can't I sign it for him, sir?" The whilom genial face flushed with horror at the thought, and transfixing the boy with a look, "If you want to be hanged you can!" he said, in a tone which our French neighbours would call decidedly pronounced. Those were hanging days for forgery, and as the little fellow (who throughout a long and honourable commercial career never forgot the abrupt but kindly hint of the banker) had no desire to be hanged, he chose the lesser evil.

UPPER CANADA REPORTS.

COURT OF ERROR AND APPEAL.

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

Mills v. King.

Practice—Arbitration.

On a reference to arbitration at *Nisi Prius* the order required the arbitrator, at the request of either party, to state any special facts for the opinion of the court; and and the court was thereupon empowered to direct the verdict to be altered or amended, as the court might think proper. The arbitrator having stated a case for the opinion of the court, the court made a rule thereon, and an appeal was brought against the judgment or decision expressed in the rule.

Held, that no appeal would lie, and that as judgment had not been entered, error could not be brought.

Appeal from the Court of Common Pleas. The judgment in that court is reported in 14 U. C. C. P. 223.

The respondents objected—1. That the decision of the Court of Common Pleas now sought to be appealed against by the defendants, is not the subject of appeal.

2. That no appeal lies upon an interpleader issue.

3. That no appeal lies upon a special case stated by an arbitrator.

Strong, Q. C., and *Burton*, Q. C., for the appeal, referred to *Wilson* v. *Kerr*, 17 U. C. Q. B. 165; and the practice as to special cases as pointed out in sections 157 & 162, C. L. P. Act, U. C.

Crooks, Q. C., contra, cited *Attorney-General* v. *Sillem*, 10 Jur. N. S. 446; *King* v. *Simmonds*, 7 Q. B. 289; *Withers* v. *Parker*, 4 H. & N. 810; 2 Lush. Prac., ed of 1865, 775, C. L. P., Act, (English) 1860; *Gumm* v. *Tyrie*, 14 W. Rep. 436, 4 B. & S. 680; *Wheelton* v. *Hardisty*, 5 Jur. N. S. 14; *Elliott* v. *Bishop*, 11 Exch. 321; *Baggalay* v. *Borthwick*, 10 C. B. N. S. 61; *Howell* v. *London Dock Co*, 2 L. T. N. S. 604, 6 Jur. N. S. 676.

The judgment of the court was delivered by

Draper, C. J.—This was an ordinary interpleader, to try the title to certain goods taken in

execution by the sheriff at Wentworth, under a *fi. fa.* The plaintiff below was the claimant, and the defendants were the execution creditors. The interpleader order directed the question to be tried by a jury. At *Nisi Prius* a verdict was taken for the plaintiff by consent, and an order for a reference was made, by which, among other things, it was declared competent to the arbitrator and he was required, at the request of either party, to state any special fact for the opinion of the court, who were thereupon empowered to direct the verdict to be altered or amended, and entered as to the goods as to which such special fact might be found, either for the claimant or execution creditors, as the court might think proper.

The arbitrator stated a case for the opinion of the court, and afterwards the court made a rule ordering that the verdict already entered for the plaintiff should stand, as to certain of the goods in question, with certain exceptions, and as to the goods excepted, and certain other goods, the verdict was to be entered for the defendants.

No proceeding appears to have been taken in the court below since the rule was made. The appeal is against the judgment or decision expressed in the rule. But the appeal is premature; or rather, the appeal does not lie; and as the judgment has not been entered, error cannot be brought.

Con. Stat. U. C., ch. 22, sec. 157, enables parties after issue joined by consent, or order of a judge of the court in which the action is pending, to state the facts of the case in the form of a special case. Sec. 162 enables the arbitrator (*sua sponte*) on any compulsory reference under the act, or on any reference by consent where the submission is or may be made a rule of court, unless the contrary be proved, to state his award as to the whole, or any part thereof, in the form of a special case for the opinion of the court.

An appeal shall lie from a judgment upon a special verdict, unless the parties agree to the contrary, and the proceedings for bringing a special case before the Court of Error and Appeal shall, as nearly as possible, be the same as in the case of a special verdict, and that court (*i. e.*, of Error of Appeal,) shall draw any inference of fact from the facts stated in the special case which the court by which the case was originally decided ought to have.

This provision differs in words from the English C. L P. Act of 1854, which (sec. 32) instead of saying "an appeal shall lie from," enacts that "error may be brought upon," &c. But the English statute contains the following provision, not to be found in our Consolidated Act; that the Court of Error shall either affirm the judgment, or give the same judgment as ought to have been given in the court in which it was originally decided; but the 11th section of our Consolidated Act contains in substance and effect the same provisions, as applicable to all cases brought before it.

The term "appeal," is used in the act as meaning the same thing as bringing a writ of error, except where the more technical and precise sense of each term, and specially of "error," is from the context obviously intended.

QUEEN'S BENCH.

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

In re. Thompson et al., and Webster, Registrar of the County of Wellington.

29 *Vic. ch.* 24, *sec.* 73—*Registry—Certificate of Lis Pendens—Land divided into Village lots—Mandamus—Costs.*

The Registrar was required to record a certificate of *lis pendens* affecting "lot number sixteen in the ninth concession of the township of Erin, and lots numbers fourteen and fifteen in the tenth concession of the same township," which he refused to do, as the west halves of lots fourteen and fifteen had been laid out into village lots according to a plan filed in his office. On application for a mandamus, *Held*, that so far as regarded the west halves he was right, for by the Registry Act 29 Vic. ch. 24, sec. 73, the certificate should shew the villa ge lots affected.

The point being new, and there being no difficulty in recording the certificate against lot 16, the rule for a mandamus was discharged without costs.

[Q. B., H. T., 1866.]

Freeman, Q.C., obtained a rule calling on Jas. Webster, Registrar of the County of Wellington, to shew cause why a writ of mandamus should not issue, directing him to register a certificate of a deputy registrar of the Court of Chancery, which certificate was as follows:—

"In Chancery.—I certify that in a suit or proceeding in Chancery between Wm. Thompson and John Burns, plaintiffs, and Chas. McMillan the younger, Hugh McMillan, Charles McMillan, and Donald McBain, defendants, some title or interest is called in question in the following lands, viz.: Lot number sixteen in the ninth concession of the township of Erin, and lots numbers fourteen and fifteen in the tenth concession of the same township.

(Signed) "Wm. Leggo,
"*Deputy Registrar.*

"Hamilton, 12th January, A.D. 1866."

Upon the same being presented to him, and his legal charges being paid; and why he should not pay the costs of this application.

From the affidavit and papers filed on moving the rule, it appeared that Mr. Proudfoot, the solicitor of the applicants, on the 12th of January last forwarded by post to the Registrar of Wellington the certificate referred to in the rule, with a fee of fifty cents, and requested him to register the same in his office; that on the 15th of the same month the Registrar returned by mail the certificate to Mr. Proudfoot, stating in his letter that it could not be registered in its present form, under the Registry Act of last session, 29 Vic. ch. 24, giving as a reson that so far as the greater parts of lots fourteen and fifteen, in the tenth concession were concerned, they had been laid out as a village for many years, and the plans thereof duly registered, and that, in cases where plans had been so filed, under the 73rd section of that act, instruments affecting the lands or any part thereof shall conform to such plans, and stating that it was out of his power to register the certificate in its present form. The Registrar also stated that so far as lot sixteen in the ninth concession was concerned, no difficulty presented itself.

Mr. Proudfoot on the receipt of the Registrar's letter, re-enclosed the certificate to him, requesting him to register it, and the Registrar again returned it and the fifty cents, declining to place

it on record, upon which this application was made.

Gwynne, Q C, shewed cause for the Registrar, and *Freeman*, Q C., supported his rule.

Upon the argument the following facts were admitted, being reduced to writing and signed by the counsel:—

That the village of Erin is an unincorporated village: that it comprises within its limits the east halves of lots numbers thirteen, fourteen and fifteen, in the 10th concession of the township of Erin: that maps or plans of the said several lots surveyed into village lots have been registered in the Registry Office of the County of Wellington by divers parties laying out such lands into village lots: that the west half of lot fifteen in the 10th concession is subdivided into 92 village lots, designated by appropriate numbers upon the map or plan thereof, which map was filed in the Registry Office on the 21st June, 1858, and the west half of fourteen in the 10th concession is subdivided into 24 village lots, designated by appropriate numbers on the map or plan thereof, which was likewise filed in the Registry Office in 1858; that on the 3rd of January, 1861, the Corporation of the Township of Erin filed in the said Registry Office a new map or plan, containing on the one map all the separate plans or surveys of the said village previously filed, including the plans of the west halves of fourteen and fifteen, pursuant to the provisions of Con. Stat. U. C. ch. 89, sec. 79: that since the filing of the last mentioned plan no index of the west halves of lots fourteen and fifteen in the 10th concession of Erin has been kept in the Registry Office, but all registries upon any part of those lots have been entered on the index kept of the plan, and of the numbers as designated therein: that the indices of the east halves of lots fourteen and fifteen in the 10th concession, not being within the village, are still kept as before—namely, as patented: that the applicants herein demanding registration of the *lis pendens* required the Registrar to register it upon the west halves of fourteen and fifteen, as the same were patented, and the fee tendered was fifty cents: that sales have been made of lots as laid down on the plan, and the deeds registered in accordance with such plan.

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

The principal point arising for our determination is, whether it was the duty of the Registrar to register the *lis pendens* in the terms in which it is expressed.

The act of last session, chapter 24, repeals in express terms the former Registry Act, ch. 89, Con Stat U. C., and several acts in amendment of the same, with a saving clause providing that all registrations, official acts, records, matters and things done in pursuance of any or either of the repealed acts, shall, where they are valid and effectual at the time of the passing of the act, remain and continue to be valid and effectual to all intents and purposes. And by the third clause so much of all other statutes, parts and clauses of statutes, as relates to the proof required for and the mode of registration of instruments and the filing of plans, are repealed.

The 78th section of the Repealed Act, ch. 89, enacted that any person who surveys and subdivides any land into village lots differing from the manner in which such lands were described as granted by the Crown, shall lodge with the Registrar a plan or map of such village lots, shewing the numbers and ranges of such lots, and the names, &c., of the streets by which such lots may be in whole or in part bounded, &c; and thenceforth the Registrar shall keep an index of the land described in such map or plan as a village or part of a village. And by the 79th section it is provided that where an unincorporated village comprises different parcels of land owned at the original division thereof by two or more persons, and the same was not jointly surveyed and laid out into a village plot, and when no entire plan or map of the village has been deposited with the Registrar, the municipality of the township within which the village is situate shall immediately cause a plan or map of such village to be made on the scale required by law, and to be deposited in the Registry Office of the county within which the village is situate.

A similar enactment is to be found in ch. 93, sec. 48, Con. Stat. U. C., relating to survey of lands. Sections 39, 40, 41 and 42 of that act also declare the mode by which plans of villages or original divisions thereof shall be surveyed, and the duty of the Registrar upon the same being deposited in his office; and by the 43rd clause of that act it is enacted that every Registrar shall keep a separate book for the registering of title deeds of lands situate in any such village, in the same manner as is by law required for registering title deeds for lands situate in townships.

By the operation of these several enactments it appears very clear to me, that up to the time the present law came into force it was the duty of the Registrar to keep a book for the registering of title deeds of lands situate in a village, in the like manner as that required for registering titles to lands in a township; that is, registering the instrument affecting any village lot in the Registry Book of the office in the usual manner, and numbering it consecutively as received with other instruments affecting lands within the county, and also entering in the index book required to be kept for each village (which index book contained each lot designated or shewn on the plan filed), opposite to each lot, a reference to each instrument registered affecting the same, so that upon turning to the index and referring to the number of the village lot, there could be seen at once references to any instrument on registry, affecting it or any part of it, since the depositing of the plan.

Upon an examination of the repealed statutes, however, it will be seen that it was not imperative that instruments affecting the lands covered by such village lots should be registered in accordance with or conform to the plan lodged in the Registry Office; nor could the Registrar refuse to register any instrument which on its face affected any township lot or a part thereof, and which could have been registered and indexed (if such village never had been laid out), as the same was patented.

The 73rd section of the act of last session enacts that whenever any land or original township

lot has been surveyed or subdivided into village lots, the person or corporation, &c., making such survey or subdivision, shall within three months, &c., lodge with the Registrar a plan or map of the same, shewing the numbers, &c., of village lots and names of streets, &c., and thenceforth the Registrar shall keep an index of the lands described or designated by any number or letter on such map or plan, by the name by which such person or corporation designates the same, in manner provided by the act. And all instruments affecting the land, or any part thereof, executed after such plan, shall conform thereto, otherwise the same shall not be registered. And the clause is declared to apply to lands already surveyed and subdivided.

It is, we think, evident that the legislature by this clause, which contains the material parts of several of the provisions of the repealed act, intended to remedy what was considered a defect as the law formerly stood, the want of uniformity in the registration of instruments affecting lands originally township lots, and laid out into village lots, and making it compulsory upon persons claiming title to lands forming the site of a village, after the plan of the same has been duly prepared and deposited in the proper office, to register all instruments affecting any of such village lots in the same manner as if the village lots were from that time described as such in grants from the Crown, the chain of title and instruments affecting the land prior to the lodging of the plan being registered and indexed against the original lot as patented, in the manner provided for township lots; one of the objects the legislature had in view by compelling such a course of registry being to simplify the state of the title in the Registry Office; so that any owner, intending purchaser, or person interested in ascertaining the title to any particular village lot, could by a glance at the Registry index book see from the references set against the particular village lot the instruments affecting it on registry since the date of the filing of the plan.

From the language of the 73rd section it is in our judgment very clear, that, so far as the west halves of lots fourteen and fifteen in the tenth concession are concerned, every instrument affecting any of the village lots comprised within the limits of these half lots presented for registry must conform to the plan filed of record in the office; and that what is meant by the words "conform thereto," as used in the section, is, that the instrument must shew on the face of it what particular village lots, and by their designation on the plan, it is intended to affect.

We are therefore of opinion that the Registrar was not bound to register the *lis pendens* as far as the same related to the west halves of fourteen and fifteen in the tenth concession of Erin, in the terms in which it is expressed; and that this rule should be discharged.

As to costs, the question being a new one, and the Registrar admitting that so far as lot sixteen in the ninth concession was concerned no difficulty presented itself to the registering of the *lis pendens* as against that lot, the rule will be discharged without costs.

Rule discharged, without costs.

Leslie v. Emmons et al.

County Court—Death of judge—Effect of, on rules pending—Alteration in note—Pleading.

A rule to enter a nonsuit having been granted in the County Court in April term, was duly enlarged until the following term. The judge died before that term began, and no successor was appointed until after its expiration but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new judge, who treated it as still pending, and gave judgment *Held* that he was right.

The plaintiff declared upon a note as made by the defendants jointly and severally. *Quære*, whether the interlineation of the words "jointly and severally," of which no explanation was offered, could be taken advantage of under *non fecit*, or whether a special plea was requisite.

[Q. B., H. T., 1866.]

Appeal from the County Court of Hastings.

The plaintiff declared as payee of a note made by the two defendants, jointly and severally, with a third person. Plea, *Non fecit*, by each defendant separately.

At the trial the handwriting was proved. It had stamps on it initialed by the payee to double the necessary value, but no proof was given as to when they were affixed.

A number of elaborate objections were taken on motion for nonsuit: in substance, that the stamps were not duly affixed, and that on the face of the note the words "jointly and severally were interlined, and no explanation offered respecting it.

There was a verdict for the plaintiff, with leave reserved to enter a nonsuit.

The case was tried before a judge since deceased, and it did not appear from his notes that any thing was left to the jury or any direction given to them.

In the following April term a rule for nonsuit was moved, on a series of voluminous objections, which, it was remarked by the court above, might have been as intelligibly expressed in as many lines as there were folios of writing.

This rule was duly enlarged to the ensuing term of July. The judge died before that term, and no successor was appointed till its expiration. The clerk of the court, however, granted a rule to enlarge it; and in October term the rule was argued before the new judge, the plaintiff protesting against his taking cognizance of it, and insisting that it was a lapsed rule. The learned judge considered the rule still pending.

As to the objection on the stamp act, he ruled that a plea was necessary to raise the point. But as to the unexplained interlineation, he held it was fatal to the plaintiff's right to recover, and that it could be taken advantage of under *non fecit;* and he made the rule absolute to enter a nonsuit.

The plaintiff appealed.

Jellett, for the appellant, cited Tay. Ev. sec. 1616; *Bishop* v. *Chambre*, 3 C. & P. 55; *Taylor* v. *Mosely*, 6 C. & P. 273; *Hemming* v. *Trenery*, 9 A. & E 926; *Mason* v. *Bradley*, 11 M. & W. 591; Chit. Com. L., Ed. 1864, Vol. II. p. 783.

C. S. Patterson, contra. cited *Davidson* v. *Cooper*, 11 M. & W. 778; *Cock* v. *Coxwell*, 2 C; M. & R. 291; *Perring* v. *Hone*, 2 C. & P. 401. *Baxter* v. *Baynes*, 15 U. C. C. P, 237.

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

We see no reason to question the learned judge's decision in treating the rule as still

pending. The reason of the thing and the necessity of the case are in favor of his view. The plaintiff's argument would go the length of holding that the death of the judge would render void or impossible everything requiring to be done as of that term: that in fact as a Court of Record it would be extinct. We think the rule was to be disposed of in due course in the following term, and the clerk's act in issuing a rule would preserve the *primâ facie* regularity of the proceeding.

Whether the objection as to the interlineation required a special plea is a point involved in much doubt, and the text writers differ in their view.

Taylor on Evidence, sec. 269, says: "So, in conformity with the rule of law established by the cases of *Hemming* v. *Trenery*, 9 A. & E. 926, and *Davidson* v. *Cooper*, 11 M. & W. 787, a defendant, under a plea that he did not make the note or accept the bill, cannot set up a defence that the instrument has been subsequently altered, unless the alteration is such as to render the stamp inefficient. Some doubts may be entertained whether this rule would prevail in cases where the plaintiff declares on the instrument *as altered;* for although this appears to have been the form of the declaration in *Parry* v. *Nicholson*, 13 M. & W. 778, the attention of the court was not drawn to that fact, the alteration being in truth an immaterial one."

In Byles on Bills, Ed. 1862, p. 303, it is said: "It is conceived, notwithstanding some recent cases, that the alteration of a bill or note need not, when the plaintiff declares on the instrument in its *altered state*, be specially pleaded. When altered, it is no longer the same instrument that the defendant signed, and moreover there is no stamp applicable to the altered instrument, so that it cannot be looked at by the jury to prove the new contract."

In the last edition of Chitty on Bills, 1859, p. 381 the rule is qualified thus: "It is submitted that the rule laid down on this question by a learned text writer" (Byles) "viz., that an alteration need not be specially pleaded when the plaintiff declares on the instrument in its altered state, requires qualification * * The rule would seem to be, that when the plaintiff so declares on the instrument that he must prove it in its altered state, the defence is open to the drawee under *non accepit;* for then it may be said, as was observed by Alderson, B., in *Cock* v. *Coxwell*, 2 Cr. M. & R. 291, 'He has pleaded it specially, by saying that he did not accept the bill you declared on and produced in evidence, but a different one.'"

The latest case to be found seems to be *Parry* v. *Nicholson*, 13 M. & W. 778. There the bill was declared on as dated 22nd March, payable at three months from date. When produced it was found the date had been altered from the 2nd to the 22nd. It was objected that this objection required a special plea, and could not avail on *non accepit*. The court in term held that a special plea was necessary, the date was immaterial, Parke, B., saying, "When it is produced in evidence it is such a bill as the one described. * * The plaintiff is to explain it, if the issue in the cause makes it material. * * We concur in the decision in the case of *Hemming* v. *Trenery*," and also *Mason* v. *Bradley*, and *Davidson* v. *Cooper:* "We have none of us the slightest doubt upon the point."

It is not easy to see how the date of a bill is immaterial. It accelerates or delays the time of payment and the time for notifying the endorser, &c. It might perhaps be urged here that the words "jointly and severally" do not on the issue of *non fecit* make any material difference. The defendants sued would be equally liable on a joint note, if they did not plead the non-joinder.

The law seems in a most unsatisfactory state on the authorities.

When evidence is given as to the alteration, it becomes a question for the jury. In the absence of any explanation, it seems there is nothing to be left to the jury on the mere inspection of the instrument.—*Knight* v. *Clements*, 8 A. & E. 215, Taylor on Evidence, sec. 1616.

But the case before us is very peculiar. We have been shewn a photograph of the note. It is a printed form: "I,—— after date for value received," — "promise to pay," leaving a very small space for the word "I" or "we," so that for a note intended to be joint and several it was absolutely necessary to interline the words; and this would seem to lessen the presumption of anything being wrong.

We think, on the whole, that the safer course would be, instead of ordering a nonsuit, to direct a new trial without costs. The judge's death has deprived us of any insight into his direction to the jury, The parties now see the difficulties on either side. The defendant (if so advised) may apply to add any pleas putting on record his objections on the stamp act, or as to the alleged alteration, and the plaintiff very possibly can be prepared with fuller evidence on both these points.

We feel a great difficulty in reconciling the decision in *Parry* v. *Nicholson* with the opinions of some of the text writers. As long as it stands unreversed, it seems to us difficult to say that a special plea is not necessary in a case like the present. The reason of the thing would seem to be that *non fecit* expressly puts in issue that defendant made the note declared on.

We think the most discreet course will be to allow the appeal, and direct a new trial without costs, to allow the facts to be more fully investigated.

Appeal allowed.

Martin v. McCharles.

Practice—Service of writ—Affidavit of service—Defects in jurat—Moving to set aside judge's order.

A jurat to an affidavit "Sworn before at," &c., omitting the word *me*, *Held*, sufficient—for all might be read as one continuous sentence, when it would mean that it was sworn before the commissioner signing.

An affidavit of service of a writ of summons in ejectment need not state that the copy served was endorsed with the name and residence of the attorney, nor that such endorsement was made on the writ within three days, nor that the service was effected upon the person or tenant in possession.

Where such writ is tendered to defendant, and placed within his reach, and its character explained, *Semble*, that this is a personal service, though he refuses to take it up.

Where proceedings are set aside in Chambers on defendant's application, *on payment of costs*, the court will not interfere merely as regards costs except in a very strong case: and defendant having taken out the order cannot be heard to set it aside.

[Q. B., H. T., 1866.]

On the 5th of February, Mr. Justice *Morrison* made an order, founded on a summons granted on the 20th of November last, on the application of the defendant, setting aside the judgment signed by the plaintiff in this cause and all subsequent proceedings; but to this, for which defendant asked, the learned judge on considering the matters brought before him, added this condition, that the defendant should pay to the plaintiff the costs of entering the judgment and of that application, which he fixed at the sum of $5, and also the sheriff's fees upon the execution of the *hab. fac. pos.*

J. A. Boyd moved for a rule to shew cause why this order should not be set aside, and why the judgment and execution in this cause and subsequent proceedings should not be set aside with costs, and a writ of restitution issue in favor of defendant, on the grounds:

1. That the affidavit of service of the writ herein is defective in the jurat, in omitting the word "me" therein.

2. That such affidavit is defective, in not stating that the copy of the writ served was endorsed with the name and place of residence of the attorney suing out the same, and that an endorsement of the day of the week and month of the service of said writ was made on the said writ within three days after such service.

3. That said affidavit is defective, in not stating that the service of such writ was effected upon the person or tenant in possession of the premises in question.

4. That there was no service of said writ upon the said defendant at all, and no notice thereof given to him before judgment signed; and there is no endorsement of the day of the week and month of the service of said writ thereupon.

5. That at all events there was no personal service of said writ, within the meaning of the 92nd rule of court, so as to dispense with the necessity of a judge's order authorizing judgment to be signed herein.

Doe Jackson v. *Roe*, 4 Dowl. 609; *Hall* v. *Full*, 2 P. R 242; 1 Chitty Rep. 118 note *a*; *Thompson* v. *Slade*, 25 L. J. Ex. 307; Lush. Prac., 3rd Ed., pp. 864, 867, were cited in support of the application.

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

As to the latter part of this application, the defendant's own affidavit shews it to be wholly unnecessary, since it appears he is in possession and has been constantly resident on the premises since the 10th of October last, while an affidavit on the plaintiff's part shews that immediately after the execution of the writ of *hab. fac. pos.* the defendant re-entered forcibly.

Under the existing order, therefore, both judgment and writ of execution are set aside, and the whole complaint is that the defendant has to pay $5.

As to this, it is urged that there were irregularities in the plaintiff's proceedings which entitled the defendant to have had the order made in his favor with costs, or at least without making him pay them.

The first objection is, that the jurat to the affidavit of service is as follows: "Sworn before at the," &c., concluding in the usual form, and signed by the commissioner. The want of the word "me" is objected to. We think that we may read the whole jurat as one continuous sentence, when its sense and meaning is that the affidavit was sworn before the commissioner who subscribes the jurat. The second objection is not sustained by the books of practice. Nor is the third, so far as the action of ejectment is concerned. The fourth, which I incline to think a defect, is, I think, cured at this stage.

It appears sufficiently that the service was made on the defendant on the premises, and he seeks now an order to allow him to defend as tenant in possession. It is not, however, stated in all the books of practice that it need be so stated in the affidavit of service, nor am I aware of any case so deciding, though I should recommend its being done.

As to the fourth and fifth objections, I think there was a service on the defendant personally. A man cannot be forced to accept a paper which is tendered to him, nor to pick it up when laid at his feet; but if it is tendered to him, its nature or character explained, and placed immediately before him within his reach, and he will not take it, we are not prepared to say it is not a personal service, though the plaintiff would have saved himself trouble by getting a judge's order.*

We have gone through the objections on which the defendant relies, and think they are not sufficient to call for our interference. But we are strongly adverse to entertain an application of this character, merely for the purpose of changing an order as to costs. It must be a very strong case which would justify our giving a rule *nisi* on this ground; and, lastly, the defendant cannot be heard to set aside an order taken out by himself.

Rule refused.

The Queen v. The Court of Revision of the Town of Cornwall.

Assessment—Court of Revision—Six days' notice of appeal to—Waiver—C. S. U. C. ch. 55, sec. 60—Mandamus.

An elector served the clerk of the municipality with notice that several persons had been wrongfully inserted on the assessment roll, and others omitted, or assessed too high or too low, and requesting the clerk to notify them and the assessor when the matters would be tried by the Court of Revision. On the 22nd of May the Court met, when it was objected for the parties named that six days' notice had not been given, but only five. The Court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a mandamus to compel them to hear and determine the matters,

Held, that they were right, the six days' notice being imperatively required by the act; and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it.

Semble, that, if this were otherwise, the proper course would have been a mandamus to the Mayor to summon the Court of Revision, under sec. 55 of the Assessment Act.

[Q. B., H. T., 1866]

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* The affidavit of service, made by a son of the plaintiff, stated that he went to defendant upon the lot in question, of which he was then in possession, and handed him a copy of the writ, but as he refused to take it, deponent laid it down on the ground in front of and not over a yard from him, and at the same time told him it was a writ of ejectment; that deponent left it there, as defendant refused to take it, and he could not say whether defendant picked it up or not.—*Rep. note.*

In Trinity Term last *M. C. Cameron*, Q. C., obtained a rule for a mandamus nisi, directed to the Court of Revision for the municipality of the town of Cornwall, commanding that court to hear and determine the complaint of Wm. Cox Allan, an elector and councillor of the town of Cornwall, against the assessment and non-assessment of the persons mentioned in certain notices served by the relator on the clerk of the municipality on 13th of May last, and filed on this application.

The affidavit of the relator set out that he was an elector, &c.: that on the 13th of May last he served the clerk of the municipality of the town of Cornwall with four notices in writing, signed by himself, copies of which were attached to the affidavit filed.

The first notice complained that 77 persons named therein were wrongfully inserted in the assessment roll for the year 1865, and it requested the clerk to notify the parties and the assessor of the time when the matters would be tried by the Court of Revision. The second notice complained that 37 persons therein named had been omitted from the roll. The third notice complained that 21 persons therein named had been assessed too low; and the fourth notice complained that 13 persons named therein were assessed too high. The three last also requested the clerk to notify the parties, as stated above in the first notice.

On the 22nd of May the Court of Revision, consisting of John S. McDougall, Donald McMillan, John Hunter, Andrew Hodge, and John McDonald, met at the Town Hall, the relator being present and prepared to prove the truth of the matters of appeal notified by him to the clerk: that Messrs. John B. McLennan and Jacob F. Pringle, Barristers, appeared on behalf of the persons mentioned in the notices of appeal, and objected that as the parties had not six days' notice before the 22nd of May, the court had not then jurisdiction to hear the appeal. And the relator's affidavit stated as a fact that the notices were only given five days before the 22nd of May: that the assessor was present and made no objection: that the Court of Revision refused to hear the appeal on the ground taken by the counsel for the parties: that when the court adjourned on that day, the chairman announced that new notices should be given to the parties and the assessor, and that there was time enough to give such new notices for the 30th of the same month, when the appeals should be heard on that day: that on the 30th the court met: that the relator was present, and was ready to proceed, but that the clerk announced to the court as a fact that he had not given the new notices, and the court refused to hear the appeals, and directed the clerk to endorse upon the assessment roll a certificate that the roll had been finally revised, which the clerk did.

Mr. Bethune, the relator's solicitor, made an affidavit corroborating the relator's affidavit, and setting out that the five persons named above constituted the court of Revision.

During last Michaelmas term the Court of Revision made a return to the writ as follows:—

In the Queen's Bench.

The return of the Court of Revision of the corporation of the town of Cornwall to the annexed writ of mandamus nisi.

"We, the said Court of Revision, do make the following return to the said writ:—

"We cannot, as we are by the said writ commanded, try and determine whether James P. Whitney," &c., &c., "or any of them has or have been wrongfully placed upon or inserted in the said assessment roll, or whether the said William Fontain," &c., &c., "or any of them, have or has been wrongfully omitted from such roll; or whether the said James McDonald (Athol)" &c., &c., "or any of them, have or has been assessed at too high a sum upon such roll; or whether Oliver King," &c., &c., "or any of them, have or has been assessed at too low a sum; nor confirm and amend the said assessment roll: because the said complaints in the said writ mentioned have never been submitted to us in manner and form as is required by the Consolidated Statutes of this Province respecting the assessment of property in Upper Canada, and chaptered 55, it appearing to us at our meetings held on the 22nd and 30th days of May last, for the purpose of trying all complaints against or appeals from the said assessment roll, and of finally revising the same, that no notices or no sufficient notices had been served on James P. Whitney and the other persons aforesaid, as required by the said statute, and that we therefore decided that by reason of the insufficiency of the said notices we had no power or jurisdiction to try and determine the said complaints, and because the said complaints against or appeals from the said assessment roll having failed on account of the want of proper notice, and no other complaints against the said assessment roll or appeals therefrom having been submitted to us, and the time allowed us by the said statute for revising the said assessment having then elapsed, the said assessment roll was on the 30th day of May aforesaid finally revised by us and certified by the clerk of the corporation of the said town of Cornwall, as required by the said statute. And because the judge of the County Court of the United Counties of Stormont, Dundas and Glengarry, on the said complaints in the said writ mentioned being duly submitted to him by way of appeal from our said decision in respect to the said appeals, after having heard counsel upon and duly considered the said appeal, decided that owing to the insufficiency of the said notices he had no power to reverse our said decision. We further return, as we believe the fact to be, that the proceedings taken by us in respect to the said assessment roll were regular and in accordance with the requirements of the said statute, and we could not have taken any other course or decided differently than as aforesaid in respect to the said complaints against or appeals from the said assessment roll without contravening and disregarding the said statute, as we were and still are of opinion that the wording of the said statute is imperative. And we have now no power, and we humbly submit that we should not be compelled by the peremptory order of this honourable court, to try and determine the said complaints, or again to revise the said assessment roll.

All which we humbly submit as our reason and excuse for not trying and determining the said complaints, as by the annexed writ we are commanded.

Dated this 18th day of November, A.D. 1865.
By order of the said court.
(Signed) John Macdonald,
Chairman of the said Court of Revision.

In the same Michaelmas term, on motion of Mr. Kerr, counsel for the relator, a rule *nisi* was granted calling upon the Court of Revision to shew cause why the return should not be quashed, on the following grounds :—1st. The return sets forth that the complaints were not heard, and that at the same time they were decided, and that the judge of the County Court refused to revise such decision. 2nd. That the return states that no notice or sufficient notice was given, and admits that notice to the clerk was given, which was all the notice required. 3rd. That the return sets forth that the time had elapsed for revision of the roll when the same was revised. 4th. The return does not shew what notice was given, or its nature, but simply it appeared to the court the notices were insufficient;—and to shew cause why a mandamus absolute should not issue, &c.

During the same term *C. S. Patterson* shewed cause, citing *In re. the Judge of the County Court of Perth and J. L. Robinson*, 12 U. C. C. P. 252; *The Queen* v. *The Mayor of London*, 13 Q. B. 30; *The Queen* v. *St. Saviour's, Southwark*, 7 A. & E 925; *Regina* v. *Justice of Yorkshire*, 13 Jur. 447; *Regina* v. *Payn*, 3 N. & P. 165; Tapping on Mandamus, 372.

M. C. Cameron, Q. C., and *Kerr* supported the rule, and cited *The Queen* v. *The Mayor of Rochester*, 7 E. & B. 928; *In re. Justices of York and Peel ex parte Mason*, 13 U. C. C. P. 159; *Rex* v. *The Mayor of York*, 5 T. R. 66; *Rex* v. *The Mayor of Lyme Regis*, 1 Doug. 79.

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

The substantial question raised by this application is whether the ground submitted by the defendants for not hearing and proceeding to the trial of the matters complained of by the relator: viz., that due notices were not given to the parties in accordance with sub-sec. 10 of sec. 60 of the Assessment Act, was a sufficient and valid reason.

By sec. 58 it is provided that at the times or time appointed the Court (of Revision) shall meet and try all complaints in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum. By sub-sec. 2 of sec. 60, if a municipal elector thinks that any person has been assessed too low or too high, or has been wrongfully inserted on omitted from the roll, the clerk shall, on his request in writing, give notice to such person, and to the assessor, of the time when the matter will be tried by the court, &c; and by sub. sec. 7 the clerk shall prepare a notice according to the form therein set out for each person: and the 8th and 9th sub-sections provide the mode by which the clerk shall effect service on residents and non-residents; and by sub-sec. 10, it is enacted that every notice required by those sub-sections "shall be completed at least six days before the sitting of the court."

It appears that the court met on the 22nd of May, and it was then objected by counsel for the parties, and was admitted, that the six days' notice had not been given, the fact being that only five days' notice had been given. The court gave effect to the objection and declined to hear the matters of complaint; and the court before it adjourned announced that it would again meet on the 30th of May: that in the mean time new notices could be given, there being sufficient time for that purpose, and that the appeals would then be heard. It does not appear that the relator in the interim took any step with a view of having new notices served, but he attended the court on the 30th, when the court, being informed that no notices had been given, decided that it had no jurisdiction to try the matters; and the roll was finally revised under the 59th section.

We cannot say that the decision of the Court of Revision is erroneous. It was argued on the part of the relator that the neglect of the clerk, or a failure by him in the performance of his duty, ought not to have prevented the complaints being heard, and that all that was incumbent on the relator was to make a request, under sub-sec. 2, to the clerk. Upon an examination of sec. 60, and its subsections 2, 7, 8, and 10, which bear on this application, we find that they are all imperative by force of the Interpretation Act, and when we consider the object of the complaints made by the relator, we cannot overlook the plain words of the statute. The legislature clearly intended that in all cases of objection by third parties, a notice of complaint must be given to the party complained against at least six days before the sitting of the court at which it is to be heard, and that such notices should be prepared and given in due time by the clerk.

It was also argued that as the parties by their counsel appeared before the Court of Revision, they waived any objection to the notice, and that the court should have proceeded to hear and determine the complaints. At first we thought there was something in the argument, but after a good deal of consideration we do not think we are at liberty to decide, in the face of a plain enactment which declares that six days' notice at least shall be given, that because a party appears to state that he has not had the notice required by the statute, that in that case five or a less number of days is sufficient, and to hold that his protest of not having notice is a waiver of it, and that, in a proceeding the object of which is to deprive him of a franchise or right, or to make him liable to taxes or to increase them.

If the parties complained against did not appear on the 22nd May, it would have been the duty of the court, before proceeding *ex parte*, under the 13th sub-section, to have ascertained whether due notice had been given to the respective parties, and if it appeared that only five days' notice had been given it would hardly be contended that the court could have heard the appeals; and surely, if their counsel appeared to notify the court of the want of notice, they should not therefore be placed in a worse position. The language of the act is plain and unambiguous. If the mode of proceeding provided by the statute is insufficient or inconvenient or open to abuse, the remedy is with the legislature. For this court to say that five days' notice or any

less number is sufficient, would be to assume a legislative authority.

By the 171st section of the Assessment Act, if the clerk refuses or neglects to perform any duty required of him by the act, for every offence he shall forfeit $100; and by the 173rd section if he wilfully omits any duty required of him by the act he shall be guilty of a misdemeanor, and liable to a fine of $200 and imprisonment As Lord Denman said in *King* v. *Burrell* 12 A. & E. 467 these are "wise and prudent provisions to secure the due execution of the act, by officers whose duty it is to learn their duty, and to do it accordingly."

We are therefore of opinion that the rule should be discharged, as the defendants in our judgments properly decided that they could not hear and determine the matters of appeal and complaint.

If the relator had made out a case for our interference, and it appeared that the want of the remedy would be injurious to the municipality, we are not prepared to say that a mandamus to the Court of Revision would be the proper proceeding, for by the 59th section of the statute it is enacted that all the duties of the court which relate to the revising of the rolls shall be completed, and the roll finally revised by the court, before the 1st of June in every year. Here they were finally revised on the 30th of May. The proper course, we think, would be found to be a mandamus to the Mayor to summon the court to meet (under the authority given him by the 55th section) with a view to hear and determine the matters complained of, due notices being first given to the respective parties.

Rule discharged, with costs.

ELECTION CASE.

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

Reg. ex rel. Ross v. Rastal.

Statement of relator's interest—Disqualification—Costs.

The statement of a relator in a *quo warranto* matter alleged that he had "an interest in the said election as a voter," and his affidavit stated that he had voted "at said election, but not for said William Rastal."

Held, that the relator's statement and affidavit were sufficient, and that his interest sufficiently appeared.

The defendant granted a lease to the corporation for five years, which lease, together with the premises therein mentioned, and the benefit therefrom, he conveyed to R. S. Rastal a few days before the election. The assignment was, however, encumbered with a condition to refund the consideration money on certain contingencies, and no reversion was conveyed by the assignment.

Held, the defendant was disqualified, and a new election was ordered, with costs to be paid by the defendant and the relator.

[Common Law Chambers, February, 1866.]

This was a *quo warranto* summons calling upon the defendant to shew by what authority he exercised the office of one of the council for the village of Kincardine, and why he should not be removed therefrom.

The statement of the relator alleged that he had "an interest in the said election as a voter." In his affidavit annexed to the statement referring to himself as the relator, he deposed to a search for Rastal's declaration of qualification as councillor for said village of Kincardine for the year 1866; a copy of that declaration was annexed to the affidavit, dated 15th January, 1866, in which Rastal, the defendant, swore to being qualified for the office for 1866, "to which he has been elected." The relator's affidavit then proceeded to declare his interest in the said election as a duly qualified voter, and that he voted "at said election, but not for said William Rastal."

The affidavits shewed that Rastal did on 14th December, 1863, grant a lease to the corporation of certain property for five years from December 1863, at a yearly rental of $40, with the usual covenants, and that this lease is still in full force.

By an assignment produced, executed 29th December, three or four days before the election, the defendant bargained and sold to one R. S. Rastal for $160 the premises comprised in the lease, together with the lease and all benefit thereunder, to hold for the residue of the term, and other the estate, right of renewal, if any, and other the assignor's interest therein, subject to the payment of the rents and observance of the lessees covenants. It stated that the lease was already subject to an "endorsation" made by defendant to one Hopkins, living in the United States, and that if that endorsation had the effect of preventing the assignee from collecting the rents during the residue of the term, then the defendant agreed to refund the consideration paid, or such part as assignee could not collect on account of any act of lessor. The lease was stated therein to be in the hands of Hopkins' agent.

By the lease the corporation covenanted to pay rent and taxes, and to repair and keep up fences, and that lessor might enter and view state of repair, and would not sublet without leave, and leave in good repair, and not carry on any business to create a nuisance. Proviso for re-entry on breach of covenant by lessor for quiet enjoyment.

S. Richards, Q.C., shewed cause, and objected that the above statements by the relator might mean *any* election; that the relator cannot himself prove this; that the relator's interest did not sufficiently appear, and that as far as the disqualification by means of the contract was concerned, that the defendant ceased to have any interest in the contract by reason of the assignment of the 29th December.

C. Robinson, Q.C., supported the summons, and urged that the statement was sufficient, and that the interest of the relator sufficiently appeared, and that Rastal was disqualified as having an interest in a contract with the corporation.

Hagarty, J.—I think on examining the papers that the statement is made with reasonable clearness, and also that the relator's affidavit to establish his right to interpose is sufficient.

No reversion is conveyed by the assignment referred to. It is a strangely drawn instrument, not of common occurrence. It would doubtless authorize the assignee to receive the rents. But the defendant remains bound under his original covenant in the lease to the corporation, and this personal liability remains unaffected by the assignment whatever may be its true effect. If so it is difficult to see how he can be held to be any other than a person having an interest in a contract with the corporation.

I think I am bound to hold that the defendant is disqualified, and must be removed from office and a new election had.

As to costs I would be reluctant to compel him to pay them if it were not that I cannot help feeling that he became a candidate knowing perfectly well that a question might arise as to this lease, and the time and manner of the assignment on which he relies raise an impression not wholly favourable to him.

I think he must pay the relator's costs.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, ESQ., *Barrister-at-Law.)*

ANDERSON v. BROWN.

Ejectment—Venue—York and Peel.

Held, 1. Where under Stat. 24 Vic. c. 53, s. 2, the venue in ejectment is laid in the county of York, when the lands lie in the city of Toronto, the venue may be changed, on the plaintiff's application, to the city, by virtue and in exercise of a common law power.

2. In such a case, the proper motion is to change the venue, and not to enter a suggestion.

3. Sec. 4 of that Stat., does not apply to actions of ejectment.

4. The plaintiff having lost a trial by irregularity on his part, the venue will not be changed, on his application, in order to expedite the trial.

5. In an action of ejectment the *case must be at issue as to all* the defendants, before such motion is made.

[Chambers, 16th Oct., 1865.]

This was an action of ejectment for lands lying in the city of Toronto. The venue was laid in the County of York one of the United Counties of York and Peel, and notice of trial given therefor. This notice was set aside for irregularity, and thereupon the plaintiff obtained a summons calling upon the defendant to shew cause why the venue should not be changed to the County of the City of Toronto, or why a suggestion should not be entered on the record that the trial be had in the County where the land is situate.

The assizes for the County of York for which notice of trial had been given, were holden on the 9th October, 1865, those for the city to which the venue was subject to be changed, were fixed for the 6th November. The only affidavit filed upon obtaining the summons, was one which stated that the premises in question were situated in the City of Toronto.

J. A. Boyd, shewed cause and filed an affidavit shewing, that the former notice had been set aside for irregularity, and that, as to one of the defendants, no appearance had been entered for him, nor judgment signed against him.

1. In local actions the venue cannot be changed, the motion should be to enter a suggestion; Lush's Prac., 3rd Ed., p. 408, citing 1 Wills., 77; *Doe d. Crooks* v. *Cumming*, 3 U. C Q B. 65.

2 The court has no power to alter a venue which is local (save when an impartial trial cannot be had, except when it is empowered so to do by statute. The first statute was I. S 3 & 4 W. IV., c. 42, s. 23. This is the same as P. S., 7 W. IV., c. 3 s. 4, consolidated in C. S, U. C., c. 29, s. 87 This enactment is *in pari materia* with C. S., U. C., c. 27, s. 23, (Ejectment,) and these both apply to cases where the venue is laid where the land is situate or the cause of action arose. We have no statute like I. S., 38 Geo, III., c. 52, s. 1, and see *Bird* v. *Morse*, 7 Taunt, 384.

But suppose these sections do apply to this case, the cause is not at issue, which the practice requires, and special grounds must be shewn: Parkinson's Handy Book of Chambers, p. 129; *Bell* v. *Harrison*, 4 Dowl, 181; *Tolson* v. *Bishop of Carlisle*, 7 C. B, 79; *Doe d Baker* v. *Harmer*, 1 Har. & Woll. 80.

3. The question turns upon the construction of St. Can., 1861, 24 Vic., c. 53. It has been held that section 2 applies to ejectment, *Paton* v. *Cameron*, 21 U. C. Q B., 364, but section 4 which provides for a *change* of venue, cannot apply to ejectment. Besides, the plaintiff having elected under section 2 as to his venue, cannot repent. The only possible object is to expedite the trial, and the courts have uniformly refused relief on this ground: *Crooks* v. *House*, 3 U. C O. S., 308; *Barton* v. *Nowlan*, 4 U. C. L. J., 20; *Ayres* v. *Buston*, 6 Taunt., 408; *Pearse* v. *Porklington*, 2 B. & P., N R., 58; *Fife* v. *Bousfield*, 2 Dowl., N. S., 705, Barnes 19.

Morphy supported the summons and submitted that under the circumstances he was entitled to a change of venue.

ADAM WILSON, J., I do not think the venue in this case should be changed under the facts of the case; but I rather think that the venue might be changed. There is no one reason which is given why the venue in *local* actions cannot ordinarily be changed, which applies in this peculiar case.

Here the venue is *not* laid in the right or true locality: the land is in the city, while the venue is in the county,—and all the party asks, is, to have it laid in the true locality in the judicial county of the city, where the land actually lies.

Although the 4th section of the 24 Vic., c. 53, does not apply to this case, I incline to think that this would be the exercise of a common law power, which might be extended to this particular proceeding. But the purpose of the plaintiff, is to change the venue because he has lost the trial where it was laid, by some irregularity on his part. The case too is formally defective, for it is not at issue, or concluded as to one of the defendants.

Summons discharged.*

DOUGALL v. YAGER.

Execution debtor applying for discharge from custody—Insufficiency of answers to interrogatories—What they must disclose.

Before a debtor can be discharged he must disclose what he has done with his property by answers which are in the opinion of the judge sufficient, that is, full, complete and true. A disposition of property which though not necessarily a moral fraud may be fraudulent as against and calculated to injure his creditors, and therefore militates against the discharge of the debtor.

In this case further explanations and a transfer of certain claims to the creditor were required.

[Chambers, January 17, 1866.]

This was a renewal for the fifth time of the application of the defendant to be discharged from custody after having answered interrogatories.†

The examination was an exceedingly long one, there being 159 questions—the answers occupy-

* See *Perdue* v. *Corporation of Chinguacousy*, *ante infra*, p. 106.—EDS. L J.

† See 1 U. C. L. J., N. S. 133.

ing 45 foolscap sheets, making about 150 folios. The defendant appeared to have been an indorser on notes made by Peter T. Bell, his brother-*in-law, and by one Carleton Clifford.*

The judgment recovered against the defendant was stated to have been for $750 76, and he was arrested under it on the 11th December, 1860, and has been in close custody since that time.

The account he gave of his property was as follows:—

Farm sold in Aug., 1863, to his brother	$5,000
His stock of goods, etc., say for.....	600
His crops for.....	320
Total	$5,920
His debts amounted to about.....	3,266
Leaving as a difference.....	$2,654

He swore the balance that was payable to him on the sale of his farm was as follows:

Price		$5,000
Mortgage on it.....	$1,600	
Note held by his brother, the purchaser, against him.....	407	
		2,007
Balance.....		$2,993
And he swore for this sum he took his brother's promissory notes—six notes, each for $400.....	$2,400	
And a 7th note for.....	593	
All bearing interest.		
	$2,993	

Payable respectively in 2, 3, 4, 5, 6, 7 and 8 years.

He swore he disposed of the 1st note for $400 to A. H. Wallbridge, who paid him all of it but about $50, and "whatever there may be payable to him after deducting the expense of his getting out of gaol, he is willing to assign to the plaintiff"

He also swore he gave the 2d, 3d and 4th notes to Boustead and to John Ross, who paid him for their face of $1,200, the sum of $900.

And out of this $900 he swore he gave one George Reid $600, who was to add $200 of his own to it, and buy cattle on their joint account, but that Reid absconded to the United States and never paid this sum. This claim he was also willing to assign to the plaintiff.

And the remaining $300 he disposed of as follows: by paying debts he owed after the sale of his farm, $75; and the remaining sum of $225 in travelling expenses in the United States, to which he has gone three times in the year before his arrest, and which last sum of $225 also includes about $30 lost in his pocket book.

The 5th, 6th and 7th notes amounting on the face to $1,393, he gave to his sister for the purpose of enabling and inducing her to bring up his two daughters until they are 21 years of age. The allowance for the two was reckoned at $150 a year. The eldest of the children was about 12 years of age.

Bell absconded from this Province, and it appeared from the examination, that the defendant not only went with him, but knew of his intention to leave, and probably assisted him away. Bell bought land, after leaving, in Illinois, for which he was to give $2,000. The defendant also bought land there, for which he was to give $1,000; he said he paid nothing on account of it.

The defendant also represented that Bell was apparently in good circumstances when he endorsed the notes, and that Clifford, the other, maker, he believed, was able to pay. He said Bell's share of the notes was about $400, and that the defendant offered before his arrest, to pay this sum in full for his own and Bell's discharge, but the offer was not accepted, and that this $400 is part of the $600 he afterwards delivered to Reid and lost.

He swore he sold his farm before he had any idea of being called on for his indorsations; that he had before then lost his first wife; that after her death he got into difficulty; that he leased his farm and lost by the tenant; that his second wife took everything from him she could convert into money, and at length eloped with another man; and that he then determined to sell out, provide for his children, and leave the country.

Robert A. Harrisyn shewed cause.

Wallbridge, Q C., *English* with him, supported the summons.

Adam Wilson, J.—There is a great deal in the case not at all satisfactory. The delivery of the $600 to Reid has great doubt thrown upon it by affidavits which are put in against the answers of the defendant, and perhaps the delivery of the two notes to Boustead is not quite satisfactory either, from what is said in the affidavit put in against the answers. The delivery of the notes to his sister for his children, although a transaction just as he represents it to be, may not be a moral fraud, but it is a fraudulent disposition of his property, calculated (whether intended so or not) to injure his creditors.

The judge is to determine whether he deems the answers sufficient; that is, whether they are full, complete and true; for I cannot imagine any answers or examination being deemed sufficient which are or is untrue, or, it may be, false from beginning to end. It is not required that the answers should show that the debtor has made a prudent use or disposition of his property; but he must tell what he has done with it, and he must tell this fully and truly. I cannot say I believe altogether the statement of the payment to Reid of the $600; this I think, must be explained by some other testimony, or the debtor must, if he can, be more explicit as to it; if nothing further can be stated with regard to it, I will not say what I may do if it should come before me again.

I think, too, the transfer of the two notes to Boustead, must be also explained; that transaction can surely be confirmed by the affidavit of the person or persons to whom these two notes were delivered, as they are relatives of the debtor, and residing in the neighborhood.

I think, too, that so much of the face of the notes as shall be equal to the debt for which the defendant is confined, which are in the sister's possession, must, if nothing else can be procured, be delivered over to the plaintiff on account of his debt. If the sister will not deliver up the notes or such a share of them as shall be suffi-

cient for this purpose, the defendant will, perhaps, have done all that he can with respect to them, by transferring his right to or interest in them to the plaintiff, if the plaintiff shall think it advisable to take them; or he may take whatever means there may be open to him at law, to obtain the notes by levy or otherwise. The defendant must give an order for them in the plaintiff's favor; if this fail in effect, I shall know how to act.

The defendant must also assign his interest in the Illinois purchase if the plaintiff agree to take it.

I must enlarge the defendant's application until these matters have been complied with.*

Lockart v. Phalira Gray—Pottage Garnishee.

Con. Stat. U. C., cap. 19, *secs.* 176, *&c.*—*Statute of Anne—Claim by landlord to rent, on execution against tenant—Division Court bailiff—Attachment of debts.*

Where an execution creditor has under the statute of Anne paid rent demanded by a landlord upon an execution against the goods of his tenant upon the premises of the former, and the sheriff levied as well for the rent as the execution debt, the sheriff becomes the debtor of the execution creditor for both sums and liable to him in an action for money had and received.

And so under the Division Courts Act, the bailiff of a Division Court would in a like case, also be liable, and therefore the execution money in his hands might be attached as a debt due to the execution creditor, to satisfy the demand of another execution claimant against him.

Semble, that money in hands of a Division Court bailiff may be attached.

[Chambers Jan. 26, 1866.]

The facts of this case were that Pottage, as bailiff of the 6th Division Court of York and Peel, had, in or about October 1864, certain executions in his hands as such bailiff, to be executed against the goods and chattels of one Albert Gray, a son of Phalira Gray above mentioned. When the bailiff seized under these writs, Phalira Gray claimed the goods as her own. An interpleader was thereupon tried in the Division Court, which was determined against her.

After the decision she gave notice to the bailiff that she claimed $200 for one year's rent, due to her by her son Albert Gray in respect of the premises upon which the goods had been seized. The sale of Albert Gray's goods took place in February, 1865.

Albert Gray denied owing his mother Phalira any rent at all. The bailiff denied that he sold for the rent claimed, and said he was served with the notice claiming rent before the sale, but that at the time of the sale, Phalira still claimed the goods as her own, and did not claim for rent at all. Affidavits were filed on each side.

It was admitted that the bailiff received notice of such a claim before he did sell.

C. McMichael, on behalf of the garnishee, Pottage, referred to the statute of Anne, and argued that rent even after it was due (which is said to have been the case here, if there was such a claim as rent at all) could not be attached in the hands of the bailiff or sheriff, because it was said the landlady could not sue for it as a *debt* owing to her by the bailiff or sheriff, her only remedy against the officer being for selling without leaving a sufficiency of distress upon the premises to satisfy the year's rent, and that as the landlady could not sue in such a case for a debt, the judgment creditor could not attach the money in the officer's hands.

Blevins, for the judgment creditor, contended that however, the law may be under the statute of Anne, it is different under the Division Court Act.

A. Wilson, J.—The question is whether there is such a difference as that contended for by the judgment creditor; if there be not, this application must fail.

The statute of Anne provides, "that no goods upon lands which are leased, shall be liable to be taken in execution unless the party at whose suit the execution is sued out, shall, before the removal of the goods from the premises, by virtue of the execution, pay to the landlord all such sums as shall be due for rent at the time of taking the goods by virtue of the execution, provided the arrears do not amount to more than one year's rent, and if they do, then the party at whose suit the execution is sued out, paying the landlord one year's rent, may proceed to execute his judgment as he might have done before the act; and the sheriff, or other officer is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money."

The Division Court Act provides, (sec. 176), that so much of the statute of Anne, as relates to the liability of goods taken by virtue of an execution, shall not apply to goods taken in execution under the powers of any division court. But the landlord of any tenement in which any such goods are so taken, may, by writing under his hand stating the terms of holding, and the rent payable for the same, and delivered to the bailiff making the levy, claim any rent in arrear, then due to him, not exceeding in any case the rent accruing due in one year.

Sec. 177. In case of any such claim being so made, the bailiff making the levy shall distrain as well for the amount of the rent, claimed and the costs of such additional distress as for the amount of money and costs for which his warrant of execution was issued.

Sec 180. No execution creditor under this act, shall satisfy the debt out of the proceeds of the execution and distress, or of execution only when the tenant replevies for the distress, until the landlord who conforms to this act, has been paid the rent in arrear for the periods hereinbefore mentioned.

Under the statute of Anne, it has been decided that an action for money had and received will not lie by the landlord against the sheriff for money made by the sheriff when he has an execution against the tenant's goods, and sells for enough to satisfy the rent as well as the execution.

This statute does not empower the sheriff to sell for, or on behalf of the landlord, it excuses the sheriff from selling at all when rent is claimed, until or unless the execution creditor shall pay the rent, and then it empowers the sheriff to sell for his benefit as well for the rent as for the execution money; while under the Division Court *Act, the bailiff sells for, and on behalf of the land*lord as upon a distress, and the creditor is not to be paid his debt until the landlord has been paid his rent.

It is true that under the statute of Anne, neither the sheriff nor the execution creditor, before levy,

* The debtor subsequently complied with the conditions imposed by the Judge, and an order was thereupon made for his discharge.—[illegible] L J.

actually pays the landlord his rent, yet the sheriff sells for enough to satisfy both rent and execution money; but in strictness the sheriff cannot be called upon as a debtor by the landlord to pay over the rent; the remedy must be in another form.

In case the execution creditor has under the statute of Anne paid the rent, and the sheriff under the express terms of that act, does levy for the plaintiff as well the rent as the execution money, I concieve there is not the slightest doubt that the sheriff becomes a debtor to the execution creditor so paying such rent as well for the rent as the execution debt which he levies, and makes for him and under his express direction, and by the authority of the statute and of the writ.

In such a case, the creditor might sue the sheriff for money had and received, and so it would seem to follow that this money may be attached as a debt due to this execution debtor to satisfy a demand of another execution claimant against her.

I think that the present judgment debtor, Mrs. Gray, the landlady for whom the rent was made —assuming it to have been made for her—has a claim for debt against the bailiff, and could maintain an action against him for money had and received in respect of this rent, and therefore the claim is one which can be attached to satisfy her judgment debts.

It was not argued before me whether money in the hands of the bailiff could or could not be attached. I see it laid down in the practice that it is attachable; and I see no reason or principle why it should not be, and I do not therefore feel this to be a difficulty in my way.

As before stated, the two facts of rent being due at all, and whether the sheriff sold for it, and made it, are strongly disputed. As I cannot determine these points, and have not sufficient information before me if I desired to do so, I must therefore order that the judgment creditor may proceed against the garnishee under the 291st sec. of the C. L. P. Act.

Costs to abide the result of that proceeding.

Jenkins v. Kerby et al.

Judgment more than six years old—Execution—Revivor.

A writ of execution may be sued out at any time within six years from judgment without a revivor, and if during the six years a writ of execution is sued out, returned and filed, the same consequences follow as if, under the old practice, a writ had been sued out within a year and a day and returned and filed; that is, such writ will support a subsequent writ issued after that period without a *sci. fa.* or revivor.

[Chambers, February 3, 1866.]

A summons was obtained in this case to set aside the writ of execution against the goods of the defendants, delivered to the Sheriff of the County of Brant, on 30th June, 1865, for irregularity with costs, on the ground that the same has been issued on a judgment more than six years old without a revival of the judgment.

The affidavits in support of the application shewed that the judgment was entered 16th March, 1858, and that the execution moved against issued on the 30th June, 1865, and that the endorsement on this writ directed the levy of interest from the 16th March, 1858—and $35 for the present and former writs (strongly suggesting several previous executions). That the sheriff had sold goods, but that an interpleader was pending as to the money produced by such sale.

Osler shewed cause, and filed an affidavit to the effect, that a writ of *fi. fa.* goods founded on this judgment was issued on 17th March, 1858, and was returned *nulla bona* on the 30th April of the same year. That on the 29th September following a *fi. fa.* against lands was issued, which, on the 4th October, 1859, was returned, lands on hand to the value of 5s. That on the 5th October, 1859, a *ven. ex.* and *fi. fa.* for residue against lands issued, which on 7th September, 1861, was returned, money made and no other lands. That on 25th September, 1862, a *fi. fa.* for residue was issued against lands, and was on 23rd September, 1863, renewed for twelve months,—and on 6th April, 1865, was returned, lands on hand to the value of 5s, and no lands as to the residue. That on 15th April, 1865, a *ven. ex.* and *plur fi. fa.* for the residue against lands was issued, which on the 30th June, 1865, was returned *feci* as to $286 80, and no lands as to the residue. That on the 30th June an *al. fi. fa.* against goods was issued, upon which the seizure and sale spoken of above was made. The last writ is the writ moved against.

Hector Cameron supported the summons.

Draper, C. J.—A difference has been pointed out between the language of the English C. L. P. Act, 1852, s. 128, and sec. 301 of our C. L. P. Act, in the Con. Stat. of U. Canada. The original enactment 19 Vic. ch. 43, sec. 202, was verbatim the same as the English Act excepting that the word "*one*" was introduced in place of "*six*," evidently by mistake of a copyist. This mistake was corrected by sec. 10 of our Common Law Procedure Act of 1857, which precisely follows the English Act. Why a change was made in the consolidating Act I cannot surmise, but I think it does not change the meaning.

The presumption at law was, that if a year and a day elapsed after the entry of judgment, without execution being issued upon it, the judgment had been executed, or the plaintiff had released the execution—wherefore a *sci. fa.* was necessary, to give the defendant an opportunity of being heard against execution issuing. But in Gilbert on Executions, 94 (cited by Parke, B., in *Simpson* v. *Heath*, 3 Jur. 1127), it is said, "but although there was a year and a day to execute a judgment, yet if there was execution taken out, and that was continued beyond the year there was no occasion for a *sci. fa.*, for then at common law there was *a*" (the learned Baron corrects this, shewing it should be read *no*) "presumption that the judgment was satisfied, because there appeared an execution taken out and it was the default of the minister that it was not served;" and Parke, B., adds, "the substance of this then is, that if a plaintiff sue out process within a year no *sci. fa.* is requisite, but if the year be suffered to expire without execution" (*i. e.* of the process sued out) "he must continue the writ down in the regular way."

In the present case the first writ of execution was issued immediately after the entry of the judgment, and this writ was very soon after

returned *nulla bona*, and in little more than six months from the entry of the judgment a *fi. fa.* against lands was sued out, which by our statute could not have been until the return of the process against goods, and which writ could not have been made returnable in less than a year from its being issued, and must be twelve months in the sheriff's hands before it could be acted upon by a sale. As to continuances which were spoken of during the argument, they were made unnecessary by the rule of Easter Term, 5 Vic. No. 23, and by the rule of Trinity Term, 20 Vic. No. 25.

As long ago as the case of *Welden* v. *Greg*, 1 Sid. 59, the practice was stated to be,—that after a *fi. fa.*, or *elegit*, if not executed, a new *fieri facias* or *elegit* may be sued out several years afterwards without suing a *sci. fa*, provided the continuances are entered from the time of the first *fieri facias*—which continuances might then and for long afterwards be entered at any time if the first writ was returned and filed,—and now, as above shewn, such continuances are unnecessary; and one sort of execution sued out returned and filed will support the awarding of a different kind of execution afterwards. As where a *fi. fa.* was taken out within the year and *nulla bona* returned and continued down for several years, and then a *ca. sa* issued. The court said that if it was a new case they should think it hard to take away all writs of *scire facias*, but the practice had gone so far that there was no overturning it, and they held the *ca sa* regular: 2 Saund. 68, g. note, citing *Aires* v. *Hardress*, 1 Str. 99. The effect of the new enactment is, that an execution may be sued out at any time within six years from the judgment without any proceeding, by revivor or otherwise. If during the six years a writ of execution is sued out, returned and filed, the same consequences follow, as if under the old practice a writ had been sued out within the year and day and returned and filed.

I think, especially considering that not a year passed without an execution having issued or being current, the proceedings are regular, and this summons must be discharged with costs.

Summons discharged.

In a Cause in the County Court of Huron and Bruce between Runciman v. Armstrong.

Habeas Corpus—Sufficiency of affidavits to hold to bail

An arrest was made on the 2nd November, special bail put in on the 9th November, a verdict rendered sometime before the 12th December, a render by the bail on the 5th January, an application to the County judge on the 2nd January, and the discharge of that application on the 5th January, and the final judgment given sometime in the same month—an application, upon a *Habeas Corpus* issued on the 8th March, to discharge the defendant from custody because the affidavit upon which the judge made his order to arrest were and are not sufficient in law, will not be entertained, as it would have been if the affidavits had been a nullity.

When a County judge has jurisdiction in the premises a Superior Court judge will not in general (if at all) exercise a power of appeal by *habeas corpus*, which was never intended as a means of appealing from the discretion of a county judge.

[Chambers, March 26, 1866.]

The plaintiff, by his agent, Hamilton Bligh O'Connor, made an affidavit of debt on the 31st October, 1865, for the purpose of procuring the order of the judge of the County Court for the issue of a *capias* to arrest and hold the defendant to bail.

On the 1st November, the judge made his order for the *capias* and that the defendant should be held to bail in the sum of $102 62

The following is an extract from the affidavit of O'Connor.

2 That I was told by Mr. Hyslop of Goderich yesterday that the said John Armstrong was immediately about to leave Canada.

3. That as the agent of the said Robert Runciman, I called on said John Armstrong for payment of said note, that he promised to come to Goderich and settle said note; but that he has not done so although the time has long since elapsed in which he was to do so.

4. That there is good and probable reason for believing that the said John Armstrong unless he be forthwith apprehended is about to quit Canada with intent to defraud his creditors.

The affidavit of Robertson was,

1. That I am acquainted with Mr Hyslop mentioned in the annexed affidavit.

2. That I tendered an affidavit to said Hyslop for him to make, shewing that John Armstrong named in annexed affidavit, was about to quit Canada with intent to defraud his creditors.

3 That said Hyslop refused to make said affidavit, solely on the ground that they were relations; but shewed to me this deponent, that he verily believed that said Armstrong was about to quit Canada with intent as aforesaid.

On the 2nd November the defendant was arrested on the *capias*.

On the 9th November the defendants put in special bail.

On the 5th January 1866, the defendant was surrendered by his bail to the sheriff of the United Counties, and he has remained and still is in the sheriff's custody.

Sometime between the 9th November and the 5th January thereafter, the cause was taken to trial, and a verdict was rendered for the plaintiff.

Judgment was, on or about the 12th December 1865, given for the plaintiff on the issue in fact, and on the 5th January judgment was given to the plaintiff on the issue in law against the defendant; but the defendant has not yet been charged in execution under the judgment.

On the 2nd January 1866, the judge of the County Court granted a summons calling on the plaintiff to shew cause why his own order for the arrest, and the *capias* should not be set aside on the ground that they were wrongfully obtained; and that at the time of the issuing of the order, no facts and circumstances were shewn tosatisfy the judge that the defendant was about to quit Canada with intent to defraud any creditor.

And on the 5th January 1866, the judge discharged the summons because the defendant's counsel had consented at the trial to a verdict being rendered for the plaintiff.

On the 8th March 1866, the defendant obtained a *Habeas Corpus* directed to the sheriff of the United Counties to bring up the body of the defendant before a judge in Chambers in Toronto, and on the 16th March 1866, the sheriff returned, that he has the body of the defendant as commanded and that the defendant was

rendered to him by the bail on the 5th January 1866, since which time the defendant has been, and still is in the sheriff's custody by virtue of such render.

S. Richards, Q. C., for the plaintiff, contended that the sheriff having shewn that he has the defendant in custody under a writ valid on its face, no enquiry can be made as to whether the writ was properly issued or not. *In re Cobbett*, 3 L. T., N. S., 631.

J. A. Boyd, for defendant.

The present application is not too late, it being for a material defect in the affidavit produced to the judge, and on which he made his order to hold to bail, it may be made at any time while the suit is pending. *Walker* v. *Lumb*, 9 Dowl., 133 (per Patteson, J.)

The affidavits produced to the judge are deficient in not shewing that the deponent believed the defendant was about to quit Canada or that he believed the facts stated to him; and in not shewing what the facts and circumstances were upon which any belief was founded, or upon which the judge could form an opinion *Bateman* v. *Dunn*, 5 B. N. C., 49; *Graham* v. *Sandrmelli*, 16 M. & W. 191; *Demill* v. *Easterbrook*, 10 U. C. L. J. 246.

A prisoner will be discharged when illegally arrested under the process of an inferior court. *Perrin* v. *West*, 3 A. & E., 405.

Want of jurisdiction can be shewn by affidavit, *Bailey's case*, 3 E. & B., 607.

As to relief given by *habeas corpus* in the United States: see *Nelson* v. *Catto*, 3 McLean's Rep., 326; *Jones* v. *Kelly*, 17 Mass., 116; *Bank of United States* v. *Jenkins*, 18 Johnson, 305.

Adam Wilson, J.—I must firstly decide whether—after an arrest on the 2nd November, putting in special bail on the 9th November, a verdict rendered sometime before the 12th December, the render by the bail on the 5th January, the application to the judge on the 2nd January, and the discharge of that application on the 5th January, and the final judgment given sometime in the same month,—I can now entertain an application upon a *Habeas Corpus* issued on the 8th March, to discharge the defendant from custody because the affidavit upon which the judge made his order to arrest, were and are not sufficient in law (assuming them to be so,) to justify him in making the order.

The judge had jurisdiction over the cause, and over the person of the defendant; he had the power to make such an order to arrest, and the defendant could have moved against it in time, on account of the supposed defects in the affidavits, but he did not do so till more than two months' after his arrest; and after having put in bail and having a verdict rendered against him—and then the judge determined that the application to procure the rescission of the order and the setting aside of the *capias* was too late; or perhaps more strictly that the defendant consented to a verdict against him.

If there had been no affidavit at all, or if the affidavit had been, or were a complete nullity, the application possibly could have been entertained, even at so late a stage of the proceedings, and so long as the defendant continues in custody upon this *capias*; but I cannot determine that the affidavits which were produced to the judge, were, and are an absolute nullity. They may be imperfect and unsatisfactory, but I do not say they are, I need only say they are not of that character that I must now, after the lapse of more than four months, and after all that has been done in the court below, assume to exercise a power of review and appeal of so extensive a nature that will bring the whole County Court business of the Province before a Judge in Chambers at Toronto. I believe that a judge of the superior courts of common law has a very great jurisdiction in cases of the proper description and the case of *Hawkins*,* which was before me in Chambers some short time ago was one which I still think required me to afford him relief by *Habeas Corpus*; for in that case, in no way of putting it could that arrest and imprisonment be supported; he was a *plaintiff*, and was therefore not within the section of the statute, which applied, as it stood at that time, only to defendants.

The jurisdiction, which did not exist in that case, did, and does exist here; the complaint is, as to the mode in which that jurisdiction has been exercised. I now decide that what has been done is not defective, or at any rate not so defective that it amounts either to an abuse of jurisdiction or to a mere nullity. I am not, therefore, called upon to say how far a judge of one of the superior courts could properly act in a case of the kind; but I may say that unless I am compelled to exercise such a power, I shall not do so, for it is an indirect, circuitous, and not very satisfactory mode of appeal which was not intended to have been, and has not been granted from the decision of the judges of the County Courts.

The statute requires that the party shall shew by affidavit, "such facts and circumstances as satisfy the judge that there is good and probable cause for believing that such person unless he be forthwith apprehended, is about to quit Canada with intent to defraud his creditors."

Now all this appears upon the affidavits in question; how much, if any more should appear, I am not required to say. It is sufficient as before stated, that the affidavits are not void or a nullity.

I think, therefore, this application must be discharged with costs, which I fix at twenty shillings.

Trust and Loan Company v Dickson.

Legal holiday—Easter Monday—Signing judgment.

The Crown offices should not be opened for business on Easter Monday, and a judgment entered on that day was set aside for irregularity with costs.

[Chambers, April 9, 1866.]

The defendant obtained a summons calling upon the plaintiff to shew cause why the interlocutory judgment, signed in this cause on the second day of April last, and all subsequent proceedings, should not be set aside with costs for irregularity, as having been improperly signed and taken for the following reasons: that the said judgment was improperly signed on Easter Monday, being a statutory holiday, and was not signed or filed by R. D. Chatterton, the Deputy

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* 9 U. C. L. J. 295; 10 *Ib.* 38.

Clerk of the Crown, and was signed prematurely and before the time for pleading had expired either with or without the extra day for pleading allowed by an order of the Chief Justice of Upper Canada of the 29th day of March last, and was irregularly and improperly signed, and was not according to the correct or proper form, and was in form a final judgment in debt for debt and damages, and was expressed in the singular in- of the plural number, and should not have been so signed in this suit where the writ was not specially endorsed; or why the issue book and notice of assessment and service thereof should not be set aside with costs for irregularity on the grounds aforesaid, and on the grounds that the same were served on Easter Monday and too late for the ensuing assizes at Cobourg; or why the defendant should not be allowed to plead and defend this action on the merits.

Several affidavits were filed touching on various points referred to in the summons. But the principal fact as shewn by them was, that judgment was signed on Easter Monday, which it was contended could not legally be done, and that therefore the judgment should be set aside.

T. H. Spencer shewed cause. Easter Monday is not a *dies non*, and there is no statute absolutely requiring business to be suspended on that day. The only statutory provision is C. S. U. C. cap. 10, sec. 38, which permits but does not require deputy clerks of the Crown to close their offices on that day. Any act which is ordinarily done *ex parte* can therefore be legally done on that day, if the clerk chooses to do it.

Draper, C. J.—Con. Stat. U.C. cap. 10, sec. 38, enacts, that except between 1st July and 21st August, every deputy clerk's office shall be kept open between certain hours. "Sundays, Christmas day, Good Friday, Easter Monday the birthday of the Sovereign, New Year's day, and any day appointed by royal proclamation for a general fast or thanksgiving excepted." On a non-judicial or non juridical day an award of judicial process or entry of a judgment is void: *Dedoe* v. *Alp*, Sir W Jones, 156; Though bail may be put in, or such business as is transacted at Judge's Chambers, may be done: *Baddeley* v. *Adams*, 5 T R. 170; see also *Figgins* v. *Wilkie*, 2 W. Bl. Rep. 1186, and *Sparrow* v. *Cooper*, *ib.* 1314; *Worthy* v. *Palter*, 5 Taunt. 180. The Imperial Stat. 3 & 4 Wm. IV. ch 42, is limited to holidays occurring in term time, but the Monday and Tuesday in Easter week are such holidays. There is an English rule of court making some other days holidays, provided they do not fall in term (H. T., 6 Wm. IV.)

I think our statute above cited must be construed as declaring the specified days to be days on which business is not to be transacted in the Crown offices It is evidently not the duty of the officer to attend, and the English cases show strongly that the courts will not permit the doing of business on a holiday to be made a means of demanding increased fees by the officers; neither was it meant to enable the officer to open his door to one and to keep it closed to another. I think the safest construction on all accounts is, to hold that the offices are not to be opened on that day.

In the present case the plaintiff has created the difficulty by signing judgment on Easter Monday. The defendant filed pleas at the opening of the office on Tuesday morning, and the plaintiff might have joined issue, served his issue book, and given notice of trial on that day, as the defendant, by an order of the 29th March, had to take one day less than the usual time for notice of trial.

I should be glad if this question could be brought before the full court, but as I think the plaintiff's proceeding irregular I must set it aside with costs.

Summons absolute. *

CHANCERY.

(*Reported by* Mr. Charles Moss, *Student at-Law*)

Portman v. Smith.

Foreclosure decree—Change in state of account after day appointed for payment—Notice of motion—Final order.

A plaintiff who goes into possession of the mortgaged premises and receives rents *after* the day appointed for payment by the mortgagor, is entitled to a final order of foreclosure without a new account being taken and a new day for payment given to the mortgagor.

Semble the plaintiff in such a case should serve the mortgagor with notice of the motion for the final order.

[Chambers, April 23, 1866.]

The plaintiff applied for a final order of foreclosure under the following circumstances: The Master had by his report appointed the amount found due to the plaintiff to be paid on the 2nd of January last by the mortgagor, who made default in payment. Upon the 8th of the same month the plaintiff rented the mortgaged premises to a tenant, and had since received rents, for which he gave the mortgagor credit and served him with notice thereof. Notice of the application for the final order was also served upon him The cases of *Constable* v. *Howick*, 5 Jur. N. S. 331, and *Greenshields* v. *Blackwood*, Chamber Reports, 60, were cited.

Mowat, V. C.—The case of *Greenshields* v. *Blackwood*, throws some doubt upon the authority of *Constable* v. *Howick*, where there has been a receipt of rents As, however, the plaintiff has served notice of this application upon the mortgagor he may take the order.

Young v. Wilson et al.

Defendant out of the jurisdiction—Substitutional service.

Where a defendant who was made a party to the suit in respect of a mortgage held by him upon the lands which form the subject matter of the suit was out of the jurisdiction, but it appearing that his solicitor has and always had the mortgage in his possession, substitutional service upon the solicitor was allowed.

[Chambers, April 24, 1866.]

The defendant Dunn being out of the jurisdiction the plaintiff examined his solicitor before one of the special examiners as to the whereabouts of the defendant. It appeared from the depositions that the defendant was in the East Indies; that the solicitor had had no communication with him in respect of this suit, and held no power of attorney from him, but he had in his possession the mortgage in respect of which

* There has been no appeal from this decision.—Eds. L. J.

it became necessary to make Dunn a party defendant, and always had possession of it from the time it was returned from the registry office.

Moss now moved for an order for substitutional service upon the solicitor citing *Hope* v. *Hope*, 4 DeG. M. & G. 342; *Cooper* v. *Wood*, 5 Beav. 391; *Heald* v. *Hay*, 9 W. R. 869; *Hornby* v. *Holmes*, 4 Hare 301; *Crookshank* v. *Sage*, Chamber Reports, 202.

Mowat, V. C.—After consideration granted the order, giving the defendant six months from the date of service on the solicitor within which to answer the bill.

ENGLISH REPORTS.

Lecocq and Wife v. The South-Eastern Railway Company

Foreign Commission—Costs of employing counsel—Practice.

In order to entitle the successful party in an action to the cost of employing counsel on a foreign commission it must be shown that special circumstances necessitate such employment.

The action was under Lord Campbell's Act for injury sustained by the death of the plaintiff's son, who was killed at the Staplehurst accident, on the defendant's line. A commission was sent to France to examine witnesses, and counsel were employed on that commission by both plaintiffs and defendants. The plaintiffs recovered £400. On the taxation of costs the Master disallowed the plaintiff's costs of the counsel who attended the commission.

Murphy moved for a rule calling on the defendants to show cause why the master should not be at liberty to review his taxation, by allowing these costs against the defendants. There was no case either way, but the plaintiffs, finding that the defendants would employ counsel, and in view of questions of law which might arise, had employed counsel, and having obtained the verdict were entitled to these costs.

Blackburn, J.—I am of opinion that there should be no rule in this case. I am far from saying that in no case of a commission to a foreign part will costs be allowed, but the course is so unusual that it must only be where some special circumstances of the case show that it was necessary. This is not shown here, and it is not sufficient to contend that as the defendants employed counsel the plaintiffs were obliged to do so without showing something special in the case.

Mellor and Shee, JJ., concurred.

Rule refused.

GENERAL CORRESPONDENCE.

By-law—Imposing toll on non-residents only.

To the Editors of the Law Journal.

Gentlemen,—Can a township municipality legally pass a by-law imposing toll on non-residents using a road constructed in and at the expense of said township for the purpose of assisting in the repairing of said road, and exempting the residents of the township in which the road is situated, it having been originally built at the expense of said township. As this is a matter of public interest, and about which different views seem to prevail, I trust you will kindly favor with a reply in the next number of your very valuable Journal, and much oblige, gentlemen, your most obedient servant and subscriber,

Thomas Matheson.

Mitchell, June 2, 1866.

[We do not think the by-law, as stated by our correspondent, valid.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. May 3.

Tanner v. The European Bank.

Bowen v. The Same.

Practice — Interpleader order—Special count—Common Law Procedure Act, 1860, *s.* 12.

The fact of a special count for breach of duty, in reference to the matter claimed in an action of trover, being added to counts in trover and detinue, does not prevent a judge from making an interpleader order relating to all the counts in such action, provided such order is just and reasonable.

Best v. *Hayes*, 11 W. R. 71, 1 H. & C. 718, approved of. (W. R. 675)

CHANCERY.

M. R. In re Hellman's Will. May 1.

Foreign domicil—Legatees—Payment of legacy.

A legatee domiciled abroad may, if of age, according to the law of his place of domicil, receive payment of his legacy, although a minor according to the laws of this country, and a legatee domiciled abroad may be paid his legacy on attaining his majority according to the laws of this country, even if he is a minor according to the law of his place of domicil. (W. R. 674.)

APPOINTMENTS TO OFFICE.

NOTARY PUBLIC.

JAMES WATT, of Oil Springs, Esquire. Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 19, 1866)

CORONERS.

JOSEPH A. FIFE, Esquire, M.D., to be an Associate Coroner for the County of Peterborough. (Gazetted May 5, 1866.)

GEORGE BRANT, of the village of Smithville, Esquire, to be an Associate Coroner for the County of Lincoln. (Gazetted May 5, 1866.)

TO CORRESPONDENTS.

"Thomas Matheson"—Under "General Correspondence."