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THE

UPPER CANADA LAW JOURNAL

AND

MUNICIPAL AND LOCAL COURTS' GAZETTE;

VOLUME VII.

FROM JANUARY TO DECEMBER, 1861.

EDITED BY
W. D. ARDAGH, ESQ., AND ROBERT A. HARRISON, ESQ., B.C.L.,
BARRISTERS-AT-LAW.

TORONTO:
PRINTED AND PUBLISHED AT 17 & 19 KING STREET, BY W. C. CHEWETT & CO.

1861.

W. C. CHEWETT & CO., PRINTERS, 17 & 19 KING STREET EAST, TORONTO.

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OF THE

CASES REPORTED AND CITED IN THIS VOLUME.

VOL. VII. TORONTO, JANUARY, 1861. No. 1.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

PRINTED AND PUBLISHED BY MACLEAR & CO., 17 & 19 KING STREET EAST, TORONTO.

FOUR DOLLARS A YEAR, IN ADVANCE. FIVE DOLLARS OTHERWISE.

Business Card of Non-subscribers, not exceeding four lines, $4 a year; Business Card *and* Subscription for one year only, $6.

LAW SOCIETY OF UPPER CANADA.

(OSGOODE HALL.)

Trinity Term, 24th Victoria, 1860.

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

Alexander Mairs, Esquire.
Theodore Henry Spencer, Esquire.
John Livingston, Esquire.
David Blain, Esquire.
Thomas Henry Bull, Esquire
James Alexander McCulloch, Esquire

On Tuesday, the 4th day of September, in this Term, the following Gentlemen were admitted into the Society as members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows, viz.:—

University Class:

Mr. Charles William Paterson, B.A.
" William Beatty, B.A.
" Duncan Dougall, B.A.
" Thomas Holden, B.A.
Mr. Mark Scanlan, junr., B.A.
" James Thomas Fraser, B.A.
" John Alexander Boyd, B.A.
" Isaac Otfried Ogden, B.A.

Junior Class:

Mr. Richard Grahame.
" Isaac Samuel Farrell.
" Richard Thomas Walkem.
" William John Fenton.
" Frederick Fenton.
" George Smith Holmested.
" Thomas Albert Killaly.
" Charles Lemon.
" John Henry Dumble.
" John Matheson.
" Richard Austin Bradley.
" William Maurice Cochrane.
Mr. William Robertson Chamberlain.
" Edward O'Connor.
" Joseph Barr.
" Hugh McKenzie Wilson.
" Charles Miller Keller.
" George Freeman.
" William Barrett.
" John Dougon.
" James Harris Gilbert.
" James Elliott Lennon.
" Phillip McKenzie
" Cornelius Velleau Price.
Mr. Thomas Whiteford Thompson.

NOTE.—Gentlemen admitted in the "University Class" are arranged according to their University rank, in the other classes, according to the relative merit of the examination passed before the Society.

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

For the University Class:

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

For the Senior Class:

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

For the Junior Class:

In the 1st and 3rd books of the Odes of Horace, Euclid, 1st, 2nd, and 3rd books or Legendre's Geometrie by Davies, 1st and 3rd books, with the problems, and such works in English History and Modern Geography as the candidates may have read and that this Order be published every Term, with the admission of such Term.

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

Ordered—That in future Candidates for Call *with honours*, shall attend a Osgoode Hall, under the 4th Order of Hil. Term, 18 Vic., on the last Thursday and also on the last Friday of Vacation, and those for Call, merely, on the last Thursday thereof.

Ordered—That the examination of candidates for certificates of fitness for admission as Attorneys or Solicitors under the Act of Parliament. 20 Vic chap 63 and the Rule of this Society of Trinity Term, 21 Vic. chap 1. made under authority and by direction of the said Act, shall, until further order, be in the following books and subjects, with which such candidates will be expected to be thoroughly familiar, that is to say:

Blackstone's Commentaries, 1st Vol.; Smith's Mercantile Law; Williams on Real Property, Story's Equity Jurisprudence, the Statute Law, and the Pleadings and Practice of the Courts.

NOTICE.—A thorough familiarity with the prescribed subjects and books will in future, be required from Candidates for admission as Students, and gentlemen are strongly recommended to postpone presenting themselves for examination until fully prepared.

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

Ordered, That the subjects of the Lectures for Michelmas Term, be as follows:—

Mr. A. Crooks, "On Trusts and Trustees."

Mr. Anderson, "On the Measure of Damages."

J. HILLYARD CAMERON,
Treasurer.

Trinity Term, 23rd Victoria, 1860.

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspayer in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
WM. B. LINDSAY, Clk. Assembly.

10-tf.

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REMITTANCES.

December.—J. H, $5; J. M., Baby's Point, $4; F. W., Rowan Mills, $10; S. M J., Toronto, $5; R. P. J, Belleville, $4; A. B., Amherstburgh, $5; G. Y., Chatham, $4; D P., L'Orignal, $15; Township Etobicoke, $10; W. A. H., Preston, $10.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL.—This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the profession in Canada, and will prove interesting in the United States.—*American Railway Review*, September 20th, 1860.

THE UPPER CANADA LAW JOURNAL.—This useful publication for September is before us We heartily recommend it as a very useful Journal, not only to members of the legal profession, but also t Magistrates, Bailiffs, &c., and in fact every person who wishes to keep himself posted in law matters It has been recommended not only by the highest legal authorities in this Province, but also in the United States and England. The present number is replete with useful information.—*Welland Reporter*, September 20th, 1860.

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 25th.*

THE UPPER CANADA LAW JOURNAL, for May. Messrs. Maclear & Co., King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well written original articles on Municipal Law Reform; responsibilities and duties of School Trustees and Teachers; and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazzette. May 19th*, 1859.

UPPER CANADA LAW JOURNAL.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 16th* 1859.

The Upper Canada Law Journal. Maclear & Co. Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal.—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co., of Toronto, and edited by the talented Robert A Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4.00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 19, 1859.

The Law Journal of Upper Canada for January. By Messrs ARDAGH and HARRISON. Maclear & Co, Toronto, $4 00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co, King Street East, Toronto.

This is the first number of the Fifth Volume and the publishers announce that the terms on which the paper has been furnished to subscribers, will remain unchanged.—viz. $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province; so it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadain public.—*Thorald Gazette, January* 27, 1859

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co, Toronto.—It is conducted by W. D Ardagh, and R. A. Harrison, B. C. L., Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator*, October 13th, 1858

LAW JOURNAL, for November has arrived, and we have with pleasure its invaluable contents In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford; it *should be taken*, however by every member of the Bar, in town, as well every Majistrate and Municipal Officer. Nor would politicians find it unprofitable, to pursue its highly instructive pages This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov. 16th., 1858.

The *Law Journal* is beautifully printed on excellent paper, and, indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas.*

UPPER CANADA LAW JOURNAL, Maclear & Co., Toronto, January.—We have so frequently spoken in the highest terms of the merits of the above periodical, that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

THE UPPER CANADA LAW JOURNAL for March. By W. D. Ardagh and Robt A. Harrison, Barristers at Law. Maclear & Co., Toronto. $4 a year cash.—Above we have joined together for a single notice, the most useful periodical that any country can produce, and happy are we to add, that it appears to be well and deservedly patronised We have so repeatedly alluded to its merits, that the reader will readily excuse any longer make-mention.—*Whig, May*, 18th 1859.

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette.*

The August number of this sterling publication has been at hand several days It opens with a well written original paper on "Law Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy:—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order, and will be found worth a careful persual. A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada." is continued from the July number; it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects. All questions are answered by the Editors, and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to themselves, as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina v. Cummings," by Robert A. Harrison, Esq., decided in the Court of Error and Appeal, is very full, and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

THE UPPER CANADA LAW JOURNAL, &C.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (Vol. 4.) commencing with January last. It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importance to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept. 4th*, 1858.

THE LAW JOURNAL, for February, has been lying on our table for some time. As usual, it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister's office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs.—*Hope Guide, March 9th* 1859.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance, after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz: that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July* 7, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," are well worthy of a careful persual This work should be found in the office of every merchant and trader in the Province, being in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator.—June* 8, 1853,

U. C. Law Journal, August, 1858: Toronto Maclear & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Cobourg Star, August 11th*, 1858.

UPPER CANADA LAW JOURNAL.—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student; and carefully read, and referred to, by every Intelligent Canadian who would become acquainted with the laws of his adopted country, and see how these laws are administered in her courts of Justice.—*Stratford Examiner, August 12th*, 1858.

DIARY FOR JANUARY.

1	Tuesday	Circumcision Taxes to be computed from this day
2	Wednesday	Last day for notice of Trial for Toronto Assizes
6	SUNDAY	*Epiphany.*
7	Monday	County Court Term begins Surrogate Court Term beg Heir and Devisee Sittings commence Municipal Elections.
9	Wednesday	Election of School Trustees
10	Thursday	Toronto Winter Assizes commence.
12	Saturday	County Court and Surrogate Court Terms end
13	SUNDAY	*1st Sunday after Epiphany*
14	Monday	Recorder's Court sits Election Police Trustees in Pol Villages
15	Tuesday	Treasurer or Chamberlain of Municipalities to make return to Board of Audit
19	Saturday	Articles, &c., to be left with Secretary of Law Society
20	SUNDAY	*2nd Sunday after Epiphany*
21	Monday	Members of Municipal Councils (except Counties) and Trustees of Police Villages to hold first meeting
22.	Tuesday	Members of County Councils to hold first meeting. Last day for notice Chan Ex Toronto Heir and Devisee Sittings end
27	SUNDAY	*Septuagesima*
31	Thursday	Last day for Cities & Counties to make returns to Government. Day for Grammar School Trustees to retire

IMPORTANT BUSINESS NOTICE

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JANUARY, 1861.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. The name of the Subscriber. 2. The amount in arrear. 3 The current year to the end of which the computation is made.

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year 1860, John Smith will be indebted to us in the sum of $5, for the current volume.*

SO "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year 1860, Henry Tompkins will be indebted to us in the sum of $25, for 5 volumes of the "Law Journal."*

Many persons take $5 '60 to mean 5 dollars and 60 cents. This is a mistake. The "60" has reference to the year, and not to the amount represented as due.

TO OUR READERS.

It is no small satisfaction to us to be enabled to issue the index, title page, &c., to Vol. 6, and Calendar for 1861, with the current number of the *Law Journal*.

During the year just expired, it has been one of our chief aims to issue the different numbers of the *Law Journal* with regularity and despatch, and in future we shall endeavour to continue to do so.

It is a subject of surprise to some readers that we are able to present so much original matter in each number of the *Journal*. We admit that it costs us much time and labor to do so, but at the same time feel no inclination to abate our exertions in this respect.

We are ambitious of retaining the good opinion which kindred English and American publications have been pleased to express in relation to us. Should there be any change in the editorial management of the *Law Journal*, we hope that the change will be an improvement. At present, however, no change is contemplated, and we are not informed that any is desired.

It is our duty in an especial manner to acknowledge our obligations to the able editors of the *Law Times*, the *Solicitor's Journal*, and *Law Magazine and Review*, for the kindly and we confess flattering notices of the *Upper Canada Law Journal*, which from time to time have appeared in the pages of those well known organs of the legal profession in the mother country. Praise from such a source has been to us not merely a just subject of pride, but an incentive to increased exertion.

Proud, however, as we feel of praise from such high quarters, we feel still more so of the steady and increasing support which we receive, not only from the Legal Profession of Upper Canada, but from Division Court and Municipal Officers, Magistrates, and all others concerned in the administration of justice. As the successful lawyer points to the number and respectability of his clients in proof of his success, so do we point to the number, respectability, and intelligence of our readers, in proof of our success and our influence.

More than one rival has been started in the hope of diverting some of our municipal and other patronage, and, after a sickly existence, has died a premature death. We need do no more at present than refer to the fate of the *Municipal Economist*, and we do so in feelings of sadness rather than of triumph. While we fear no opposition, we entertain no feelings of jealousy. We are glad to learn that the *Municipal and School Reports* are likely to succeed. There is room enough for us both. Our spheres are not precisely the same; and even were they so, these Reports would not suffer any injury from any wilful act of ours. We wish them every success, and shall not fail to lend a helping hand, if in our power, to contribute to their success.

In the volume which with this number we commence, increased attention will be given to the claims of Division Courts upon us. A treatise on the practice of Division Courts is already announced, which, in addition to the information ordinarily furnished by us, will appear in the *Law Journal*. As in times past, so in the future, we

shall solicit inquiries from Division Court officers and others, when in doubt as to the practice or procedure in Division Courts, or as to the construction of the statute or rules governing and regulating that practice and procedure. We are never more happy than when giving information of this kind, and therefore constantly and continually solicit inquiries. We also invite candid discussion on all matters of interest to the courts. Discussions of such a nature, conducted in a proper spirit, do much to promote the well being of the courts, and for this reason will always find ready admission to our columns.

The number of Chamber decisions on points of practice in the Superior Courts has not been as great as we could have desired. This has been owing rather to a paucity of decisions than to neglect to report decisions. When the Common Law Procedure Act, 1856, first came into existence, an entirely new practice was established, and every day brought its new points decided. Then our columns teemed with reports of points of practice decided in Chambers. But now the scene is changed. The new, ill-understood, uncertain practice of 1856 is the settled and well-understood practice of 1860-1. For twenty cases then decided on points of practice, there is not one now to report. Still new points, though few, do arise, and it shall be one of our objects to chronicle them as decided. Our readers may rely upon attention to this important branch of our duty.

Nothing more occurs to us at present. Our anxiety is to make the *Law Journal* as useful as possible to its patrons. Acting in this spirit, we shall be at all times glad to receive suggestions from its readers. While, however, making this declaration, we cannot promise to adopt every suggestion offered to us. To do so would be both absurd in itself and destructive to our stability. Our chief concern is in the first instance to satisfy all subscribers; failing this, our next is to satisfy the greatest possible number. While such is our desire and such our line of conduct, we cannot be expected to adopt extreme views, or to do out-of-the way things, in order to satisfy the caprice or mistaken zeal of any individual subscriber.

COUNTY COURTS—JURISDICTION IN EJECTMENT.

(*Continued from page* 207.)

The jurisdiction in ejectment is limited to the County Court of the county in which the premises sought to be recovered lie. (Sec 7, County Courts Act)

It is just possible that premises may be partly in one county and partly in another, and in that case a recovery could only extend to the portions lying in the particular county. In *Re Ellis* v. *Peachey*, 5 Dowl. & L. 675, will be found a decision on an analogous enactment.

The action of ejectment in the County Courts is restricted to the following cases: Where the term and interest of the tenant of any such corporeal hereditament shall have expired, or been determined by the landlord or tenant by a legal notice to quit: Where the rent of any such corporeal hereditament shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

There is ample room to dilate upon the grounds stated, but, as they involve for the most part matters of general law, we purpose merely to refer to a few points.

Where a tenancy is once created, it can only be determined by effluxion of time—by surrender—by forfeiture—by notice to quit.

If the tenancy be for a term certain, on the expiration of that term the tenancy ends without any act done by either party. No notice to quit is necessary; both the parties have notice from the lease of the period at which it determines. The lease constitutes the tenant's title to the possession; with its expiration the right of possession ends. He is only a tenant by sufferance, and may be treated as a trespasser. The landlord's reversion becomes a right to *the possession*. (*Right* v. *Darby*, 1 T. R. 162; *Cobb* v. *Stokes*, 8 East 358; *Hey* v. *Moorhouse*, 6 Bing. N.C. 57; *Butcher* v. *Butcher*, 7 B. & C. 399)

A tenancy, however, from year to year, from month to month, or the like, is a continuing interest until determined by one of the parties; and under a lease for seven, fourteen, or twenty-one years, without specifying at whose option it may be determined, the lessee only has the option of determining it at the end of the seventh or fourteenth year, and this option passes to the devisee (*Doe Duckett* v. *Watts*, 9 East. 16)

A surrender in express terms and *by operation of law* is briefly but most ably treated of in Smith's Landlord and Tenant, page 223

With regard to a tenancy from year to year, as it is a continuing interest it must be determined by notice to quit; and in proceedings in the County Court, under the enactment before us, it will be often important to determine what is a tenancy from year to year, and in this connexion what agreement operates as a demise, and when and as to notice to quit what notice is sufficient—waiver of notice—the obligations attendant on a demise, &c. &c. &c.

To enter upon these topics would be to open up an extensive branch of the law of landlord and tenant, which, with all the valuable text books on the subject easily attainable by the reader, would be idle work on our part; and it would little benefit the practitioner to string together a

number of cases, which may be easily found better arranged than we would undertake to give them in an editorial.

If ejectment be brought for non-payment of rent, it ought to be borne in mind that the landlord must "have right by law to enter for non-payment thereof," and so the forfeiture must be in force at the time of action brought. If there be any waiver by landlord, his right of action is gone; therefore the bearing of the doctrine of waiver upon the particular case may be considered.

The most common acts of waiver are receiving rent or suing for rent accruing after forfeiture. And here again we must refer the reader to the many valuable works which treat *in extenso* of this division of the law.

The third section of the Act provides for procedure by extending the practice of the Superior Courts to the County Courts; and the fourth section confers upon these courts the same powers that may be exercised by the Superior Courts in the action of ejectment.

It seems clear that, at the trial of the action, proof must be given to bring the case within the statute, *e. g.* that the plaintiff is landlord; of the existence of a tenancy, and the yearly value of the premises, and, of course, of the landlord's right to possession.

WRITS OF INJUNCTION AT LAW.

One of the recent amendments of the law has been that of conferring jurisdiction upon courts of common law to grant writs of injunction.

In case of breach of contract or other injury where the party is entitled to maintain and has brought an action, he may in like case and manner, as provided with respect to writs of Mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right. (Consol. Stat U. C., cap. 23, s. 9).

But it is one thing to command obedience, and it is another to enforce it. However valuable the power to issue a writ of injunction might be, that value is much impaired if the power to enforce obedience is not fully equal to every emergency that may arise

The Act above cited provides that the writ of injunction may be enforced by attachment by the court, or when such court is not sitting by a judge (Ib. s. 12). No direction is given as to the steps necessary upon breach of the injunction to procure an attachment. That is left to conjecture.

The practice of the Court of Chancery was formerly upon an affidavit of the service of the injunction and of its breach in the first instance to issue a writ of attachment, (Edin 75) That left no means of escape. While such was the practice the process of the court was calculated to inspire respect.

The modern practice, however, is to give notice to the party of the intended application (Edin. 76), and if upon receiving that friendly warning he is wise enough to snap his fingers at the court and change his residence, the court smiles benignly while forgetting the contempt of its process.

Is this all that the legislature has done when conferring the right to issue writs of injunction upon courts of common law? If so, the jurisdiction must prove in some cases where relief is much required to be a miserable abortion. Indeed, in one case, and the only case in which, to our knowledge, the jurisdiction of a court of common law to punish for breach of an injunction has been involved, the jurisdiction has proved to be a failure

We refer to *Melling* v. *Ellis*, reported in other columns. It appeared that defendant was in possession of a quarry situate at Queenston, on the confines of Upper Canada, and of quarrying implements to the value of $2000 belonging to the plaintiff, and when plaintiff sought possession of his property he was set at defiance by defendant—a man of no means, and as it afterwards turned, of a very reckless disposition. Plaintiff, under these circumstances, rather than resort to a breach of the peace, commenced an action against defendant to recover possession of the loose property so wrongfully witheld, and in that action claimed a writ of injunction to restrain the defendant during its pendency from removing or otherwise disposing of the property in dispute. Defendant was (to use the language of the writ) strictly enjoined altogether and absolutely to desist from selling or disposing to his own use, or removing any of the quarrying implements, &c., until the court should make an order to the contrary.

The writ was duly served, and the defendant did not choose to obey it. On the contrary, living as he did on the borders of the United States, he availed himself of the opportunity while defending the suit, and so gaining time of removing every article, probably to the United States of America, and afterwards, when conducting his defence in court, gloried in the fact that he had done so.

Of course, therefore, our reader remarks, he was duly punished for this flagrant contempt; in all probability he was imprisoned till he restored every article to the plaintiff according to the judgment of the court. Nothing of the kind. When application was made for a writ of attachment against him, the learned judge to whom the application was made, was compelled, by "the practice" to adjudge, that if the defendant did not forthwith follow the property into the United States he would run a serious risk of being

imprisoned. In other words, it was held to be necessary to give the defendant notice of the intended application for a writ of attachment, so that if he chose he might to a certainty make his arrangements on the day named to be *without* the jurisdiction of the court.

Can any one fancy a greater farce? The upshot of it is, that a man who wilfully and knowingly sets the process of the court at defiance, is told by the court that he is in danger and had better get out of Upper Canada as soon as possible. It may be said that one good effect at all events of this state of things will be, that we shall get rid of undesirable citizens. Probably . . But what satisfaction is this to the man who, relying upon the process of the court, loses probably all that he is worth in the world? What satisfaction (in the case above referred to) is it to the plaintiff who has lost his $2000 worth of property to say, the defendant is gone, and he is no loss to the country—you will never see him again! Truly such commisseration is bitterly sarcastic, better calculated to wound the feelings, better calculated to insult the common sense, than to replenish the pockets of the victim, who, relying upon the process of the court to protect his property, finds that he has been relying on a broken reed.

If the proceeding by injunction is to be retained it should be made effective, and if not made effective it had better be repealed. Better far that the process should never issue than be issued only to be derided. The man who blusters as to what he will do when it is well known that he is powerless to do anything, is laughed at for his pains. So the court that commands what it cannot effectively enforce is itself brought into contempt

We do not advocate that in every case an attachment should, in the first instance, issue for the breach of an injunction The liberty of the subject is too important to be at the mercy of a disappointed or revengeful suitor. But we do say, that in some cases the court should have the power, *if it see fit*, to issue process of attachment in the first instance.

If a creditor, having reason to believe that his debtor is about to abscond, desires to arrest him, the court does not require that notice shall be given to the debtor of an intended application on a particular day for process to arrest him, and simply because to require such a thing would be to require the perpetration of a downright absurdity. To require a notice to be served upon a man who violated the terms of an injunction under the circumstances of *Malling* v. *Ellis*, of an intended application for a writ of attachment, is not, to our mind, one whit less an absurdity. It is in truth worse than an absurdity—it is holding out a premium to a man to violate the strict injunction of the court, and protecting instead of punishing him when he does so.

We presume that the liberty of the subject could be safely placed in the hands of the court in cases of contempt. If not satisfied of the contempt, then let a notice be served, but if satisfied, the hands of the court should not be powerless to act.

We repeat, that the law which presents such an incongruity should either be wholly repealed or judiciously amended. We have done our duty in directing attention to it, and must leave to others the consideration of legislative action.

SUMMARY CONVICTIONS AND APPEALS THEREFROM.

BY A BARRISTER.

(*Continued from Vol. VI. page 271.*)

Appeals from summary convictions, or decisions of magistrates, are now governed by chap. 114 of the Consolidated Statutes for Upper Canada, and by chap. 99, sec. 117 of the Consolidated Statutes of Canada The first mentioned act regulates the practice in cases of appeal from convictions for offences or breaches of the law, *not being crimes*, and the other the practice in appeals from summary convictions under any of the criminal statutes of Canada.

The difference in the practice under these two acts is chiefly, that under the first, or Upper Canada Appeal Act, the notice of appeal must be given within *four* days after the conviction, order, or decision, and *eight* days before the first quarter sessions to be held not sooner than twelve days after such order, &c.; and under the other act, the notice must be given within *three* days after the conviction and *seven* days before the first quarter sessions.

If the first quarter sessions are held within twelve days after the conviction, the appeal under either act must be to the next following sessions.

The words "within four days" after the conviction, exclude the day of conviction; (*Scott* v. *Dickson*, 1 U C. Pr Rep, 366) and the words "eight days before" the first quarter sessions, exclude the first day of the sessions. (See as to the computation of time in cases of a similar nature, 2 U C Pr. Rep, 122, 126, 144, 145, 227, 230, 231, 233 & 259)

The terms "conviction," "order," or "decision," in the statute, refer to the judgment or decision pronounced by the magistrate, not to the formal record of that decision which may not be drawn for some time after. Courts of quarter sessions have discretionary power to make rules of practice respecting the hearing of appeals, and the superior courts will not interfere unless the rules are manifestly wrong or unjust. (*Rex* v. *Lancashire*, (Justices) 7 B. & C., 692; *Rex* v. *Wiltshire* (Justices) 10 East. 404; *Rex* v. *Essex*, (Justices) 2 Chit., 385; *Regina* v. *Mont-*

gomerysuire (Justices), 3 Dowl. & L., 119; *Regina* v. *Bakewell*, 7 Q. B., 601; *Regina* v. *Gloucester* (Justices), 11 Jur., 674; 16 L. J., 57.

The time within which an appeal must be entered, is fixed by the practice of each sessions. If no time is fixed the appeals may be entered and brought up at any time during the sessions. It is advisable, however, that a time should be fixed by each quarter sessions, in order that the magistrates in sessions may know what business they have to dispose of; and that the respondent may know whether or not the appellant intends to prosecute the appeal, and that he may not be compelled to keep his witnesses at court longer than necessary. In some counties it is a standing order of sessions, that all appeals be entered with the clerk of the peace during the first day of the sessions, and an appeal list made up by him for the information of the court.

Upon the hearing of appeals, the first step in all cases, after the appeal is called on and the jury sworn (if a jury is required), is that the appellant should prove his notice of appeal. The notice of appeal is the only instrument which brings the appeal before the court, and by general practice great nicety is required in drawing it. (Burns, Jus., Sessions, 206.) The notice of appeal by the statutes above mentioned, must be in writing. But in any case not coming under either of these acts, and the act creating the offence merely requires notice to be given, a verbal notice would be sufficient. *Rex* v. *Salop*, (Justices) 4 B. & Ald., 626; *Rex* v. *Surrey*, (Justices) 5 B. & Ald., 538; *Rex* v. *Lincoln*, (Justices) 3 B. & C., 548; *Rex* v. *Yorkshire*, (Justices) 4 B. & Ald., 685.)

The service of the notice of appeal may be proved by affidavit or *viva voce* in open court. Being a preliminary step to the hearing of the cause by the jury, and the sufficiency of the notice being a question for the court to determine, it is perhaps preferable to prove the service by affidavit.

As to the form of the notice, it must contain an intimation of the intention to appeal, and of the cause and matter thereof, and should be directed to the other party, and be intitled in the same manner as the conviction intended to be appealed against, and which may be recited in it. (Dick, Qr. Sess., 633.)

Under the Upper Canada Appeal Act, which provides that notice be given to the other party, or left with the convicting Justice for him, a notice directed to the convicting magistrate, and served upon him, has been held sufficient; but under the other act such a direction and service would not, it is apprehended, be sufficient. The notice of appeal should state, that the appellant is a party aggrieved by the act complained of (*Rex* v. *W. R. Yorkshire*, (Justices) 1 M. & R., 547; 7 B. & C., 678) The cause and matter must also be set forth in the notice; but it has been held sufficient to state as the ground of the appeal, that the appellant "*was not guilty of the said offence.*" (*Rex* v. *Newcastle-upon-Tyne* (Justices), 1 B. & Ad., 933; *Rex.* v. *Justices of Devon*, 1 M. & S., 411.)

Unless personal service is made necessary by statute, leaving the notice at the residence of the respondent would be sufficient. (Dick. Qr. Sess., 634.) It is doubtful if under the acts above mentioned, such a service would be sufficient, but if made upon the convicting magistrate it must be personal.

If the respondent does not appear at the sessions the appellant will not be allowed to quash the conviction appealed against, until he has proved notice of appeal.

After proof of notice of appeal, the respondent may show that the appellant has remained in custody, or entered into the recognizance required by the statute, or he may shew that the recognizance is insufficient. If the recognizance has not been entered into or is defective, the appeal will be dismissed. (See *Kent* v. *Olds et al*, reported in this number of the *Law Journal*.)

When notice of appeal is proved, and a jury sworn, the party making the complaint to the magistrate (generally the respondent) begins. The distinction between an appeal from a court of record, and an inferior court not of record, is thus stated by Lord Kenyon, in *Rex* v. *The Inhabitants of Newbury*, 4 T. R., 476: "In writs of errror and appeals to the House of Lords, where each party is in possession of all the evidence on both sides, the party who impeaches the decision below, always begins; but in a case of this kind, and where the appeal comes on to be heard naked and destitute of all evidence before the court, those who have done the act ought to establish the propriety of it by evidence."

There is this additional reason why the party making the complaint in the court below should begin—that the parties are not restricted to the evidence adduced before the convicting magistrate, but may adduce new evidence. Where, however, by the practice of the Sessions, the appellant was bound to begin, and the appeal was dismissed on account of his refusal so to do, the court above refused to interfere. (*Rex* v. *Suffolk*, Justices, 6 M. & S. 57).

Upon the verdict of the jury being given, on order of court should be made in accordance with their finding, and that with or without costs as the court shall think fit.

The magistrates in Sessions have by the statute general power over the costs. But they cannot order the person charged with an offence, and who has been acquitted by the jury, to pay any part of the costs of the appeal, or convict him of an offence for disobeying such order, (*Regina* v. *Orr*, 12 U.C. Q.B., 57) It is a general rule in

courts of Quarter Sessions to award costs to the successful party; but where the conviction has been quashed for matter of form merely, it is usual in several counties to quash the conviction without costs, for the reason that as the conviction is drawn up by the magistrate, and not by the party seeking to uphold it, it would be unreasonable to make the respondent pay costs for an informality not committed by him or by any person under his control The party objecting to the form may waive the objection and try the appeal on the merits The defect in the conviction may, however, be of such a nature as to go directly to the merits, and in that case it would not be unreasonable to make the respondent pay the costs of the appeal.

Where costs are awarded they form a part of the judgment, and the amount should be fixed and stated in the order of Sessions. The court cannot grant costs to be taxed by the Clerk of the Peace or by any other person; though they may obtain the opinion of third persons, and if they think fit adopt that opinion. They must themselves fix the amount during the same Sessions, (*Rex* v. *St. Mary's, Nottingham*, 13 East. 57; *Rex* v. *Skinn*, cited in *Rex* v. *Sweet*, 9 East. 27; *Regina* v. *Long*, 1 Q B., 740; *Selwood* v. *Mount*, 1 Q.B., 726; *Regina* v. *Clark*, 13 L. J., 91; but contra per Coleridge, J., in *Regina* v. *Westmorland* (Justices), 12 L.J., 113.)

It is stated by Dickinson to be the practice at many Sessions to allow forty shillings to the successful party where costs are given.

The usual practice in courts of Quarter Sessions is to have the costs taxed by the Chairman or Clerk of the Peace, and upon such taxation the amount is inserted in the order of Sessions made in the matter of the appeal, and the order is then passed by the court. In the taxation of costs a counsel fee of $5 is allowed in some counties to the successful party; in other counties it is refused. And in some counties counsel fees are allowed only to the county attorney.

A court of Quarter Sessions cannot delegate its authority to a third party as a referee to decide an appeal even by consent, (16 Vin. Abr. 417, *Rex* v. *Harding*, 2 Salk. 477). However, they may refer a matter to a committee of their own body in order to report to them, and may adopt the report without further exercising their judgment (*Rex* v. *Harding*, 2 Salk., 477; *Rex* v. *Natland*, cited 5 Tyr., 1056).

A second conviction, it appears, may be filed with the Clerk of the Peace after the first has been returned, (*Wilson* v. *Graybiel*, 5 U. C, Q B, 287:) but after the case has been called on and the matter is in the hands of the court, a new or amended conviction cannot be filed; because, when the case is taken up, and is under the consideration of the court, it becomes a part of the records of the court, and therefore no longer under the control of the magistrate: and the court of Quarter Sessions have no power to amend or change the record of the proceedings of an inferior court.

Appeals may be respited from one court of Quarter Sessions to another, and no notice of trial or of intention to proceed at such subsequent Sessions is required under the Statutes in force in this Province relating to appeals.

The judgment of the court of Quarter Sessions may be appealed from if the conviction is bad on the face of it, (*Shaw* v. *Hespeler*, 16 U.C, Q B, 104), but not on the merits, (*Regina* v. *Impey*, Hil. Term, 4 Vic, P.C., Jones, J, M S R & H. Dig. Appeal, 1; *Regina* v. *Hussey*, 2 U.C. Pr. Rep., 194, but see *Victoria Plank Road Company* v. *Simmons*, 15 U.C., Q.B., 303, and *Regina* v. *Watson*, 7 U C., C P., 495, where a doubt is expressed on the point.) These cases were, however, decided before the passing of the Criminal Appeal Act, 20 Vic. chap. 61. The effect of that act upon the right of appeal remains to be decided.

HARRISON'S C. L. P. ACTS.

Messrs. Maclear & Co., 17 & 19 King Street East, Toronto, the publishers of this work, have caused to be compiled and published a Table showing the sections of the C. L. P. Acts of 1856 and 1857, and the sections of the Consolidated Statutes of Upper Canada with which they correspond.

This Table will be of incalculable benefit to all who desire with facility to make use of Mr. Harrison's notes on the different sections of the old Acts as applicable to the present Consolidated Statutes.

Bearing in mind that the Consolidated Statutes are not new laws, but only a different arrangement of the old Acts, Mr. Harrison's work on the old Acts, accompanied by the table to which we have referred, will be nearly as useful to the practitioner as when first published.

We understand that every person who has purchased or who may purchase a copy of Harrison's C. L. P. Acts, can receive without cost, upon application to Messrs. Maclear & Co., a copy of the Table, and we presume that upon these terms there will be no lack of applicants.

We are requested to mention that Messrs. Maclear & Co. still have for sale a few copies of Mr. Harrison's work on the Common Law Procedure Acts; and as the Editor of the work has no present intention of issuing a new edition, these copies ought to be in good demand.

THE MUNICIPAL MANUAL.

In reply to the inquiry of a correspondent as to the best work on municipal law of Upper Canada, we have only to state that Harrison's Municipal Manual is the only work of the kind in Upper Canada.

THE GRAND TRUNK RAILWAY COMPANY.

It is generally known that at the last Assizes for the County of Ontario verdicts were recovered against this Company for very large amounts, by Glyn, Mills & Co., and Messrs. Baring, Brothers, the well-known London Bankers.

It was at the time said that the right of these creditors to the Rolling Stock, under any executions they might issue, would be disputed by the First Preference bondholders.

We now learn that a bondholder has submitted the question of priority to eminent English counsel, and subjoined is published as their opinion, for which we are indebted to our esteemed cotemporary, the *Law Times*.

OPINION.

1. We are of opinion that, by the terms of their bonds and of the Canadian statutes, the first preferential bond-holders of the Grand Trunk Railway of Canada possess a hypothic, mortgage, charge, or lien, of the same nature, covering the same kinds of property and ranking in the same order of priority with that which the province had previous to the Act of 1856, stat. 19 & 20 Vict. c. 111; and that such charge extends to the rolling stock and plant of the company as well as to the road and works, and is a first charge thereon.

2. We are of opinion that the said first preferential bondholders are entitled, in case of any danger to their security, to have receivers appointed, or such other means employed as by the laws of the respective jurisdictions through which the railway passes may be provided for protecting and making available the property included in their charge; and assuming that there is an evident prospect of the revenue of the company proving insufficient to pay the interest becoming due on their bonds, and that judgments to large amounts have been obtained against the company in Upper Canada, we consider that an application to the Court of Chancery in Upper Canada for a receiver, and an injunction to restrain the judgment-creditors from issuing execution, would be successful.

H. M. CAIRNS.
R. PAUL AMPHLETT, Q.C.
JOHN WESTLAKE.

MICHAELMAS TERM JUDGMENTS.

QUEEN'S BENCH.

Present: ROBINSON, C. J.; MCLEAN, J.; BURNS, J.

December 15, 1860.

The Queen v. *Rapelle.*—Question: whether instrument forged by defendant was an order for payment of money? *Held*, only to be a request, and not an order. Conviction reversed. Prisoner discharged.

The Queen v. *Pahmahgay.*—Question: whether the testimony of an Indian, who was not a Christian, sworn on the Gospels, is admissible? *Held*, admissible. Conviction affirmed.

The Queen v. *Robert Armstrong.*—Question: whether defendant, under the circumstances of the case, was an agent within meaning of Con. Stat. Can. cap 92, sec. 44? *Held*, not. Conviction reversed.

The Queen v. *Tisdale & Shearer.*—Criminal case. Application for a new trial. Rule *nisi* refused.

Prosser v. *Henderson.*—Rule *nisi* for new trial granted.

Coston v. *Knaggs.*—Rule *nisi* for new trial refused.

Commercial Bank v. *The London Gas Company.*—*Held*, that defendants, a gas company, are not justified in withholding gas from plaintiffs, because plaintiffs dispute an account of defendants as excessive, and refuse to pay it; but that a mandamus is not the proper remedy. Rule for mandamus, therefore, refused.

Pogue v. *Pogue.* Rule *nisi* for new trial on affidavits.

Argle v. *Baldwin et al.*—Rule *nisi* for new trial refused.

Chapple v. *The Great Western Railway Co.*—Action by administratrix for negligently causing the death of deceased. Verdict for defendants. Application for new trial. Rule refused.

Rees v. *The City of Toronto.*—Action for debt against defendants. Nonsuit. Application to set it aside. Rule refused.

Canada Life Assurance Co. v. *Jarvis et al.*—Rule *nisi* for new trial granted.

Addison v. *Burrill.*—Rule *nisi* for new trial granted.

Purdon v. *Playfair.*—Application for new trial upon affidavits of some jurors that they believed their verdict incorrect. Rule *nisi* discharged.

Carlisle v. *Hoshell.*—Application for new trial. Rule *nisi* refused. Equitable plea held bad, and not proved by evidence.

Wright v. *McGinnis.*—Application for new trial. Rule *nisi* refused.

Hutt v. *The Welland Railway Co.*—Rule absolute to enter nonsuit pursuant to leave reserved.

O'Mullin v. *Bishop.*—Rule *nisi* to set aside verdict discharged.

In the matter of John Anderson.—Prisoner remanded.

School Trustees of City of Toronto v. *City of Toronto.*—Application for a mandamus on the city of Toronto to levy a school rate. Rule absolute.

McDougall v. *Elliott.*—Rule absolute to add £27 10s. to verdict for plaintiff.

Tyson v. *The Grand Trunk Railway Co.*—Action for loss of a mare and destruction of a waggon by negligence of defendants. Verdict for plaintiff, with leave to move to enter a nonsuit. Rule *nisi* discharged.

Sage v. *Callaghan.*—Rule *nisi* for new trial discharged.

Brown v. *Brockville and Ottawa Railway Co.*—Action by plaintiff for injury to himself and destruction of his waggon through negligence of defendants. Verdict for plaintiff, with leave to defendants to move to enter a nonsuit upon, among other grounds, the ground that the action was not brought within six months. Rule absolute to enter nonsuit.

Corporation of County of Perth v. *McGregor.*—Rule absolute for new trial, with costs to abide the event.

Robinson v. *Grange.*—Rule discharged, but without costs.

McGee v. *Baird.*—Rule absolute to postpone execution in this case to two other executions, under the Consol. Stat. U. C. ch. 26, sec. 17.

December 22nd, 1860.

McArthur v. *Cool.*—Former judgment in this cause must be held good until reversed by appeal. Postea to defendant.

Whitehouse v. *Roots.*—Replication good, and plaintiff entitled to judgment on demurrer.

Cross v. *Goodman.*—Defendant entitled to judgment on demurrer.

Williams v. *Marshall.*—Rule absolute for new trial, without costs.

Great Western Railway Co. v. *Corporation of Dundas.*—Judgment for plaintiffs on demurrer.

Evans v. *Morley.*—Judgment for plaintiff on demurrer to 1st, and 3rd pleas, and for defendant on demurrer to 2nd and 4th pleas Either party may apply in Chambers to amend within one month

Hard v. *Palmer* —Judgment for plaintiff on demurrer, with leave to apply in Chambers within a fortnight

Cartwright v. *McPherson.*—Rule *nisi* discharged. *Burns, J.* dissenting.

Garrett, exor. of Taylor v. *Provincial Insurance Co* —Judgment for defendants.

Henderson v. *Fortune,* (Belleville case)—Though verdict excessive new trial could only be granted on payment of costs. Questionable benefit to defendant. Rule *nisi* discharged Verdict for defendant stands.

Higgins v. *Corporation of Whitby* —Verdict to be entered for defendant on 2nd plea, and judgment for defendants on demurrer to same plea.

McKay v *Fee.*—Action for 24 per cent interest on a note after recovery of judgment in detinue for the note, and six per cent. interest cannot be maintained.

Ferguson v. *Grant.*—Appeal from County Court of Wellington Judge exercised a proper discretion in granting new trial. Appeal dismissed with costs.

Johnston v. *Burger.*—Appeal from County Court of Welland on rule for a new trial. Judgment not erroneous. The learned judge exercised a proper discretion on the facts before him. Judgment discharging rule affirmed, on plaintiff remitting all damages above $135. Appeal dismissed with costs.

United Counties of Northumberland and Durham v. *Town of Coboury.*—Rule obtained to set aside award. So much of award as to costs void. Rule absolute to set that part aside.

McLeod v. *McKay.*—Appeal from a county court on demurrer. Appeal dismissed with costs.

Marshall v. *McAulay.* — Appeal from a county court. Dismissed with costs,

Stewart v. *Cameron.*—Rule *nisi* for new trial discharged.

Smith v. *Paisley et al.*—Action against three defendants in tort. Verdict for one of defendants, and for plaintiff as to remaining defendants. Rule *nisi* for new trial on application of defendants. Nothing to shew that defendant in whose favor verdict given a consenting party. Stands till consent given or shewn.

Ferris v. *Waddel et al* —Action by plaintiff against defendants as sureties of defendant Waddel. Rule absolute to strike out $85 from plaintiff's verdict.

Clark v. *Donaldson et al.* — Stands till decision of *Moffatt* v. *Robertson* in appeal

Stebbins v. *Anderson.*—Rule *nisi* discharged

Matheson v. *Cummings.*—Rule *nisi* discharged.

Gladstone et al v. *McDougall et al.*—Rule upon defendant to shew cause why he should not pay plaintiff's costs of garnishee proceedings, and answer matters alleged in affidavit against him.

Kesteven v. *The Buffalo and Lake Huron Railway Co.*—Rule *nisi* discharged.

Haworth et al v. *Fletcher.*—Judgment of court below reversed, as to old lumber, &c , but stands for Fletcher as to horses, cow waggon, &c

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

December 15, 1860

Cullen v. *Nicherson* —Postea to plaintiff.

Smith v. *Cluxton.*—Rule *nisi* discharged.

Grant v. *McMillan.*—Rule *nisi* discharged.

Kelly v. *McDermott* —Judgment for plaintiff on demurrer.

Kindley v. *Gildersleeve.*—Judgment for plaintiff on demurrer.

Churchwardens of St. James v. *Daly.*—Judgment for defendant.

Manly v. *Hull.*—Peremptory mandamus granted.

In re Grover and the United Counties of Northumberland and Durham —Return quashed. Peremptory mandamus to issue.

Smith v. *Cleghorn.*—Rule *nisi* to enter nonsuit discharged, and rule for postea to plaintiff.

Mitchell v *The City of Toronto.*—Rule *nisi* granted.

Ladies of Sacred Heart v. *Matheson.*—Rule absolute for nonsuit.

Miller v. *Cummings* —Rule for nonsuit absolute.

Drew v. *McAulay.*—Rule absolute for new trial without costs.

Lund v. *Smith* —Rule *nisi* to set aside award. Discharged with costs.

Rogers v. *Dickson.*—Rule *nisi* for new trial absolute, with costs to abide the event.

Clapp v. *The Corporation of the Township of Thurlow.*—Rule absolute to quash by-law, with costs, as by-law within sec 223 of the Municipal Act, and requirements of that section not complied with.

Dobbie v. *Tully.*—Rule *nisi* for new trial discharged.

Higgins v. *The City of Toronto.*—*Held,* that notice on Monday, 1st October, for Monday, 8th October, not sufficient. Rule absolute for new trial, with costs.

Baldwin v. *Bird.*—Rule *nisi* for new trial discharged

Wilson v. *Wilson.*—Rule *nisi* to enter nonsuit, pursuant to leave reserved, discharged.

Caldwell v. *Potter.*—Entry of stet process recommended.

O'Reilly v. *Utter* —Rule *nisi* discharged.

Crouch v. *Crawford.*—Rule *nisi* refused.

Murney v. *Conolly.*—Rule *nisi* refused.

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Ryland v. *King.*—Judgment for plaintiff on demurrer. Leave granted to apply to a judge in Chambers to amend within one month.

Wilson v. *The Corporation of Huron and Bruce.*—Judgment for plaintiff on all the breaches except the 9th, and on that judgment for defendant. Per Hagarty, J.: If the pleader had set out the agreement in its own words, our judgment would, in all probability have been the other way. Per Draper, C. J.: The pleadings are so badly copied that we have found it very difficult to understand the breaches: no division of sentences, or capitals to show the sentences.

Fraser v. *Armstrong* —Merger. Mortgage taken for a promissory note. *Parker* v. *McCrea,* 7 U. C. C. P. 124, upheld. Rule *nisi* discharged

Lyman v. *Snarr.*—Leave to amend within one month; and rule for new trial discharged without costs (four trials having taken place), otherwise new trial granted without costs.

Bank of Upper Canada v. *Upton.*—Action on promissory note that Upton and Brown made note and gave to Cotton, to get C E. Anderson to discount it for Cotton. That C. E. A. handed it over to Wm. J. Anderson, and after W. J. A. had endorsed it, he handed it over to the plaintiffs, who gave no consideration: and that they are trustees for Wm. J. Anderson. Rule discharged. Leave to appeal granted.

Bank of Upper Canada v. *Upton and Brown.*—Rule to allow plaintiff to come in and plead. Not shewn that defendant has any other defence than that in the previous case. Rule *nisi* discharged.

Moore v. *Gray.*—New trial on payment of costs.

McGowan v. *Farley.*—Rule absolute for nonsuit.

Roe v. *Southard* —Special case. Postea to defendant.

Campbell v. *Greer.*—Motion to arrest judgment on new trial. New trial without costs. (Hagarty, J , *dissentiente.*)

Kraeaer v. *Glass* —*Held,* that Con. Stat. U. C. cap. 73 does not alter the law as to the disability of a feme covert to make contracts; and that the note given by plaintiff's wife was as against her void. New trial without costs.

Foster v. *Smith* —Setting down a cause for appeal from county court after time limited by statute an irregularity, and application in such a case should be made to Practice Court.

In re S. B. C., one, &c.—Rule absolute to strike an attorney off the rolls.

Caldwell v *Potter*—New trial without costs.

Ferguson v *Bell*—Under Fraudulent Assignment Act to set aside a fraudulent confession of judgment. *Per cur.*: Do not see that we can interfere summarily; but it might be proper to entertain it in ordinary course. Sheriff having notice of the fraudulent confession of judgment must exercise his discretion in paying. Rule discharged.

In re Abbot, one, &c—No rule.

Keene v. *Steadman*—Rule *nisi* discharged.

Hooker v *Gamble*—To be argued again

Smith v *Thompson*—Plea as it stands no answer; if amended the evidence given would not support it *Per cur* If not amended within a month, then a venire de novo. If amended then, new trial without costs

Manly v. *Hall*—Rule absolute without costs.

THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE.

(From the Solicitor's Journal.)

The annual meeting of this association was held on September 24th, at Glasgow, when Lord Brougham delivered an inaugural address. On the following day (Tuesday) his lordship again took the chair, when the proceedings commenced with an address by the Lord Advocate as President of the first or Jurisprudence department.

JURISPRUDENCE.

The Lord Advocate.—After the very comprehensive view of the duties and objects of this association which was delivered last night by your noble President, I shall proceed to fulfil the duty imposed upon me by the kindness of the committee in asking me to preside over the section devoted to jurisprudence, by a few introductory remarks, confined entirely to the proper business of that section, and devoted to elucidating shortly, the principles upon which we should seek for the reformation and improvement of the law in respect of its relation to social science, and some of the more salient and important topics which may probably fall under our attention in the course of our deliberations. We are to consider in this section law as a branch of social science—that is, in its immediate practical relation to common life. In one sense, it is nothing, but a department, or rather the embodiment, of social science, inasmuch as it is the mainspring of all social movements and relations. But the science of jurisprudence, in its more specific acceptation, is apart from its social results. It deals with what is, not with what ought to be; and the tendency of the study is rather to shut out than to enlarge the contemplation of its practical effects. It is, indeed, a science of the highest order, tasking the intellectual powers by demands on them for all the qualities combined which the exact and the more general sciences require—the grasp of generalisation which is essential to mental philosophy, with the careful analysis or indication characteristic of mathematical inquiry. But it is not in its scientific character that we are to deal with jurisprudence in our meetings here. We are to try this great science by its existing results as compared with existing necessities, to see how far this great machine corresponds in its effects with the great object for which alone it was created. But it is impossible to deny the great benefit which must ensue from bringing in contact, not only the legal professors of different systems, but the trained and experienced lawyer, with the opinions and interests of those for whom laws are made, and who profit or suffer by them. Lord Bacon says, in his Essay on the Advancement of Learning:—"All those who have written of laws have written either as philosophers or as lawyers, none as statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars which give little light because they are so high. For the lawyers, they write according to the States where they live, what is received as law, and not what ought to be law: for the wisdom of a law maker is one, and of a lawyer is another." Jeremy Bentham, in his Treatise on Legislation, treats the lawyers with still more suspicion. He says,—"When a religion falls, its ministers fall with it. Everything which diminishes respect for the idol enfeebles that felt for those who sacrifice to it; so the voice of all jurists is raised in concert to celebrate an established system, and the people, misled by their unanimity, do not stop to discover the self interest which produces it." It is impossible to deny the justice of this sentiment. The jurist deals with men as with the pieces on a chess board: the debtor and the creditor, the man with security and the man without, the grasping landlord or the refractory tenant, are so many *dramatis personæ* who are to play their part and be removed, according to the most approved rules of the art. But in the intellectual absorption of the struggle, the flesh and blood of the matter is necessarily forgotten. The unlucky suitor, who has dropped a link in his title, and has become the unwilling hero of a leading case, is looked upon with a malignant triumph as a traitor to the first principles of conveyancing. The law has retained its purity. The judgment has established the foundations of the science against his attempt, and the lawyer recurs with pride to the decision. No thought all the while for the litigant, who paid his money and lost his property. No question how it came about that he could not tell how to take his title until instructed by a lawsuit, and canonised in the reports of Shaw and Dunlop. No reflection that, although the judgment was approved by the soundest jurists of the day, it has produced to the parties immediately concerned nothing but injustice. Such is the inevitable tendency of the exclusive pursuit of any science; but in the study of the law and the practice of it, which entails such stern demands on a life's erection, it is inevitable. Men acquire a kind of personal attachment to the implements with which they work, and it costs them a pang to see destroyed, by a sudden and innovating hand, the weapons which it has cost them such toil to find, and such labour to learn to use. Of course, this criticism, or rather confession, of the necessary tendency of legal training, is only comparative. I need not, in this presence, tell you that a great lawyer may rise above the trammels of his art and combine the grasp of the philosopher with the knowledge of the jurist, and superadded to both the practical sagacity of the statesman. Still less am I disposed to encourage socialist or empirical innovation, springing generally out of specific cases, and propounded in ignorance of the system to which it is proposed to apply them. If high scientific acquirements in jurisprudence have a tendency to produce too exclusive devotion to things as they are, it does not by any means follow that enlarged views and wholesome change are only to be looked for as the companions of ignorance. Still, in our prosecution of the objects of the department over which you have asked me to preside, we must be content to throw behind us the professional fetters of our training. In our meetings here we have all the elements Lord Bacon enunciates, and one he did not recognise. We have the lawyers, the philosophers, the statesmen, and, in addition to all, in this great emporium of the transactions of life, where men and money come and go with such startling rapidity, we have the presence, the co-operation, and the practical wisdom of those who are trained in the lessons of daily business, and who form their opinions of what laws ought to be from their recurring experience of what they are. I therefore come to consider in what spirit and on what principles the social results of our system of law are to be canvassed and reformed. I shall start with a caution on the other side. If the jurist be too apt to hug the chains of his science, and magnify the importance of time-honoured forms and axioms, the unskilled reformer has also perils of his own; and, among the chief, is the danger of unsettling much in order

to rectify a little. The legal system of a country like ours, in which the laws have not been dictated by a Justinian or a Napoleon, but have been made by the people for their own use, is a plant for slow and gradual growth, spreading its tendrils widely, and striking its roots deeply around and throughout the whole social economy of the community; just as our system of civil liberty and Parliamentary government subsists and flourishes by a secret spell, the fruit of gradual accommodation to the habits and associations of the people, notwithstanding many anomalies and theoretical contradictions. So it is with our laws. The law which is most imperfect in theory may be most useful in practice—or may, through length of time or repeated judicial consideration, have become, while retaining its outward form, animated by a spirit never contemplated by its authors. We shall be merely shallow innovators, and undeserving the name of reformers, if we neglect this unseen but potent element—that which, in truth, is the very life-blood of a nation's prosperity. For experience tells us every day that it is not by laws which are written in a statute-book, nor by constitutions proclaimed in public, that nations flourish or are free. Freedom and laws are the products of time as well as of patriotism and wisdom; and must be accommodated not only to the abstract rules of justice, but to the habits and tendencies of those who are to receive them. It might, I believe, be said of our law, as was said of political constitution, that if the whole fabric were swept away at once, and the greatest wisdom which the land could furnish were to devise a new system, they would not produce anything which would be comparable to that which they had destroyed. I may here remark, that the element of which I speak is one of which the legal reformer cannot avail himself. What he does in the way of change, must be done by specific enactments. He cannot provide for the effect which his new law may have, when a century of application and decision has passed over its head. Lord Bacon felt this so strongly, that in a sketch which he entitles "A Proposal for Amending the Laws of England," he has hardly courage to propose proceeding by Act of Parliament. He says —"It is objected that labour were better bestowed in bringing the common laws of England to a text law, as the statutee are, and setting both of them down in method and by titles." To which he replies:—"It is too long a business to debate whether *lex scripta, aut non scripta*, a text law, or customs well registered, with received and approved grounds and maxims, and Acts and resolutions judicial, from time to time duly entered and reported, be the better form of declaring and authorising laws. It was the principal reason or oracle of Lycurgus that none of his laws should be written. Customs are laws written in living tables, and some traditions the Church doth not disauthorise. In all sciences they are the soundest that keep close to particulars; and, sure I am, there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law. But howsoever that question be determined, I dare not advise to cast the law into a new mould. The work which I propound tendeth to pruning and grafting the law, and not to ploughing up and pruning it again; for such a remove I should hold indeed for a perilous innovation." Yet Lord Bacon in this, and some other of his fragments on the same subject, shows himself to have had large and enlightened views on the subject of legal reform, and was not unprepared to have proceeded boldly enough in the direction of repeal. Lord Stair, a name not unworthy to be placed alongside that of Bacon in respect of power and learning, but who does not disclose the same tendencies in favour of freedom, thus treats the same subject in strong and serious language. He says:—"Yea, and the nations are more happy whose laws have entered by long custom, wrung out from then debates upon particular cases, until it came to the consistence of a fixed and known custom; for thereby the convenience and inconveniences thereof, through a tract of time, are experimentally seen: so that which is found in some cases convenient, if in other cases afterwards it be found inconvenient, it proves abortive in the womb of time before it attain the maturity of a law. But in statutes the lawgiver must at once balance the conveniences and inconveniences, wherein he may and often doth fall short; and there do arise *casus incogitati*, wherein the statute is out, and then recourse must be had to equity. But those statutes are best which are approbatory or correctory of experienced customs; and in customary law, though the people run some hazard at first of their judges' arbitrement, yet, when that law is come to a full consistence, they have by much the advantage in this, that what custom hath changed is thrown away and obliterate without memory or mention of it; but in statutory written law the vestiges of all the alterations remain, and ordinarily increase to such a mass that they cease to be evidences and securities to the people, and become labyrinths wherein they are fair to lose their rights, if not themselves, at least they must have an implicit faith in those who cannot comprehend them without making it the work of their whole life." There is not wanting in these sentences a tinge of the predilection for the arbitrary power of courts, which was characteristic of our Scottish system for many years afterwards. But in both there is much truth; and herein lies the great difficulty, in England especially, of dealing with the great mass of the statute law.

CODIFICATION OF THE STATUTES

There would be no great difficulty in expurgating the Statute Book of laws wholly repealed; but the next step is surrounded by obstacles. The re-enactment of statutes partially repealed, and the consolidation of laws relating to the same subject, bring the legal reformer at once into contact with that unwritten law which has sprung from the stem of the statute, and has been engrafted on it by judicial decision. This difficulty has always appeared to me so great, that I am rather inclined to think that either more or less should be attempted; and that if we are ambitious of more than publishing a compendious edition of the statutes, embracing those in ordinary use, it will be found impossible to effect any very material improvement short of codification in some branches of the law. It is worthy of consideration whether in the more important branches of the law codification should not supplement the attempt to consolidate. It would be presumptuous in me to do more than offer a suggestion on this important subject in so far as it relates to the sister kingdom. But looking to the enormous and heterogeneous mass of statute law under which the jurisprudence of England lies, and through which the precious ores of grain are to be searched, it would seem a task more likely to succeed to sweep away much that exists, and supply its place, not by new words, professing to repeat old provisions, but by clear and specific codification. With us the case is different: the statute law of England was the bulwark and protection of her liberties. If, in Scotland's earlier history, we could not boast of similar protection, on the other hand our statute book is not similarly encumbered; unlike those of England, a Scottish Act of Parliament is abrogated by disuse, and those that remain are short general enactments, drawn to be the basis of future law, to be founded on them by judicial interpretation; and so, as Lord Stair expresses it, "attain the maturity of a law." This, however, is a subject which the members of this section will be better able to discuss than I can pretend to be.

BANKRUPTCY AND INSOLVENCY

This leads us naturally to say a word on the subject of the law of bankruptcy. In common with all who take an interest in legal progress, I lamented the fate—the undeserved fate—of the Bill of my friend the Attorney General during the last session. Smothered as it was under the heavy pile of unproductive and unremembered loquacity, which met with such unsparing castigation last night, I hope it still retains its vitality and will re-appear under happier auspices. It is a measure worthy of the reputation of its author, who unites, with pro-

found learning, and unrivalled powers as an advocate, the enlarged and statesmanlike views of a great reformer of the laws. In this respect, we in Scotland have already tried the experiment he was anxious to introduce, and with what success, I believe, in the course of our discussions, we shall have opportunity of obtaining useful and interesting information. The general feature of a useful system of bankrupt law may be very safely gathered from what I call the instinct of trade. When we had traders flying from the laws made for their benefit, and recurring to private tribunals of their own constitution, we may conclude, with absolute certainty, first, that there must be some radical defect in the law as it exists, and, secondly, that the true remedy is to be sought in the direction to which, with all its difficulties and uncertainty, the creditors of insolvent debtors have had recourse. In other words, let the creditors, as the Attorney-General proposed, manage their own affairs when they prefer to do so. Too much still survives of the old notion, that bankruptcy demands the intervention of the State for its degradation and punishment. So, of old, our debtors were denounced rebel to the Sovereign, were exposed to the *justos carceres*, wore a distinctive dress, and were subject to manifold indignities, superadded to the total loss of their worldly goods. These severities were the clumsy weapons of a ruder age, to compel the disclosure of hidden resources, and punished the innocent and the guilty alike. But the true object of the law of bankruptcy should be the rapid, thorough, and economical application of the whole available funds of the debtor to pay his creditors. That is the main and primary object of a system of bankrupt administration. The discharge of an innocent, the punishment of a fraudulent debtor, are subsidiary objects, important in themselves, but which should not be allowed for a moment to interefere with the main object of realising and distributing the debtor's estate with economy, certainty, and despatch. I do not altogether sympathise with the feeling which seems to prevail in some quarters that the main object of Bankrupt Law ought to be to check undue speculation, and that the interest of the creditors themselves should be subservient to the exposure and punishment of rash and improvident merchants. It is right enough to give to the creditors themselves the power of dealing differently with the debtor who has suffered from misfortune, and the debtor who has ruined himself by folly. And it is not only right, but essential, that the fraudulent debtor should be stringently and summarily dealt with. But a system of Bankrupt Law cannot be converted into a machine for regenerating mercantile morality, or restraining within bounds the spirit of speculation. It may, acting in its proper province, be of assistance in a work which is greatly needed: but it should never be forgotten, that the end and aim of all proceedings in bankruptcy is the benefit of the creditors; and no element which interferes with or retards the accomplishment of that object ought to be admitted. Thus, it may be true that settlements by composition have a tendency to prevent investigation, and encourage the reckless trader. Still, if the creditors thereby receive their shares of the debtor's estate more rapidly and cheaply, these contracts ought to be encouraged. We must look to more general and deeper sources for the repression of the gambling spirit in commerce. A sounder and more healthy tone of mercantile morality, and the instinct of self-preservation, are the only real safeguards against it, while, by endeavouring, to the prejudice of the creditors, to make our bankrupt system one of rewards and punishments, we shall accomplish little in the way of improvment, and promote much individual injustice. I cannot say that in the recent discussions on Sir Richard Bethell's Bill, I was much impressed by the objections which were raised to the extension of its provisions to non-traders. Indeed I am at a loss to understand what prejudice can possibly accrue to non-traders by the extension of a system beneficial to the mercantile community. The exclusion of non-traders from the provisions of the bankrupt law is not a privilege but a penalty. The vicissitudes and uncertainties of commerce were supposed to excuse the insolvency of those engaged in it, while, on the part of the community at large, bankruptcy is regarded as an offence. The law abated none of its rigour in regard to the over-truding debtor, as the dismal walls of Whitecross-street, and the Fleet can so well attest; but it withheld, as a boon not deserved by him, the ready means of payment and discharge which it provided for the unfortunate trader. In all this, there is not favour but discouragement to the non-trader, it is exclusion from a privilege, not exemption from a penalty, which is the object of the law. There are many reasons which, to my mind, are conclusive for the abolition of this distinction. A non-trader is as much bound as a trader to pay his debts, and to pay them according to the precise time and manner of his contract. It is as desirable for the creditors of a non-trader, as for those of a trader, that his available estate should be rapidly, cheaply, and justly realised and divided. It is here that the real difficulty arises. Landed proprietors have a vision of their ancestral acres being seized and sold for some paltry debt: and even the man who knows at the bottom of his heart that his estate is no longer his, shrinks from the act which he feels to be just as well as inevitable, of permitting it to be applied to liquidate his debts. Far better for him, as well as far more just to his creditors, did the law leave him no choice in the matter; and thus would be saved many a long-lingering, heart-broken life—prolonged from day to day in vague hopes, which reason from the first disowned, and which, had the worst been faced from the beginning might have been vigorous and useful. But there are two special reasons for extending the operations of the bankrupt law to non-traders—one in which the public has an interest, and the other important to the debtor. The first is the equalizing operation of bankruptcy. Of all the frauds to which insolvency gives rise, collusive and secret preferences are the worst, and the greatest and most salutary benefit of a correct system of bankrupt administration is the even-handed justice it secures. There can be no reason why the creditors of a non-trader should be deprived of this protection. The other is the power of discharge. It has been said that the worst use you can put a man to is to hang him; certainly it is little more profitable to shut him up, or to leave him at large an incumbrance on society. It may be true that it is a homage to the virtues of prudence and foresight to nail unhappy debtors to our barn doors, and leave them there, to the terror of the lieges; but I doubt if mankind ever learn the lessons which such discipline teaches. The man may be useful, if free—he is worse than useless if he is not—and at all events, it is but reasonable to give him the chance of freedom, if those who have suffered through him be willing, and his own conduct has been honest. The distinction between traders and non-traders has become so shadowy, that the filmy line of principle which used to separate them is now utterly capricious in its operation. I conclude, therefore, that the bankrupt law of both countries should extend to all, and should have for its object the shortest and cheapest way of dividing the debtor's estate ratably among his creditors, subject to judicial inspection, but under the management of the creditors themselves.

PUBLIC PROSECUTOR.

I now turn to the subject of a minister of justice or public prosecutor, in the criminal department of the law. Now this is a very large and important matter, but more fitted to be dealt with by English hands than by mine. As regards ourselves, I suppose I am hardly an impartial witness as to the usefulness of a public prosecutor. At the same time, I think I am entitled to say—because I speak now from very considerable experience of that office—that every year that I have had the opportunity of seeing the working of the system has increased my conviction that it would be very difficult indeed to devise a mode of prosecuting criminal business which would accomplish the twofold object which the prosecutor ought to

have before him—the detection of the guilty and the protection of the innocent. No doubt, a public prosecutor in an arbitrary state is very dangerous to the liberties of the people; but a public prosecutor, under the influence of public opinion and Parliamentary responsibility, is, in my opinion, as far as the practical working of it is concerned, the best mode in which the criminal affairs of a country can be conducted. It is impossible to deny that as crimes are crimes against the public, so the public should be at the expense of prosecuting and punishing them. And whatever may be the practical operation of the system in England, of which I say nothing, because I do not know much—whatever may be the practical operation of it, it has no right to leave upon a private prosecutor—who may be supposed to prosecute only for the injury done to himself—the vindication of the great public law, the breach of which is truly at the ground-work of the proceedings. And, accordingly, it has been the desire in England for many years to accomplish, if possible, this most desirable change. Again we are beset, however, with the same difficulties that I have alluded to in speaking of other subjects. We work here upon a small scale—we can keep everything within bounds—the public prosecutor and his deputies are cognisant of every offence that takes place in all parts of the land. He knows the proceedings that have been going on, and therefore he can judge personally for himself, on his personal responsibility, of the things that are done. Well, a great minister of justice in England would find it difficult to undertake the work to this extent; and it is quite true that without direct personal responsibility the office is one unquestionably exposed to danger and risk. Then, again, from the enormous mass of the English population, it would be a very difficult thing to keep within the Crown office, as we do, the whole records of crime—of such crime as requires public prosecution. These are practical difficulties. Again I say I cannot deal with them—I have not even the knowledge or information to suggest how they should be dealt with. At the same time, I think I may say that if the system we have works well here, there must be the means, in one shape or other, of bringing it also unto practical operation in England. Well, there is another question that has been raised. If we are to give a public prosecutor to England, are we to take a coroner's inquest and grand juries from England? I think it is not impossible that a paper, of which I see my friend Mr. Smith has given notice, may propose to deal partly with that question, and therefore I do not think it necessary to enlarge upon it at any length. All I can say is, that if a coroner's inquest is intended for the protection of the subject, if it is intended for the purpose of taking care that the cases shall be investigated and examined, I think that object may be attained without the necessity of importing so large and wide a system from England. For my own part I believe that in no where in Europe is crime more uniformly investigated or more efficiently detected than it is with us.

CORONERS INQUESTS.

But if a coroner's inquest is wished in order to detect crime—if the object is to ascertain and detect occult and latent crimes—I then say I would object to exchange a most efficient and philosophical machine for a very rough and doubtful one, because, if you are only dealing with the detection of the crime, can any man doubt that inquiry which is not public is the best and most efficient mode of detecting it? If you are to send a detective down to a remote county to ascertain the truth as to some act that had been committed in private, you would hardly put an advertisement in the newspaper that you had done so, and you would scarcely tell him, on his arrival, to proclaim at the market cross what he wanted. Quite the contrary, and there can be no doubt that the quiet investigation which goes on in the Crown Office in Scotland is infinitely better adapted to detect facts than the investigation which takes place before a coroner's inquest, which gives warning to the guilty, which throws suspicion upon the innocent, and which, for the most part, though it has served its turn nobly, as the production of England against arbitrary power—for the most part, I believe, not really to be conducive to the detection of the more secret and difficult crimes. But there is another object—another result which our system accomplishes, which the coroner's inquest was greatly against—I mean the protection of the innocent. I am not at this moment saying that the coroner's inquest should be abandoned in England. It is consonant to the feelings of the English people, and has been productive of good in England. I am only comparing it with our own system, and I say that any man who has experience of the Crown Office work in Scotland will admit that if it is good for the detection of crime, it is very potent in the protection of the innocent—in preventing false rumours from getting afloat—in discouraging false accusations—in preventing colourable appearances from being tortured by the public gossip into accusations of crime. For all these things I would deprecate the introduction into Scotland of the system of coroners' inquests as it exists in England, leading sometimes as it may to the unhappy man, who is thrown into circumstances of suspicion, having the finger of scorn pointed at him during all his days, and those who hear the accusation may never hear the refutation. But I own I do not very well see how the administration of criminal law can proceed much longer in England without some institution like that of a Minister of Justice. If our experience in Scotland can be of any assistance, I am sure it will be a pleasure for us as well as a duty to afford it.

ADMINISTRATION OF THE LAW

The only other matter to which I intend to refer was the large and extensive question of the administration of the law—the mode of conducting cases, their expense, and the rapidity of decision and judgment. But I shall not enlarge on these topics. I thank you very heartily for the attention with which you have listened to me. There is also the question of the assimilation of the law of equity, which to English lawyers is interesting, and which is interesting also to us, but I shall not longer detain the session from its deliberations. Many nations have good systems of laws, but there is a stage and a progress in which we have now to a great extent outstripped the rest of the world. There have been many great and beneficient systems of law announced by despotic rulers—the next stage in a nation's history is the potent, free, and independent administration of them, and for this, more than anything else, have come the bloody wars on which the freedom of nations has been gradually built up; judges rising against the power of the Crown if it required them to decide contrary to the spirit of the constitution and the laws under which they lived. It is to England that we owe it chiefly, and it is a great boon, for which we never can be sufficiently thankful, that even in the very worst of times, and when political principles were forgotten, the noble spirit of her judges stood upright amidst the crash of everything else that was noble and free in that country, and asserted there, for the first time, I believe, in the history of the world, the majesty of the law above every other power in the country. But we are past that stage—the thing is done—we have vindicated the power of administering the law, unawed by terror from any side; and now we stand in the position—and few countries can say the same, happy is the country that can—that in perfect security, the law be it what it may, will be administered with honesty and vigour. We can call such an assembly as this, of those who are lawyers and those who are not—those who have transactions and have to regulate the law by which they proceed—we can call such a meeting as this to deliberate what the law ought to be, in the perfect conviction that if, in the end, public opinion shall come to think that there will be a change, that change will be effected by the most constitutional means.

His Lordship concluded his powerful and talented address amid loud acclamations.

DIVISION COURTS.

TO CORRESPONDENTS

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

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

OFFICERS AND SUITORS.

The Law and Practice of the Division Courts.

We have received the first contribution upon the Law and Practice of the Division Courts, but too late for insertion in this number. This we regret, as we had fully intended to commence the publication with the new year.

A memorandum accompanies the sheets received, the contents of which our contributor desires should be made known. This we conceive will be best done in his own words.

A. V. (as our contributor chooses to designate himself) says, "The writer aims at producing a little manual of "practical utility upon the law and practice of the Division "Courts. The subject is somewhat wide, but he trusts "that a long experience and observation in these Courts "will enable him to make a selection, embracing as well "matters *necessary* to be done as matters of *most frequent* "*occurrence* in the Courts."

"The writer is desirous of aiding, so far as his abilities "permit, in giving practical value to the Division Court "system, believing that, so far, the Courts have, in a large "degree, accomplished the purpose for which they were "designed, and (while continued within reasonable limits "of judisdiction) are really useful and valuable tribunals."

"Such being his object and such his only motive, "County Judges and others connected with the Courts are "asked for cases or other information which their expe- "rience may point out as likely to aid him. All such will "be acknowledged if desired, and any suggestions made "will be gladly received."

"A similar arrangement to that in Lloyd's work on the "English County Courts seems most suitable in treating "the topics to be embraced, and will for the most part be "followed."

It is to be hoped so far as our valued contributor appeals to County Judges and others connected with Division Courts, for cases or other useful information in regard to the Courts, that his appeal will not be in vain.

We know that the County Judges in Upper Canada, as a body and as individuals, are not wanting in interest for the Courts over which they preside. We know also that the Division Court Clerks of Upper Canada, as a body and as individuals, have the success of the Courts, on which their livelihoods depend, at heart. Surely therefore "A. V." may reasonably look for that assistance which he asks, and which we trust he will abundantly receive.

Although "A. V." has given us no pledge to produce the matter he has undertaken within any limited time, yet he proposes giving as much in each number as other important engagements admit

GOODS EXEMPT FROM SEIZURE.

Claim for Rent upon Execution from Division Court.

We have much pleasure in giving a further communication from "B," on the subject of landlords' claims for rent when there is an execution from a Division Court against the tenant's goods.

A full discussion of doubtful questions of this kind in our pages (with an audience, so to speak, as numerous as our readers), cannot fail to prove beneficial to such of our readers as are interested in the point.

The most that any writer in a law periodical who examines questions of construction not expressly decided can do, is to argue the question on the materials before him, and give all that may be urged by those who take an opposite view.

In the question at issue between "B." and ourselves, our readers must judge for themselves. We cannot yet agree in the conclusion to which "B." has arrived. And when we say so, it is only proper we should add that our correspondent is one whose position and acquaintance with the subject is such as to entitle anything he may urge to great weight.

What we contend is this, that there is nothing in the exemption act to protect the goods of a tenant from distress or seizure by landlord for rent; that that act applies only to executions, and that by the Division Court Act the Bailiff of the Court is, upon claim served, made the Bailiff of the landlord for the purpose of the distress. He is not the Bailiff of the landlord for distraining the goods of a stranger, as was decided by the cases to which "B" refers, but it does not follow that he is not to be considered the Bailiff of the landlord for the purpose of distraining the goods of *the defendant* (the tenant) liable to seizure in distress for rent.

The argument in the cases referred to was, that there was nothing to restrict the landlord's right to have the rent satisfied out of the goods of a stranger on the premises, in case, after seizure, they are claimed by the owner, as he was entitled under the statute of Anne; but it was decided otherwise in *Beard* v. *Knight*, and *Vaughn* v. *Taylor and others*.

The language of Watson, B., in delivering judgment in *Vaughn* v *Taylor*, we think, makes this very clear and strengthens our position. "The statute 8th of Anne, is by direct enactment declared not to apply to goods taken in execution under a warrant of a County Court. The whole frame of the section seems directed to the case *where the goods levied are the property of the tenant*. The overplus of the sale and the residue of the goods are to be returned to the defendant, and we do not feel disposed to extend further than we are compelled to do, the undue hardship and anomaly that one man's property may be taken to pay another man's debt."

The 176th section of our Division Courts Act is similar to that of the English Act. It enacts that so much of the 8th of Anne "as relates to liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of the Divison Courts," &c.

"B" says, "if goods not liable to seizure or execution might in the one case be taken by the Bailiff, why not in the other, they being in both cases equally liable to be distrained by the landlord for rent?" We answer in the words of Baron Watson, "The *stranger* has a perfect right to remove his goods at any time or under any circumstances, to avoid the distress. This right is founded on the clearest principles of justice The stranger has no interest in the tenancy and is under no obligation, legal or moral, to allow his goods to be applied to pay the debt of a third person"

The goods of a *stranger* being on land demised, no doubt may be distrained for rent service, and it was this hardship and anomaly that the Courts in both cases referred to, and were not disposed *to extend*; but there is no hardship in taking a man's goods to pay his rent.

To the Editors of the Law Journal.

Permit me again to trouble you with a few further remarks on the subject of claims for rent served on Bailiffs acting under warrants of execution from Division Courts, and the cases bearing thereon referred to in my previous communication. In both those cases, I find, on again referring to them, that the goods seized were claimed by and decided on Interpleader to be the property of a third person, and though seized on the premises of the defendant, were yet not held liable for the rent so claimed, *because* they were not the goods of the defendant and were not liable to seizure under executions against him. No one will pretend to deny, however, that as a general rule, with a few well known exceptions, such goods would be liable to distress, in the ordinary way, by the landlord.

Now, if the goods of a stranger found on the premises of a defendant are not liable to seizure for rent under an execution, I should like to know upon what principle the goods of defendant, exempt by law from seizure under execution can be taken under that process to satisfy a demand for rent. I endeavoured at first to solve the difficulty by assuming, that on receipt of the notice of claim, the law authorized the bailiff to distrain without any direct authority from the landlord for that purpose. But on testing that view I found it unsound. For if goods not liable to seizure on execution might in the one case be taken by the bailiff why not in the other also, they being in both cases equally liable to be distrained by the landlord for rent.

On more carefully reading the judgment of the court in *Beard* v. *Knight*, I find the learned Chief Justice expressly states, as a conclusive reason, in his opinion, why the goods in question might not be lawfully taken for the rent, "that they were not liable to seizure under the execution." Now if this be the correct principle in the one case, I humbly submit that it must be so in the other.

The earlier decision in the case of *Woodcock* v. *Prichard*, 17 L. T., 16 Q. B., is directly contrary to what I believe to be the law governing this question, and I think, contrary to the latter decision in appeal of *Wilcox et al* v. *Searly*, and must now be held to be overruled by the latter decision. I think the present law of the Division Courts is the same as it was under the statute of Anne, in regard to this matter, with the exception that the bailiff is not now obliged to pay the rent before removal of the goods; but proceeds to sell at once, first to pay rent and then the execution debt—and this he does I believe under the writ, as formerly, and not by any authority in the notice of claim.

I regret having to take up your valuable space by again recurring to this subject. I know, however, your anxiety to afford information to Division Court officers, when likely to be serviceable, will render apology unnecessary.

21st December, 1860. B.

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister at Law.*)

IN RE LAWRENCE JOICE, CONVICTED BY ROBERT ANGLIN, ESQUIRE, A JUSTICE OF THE PEACE FOR THE COUNTIES OF FRONTENAC, LENNOX AND ADDINGTON.

Master and servant—Conviction—Application to quash same pro tunc—Limitation of action where conviction quashed

The Master and Servant Act, 10 & 11 Vic., ch. 23, does not apply to the case of school trustees and school teacher Where a trustee therefore had been convicted under it as a master the conviction was quashed

Owing to a misapprehension as to the office in which the return to the *certiorari* should be filed a rule to return, and afterwards a rule for an attachment, issued, although a return had in fact been filed More than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused.

Quære, whether the six months could be held to run only from the time of quashing the conviction?

Harrison, in Michaelmas Term, obtained a rule *nisi* calling on the justice to shew cause why the conviction should not be quashed as of Hilary Term last, on the ground that the said justice had no jurisdiction over the subject matter of the complaint, and the conviction was in other respects illegal and unlawful; and why the said Joice should not be allowed to issue process, and commence an action against the said justice in respect of the said conviction and the proceedings thereon, as of Hilary Term, or as of such other time as the court might direct, and why the said justice should not pay the costs of issuing the writ of *certiorari*, or the application for a writ of attachment, and of this application.

It appeared that Joice was one of the trustees of a school section in the township of Pittsburg, for the year 1857, and that he, with the other trustees, acting in their corporate capacity, in February, 1857, engaged a school teacher by a contract in writing, to teach in this section for ten months, which expired in January, 1858. Some dispute arose between the teacher and the trustees in regard to the teacher's salary, and upon a complaint made by the teacher to Mr. Anglin as a magistrate, the case was treated as one coming under the Master and Servant act, 10 & 11 Vic., ch. 23, and a conviction made of Joice as a master.

The conviction had been removed into this court, and it was sworn that while the proceeding upon the *certiorari* was pending, the justice had issued his warrant, and caused some of Joice's cattle to be seized and sold

When the writ of *certiorari* was issued and served upon Mr. Anglin, he immediately made a return of the conviction under the advice and instruction of counsel, and the writ and return was without delay sent to the clerk of the court, Mr Small, and filed in his office. Mr. Joice's attorney having been by mistake of the clerk informed that it had not been returned, a rule to return the writ of *certiorari* was taken out.

This rule was served in May or June last, and in consequence of it Mr Anglin's attorney on the 5th of June, called at the office of Messrs Patterson & Harrison, who had taken out the writ, and told them that it had been returned, and found the writ in the crown office

Hearing afterwards that a rule for attachment had issued for not returning the writ, the attorney, Mr Kirkpatrick, instructed his agent in Toronto to move to have the same rescinded, but it seemed it was understood between his agent and Messrs. Paterson & Harrison, that the attachment should not be acted upon.

Prince shewed cause.

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

The conviction is clearly illegal, and must be quashed, and the rule so far is to be made absolute It was clearly no case under the statute 10 & 11 Vic, ch 23, and the justice who convicted misapplied the statute

But as to that part of the rule which asks that Mr Joice should be allowed to issue process in the action against the justice on account of the illegal conviction as of Hilary Term last, or of any day other than the true time of suing out the writ, we should by that be depriving the justice of a protection which an act of parlia-

ment gives him, and we should be so far indirectly repealing the act The seventh section of 16 Vic , ch 180, provides that the six months within which the action must be brought are to reckon from the day on which the act was committed. in other words, from the time of the wrong done by the justice At least, so we construe the act If in consequence of the enactment in the second section of the act, which makes it necessary to have the conviction quashed before an action can be brought, the party is advised that the six months can be legally computed from the time of setting aside the conviction, he can proceed at the peril, perhaps, of having an application made to set aside the proceedings under the sixth clause of the act, or at any rate of having the lateness of the action urged in a more formal shape

Conviction quashed.

COMMON PLEAS.

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

Munson v Municipality of Collingwood.

School teacher—Salary—Action for—Mandamus re.

Held, that the Municipal Corporation Act does not authorise the acceptance by the treasurer of orders for school teacher s salary, although permitted to pay such orders on presentation, nor has the treasurer authority to bind the corporation by his acceptance of orders

Held, also that the board of school trustees of a town have authority to levy and collect a rate for the payment of school teacher s salaries and expenses and that they are liable in a n action for such expenses, or can be compelled by mandamus to raise the money

The declaration contained five counts. 1st. On an order made by the chairman of the board of school trustees, directed to the treasurer of the defendants requiring him to pay plaintiff or order £37 10s , which order defendants under the hand of their treasurer accepted. 2nd. On a similar order for $150. 3rd. For money had and received 4th That plaintiff was a common school teacher for one year next before the 10th of January, 1859, in the town of Collingwood; that on the 28th of March, 1858, the trustees of that school prepared and laid before the defendants an estimate of the sum they judged expedient for paying the salary of the plaintiff as such school teacher by levying and collecting a rate, and it then became defendants' duty to provide the said sum in manner aforesaid. That the trustees, on the 10th of January, 1859, gave plaintiff an order for £37 10s. on the treasurer, being plaintiff's salary as aforesaid; yet defendants would not provide that sum, or levy, impose, or collect a rate for payment thereof, but wholly neglected, &c. 5th. A similar count to the fourth, for the plaintiff's salary for six months, ending the 4th of July, 1859, being $150

Pleas —1st. A denial of the defendant's acceptance of the order mentioned in the first count. 2nd. Payment to the first count 3rd. To the second count denial of the defendants' acceptance of the order 4th To the third count, never indebted. 5th To the fourth count, that the defendants did provide the sum in that count mentioned, and did levy, impose and collect a rate for payment thereof 6th. To the fifth count, similar, to the 5th plea. 7th To the fifth count, that on receiving the estimate of the school trustees the defendants did impose a rate, and delivered the roll containing the rate so imposed to the collectors of the town; that the time passed for the return of the collector's roll has not expired, and defendants have not as yet received money Issues

The trial took place at Barrie, in October, 1859, before Sir J B Robinson, C J. The acceptance by the treasurer of the corporation of the town of Collingwood of the orders set out in the first and second counts was proved. The clerk of the defendants produced an estimate of the money to be raised in the year 1858 for school purposes, in which the plaintiff s salary was included, and he said a by-law was passed to raise that money, but on its being produced it appeared to be a by-law to raise money for school houses, library and apparatus, and it appeared that the sum required for school teachers was raised by a rate imposed by resolution He produced the minutes of the council of the 19th of April, 1858, shewing what the estimate embraced; that money was levied He also produced the estimates of school moneys required for the year 1859, which included the teacher's salary. A by-law was introduced to raise that money by assessment, but had not yet passed. It was read a second time on the 25th of July, 1859, and since then nothing had been done A small portion only of the taxes for 1858 had been collected. The clerk thought enough had been collected generally on the roll to pay the teacher's salary, but he could not say whether enough of the rate imposed for that purpose had been collected. The chairman of the board of school trustees was also called. He stated that in 1858, the first year of the incorporation of the town of Collingwood, the corporation paid people employed by them on the streets, &c., by orders on the treasurer, and those orders got into circulation, and many people paid their taxes with them, so that enough has not been collected in money to pay the school teacher: the government grant would be received by the end of June; the rest for the year is to be raised by a rate No separate rate was imposed in Collingwood. The government grant for the first six months of 1859 had not been paid to defendants The witness was a member of the town council of Collingwood as well as chairman of the Board of school trustees.

On the defence it was objected: 1st. That this action will not lie against the defendants. 2nd. That no acceptance by defendants was proved.

The jury, under the direction of the learned Chief Justice, found a verdict for the plaintiff on the 1st, 2nd, 4th, and 5th counts, and £65 damages, it being admitted that £10 was paid, and for the defendants on the 3rd count.

In Michaelmas Term, *R. A. Harrison*, obtained a rule *nisi* to arrest the judgment on the 1st, 2nd, 4th and 5th counts, or for a new trial on the law and evidence, the acceptance proven not being under the seal of the corporation, and the treasurer having no authority to bind them by his acceptance, and as to the causes of action set forth in the 4th and 5th counts, that the plaintiff's remedy is not by action.

McMichael shewed cause in the following term He referred to the Common School Act of U. C. 13 & 14 Vic , ch 48, sec. 18, subsec 1, and sec. 24, subsec 6, 7, & 8, and *Gibbs v. Trustees of the Liverpool Docks* (in error) 3 H. & N 164.

Harrison, contra, contended the action would not lie, that the plaintiff had a remedy under 16 Vic , ch. 185, sec 22, subsec. 6, and a mandamus also would lie. The complaint in the 4th and 5th counts is the right to pass a by-law, which is a matter between the school trustees and these defendants,—Tapping on Mandamus, 93 & 347. Even if the treasurer has funds he holds them as the servant of the corporation, and must apply them according to the direction he receives As to the 1st and 2nd counts, no authority has been shewn for the treasurer binding the municipal corporation of which he is a member by his acceptance.

Draper, C J —The School Act of 1850, section 18: 1st Enacts, that it shall be the duty of the municipality of each township to levy such sums by assessment upon the taxable school property in any school sections for the purchase of a school site, the erection, repairs, renting, and furnishing of a school house, the purchase of apparatus and text books for the school, b oks for the library, and salary of the teacher, as shall be desired by the trustees of such school section on behalf of the majority of the freeholders or householders at a public meeting Section 21 —The council of each incorporated town in Upper Canada shall be, and is hereby invested, and shall be subject to the same obligations as are the municipal council of each county, and the municipality of each township by the 18 & 27 sec. of this act. Section 24 The board of school trustees for each town are constituted a corporation, and it shall be their duty,

Sixthly.—To prepare from time to time, and lay before the municipal council of the town an estimate of the sums which they shall judge expedient for paying the whole or part of the salaries of teachers, for purchasing or renting premises, &c., and it shall be the duty of the council of such town to provide such sum or sums in such manner as shall be desired by the said boards of school trustees.

Seventhly.—The board of school trustees may levy at their discretion any rates upon the parents or guardians of children attending any school under their charge, and may employ the same means for collecting such rates as trustees of common schools in any townships may do under the 12th sec. of this act.

The 12th section authorises the trustees of every school section to apply to the treasurer of the township, or employ their own

lawful authority as they may deem expedient for the raising and collecting of all sums authorised in the manner hereinbefore provided to be collected from the freeholders and householders of such section, by rate according to the valuation of taxable property, as expressed in the assessor's or collector's roll

Section 24 Seventhly continued —Provided always that all monies thus collected shall be paid into the hands of the chamberlain or treasurer of such town for the common school purposes of the same, and shall be subject to the order of the said board of school trustees

Eighthly —To give orders to teachers and other school officers and creditors upon the treasurer of such town, for the sum or sums which shall be due them

The first and second counts are rested upon the provisions in the common school act of 1850, sec 24 Eighthly The giving to the plaintiff an order on the treasurer for her salary is sufficient evidence of her right to receive the sum therein named The treasurer's duty is defined in the Consolidated Statutes of Upper Canada, ch. 54, sec 160, to be, to pay out the moneys belonging to the corporation to such persons and in such manner as the laws of the province and the lawful by-laws or resolutions of the council direct.

The acceptance by the treasurer of such an order as set forth in these counts, must import an undertaking to pay it to the person entitled according to its terms. The duty of the treasurer as officer of the corporation required him to pay, but the statute does not in terms at least authorise him to accept such an order. He is a depository of the corporation and school moneys; these or similar orders would be authorities to him to make immediate payment, and vouchers that he had done so; but he was not, so far as I can see, authorised to turn them into evidences of debt on the part of the corporation, and against them

The evidence given at the trial shews, however, that a practice had grown up for the defendants to give orders on their treasurer, which, when he had accepted them, got into circulation, and at last found their way into the collectors' hands in payment of taxes Such a practice seem to me at variance with the spirit, if not the intention of the municipal act, (Consolidated statutes, U C., ch 54, sec. 215,) which enacts that no council shall act as a banker, or issue any bond, bill, note, debenture, or other undertaking of any kind or in any form in the nature of a bank bill or note, or intended to form a circulating medium, or to pass as money, and any bond, bill, note, debenture, or other undertaking issued in contravention of this section shall be void The orders drawn by the defendants themselves upon, and accepted by the treasurer and left outstanding, might soon produce the mischief this enactment was intended to prevent, and orders drawn by other bodies or parties on the treasurer and accepted by him, would, if such acceptance was binding on the defendants, tend to a similar result But it appears to me that the treasurer had no legal authority to bind this municipal corporation, even if an acceptance of these particular orders under their corporate seal would have bound them, on which it is unnecessary to pronounce I think, therefore, that these counts founded upon orders drawn by the board of school trustees upon the defendants' treasurer, and accepted under his hand, do not give the plaintiffs a right to recover.

The fourth and fifth counts are framed in tort; they vary only in respect to the period for which the plaintiff was entitled to a salary as school teacher: the one setting forth that she was such teacher for 1858, the other for the first six months in 1859. Then each states that the board of school trustees did prepare and lay before the defendants an estimate of the sum which they judged expedient for the purpose of paying the whole of the salary (respectively) by levying and collecting a rate on the taxable inhabitants of the town that it became defendants duty to provide the sum in manner aforesaid, and that although the trustees gave the plaintiff an order for her said salary so required to be levied and raised on the defendants' treasurer, yet defendants would not provide the said sum, nor levy, impose, or collect a rate for the same, but neglected and refused so to do, whereby the plaintiff is deprived of her said salary

It has not, I believe, been actually decided whether the board of school trustees of a town have "lawful authority," such as is given to the trustees of a school section by the 13 & 14 Vic, ch 48, sec. 12, monthly,—and by 16 Vic. ch. 184, sec 6, to raise and collect moneys for school purposes without reference to the municipal corporation. The first section of 16 Vic, ch. 185, is large enough at first sight to confer the authority, through the 13 & 14 Vic certainly did not give it By the first section it is enacted, that the board of school trustees in each town shall, *in addition* to the powers with which they are now legally invested, possess and exercise as far as they shall judge expedient in regard to such town, *all the powers* with which the trustees of each school section are or may be invested by law, in regard to such school section. In the case of *The School Trustees of Galt* v. *The Municipality of Galt*, (13 U C. Q B 511,) I expressed an opinion that the 6th section of that act of 16 Vic, did not extend to boards of school trustees, from the conflict that a contrary conclusion would create with other provisions of the school acts affecting such boards. The language used in the first section shews that the new powers are *in addition* to, not in abrogation of the powers previously possessed, and still less of duties previously imposed, and the words, "shall possess and exercise *as far as they shall deem expedient*," seems to imply, that they may possess a power and yet be under no obligation or duty to make use of it

The sixth section of the 16 Vic has, however, no application to teachers' salaries, or the other school expenses which under section 12 of 13 & 14 Vic., the trustees of school sections had power to raise and collect by the employment of "their own lawful authority;" and in the case of *The School Trustees of Port Hope* v *The Town Council of Port Hope*, (4 U C C. P. 118) *Macaulay*, C. J., was disposed to think the board of school trustees might levy a rate for such purposes. I am unable to make a consistent construction of all the enactments if this view be adopted, but it has in its favour the consideration that it tends to assimilate the powers and duties of school trustees in townships, and in cities and towns, and I am therefore disposed to adopt the suggestion as the proper mode of construing the statute.

But in determining that the board of trustees could themselves have raised and collected the sums for which they laid an estimate before the defendants, it appears to me a great obstacle is thrown in the way of the plaintiff's recovery Her contract was with the board, and the power to give an order on the treasurer of the municipality is a very different thing from what it was when they had no power to raise the money themselves It appears to me, that if no order had been given to the plaintiff on the defendants' treasurer, it would have been impossible for her to have sustained either the fourth or fifth counts, and I feel great difficulty in holding that the giving the order vests in her such a right that she can treat, the non-compliance with the requisition of the board of trustees as a breach of duty for which she can maintain an action. If such a consequence follows in her case, it must follow in the case of every other school officer and creditor of the board whose demand was included in the estimate prepared and laid before the defendants. This alone would, I think, be a great inconvenience, while at the same time the board of trustees, having the power to raise the money, would, as appears to me, still remain liable to the different claimants. Besides, it appears to me, it cannot be truly said that this alleged damage to the plaintiff is so immediately connected with the nonfeasance of the defendants that she can be said to have lost her salary by reason therof. If I am right as to the board of trustees, she has a claim on them, and if an action would not be maintainable, I should think she might sustain an application for a mandamus to them to raise the money.

Per cur.—New trial without costs

SCHOOL TRUSTEES OF ARTHUR v TOWNSHIP COUNCIL OF ARTHUR AND LUTHER.

School rate on non-resident lands—How collectable

Held that it is the duty of the local municipality to make up and supply out of their general fund any deficiency that may exist in the school rate of any township upon notice being given them at the end of the current year by the collector of school rates, and that such notice need not be under the seal of the trustees.

(C P, H T. 23 Vic)

The declaration stated that the collector appointed by plaintiffs for the said school section for 1856, being unable to collect the

school rates charged on certain lands liable to assessment within the said school section, amounting to £100, by reason of there being no residents on the said lands and no goods and chattels to distrain, the plaintiffs made a return to the clerk of the defendants before the end of the year 1856, of all such lands, and of the uncollected rates thereon, but the defendants have not paid the said sum of money, contrary to the statute, although often requested

2nd count —A similar cause of action for the unpaid rates for 1857

3rd count —For the unpaid rates of 1858.

Plea —To each count, that the plaintiffs did not duly make a return to the clerk before the end of the current year, never indebted, and payment.

The case was tried in November, 1859, at Guelph, before Burns, J. It was proved that the plaintiff's collector for the year 1858, before the close of that year, delivered to one Mitchell, the defendant's clerk, a statement of the school taxes due upon lands of non-residents in school section No 1, of the township of Arthur This statement included the sums due on such lands for the years 1856, 1857, and 1858; shewing due for 1856, $38 65; for 1857, $93.11, and for 1858, $100 77; total, $232 53. This collector swore that he handed Mitchell the return for 1858, and he put in those for 1856 and 1857. Mitchell swore that the only paper he got was one which he produced, which shewed the amounts in arrear for the three years as above stated, and that he never received any return for 1856 or 1857, but he stated that he received some of the non-resident taxes, of which $6 were for 1857, and $33.79 for 1858, and that these sums be paid over on the 16th of May, 1859, to the secretary-treasurer of the plaintiffs.

Then if plaintiffs could recover for the three years, the amount would be $232 53, less $33.79, paid over by Mitchell $192.74—£48 3s. 8d. If the plaintiffs could only recover for the third year, then the amount as shewn above for that year is $100.77, less $33 79=$66 98—£16 14s. 11d. If the plaintiff could recover for 1857 and 1858, on both which years Mitchell received payments, then 1857, $93.11; 1858, $100.77=$193.88, less $39.79=$153.9, or $38 5s. 8½d.

It was objected that no return was proved for 1856 and for 1857, and therefore that plaintiffs could not recover on the first and second counts, that the township council could not be called upon to pay until they received the money, or not until the end of five years, and that the declaration did not disclose any liability.

The learned judge reserved leave to defendant to move for a non-suit on these objections, and took a verdict for the plaintiff for the sum of £48 3s 8d., being the arrearages for the three years, with leave to the defendants also to remove to reduce the verdict by reducing either or both the amounts for 1856 and 1857. If both were ordered to be deducted, then the verdict was to be entered for £19 9s. 5d. (an error apparently arising from the first witness' statement of the amount due for 1858, and should be £16 14s. 11d) on the third count, and a verdict for the defendants to be entered on the first and second counts.

In Michaelmas Term, Lemon obtained a rule *nisi* to enter a non-suit on the leave reserved, or to reduce the verdict to the amount due for the unpaid rates of 1858, or why judgment should not be arrested on the ground that the record showed no liability on the part of the defendants to the plaintiffs.

In the following term Adam Crooks shewed cause He referred to the Consolidated Statutes of Upper Canada, ch. 64, s. 127, under which the plaintiffs claimed a right of action, and contended that the declaration was sufficient if the action would lie at all; and in support of the claim to recover generally, he cited *Hopkins* v. *The Mayor of Swansea*, 4 M. & W. 621, and in error 8 M. & W. 901, and *Addison* v. *The Mayor Aldermen and Burgesses of the Borough of Preston*, 12 C B 108

M. C. Cameron contra, insisted that none of the returns were properly made, for they were not under the hands and seals of the school trustees, and he objected that the declaration should have shewn that there were funds in the hands of the municipality to pay the demand.

DRAPER, C. J —The 127 section of ch. 64, Consolidated Statutes of Upper Canada (16 Vic, ch 185, sec 22), enacts that if the collector appointed by the trustees of any school section be unable to collect that portion of any school rate which has been charged on any parcel of land liable to assessment by reason of there being no person resident thereon, or no goods and chattels to distrain, the trustees shall make a return to the clerk of the municipality before the end of the then current year, of all such parcels of land, and the uncollected rates thereon; and the clerk shall make a return to the county treasurer of all such lands and the arrears of school rates thereon, and such arrears shall be collected and accounted for by such treasurer in the same manner as the arrears of other taxes, and the township, village, town or city, shall make up the deficiency arrising from uncollected rates on lands liable to assessment out of the general funds of the municipality.

Section 27, sub-sec. 15, makes it the duty of the school trustees to make their return before the end of the then current year

By the assessment law, (Consolidated Statutes U C ch 55, sec. 110,) the treasurer of each local municipality is to furnish the treasurer of the county with a correct copy of the collector's roll, so far as the same relates to lands in the municipality, "and also with an account of all arrears remaining due upon lands on account of any rate imposed by school trustees." This seems at variance with the direction contained in ch. 64, sec. 127, quoted above

Sections 123, *et seq*, provide for the sale of lands after taxes have been in arrears for five years, under a warrant from the county treasurer Section 154, provides for the creation in every county of a non-resident land fund to consist of all moneys received by the county treasurer on account of the taxes on non-residents' lands, whether paid to him directly or levied by the sheriff, and by the following sections he is to open an account for each local municipality with such fund; and by section 163, surplus money belonging to such fund are to be ratably apportioned by the county council among the municipalities. Section 158 particularly provides, that every local municipal council on paying over any school or local rate, shall supply out of the general funds of the municipality any deficiency arising from the non-payment of the tax on land.

I think, that taking the 16 Vic, ch. 185, sec. 22, and the 16 Vic, ch. 182, sec. 69, into consideration, it is made the duty of the local municipality to make up and supply any deficiency arising to the school fund which arises from the inability of the collector of school rates to collect the same by reason of there being no resident on such land, or no goods and chattels thereon which can be distrained, and it is equally my opinion that the legislature intended such deficiency should be made up out of the general funds of the municipality immediately after the return made to the clerk of the municipality of what school rates are so in arrear. The provisions of the assessment law remove all doubt, if there was room for any, under the school law

I can see no reason for holding that this return need be under the seal of the corporation of school trustees, it is in effect no more than a statement of what their collector has reported to them.

These statutory provisions are sufficient to establish the legal right of the school trustees to recover the amount of the deficiency so required to be made up The legal liability of the local municipal corporation to pay out of their general funds rests upon the same foundation, and this is strengthened by the 69th section of the 16 Vic., ch. 182, (Consolidated Statutes, U. C, ch 55, sec. 159,) which provides that all sums that may at any time be paid to a municipality out of the non-resident land fund of the county shall form part of the *general funds* of such municipality, which non-resident land fund is in part composed of the unpaid school rates returned by the trustees of the school section to the clerk of the municipality, and by him to the county treasurer But it was assumed by Jervis, C J, in *Addison* v. *The Mayor, &c, of Preston*, that if legal right on one side to receive the money, and legal right on the other to pay it, co-exist, an action of debt will lie, and each count of this declaration sets out in substance the section of the statute upon which the right is founded

I felt some difficulty about the proper construction of the words, "the then current year." It is contended on the part of the defendants, that the return of taxes so uncollected must be made before the end of the year within which they are imposed, or the trustees of the school section cannot claim them from the local municipality I think it quite clear that if this be so, the trustees cannot claim them at all; not from the land owner, or by any process against the land, for no authority is left in them so to collect after the current year; nor yet from the county treasurer, if by

the returns made to him he discovers the arrearages and charges the land in his books, for the law strictly prescribes what appropriation of it shall be made when he receives it. The effect then of the defendants' argument is, that the school, sections must lose the money, and either the landowner will get the benefit by not paying his school rate, or the non-resident land fund will be increased by the amount, and so the municipality will ultimately receive it without having previously made up the deficiency caused by its non-payment as part of their general funds. I am satisfied this was not meant by the legislature, and though it is not easy to deal with the section as it stands, and yet under such circumstances to prevent a consequence plainly contrary to the intention of the two acts, I think we may hold that the trustees may before the end of each current year, return all school rates upon lands not collected, for the reasons stated in the act, and of which no prior return has been made to the clerk of the municipality. With this construction the plaintiffs will be entitled to retain their verdict, otherwise it must be entered on the third count only for the plaintiffs' damages and for the defendants on the first and second counts.

Per Cur—Judgment for plaintiffs

IN PRACTICE COURT.

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

THE QUEEN V. CHARLES MERRIGOLD.

Writ of Extent—Lands—Issue of second of same teste as former writ—Grounds therefor

Where, in the execution of a Writ of Extent the counsel for the Crown considering the property returned by the finding of the jury to be ample to cover the Crown debt designedly omits property sold before the execution of the writ by the Crown debtor to *bona fide* purchasers for value and on an application subsequently made to quash that writ of extent and issue a second writ of the same teste as the former writ in order to seize and make contribute the last mentioned property, there was no reason suggested for allowing the application but the fact that the Crown debtor appeared from the books of the County Register office to have been possessed of other property than that returned, the application was refused.

(Sittings after Mich. T., 1860)

In Hilary Term, 1860, a Rule was obtained calling on the Defendant and George William Malloch, Matthew William Pruyn and others, to shew cause why the Writ of Extent issued in this cause on the twenty seventh of November, in the twenty second year of the reign of Her Majesty the Queen, and directed to the Sheriff of county of Brant, and all proceedings in this cause subsequent thereto should not be quashed and a new writ directed to the same county of the same teste as the former writ be issued upon the ground that there are certain lands situate in the said county of Brant now or at one time belonging to the said defendant which ought to have been extended under and by virtue of the said writ which were not so extended.

The affidavit filed on moving the Rule shewed the recovery of the judgment against the defendant, the issue of the Extent and the return of the Sheriff as to certain lands which the defendant was seized, the issue of a writ of *venditioni exponas* and that no lands had been sold, and then proceeded to state that as appears from the County Register Books in addition to the lands returned under the inquisition, the defendant was seized, on 10th April, 1849, of Lot No 18 on North side of Dalhousie street in Brantford, and on the 11th February, 1852, of Lots No 20 and 21 on the North side of said street as well as several other lots of land, as appeared from the certificate of the Registrar.

In Easter Term last *Mr Long* shewed cause and filed an affidavit, stating that the Reverend Hugh McLeod of Cape Briton, who is the holder of a Mortgage in fee on the west half of Lot No. 17, on the south side of Darling street, made to him by the trustees of the congregation of the Presbyterian Church of Canada, in Brantford Mr. Long appeared also for John Turner and the trustees of the Presbyterian Church.

Mr E B. Wood appeared for the estate of the late John Russell and stated that what was seized is sufficient to satisfy the crown debt.

It was admitted that the property seized under the writ exceeds in value one hundred and ninety-nine pounds, the claim of the Crown.

Mr E B Wood also objected that the bond does not constitute a lien, and that it does not appear from it for how much it is to be considered as a lien

Mr R A Harrison for the Crown referred to *Rex* v *Gibson*, Parker's Revenue Cases page 35—*Rex* v. *Buchanan*, *Ib.* page 176, and Imperial Statute 33 Henry VIII, chapter 39

RICHARDS, J.—The case of the *King* v *Gibson*, referred to by Mr. Harrison, shows that a second Extent may issue, tested the same day as a former one. But in the case referred to it appeared that a considerable portion of the defendant's effects were secreted so that they could not be discovered before the first writ of Extent, under which a portion of the defendants effects seized, was returned A second writ was also sued out, but in consequence of the Bankruptcy of the party to whose hands the defendant's goods came after the issuing of the first writ and before the issuing of the second, the proceedings on the second writ were of no effect. The Court allowed the last or second writ, and the proceedings under it to be quashed and set aside, and directed that a new Extent should issue bearing the same teste as the first Extent.

The note of the case of the *King* v. *Buchanan et al*, does not show the facts very clearly, but states that after the issue of an Extent against the defendants, an inquisition was taken and goods were seized, but it was afterwards found that there were some cloths in the hands of a packer belonging to them. On an affidavit of this fact a motion was made to quash the Extent and inquisition and to have a new Extent of the same teste as the former, in order to find and seize these cloths. An order was made absolute to that effect.

It was stated in the argument, that the property, which it is now sought to cover by the writ, was designedly omitted in the finding of the jury, as the gentleman who acted on behalf of the Crown, considered the property returned by the finding of the jury ample to cover the debt of the Crown, and that he did not desire to interfere with "*bona fide*" purchasers from the Crown debtor. There was no affidavit filed on this point, and Mr Harrison, who argued the case on behalf of the Crown, neither affirmed nor denied the statement, although it was admitted that the property returned by the jury was sufficient to satisfy the amount due the Crown.

There is no reason suggested for allowing the application, but the bald fact that Merrigold appears to from the abstract of title from the Registry office, to have been possessed of other property than that returned. As what is returned appears to be sufficient to satisfy the claim of the Crown, I cannot suppose there was any fraud used to prevent the Crown from covering as much property as they desired to include in the finding of the jury, particularly as a reference to the Registry office would have given all the information as to Merrigold's real estate that is now presented to the court I think therefore I must assume that the Crown intentionally omitted the other property from the finding of the jury; if so then there is no reason suggested why the parties, who from their peculiar position, it was then thought, ought not to be compelled to contribute to the payment of this debt, should now be placed in a different position.

I do not therefore see my way clear in making this rule absolute.

IN CHAMBERS.

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

JOHN MELLING V. JOSEPH ELLIS.

Consol Stat U C cap 23, ss 9, 11, 12, 13—Writ of Injunction—Violation—Contempt—Attachment

No order can be made for the issue of a writ of attachment for violating the terms of a writ of injunction without a previous notice of some kind to the defendant. Where the injunction operates strictly by way of restraint, the proper course is either to move that the defendant be committed for breach of the injunction, or to move that he be committed unless he show cause at a future day to the contrary.

If the first course be adopted, the motion must be made on personal service of a notice of motion on defendant

(December 18, 1860)

On 14th June, 1855, George Tate became the purchaser of about 10½ acres of land near Queenston, known as "The Great Trunk Quarries."

Subsequently, Mr Tate caused to be conveyed and placed on the quarries, for the use thereof, various implements used in quarrying, in value exceeding $2,000

During the month of July, 1858 the defendant Joseph Ellis, as a tenant here, was placed by Mr Tate in possession of the quarries and quarrying implements

On 9th December, 1859, John Melling, the plaintiff, became the purchaser of the quarries, quarrying implements, &c, defendant then still being in possession

When plaintiff so purchased he forbid defendant to quarry or to remove or meddle with any of the quarrying implements Notwithstanding, defendant set plaintiff at defiance

Plaintiff then instituted an action of ejectment to recover possession of the quarry, and an action of detinue to recover possession of the quarrying implements, and in the latter action claimed a writ of injunction to restrain the defendant from selling, removing or disposing of the quarrying implements

On 7th August last, plaintiff applied to Mr Justice Burns and obtained an order for an *ad in erum* writ of injunction, and on same day caused the writ of injunction to be issued

The injunction, so far as material, was in the following form:

"Victoria, by the Grace of God, &c.

"To Joseph Ellis, of the Township of Niagara, in the County of Lincoln, his agents and servants, or any person under his direction or control, and every of them, greeting.

"Whereas, on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty, an order was made by the Honorable Robert Easton Burns, one of the Justices of our Court of Queen's Bench at Toronto, pursuant to the Common Law Procedure Act, 1856, in an action depending in our said Court, wherein John Melling is the plaintiff, and you, the said Joseph Ellis, are defendant, that a writ of injunction do issue to restrain you the said Joseph Ellis, and your agents and servants, or any person under your direction or control, from selling or disposing to your own use, or removing any of the quarrying tools, implements, goods or chattels, in or about the said premises, belonging to the plaintiff, and of which a list is hereinafter given.

"We therefore do hereby strictly enjoin and command you, the said Joseph Ellis, and your agents or servants, or any person under your direction or control, and every one of you, that you and every one of you do from henceforth altogether and absolutely desist from selling or disposing to your own use, or removing any of the quarrying tools, implements, goods or chattels in or about the premises belonging to the plaintiff, &c., &c, and of which the following is the list, namely, &c, until our said Court shall make order to the contrary

"Witness, the Honorable Sir John Beverley Robinson, Baronet, Chief Justice of our said Court at Toronto, this seventh day of August, in the year of our Lord one thousand eight hundred and sixty "C C Small"

On 8th August last, defendant was personally served with a duplicate original of this writ of injunction, and at the time of the service of the writ the quarrying implements, or a large portion of them, were in possession of the defendant.

Both the action of ejectment and the action of detinue were tried before Mr. Justice McLean, at the last assizes for the County of Lincoln

Between the day of the service of the injunction and the commission day of the Assizes, the defendant and his agents, in violation of the terms of the writ of injunction, removed or caused to be removed from off the quarries, all the quarrying implements for which the action of detinue was brought.

The defendant defended the action of detinue in person, and in open court boasted that he had made away with the quarrying implements so that plaintiff should never see one of them. It was sworn that the defendant was not a man of means.

Mr R. A Harrison thereupon for plaintiff, on affidavits showing the foregoing facts, made application to a Judge in Chambers for an *ex parte* order for a writ of attachment against defendant. The affidavits showed good grounds to suppose that defendant, if informed of the application, would immediately abscond to escape the consequences of his contempt *Mr. Harrison* argued that notice to defendant of an intended application for a writ of attachment would operate as a notice to defendant to leave the Province in order to escape the consequences of the writ if issued, and urged that the writ should issue without previous notice to defendant—leaving him when in custody to purge himself if possible of the contempt Reference was made to Consol Stat U C cap. 23, ss. 9, 11, 12, 13, p 275, Com Dig Chancery, D 3 (Attachment); Eden on Injunction, 75; Drewry on Injunction, 405, 406; *St John's College* v. *Carter*, 4 Ml & Cr 497; *Angerstein* v. *Hunt*, 6 Ves. 487

The application having been the first of the kind made to a Court of Common Law since the Common Law Procedure Act, Mr. Justice Hagarty, to whom the application was made, took time to consider, and on the following day delivered judgment

Hagarty, J.—I can find no authority to warrant me in ordering the issue of a writ of attachment for the violation of the terms of a writ of injunction without a previous notice of some kind to the defendant There is no instance in which personal service of a notice has been wholly dispensed with in case of an attachment, though there may be some cases in which an incomplete personal service has been ordered. I have consulted the Vice-Chancellors of Upper Canada, and they are not aware of any such authority On the contrary, they inform me that the settled practice of their Court is otherwise

Where the injunction operates strictly by way of restraint, the proper course, according to the books, is either to move that the defendant be committed for breach of the injunction, or to move that he be committed unless he show cause at a future day to the contrary. If the first course is adopted the motion must be made on personal service of a notice of motion on defendant.*

The learned judge referred to 2 Daniel's Ch Pr 1264; *Pearce* v. *Crutchfield*, 14 Ves. 206; *In re Morris*, 22 L J Q B 417; *Swinfen* v. *Swinfen*, 1 C. B. N. S. 364; *Thomas* v. *Rawlings*, 28 L J. Ex. 347; 33 L. T. Rep. 186.

The following order was thereupon made and issued.

John Melling, *Plaintiff*, v. Joseph Ellis, *Defendant* } Upon reading the writ of injunction issued in this cause, the affidavit of service thereof, and the affidavits on which said writ was issued, and upon reading the affidavit of plaintiff and others filed yesterday in this cause, I do order that the defendant stand and be committed for contempt in violating the terms of the said injunction, and that a writ of attachment do issue for the arrest of his body for said contempt, unless he the said defendant, his attorney or agent, do upon the second day after the day of personal service of this order, shew cause to the contrary.

Thomas John Cottle and John Barwick v Isaac Morris.

Ejectment—Service of Writ on Defendant's Wife—Allowance

Where the writ of ejectment was served on the wife of defendant (she being at the time in possession of the *locus*) and stating that her husband was in the United States on an application for an order to allow the service under the particular circumstances of the case an order was made allowing the service as of the date of the order.

(5th December, 1860)

This was an action of ejectment The writ of ejectment was served on the wife of the defendant She was at the time of the service in possession of the *locus in quo*, and stated that her husband had gone to reside in the United States of America.

It appeared that defendant was at the time of the service of the writ of ejectment a resident in the City of Philadelphia, in the United States of America, and was there engaged as a hand in an iron foundry.

Jackson for plaintiff, obtained a summons on the defendant, his attorney or agent, to shew cause why the service of the writ of ejectment and notice of claim attached thereto effected on the wife of the defendant, should not be deemed good and sufficient service, and why the service should not be deemed as good and sufficient, for all subsequent proceedings as if personal service had been effected on the defendant.

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* Subsequently plaintiff adopted this course in preference to the order nisi and having caused defendant to be personally served with notice, Mr Justice Burns, upon the production of the notice and affidavit of service, ordered the attachment to issue.

Lawder, for defendant, showed cause, and filed among other things an affidavit of John Senkler, Jr., describing himself as "partner of the attorney in this cause for the above-named defendant," showing the residence of defendant to be in Philadelphia, and stating that he had not been able to communicate with defendant. The affidavit also stated that deponent had seen in possession of defendant's wife, two deeds relating to the *locus in quo*, and purporting to convey to defendant that part of the *locus* for which the defendant desired to defend.

BURNS, J.—Granted an order allowing the service as of the day of the date of the order.

BURTON ET AL v. KELLY.

Judgment debt—Married Women's Protection Act, 22 Vic. 2nd Sess. cap. 34. (Con Stat U C cap 73)—*garnishing rent due to wife for debt of husband*

The mere registry of a judgment against a husband's lands, before the passing of the 22 Vic. cap 34 (Married Women's Protection Act) does not of itself give a right to the judgment creditor to garnish a debt due for rent of the wife's land since the passing of that act

(Chambers, 27th December 1860.)

On 3rd December, 1851, the judgment creditors recovered a judgment against the judgment debtor for £153 10s 11d damages and costs, and afterwards caused a certificate of the judgment to be registered against the lands of the judgment debtor.

On 30th November last, upon an affidavit in the usual form made by one of the judgment creditors as to the recovery of the judgment, that the judgment still remained unsatisfied to the amount of £123 7s. 5d., and that Anne Loring of the City of Toronto was indebted to the judgment debtor in the sum of $215 84 for ground rent due on a day passed in respect of certain premises in the City of Hamilton, an order was made in the usual form attaching all debts due or accruing due from the garnishee to the judgment debtor to answer the judgment of the judgment creditors.

At the same time a summons was issued in the usual form calling upon the garnishee to shew cause why she should not pay the judgment creditors the debt alleged to be due from her to the judgment debtor.

On shewing cause both the garnishee and Lorinda Kelly, the wife of the judgment debtor claimed that she the wife of the judgment debtor was entitled in her own right and free from any contract, claim or right of her husband to the moneys sought to be garnished.

It appeared that by a deed in fee simple dated 23rd May, 1860, the Canada Life Assurance Company conveyed to Lorinda Kelly, solely and absolutely, certain lands in the City of Hamilton—that at the time of the conveyance to her there was a subsisting lease of the land to one Valentine H. Tisdale, which was by Tisdale assigned to the garnishee by way of mortgage—that part of the rent sought to be attached accrued due since the conveyance—and that the whole of it was claimed by Lorinda Kelly, as the owner of the reversion in fee.

Jackson for the judgment creditors.

H B Morphy for the judgment debtor.

English for the garnishee.

The summons was argued chiefly under the 22 Vic., 2nd Sess., cap 34, intitled "An act to secure to married women certain separate right of property" (Con. Stat. U. C. cap. 73, page 791.)

RICHARDS, J.—It does not appear that the amount due by the garnishee for rent or any part of it accrued before 4th May, 1859, when the statute in reference to the protection of the property of married women was passed.

The thirteenth section of that act provides that the estate of the husband in the real property of his wife shall not during her life be subject to his debts.

Then follows a proviso which protects the right that any creditor had obtained in respect of the husband's estate in the land of his wife under any judgment or execution obtained before 4th May, 1859.

If the plaintiffs by registering their judgment obtained a charge on the lands of defendant's wife which is now binding they may enforce it. The mere registry of the judgment does not of itself in my opinion, give a right to garnish a debt due for rent of the wife's land after the passing of the act

The summons and order, so far as relates to the garnishee Anne Loring, must be discharged with costs.

Summons and order discharged with costs

CHANCERY.

(Reported by THOMAS HODGINS, Esq. Barrister at-Law.)

THE TOWN OF PORT HOPE v. THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

Consolidated Municipal Loan Fund Acts—Loan to United Counties—Loan to Town within United Counties—Liability of Town

The United Counties of Northumberland and Durham made application for and obtained, under the Municipal Loan Fund Act, 16 Vic cap 22, a loan of the sum of £115,000, for the purpose of constructing certain roads of the united counties, in which roads the town of Port Hope was not directly interested. Afterwards the town of Port Hope itself raised a large sum of money, under the same fund, for the purpose of aiding in the construction of certain railways, and for the improvement of the Port Hope Harbour.

Held, that the town, in addition to its direct liability on the last mentioned loan, continues liable for its proportion of the debentures issued by the united counties.

The Council of the United Counties of Northumberland and Durham, under the authority of the Upper Canada Municipal Loan Fund Act, 16 Vic. cap. 22, raised the sum of £115,000, for the purpose of constructing certain roads in the counties.

The town of Port Hope was not directly interested in these roads, and no part of them was in that town.

The town of Port Hope itself raised the sums of £50,000, £30,000, £50,000 and £85,000 to aid in the construction of certain Railways: the last sum being also for the improvement of the Port Hope harbour.

In pursuance of the act of 1859, "An Act further to amend the Consolidated Municipal Loan Fund Acts," the town caused the rate of five cents in the dollar, in that act mentioned, as the assessed yearly value of all the assessable property in Port Hope, to be levied for the year 1859, and paid over the moneys arising therefrom to the Receiver General, on account of the moneys raised on their own behalf; and they claimed not to be liable for any further assessment in respect of the moneys raised by the united counties.

The united counties, on the other hand, claimed that the town is liable for its proportion of the debentures issued by the united counties: and proceeded to enforce their claim by warrant directed to the sheriff, under the provisions of the Consolidated Assessment Act of Upper Canada.

The plaintiffs thereupon applied to this court for an injunction

McGregor for plaintiffs: *Hodgins* for defendants.

The judgment of the court was delivered by

SPRAGGE, V C.—It is not questioned but that the by-law of the united counties for raising the sum of £115,000 was a legal one, and I suppose it cannot be doubted that under the act first referred to, 16 Vic cap 22, Port Hope was liable for its proportion of that debt One clause expressly provides for such a case: "If the by-law has been passed by a county council, the principal and interest of the loan shall be payable by all the townships, towns and villages in the county;" and it then goes on to provide how the county treasurer is to apportion the amount to be paid by each. Section 53 provides that the treasurer of each municipality shall, upon the passing of a by-law, ascertain in the mode therein pointed out, the amount required to be assessed; and proceeds, "and shall certify the amount in a notice to the clerk of the municipality, or if such municipality be a county, then to the clerk of each township, or incorporated town or village therein the amount payable by the same.

Now it is quite clear, though the statute speaks of only one assessment, that there must necessarily be two in all cases where the township, town or village had itself raised money under the act as well as the county.

Then came the act 22 Vic. cap. 15, which provided for a different mode of assessment. Section 88 in the Consolidated Statutes of Canada provides, "That a sum equal to the amount of five cents in the dollar on the assessed yearly value," or a like per centage on the interest, "at six per cent per annum on the assessed value of all the assessable property in any municipality

which has raised money by debentures issued under the acts mentioned in the preamble to the last preceding section, shall be paid by such municipality to the Receiver General, on or before the first day of December, in the year one thousand eight hundred and fifty nine, and every year thereafter, unless and until the total amount in principal and interest payable by such municipality to the Receiver General under the said acts, by reason of such loan, have been paid and satisfied, or a smaller sum shall be sufficient to satisfy the same in any year, in which case such smaller sum only shall be paid."

Section 94 provides: "Instead of the special rate mentioned in the fifty-third, fifty-fourth, fifty-fifth, fifty-sixth and fifty seventh sections of this act, there shall in the present year one thousand eight hundred and fifty-nine be levied upon all the assessable property in every municipality which has raised money by debentures issued under the acts aforesaid, a rate of five cents in the dollar upon the assessed yearly value, and a like per centage on the interest, at the rate of six per cent. per annum of the assessed value of such property, and a like rate in each year thereafter, until the total sums payable as principal or interest to the Receiver General by reason of such debentures shall be paid off, or until a reduced rate shall be substituted by order in council, as hereinafter mentioned."

It is argued for the plaintiff that this substituted rate, substituted for the assessment under 16 Vic., is only authorized to be levied once — one equal rate upon all the assessable property in the municipality. I think this position wholly untenable: it is at variance with the expressed intention of the act, which is "to afford relief to the municipalities which had raised money by debentures issued under the said acts," (16 Vic. cap. 22 being one of them) "and at the same time to secure the ultimate redemption of such debentures by the municipalities *respectively* liable."

When the municipality is a county, section 11 shows that such sub-division, township, town or village is to contribute: the county being the aggregate of them all. The position contended for by the plaintiff would throw the redemption of the debentures not upon the municipality but upon a part of it. Suppose the case of half of the townships having borrowed for their own purposes, and the other half not, the debt of the county—contracted, it must be presumed, for the common benefit of all—would have to be paid by those townships only which had not borrowed: but suppose all the townships had borrowed, (and the position must apply to such a case if good at all) how could the county debt be paid?

It would be an entire change of principle from that upon which the former act proceeded, and there is nothing in the act to indicate such change. It would be more than a change of principle, it would be rather a negation of principle, for it would shift a debt from one party to another: for every redemption in one quarter would be a burthen added to another — it would be no more just than it would be to exact that half of the members of a joint-stock company should pay the whole debt of the company, exempting, to make a parallel case, those who owed debts, on their private account to the creditors of the company.

There is besides nothing in the act necessarily calling for such an interpretation. Section 88 makes a sum to be ascertained in a particular way, payable to the Receiver General by every municipality which has raised money under 16 Vic., c. 22,—that applies to the town of Port Hope and to these united counties: each has raised money separately; each has to pay its own debt. Section 94 creates the difficulty, if any difficulty exists. It provides for the levy of a certain rate upon all the assessable property in every municipality which has raised money by debentures under, inter alia, the same act, 16 Vic., cap. 22. Well, Port Hope is a municipality which has so raised money; these united counties are a municipality which has also raised money. The assessable property in Port Hope, it is not denied, is liable to be so assessed, in respect of the moneys raised by itself; but why is it not assessable as part of the municipality of Northumberland and Durham, while its property is assessable property as part of that municipality? The property in that town is made by the law property in two municipalities—there is nothing in the act which says that it shall be assessed in respect of one rather than the other, or that it shall not be assessed in respect of both. The act rather points to an assessment in respect of both, because the rate authorised by it is in terms "instead of the special rate mentioned in 16 Vic., c. 22" and that special rate was clearly in respect of county as well as town debts. The point appears to me to be too clear to admit of serious doubt.

The injunction must be refused.

QUARTER SESSIONS—COUNTY OF WENTWORTH.

JAMES KENT v. MATHEW OLDS ET AL.

Held, that the person appealing from a summary conviction by a magistrate must comply with all the conditions imposed upon him by the statute under which he appeals.

Where in the recognizance the appellant instead of being bound to appear and try the appeal, &c., as required by the Act, was bound to appear at the Sessions to answer to any charge that might be made against him, the appeal was dismissed.

An application to take the appellant's recognizance in Court was refused on the ground that, although the recognizance need not be entered into within four days it must be entered into and filed before the sittings of the Court of Quarter Sessions to which the appeal is made.

(Hamilton, December, 1860.)

This was an appeal from a summary conviction. At the trial, after notice of appeal proved, objection was taken by *Sadlier* to the form of the recognizance filed. By it the appellant was bound to appear at the Sessions to answer to any charge that might be made against him instead of being bound to appear and try the appeal, and abide by the judgment of the court and pay such costs as might be awarded, and Mr. Sadlier argued that the appellant has no standing in this Court unless he either remains in custody or enters into a recognizance such as the statute requires.

Robertson contra, argued that the appellant having appeared is subject to the order of the court, and is virtually in custody, and that the objection could not then be taken.

LOCAL, Co. J., and Chairman of Sessions.—The person appealing from a summary conviction by a magistrate must comply with all the conditions imposed upon him by the statute. He must not only give notice within the proper time, but he must also either remain in custody or enter into a proper recognizance. He has no standing in Court until he has done all that he is required to do. The appeal must be dismissed.

Note.—An application to take the appellant's recognizance in Court was refused, on the ground, that, although the recognizance need not be entered into within four days, it must be entered into and filed before the sitting of the Court.

GENERAL CORRESPONDENCE.

Vendor and Vendee—Mortgage—Judgments.

TO THE EDITORS OF THE LAW JOURNAL.

Orangeville, 16th Nov., 1860.

GENTLEMEN,—A case has just occurred here, which being rather unusual, I beg to submit to your opinion.

A. has several judgments recorded against him. B. sells and conveys by deed to A. a property, and at once takes a mortgage from him on the property and forthwith registers it.

Question? Who holds the first lien on the said property, B. by mortgage, or the prior judgment creditor of A.? Your answer will much oblige,

Your obedient servant and subscriber,

J. R. B.

[The question put by our correspondent is not free from doubt. On the authority of decided cases, however, our opinion is that the judgment creditor of A. would have the first lien. On this point, so far as the courts of common law are concerned, we quote the head note of *Kuttan* v. *Levisconte*,

16 U. C. Q. B., 495, which well represents the judgment of the court in that case:—"Where lands are conveyed to a purchaser, against whom judgments are then registered, and execution against lands in the sheriff's hand, and a mortgage is taken back on the same day for a balance of purchase money, the judgments and executions attach before the mortgage."

It is true that Mr. Justice Burns is reported to have said, (p. 499), "There is really very little use, as it appears to me, in our being asked to consider the question in this court (Queen's Bench) which can be of no practical use to the parties, for without doubt the plaintiff would have a good remedy in equity to charge the estate by way of lien for the remainder of the unpaid purchase money, to the exclusion of the judgment creditors." The case of *Baldwin* v. *Duggan*, 6 Grant, 595, in equity appears to us to conflict with the remarks of Mr Justice Burns, and on the same point reference may be made to *Grace* v. *Whitehead*, 7 Grant, 591.

In Lower Canada there is a conveyance which in the same instant operates both as a deed to a vendee and mortgage back to vendor for balance of purchase money. The adoption of some such conveyance in Upper Canada, or a conveyance to uses, seems to us at present, the only safe mode of conveying land to a person against whom judgments are registered, so as to preserve a lien for unpaid purchase money as against the judgments.—EDS. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. SCALES v. BAKER. *March* 2

Marriage settlement—Husband and wife—Separate use.

By a marriage settlement made previous to the marriage of A. and B. in 1840 a sum of £2000 was settled on B. for her sole and separate use. Shortly after their marriage they invested the £2000 in shares in a joint stock bank in their joint names. In 1856, A. sold the shares on the express understanding that he would reinvest the proceeds in some other good security in the joint names of himself and B. A. invested the proceeds however in the purchase of real property conveyed to himself in fee. A. died in 1859.

Held, on a bill filed by B. that she was entitled to be considered as an incumbrancer on the property and had a lien on it to the amount of the purchase money which belonged to her for her separate use.

V. C. K. FULLERTON v. MARTIN. *March* 3.

Settlement directed by will—Advancement and maintenance—Contingent interest—Intermediate income—Corpus.

A testator directs £6,000 to be set apart by his trustees and invested and settled upon each or either of two of his daughters marrying after his decease; as to the income to such daughter for life, for her separate use without power of anticipation; and as to the *corpus* after her decease to her children equally upon their attaining twenty-one, and in default of children attaining a vested interest such legacy to fall into the residue, which is given to certain persons for life with remainders over. One daughter marries after her father's death, and dies leaving a husband and one infant child.

Held, that it was doubtful whether a further settlement by deed was intended: that the daughter did not take an absolute interest, that the limitation to the children was contingent, and that the court would not direct the insertion of clauses other than those pointed out by the testator; he having not merely directed a settlement but pointed out what it should contain.

Held, also, that the tenant for life of the residue was entitled to the intermediate income as income.

V. C. K. DAY v. DAY. *Feb.* 28.

Bequest of Railway shares—Calls—Liability of specific legatee of shares to pay calls.

A testator leaves "to his son H. any shares in Railway's mines and other undertakings that might belong to him at his decease." *Held*, that this bequest imposed upon the legatee the onus of paying all calls accruing due subsequently to testator's death.

V. C. S. PERRY v. HOLL. *Feb.* 24.

Power of attorney—Power to Mortgage—Payment to agent.

A. gave to B. a power of attorney to receive his rents and official salary, &c., and to act generally in his affairs as fully as he himself could.

Held, that the power taken together with certain correspondence, authorised a mortgage of policies. B. an agent under a general power of an attorney had in his possession certain moneys of C. and also two policies belonging to A. his principal. B. representing that he acted by direction of A. borrowed a portion of the moneys and assigned one of the policies as security; but he never paid any portion of the money to A.

Held, that as between A. and C. there was a good payment to A.

V. C. W. HUGHES v. LEWIS. *Feb.* 29.

Practice—Motion to dismiss—Costs.

On the 18th of February, the defendant served the plaintiff with notice of motion for the 29th to dismiss for want of prosecution. On the 27th after defendants brief had been delivered to counsel replication was filed and on the 28th at 4 p.m., 20s. costs were tendered to defendant but not accepted. *Held*, that defendant was entitled to costs of the motion.

COMMON LAW.

Q. B. REGINA v. JOHNSON. *Feb.* 8.

Practice—Indictment for obstructing highway—New trial.

Where a defendant is acquitted on an indictment for obstructing a highway the court will not grant a new trial on the ground that the verdict is against the evidence.

C. P. FITZJOHN v. MACKINDER. *Feb.* 25.

Malicious prosecution—Remote cause.

If a party to a civil action commit perjury and thereby cause the judge to believe that the opposite party is committing perjury in consequence of which the judge commits such opposite party and binds over the party so committing perjury to prosecute and such last mentioned party accordingly goes before the grand jury and procures a bill to be found against the party committed and adheres to the charge at the trial when the party committed is acquitted, the prosecutor having no reasonable or probable cause for the charge but preferring it with a knowledge of its falsehood and endeavouring to maintain it by further and perjured evidence.

Held, that it is not the party who commits perjury but the judge who committed under the act who sets the criminal law in motion and by whom the prosecution is instituted; that although the perjured party does lead the committing judge into the belief that the other party who speaks the truth is swearing falsely, and thus does cause the prosecution to be instituted, yet that is only a remote cause and not sufficiently proximate to make the perjured party civilly responsible in an action for a malicious prosecution.

EX C ANDERSON v. RADCLIFFE ET AL. *Feb.* 8

Champerty—Attorney and client—Security for costs incurred distinguished from a purchase of the subject matter of the suit.

After verdict and before judgment a plaintiff in ejectment assigned the subject matter of the suit to his attorney as a security for money advanced by the attorney for carrying on the suit and other purposes and for the amount due to him for his professional services *Held*, (affirming the judgment of the Queen's Bench) that the assignment was not void as against public policy or by reason of any of the statutes against champerty and maintenance

Q B. CURRIE *v.* ANDERSON. *Feb.* 7,

Statute of frauds—Acceptance within sec 17.

Certain goods were purchased of the plaintiffs by the defendant and were by the defendant's order delivered on a certain ship together with other goods of the defendant which had been forwarded by the defendant to the plaintiffs. The bill of lading was made out according to the defendant's directions and delivered to him After more than a year had elapsed the defendant returned the bill of lading to the plaintiffs and informed them that the goods were lost, requesting them at the same time to see after them, and stating his opinion that the master was liable.

Held, in an action to recover the price of the goods that there was here sufficient evidence to warrant the jury in finding that there had been an actual receipt and acceptance within section 17 of the statute of frauds.

Q B BEACHEY *v.* BROWN. *Feb* 15

Contract—Promise of marriage—Plaintiff's engagement to another person.

The existing engagement of the plaintiff to another person of which the defendant was ignorant at the time of an agreement by the plaintiff and defendant to marry is no defence to an action on the agreement.

Q. B. REG. *v.* KNIGHT ET AL. *Feb.* 26.

Highway—Obstruction—Power of Gas Companies to lay down pipes.

The members of a gas company having parliamentary powers to open streets for the purpose of public lighting, but having no similar powers for the purpose of conveying gas to private houses, are liable to be convicted for a nuisance in obstructing the highway, if they open the streets in order to lay down service pipes from the mains already laid down by them for public lighting to the houses of the adjacent inhabitants.

An inhabitant who directs such service pipes to be laid down to his house is also similarly liable.

Q B. IN RE MARSACK *v.* WEBBER *Feb.* 25

Arbitration—Costs—Event of award.

Where two parties agree to refer several disputes arising out of one matter to arbitration and that "the costs of the reference and award are to abide the event of the award," and the arbitrator decides some of the matters in dispute in favor of one party and some in favor of the other, there is no "event" of the award within the meaning of the agreement, and neither party is entitled to his costs.

EX. WYATT *v.* WHITE. *Feb.* 25.

Malicious prosecution—Reasonable and probable cause—Search warrant—Direction to arrest person in whose custody goods are—Effect of.

A direction in a search warrant to arrest the person in whose custody the goods alleged to be stolen are, consequent upon the warrant to search and the person procurring the warrant to be issued, is not responsible for an imprisonment under it if there was reasonable and probable cause for believing that the goods were stolen.

EX BENNETT *v.* BAYES ET AL. *Feb* 25.

Landlord and tenant—Distress for rent—Responsibility of agent of landlord for wrongful distress—Distress after tender

The agents of a landlord for collecting his rent signed as such agents and delivered to a broker a warrant to distrain for rent in arrear. The tenant made a good tender of rent to one of the agents before the execution of the warrant which was refused and the goods distrained

Held, that the agents were responsible in an action for such wrongful distress.

Quære, whether an agent for landlord who directs a broker to distrain for a landlord is responsible if the distress becomes unlawful by the act of the broker.

Q B. CHILDERS *v.* WOOLER ET AL *Feb* 25.

Sheriff—Execution against goods of wrong person.

The attorney of an execution creditor in an action against W. F. caused a writ of *fi fa* to be issued against W F and endorsed on the writ The defendant is a "blank" and resides at Redcar. The writ was delivered to the sheriff who executed it against W F. who resided at Redcar and son of the real defendant W F who resided at Cotham near Redcar. The attorney and the sheriff both acted *bona fide*. *Held*, (*dissentiente* WIGHTMAN, J.,) that the endorsement on the writ was the mere statement by the attorney of the execution creditor for the purpose of affording information to the sheriff and left him to his own discretion as to how he should act and that it was not a requirement to the sheriff which made him the agent of the attorney for the purpose of seizing the goods of W. F the son

Q. B. *Jan.* 26

ROUTLEDGE, APPELLANT *v.* HISLOP, RESPONDENT.

Master and servant.

A servant in husbandry sued her master in the County Court, claiming damages on the ground that she having been hired for a year had been dismissed within the year without reasonable or probable cause, in which suit the decision was in favor of the master. She then applied to the justices of the Peace for an order upon her master to pay her her wages; claiming her wages for the whole year, on the ground that she had been dismissed without just cause.

Held, that the justices had no power to enquire into the merits of the case and adjudicate thereon, as the same question substantially had been already adjudicated on by a court of competent jurisdiction

Q B. RENWICK *v.* TIGHE *April* 19

Bill of exchange—Presentment—Notice of dishonor

The plaintiff, holder of a bill of exchange, having asked the acceptor on the last of the days of grace if he was going to pay the bill was told by him that the defendant the drawer would pay it, and that he had not a shilling The plaintiff did not formally present the bill to the acceptor but sent the same day by post a notice to the defendant that the bill was not paid, which notice was addressed to the defendant at "Edward Street, Hampstead Road;" the defendant had a lodging at 28 Edward Street, but the notice never reached him The bill was dated from "London" only.

Held, that there was no impediment to the action either for want of a sufficient presentment for payment or a sufficient notice of dishonor.

C. P. BECK *v.* DENBIGH ET AL. *April* 17.

Trespass—Trover—Distress.

If a landlord put in a distress and declare that he distrains and does really intend to distrain certain goods on the premises which are not by law distrainable—for this *alone* neither trespass nor trover will lie—the intention not constituting any cause of action. The ruling of the judge that inasmuch as the sale took place subsequently to the issuing of the writ no evidence of the sale could be given, held to be correct.

Q. B. HOLDEN ET AL v BALLANTYNE ET AL. *April* 18

Practice—Misjoinder of defendants—Discretion of the judge as to amending the record—Common Law Procedure Act.

By the C. L. P. Act it shall and may be lawful for the Court or a judge in case of the joinder of too many defendants in any action on contract at any time before the trial of such cause to order that the name or names of one or more of such defendants be struck out if it shall appear to such Court or judge that injustice will not be done by such amendment.

Held, that the court *in banc.* will not review the discretion of the judge where he has refused to amend, *contra*, where he may have amended improperly.

REVIEWS.

THE NORTH-BRITISH REVIEW for November is before us, and is an excellent number.

The discussion which is now taking place upon Theological subjects, occupies the first pages with a genial yet conservative article under the heading of "Modern Thought, its progress and consummation" which is well worth a perusal.

The events which have lately transpired in Syria, render interesting, an account of the Druises, the tribe which during the past year has so fiercely revived the animosity of the Mahommedan to the Christian.

Critical and generous notices of the writings and literary position of Leigh Hunt, Lord Macaulay and the American Humorists give a graceful attraction, while a carefully prepared paper upon the "Province of Logic and recent British Logicians" enters fully into an abstruse subject, with a lucidity of style necessary for the general reader, and an ability to be admired by the student whatever his metaphysical views.

There is also an article upon the South American Republics, whose progress seem to have been impeded throughout their entire history, by internal contests not unlike the one now threatening the more powerful republic of North America.

Other papers upon Revivals, &c., conclude the quarterly.

THE ECLECTIC MAGAZINE for January is received.

This magazine it will be recollected is made up of selections from the best current foreign literature, together with embellishments.

The embellishments of the present number relate to historic events of France and England in *the divorce of the Empress Josephine and King Henry the VIII., and Anne Boleyn.*

Several selections from Italy, Sicily, and Syria, are at present opportune considering the great interest now felt in these places.

The Reviews contribute other entertaining articles among which is a noticeable a paper from the *British Quarterly* with the heading of "Hours with the Mystics." It reviews the different phases presented by Sabbatism, Gnosticism and Mysticism from the earliest times.

We take this opportunity of thanking the enterprising publishers for two premium plates beautiful in design and well executed called respectively "Sunday Morning and "Returned from Market."

PATENTS OF CANADA, FROM 1824 TO 1849. Toronto: Printed by Lovell & Gibson, Yonge Street, 1860.

The business of the Patent Office in Canada having (according to the Preface) within the last few years greatly increased, the government have deemed it advisable to follow the example of other countries and to publish from time to time the specifications and drawings of all Patents issued in the Province.

The volume before us (700 pages) contains the specifications of Patents issued in both Provinces before and after the union, from the year 1824 to January 1844, and of the specifications and drawings from the latter period till 1849.

It has not been thought advisable to incur the expense of engraving drawings of those inventions the patent right of which expired in January, 1858; for (as well remarked in the Preface) the publication of the names and specifications of such is sufficient notice of their having existed, and that they have by the expiration of fourteen years, now become public property.

We understand that a second volume of the publication will be issued on or before 1st May next.

We cannot too highly recommend this well directed effort of the Canadian Government. The patent interest is now becoming in Canada, as in older countries, one of great importance. Few there are who understand or pretend to understand the intricacies of the law regulating the granting of Patents for inventions; but to solicitors concerned in the issuing of patents, and to all inventors intending to apply for patents, a knowledge of patents previously granted is most essential.

We regret to say that applications for Letters Patent are too often prepared by men who know nothing of the law relating to such applications. The result *is* incomprehensible specifications—and *will be* endless and vexatious law suits.

It is the fashion with every man who feels himself able to spell the Queen's English, and to reduce it to passable syntax to prepare agreements, deeds, mortgages, and other such writings. That fashion is now being extended to the preparation of the more difficult writings necessary to the obtaining and validity of Letters Patent for invention. The consequences will fall upon those who are sufficiently "penny wise and pound foolish" to employ mere scriveners.

Lawyers however have no good grounds to complain of "these fashions." The most tedious chancery suits, and the most protracted law suits are those that arise upon the the construction of bungled conveyancing. We know one instance where a man to save $3 employed a schoolmaster to prepare a mortgage, and afterwards had the pleasure of paying $200 to have it reformed in Chancery so as to express what was really intended by the parties, and what a lawyer of any experience could not have failed to express.

BLACKWOOD'S MAGAZINE is received.

It contains the conclusion of an argument upon the benefits of Iron-clad ships of War, a paper upon Social Science, and some entertaining matter of a light character.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

WILLIAM MORTIMER CLARK, of Toronto, Esquire, Attorney-at-Law.—(Gazetted December 8, 1860)

WILLIAM DICKINSON MACKINTOSH, of Sarnia, Esquire, Attorney-at-Law.—(Gazetted December 8, 1860)

THOMAS WATTS, of Ottawa, Esquire.—Gazetted December 8, 1860)

WILLIAM STEVENS SENKLER, of Brockville, Esquire, Solicitor-in-Chancery.—(Gazetted December 22, 1860)

ASSOCIATE CORONERS.

JOHN MUNRO, Esquire, M D, for County of Wellington.—(Gazetted December 8, 1860)

ROBERT CHARLES MANNERS, Esquire, for County of Middlesex.—(Gazetted December 22, 1860)

THOMAS R. K. SCOTT, Esquire, for County of Lambton.—(Gazetted December 22, 1860)

TO CORRESPONDENTS.

"B"—Under "Division Courts," page 14.

"J. J R."—Under "General Correspondence," page 21