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DIARY FOR NOVEMBER.

5. Saturday .. Articles, &c., to be left with Secretary of Law Society.
6. SUNDAY... *20th Sunday after Trinity.*
7. Monday ... Chancery Hearing Term commences.
13. SUNDAY... *21st Sunday after Trinity.*
19. Saturday .. Chan Hearing T. ends. Last day for serv. of Writ for Co. Court.
20. SUNDAY... *22nd Sunday after Trin ty.*
21. Monday..... MICHAELMAS TERM beg" s.
25. Friday ..... Paper Day, Q. B.
26. Saturday... Paper Day, C. P.
27. SUNDAY... *1st Sunday in Advent.*
28. Monday..... Paper Day, Q B.
29. Tuesday .. Paper Day, C. P. Last day for declar. for Co. Court.
30. Wednesday Paper Day, Q. B.

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.

NOVEMBER, 1859.

ASSIGNMENTS TO CREDITORS.

In the absence of a Bankruptcy law in this Province, the law regulating debtor and creditor in general, and that branch of it which relates to assignments in trust for creditors in particular, is deserving of close attention.

Of late years there have been signal changes in this branch of the law—changes made, so far as one can see, without system and without connexion, and consequently by no means free from confusion and doubt.

Under this state of the law, the questions, what is a legal assignment, when such an assignment ought to be executed, the effect of it when executed, and what shall be done with it when executed, are not easily answered. We propose to make some remarks on decided cases, to show as far as possible the true answers to these questions.

What is a legal assignment.]—An agreement between creditors and their debtor may be by parol, that is, oral (*Norman* v. *Thompson*, 4 Ex. R. 757), but under certain circumstances writing is positively required. If the property intended to be assigned is such that an executory agreement in respect thereof is by the Statute of Frauds required to be in writing and signed by the party to be charged therewith, it would seem that the statute applies, and must be complied with. Thus, if the subject matter of the assignment be real estate, or goods exceeding £10 in value, or something not to be performed within a year, the assignment ought to be in writing. (Per Macaulay, C.J., n *Brunskill* v. *Metcalf et al.*, 3 U. C. C. P. 153.) The consideration of such an assignment is the fact that a number of creditors sign, each acting on the faith of the engagements of the others—each having the undertaking of the rest as a consideration for his own authority. (Per Sullivan, J., *Ib.* 2 U. C. C. P. 451.)

When to be executed.]—Though it is enacted by statute, 22 Vic. cap. 99, sec. 19, that if any person, being at the time in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, shall make or cause to be made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects, &c., with intent to defeat or delay the creditors of such person, &c., every such gift, conveyance, assignment, transfer, &c., shall be deemed and taken to be absolutely null and void as against the creditors of such person; yet, it is expressly declared that nothing in the act contained shall be held or construed to invalidate, &c., "any deed of assignment made and executed by any debtor for the purpose of paying and satisfying, ratably and proportionably, and without preference or priority, all the creditors of such debtor their just debts." Until the assignment is executed by some creditor or creditors, it is a mere voluntary conveyance, revocable at the pleasure of the debtor, and consequently void against a subsequent purchaser for value or an execution creditor. (*Harland* v. *Bucks*, 15 Q. B. 713; *Siggers* v. *Evans*, 5 El. & B. 367; *Maulson* v. *Topping et al.*, U. C. Q. B. 183.)

The effect, when executed.]—The assignment is to be for the benefit of creditors, and *not* of the debtor. If, therefore, the effects assigned be of much greater value than the debts due, and the transaction appear to be an attempt to tie up the property as against creditors, it will be void. (*Bulkwell* v. *Beddome et al.*, 16 U. C. Q. B. 203; *Cuming* v. *McNaughton*, 16 U. C. Q. B. 194.) Or if the debtor exact benefits for himself—such as the retention and enjoyment of his furniture or other part of his property; a release from his debts in full, though payment be only of part; or the payment of the surplus, if any, after dividend—in these and other cases the better opinion appears to be that the assignment would be void as against non-executing creditors. (*Wilson* v. *Kerr et al.*, 17 U. C. Q. B. 183; *Maulson* v. *Topping et al.*, *Ib.* 168.) Speaking of an assignment of this kind, the Chief Justice of Upper Canada is reported to have said: "In my opinion, it was also fraudulent, by reason of the stipulation contained in the assignment that no creditors should share in the proceeds except such as should execute the assignment within forty days, which assignment contained the release by the creditors who should execute of all the debts in full, on condition of their getting the dividend out of what the effects might produce, and a provision that after the executing creditors

should be paid their dividend, any surplus that there might be should go to their assignor" (17 U. C. Q. B. 170); and Mr. Justice Burns, in the same case, described the assignment as "an attempt to coerce the creditors to come in under a disadvantageous condition, *at the peril of getting* nothing" (*Ib.* 171). In one case where the debtor having obtained from his creditors an extension of time, covenanted to pay all his debts in full and not to part with his effects except for the benefit of his creditors generally, but subsequently made an assignment to one of his creditors for the benefit of all, the deed containing a release from all further indebtedness by the creditors executing the assignment. The Court of Chancery declared such an assignment to be in contravention of the agreement; that the creditors were entitled to participate ratably in the proceeds of the trust without releasing the balance of their claims (*Taylor* v. *Mabley*, 6 U. C. Chan. R., 570). The result of the cases seems to be that a person who is making an assignment has no right to dictate terms whereby he is to derive a benefit or advantage to himself. If there be any secret trust, benefit or advantage to be derived from the assignment by the debtor, the transaction will be fraudulent and void as against those creditors who do not agree to it.

What shall be done, when executed.]—The assignment must be not only for the benefit of creditors in good faith, but notice of it must be given, directly or indirectly, actually or constructively, to the public, so that creditors may be informed of its existence, and govern themselves accordingly. It is enacted by the 20 Vic. cap. 3, sec. 2, that every sale of goods and chattels which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing sworn to and registered in the office of the clerk of the county court of the county or union of counties where the bargainor (if a resident of Upper Canada) shall reside; otherwise such sale shall be void as against the creditors of the party conveying, &c. (secs 2 & 5). The instrument must be accompanied by an affidavit of execution, and an affidavit of the bargainee, or his agent duly authorized in writing to take the conveyance, &c., that the sale is *bona fide* and for good consideration, as set forth in the conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein as against the creditors of the bargainor (sec. 2 of 20 Vic. cap. 3). The statute (which does not apply to lands) recognizes a delivery and continued possession thereafter to convey title, and the object is to guard the rights of creditors and subsequent purchasers and mortgagees in good faith against cases where a delivery and continued change of possession does not follow the sale; and it is sufficient for us on this point to state that any assignment to creditors has been held to be a "sale" within the meaning of and to come under the operation of the act. (*Taylor* v. *Whellemere et al.*, 10 U. C. Q. B. 440; *Heward* v. *Mitchell, et al.*, *Ib.* 535, S. C. 11 U. C. Q. B. 625.) *It seems that the affidavit* may be made by one of several, as well as by all assignees, in a deed. (*Heward* v. *Mitchell et al.*, 11 U.C. Q.B. 625.)

The act as to the registry of bills of sale, &c., applies only to cases where the goods and chattels are in the possession of the assignor at the time of the assignment, and not to goods and chattels subsequently acquired. As a general principle, it is clear that an assignment of personal property can only operate upon such property as was in existence, and as the assignor had an interest in, at the time of executing the assignment. (*Short* v. *Ruttan*, 12 U. C. Q. B. 79.) Thus: where a chattel mortgage was made on the 18th February, 1853, of seven hundred pieces of timber, "together with whatever quantity of squared timber the party of the first part may manufacture during the remainder of the season," and the timber made after February, 1853, was allowed to remain in the possession of the mortgagor, it was held that as against a creditor of the mortgagor the mortgagee was not entitled to such subsequently made timber. (*Cummings et al.* v. *Morgan*, 12 U. C. Q. B. 565; see also *Campbell* v. *Reed*, 14 U. C. B. 305.) If the goods intended to be assigned are not in the possession of the assignor—for example, in a custom house—*it would appear there cannot be any actual* and continued change of possession to satisfy the statute. (*Harris et al.* v. *The Commercial Bank*, 16 U.C. Q.B. 43.)

It is not a question of law, but a matter of fact for the decision of the jury, whether, under all the circumstances of a particular case, there has been an immediate delivery, and actual and continued change of possession, under an assignment, sufficient to satisfy the statute, where the assignment is not registered, as the statute prescribes. (*Forbes et al. v. Smith*, 13 U. C. Q. B. 243; *Waldie v. Grange*, 8 U. C. C. P. 431.)

Where a debtor, just before several executions issued against his property, assigned it to trustees for the benefit of his creditors, with the most minute accuracy as to every article of property, and his sign was taken down from his shop, but he remained with his clerks in possession of the goods, selling them as if his own property, but accounting *to the trustees, the property having* been taken in execution by the sheriff as belonging to the debtor, it was held, in an action of trespass by the trustees against the sheriff, that, the jury having negatived the possession of the trustees, a verdict for the sheriff was correct. (*Armstrong et al. v. Moodie*, 6 U. C. O S. 538; see also *Servos* v. *Tobin et al.*, 2 U. C. Q. B. 530; and *Wilson* v. *Kerr et al.*, 17 U. C.

Q. B. 168.) A change of possession, and afterwards the assignees redelivering to the debtor as their agent, though his being agent may accord with the express terms of the deed, is after all nothing but a symbolical delivery, leaving the goods just where they were before; and this, the Legislature determined, should not be the case without registration of title. (*Heward v. Mitchell et a.*, 10 U. C. Q. B. 440, S. C. 11 U. C. Q. B. 625.) Where there is no registry of the assignment, the only really safe mode, under all circumstances, is for the assignor to go out of possession, and so continue. If this be not done, instead of the public knowing of an actual and continued change of possession, they will probably know of nothing except what has all the appearance of a fraud, such as the Legislature designed to prevent. (*Carscallan v. Moodie*, 15 U. C. Q. B. 92; *McLeod* v. *Hamilton*, *Ib.* 111; *Taylor et al. v. The Commercial Bank*, 4 U. C. C. P. 447.) Still, where the parties put others in possession with the assignor, and the jury found a verdict for the assignees, the court refused to disturb the verdict. (*Maulson et al.* v. *The Commercial Bank*, 17 U. C. Q. B. 30.)

THE CANARY AND THE COUNTY JUDGE.

The County Courts of England, as our readers know, are similar in their constitution, jurisdiction, and procedure, to the Upper Canada Division Courts. The Judge decides both upon law and facts, and, like our local Judges, may exercise a large discretion. Our Judges, however, do not venture to *legislate*—they declare the law, they do not attempt to manufacture laws to suit their own particular views.

A certain Judge (Everett), who enlightens the profane vulgar resorting to the Salisbury County Court (England), has announced a new principle, not discoverable in the books as we on this side of the Atlantic read the law; and which the learned Judge must have drawn from his own brains instead of from his books, unless, indeed, by some curious process of reasoning, he has discovered it in the maxim, *de minimis non curat lex* (the law does not concern itself about *Canaries*). The case of *Matthews* v. *Redway*, reported in the *County Courts Chronicle*, is our authority. The question was as to the value of a Canary bird, and on the case being called, His Honour Judge Everett said, "he would never allow such a case to be brought into Court, without setting his face against it. He would decline to try it, and the plaintiff might go to the Queen's Bench for a *Mandamus* to compel him, if he pleased. He would never sit to try such rubbish as the value of a Canary bird."

We assume, a sale by the plaintiff to the defendant, and the action brought to recover the "value" of the bird.

The County Courts are "small debts Courts," and are so designated in the Act. The Legislature has not given any arbitrary meaning to the words "small debts," and in their ordinary signification, they include all debts however trifling in amount.

We believe, that in some of the United States, debts under a certain named amount, are, by positive enactment, not recoverable through the Courts, but we never heard of such an enactment in England, or in any British Colony where the law of England is the rule for decision of civil rights. And in the absence of any statutory provision, Mr. Everett, we are bold to say, was guilty of a denial of justice, in refusing to entertain a case because the debt claimed was very small. Not even the musical aspect of this little case, could soothe the angry feelings in the Judge's breast. Poor birdie—poor plaintiff. If the learned Judge was so irate, the subject of the action being a Canary bird, how would he have felt if the matter was more minute, and involved a question as to the value of one well trained "industrious flea." But we must not dwell too much upon what our brother of the *County Courts Chronicle* pronounces an "error in judgment," while admitting fully the general excellence of the decisions given by the County Court Judges, and the good sense, temper, and discretion, with which their actions are guided.

Our cotemporary goes on to say, "It is not because in this solitary case the matter relates to a Canary bird only, that we advert to it, but we offer some few remarks, because we think an important principle is involved in the question. Articles may derive their value from peculiar and adventitious circumstances; and to take this very case before us, a Canary may not be a bird to afford much in the way of nourishment for the table, like a Dorking pullet, or an Aylesbury duck; but, as an article of trade, to be bought and sold by professed dealers in such things, a Canary may range in value, we believe, from 3*s.* to 30*s.*, or more. Societies are formed for improving their breed, and the Crystal Palace does not disdain to hold exhibitions of them, and to decree prizes to the owners. Will it be maintained, that if a stranger wantonly kill or maim such a bird, the owner is to be deprived of the power of seeking compensation for the loss he has sustained? But we go further than this—we look to the principle upon which the refusal of the learned Judge to try the case, is based, and we cannot but think it unwise, and unsafe to say, that in a Court which has been characterized essentially "the poor man's Court," any matter, however apparently trivial, where there is a wrong to be remedied, and justice to be done, is unworthy of being heard and decided."

We cordially concur in these remarks, and go further. We assert, the action of the Judge was not only ill-judged,

but contrary to law. If men fail to receive justice through the Courts, they will be apt to carve out justice for themselves. Five shilings may be a matter of no moment to the man who is worth 50*s.* or more a day, but to him whose earnings for a day would not equal 5*s.*, it is of consequence.

A Canary bird worth a crown, may be one of a stock numbering thousands—indeed, a man's whole means may be invested in the "Bird trade," and if he choses to sell every single bird on credit, is he to be told, you cannot recover the price of any such rubbish, as the value of a Canary bird is not worthy of notice.

Our local Judges, we believe, are, as a class, not inferior to the County Court Judges of England. They possess a more extended jurisdiction, being Judges of Superior Courts as well as of Inferior, and we have seen one of the ablest of our Judges, on one day disposing of a "question of value" extending to ten thousand pounds, and the following day in the Division Court (analagous to the English County Courts,) patiently investigating a case, the amount claimed being ten shillings.

The Superior Courts of Common Law in England, do not disdain to take cognizance of an action for two guineas, and even for less than that amount, if satisfied that there is no other Court in which the sum could be recoverable; and Judge Everett might have tried the little Canary case, small though the subject, without damage to his dignity.

There is always danger from pernicious example, and we are accustomed to look to the Past for light. In this point of view, the case is not undeserving of notice. One word more, it has been well observed, that the local Courts though commonly dealing in matters trifling in amount, "are not small Courts, for the principle of justice renders them great."

CONSOLIDATED STATUTES.

In this number we publish the proclamation giving effect to the Consolidated Statutes for Upper Canada, including the acts of last Session. They are to take effect "on, from and after the fifth day of the month of December, now next ensuing." A similar proclamation has been issued as to the Statutes for Canada.

PROVINCE OF CANADA.—EDMUND HEAD.

VICTORIA, *by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith, &c., &c., &c.*

To all to whom these presents shall come—GREETING:

JOHN A. MACDONALD, *Atty. Genl.* } WHEREAS in and by a certain Act of the Legislature of the Province of Canada, passed in the Twenty-second year of Her Majesty's Reign, and intituled, "An Act respecting the Consolidated Statutes for Upper Canada," it is amongst other things enacted that "The printed Roll attested as that of the Public General Statutes which apply exclusively to Upper Canada, revised, classed and consolidated, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof, and to embody the several Acts and parts of Acts mentioned as to be repealed in the Schedule A thereto annexed; but the marginal notes thereon, and the references to former enactments at the foot of the several sections thereof, form no part of the said Statutes and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected, and any mis-print or clerical error in the said Roll may also be corrected,—in the Roll hereinafter mentioned;" That "The Governor may select such Acts and parts of Acts passed during the present Session, as he may deem it advisable to incorporate with the said Statutes contained in the said first mentioned Roll, and may cause them to be so incorporated therewith, adapting their form and language to those of the said Statutes (but without changing their effect), inserting them in their proper places in the said Statutes, striking out of the latter any enactments repealed by or inconsistent with those so incorporated, altering the numbering of the chapters and sections, if need be, and adding to the said Schedule A a list of the Acts and parts of Acts of the present Session so incorporated as aforesaid; and the Governor may direct that all sums of money stated in the said Roll in Halifax currency, be converted into dollars and cents, in all cases where it can be conveniently done;" That "So soon as the said incorporation of such Acts and parts of Acts with the said Statutes, and the said addition to the said Schedule A shall have been completed, the Governor may cause a correct printed Roll thereof, attested under his signature and countersigned by the Provincial Secretary, to be deposted in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof, and to embody the several Acts and parts of Acts mentioned as repealed in the amended Schedule A thereto annexed; any marginal notes however, and references to former enactments which may appear thereon being held to form no part of the said Statutes but to be inserted for convenience of reference only;" That "The governor in Council, after such deposit of the said last mentioned Roll, may, by Proclamation, declare the day on, from and after which the same shall come into force and have effect as law by the designation of "The Consolidated Statutes for Upper Canada;" And that "on, from and after such day, the same shall accordingly come into force and effect as and by the designation of "The Consolidated Statutes for Upper Canada," to all intents as though the same were expressly embodied in and enacted by this Act, to come into force and have effect on, from and after such day; and on, from and after the same day, all the enactments in the several Acts and parts of Acts in such amended Schedule A mentioned as repealed shall stand and be repealed,—save only as hereinafter is provided; AND WHEREAS THE RIGHT HONORABLE SIR EDMUND WALKER HEAD, Baronet, being Governor General of our said Province of Canada, hath selected such Acts and parts of Acts passed during the Session of the Legislature of the Province of Canada now last past, as he deemed it advisable to incorporate with the Statutes contained in the printed Roll attested as that of the Public General Statutes which apply exclusively to Upper Canada, revised, classified and consolidated, under his signature, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, and hath caused them to be so incorporated therewith, adapting their form and language to those of the said Statutes, (but without changing their effect,) hath caused them to be inserted in their proper places in the said Statutes, striking out of the latter such enactments as are repealed by, or are inconsistent with those so incorporated, and hath caused

the numbering of the Chapters and Sections to be altered, as was necessary, and hath caused to be added to the Schedule A a list of the Acts and parts of Acts of the said Session so incorporated as aforesaid, and hath caused all sums of money stated in the said Roll in Halifax currency, to be converted into dollars and cents, in all cases where it could be conveniently done; and so soon as the said incorporation of such Acts and parts of Acts with the said Statutes and the said addition to the said Schedule A was completed hath caused a correct printed roll thereof, attested under his signature and countersigned by the Provincial Secretary, to be deposited in in the office of the Clerk of the Legislative Council; AND WHEREAS the provisions contained in the first three sections of the said Act have been thus duly carried into effect; AND WHEREAS our said Governor, after such deposit of the said last mentioned Roll, by and with the advice and consent of our Executive Council for the said province, hath declared the Fifth day of December next as the day on, from and after which the same shall come into force and have effect as law by the designation of "The Consolidated Statutes for Upper Canada; NOW KNOW YE, that by and with the advice of our Executive Council of the said Province of Canada, we do, by this our Royal Proclamation, declare that on, from and after the Fifth day of the month of December now next ensuing, the said last mentioned Roll attested under the signature of our said Governor of our Province of Canada countersigned by the Provincial Secretary, and deposited in the office of the Clerk of the Legislative Council of the said Province as aforesaid, shall come into force and have effect as law by the designation of "The Consolidated Statutes for Upper Canada," to all intents as though the same were expressly embodied in and enacted by the said Act. Of all which our loving subjects of our said Province, and all others whom these presents may concern, are hereby required to take notice, and to govern themselves accordingly.

In testimony whereof, we have caused these our Letters to be made Patent, and the Great Seal of our said Province of Canada to be hereunto affixed: Witness, our right trusty and well-beloved the Right Honorable Sir Edmund Walker Head, Baronet, one of our most Honorable Privy Council, Governor General of British North America, and Captain General and Governor in Chief in and over our Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward, and Vice-Admiral of the same, &c., &c., &c., at our Government House, in our City of Quebec, in our said Province of Canada, this ninth day of November, in the year of our Lord, one thousand eight hundred and fifth-nine, and in the Twenty-third year of our Reign.

By Command,

CHAS. ALLEYN, *Secretary.*

TO SUBSCRIBERS.

The attention of subscribers, now that we are drawing towards the end of our fifth year, is requested to the large amount of arrearages on our books.

By the new system of addressing the Law Journal each subscriber is monthly informed of the amount which he owes us to the end of the current year of his subscription.

When the present volume is finished we shall be compelled in justice to ourselves to make a decided effort to collect our dues. The ordinary expenses of publication are so heavy, that without a corresponding support from those for whose benefit we publish, we cannot be expected to continue our labors.

DAVID DUDLEY FIELD.

This distinguished lawyer recently delivered an address, on the opening of the Law School of the University of Chicago, the greater part of which we are enabled to publish. We do not remember ever to have read a production in which the Science of Law as applied to the affairs of men is so philosophically, so logically, and so ably treated.

The arguments, towards the conclusion of the address, in favor of the establishment of Law Schools, though short, are forcible. We recommend the perusal of them to all interested in Upper Canadian Universities. It seems to have been the policy of those who guide the destiny of more than one Upper Canadian University that we could name, studiously but stupidly to ignore the teaching of Law as a Science.

THE TYLER CASE.

The importance of this case in an international point of view is so great that without further apology we make room for its insertion.

Attention is directed to the advertisement of Little, Brown & Co., announcing the publication of a new law book, entitled "Parsons on Maritime Law;" as well as Vol. XVIII. of the *United States Digest*, and Vol. VII. of *Gray's Reports*.

In other columns will be found an advertisement of the *Eclectic Magazine*, to which we direct attention.

SELECTIONS.

ADDRESS OF HON. DAVID DUDLEY FIELD,

ON THE OPENING OF THE LAW SCHOOL OF THE UNIVERSITY OF CHICAGO, SEPTEMBER 31, 1859.

After a few preliminary remarks Mr. Field proceeded:—

Law is a rule of property and conduct prescribed by the sovereign power of a State. The science of the law embraces therefore all the rules recognized and enforced by the State, of all the property and of all the conduct of men in all their relations, public and private. Whenever there appears material capable of appropriation, whether it be solid earth or flowing water; whether it be the product of the soil, or the workmanship of man's hand, then comes the law, and gives you the rule by which you may take it, use it, and transfer it. Wherever there is a community, wherever there is a family, wherever there is a man, the law prescribes the rights, the duties, the relations. No engagement can be entered into, no work undertaken, no journey made, but with the law in view. No man walks abroad in the morning, or lies down to sleep at night, nor takes his bride to the altar, or lays his child in the cradle, but under the law's protection. This science therefore is equal in duration with history, in extent with all the affairs of men.

But we can measure it best by tracing its progress. When men dwelt in tents and led a pastoral life, their laws might doubtless have been compressed in a few pages. They had, of course, some part of our law of personal rights, the law of

succession, and of boundaries between the occupiers of adjoining pastures. This was the condition of the race in the primitive ages, and is even yet the condition of some parts of it. The Laplander in the North, the Bedouin in the South, the Nomadic tribes which roam over central Asia, our American Indians, and the Southern Africans, are in this condition. The Bedouin encamps upon the edge of the sand, or along the declivities of the mountains, his tents, his flocks and herds, his scanty list of clothing and utensils being his only wealth. When he has exausted one spot he removes to another, and if he is disturbed he flies to the desert. Nevertheless he is not without the pale of the law. He recognizes in many things more than the right of the strongest. His personal relations to his wife, his children, and his neighbors are subjects of regulation, and when he dies his effects are parted according to rule among his kindred.

The next stage in the civilization of the race was the fixed habitation and the cultivation of the soil; and this brought with it the next stage in the development of the legal system —the law of land and of permanent structures—a department which, though it teaches of the most permanent of earthly things, has been the most fluctuating, because it has been generally an index of political change and condition. To possess land, to own an estate, to found a family, and to make for it an ancestral home, are almost universal objects of ambition.

We seem to ourselves to be more firmly fixed when we are anchored in the soil. Where a man can stand beneath an ample roof, and look over broad meadows and cornfields, all his own, watch the reapers of his harvests, and the cattle in his pastures, he feels more stable in his fortunes, than if his wealth were in ships or factories, more abiding on the earth. Then the pleasures of agriculture are the most favorable to a serene spirit and happy life. The Fair, which has been lately held in this city, and of which I hear so much, which so many thousands attended, and where the wealth of your soil was marvellously displayed, bears witness to the interest excited in this pursuit. And notwithstanding the enormous increase of personal property in our modern society, the larger portion of man's wealth is still in the land. In the State of New York, the most commercial of our States, the assessed value of real property the last year was over a thousand millions of dollars, while that of personal property was but three hundred and sixty seven millions, and even in its metropolitan city, where there is the largest aggregation of personal property, its assessed value has only one hundred and sixty-two millions, while that of real property was three hundred and sixty-eight millions.

In the distribution of the land has determined the policy and the fate of governments, and these in their turn have encouraged the aggregation or subdivision of estates, as they inclined to aristocratic or democratic institutions.

For these reasons, the law, which regulates the possession, enjoyment and transfer of real property, has always been the subject of special attention. It has oscillated, as governments have swayed back and forth; at one time allodial, at another feudal; sometimes comparatively simple, then excessively complex; in one country natural, in another artificial.

But in all countries, whether in the valley of the Nile, or in an English county, and under all systems, that of the Jews in Palestine, or of the Romans in Italy, or the Mahomedans in India, or the French on the Seine, or the English in Australia, even under the simplest system that has ever been, or can ever be devised, the law of real property has ever been and must be large and difficult. The acquisition and use of land, the different kinds of ownership, the exclusive and perpetual, or the joint and temporary title, the conflicting interests of adjoining owners, the relative rights of landlord and tenant, and a thousand other conditions and incidents, can only be regulated upon a careful and minute analysis, by a series of rules adjusted with nice discrimination and adapted to an almost infinite variety of circumstances.

In the next stage of civilization, the products of the soil, were wrought into new forms, and manufactured fabrics added to the wealth and comfort of man. Manufactures required the purchase and collection of materials, the employment of workmen and the sale of the fabric. Commerce led to navigation. Each of these operations added a new chapter to the law.

Of these three stages in civilization and law, the ancient world was witness, but not in their highest development, though in forms of which the records will last forever. The accumulation of law-books became so burdensome, that, thirteen hundred years ago, it was found necessary to reduce them by substituting digests. The historian of the "Decline and Fall of the Roman Empire" has given us, in a memorable chapter, an account of the men and the process by which this work was accomplished, under the order of Justinian. Since then, however, materials have accumulated, greater by far than those, out of which the Roman Codes were constructed. Of the vast fabric of our present law, it is not difficult to distinguish between what is ancient and what is modern, and we can see that not half of it is as old as Justinian. While our law of obligations or contracts came from Rome, our law of property and of personal rights came, most of it, from other quarters. The present law of real property in this country and in England was brought from the North, or Northeast, by those conquering tribes whose scheme of civil polity was a gradation of ranks, bound together by feudal ties. This feudal system after having flourished through several centuries, has been gradually softening and disintegrating under the double influence of commerce and peace. Our maritime law is also in great part of modern origin, for though the commerce of the ancients covered the Mediteranean and the Red Sea, and coasted along the adjacent shores of Europe and Asia, yet the rules which govern modern commerce began with the activity of the middle ages and grew to maturity with the enterprise of our own times. The best part of our law of personal rights we owe to the spirit of Christianity and the influence of chivalry. A man's person is now sacred. You shall not confine it; you may not touch it. He may go or stay wheresoever he will; he may engage in any pursuit which pleases him; he may embrace any faith which appears right in his own eyes. Associations being more powerful than individuals, corporations scarcely known to the ancients, have become the most frequent and the most powerful agencies of modern society. During all the while the machinery of government has been increasing and expanding, till volumes are filled with the rules which relate to that alone. And last of all there have just appeared the three most marvellous inventions of all time—the steamer, the railway and the telegraph, which, while they have been making a revolution in the social life of man, have at the same time been adding three chapters to the books of his laws. And thus has it happened that the body of the law, the *Corpus Juris*, as we sometimes call it, has grown to its present colossal proportions—a structure so high and so vast that the mind is lost in the contemplation of its vastness as a whole, and the number and completeness of its parts.

The more perfect indeed is the civilization, the more complete are the laws. The latter are in some respects both the cause and the consequence of the former. They act and re-act upon each other. Ask the man who wonders that there are so many laws, to go with you to the neighboring prairie, and standing in the door of the farm-house, with cornfields and pastures before you, explain to him the title by which the owner holds the land, how far his use is absolute, and how qualified by the rights of his neighbors, or the paramount rights of the State, the relative rights of the wife and husband, the persons who shall succeed when the owner dies, the rights of the adjoining proprietors in the stream which runs through the pasture, the rights of the tenant, who tills the meadow, what right the owner has in the shore of the lake, how far he

may build into it, and on what conditions, the relative rights of himself and the public in the highway before his house, the right which he has to the pew in the church, whose spire shines through the trees, and in the family vault where he expects in due time to be borne. Or take him with you to a point overlooking this city, and look down upon its network of streets, its long lines of private buildings, its public edifices, and its crowded port. The eye is weary with the infinite variety of objects on land and water; the ear stunned by the incessant roll of wheels and the tread of feet The streets are thronged with men and women, intent on business or pleasure. Vessels are furling or unfurling their sails as they return to port or depart on their voyages. Steamers are plughing the lake, railway trains are arriving and departing. In all this scene of excitement and struggle, there is not a person or an act, which the law does not sway, by an influence silent and unseen perhaps; but none the less effective. Look into the banking-house, and see it at work dictating the form and use of commercial paper, by which the exchanges are effected; there is not a promissory note, or a bill of exchange that is not in part the work of its hand; look into the insurance office, and see the law guiding its operations, the insurance of dwellings, warehouses, vessels and cargoes, and the adjustment, of losses by storm and fire; look into the counting room, the work-shop, the market, and consider the rules which control the sale and delivery of all sorts of merchandise; those which regulate the building, freighting, manning and sailing of ships; the construction, repairs and occupation of buildings. You see the offices of corporations and partnerships. These are the subjects of careful regulation, suited to all the purposes for which such associations are formed, from the smallest trade to the mightiest enterprise, whether the object be gain or charity or human culture. Dissolve this mass of busy men into its elements, and observe that there is a law for each and peculiar to each, for the clergymen, the lawyer, the physician, the banker, the merchant, the artizan, the seaman. The scholar appeals to it for protection of his copy-right, the inventor for his patent.

You see a funeral procession. When the dead man is gathered to his fathers, and the procession has dispersed, his kindred will return to his tenantless mansion to read his will, or to learn if he has left the disposition of his estate to the general laws of succession. Then comes into operation that long chapter of laws, regarding the distribution of the property of the dead, testate or intestate; the validity and interpretation of wills, the fact of marriage, the legitimacy of the children, the death of the absent. You will see crowds hastening to the railway trains or the steamers. Every individual among them relies upon the law for the protection of his person and the enforcement of his contract.

But how are rights to be enforced? The State itself, of its own motion, undertakes the punishment of the graver violations of law. Hence the need of a penal code, with its definitions of crimes and its apportionment of punishment. These are great departments of the law, which have engaged and will ever engage the attention of the wisest men.

For the prosecution of criminals, as well as for judging between man and man, the State provides the machinery of tribunals and officers of justice. These, however, though vast and intricate in their details, are but a part of the machinery of government. Who that has studied this department alone but wonders at its magnitude. A lifetime seems scarcely sufficient for its mastery. Political philosophy and history are its adjuncts. Take our political code, survey it generally, enter into its details, study its history, consider how many good and wise men have participated in its framing, how cautiously it has been contrived, amended, added to, debated, at every step in its progress, and then stand reverently before it as the grandest monument of human genius. Time would fail me if I were to attempt recounting even the principal epochs in its history; the long and hardy training of our forefathers beyond the sea, where their institutions were purified by blood and fire, the transplanting of these institutions hither, their curtailment of the monarchical portions, the amelioration which time and experience have wrought, the principle of federation, its origin and development, and the final completion of the vast structure of our government, federal and state, through all its parts. The magnificent dome which rises so high into the air and whose arches stretch across the continent, was built with infinite labour, out of an endless variety of materials; while the walls and columns upon which it rests were the slow work of centuries of suffering and patience. Large must be the book, which shall even describe adequately this double goverment of ours, larger still that which shall contain all the laws, by which it moves and all the functions which it performs; its various departments, legislative, executive and judicial, the powers and duties of all its public officers, its revenues, and the different branches of the public services.

These are general views, as we look from an elevation upon a scene below. Its immensity is only half comprehended until we enter into details. It is as if upon a mountain top we look over and beyond hill and valley, lake and river, and great towns; we understand their distances; we have a general idea of vastness; but when we have descended and traveled over the scene, then and then only we know how vast, how varied, how infinite in details it really was. The distant mountains which appeared to have sides as smooth and regular as a garment of fur, we find composed of giant ridges, deep valleys, torrents and water-falls. The valley which seemed spread out like a map of level ground, is filled with winding streams, and roads, a succession of hill and vale, covered all over with villages and farm-houses, and vocal with the voices of men, and animals. So would it be, if after the general view we have taken you should enter into more minute details.

Let us select for example a single department and follow out its subdivisions. Take if you will the contract of sale, and see into how many branches it devides itself. Whether the contract be written or unwritten, whether there be an actual transfer, or only an agreement to transfer, whether the thing agreed upon be already made or only to be made, whether it be sound, or defective, or deficient in quantity, whether there be fair dealing, concealment or misrepresentation as to quality, existence or value, whether the thing has been delivered or paid for, in whole or in part, whether the seller or the purchaser ever, and if so when and upon what terms, may rescind the contract and be reinstated; all these, and many more, are considerations affecting the transaction, which the law has carefully provided for, by an appropriate rule.

The law may be compared to a majestic tree that is ever growing. It has a trunk heavy with centuries, great branches equal to trees themselves, with their roots in the parent trunk; lesser branches, and from those lesser branches still, till you arrive at the delicate bud, which in a few years will be itself a branch, with a multitude of leaves and buds. Or it is more fitly compared with the streams of your own Mississippi Valley, where there is the great parent stream, the father of rivers; into this pours the Arkansas, the Ohio, the Missouri; into these again pour lesser rivers; and still smaller into these last, and so on till you reach at last all over the valley the myriads of rivulets, and trace them to their springs. In like manner the law appears infinite in its manifestations. The shelves of law libraries groan under the accumulation of their volumes. The curious in such matters have computed that the number of cases in the English Courts, relating to practice alone, amount to 25,000, and that the common law has 2,000,000 rules.

Compare this science with any of the other sciences; with those which are esteemed the greatest in extent, and the most exalted in subject. Take even Astronomy, that noble science, which numbers among its illustrious disciples, Copernicus,

Galileo, Kepler, Newton, LaPlace, which weighs the sun, and the planets, measures their distances, traces their orbits, and penetrates the secrets of that great law which governs their motion. Sublime as this science is, it is but the science of inanimate matter, and a few natural laws; while the science which is the subject of our discourse governs the actions of human beings, intelligent and immortal, penetrates into the secrets of their souls, subdues their will, and adapts itself to the endless variety of other wants, motives and conditions.

Will you compare it with one of the exact sciences—as, for example, with mathematics? Of this science I would always speak with profound respect. Clear, precis[illegible]imple in its elements, far-reaching and sublime in its result, it has disciplined and exalted some of the greatest minds of our race, and been the nursery of other sciences, and of the mechanic arts. Liebnitz, Euler and La Grange have been its teachers, and illustrious examples of the strength and elevation which it can give to the intellect. But the science of calculation is occupied with a single principle. This it may go on to develop more and more, till the mind is almost lost in its immensity; yet the development of that one principle can never reach in extent, comprehensiveness and variety the development of all the principles by which the actions of men toward each other are governed in all their relations. The law, it will be remembered, is the rule of all property and all conduct. Just so far as property is diversified (and it has scarcely a limit,) so far as the law diversified, and as varied as are human actions, so varied as the rules applicable to them.

The differential and integral caculos is undoubtedly the most subtle instrument of calculation which was ever invented; yet it is but an instrument of calculation after all.

As man is an object more interesting than any inanimate matter, or any abstract principle, or any instrument of calculation; as his actions are higher objects in the scale of the universe than the movement of any inanimate thing, so are the rules which are the guides of his conduct, greater in extent, variety and interest than the rules of astronomy and mathematics.

This rapid survey may serve to give us some idea, imperfect indeed, of the magnitude of legal science. Though it may be the most familiar of all things; it is also the most profound and immense. It surrounds us everywhere like the light of this autumnal day, or the breath of this all comprehending air. It sits with us, sleeps besides us, walks with us abroad, studies with the inventor, writes with the scholar and marches by the side of every new branch of industry and every new mode of travel. The infant of an hour old, the old man of three score and ten, the feeble woman, the strong and hardy man, are all under its equal care and by it alike protected and restrained.

It is hardly a weakness for one, who loves it as I do, to seek to detect it in its invisible agencies; to see it govern where it is silent, and restrain where it is unheard; to fancy its invisible foot treading in all workshops and markets, and its invisible hand, waiving the crowds right and left; to follow its majestic governing and protecting presence into the lonely cabin, on the prairie, into the little hamlet, upon the side of the mountain; into the ship, struggling with the storm, in the North Atlantic, into the room by the way-side, where a few disciples are worshipping God, according to their consciences, amidst a population of a different faith, but as undisturbed and as fearless, as if they were surrounded by a battalion of armed men.

We have considered thus far the magitude of legal science. It's importance is more than commensurate with its magnitude. Without it there could be no civilization, and no order, where there is no law there can be no order, since order is but another name for regularity, or conformity to rule. Without order, society would relapse into barbarism. The very magnitude of the law is a proof of its necessity. It is great because it is essential. There is a necessity, not only for law, but for a system, with arrangement and a due relation of parts. For without this system the administration of government both in its judicial, and its administrative departments would fall into irretrievable confusion. It is necessary both for those who are to administer, and those who are to obey. There is besides, a natural tendency to assimilation where there is a great number of rules, just as there is a natural tendency in substances to crystalization. Law, and the science of Law go therefore together and both are as essential as industry, refinement, liberty, civilization. I do not affirm that law is the cause of civilization, but the concomitant of it.

The science of the law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the judge or upon his notions of what was just, our property and our lives would be at the mercy of fluctuating judgment, if not of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican government above all others, The law is our only sovereign. We have enthroned it. In other governments, loyalty to a personal sovereign is a bond for the State. Men cohere because they adhere to the throne. We have substituted loyalty to the law, for what with others is loyalty to the person. In place of a government of opposing interests, we have a double government of written constitutions. The just interpretation of these constitutions and the working of the double machinery, so that there may be no break and no jar are committed in a great degree, how great few ever reflect, to the legal profession, and are dependant upon their knowledge of the science of law in all its departments, political, civil, penal and remedial. Precisely, therefore, as free government and republican institutions are valuable, in the same proportion is the science of the law valuable as a means of preserving them.

My subject does not lead me to consider the dignity, value or responsibilities of the legal profession. We are now concerned, rather with the science they cultivate, than with them. But if it were within the scope of this address, I might remind you that the law is lifeless without a sanction and a magistracy to enforce it. When a magistracy is established capable of judging, and independent in its judgment, the office of advocate begins and rises at once to dignity and power, as the means or communication between the magistrate and the suitor, and as assessor or aid to the magistrate.

I might also remind you that the law throws its own importance over the professor who teaches it and the advocate who practices it. Upon the learning, characters and fidelity of its practisers, its administrations mainly depends as we know from their history, as and we might have inferred from their office. In all countries and at all times, the character of the lawyer, and the public consideration accorded to him have been faithful witnesses of the freedom and civilization of the country and time. When there is arbitrary power, there is no occasion to study the law; when the law begins to reign, its teachers and practisers come forth, the law and the lawyer go together, all the world over.

I might add, that if there be any science and any culture, tending to invigorate and sharpen the intellect, they are legal science and discipline. Every science rewards those who study it, by enlarging their minds to a comprehension of its learning—and the greater the science, the greater the reward. But there is something in the conduct of litigation which makes the judgment severe and keen, beyond any other discipline to which it is subjected. While, therefore, the study of the law has the effect of enlarging its practice, has the effect of sharpening the intellect, leading to precision of thought and language, and acuteness in discovering the truth of facts. Who can unravel intrigues, lift the veil from hypocrisy, dissect evidence, and lay falsehood bare, like the practised lawyer? Better men have never existed, more exalted in intellect or purer in motive, or more useful in effort, than our profession can show. I should delight in placing some of them be

fore you; and in asking my professional brethren to join with me, in saying, let us magnify our office; let us cherish it as full of great traditions, of illustrious examples; of beneficent results; let us fulfil it, as the best agent of political and social good; let us recommend it as requiring the highest talent, the purest intentions, the most patient industry.

But I must return from this digression to the science which is the object of this discourse. Am I not justified in saying of it, that while of the moral sciences it is the most exact, it is of all sciences the most comprehensive in its compass, the most varied and minute in its details, the most severe in its discipline, and the most important to the order, peace and civilization of mankind.

How shall this science be best learned? There are three methods. The private study of books; the advice and aid of practitioners, amid the bustle and interruptions of practice, and the teaching of public schools.

The inadequacy of the first is obvious; the disadvantages of the second are too painfully known to all of us who studied in that way; the third is beyond question the most efficient and complete. There is as much need of public schools for the law, as for any other science. There is more, for the greater the science the greater the need. Above all others, this science, so vast, so comprehensive, so complicated and various in its details, needs to be studied with all the aids, which universities, professors, and libraries can furnish.

Where else so readily as here, will the student obtain a view of the law as a whole, and of all its parts in their several relations and dependencies; here, where are collected the records of the science, where there are professors devoted to its teaching, where there are scholars emulous of distinction, and stimulating each other. If medical schools have an advantage over the former method of study and practice by the side of a practising physician, or if theological schools give better training, than the private study of an ordained clergyman, busy with parochial duties, for similar reasons, a school of law, with its large library, its professors set apart to the duty its lectures, its company of students, its discussions, oral and written, are helps above all that the private office of a busy advocate can offer to a complete legal education. Not that I would altogether dispense with, or undervalue the observation of actual practice obtained by attendance in a lawyer's office, during the smaller portion of his legal course, preliminary to the student coming himself to the bar. After the general survey of the law, the comprehension of its parts, and the examination and study of all those parts in all their relations, which a thorough training in a law school can best give, it would undoubtedly tend to the advantage of the youthful practitioner to pass a few months in the office of an elder brother, observe its methods, and participate in its active duties.

DIVISION COURTS.

CORRESPONDENCE.

To the Editors of the Law Journal:

COUNTY OF HURON, Oct. 18, 1859.

GENTLEMEN,—Has a bailiff power to seize a mortgage on real estate, under a warrant of execution issued from a Division Court? And if so, how can he collect it, and who has to sign the release for the legal discharge of the debt, and its registry for the safety of the mortgagor?

By answering these few questions, through your valuable journal, you will perhaps oblige more than

ONE OF YOUR SUBSCRIBERS.

[Our correspondent puts his questions in a manner which causes us to have some doubts on the subject; but we are inclined to hold that a bailiff can seize and collect a mortgage under an execution against the mortgagee, under certain circumstances. For instance, if on going to make a seizure he finds a mortgage made to the execution debtor, containing a covenant for the payment of money, and of which there has been no forfeiture, we think that under the 89th section of the D. C. Act, which mentions "specialties or securities for money," it could be taken in execution. We know of no provision, however, for registering a discharge of the mortgage when collected; but probably a Court of Equity would compel the mortgagee to do so.—EDS. L. J.]

To the Editors of the Law Journal:

PRESTON, 4th November, 1859.

GENTLEMEN,—Agreeably to your request, I hereby send you the result of the operations of the 91st clause of the Division Court Act of 1850, in the Second Division Court for the County of Waterloo, for the period of eighteen months—viz., from 1st January, 1858, to 30th June, 1859:

		AM'T CLAIMED.
Number of Judgment Summonses issued	41	$1644 92
Of these were withdrawn	10	502 17
Leaving for hearing in Court	31	1142 75
Of these were dismissed by the Judge	5	313 70
Orders were made on	26	829 05

Note.—Two orders for commitment; both were executed, and the result was the payment of one of the claims. 24 orders were made for monthly payments.

Out of the 26 claims, now paid in full	5	86 67
Reducing the number to	21	742 38

On 14 claims out of the 21, *part* payments were made, and on the remaining 7 claims *no* payments were made, nor further action taken.

The said 14 claims amount to $453 61; amount paid thereon, $160 90; balance due	$292 71
Adding to this balance the amount claimed by the said 7 claims, being	288 77
will show the amount still due to be	$581 48

Upon calculation I find that the sum paid on the above $829 05 is equal to 30 per cent., leaving 70 per cent. unpaid.

Respectfully yours,

OTTO KLOTZ.

To the Editors of the Law Journal.

NEWCASTLE, November 1st, 1859.

GENTLEMEN.—Allow me to ask your opinion, on the meaning of the 57th clause of the Division Courts' Acts, 1850. You will observe that it begins thus: "Whereas it is expedient that judgments exceeding ten pounds in the said Courts, shall affect *lands* (in certain cases), and that execution should issue in certain cases, against *lands* on judgments obtained in any Division Court, &c.;" and, after pointing out the mode for removal into the County Courts, states that until the judgment is fully paid and satisfied, the plaintiff or defendant shall be entitled to pursue the *same remedy* for the recovery of the same or balance due thereon, as if the judgment had been originally obtained in the County Courts.

Does this entitle a party, after removal under this clause, to obtain a garnishee summons and order, &c., under the County Courts Procedure Acts? And is such practice general? I ask, because it prevails in these Counties.

Your's truly,

AN INQUIRER.

[From the preamble to the section of the Division Courts' Act, giving a remedy to judgment creditors over £10, against lands, it would seem as if lands especially were intended to be affected by it; but the provision is a remarkable one, as is also that enabling parties to garnishee debts, &c., and both should therefore be construed liberally, and in favor of those they were intended to benefit, namely, judgment creditors.

When the Division Courts' Act was passed, "garnishment" was not known, and therefore a writ against lands, was the only additional remedy which could have been gained in the County Court; and the Legislature in giving additional machinery to creditors in the County Courts, can hardly be supposed to have intended to exclude any creditors in that Court, whether they were so originally or not. But in the present case, they are actually all on the same footing, being given in the former Act the same remedy for the recovery of the debt or balance due, as if the judgment had been originally obtained in the County Court.

We think, then, that a party can garnishee on such a judgment, and this seems, also, to be the opinion of Judge Harrison and Judge Gowan, the only two County Court Judges of whose practice on this point, we have any personal knowledge. —EDS. L. J.]

To the Editors of the Law Journal.

BELLEVILLE, 14th Nov., 1859.

GENTLEMEN,—Being a subscriber to the *Law Journal*, I ask the permission of putting the following questions:—

There are two executions in the hands of different bailiffs, from different divisions in the same county, against the same defendant. Bailiff A. received his firstly and levied firstly, and took the usual receipting bond from the defendant, and two sureties, that the property levied on should be given up to him on a certain day, or when called for, and then immediately left the defendant's premises and left the property in defendant's possession. The bailiff B., in the meantime, or before the time had elapsed for delivering the property up on the bond, and before the first execution run out, received his execution and levied, and took away from defendant's premises the same property and kept possession of it, and whilst both executions were current sold the property and returned his execution "money made" within the time required by law.

Was the leaving of the property by the first bailiff in the defendant's possession, and taking the bond, an abandonment of the first levy? And did the second execution attach the property, on making the levy under it? And is the money property made and returned on the second execution?

The bailiff A. did not make another levy. It has already been decided that executions from Division Courts do not take priority from the time of delivery to the bailiff, but only from the time of actual levy. Please answer in your next number.

R. H. JONES, *Bailiff.*

[The above question would seem, in the opinion of our correspondent, to turn upon the point of law which he says "has already been decided," namely, "that executions from Division Courts do not take priority from the time of delivery to the bailiff, but only from the time of actual levy." We know of no such decision having ever been given, and in the absence of any we are inclined to doubt that such is the law.

We think that the property in this case should have been sold for the benefit of both executions and the proceeds first applied on the first execution. It is a very common practice with bailiffs to take such bonds in order to save to the execution debtor the expense that would attend the removal of the goods, or the leaving them in charge of keepers, but this is done we believe with a view to prevent the execution debtor from making away with them before the time of sale, and not to be secured against subsequent executions to the one under which they are seized.

The fact of the bailiff who first seized not having removed the goods or put a keeper in possession of them cannot in our opinion be construed into an abandonment of the seizure.—EDS. L. J.]

To the Editors of the Law Journal.

As to the effect of Judgment Summons in the Sixth Division Court, County of Grey, Townships of Holland and Sullivan. First Court held for this Division, in June, 1858, the last in September, 1859—a period of 15 months.

Year & Month.	Cases Entered	Number of Suits.	Amount of Judgment. £ s. d.	RESULT
June...	95	Nil.	Nil.	
Sept...	92	111	12 16 6½	Deft. discharged—Costs added to Jdgt—Evicted from deft his possession of freehold—Certificate lodged.
		112	4 0 8	Arranged before hearing.
		113	17 11 7	Not served. [tled.
		114	8 8 1	Discharged—Costs added—Set-
		115	5 9 0½	Order of payment—3 months—Settled.
		132	2 12 1	Adjourned — Deft. paid on account, balance to be paid.
		133	8 6 6	Deft. discharged—Costs on Plt.
Jan....	128	193	16 4 4½	Not served.
		208	22 12 5	Deft. discharged—Costs added to Jdgt.—Plt. on exam'tion, admitted horse & note his property—Seized and satisfied.
		212	9 15 5½	Adjourned — Deft. deposited good security.
		218	3 0 7½	Adjourned on deft. pay'g nearly whole debt and costs
		210	11 10 3	Deft. discharged—Costs on plt.
March.	71	Nil.	Nil.	
June...	122	203	1 18 1	Deft. paid debt and costs.
		201	2 13 6½	Adjourned for assgnm't of debt.
		205	2 5 1	do. do. of Jdgt.
Sept...	62			The 2 last cases, deft. taken under attachments—Paid.
Non-services, 2 cases,		Total.....	130 4 4	
		33 15 11½		
Doubtful 2 cases,		19 16 9		
			53 12 8½	
Obtained & secured....			76 11 7½	15 Causes—11 Successful.

The above amount has been obtained by Judgment Procedure.

Your's most respectfully,

HENRY CARDWELL, *Clerk.*

To the Editors of the Law Journal.

November 12th, 1859.

GENTLEMEN,—Permit me, for my first time, to request an answer in your next number, to the following questions on this case.

I had a judgment against H., and in favour of C. Execution came out, and the Bailiff of said (Division) Court, substi-

tuted another man to do his business. This man hired by the Bailiff, gives a third person the execution, and a warrant attached to it, under the seal and signature of him (the Bailiff). Then the third person goes to work, and makes the money, not from defendant H., but from a friend of H's., who paid the money for H., under a protest, saying the Sheriff had an execution, and although the money did not come from defendant H., that is to say, direct, the above Bailiff causes the money in question, to be returned to him, and makes his Return, "goods claimed by Sheriff." Which party has the legal right to the money made, C. or the Sheriff?

Your's truly,

A SUBSCRIBER.

[We do not exactly understand the relative positions of the parties; but we suppose that the execution alleged to have been held by the Sheriff, was against the goods and chattels of H. If so, we cannot see what it could have to do with "H's. friend," who paid the money on the execution from the Division Court. The Sheriff could have no claim on this money, and C. would, in our opinion, under the circumstance as we understand them, have an action against the Bailiff, for the amount received and made by him on the *fi. fa.* against H.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law.*

HANKEY v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Certiorari—Practice—Appearance—Waiver.

Where a cause is removed from the County Court by *certiorari* after issue joined, *semble* that the plaintiff should declare *de novo* in the court above.

In this case the plaintiff did so declare, and signed judgment in this court, though the defendants had not appeared. Defendant moved in Chambers to set aside the judgment on other grounds, but made no objection for the want of appearance. *Held*, that he was precluded from afterwards objecting on that point.

J. Bell (of Belleville) obtained a rule *nisi* on the plaintiff to shew cause why the declaration and subsequent proceedings should not be set aside for irregularity, because no appearance was filed for defendants, and the defendants did not appear; or why the order made by the Chief Justice of the Common Pleas should not be rescinded, and the declaration and subsequent proceeding set aside for irregularity, on the grounds that the County Court of the County of Oxford being a court of record, and the cause being at issue in that court, the trial should be of the issues that had been so joined in the Court below; that the venue in the cause brought up was in the County of Oxford, and could not be changed without an order, wherefore the venue in the cause in this court should also have been in the County of Oxford; that the declaration served was not founded on any writ, and that for the same cause of action another cause was at issue.

On the 8th of September, 1858, the cause was at issue in the County Court of Oxford. On the 11th of September the *certiorari* issued. Afterwards the plaintiff's attorney sent to the defendants' attorney a declaration in the cause in this court, who returned it with the remark that issue had been already joined in the cause in the court below, and that if compelled to plead *de novo* he should plead that another action was pending. The defendants' attorney made oath that he was afterwards served with an issue book made up on a declaration in the Queen's Bench, laying the venue in the County of Middlesex, and stating the same cause of action as had been set forth in the declaration in the County Court. Judgment by default was signed upon that declaration, and notice of assessment given on the 23rd of October.

It was sworn further that no appearance had ever been entered for the defendants, except in the court below; that the cause of action arose in the County of Perth; that the attorney was informed the defendants had a good defence to the action; and that no process had issued in this case from the Queen's Bench but only the summons on which the plaintiff had declared in the County Court.

On the 29th of October the defendants moved in Chambers to to set aside the interlocutory judgment on the same grounds that were stated in the application to this court, which summons was discharged.

The plaintiff's attorney filed an affidavit to the effect that the declaration in the County Court was for the same cause of action as that declared upon in the cause in this court; that the *certiorari* issued at the instance of the defendants; that the defendants' attorney did not give any notice, or take any exception until during this term (Michaelmas) on account of the want of appearance by defendants; and that in the application made at Chambers to set aside the interlocutory judgment no objection was taken on the ground of want of appearance, nor was any intimation given of such an objection, or that any attempt would be made to set aside the proceedings subsequent to the summons if the plaintiff should proceed to assess damages.

D. G. Miller shewed cause, citing *Turner* v. *Bean*, Barnes 345; Ch. Arch. Prac. 1268.

Read, contra, cited *Clack* v. *Dixon*, 3 M. & S. 93; *Clark* v. *The Mayor, &c.*, of Berwick, 4 B. & C. 649; *Landens* v. *Sheil*, 3 Dowl. 90.

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

We are not aware of any legislative provision in this province respecting removal of cases from county courts by *certiorari*. They have been granted, we assume, upon the principles of the common law; and we have nothing to govern us in regard to the subsequent proceedings upon the return of the writ but the practice pursued in England in like cases. In *Fazacharly* v. *Baldo*, (1 Salk. 352,) a distinction appears to be drawn between cases removed by a *habeas corpus cum causâ* and those returned upon a *certiorari;* the former does not remove the record, but that remains below, and the return is only an account or history of the proceedings; and for this reason, it is said that in that case, if a cause be removed by *habeaas corpus* the plaintiff in the superior court must begin *de novo*. This we take to be equivalent to saying, that when the record is removed by *certiorari* the plaintiff need not begin *de novo*, otherwise there would be no such difference. In *Woodcraft* v. *Kinaston* (2 Atk. 317,) the same doctrine has the high authority of Lord Hardwicke, who says, "There is a difference between a *habeas corpus* and a *certiorari*. That removes the body *cum causâ*, and then you must begin in the superior court and declare *de novo;* but on a *certiorari* you must proceed on the record as it stands when removed."

This is very distinct, and the law as thus laid down seems reasonable and convenient, for when the parties have been content to rest the matter in controversy between them upon a certain issue, it seems needless to incur the delay and expense of going over the the same ground again after the removal of the cause; yet the practice in England after all seems not to be in accordance with this doctrine of Lord Hardwicke, for in the case cited of *Turner* v. *Bean* (Barnes 345), about the same time that the case of *Woodcraft* v. *Kinaston* was before Lord Hardwicke, the Common Pleas held that when proceedings from an inferior court of record were returned upon a *certiorari* into their court, and it appeared that the parties were at issue in the court below, the plaintiff must nevertheless declare *de novo*.

In Chitty's Archbold, 1247, this is recognisod as the practice; and in Tidd's Practice, 5th ed., vol. I., p. 470, the same thing is stated more at length, and the reasons given for it from Lord Chief Baron Gilbert's Treatise on Execution, 144, 200.

We cannot hold that the plaintiff was wrong in declaring *de novo* when there is so much to support his proceeding, though we cannot but say that, considering the respectable footing on which our county courts are, we think it would be well if we were allowed to take up their proceedings in the stage at which they had arrived before the removal, for the reason given by Chief Baron Gilbert for the contrary practice no longer applies.

When the pleadings were *ore tenus* the *certiorari* could remove nothing but the writ, and the parties had of necessity to make their statements anew, since their existed no written pleadings to be removed with the writ. It does appear, however, that the current of authority sustains the plaintiff in having declared *de novo*

in this court after the removal of the cause, although the parties had pleaded to issue in the court below. It is said that the plaintiff in such a case cannot claim more damages than he had claimed in the other Court, but there is no complaint of that having been done here.

We do not think that the defendants can be allowed, at this late stage of the proceedings in this court, to object that the plaintiff could not declare after the removal until he, the defendant, had appeared in this court, for he has acted in the cause in this court by the application he has made, and when he moved to set aside the interlocutory judgment he made no objection on the ground of defendants not having entered an appearance, but relied only on other irregularities.

If the defendants did not enter an appearance in this court after the removal of the cause, the plaintiff should have served him with a rule for a *procedendo* to issue unless he appeared within four days, because the plaintiff could not regularly declare against him till he had appeared. If within the time he had entered an appearance, then the plaintiff could properly declare. If the defendant failed to appear, then the *procedendo* would have gone, and the cause being sent back to the court below could never afterwards be removed.

This would have been the regular mode of proceeding.

But we think the defendants, by their delay, and by the course they took in complaining of other irregularities, and omitting to object to want of appearance when they moved on other grounds, have precluded themselves from objecting on that ground now.

Rule discharged.

COMMON PLEAS.

Reported by E. C. JONES, Esq., *Barrister-at-Law.*

RANNEY v. MACLEM.

School Trustees—Arbitrators—Personal responsibility.

Where an award is made against a trustee corporation by arbitrators under the arbitration clauses of the Common School Acts, the arbitrators have no power to declare the personal property of the trustees liable without first giving such trustees an opportunity to show cause against such personal responsibility.

Quære, Have such arbitrators power to determine the personal responsibility of trustees on their refusal to fulfil the award.

This was an action of replevin by the trustees of a school section in Dereham against the arbitrators and collector, under an award in favor of a teacher. The award was made by the arbitrators against the trustees in their corporate capacity, and, on their neglecting to pay at the time appointed, a warrant was issued against their personal property, whereupon they replevied. The facts of the case appear at length below.

R. A. Harrison for the plaintiff.

D. G. Miller for the defendant.

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

Upon the pleadings before us on this demurrer, the plaintiff complains, in an action of replevin, that the defendants took his goods, and detained them, and unlawfully converted them to their own use.

The defendants justify the taking and detention by setting forth that the plaintiff and two other persons were school trustees; that they had employed one A. S. H. as teacher of their school, on certain specified terms; that they refused, after a short time, to let him continue to be teacher; that a difference arose between the trustees and the teacher, in regard to his salary, and the agreement with him, and the refusal to let him continue; which difference was referred, under the statutes, to three arbitrators, who awarded (24th April, 1858) that the teacher was *then* the teacher of the said school, and ought to be sustained; but the trustees wilfully neglected to perform their duties in that behalf, and refused and continued to refuse to pay the salary of the teacher, or to admit his claim thereto, until the year mentioned in the agreement had expired; and at the expiration of the year, the said differences continuing in regard to the salary of the teacher, and the sum due to him, the teacher demanded a reference, and named the defendant W. E. Nesbitt as one arbitrator; and the trustees refusing to name an arbitrator, the teacher named one Thomas Banbury as second arbitrator; which two arbitrators, with defendant Rodgers, who was local superintendent, on the 18th October, 1858, made their award, that there was justly due to the teacher from the trustees, according to agreement, $273 95c.; and they awarded that the trustees should pay that sum to the teacher within three days after the publication of the award and notice thereof in writing, with $12 costs: that it thereupon became the duty of the trustees to exercise their corporate power for the payment of the teacher's salary, according to the award; yet the trustees, after three days' publication, &c., and notice thereof, and demand in writing, did wilfully neglect and refuse to exercise their said corporate powers, and to pay, &c, and thereby became personally responsible for the fulfilment of the contract, and for the payment of the sum in the award mentioned; and thereupon the arbitrators issued their warrant to the defendant Maclem, to enforce the collection of the moneys in the award mentioned against the personal property of the plaintiff so being one of the trustees, and having negligently and wilfully refused to exercise the powers, &c., as they lawfully might, &c.

I have not been able in principle to distinguish this case from those of *Kennedy* v. *Burness* (15 U. C. Q. B. 47), *Kennedy* v. *Hall* (6 U. C. C. P. 218), and *Kennedy* v. *Burness* (6 U. C. C. P. 227).

Admitting, for the sake of argument, that in case trustees become liable under the 12th section (16thly) of 13 & 14 Vic. cap. 48, for wilfully neglecting or refusing to exercise their corporate powers for the fulfilment of any contract or agreement made by them, such liability may be enforced by the warrant of the arbitrators, under the 15th section of 16 Vic. cap. 185, under the general authority given to enforce the collection of any sum of money by them awarded to be paid, it appears to me necessary to show that there has been some adjudication of the fact of wilful neglect or refusal, to justify the issuing of a warrant.

It may be that the same or other arbitrators, to be named according to the statutes, would have the power to determine that the trustees had been guilty of a wilful neglect and refusal, and might make an award to that effect, and that such award would be considered as justifying the issue of a warrant to levy *de bonis propriis* the money awarded to be paid by the school trustees as a corporation; but in the present case the plea assumes no such adjudication to be necessary, and that a distress warrant may issue against the individual property of each trustee, without its being shown that he has had any opportunity to contest the fact of wilful neglect or refusal. The award shown affects the corporation—the warrant is against the effects of one of the individuals composing it. The award, as it stands, according to the cases referred to, does not justify the warrant; and so the plea admits, in effect, by averring the fact of wilful neglect as the necessary foundation for the warrant. But this is, in effect, issuing execution without trial or judgment, and is so manifestly contrary to justice that it cannot be sustained.

The general question has been so fully discussed in the previous cases, that I think it unnecessary to say more than that in my opinion there must be judgment for the plaintiff on this demurrer.

COMMON LAW CHAMBERS.

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

SWIFT v. WILLIAMS ET AL.

Irregularity—C. L. P. Act, sec. 107—Time writ returnable—Declaration.

Where a plaintiff is unable to serve all defendants, he must obtain time to declare, to prevent time running in favor of those served.

A writ is returnable from the day of service, and the year runs from that date.

A plaintiff must deliver as well as file his declaration before he can be held to have declared within the meaning of the Act.

(Oct. 21, 1859.)

This was a motion to set aside the plaintiff's declaration as against the defendant Williams, on the ground that the same was not served within one year after the service of the writ. The motion was made under the 107th section of the C. L. P. Act, 1856 (same as English C. L. P. Act, 1852, sec. 58, English Rule 35, H. T. 2 Wm. IV.), as follows: "A plaintiff shall be deemed out of court, unless he declare within one year after the writ of summons is returnable." The facts were as follows:—The writ against the three defendants was issued on the 10th September, 1858; served on Williams and another 13th September, 1858, and on the third defendant 23rd July, 1859. An appearance was entered for

Williams on the 21st September, 1858. The plaintiff's declaration was filed on the 3rd September, 1859, and served upon defendant Williams' attorney on the 1st October, 1859.

J. B. Read showed cause, objecting that it appeared on affidavits that the plaintiffs could not serve the third defendant until July 1859, and that the C. L. P. Act, sec. 107, did not apply in such a case; also that the declaration, although not served, was filed within the year, and that the year could only be reckoned from the end of the six months during which the writ was current.

Hodgins, contra, cited *Barnes* v. *Jackson*, 1 Bing. N. C. 545 s. c. 3, Dowl. P. C. 401; *Morton* v. *Gray*, 9 B. & C. 544; *Norrish* v. *Richards*, 3 A. & E. 733; *Eadon* v. *Roberts*, 9 Ex. 227, and Notes to Harrison's C. L. P. Acts, 214.

HAGARTY, J.—The case of *Morton* v. *Gray* seems clearly to settle that the plaintiff must obtain time to declare, to prevent time running in favor of a defendant who is served, although another defendant be still unserved.

I think process must be returnable from the time of service.

I cannot distinguish this case from *Eadon* v. *Roberts* (9 Ex.), in which Parke, B., delivering judgment, says: "We are all of opinion that, according to the true meaning of the words 'declare within the year,' the plaintiff must either have delivered his declaration within the year, or, having filed it, must have given notice to the defendant within that time." "A plaintiff does not declare, till he has informed the defendant of the cause of action." This proceeding was under the old practice. Our present practice cannot help the plaintiff—our rule of court requiring declarations to be served.

Watkins v. *Finton* (8 U. C. C. P. 289), decides that a plaintiff cannot treat a plea filed, but not served, as a nullity, and sign judgment, but should move to set it aside as irregular. I think the authorities are clearly in favor of the application, and I must make an order, as asked in the summons.

(Reported by C. E. ENGLISH, Esq., M.A., Barrister at-Law.)

SWIFT ET AL. v. COBOURG AND PETERBOROUGH R. R. COMPANY.

Sheriff—Possession of goods—Rights of mortgagor and mortgagee.

The word "seize" under the C. L. P. Act 1857 sec. 22, applies to the corpus of the goods seized and not to the interest of the defendant in them.

A sheriff selling the equity of redemption in certain goods under an execution against the mortgagor is entitled to *seize* the goods even if in possession of mortgagee.

If the sheriff's impropriety remove the goods out of the possession of the mortgagor his (the mortgagee's) remedy is against the sheriff and not by application to a judge in Chambers.

The particulars in this case appear in the judgment.

BURNS, J.—The facts appear to be these: The plaintiffs have assigned their judgment to one John Fowler, who caused execution to be placed in the hands of the sheriff of the United Counties of Peterborough and Victoria, some time in June last, and upon which writ of execution the sheriff seized two locomotives, some platform cars, and other property of the defendants. John H. Dumble, of Cobourg, made claims to the same as the mortgagee thereof, and thereupon the sheriff applied for an interpleader summons. An order for an issue to be tried was made. While that order was in force and before anything was done upon it, the sheriff proceeded to sell the equity of redemption of the defendants in the property so seized. Upon the application of J. H. Dumble, that sale was set aside as being a violation of the interpleader order. The interpleader order was made originally under the idea and belief that Dumble claimed title to the property seized, by virtue of an absolute assignment and not as mortgagee thereof, and consequently when it was ascertained that such was the fact, an application was made on the part of Fowler, the assignee of the plaintiff's judgment to rescind the interpleader order.

The order was rescinded, Dumble consenting thereto and no opposition being made by the sheriff, though he now swears that he did not assent to it or authorize any one to assent to the rescinding of the order.

Since these proceedings, it appears the sheriff has again seized the property and is intending to proceed to sell the same.

On the 8th September, Mr. Justice McLean, granted a summons calling upon John Fowler, to shew cause why the sheriff should not deliver up to Dumble, the mortgagee of the property seized, the same being seized in the possession of the said Dumble, as such mortgagee. This application was supported by Mr. Dumble's affidavit, that he had taken possession under his mortgage, and that on the 5th of September, the sheriff seized the same for the interest of the defendants in the equity of redemption thereof, at the instance and on the behalf of Fowler, the debt due to Dumble being still unpaid and unsatisfied; and he states that Fowler knew at the time of the seizure, of the existence of his, Dumble's mortgage, and that the pretence for seizing the property is on account of the defendants equity of redemption.

The application is opposed upon a variety of affidavits, setting forth circumstances to shew that Fowler had not the possession of the property but that the same still remained in the possession of the Company, and that Fowler was merely a manager for the Company in the conduct of their business, and that if he had any control over the property it was as such manager of the Company and not as mortgagee thereof. The sheriff swears that he does not believe that Dumble ever had any possession of the property, and that it is necessary the sheriff should have the possession in order to effect a sale. He states that Dumble's debt is not due.

It is quite out of the question that I can try upon affidavits, whether Dumble was or was not in possession, of the goods or under what circumstances he was in possession, if he were in truth in possession at the time of the sheriff's seizure. There seems to have been some mismanagement in this matter from the beginning, for now the affidavits in reply to this application attack Mr. Dumble's mortgage, on the ground that it forms no valid security, and that in fact it is not real. If that be so, and by the present sale of the goods it is intended to dispute the validity of the claim, of Fowler, I cannot understand why the sheriff should have permitted the interpleader order to be rescinded; for had that remained, Mr. Dumble in the issue to be tried would have been obliged to support and sustain it I suppose, however, the sheriff, (although he now swears he never assented to the order being rescinded,) must have permitted it to be rescinded, and it seems now by the course he has taken that he is satisfied to question, himself, the validity of Dumble's mortgage. Even before the interpleader order was rescinded the sheriff appears to have taken part with Fowler, who was interested in pressing the execution for he notwithstanding he had asked the protection of the Court, went on to sell the defendants equity of redemption.

It does not appear to me that the Court or a Judge has any power to interfere in the manner Mr. Dumble now asks. If the property was in the possession of the defendants, the mortgagors of it, then I apprehend there can be no question the sheriff had a right to seize the property and to deprive the mortgagee of the possession. If the sheriff disregard the mortgage contending that it is invalid and forms in truth no legal charge upon the property, then I suppose he would sell the *corpus* of the goods, but in that case he assumes the responsibility of establishing what he contends for, if the mortgagee does not submit. If the sheriff submits to the mortgagee then although he has taken the *corpus* of the goods finding them in the possession of the mortgagor he could sell only the equity of redemption in term. On the other hand, if the sheriff finds the goods in the possession of the mortgagee then what is the sheriff's duty in such a case? The mortgagee in the present case has applied to a judge to order the sheriff to restore him the possession. He could not obtain such possession by replevin for the goods when taken by the sheriff are in the custody of the law. The mortgagee contends the sheriff has no right to deprive him of the possession on the pretence that he seizes an equity of redemption. I take it the mortgagee is right in that proposition, but still I think the sheriff is right to make a seizure of the goods themselves in the possession of the mortgagee in order that he may sell the equity of redemption. I think that is the effect of the new provision enabling the sheriff to sell the equity of redemption upon an execution against the goods and chattels of the mortgagor. If the mortgagee has the legal custody of the goods the sheriff cannot of course upon an execution against the goods of the mortgagor, take the property from the custody of the mortgagee, but still, I apprehend he must seize them in order to sell the mortgagor's interest. Upon an execution against lands it is the estate upon which the writ operates and not the

corpus of the land, but upon an execution against goods it is the possession of the property upon which the word "seize" acts. It appears to me that it would be very absurd to speak about seizing an interest or equity of redemption in goods which the sheriff may never see. Suppose there be a quantity of new goods mortgaged, if the sheriff seize the goods and expose the interest of the mortgagor for sale; a purchaser may be found giving that interest for something beyond the mortgage debt, but if the goods be some worn out furniture, the purchaser would give a very little, if any, for the interest. This interest whether it may be valuable or being worth anything at all, most certainly cannot be determined without the goods being viewed, and I know of no way to ensure that, but to construe the word "seize" used in the Act referred to, to mean the same thing in case the goods be in the possession of the mortgage as it would if they were in the possession of the mortgagor.

I cannot however, take upon myself to decide between the parties, and order a delivery of the goods under the circumstances. If the mortgagor shall suffer by the act of the sheriff or that his debt is lost or diminished in amount, he must seek his remedy against the sheriff for such injury or damage.

I do not discharge the summons with costs, though it be moved with costs, for this application grows out of the new Act, and besides, it seems to me there is some little foundation for thinking that the sheriff instead of acting indifferently between the two contending parties, has given the preponderance to Mr. Fowler.

Summons dismissed.

MEYERS v. ROBERTSON.

Practice—Contempt—Order for committal—Ca. Sa.

A *Ca. Sa.* cannot be issued in Upper Canada on a judgment for costs only. Under 22 Vic. cap. 96, sec. 13, if the judgment be for costs only, an order for committal for contempt only will be granted, and not an order for a *Ca. Sa.* to issue.

The defendant, by this application, called on the plaintiff to show cause why a writ of *Ca. Sa.* should not issue against him for his contempt in not appearing and submitting to oral examination on oath, in pursuance of an order duly made in this cause, and appointment endorsed thereon. No cause having been shown, *English*, for the plaintiff, asked for the usual order for a *Ca. Sa.* to issue against the plaintiff for the amount of the judgment in this cause, pursuant to 22 Vic. cap. 96, sec. 13.

MCLEAN, J., on hearing that the judgment was in favor of the defendant for the costs of defence merely, refused the order, on the ground that according to the statutes now in force in Upper Canada, no *Ca. Sa.* can issue for costs only; but said he would grant the order for committal of the plaintiff under the statute, and allowed the summons to be amended and re-served for that purpose.

Order refused, with leave to amend.

DAVIS AND OTHERS v. CUNNINGHAM.

Arrest under Ca Sa.—Discharge by consent—Escape—Subsequent arrest or capture—Release from custody.

A mere release from custody, of a person arrested under a *Ca. Sa.*, for a given time, in order to make arrangements if possible to satisfy the debt, does not amount to a discharge in law.

A sheriff releasing a debtor arrested under a *Ca. Sa.* from custody, on the *verbal* consent merely of the attorney, suffers an escape, for which he is liable to the plaintiff.

A person arrested under a *Ca. Sa.*, and suffered to go at large by the sheriff for a limited time, with the consent of the attorney, may be re-arrested under the same writ.

June 4, 1859.

A judgment was obtained in this suit on the 29th March, 1859, and a *Fi. Fa.* issued, which was returned *nulla bona* on the 12th April. An order was then obtained for the examination of the defendant before the judge of the county court of the county of Wellington, and he was so examined.

The examination being duly certified, an order was made that a writ of *Ca Sa* should issue against the defendant, on the ground that he had made a fraudulent transfer of his property, to prevent it's being taken in execution.

On the *Ca. Sa.* defendant was arrested on the 4th day of May, and while in custody went with the bailiff to the sheriff's house, where he saw the *sheriff and the plaintiff's attorney*. He then entreated to be allowed to go at large for a short time, to enable him to arrange the demand; and it being then Saturday night, rather than commit the defendant to gaol, the sheriff, with the consent or by the direction of the plaintiff's attorney, allowed him to go at large, upon the express understanding that the defendant would be taken into custody at a particular time, if the demand were not settled.

Additional time was allowed to the defendant beyond the period first limited; but having wholly failed to raise the necessary means for satisfying the amount, the sheriff was told that no further indulgence could be granted. On the 19th May the defendant was again taken into custody by the sheriff's officer, and contrived to escape from him. He now moves that the last arrest made under the *Ca. Sa.* issued in the cause, and all proceedings subsequent to the first arrest, shall be set aside, on the ground that the defendant was discharged from arrest by the plaintiff's attorney, and that he therefore could not be arrested a second time in the same cause on the same *Ca. Sa.*

MCLEAN, J.—There is no doubt that the defendant was arrested on the 4th May, and that he was then suffered to go at large, and continued at large until the 19th, with the assent of the sheriff and the plaintiff's attorney; and if what occurred on the evening of the 4th, when he was released from actual custody, amounts to a discharge in law, he could not legally be again arrested upon the same writ.

In note *s* to sec. 191, page 356, of Harrison's C. L. P. Act, it is very correctly stated that the discharge of the debtor before this act, whether rightfully or wrongfully, if by order of the attorney, was considered a *satisfaction* of the debt; therefore it was that no subsequent arrest could be made for the same cause of action.

An arrest can only be made when there is a sufficient cause of action subsisting—and it is not pretended to be denied that that was the case when the defendant in this suit was arrested—but it appears that Mr. Kingsmill, the plaintiff's attorney, at the earnest solicitation of the defendant, treated him better than he deserved, in consenting that the arrest should be so far suspended for a short time that the defendant was not required to be committed to gaol till the Monday following, on his pledge that he would either satisfy the defendant or surrender himself to the sheriff at that time. He failed to make any arrangement which could entitle him to a discharge, and the time was still further extended, in the hope that it might become unnecessary to commit the defendant to gaol; and it was not until the sheriff and plaintiff's attorney despaired of anything being done, that orders were given to take the defendant again into custody under the writ. Instead of surrendering himself, and being grateful for the indulgence shown him, when the sheriff was obliged to arrest him, in order to carry out the execution of the writ in his hands, the defendant, under pretence of preparing to accompany the bailiff to Guelph, went into a room at his own house, and from thence, with the assistance of his wife, made his escape out of a window; and he now applies to be wholly discharged, on the ground that he has been a second time arrested, after having been previously arrested and discharged by the sheriff, for the same cause of action!

The 191st section of the Common Law Procedure Act of 1856, provides that a written order from the attorney by whom the *Ca. Sa.* shall have been issued, shall justify the sheriff, &c., in discharging a party, unless notice in writing to the contrary shall have been given by the plaintiff or person for whom the attorney professes to act; but such discharge *shall not be a satisfaction of the debt, unless made by authority of the creditor;* and without such consent, an attorney is not justified in giving any order for the discharge of a debtor. The mere consent to allow the defendant to go at large for a time, could not, since that act was passed, operate as a discharge from the debt, for there was no order in writing from the attorney, and the consent of the plaintiff in the suit was wanting. The debt, then, being still subsisting, and the *Ca. Sa.* being still returnable and in full force, I am of opinion that the defendant was liable to be arrested upon it by the sheriff at any time before the return day. The release of the defendant by the sheriff, without any written order from the attorney, was in fact an escape, for which the sheriff might be held liable by the plaintiff; but the defendant has no right to claim to

be wholly relieved from arrest because he has escaped out of custody.

The summons must therefore be discharged, with costs; and I am glad that the change in the law under the 191st section of the Common Law Procedure Act is such as to sanction this result, and defeat a scandalous attempt to throw upon the sheriff a liability for a considerable amount, because he extended to the defendant more indulgence than he seems to have deserved.

Summons discharged, with costs.

CHANCERY.

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

McDONALD v. PUTNAM.

Creditor and Debtor—Revocable and Irrevocable Assignments—Release—Sureties.

A debtor who had executed a chattel mortgage and given security to two of his creditors executed an assignment giving his sureties a preference, and providing for a general release just before another creditor issued his execution. On a bill filed to set aside the assignment as void against the execution creditor, it was

Held, That from the circumstances surrounding the execution of the assignment the debtor intended to execute an irrevocable deed in favor of his sureties, and that on that ground the deed was not void; but as it contained a general release which would deter creditors from executing it, it was set aside, and the creditors entitled to the proceeds of the estate according to priority.

This was a bill filed by John McDonald and William B. Lyle, against George Y. Putnam and others, to set aside an assignment for the benefit of creditors, on the ground that it was executed while their suit at law was pending with the view to defeat their claim. The facts appear in the judgment.

A. Crooks for the plaintiff. *Hector* for the defendant.

ESTEN, V. C., delivered the judgment of the Court.

The facts of this case are, that George Y. Putnam, being indebted to various persons, and amongst them to the plaintiffs, and the plaintiffs having commenced an action against him for the recovery of their debt, Putnam having also made a chattel mortgage some time previous, extending to after acquired property, and granted a confession of judgment to Messrs. Gilmour and Coulson, whose debt amounted to £2,500, and who also held the bonds of Jacob Putnam, and Lockwood and Warren as sureties for the same debt or part of it, made the assignment in question without any communication with his creditors except that he had consulted Warren about it, to Whitelaw, not a creditor, under which Jacob Putnam would be entitled to a preference, and as he is liable to Gilmour and Coulson for their whole demand as surety for his son George Y. Putnam, the whole property comprised in the assignment would pass to Gilmour and Coulson. None of the creditors have executed the assignment. The plaintiffs have not acceded to or acquiesced in it, but the contrary. Lockwood has I think assented to it, even supposing it to be revocable in its inception. It is also asserted by Mr. Lawder, in his evidence, that Mr. Currie, claimed the benefit of it, on behalf of Jacob Putnam; but he accompanied Mr. Lawder, who was acting on behalf of Gilmour and Coulson, and his claim seems to have been preferred for the benefit of Gilmour and Coulson; while on the other hand Whitelaw states that Jacob Putnam, although informed by him of the assignment, never made any application to him about it. Further enquiry would be proper to ascertain if it were necessary, to what extent Jacob Putnam, and the other creditors, to whom the assignment was communicated had assented to it. If Currie was acting on behalf of Gilmour and Coulson, without authority from Jacob Putnam, his application would not operate as an assent on the part of Gilmour and Coulson, who in fact have not assented to the assignment, but have acted in contravention of it by placing their writ in the sheriff's hands; in fact they have attempted to claim both under and paramount to the assignment. As Gilmour and Coulson, they are not entitled to any benefit under the assignment; but if Jacob Putnam has really assented to the assignment so as to preclude himself from asserting his legal remedy against George Y. Putnam, and he is liable to Gilmour and Coulson, and should pay them, he might *cæteris paribus* claim the benefit of the assignment; and so might any of the other creditors who had acted in a similar manner. What then would be the effect of the answer of Jacob Putnam, claiming the benefit of the deed, and yeilding undoubtedly an unqualified assent to it so as to bind him? It seems to me that the plaintiff having previously obtained judgment, and issued execution and placed it in the sheriff's hands, and the goods being therefore bound, no subsequent assent on the part of the creditor could sustain the deed, so far as they are concerned. I may add that such appears to be the law from the cases of *Wilson* v. *Kenny* 17 U. C. Q. B. 168, *Maulson* v. *Topping*, 9 U. C. C. P. 183 and *Seggers* v. *Evans* 5 E. & B. 367.

I have carefully examined almost all the cases that were cited, and some other cases, with respect to the revocable character of creditor's deeds, and it may not perhaps be without its use, certainly to myself, although not strictly necessary, to state shortly the views I have formed of the rules applicable to such cases. Lord Justice Turner in the case of *Smith* v. *Hurst* 10 Hare, so well described the distinction between trust deeds in favor of particular persons, and trust deeds in favor of creditors, and stated that the latter class of deeds might be revocable or not revocable in their inception, and that the question to which class they belonged was to be determined by their contents and the circumstances attending their execution, and that although revocable in the first instance, they might become irrevocable as to all or some of the creditors in consequence of subsequent dealings between them and the author of the trust or perhaps the trustee. In the case of *Griffith* v. *Ricketts* 7 Hare, 299, 301, Wigram, V. C., evidently considers a deed of trust in favor of creditors not revocable in its inception where the grantor had covenanted with the trustee not to revoke the trusts, and to aid in their execution, and for further assurance—provisions for the most part utterly inconsistent with the idea of mere agency. As to the nature of the communication to creditors which would be sufficient to make a revocable deed irrevocable, as to them, some difference of opinion perhaps exists, and the law does not seem to be settled. Knight Bruce, V. C., in the case of *Wilding* v. *Richards* 1 Coll. 655 seemed to think that to make a revocable deed irrevocable, the creditors must have assented to such a degree as to become bound to accede to the deed; while Wightman, J., in the case of *Harland* v. *Binks* 15 Q. B. 721, inclined to the opinion that if the deed were made known to the creditor and he might have forborne suit in consequence, the deed could not be revoked as to him without affording him the option of acceding to or repudiating it. I confess the opinion of Mr. Justice Wightman, appears to me highly reasonable and just, and it seems to be confirmed by what was said by Lord Campbell, C. J., in the subsequent case of *Seggers* v. *Evans* before mentioned. There is another class of cases nearly allied to that which I am considering, namely, that in which a trust is created for the benefit of the creditor or creditors who therefore cannot claim the execution of the trust but for the benefit of the parties to the deed. Such were the cases of *Gibb* v. *Glamis*. To entitle a party to enforce such a deed, not only must a trust be created, but the plaintiff must be a *cestui que trust*. In the two last mentioned cases the plaintiff did not fill that character although an irrevocable trust had been created. In the case of a mere revocable deed of management, no trust is created, but a mere agency. The two classes of cases have in some measure been confounded, but they are rather alike than the same. I may add that then the question is not whether the deed is revocable, but whether the plaintiff is entitled to be admitted to the benefit of it. He must be able to make it appear that he is in a situation to furnish what may be deemed to be the consideration for the deed as in the case of *Lane* v. *Husband* 14 Sim. 656. When the deed containing a letter of license and release, and the plaintiff is not seeking to accede to the deed, until seven years after the death of the debtor, who survived after the execution of the deed three years, it was deemed that he could not furnish the consideration for which the deed was executed, and when the time for executing the deed has elapsed, so that it cannot now be executed, the plaintiff must be able to shew that he has done what is equivalent to an actual execution of the deed, so that if he attempted to contravene its provisions the Court would restrain him by injunction, as in *Biron* v. *Mount* 24 Beav. 642, *Couthwaithe* v. *Firth*, 4 DeG. & S. 552. In the present case had it been necessary to decide the point, I think I should have come to the conclusion that the deed was not revocable, at all events so far as Jacob Putnam and Lockwood were concerned.

It is true that when a deed is made in favor of the creditors generally without any communication or bargain with them, it is *prima facie* revocable as a mere deed of agency. But it is to be judged by the surrounding circumstances. Now here the deed was made on the 1st of January, 1858; the plaintiffs had commenced an action in the previous autumn which was then pending—Gilmour and Coulson had a chattel mortgage purporting to include these very goods, they have also a judgment, and Jacob Putnam the father, and Lockwood, were liable to them, the former for the whole, the latter for part of their demand against G. Y. Putnam. It seems to me that George Y. Putnam's object in making this deed was to protect his sureties, and especially his father, against the plaintiff's demand, and to the accomplishment of this object it was essential that an irrevocable trust should be created, for it is well settled that a revocable deed cannot be held against creditors. Under these circumstances it is not unreasonable, I think, to hold, it being a mere question of intention that George Y. Putnam, intended to create an irrevocable trust in favor of his sureties, and not to institute a mere agency for the payment of his debts. The deed therefore cannot be held to be void against the plaintiffs on that ground. It is however contended that it is void as against creditors in consequence of the general release contained in it, and reference is made to the cases of *Wilson* v. *Kenny* 17 U.C.Q.B. 168 and *Maulson* v. *Topping*, 9 U. C. C. P. 183, in support of that position. It was unnecessary in those cases to decide the point, but the learned Chief Justice of the Queen's Bench expressed a strong opinion upon it, and so did Mr. Justice Burns; and the learned Chief Justice of the Common Pleas appears to have thought that the introduction of such a release might be evidence of fraud sufficient to vitiate the deed. Following these authorities, and thinking it highly reasonable that although a debtor will be justified in *bona fide* surrendering his property as far as it will go for payment of his debts, he ought not to be permitted to impose such conditions as will deter creditors from executing the deed. I must hold this deed void on account of the general release contained in it which would deprive the creditors, of all claim upon their debtor and debar them from all recourse against his after acquired property, while the property comprised in the deed would probably be in a great measure absorbed by the claims of the preference creditors. The proceeds of the goods, therefore, belong to the creditors according to their priority. I think the plaintiffs entitled to the costs.

IN RE BECKWITH.

Surrogate Courts—Contentious causes—Removal—Delay.

The Legislature has intended that only those causes in which disputed questions of law or fact arise should be removed to the Court of Chancery, and not contentions as to whom administration should be granted.

The 36th section of the Surrogate Act provides for the appointment of an administrator *pendente lite*, when a cause is reserved by the Judge for argument in term.

(15th November, 1859.)

This was a motion to remove a cause from the Surrogate Court of the United Counties of Lanark and Renfrew, on the grounds that there was a contest, and on account of delay in consequence of the cause being reserved for the January term of the Court below.

THE CHANCELLOR.—The Legislature, in the act authorizing the removal of causes from the Surrogate Courts to this Court, says that they must be such causes as this Court may think fit to have removed, and where questions may be raised which it would consider proper to be adjudicated upon here. They must be not only causes in which contention arises, but causes in which disputed questions of law or facts arise. In this case there is a contest as to whom administration should be granted—two different parties having applied for it; and on that ground the Judge ordered the cause to be removed to term: and now application is made to remove the cause here, it being one of contention, and because of delay. We think the Judge was right in removing the cause to term. There being a contest as to who was entitled to administration there must be a citation, and to decide it the matter should be argued in term. The parties do not appeal from the Judge's decision, but say they think it proper to come here. As to delay, the Court has power by the 36th section to appoint, in the interval between the terms, an administrator, pending the litigation, so that no cause of complaint can arise on that ground. I do not think that the Legislature intended every case of contest to be removed to this Court. The motion must therefore be refused.

SPRAGGE, V. C., concurred. The Legislature has by the 30th section provided for the granting of administration *pendente lite*, and no ground of delay can therefore be urged to authorize an appeal to this Court.

Motion refused.

IN RE LEE AND WATERHOUSE.

Surrogate Courts—Removal of cause—Costs—Personal Representative.

In cases which by the Surrogate Courts Act are proper to be removed to the Court of Chancery, the Court will not restrict the parties to Surrogate Court costs.

A personal representative can only be appointed on petition.

(15th November, 1859.)

THE CHANCELLOR.—This is an application under the Surrogate Act as to costs and the appointment of a personal representative in a case removeable to this Court. The Legislature has provided that certain causes arising in the Surrogate Courts may be removed into this Court. I assume that the intention of the Legislature was that only such causes as are proper to be removed may be so removed here on the order of a Judge, and such Judge is to impose terms as to payment or security for costs as shall seem meet. In this case the application is that we make an order that no more than Surrogate Court costs shall be allowed here. We do not see that we ought to make such an order. Suppose the cause is a proper cause to be removed, it is so removed as authorised by the Legislature, it is done so because it is a cause proper to be tried here, and being so we do not think it a proper discretion to limit the parties to other than the costs allowed in this court. In regard to the appointment of a personal representative for which application *ex parte* has been made, we do not think it can be granted. The appointment can only be made on petition.

COUNTY COURTS.

(In the County Court of the United Counties of Frontenac, Lennox and Addington before HIS HONOR JUDGE MACKENZIE.)

CHARLES J. PALSGRAVE v. THOMAS FLYNN, ROBERT SPENCER, AND BENJAMIN EVANS.

Action on a promissory note made by the defendant, Thomas Flynn, and endorsed by the defendants, Robert Spencer and Benjamin Evans. The note bears date on the 15th March, 1858, and payable five months after date, so that it became due on the 21st August, 1858.

The defendants severally pleaded "that after the making of the promissory note in the declaration mentioned, and before the same became due, to wit on the 23rd day of March, 1858, the defendant, Thomas Flynn, made and sealed as his act and deed delivered to the plaintiff his (the said defendant Thomas Flynn's) Indenture of Mortgage signed by the defendant Thomas Flynn, and sealed with his seal, and conditioned for the payment by the defendant Thomas Flynn, to the plaintiff of the sum of 270 dollars and 90 cts. at a certain time therein mentioned, and yet unexpired, and whereby the said defendant Thomas Flynn covenanted with the plaintiff to pay the said sum at the said time, and the defendants severally averred that the amount of the said note was included in and formed a part of the said sum of 270 dollars and 90 cents, in the said mortgage and covenant mentioned, and which said Indenture of Mortgage the plaintiff then accepted and received of and from the defendant Thomas Flynn, in lieu of and in full satisfaction and discharge of the said promise in the declaration mentioned."

To which plea the plaintiff replied "That he the plaintiff did not accept and receive from the defendant, Thomas Flynn, the said Indenture of Mortgage in the said plea mentioned in lieu of and in full satisfaction and discharge of the promissory note declared upon in the cause as by the defendants severally in their pleas alleged."

The defendant joined issue.

The cause was tried before the Judge of the County Court at the sittings of the Court in the month of March last, when a verdict

was rendered for the plaintiff, with leave reserved to the defendants to move in term to enter a nonsuit, if the Court should be of opinion on the whole evidence that a nonsuit should be entered.

In April Term, *Agnew*, for the defendants Flynn and Evans, and *Parke*, for the defendant Spencer, obtained separate rules, calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved.

In the same term *Parke* and *Agnew* supported the rule, and cited the following cases: *Matheweson* v. *Brouse*, 1 U. C. R. R. 272; *Murray* v. *Miller*, 1 U. C. R. R. 353; *Shaw* v. *Crawford*, 16 U. C. R. R. 101; *Lewis* v. *Ballard*, 7 U. C. R. R. 121; *Faeman* v. *Maybee*, 7 U. C. C. P. 167; *Parker* v. *McRae*, 7 U. C. C. P. 121; *Price* v. *Moulton*, 10 C. B. 561.

The rule was enlarged by consent until July term, and from July term until October term, when *Macarow* for plaintiff shewed cause.

Parke and *Agnew* in support of rule.

The facts appear in the judgment.

MACKENZIE J.—The defendants at the trial produced in evidence an Indenture of Mortgage made between the defendant, Thomas Flynn, and the plaintiff, on the 23rd day of March, 1858, whereby the defendant, Thomas Flynn, for and in consideration of the sum of 270 dollars and 90 cents, had assigned and made over to the plaintiff certain goods and chattels therein enumerated, upon the condition that if the defendant (Thomas Flynn) should pay unto the plaintiff the full sum of 270 dollars and 90 cents, with legal interest for the same from date, on or before the 23rd day of November, 1858, the said Indenture of Mortgage should be void. The Indenture of Mortgage contains a covenant to pay the money and interest to the plaintiff on the said day and time limited for the payment thereof: it also contains a power of sale of the goods by the plaintiff in the event of the defendant making default in the payment in the said sum of money as in the said condition mentioned. The mortgage was filed in the office of the County Court Clerk on the 20th March, 1858, accompanied with an affidavit of James Hickey as agent of the plaintiff, that "the mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid." There is also a power of Attorney from the plaintiff to the said James Hickey, authorizing him to take and receive such mortgage from the defendant, Thomas Flynn, filed along with the mortgage.

It is admitted on the pleadings, and it was not denied at the trial, that the sum of money specified on the note was included in and formed part of the sum of $270 90 in the mortgage and covenant in question mentioned. It may be laid down as a general principle of law that a lesser security is extinguished by a higher security taken for the same debt, and merges in it. The policy of the law in this respect is plain, that there shall not be two subsisting remedies, one upon the covenant, and another upon the simple contract, by the same person against the same person for the same demand. But when the higher security is taken only as a further or collateral security, there is no merger.

The question for the decision of the Court is, what is the legal effect of the indenture set out in the pleas and produced at the trial? The note declared upon was made on the 15th March, and became due on the 18th August, 1858. The indenture of mortgage was made on the 23rd March, and the money made payable thereby on the 23rd November, 1858. The cases of *Matheweson* v. *Brouse* and of *Parker* v. *McCrea* are in point. The defendants have expressly averred in their pleas that the plaintiff accepted the mortgage and covenant in full satisfaction and discharge of the promise in the declaration. There was an attempt made at the trial to shew by parol evidence of an agreement or understanding between Flynn and the plaintiff's agent contrary to the legal effect of the instrument itself, and contrary to the written affidavit of the plaintiff's agent, wherein he swears "that the mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due." If it is the legal effect of giving the indenture and covenant for the debt on the note to extinguish wholly the antecedent simple contract debt, then it was unnecessary for the defendants to have set forth as a fact that which was a mere legal inference from other facts stated; but having stated that the indenture was received in satisfaction and discharge, I think they may rely on the plain legal effect of the sealed instrument for substantiating their pleas —If the law makes the one an extinguishment or discharge of the other, then it must be intended to have been given on the one side and accepted on the other, according to the effect and for the purpose which the law ascribes to it. In *Parker* v. *McCrea*, Draper, C. J. said, "The defendant owes the plaintiff $85 2s. 4d. on a promissory note, with interest, and to secure the debt he gives the plaintiff a mortgage under seal of his chattels, with a covenant to pay the sum stated in such mortgage.—Neither party deny the identity of the debt secured by the mortgage with that due on the promissory note. The defendant asserts it by his plea, and the plaintiff confesses it, replying that it was not taken in satisfaction and discharge. On this statement it would be merely a question of construction and legal effect of the deed, and there can be no doubt that it would be treated as an extinguishment of the right to sue upon the promissory note." The above case is like the present, and the language of the learned Chief Justice in every respect applies to the present case. The legal effect of the mortgage and covenant given by the defendant Flynn to the plaintiff was to extinguish the right of the plaintiff to sue upon the promissory note. When the plaintiff received a higher security, a mortgage with a covenant to pay the day on which the note should become due, he received an instrument the legal effect of which was to extinguish his right to recover on the simple contract debt upon the note. Then the law having made the one an extinguishment or discharge of the other, it must be intended that the mortgage in question was intended to be given by the defendant Flynn, and accepted by the plaintiff, according to its legal effect, and for the purpose which the law ascribes to it; therefore the Rule for entering a non-suit must be made absolute.

Rule Absolute to enter a Nonsuit.

IN THE SUPREME COURT AT MICHIGAN, U. S.

IN RE TYLER.

Conflict of State and Federal jurisdiction.

The United States have not jurisdiction over the waters of the River St. Clair, which are without the boundaries of the United States, and within the boundaries of the County of Lambton, in Canada. October 14, 1859.

One Tyler was charged with the crime of murder, in shooting the captain of a vessel upon whom he was attempting to at the same time to serve a process from the United States court.

The vessel was lying upon the Canadian side of the river, and near to the Canada shore. The shooting was done on account of resistance offered by the captain. Tyler at once returned to the American shore, and surrendered himself up to the United States authorities.

He was tried and convicted in the United States court on an indictment for manslaughter. The indictment was under an act of Congress which provides, "that if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, shall unlawfully and willfully, but without malice aforethought, strike, stab, wound, or shoot at any other person, of which striking, stabbing, wounding, or shooting, such person shall afterwards die upon land, within or without the United States," every such person, &c., shall be deemed guilty of manslaughter. He was fined one dollar and sentenced to thirty days' imprisonment in the Wayne county jail, and performed his sentence.

An indictment being found against him in St. Clair county, under a State law punishing such offences where death occurs within the State, he pleaded the former conviction and sentence in bar, and the St. Clair Circuit Court reserved the following questions for the decision of the Supreme Court:

"First. Had the United States, at the time of the said conviction and judgment, admiralty jurisdiction over the waters of the River St. Clair, which are without the boundaries of the United States and within the boundaries of the county of Lambton, in the Province of Canada, within the intent and meaning of the act of Congress entitled 'An Act in addition to an Act more effectually to provide for the punishment of crimes against the United States, and for other puposes,' approved March 3d, 1857?

"Second. Was the shooting of Henry Jones by the defendant, in the manner and under the circumstances set forth in the said pleas and replication, within the admiralty and jurisdiction of the United States for the seventh circuit and district of Michigan, under the said first sanction of the act of Congress aforesaid?"

The case was argued in June last.

MARTIN, C. J.—Jurisdiction is co-extensive with the territorial limits of the government exercising it. Admiralty jurisdiction is that which a nation exercises beyond its territorial limits, and upon the high seas. This is exercised because these seas are the peculiar property of no nation, but a common highway for all; and is properly exclusively confined to cases of civil jurisprudence. The United States have never conferred upon its admiralty courts criminal jurisdiction. It is true that criminal jurisdiction over certain specified offences is conferred by Congress upon the courts exercising admiralty jurisdiction, but such jurisdiction is never administered under the admiralty code, but after the course of the common law.

In England, at the time of our revolution, and for a long time prior, no power existed in the courts of admiralty to try and punish for crime. This power was conferred upon a commission which proceeded under the common law. Thus the right of trial by jury, and of being confronted with witnesses, was secured to persons charged with the commission of offences upon the high seas, as well as to those charged with their commission upon land. This common law was brought to this country by our ancestors, and at the time of the revolution, and the formation of our Federal government, was the law of every colony. The objections which had prevailed in England to the trial of those charged with crime under the admiralty code—whereby the right of trial by jury was refused—and which ultimately led to the withdrawal of this jurisdiction from the admiralty courts, equally prevailed here, and, when the framers of the constitution inserted in it the clause conferring admiralty and maritime jurisdiction upon the Federal judiciary, they conferred such only as existed in the mother country at the time of the separation. This is manifest from the fact that provision is made in a separate clause of the constitution for the power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, and in also providing that the trial of all crimes shall be by jury. Had crimes been considered as embraced within the admiralty jurisdiction, this power would be unnecessary, if not inconsistent with the judicial power, and certainly the provision for trial by jury would be wholly inconsistent with the power and practice of admiralty courts.

If the admiralty courts had no jurisdiction over crimes committed on the high seas, what court has, and what is the extent of that jurisdiction? Congress, by various acts from 1789 to the present day, has conferred that jurisdiction upon the Circuit and District Courts of the United States.

Such jurisdiction is confined to the high seas, or other waters out of the jurisdiction of any particular State.

When, therefore, Congress provides for the punishment of felonies, if committed within the admiralty and maritime jurisdiction of the United States, such jurisdiction must be regarded as confined to the high seas, or, probably, tide-waters in certain instances perhaps, as such only are within the dominion of Congress for such purpose. The constitutional limitation must be considered as incorporated into and as controlling the act. And Congress, in every or nearly every instance, has accordingly respected this limitation of power by enacting that the offences shall have been committed on waters out of the jurisdiction of any State.

The words "admiralty and maritime jurisdiction," as used in the criminal code, must then be interpreted by the grant of power to Congress in the constitution, and construed as signifying the high seas. If there be a civil admiralty jurisdiction extending elsewhere, and on other waters, it is, therefore, immaterial to inquire

This leads us to the inquiry, are the waters of the St. Clair River which are without the boundaries of the United States, and within those of Canada, within the admiralty jurisdiction of the United States, and without the jurisdiction of any particular State, within the meaning of the crimes act? When the constitution was framed, it cannot—except by the most violent presumption—be presumed that the lakes and their connecting waters were intended to be embraced within the admiralty jurisdiction of the United States. The term was employed in the sense it had been for centuries used in the mother country, and from their first settlement in the colonies, to designate jurisdiction upon the ocean—that space without the territorial limits of any government—the common highway of all nations. The lakes, and rivers or straits connecting them, were not presumed to be of such a character. They were before the revolution within the exclusive domain of Great Britian, and by the treaty of peace, dominion over them was divided. No waste of waters beyond any territorial jurisdiction—no common highway of nations, ever existed upon them. By the treaty of 1783, the boundary line between Great Britain and the United States ran through the centre. They can, therefore, in no sense, be denominated "high seas" within the meaning of the constitution. Under no known rule of admiralty law, then, can they be regarded as within admiralty and martime jurisdiction

Nor were they ever regarded as being within such by Congress, nor by the courts of the United States, until the decision of the case of the *Genesee Chief* v. *Fitzhugh* (12 *Howard*, 43)—If they had been within this jurisdiction, there was no occasion for the passage of the act of 1845 extending what Judge Conklin very properly calls a *quasi* admiralty jurisdiction over them.

This act does not extend full admiralty jurisdiction over them, nor include them within such jurisdiction. It only extends the jurisdiction of the District Court over cases of contract and tort arising in, upon, or concerning certain classes of boats and vessels navigating them, to be exercised in the same manner as jurisdiction was exercised over contracts and torts upon like vessels navigating the high seas or tide-waters, *within the admiralty and maritime jurisdiction* of the United States, and secures to parties a concurrent remedy at common law, and by the State laws, when competent.

As I understand it, this act distinctly recognizes the distinction between these waters and the high seas, and regards them as being without the admiralty and maritime jurisdiction of the United States. Its language will not admit of a construction which will embrace them within such jurisdiction The jurisdiction conferred is likened to the admiralty, but it is not the full and exclusive admiralty jurisdiction which is extended over them. As it did not exist over the lakes before the act, Congress had no power to extend it over them. I am aware that the Supreme Court of the United States, in the case of the *Genesee Chief*, regarded this as being an extension of the admiralty jurisdiction; or rather as I understand the opinion of Chief Justice Taney, as a recognition of the existence of such jurisdiction under the constitution. To my mind, it is certain that it exists as admiralty jurisdiction by virtue of the constitution, or not at all. Congress cannot extend such jurisdiction over waters not recognised by the law of nations as the proper subjects of it. The law was in the eye of the framers of the constitution when the provision conferring admiralty and maritime jurisdiction upon the Federal courts was incorporated into it, and this includes only the high seas or tide-waters

If Congress had the power to pass the act at all, it was under the power to regulate commerce between the several States. This seems to have been the aim of Congress, for the act confers jurisdiction only in cases of contract or tort arising upon vessels "employed in business of commerce and navigation between ports and places in *different States and Territories*." And this appears to be the later view of that court. (*See Allen* v. *Newburry*. 21 *Howe.*) It was said, in the argument of the prisoner's counsel that this court had recognized these waters as within the original grant of admiralty jurisdiction, and of like character with the sea in respect to maritime legislation and jurisdiction. In this the counsel is mistaken. No such question was before us, nor did we undertake to determine under what grant such jurisdiction was exercised. As an exercise of the power to regulate commerce between the different States, I am still of the opinion that the civil jurisdiction of the District Court might have been extended in the manner and with the limitation that it was. If these views are correct, the crimes acts of 1825 and 1857 do not embrace the offence for which Tyler stands charged, as the offence was not committed on the high seas, or in any arm of the sea, or within any river, haven, creek, basin or bay within the admiralty jurisdiction of the U. S.

The act of 1857 was additional to that of 1825, and the section under which Tyler was indicted in the Federal court was passed to supply a *casus omissus*. The act of 1825, which defined and punished certain crimes committed on "the high seas, or in any arm of the sea, or in any river, &c, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State," was so passed before any jurisdiction of the Federal courts was extended over the lakes or their connecting waters. This act, then could not have embraced offences committed upon these waters, 1st. Because they are not high seas; and, 2d. Because Federal jurisdiction had not been extended by Congress over them. The act of 1845, extending the jurisdiction of the District Court over them in certain cases, is confined to civil cases alone, and does not confer full admiralty jurisdiction. Had Congress intended to extend the crimes act over them, it is natural to suppose that such intention would have been declared. But it did not so intend, for it had not the power. The act of 1857 defined and provided for the punishment of another felony, but did not enlarge, or undertake to enlarge, the jurisdiction of the courts, or to confer jurisdiction over waters, not within the act of 1825.

It is to my mind an utter impossibility to extend the provisions of these acts over the lakes and their connecting waters. They are operative only within the admiralty jurisdiction of the courts of the United States. Now, such jurisdiction can exist only on the high seas, as has already been shown, although a *quasi* admiralty jurisdiction, for purpose of regulating and protecting commerce, may exist elsewhere. But the crimes acts do not confer jurisdiction of the Federal courts co-extensively with that they have or may have in civil cases. The offence must be committed "out of the jurisdiction of any particular State."

The Federal courts have no jurisdiction over crimes committed in foreign waters with a single exception, viz: when an inhabitant of an American ship commits a crime against the person or property of another inhabitant, and then only when the foreign government disclaims or declines to exercise jurisdiction. This is not such a case.

Nor have they criminal jurisdiction over the waters of "any particular State."

Now, there are no common, no unappropriated waters on the line of the lakes. The boundary line runs through their centre, and every crime committed upon them is committed within the jurisdiction of some State or that of Great Britian. Where, then, can a crime be committed on these waters, within the admiralty jurisdiction of the United States, and without that of any particular State?

I think both questions should be answered in the negative.

CAMPBELL, J.—The facts set up in the pleadings show that Tyler shot Jones upon an American vessel on the St. Clair River, within the limits of Canada, and that he died of the wound at Port Huron, on land, within the county of St. Clair, in this State. The question presented for our consideration is, whether Tyler's offence came within the United States laws and the jurisdiction of the United States Circuit Court.

It is much to be regretted that this question was not presented to the consideration of the Circuit Court of the United States, where the trial was had. It is fairly raised here upon the issue of a former conviction, and the very able arguments we have listened to have exhausted the subject.

Homicide has always been treated as an offence depending on locality, and it is so regarded by the act of Congress under which Tyler was indicted. Where death does not immediately follow the mortal blow, and happens in another jurisdiction within the realm, the place of death was generally, under the views taken by the common law authorities, the proper place of jurisdiction, inasmuch as the crime was not complete without it. There is some doubt whether at the common law originally such offences were provided for at all. But, as the blow itself may be made a punishable assault, there is no very good reason for not allowing it to be punished as an assault, qualiffed by its natural and legitimate consequences. (1 *Bish. Cr. L.*, ss. 554, 555) This is the plain design of the act of Congress, which punishes an assault upon the water when death ensues upon land, either within or without the United States. There very few places in the United States where a crime of violence would come within the Federal jurisdiction. In this case, the place of death being within the State jurisdiction, the authority of Congress to punish the assault could only be deduced from a jurisdiction existing where the assault was committed. And, inasmuch as under our treaties with Great Britain the place was under the exclusive territorial jurisdiction of that country, the case presents the question whether, under this act of Congress, a person who commits the offence charged, within a foreign jurisdiction, is made punishable here.

Upon the high seas, every vessel, public or private, is, for jurisdictional purposes, a part of the territory of the nation of its owners. An offence committed on board such a vessel is an offence against the sovereignty of that nation. But when a private ship enters a foreign jurisdiction, it becomes at once, with all on board, (in the absence of treaty stipulations to the contrary,) subject to the municipal laws and control of the country it visits. (*The Schooner Exchange* v. *McFadden*, 7 *Cr. R.*, 116.) Any crime committed there may be punished by the local laws. The right to enter upon and navigate the waters of any country is subject in all cases to the condition of temporary obedience to its laws. And, if the laws of Canada made provisions for the punishment of such an assault as the one under consideration, no doubt Tyler, if found there, would have been properly amenable to those laws—whether amenable to our laws or not.

The matter to be investigated resolves itself to the inquiry whether the act of Congress under which the trial was had in the United States court is, upon fair rules of construction, intended to cover just such a case as this. If the case falls within it, an inquiry may then arise into its constitutional validity.

By the words of the Statute if taken literally and without qualification, every person, of what ever nationality, who, upon the waters mentioned in the act, whether in a vessel or not, commits an assault without malice upon any other person of whatever nationality, and whether in or out of a vessel, of which the assaulted person dies on land, within or without the United States, is guilty of manslaughter, and punishable in the Federal Courts.

No one would contend for a moment that the act should be so broardly construed. It would occur at once that there are several classes of objections to such a construction. It is obvious that Congress could by no possibility have power in all these cases. It is also plain that, if any of these places are off the high seas, some provisions which might be valid on the high seas would not be so elsewhere. And it is further manifest that, whether on or off the seas, the citizenship of the parties might become an important element in the inquiry. Other difficulties might arise, which it is unnecessary to refer to more particularly.

It is undoubtedly true that every word which goes to the description of an offence or the circumstances under which it is punishable must be regarded; or, in other words, that no one can be held liable unless he comes within all the particulars of the offence described. But there is no rule of construction which requires, when a legislature out of abundant caution enumerates a great variety of possible places, and punishes crimes committed in any of them, that the law must be regarded as an assertion that there are such places within the jurisdiction. And it does not therefore necessarily follow, because Congress has provided for the punishment of offences upon bays, creeks, havens, and rivers not within States, nor forming a part of the high seas, that we must assume the existence of such within the admiralty jurisdiction—much less that Congress intended to include within that all navigable waters on the globe without the United States. And there is no principle which would include Canadian waters that world not require this unlimited construction.

The phrases describing the waters named in this act of Congress are substantially borrowed from English statutes relating to the admiralty. Under those statutes the havens, bays, &c., named, were all understood to be within the realm, and opening from the sea, although by the prevailing authority their enumeration was nugatory; for, according to many cases, none were in fact within the admiralty jurisdiction. The decisions on this point were not uniform. In the conflict of opinion on the extent of admiralty jurisdiction it was wise to include such places in any general act, and yet their inclusion as qualified could not be regarded as corroborating the admiralty claim. In borrowing phrases from old

statutes, it is usually deemed proper to take them as construed. If this be done, the statute before us is satisfied without departing from the Republic. If there are such waters as are there described within the Republic and not within States, they are included. If there are no such waters in the country, still the act is not impaired, but is only applicable, as in England, to the high seas.

This act was passed in 1857, but it is amendatory and supplementary to other acts of identical extent as old as 1790. And it is not to be supposed that it was meant to use language in any different senses at the different periods. A reference to the condition of things existing when the constitution was adopted, as well as subsequently, will show that, whatever may have been the real state of the case, there were, in more than one locality, navigable waters open from the ocean and not admitted to have been within the exclusive jurisdiction of any particular State. Such seems to have been the case with Delaware Bay, (*see* I *Kent Com.* 29,) and even the Delaware River was held in Pennsylvania, in *Montgomery* v. *Henry*, 1 *Dall. R.* 50, not to be within the body of any county. The same difficulties existed in New York Bay and the lower part of Hudson River, which, in 1808, were the source of serious controversies between New York and New Jersey. (*N. Y. Rev. L. of* 1813, *vol* 1, *p.* 238.) It was not until 1834 that the controversy was settled; and now each State has the right to serve process over all of the lower waters, while the jurisdiction and property are parceled out in a very different manner from that u ually adopted by neighbouring States. (3 *N. Y. Rev. St.*, *p* 175.) There were also waters opening into the Gulf of Mexico which were within Territories; and the subsequent acquisition of Louisana and Florida continued this state of things up to the admission of Florida into the Union. Upon the Pacific coast we have still some waters of this description. There is therefore no necessity to go beyond our own territory to satify the act. And the jurisdiction referred to, by the language used, being a local one, referring (as was held in *United States* v. *Bevans*, 3 *Wheat R.* 336) to a fixed natural locality, and not satisfied by a vessel, even although that vessel was a public man-of-war, we ought not to extend a claim of criminal jurisdiction into foreign parts, unless such an intention is very clearly expressed.

Whether, apart from the jurisdiction over commerce, any such prerogative exists over citizens as to authorize us, as is done in England, to take cognizance of their offences wheresoever committed, or whether, if possessed, it is vested in the individual States, which have exclusively supervision of all ordinary transactions at home, or in the Federal government, which at home has no concern with such acts, is an interesting enquiry, but entirely unnecessary for the purpose of this case. No case is reported in which jurisdiction over the delinquencies of absent citizens has been exercised by the United States courts on any such grounds. And I have discovered no act of Congress which purports to provide for such cases. The offences commiited out of the country which are made ; unishable (except military delinquencies and correspondence with foreign Powers, and possibly treasons) are all confined to the waters.

The power to define and punish piracies and felonies upon the high seas, and offences against the law of nations, is given by the constitution in the broadest terms. The crimes act of 1790 uses as broard language as the act before us, namely "*If any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State,*" &c. *1 L. U. S. b.* 113. And the language thus used was not qualified by the phrase which is found in the acts of 1825 and 1857, "*within the admiralty jurisdiction* of the United States." The act literally reached "any person" who might commit the offences charged in any navigable waters. Murder and robbery committed there were declared to be piracy, as murder and robbery on the sea where piracy at common law. In the case of the *United States* v. *Palmer*, 3 *Wheat. R.* 610, it was expressly held that robbery committed on the high seas by American Citizens upon a foreign ship did not come within the intent of the act, although the language of the act was broad enough to cover such a case, and it was also within the power of Congress. This ruling was based upon the doctrine that the law was only intended to punish crimes against the United States, and a crime committed on board of a foreign ship on the high seas, or upon a foreigner, not on an American ship, was no offence against the United States, because not committed within her jurisdiction. In *United States* v *Holmes* 5 *Wheat. R.* 412, the same doctrine was recognized as to vessels having a lawful national character. In *United States* v. *Klintock*, 5 *Wheat. R* 144 where the offence charged was alleged to have been committed on a piratical vessel which had no nationality, it was held to come within the act because it was an offence against all nations and of universal jurisdiction. But the doctrine as to foreign vessels is reiterated in this language: "Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign Power; but we think they ought to be applied to offences committed against all nations, including the United States by persons who, by common consent, are equally amendable to the law of all nations." In the case of the *United States* v. *Certain Pirates Wheat R* 184, Johnson J., intimates a doubt whether in cases of robbery, which he deems general piracy, the fact that it was committed on a foreign ship should exempt it from our jurisdiction. He, however lays it down very clearly that murder on a foreign ship is no offence against the United States, and in no sense within her jurisdiction, but he also intimates a doubt whether, if committed by an American, it may not be reached by reason of his allegiance. The Court however has never departed from the doctrine in *Palmer's* case. It was held in the *Pirates'* case that a piratical offence, committed on a piratical vessel, was punishable, although committed within a marine league of the shore of a foreign country, provided it was upon the high seas, because the neutral rights allowed in favor of nations over that space of the ocean render it neutral to war only, and not to crimes. And it is well settled that the maritime jurisdiction accorded to nations over their contiguous waters is not an absolute and exclusive one, but is subject to the peaceable use of all parts of the open ocean as a common highway of nations, but liable to any regulations necessary for the safety and protection of commercial rights and the fisheries, as well as the preservation of neutrality. A foreign vessel upon any part of the high seas has been regarded as foreign terriorty.

In the United States v *Kessler, Baldw. R.* 15, the question came up directly whether an offence committed on a French vessel, within a marine league of our coast, was punishable in the Federal courts; and it was held that such a vessel was foreign territory, and for that reason a crime committed on her was not punishable by our laws. In the *United States* v. *Davis*. 2 *Sumn.* R. 482, an American officer of a vessel, who, while on his own vessel on the high sea, but within a short disatnce of the shore of the Society Islands, shot a person on a vessel belonging to those Islands, was held not punishable under the acts of Congress; and the court regarded the offence as exclusively punishable by the local authorities. The decision was given by Judge Story who drew the crimes act of 1825, and whose inclination was generally in favor of giving a liberal extension to the Federal jurisdiction. This decision is in accordance with *Palmer's* case.

Every principle which takes out of the operation of the acts of Congress crimes committed by Americans on foreign vessels on the high seas applies with greater force to offences committed within the acknowledged and fixed territorial limits of a foreign nation, because it is dependant entirely on the national character of the place of the offence, and cannot by any sound reasoning reach that which is territory by implication only, and yet be excluded from that which is actual territory.

This view of the courts is strengthened by the fact that, those statutory marine offences which are not confined to place are all mutinous offences, committed on board of American vessels by their crews. The only case expressly provided for in foreign waters is where are offences committed by persons belonging as passengers or crew on board of American vessels or others occupying similar relations to the same ship, and committed on the ship. (*See sec.* 5 *of act o,* 1825.) And, even in that case, which is plainly within the power to regulate foreign commerce, it is expressly provided that, if the offence be punished by the local authorities, such punishment shall be a bar to further proceedings in this country. This act shows that it could never have been intended to regard offences committed abroad as offences against the United States, merely because committed by American citizens or on American vessels, unless some other element entered into the account.

It is further worthy of consideration whether the mischief of the old law is not to be regarded as in great measure the occasion of the new. The act of 1790 punished manslaughter only when committed on the high seas. In the case of the *United States* v. *Wiltberger*, 5 *Wheat R.* 76, it was decided that, under that act manslaughter committed on an American ship near Whampoa, in a river navigable from the ocean, was not punishable. That decision was made in 1820. A revision of the crimes acts was made in 1825, and yet it was not considered necessary to make any new law on the subject. As Whampoa was then without the jurisdiction of any country which had recognized the general law of nations, there was certainly strong occasion for a change, unless the policy of this country had been regarded as fairly expressed in *Palmer's* case. And, if the British portion of St. Clair River is within the purview of the act of 1857, we shall have presented the singular anomaly of an assault which constitutes a crime if followed by death on land either within or without the United States, and yet is no crime or offence whatever if followed by death on the spot. The act of 1857 was occasioned by the result of a trial before Judge Curtis for a fatal assault committed on the high seas, and which would have amounted to manslaughter, under the old statute, if the wounded man had not survived long enough to be landed. *United States* v. *Armstrong*, 2 *Curt. C. C. R.* 451. The bill was introduced by Mr. Fessenden, who made this statement on its introduction, and it passed without any examination or debate. There is no reason to suppose its intention was to go beyond the class of assaults made manslaughter under the former statute, or to do more than provide for the cases of death on land resulting from attacks which already were punishable where death occurred at the place where the fatal blow was given. If designed to go further, it creates a *casum omissum* by no means less formidable than the one it was meant to supply. I am very strongly inclined to the opinion that, even if the other statutes had received no construction, the effect of this, as an amendatory act, should be confined to the high seas. But, be this as it may, I have no doubt whatever that it cannot be extended to cover an assault made in a foreign country, unless made by one of the ship's company or passengers upon another of the inhabitants of the ship.

These considerations would, to my mind, be sufficient to dispose of the case before us, without regard to the views which have been presented to us as applicable to these particular waters. Although they are navigable, and actually used for commerce of a maritime nature, which, when foreign, or between different States, may, perhaps, be open, under the legislation of Congress, to the forms of admiralty remedies, where the option of a jury trial is allowed, yet every portion of the lakes and their connecting waters is the exclusive property of Great Britain, or of some American State. And the Supreme Court of the United States has recently decided that upon these waters as upon the internal tide-waters of the States, the jurisdiction of the admiralty is not local and territorial, but is transitory, and attaches only to such commerce as has been by the constitution of the United States submitted to the control of Congress. (*Allen* v. *The Fashion*, 21 *How., and Maguire* v. *Card, Id.*) There is no construction of the act of 1857 which, under any theory of jurisdiction, could extend it to offences committed on the *lakes*, for they come within none of the terms used; and it would be a very forced construction which should apply the statute to their connecting waters.

Without expressing my opinion upon the power of Congress to punish such an offence as Tyler's I am entirely satisfied that no act of Congress now in force can be fairly construed to embrace it. I am therefore of opinion that the case was not within the jurisdiction of the Circuit Court of the United States for this district, and was not within the intent of the act of 1857.

Both questions reserved should be answered in the negative.

(To be concluded in our next.)

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Picton, Nov. 14th, 1859.

Gentlemen,—As Clerk of this Municipality I would beg leave to made one or two enquiries of you respecting a return to be made by me to the Honorable Receiver General of this Province.

Under 20 Vict., ch. 10, sec. 1, a return of the number of the names of all resident rate-payers *rated on the Assessment Roll* for each year is required to be made on or before the 31st of December, in order to obtain the proportion of Clergy Reserve Fund money.

1.—Should the Poll-tax-payers be included in this return? (See 16th Vict., ch. 182, sec. 35, Statute Labour.)

I think the Poll-tax-roll is not a portion of the Assessment roll, as on reading the act just referred to you will perceive.

2.—If a person is rated on the roll in 4 or 5 different places should these repetitions of his name be considered as so many *distinct names or numbers*?

By stating your opinion of the above queries through the columns of your valuable journal, you will much oblige,

Your obedient servant,

John Twigg.

[1.—Our correspondent is we think, correct in his surmises. Persons subject to Statute labor merely are those "not assessed upon the assessment rolls," and as a return is to be made only of such rate-payers as only are "rated upon the assessment roll," these ought to be excluded.

2.—No. The return is to show "the number of resident *rate-payers* appearing on the assessment roll," and not the number of pieces of land which each rate-payer owes. (See sec. 20, Vic., cap. 71, Schedule).—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. Glynn, (Bart) v. Aberdair Railway Company. *April*, 29.

Notice to Sheriff—Compensation.

Where a Railway Company took land without making compensation, and the owner of the land gave notice to them to summon a common jury under the 68th section of 8 & 9 Vic. c. 18, and before the company had issued their want to the sheriff, gave a second notice, requiring a special jury.

Held, upon a demurrer to a plea, stating that the first notice had been waived, and varied by the second, and that they had issued their warrant within twenty one days of the second notice, that the twenty one days began to run from the time of giving the first notice, and that the 54th section of the Act could not alter the 68th section of the same Act.

Q. B. Roper v. Lendon. *April*, 30.

Policy of insurance—Condition precedent—Agreement to refer to arbitration—Jurisdiction.

Where one of the conditions indorsed on a policy of Insurance was that, if a loss occurred, notice thereof should be given forthwith to the Company, and within fifteen days after such fire a particular of the loss should be delivered; and, in case any difference should arise between the insured and the Company, that such difference should be submitted to arbitration.

Held on demurer, that in an action on the policy, a plea which averred that a particular of the loss was not delivered within fifteen days was good, inasmuch as the delivery of such a particular was a condition precedent to the plaintiffs right to recover on the policy; but that a plea averring that the action was brought in respect of a matter which it was agreed by the policy should be

referred to arbitration, and that the defendant was ready and willing to refer, was bad; as by the policy, the reference to arbitration was not made made a condition precedent to the right of action.

EX. COLLINS v. CAVE. *Feb.* 12.

Action—Deceit—Fraudulent representation—Fraudulent suppression of evidence—Fraudulent to induce third party to sue plaintiff—Remoteness of damage.

The declaration stated that the plaintiff and defendant and one C., had entered into a joint speculation in certain shares, C. advancing the money, and the plaintiff and defendant being indebted to him, each in a third. That afterwards, C. was desirous of withdrawing from the adventure, and the defendant offered to take the whole of it upon himself; that the plaintiff consented to abandon his interest to the defendant, and that C, agreed to accept the defendant as his debtor in respect of the plaintiff's share, and in the place of the plaintiff; and that the plaintiff had given up his share to the defendant, and was thereby released. That the defendant was the only witness to prove the agreement, and that he did, maliciously and wrongfully, to induce C. to sue the plaintiff, and to believe that no such agreement was made, and to deter the plaintiff from calling him as a witness, and to destroy his credit, write a letter, purporting to be a letter to the plaintiff, but directed and sent to C., by reason whereof, C. brought an action against the present plaintiff, and that it was referred to a barrister, on the terms that neither party should be called as a witness, and that the arbitrator made his award against the plaintiff.

Held, that the declaration disclosed no cause of action.

Q. B. MILLS v. CATTLING *April* 28.

Conditions of sale—Action to recover deposit—Void condition.

Property put up to auction, was described as "well-secured, improved, leasehold ground-rents" one of the conditions provided, that no objection should be taken by the purchaser on the ground that there was no reversion, in the vendor; it turned out that there was no such reversion, the vendor having parted with all his interest, which was leasehold only.

Held, in an action by the purchaser to recover back his deposit, on the ground that the vendor, having no reversion, could not make a good title, that this objection was precluded by the condition, and that the condition was not void.

EX. COWARD v. BADDELY. *April* 29.

Assault and battery—What is a battery—Touching without hostile intentions.

The plaintiff pulled the arm of the defendant, the Superintendent of a fire brigade, the moment the latter was engaged in directing the hose of the engine against a fire, for the purpose of calling his attention to an observation with respect to the effect of the water upon the flames. The defendant gave the plaintiff into the custody of a police constable, who was present, for an assault, who conveyed the plaintiff to a police station, where he was confined during that night. In an action for false imprisonment, the defendant justified under the Metropolitan Police Act.

Held, that the pulling of the defendant's arm, being without any hostile intention, the defendant could not justify the giving of the plaintiff into custody.

EX. GRINHAM v. WILLY. *April* 20.

False imprisonment—Signing charge sheet—Statement to police constable.

The defendant, who had been robbed of his watch, gave a truthful narrative of the facts to a police constable, who, of his own motion, arrested the plaintiff upon suspicion, and requested the defendant to accompany him to the police station, and when there, required him to sign the charge sheet, which he did.

Held, in an action for false imprisonment, that there was no evidence of the defendant having given the plaintiff into custody.

B. R. REGINA v. MORGAN. *April* 30.

30 & 40 Geo. III., ch. 99—Common informer.

The penalties imposed by sections 6 and 26 of the Pawnbrokers Act, for not stating truly upon the ticket the sum advanced, may be enforced by a common informer.

EX. STILLWELL v. RUCK. *April* 21. *May* 5.

Inspection of books under 14 & 15 Vic., ch. 99—Costs of application and inspection.

Where there was an application to inspect books under 14 & 15 Vic. ch. 99, and the order was granted, it was argued that according to the rule laid down in Gray on costs, the costs of the inspection must be borne by the party seeking it, but that the costs of the application, were costs in the cause.

Held, that there was no such general rule, and that it was in the discretion of the court to make its order as to the costs.

EX. C. *May* 13.

GARTON v. THE GREAT WESTERN RAILWAY COMPANY.

Notice of action, when necessary—Pleading—Action for a matter done in pursuance of Statute.

The Incorporation Act of the Great Western Railway enacts, that no action shall be brought for anything done in pursuance of the Act, without previous notice to the intended defendant.

In an action against the company for money had and received, and on accounts stated, issue was joined upon a plea, that the cause of action accrued after the Act came into operation, and that no notice was given, pursuant to the statute.

Held, after verdict for the company upon this issue, that the plea was bad for not shewing by averment, that notice was required, and that the action was brought for a matter done or omitted in pursuance of the Act; and that judgment must be reversed.

EX. C. HENDERSON v. BROOMHEAD *May* 18.

Libel—Affidavit made in the course of a judicial proceeding, reflecting upon one not a party to the cause—Malice—Action.

No action lies for defamatory words written or spoken in giving evidence in a judicial proceeding; and it is so, although it is a stanger to the cause, who seeks damages for matter in such manner falsely and maliciously spoken or written of him, and whether the matter be relavent or not.

The defendant, in support of a summons for particulars of goods sought to be recovered from her, in an action by W., made an affidavit, reflecting upon the present plaintiff. At the trial of the present action, for alleged libel contained in that affidavit, it was proposed to give evidence for the plaintiff, for the purpose of establishing his cause of action, that the matter contained in the affidavit, was false within the knowledge of the defendant; but the judge directed the jury, that such evidence was inadmissable for that purpose, and that such matter was not a legal subject matter of this action.

Held, that the direction was right.

C. P. MALTASS v. SIDDLE *May* 3.

Bill of exchange—Notice of dishonor.

Where an accommodation bill was drawn by certain members of a company, as agents of such company, on the company, and accepted by the same members as such agents, and was indorsed to another member of the company, without value, who, at the request of the parties finding the money, again indorsed it.

Held. that such indoser was entitled to notice of dishonor, from the subsequent indorsee.

C. C. R. REGINA v. HARRIET WEBSTER. *May* 7.

Perjury—Indictment, form of—Want of certainty.

An indictment for perjury, stated that a cause was pending in the County Court, in which A. and B. were plaintiffs and C. de-

fendant; that on the hearing of such cause, it "became a material question whether the said A. had, in the presence of the prisoner, signed at the foot of a certain bill of account, purporting to be a bill of account between a certain firm called A. & Co., and the aforesaid C, a receipt for payment of the amount of the said bill;" and that the said prisoner did "falsely, corruptly, and maliciously swear, that the said A. did, on a certain day in the presence of the prisoner, sign the said receipt (meaning a reciept at the foot of the said first mentioned bill of account, for the payment of the said bill), whereas," &c.

Held, that the indictment was sufficiently certain.

EX. LANGTON v. HIGGINS. *May* 5.

Trover—Conversion—Delivery of goods to vendee.

Where there was an agreement between plaintiff and C, for the sale, by C to the plaintiff, of all the oil produced from the whole crop of peppermint grown on his farm in the year 1858, and C., after having had the oil weighed according to contract, and put into the bottles, which the plaintiff had sent for that purpose, sold it to the defendant.

Held, that the bottles having been sent by the plaintiff and filled by C., or his agent, the property in the oil had passed to the plaintiff, and that he could maintain an action of trover against the defendant.

Q. B. WARD AND ANOTHER v. LOWNDES. *May* 11, 12.

Common Law Procedure Act, 1854, *sections* 67, 68, 69—*Mandamus*—*Public Health Act*, 1848, *sec.* 89.

In a claim for a *mandamus* to levy a rate and pay a debt under the Common Law Procedure Act, 1854, it is not necessary to state the specific sum which is due, but the *mandamus* may issue for the sum found to be due by the jury.

The T. Improvement Commissioners, became indebted to the plaintiffs as architects, for work and labour, and plans. Afterwards by a provision order, under the Public Health Act (12 & 13 Vic., ch. 3), confirmed by 18 & 19 Vic., ch. 125, the former Act was applied to the town of T., and a local board of health was substituted for the Commissioners; a provision being made, that, if the property and estate of the Commissioners should be insufficient to discharge their liabilities, such deficiency should be charged upon the rates leviable under the Public Health Act.

Held, that section 89 of the last mentioned Act, which only provides for the payment of charges and expenses which may have been incurred at any time within the six months before making of the rate, did not apply to the liabilities of the Commissioners, which were made a charge upon the rates; and that, therefore, a plea, which stated that the plaintiffs' claim was not incurred within six months, was bad.

C. P. GRIFOLD v. BRENDEN. *June* 15*th*.

Bill of Sale, filing of, under 17 *&* 18 *Vic., c.* 36 "*together with*" *an affidavit &c—Evidence of filing of one, amounting to evidence of filing the other—Public document—Certified copy*, 14 *&* 15 *Vic., c.* 99, *s.* 14.

A certified copy (under s. 14 of the 14 & 15 Vic., c. 99.) of the entry under s. 3 of the 17th & 18th Vic. c. 36, in the book kept by the officer of the court of Queen's Bench, of a bill of sale, and of the date of the execution and filing of it, is evidence, not only of the filing of the bill of sale, and of the date of the execution and filing of it, but also of the filing and time of filing of the affidavit, together with which affidavit the bill of sale is, by s. 1 of the 17th & 18th Vic., c. 36, to be filed.

C. P. BENNETT AND ANOTHER v. THE MANCHESTER SHEFFIELD & LINCOLNSHIRE R. Co. *June* 15th

Railway and Canal Traffic Act—Distinct Railway or Canal—Preference.

A railway company had an old haven and new dock, the latter being in immediate connection with their railway, and the land around the new dock belonging to the company; but the land around the old haven belonging to other persons. The railway company, by neglect, suffered the old haven to become in such bad condition that vessels which would otherwise have gone into it went to the new dock, to the advantage of the company and to the injury of the persons who possessed the land around the old haven.

Held, that the old haven and new dock being distinct things, this was not an undue preference of themselves which came within the Railway and Canal Traffic Act 1854, that Act applying to preferences on the same railway and canal.

C. P. BUTLER v. ABLEWHITE. *April* 20*th*. *June* 14*th*.

County Court—Concurrent jurisdiction, 9 & 10 *Vic. c.* 95 *s.* 128—15 & 16 *Vic., c.* 54, *s.* 4.—*Two residences of Plaintiff*

The defendant resided and carried on business permanently in London. The plaintiff had two residences, each of which was occupied by the plaintiff and his family during certain portions of the year, the one at his country seat in Warwickshire, the other at his town house in Grosvenor place; the former was more than twenty miles, the latter less than twenty miles from defendant's residence. The cause of action, which was for less than £20, arose in London; and at the time of action brought in this court, the plaintiff and his family were residing at the plaintiff's country seat, in Warwickshire.

Held, that the superior court had concurrent jurisdiction with the county court to entertain the plaintiff's claim within the meaning of the 128th section of the 9th and 10th Vic,, c. 95; and the court discharged a rule calling on the plaintiff to show cause why the proceedings should not be stayed, on payment of the debt without costs, holding that the plaintiff was entitled to his costs under the 4th section of the 15th and 16th Vic., c. 54.

EX. MCKEWARD v. ROLT. *June* 16th.

Practice—Interrogatories—Common Law Procedure Act 1854 s. 51.

The officer of a Banking Company, constituted under 7 Geo. 4, c. 46, can have interrogatories delivered to him under 51st section of the Common Law Procedure Act 1854.

Q. B. REGINA v. CLARKE. *June* 16*th*.

Writ of error—Fiat of Attorney General—Quo warranto.

If in an information of a *quo warranto* the Attorney General have granted his fiat that a writ of error may issue, the court will not interfere, the first being conclusive.

EX. LIVERSIDGE v. BROADBELT. *June* 15*th*.

Contract—Agreement to pay debt to a person other than the creditor. Consideration.

C, a builder was indebted to L, a timber-merchant in the sum of £113 for which he had given two bills of exchange. B was indebted to C in a larger amount. Upon C being applied to for payment of one of the bills which had become due, he wrote and signed the following document: "I hereby agree to authorize B to pay L on his order the sum of £113, the amount of two acceptances, together with expenses on the bills, and interest thereon towards my account, for building the cottages at W. B to debit my account with the above money; also L's receipt to B I acknowledge shall be binding between myself and B on the contract." This document was taken by L to B who wrote thereon the word "acknowledged," and signed his name thereunder.

Held, that there was no binding agreement by B to pay the money to L there being no consideration for the promise and that an action could not be maintained by L against B for recovery of the money.

CHANCERY.

V. C. K. BAUER v. MITFORD. *June* 4*th*, 9*th*.

Exceptions—Pedigree—Evidence—Hearsay evidence.

Hearsay evidence is admissable in cases of pedigree, being statements of living witnesses as to that which they have heard persons, now deceased, say with respect to the pedigree of

their family: they being proved *aliunde* to be members of that family by extrinsic evidence.

Although the court will admit hearsay evidence in cases of pedigree, it looks at such evidence with great jealousy, the parties giving it being interested witnesses; but discrepancies may go to confirm the truth of such statements.

V. C. K. BROWNE v. SAVAGE. *June 11th.*

Mortgage—Priority—Trustee—Stamp.

When a fund on interest is held in trust and the *cestui qui* trust makes an assignment by way of mortgage, the assignee, in order to protect himself, must either give notice to all the trustees or obtain a stop order.

If a trustee of a fund makes a false representation to an assignee he is personally responsible.

Notice of an assignment of an interest in a fund may be given at any time, and lapse of time only is not sufficient to ignore its existence.

A formal notice of an assignment to a beneficiary in a trust fund, being also a trustee, is unnecessary; any species of notice is sufficient, written or verbal, except a casual observation, which is not sufficient.

Notice to a beneficiary in a trust fund, being also a trustee who encumbers his share, is not sufficient to protect an assignee.

Notice of an assignment to a trustee who is also assignee, is sufficient notice.

A document must be stamped to make it receivable as evidence in a court of equity, but when once stamped it becomes valid *ab initio.*

V. C. K. IN RE KEEN. *June 16th.*

Practice—Amendment—Petition.

When after a petition has been presented, but before the order has been drawn up, an event happens affecting the existing order; such fact cannot be introduced by amendment.

V. C. K. NOEL v. NOEL. *June 15th.*

Special case—Power—Intention.

N under his marriage settlement has a special power of appointment among his children as to £3000, part of an unascertained fund appointed by his father, who derived it under the will of Lord W. the residue, if any, being limited to him absolutely. N., by his will, gives all his real and personal estate whatsoever and wheresoever which he in any manner derived or became entitled to through the will of his late father, or of Lord W, in possession, reversion, remainder or expectancy, unto his two daughters equally for their absolute use forever,

On the question whether this was an exercise of the power:

Held, that it was not.

L. J. PERRY v. SHIPWAY. *June 6th, 7th.*

Trustees of dissenting chapel—Injunction to restrain minister from officiating.

Injunction granted at the suit of the trustees of a dissenting chapel, in whom the legal estate was vested upon trust for the use and benefit of the congregation, to restrain a minister from officiating therein, with whose conduct they were dissatisfied, and who retained the pulpit of the chapel against the will of the majority of the trustees.

M. R. WARD v. GRAY. *April 29th. June 2nd.*

Will—Construction—Legatee—Gift to A and her children.

A testator directed that all his legatees should contribute one per cent. out of their legacies to A and her children.

Held, that specific and residury legatees and annuitants were liable to contribute.

Held also, that A took a life estate with a power of appointment among children with remainder in default of the children equally.

REVIEW.

THE WESTMINSTER REVIEW: Leonard Scott & Co., 79 Fulton Street, New York.

We have received the quarterly number for October of this excellent Review. As usual it abounds with able and some deeply interesting articles. The contents are: 1. Militia Forces. 2. Rousseau, his Life and Writings. 3. Spiritual Freedom. 4. Modern Poets and Poetry of England. 5. Physical Geography of the Atlantic Ocean. 6 Garibaldi and the Italian Volunteers. 7. Tennyson's Idylls of the King. 8. Bonapartism in Italy. The article on Militia Forces affords much material for thought and ought to be read with attention in Canada, where the maintenance of such a force appears to be a task of some difficulty. The articles on Garibaldi and Bonapartism in Italy are of much interest at the present time. The article on the Physical Geography of the Atlantic Ocean lays bare many of the hidden wonders of the deep, and is throughout worthy of study.

THE UNITED STATES INSURANCE GAZETTE AND MAGAZINE, Edited by G. E. Currie, New York. The Nov. number is received.

Among other papers of interest is one very ingenious and withal convincing paper headed "The usual objections to Life Assurance answered." The number is replete with statistical information indispensable to underwriters and others concerned in the business of Insurance. There are, besides, extracts from the Insurance law of several States of the Union, which for purposes of comparison with a view to the selection of the best, are materials most useful and very necessary to legislators. Price $3 per annum, payable in advance.

THE LOWER CANADA REPORTS, Edited by Messrs. Lelievre & Angers; published by Augusté Coin, Quebec.

No. 9, Vol. X. of these Reports is received. It contains thirteen reported cases, of which one (*McCarthy* v. *Hart*) is the most interesting to an Upper Canadian lawyer. It deals generally with the right of attorneys in Lower Canada to form partnerships, and particularly as to the effect of a dissolution of partnership upon suits pending at the time of the dissolution. It was there held, where two attorneys are in partnership and one is nominated to the bench as assistant Judge, that service on the remaining partner is sufficient.

"THE WEEKLY LAW GAZETTE," Cincinnati. "THE LEGAL INTELLIGENCER," Philadelphia. "THE LEGAL JOURNAL," Pittsburgh.

We regularly receive the above Exchanges, and intend for the future liberally to avail ourselves of their contents, as we are happy to notice they do of the contents of the *Law Journal*. It is very gratifying to know that between us there exists not merely brotherly feeling, but an aptitude and ability to be useful to each other in the great field of legal science.

APPOINTMENTS TO OFFICE, &c.

CORONER.

EDWARD . LAYTER, Esquire, M. D., Associate Coroner for the United Counties of Peterborough and Victoria.

NOTARY PUBLIC.

HENRY McKINSTRY, of Hamilton, Esquire, to be a Public Notary in Upper Canada.

TO CORRESPONDENTS.

ONE OF YOUR SUBSCRIBERS—OTTO KLOTZ—AN INQUIRER—R. H. JONES—HENRY CADWELL—A SUBSCRIBER—under "Division Courts."

JOHN TWIGG—under "General Correspondence."