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DIARY FOR JULY.

1. Friday.....Long Vacation commences. Last day for County Council to equalize Rolls of Local Municipalities.
3. SUNDAY ...6th *Sunday after Trinity.*
4. Monday .....Heir and Devisee Sittings commence. County Court and Surrogate Court Term begins.
9. Saturday ...County Court and Surrogate Court Term ends.
10. SUNDAY ...7th *Sunday after Trinity.*
14. Thursday ...Last day for Judges of County Courts to make return of appeals from Assessments.
17. SUNDAY ...8th *Sunday after Trinity.*
19. Tuesday .....Heir and Devisee Sittings end.
24. SUNDAY ...9th *Sunday after Trinity.*
25. Monday .....*St. James.*
30. Saturday .. Last day for County Clerk to certify County Rate to Municipalities in County.
31. SUNDAY ...10th *Sunday after Trinity.*

The Upper Canada Law Journal.

JULY, 1864.

THE LAW OF REPLEVIN IN UPPER CANADA.

Replevin at common law was for the specific recovery of personal property, and that only under particular circumstances, and in no case for the recovery of damages.

Blackstone wrote that replevin "obtains only in one instance of an unlawful taking, that of a wrongful distress" (3 Com. 146).

If by this expression he meant that in practice it was not usual to have recourse to replevin except in the case of a distress alleged to be wrongful, he was probably justified by the fact; but there are not wanting authorities to shew that the remedy by replevin was not so confined, (per Coleridge, J., in *Mennie* v. *Blake*, 6 El. & B. 847).

In Comyn's Digest it is said that Replevin lies "of all goods and chattels unlawfully taken out of the possession of the owner, (Pl. 3 K. I.) but a mere wrongful detention was not held to be a taking within the meaning of this definition (*Mennie* v. *Blake*, 6 El. & B. 847).

Whether Replevin could at common law be sustained upon a mere tortious taking or detention, was at all times a question of considerable doubt (*Foster* v. *Miller*, 5 U. C. Q. B. 509).

The Legislature of Canada in 1851 removed the doubt by declaring that whenever any goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities, or other personal property or effects, have been or shall be wrongfully detained, the owner, or person, or corporation who by law can now maintain an action of trespass or trover, shall have and may bring an action of replevin for the recovery of such goods, chattels, or other personal property aforesaid, and for the recovery of the damages by reason of such unlawful capture or detention, in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress (14 & 15 Vic. cap. 64, Con. Stat. U. C. cap. 29).

It was by s. 8 of the same act provided that where the original taking of the goods, chattels, or other personal property is not complained of, but the action is founded on a wrongful detention thereof, the declaration shall conform to the writ, and may be the same as in an action of detinue (s. 8—Con. Stat. U. C. cap. 29, s. 17).

So it was declared that the defendant should be entitled to the same pleas in abatement or bar as heretofore, and may plead as many matters in defence as he shall think necessary, and which would by law constitute a legal defence if the action were an action of trespass, when the taking be complained of, or were an action of detinue, when the detention only be complained of (s. 9—Con. Stat. U. C. cap. 29, s. 15).

The expression "the owner, &c., who by law can now maintain trespass for personal property, &c.," is not very distinct. It may mean that the owner who, under the circumstances, could maintain trespass or trover for the recovery of damages for the taking or conversion of goods, may in his option bring replevin, though the words "in like manner as actions are now brought and maintained by any person complaining of a wrongful distress" may seem to point to a restriction in the case of replevin (per Draper, C. J., in *Henderson* v. *Sills*, 8 U. C. C. P. 71).

Nor does the enactment enabling the defendant to plead as many matters of defence as he shall think necessary, and which would by law constitute a legal defence in trespass, trover or detinue respectively, throw much light on the question. The old plea denying property in replevin always prayed a return. The plea of not possessed in trespass or trover in terms prays no return, for in trespass or trover, as the action is for damages only, no prayer for return is necessary.

If a plea of not possessed in replevin assert property in defendant, and the plea be found for him, he would most assuredly be entitled to a return. But the rights of a defendant in replevin who pleads not possessed simply, are not so easily defined. It will probably be found that the object of the act is not so much to make replevin concurrent with trespass or trover as to extend the remedy, without altering it to cases other than those of wrongful

taking (*Henderson* v. *Sills*, 8 U. C. C. P. 68; *Haacke* v. *Maror*, 8 U. C. C. P. 461).

In trespass it is sufficient for the defendant to allege in his plea matter of excuse, but in replevin the avowant who is to have a return is in the nature of a plaintiff, and therefore the avowry, which is in the nature of a declaration, must shew a good title in omnibus and contain sufficient matter to entitle defendant to a return. Thus in trespass, if the defendant justify for an amercement in a Court he must set forth a warrant, for he is a wrong-doer unless he acted under a warrant; but it is not necessary to aver the matter of presentment, because as to him it is immaterial whether the offence was committed or not, so there was a presentment, and his plea is only to excuse the wrong. But in an avowry, the defendant ought to aver in fact that the plaintiff committed the offence for which he was amerced, because defendant is an actor, and has to recover, which he can only do upon the merits. It does not, therefore, follow that whatever would be a good plea in trespass, trover or detinue would also be a good plea, or more correctly avowry, in replevin. The avowant, it is apprehended is still an actor, and if successful, is entitled to a return and must therefore shew title good in omnibus in order to entitle himself to the return. (See *Haacke* v. *Maror*, 8 U. C. C. P. 441).

The verdict is divisible so that the defendant may have a return of whatever part of the goods he proves himself entitled to. (*Sills* v. *Hunt*, 16 U. C. Q. B. 521; *Haggart* v. *Kernahan*, 17 U. C. Q. B. 341; *Henderson* v. *Sills*, 8 U. C. C. P. 68). If plaintiff obtain a verdict for damages he is entitled under the statute of Gloucester to the general costs of the cause; but where defendant is entitled to a return of part of the goods he is entitled to a proportion of the costs occasioned by that part of the case, and to deduct them from plaintiff's bill (*Caniff* v. *Bogart*, 6 U. C. L. J. 59).

Shortly after the passing of our act of 1851 it was held that goods seized under an attachment from a Division Court might be replevied to a third person not a party to the suit, claiming them as his own. (*Arnold* v. *Higgins*, 11 U. C. Q. B. 491.) But the law in this respect is now changed by act of Parliament (23 Vic. cap. 45, s. 8).

Nor can goods seized under process issued out of a Court of Record for Upper Canada be replevied. (Con. Stat. U. C. cap. 29, s. 2). But the taking of goods under one writ of replevin does not prevent the operation of a second writ in the hands of the same sheriff (*Crawford* v. *Thomas*, 7 U. C. C. P. 63).

When the action is brought for goods, chattels or other personal property distrained, the action is local, but in other cases the venue may be laid in any county. (Con. Stat. U. C. 29, s. 13; *Buffalo and Lake Huron Railway Company* v. *Gordon*, 3 U. C. L. J. 28; *Vance et al.* v. *Wray*, 3 U. C. L. J. 69).

In case the value of the goods or other property or effects distrained, taken, or detained does not exceed the sum of $40 the writ may issue from the Division Court of the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken, or detained. (23 Vic. cap. 45, s. 6). Where the value does not exceed the sum of $200 the writ may issue from the County Court of the county wherein the goods, property, or effects were distrained, taken, or detained. (Con. Stat. U. C. cap. 29, s. 3). A certificate is necessary to obtain full costs in replevin, as in other actions (*Ashton* v. *McMillan*, 3 U. C. Pr. 10).

Before any writ of replevin can issue, the person claiming the property, his servant, or agent must make an affidavit entitled and filed in the court out of which the writ is to issue, and sworn before any person entitled to administer an affidavit therein, stating:—

1. That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof, describing the property in the affidavit.

2. The value thereof, to the best of his belief, and such description of the property and value shall be stated in the writ (Con. Stat. U. C. cap. 29, s. 4).

No writ of replevin shall issue:—

1. Unless an order is granted for the writ, on an affidavit by the person claiming the property, or some other person, showing to the satisfaction of the court or judge, the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be);

2. Or unless the affidavit for the writ states, in addition to what is required by the fourth section of the Act relating to replevin, that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his psssession, within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the writ, and that there is good reason to apprehend that unless the writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property;

3. Or, in case the property was distrained for rent or damage feasant, the writ of replevin may issue without an order, if the affidavit states, in addition to what is required by the fourth section of the Act relating to replevin, that

the property was distrained and taken under color of a distress for rent or damage feasant, and in such case the writ shall state that the defendant hath taken and unjustly detains the property, under color of a distress for rent or damage feasant (as the case may be).

In case the writ issue without an order the sheriff is to take and detain the property, and is not to replevy it to the claimant without the order of a Judge or that of the Court; but may within fourteen days from the time of his taking the same re-deliver it to the defendant, unless in the meantime the claimant obtain and serve on the sheriff a a rule or order directing a different disposition of the property, but this is not to apply in case of a distress for rent or damage feasant (23 Vic. cap. 45, s. 2).

When an application for an order is made, the Court or Judge may proceed on the *ex parte* application of the claimant, or may grant a rule or order on the defendant to show cause why the writ should not issue; and may, on the *ex parte* application, or on the return of the rule or order to show cause, grant or refuse the writ, or direct the sheriff to take a bond in less or more than treble the value of the property, or may direct him to take and detain the property until the further order of the Court, instead of at once replevying the same to the plaintiff; or may impose any terms or conditions in granting the writ, or in refusing the same, (on the return of a rule or order to show cause), as, under the circumstances in evidence, appear just (Ib. s.3).

In case a writ of replevin is issued, whether with or without an order, or in case any rule or order is made under the preceding section, the defendant may, at any time, or from time to time, apply to the Court or Judge, on affidavit or otherwise, for a rule or order on the plaintiff to show cause why the writ, or why the rule or order respecting the same, should not be discharged, or why the same should not be varied or modified, in whole or in part, as therein specified, or why all further proceedings under the writ should not be stayed, or why any other relief, to be referred to in the rule or order so applied for, should not be granted to the defendant, with respect to the return, safety or sale of the property or any part thereof, or otherwise; and the Court or Judge may make such rule or order thereon, as, under all the circumstances, best consists with justice between the parties (Ib. sec. 4, *Scott* v. *McRea*, 3 U. C. Pr. 16).

The writ must be tested in the same manner as a writ of summons under the Common Law Procedure Act, and be returnable on the eighth day after service of a copy thereof, and may be in the form given (Con. Stat. U. C. cap. 29, sch. A) or otherwise adapted to the circumstances of the case (Con. Stat. U. C. cap. 29, s. 5).

The copy of writ should be served on defendant personally, or if he cannot be found, by leaving a copy at his usual or last place of abode, with his wife, or some other grown person being a member of his household or an inmate of the house wherein he resided (*Ib.* s. 6).

The sheriff is not to serve the copy of writ until he has replevied the property or some part of the property therein mentioned—if he cannot replevy the whole in consequence of the defendant having eloigned the same out of his county, or because the same is not in the possession of the defendant or of any person for him (*Ib.* s. 7).

Before the sheriff act on any writ of replevin he is to take a bond in treble the value of the property to be replevied, as stated in the writ, conditioned that if the plaintiff do prosecute his suit with effect and without delay against defendant for the taking, and unjustly detaining (or "unjustly detaining," as the case may be) of the property described, make a return of the property, if a return thereof be adjudged, and pay such damages as the defendant shall sustain by the issuing of the writ of replevin if the plaintiff fail to recover judgment in the suit; and further, do observe, keep, and perform all rules and orders made by the Court in the suit, then the bond to be void, or else to remain in full force and virtue (Con. Stat. U. C. cap. 29, s. 8; Form B; 23 Vic. cap. 45, s. 5).

In case the property to be replevied or any part thereof be secured or concealed in any dwelling house or other building or enclosure of the defendant, or of any other person holding the same for him, and in case the sheriff publicly demands from the owner and occupant of the premises deliverance of the property to be replevied, and in case the same be not delivered to him within twenty-four hours after such demand, he may, and if necessary shall break open such house, building or enclosure for the purpose of replevying such property or any part thereof, and shall make replevin according to the writ (Con. Stat. U. C. cap. 29, s. 9).

If the property to be replevied, or any part thereof, be concealed either about the person or on the premises of the defendant, or of any other person holding the same for him, and in case the sheriff demands from the defendant or such other person aforesaid deliverance thereof, and deliverance be neglected or refused, he may, and if necessary, shall search and examine the person and premises of the defendant or of such other person for the purpose of replevying such property or any part thereof, and shall make replevin according to the writ (Ib. s. 10).

The sheriff must return the writ at or before the return day thereof, and must transmit annexed thereto:—

1st. The names of the sureties in, and the date of the bond taken from the plaintiff, and the name or names of the witnesses thereto;

2nd. The place of residence and additions of the sureties;

3rd. The number, quantity and quality of the articles of property replevied; and in case he has replevied only a portion of the property mentioned in the writ and cannot replevy the residue by reason of the same having been eloigned out of his county by the defendant, or not being in the possession of the defendant, or of any other person for him, he must state in his return the articles which he cannot replevy and the reason why not (Ib. s. 11).

In case the defendant has been duly served with a copy of the writ, and does not enter his appearance in the suit at the return thereof, the plaintiff may, on filing the writ and affidavit of its due service, enter a common appearance for the defendant, and proceed thereon as if he had appeared (Ib. s. 12).

Upon an appearance being duly entered by or for the defendant in the office of the Clerk or Deputy Clerk of the Crown or of the Clerk of the County Court from whose office the writ of replevin issued, the plaintiff and defendant respectively shall (in the absence of any provision herein or in any rules of the Superior Courts of Common Law to the contrary), declare, avow, reply, rejoin and otherwise plead to issue and take all subsequent proceedings to trial and judgment according to the practice in replevin in England, so far as applicable to the Court having cognizance of the case, but all such proceedings shall be taken respectively, within the same time as in other personal actions in the same Court, and in case of default so to do, the parties respectively shall be liable to the like judgment and proceedings as in such personal actions under the "Common Law Procedure Act" (Ib. 14).

Any plaintiff or defendant in replevin, who, if judgment were obtained, would be entitled to relief against such judgment on equitable grounds, may plead the facts which entitle him to such relief by way of defence, and the Court will receive such defence by way of plea; but such plea must begin with the words "for defence on equitable grounds," or words to the like effect (Ib. s. 16).

If the defendant justifies or avows the right to take or distrain the property, in or upon any place in respect of which the same might be liable to forfeiture, or to distress for rent, or for damage feasant, or for any custom, rate or duty, by reason of any law, usage or custom at the time when, existing and in force, he must state in his plea of justification or avowry a place certain within the city, town, township or village within the county, as the place at which such property was so distrained or taken (Ib. s. 19).

If the sheriff makes such a return of the property distrained, taken or detained, having been eloigned, as would warrant the issuing of a capias in cithernam by the law of England, then upon the filing of such return, such writ may be issued by the officer who issued the writ of replevin (Ib. s. 20).

The sheriff, before executing a capias in Withernam, must take pledges according to the law of England in that behalf in like manner as in cases of distress (*Ib.*)

The Courts of Queen's Bench and Common Pleas may, from time to time, make such rules for advancing and rendering easy and effectual the remedy by replevin, as well by regulating the practice to be observed in such actions, as by prescribing or changing the forms of writs and proceedings to be used therein, as such Courts deem conducive to the ends of justice, and all such rules shall have the like force in the County Courts as in the said Superior Courts (Ib. s. 21).

So far as relates to proceedings in the Superior Courts of Law and in the County Courts, the sections of the Common Law Procedure Act, numbered respectively from three hundred and thirty-three to three hundred and forty-one, are to be deemed to apply to the Act 23 Vic. cap. 45, amending the law of Replevin, as if that Act had been incorporated with the Common Law Procedure Act, but it is declared not to be necessary to lay before Parliament the rules, orders, or regulations made by the Judges for the purposes of the Act amending the law of Replevin (23 Vic. cap, 45, sec. 9).

In replevin, in a Division Court, the matter is to be disposed of without formal pleadings, and the powers of the Courts and officers, and the proceedings generally in the suit must be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts (23 Vic. cap. 45, s. 7).

JUDGMENTS.

QUEEN'S BENCH.

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

June 13, 1864.

Bank of Upper Canada v. *Deedes et al.*—Rule *nisi* discharged.

Kingan v. *Hall.*—Judgment for plaintiff on demurrer.

In re Corbett v. *Taylor.*—Appeal allowed, and rule absolute to enter nonsuit in court below.

Severn v. *Toronto Street Railway Co.*—Appeal allowed, and rule absolute for new trial in court below.

McLean v. *Buffalo and Lake Huron Railway Co.*—Rule absolute for new trial without costs.

Wilson v. *McKechnie.*—Rule discharged.

O'Rorke v. *Great Western Railway Co.*—Rule absolute to enter verdict for defendants, as goods carried under a special contract.

Bricken v. *Ancell*—Rule discharged.

McAnany v. *Tickell*—Judgment for plaintiff on special case.

Hamilton v. *Montreal Assurance Co.*—Judgment for defendants on demurrer.

Hamilton v. *Montreal Assurance Co.*—Application for rule *nisi* for new trial. Stands.

In re Motteshed v. *Read.*—Appeal dismissed. Plea held good.

White v. *Batty.*—Appeal allowed, and rule absolute to increase verdict by $80 on leave reserved.

Hill et ux. v. *Greenwood.*—Rule discharged.

Craig v. *Corcoran.*—Rule absolute for new trial.—Costs to abide the event.

McGee v. *McLaughlan.*—Rule discharged.

Cowan v. *Smith.*—Rule discharged.

Morley v. *Bank of British North America.*—Rule absolute for new trial on payment of costs.

Fisher v. *Hartly.*—Rule discharged.

Bank of Montreal v. *Monro.*—Postea to plaintiffs.

Swann v. *Scott.*—Judgment for plaintiff on demurrer.

Corporation of Simcoe v. *Groff.*—Rule discharged.

Stevens v. *Majors.*—Rule absolute for new trial. Costs to abide the event.

Woods v. *Bowden.*—Rule discharged.

Couch v. *Munro.*—Rule discharged.

Biggar v. *Howie.*—Rule discharged.

Ganton v. *Size.*—Rule discharged.

Wismer v. *Wismer* —Rule discharged.

Young v. *Elliott.*—Rule absolute for new trial. Costs to abide the event.

The Queen v. *Switzer.*—Rule discharged without costs.

In re Hewitt, J. P., &c.—Rule discharged without costs.

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

June 18, 1864.

Hamilton v. *Montreal Insurance Company.*—Motion for rule *nisi* withdrawn by defendants.

Harmer v. *Cowan.*—Appeal dismissed with costs.

Bostwick v. *Mills.*—Appeal allowed. Judgment to be given in court below for plaintiff on demurrer.

Strachan v. *Sessions.*—Appeal dismissed with costs.

Nevine v. *Jardine.*—Special case.—Judgment for plaintiff.

Jones v. *Smith.*—Writ of error allowed.

Secretary of State for War v. *City of London.*—Postea to plaintiff.

Queen v. *Boultbee.*—Appeal dismissed.

Battersby v. *O'Dell.*—Appeal allowed. Rule for nonsuit in court below to be discharged

Kelly v. *City of Toronto.*—Rule discharged without costs.

Moore v. *Boyd.*—Rule absolute to enter nonsuit.

In re Arnold & Rogers.—Rule *nisi* granted, and cross rule discharged.

McIntosh v. *Tyhurst.*—Rule *nisi* granted.

COMMON PLEAS.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON, J.

June 13, 1864.

Cooper v. *Wellbanks.*—Rule absolute for new trial without costs.

Roberts v. *Minten.*—Rule refused.

Henderson v. *McLean.*—Rule *nisi* granted.

In re Tremayne.—Rule refused.

Boulton v. *McNabb.*—Rule absolute for new trial without costs.

Gilchrist v. *Weller.*—Judgment for defendant on demurrer, without costs, no one having appeared for defendant.

Eadus v. *Dougall.*—Judgment for defendant on demurrer to first count, and for plaintiff on second count.

Turnbull v. *McNaught.*—Judgment for plaintiff on demurrer.

In re Kelly & Macarow.—Rule discharged without costs.

Hope v. *Greaves.*—Rule absolute to enter nonsuit.

Ansley v. *Breo.*—Rule discharged.

Joslin v. *Jefferson.*—Rule absolute to enter verdict for plaintiff.

Wingate v. *Enniskillen Oil Co.*—Rule to enter nonsuit absolute. Leave to appeal granted.

Dickson v. *Grimshawe.*—Rule absolute to set aside proceedings for irregularity, with costs.

Prince v. *Moore.*—Postea to plaintiff.

Woodill v. *Sullivan.*—Rule discharged.

Reynolds v. *Pearce.*—Rule absolute for new trial on payment of costs.

In re Stanton, one, &c.—Rule discharged upon payment of costs.

Weller v. *Hartgraves.*—Rule discharged.

In re Campbell and the Corporation of the City of Kingston.—Rule absolute to quash a section of a by-law, with costs.

The Queen v. *Schram* —Rule discharged. The Foreign Enlistment Act to be held in force in this colony.

The Queen v. *Anderson.*—Rule discharged.

June 18, 1864.

Mills v. *King.*—Interpleader issue. Special case. Decision as to description of goods under Chattel Mortgage Act.

Rowe v. *Jarvis.*—Rule discharged with costs.

In re Staley v. *Bigelow.*—Appeal allowed, and rule to enter nonsuit in court below absolute, without costs of appeal.

Lavis v. *Baker.*—Rule for new trial discharged without costs.

Corporation of Wellington v. *Wilson.*—Judgment for plaintiff on demurrer.

Miller v. *Beaver Insurance Co.*—Rule absolute to enter verdict for plaintiff on first issue. Stat. 27 Vic. cap. 13, sec. 2, as to renewal of writs of execution, held not to be retrospective.

McCarthy v. *Oliver.*—Rule absolute to enter nonsuit.

The Queen v. *Carson.*—Conviction affirmed.

The Queen v. *Ross.*—Conviction quashed. Held, that county magistrates have no jurisdiction to act as such in cities, though in matters relating to the county.

Carnegie v. *Tuer.*—If plaintiff consent within ten days to reduce damages to $150, then rule discharged, otherwise rule absolute for new trial on payment of costs.

Sanderson v. *Gairdner.*—Rule discharged.

Cameron v. *Milloy.*—Rule absolute for new trial on payment of costs.

Bannon v. *Frank.*—Rule absolute to enter nonsuit if plaintiff elects nonsuit before first day of next term, otherwise rule absolute to enter verdict.

PRACTICE COURT.

Present: ADAM WILSON, J.

June 16, 1864.

McKenzie v. *Harris.*—Rule discharged without costs.

Severn v. *Cosgrave.*—Rule discharged without costs.

Robson v. *Arbuthnot.*—Rule as to irregularity discharged with costs, with leave to defendant next term to move for a new trial on the merits, unless plaintiff shall in meantime consent to new trial on payment of costs.

Hannah v. *Goodenough.*—Rule directing feigned issue enlarged till last day of Easter term past. Such rule to be amended so as to include the trial at which the record was made a remanet. Plaintiff's rule made absolute, allowing him the costs of the trial of the feigned issue, and of this application.

THE NEW STAMP ACT.

We give this important Act an early insertion. We shall have occasion hereafter to notice it more at length. Its operation has been postponed, we are informed, until the 1st of August next. *Quære* as to the effect of this.

AN ACT TO IMPOSE DUTIES ON PROMISSORY NOTES AND BILLS OF EXCHANGE.

Whereas it is necessary to increase the Provincial Revenue and for that purpose to impose and provide for the collection of the duty hereinafter mentioned: Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. Upon and in respect of every Promissory Note, Draft or Bill of Exchange, for an amount not less than one hundred dollars, made, drawn or accepted in this Province, on or after the first day of July in the present year one thousand eight hundred and sixty-four, there shall be levied, collected and paid to Her Majesty for the public uses of the Province, the duties hereinafter mentioned, that is to say:

On each such Promissory note, and on each such draft or Bill of Exchange executed singly, a duty of three cents, for the first hundred dollars of the amount thereof; and a further duty of three cents for each additional hundred dollars or fraction of a hundred dollars of the amount thereof;

On each such Draft or Bill of Exchange executed in duplicate, a duty of two cents on each part of the first hundred dollars of the amount thereof, and a further duty of two cents for each additional hundred dollars or fraction of a hundred dollars of the amount thereof;

On each such Draft or Bill of Exchange executed in more than two parts, a duty of one cent on each part for the first hundred dollars of the amount thereof, and a further duty of one cent for each additional hundred dollars or fraction of a hundred dollars of the amount thereof;

And any interest made payable at the maturity of any Bill, Draft or Note, with the principal sum, shall be counted as part of the amount thereof.

2. The duty on any such Promissory Note, Draft, Bill of Exchange or part thereof, shall be paid by affixing thereto an adhesive stamp or adhesive stamps of the kind hereinafter mentioned, to the value of such duty, upon which the signature or part of the signature of the maker or drawer, or in the case of a Draft or Bill made or drawn out of this Province, of the acceptor or first indorser in this Province, or his initials, or some integral or material part of the instrument shall be written, so as (as far as may be practicable) to identify each stamp with the instrument to which it is attached, and to show that it has not before been used, and to prevent its being thereafter used for any other instrument.

3. Every bill, draft, order or instrument,—

For the payment of any sum of money by a bill or promissory note, whether such payment be required to be made to the bearer or to order,—

Every document usually termed a letter of credit, or whereby any person is entitled to have credit with, or to receive from or draw upon any person for any sum of money,—

And every receipt for money given by any bank or person, which shall entitle the person paying such money or the bearer of such receipt to receive the like sum from any third person,—

Shall be deemed a bill of exchange, or draft chargeable with duty under this Act.

4. Every bill of exchange, draft or order drawn by any officer of Her Majesty's Commissariat, or by any other officer in Her Majesty's Imperial or Provincial service, in his official capacity, or any acceptance or endorsement by such officer on a bill of exchange drawn out of Canada, or any draft of or on any Bank payable to the order of any such officer in his official capacity as aforesaid, or any note payable on demand to bearer issued by any chartered Bank of this Province, or by any Bank issuing such note under the Act chapter 55 of the Consolidated Statutes of Canada, intituled, "An Act respecting Banks and freedom of Banking," shall be free from duty under this Act,—

Any cheque upon any chartered Bank or Licensed Banker, or any Savings Bank, if the same shall be payable on demand,—

Any post office money order,—and

Any municipal debenture or coupon of such debenture,—shall be free of duty under this Act.

5. The Governor in Council may from time to time direct stamps to be prepared for the purposes of this Act, of such kinds and bearing respectively such device as he thinks proper, and may defray the cost thereof out of any unappropriated moneys forming part of the Consolidated Revenue Fund; but the device on each stamp shall express the value thereof, that is to say, the sum at which it shall be reckoned in payment of the duties hereby imposed.

6. The Minister of Finance may appoint any postmasters, collectors of inland revenue or other officers of the Government, to be the distributors of stamps under this Act, and may authorize any other persons to purchase stamps from such distributors to sell again;—and the Governor in Council may fix the remuneration to be allowed to such distributors, and the discount to be made to persons so purchasing to sell again; but such discount shall in no case exceed five per cent on the value of such stamps, and shall not be allowed on any quantity less than one hundred dollars worth.

7. The Governor in Council may make such further regulations as he may deem necessary for carrying this act into effect, and may by any order in Council declare that any kind or class of instruments as to which doubts may arise, are or are not chargeable with any and what duty under this Act according to the true meaning thereof; and any order in Council made under this Act shall be published, and may be proved, in the manner provided by the Act respecting the duties of customs and the collection thereof, as to orders in Council under that Act.

8. The stamp or stamps required to pay the duty hereby imposed shall in the case of any promissory note, draft or bill of exchange made or drawn within this province, be affixed by the maker or drawer thereof, and in the case of any draft or bill of exchange drawn out of this province by the acceptor thereof or the first indorser thereof in this province; and such maker or drawer, acceptor or first indorser, failing to affix such stamp or stamps at the time of making, drawing, accepting or indorsing such note, draft or bill, or affixing stamps of insufficient amount shall thereby incur the the penalty hereinafter imposed, and the duty payable on such instrument, or the duty by which the stamps affixed fall short of the proper amount, shall be doubled.

9. If any person within this Province makes, draws, accepts, indorses, signs, becomes a party to or pays any promissory note, draft, or bill of exchange, chargeable with duty under this Act, before such duty (or double duty as the case may be) has been paid by affixing hereto the proper stamp or stamps, such person shall thereby incur a penalty of one hundred dollars, and except only in case of the payment of double duty as hereinafter mentioned, such instrument shall be invalid and of no effect in law or in equity, and the acceptance, or payment, or protest thereof shall be of no effect, except that any subsequent party to such instrument or person paying the same, may at the time of his so paying or becoming a party thereto, pay such double duty by affixing to such in-

strument a stamp or stamps to the amount thereof, or the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his signature or part thereof, or his initials, on such stamp or stamps, in the manner and for the purposes mentioned in the second section of this Act; and such instrument shall thereby become valid, but no prior party who ought to have paid the duty thereon shall be released from the penalty by him incurred as aforesaid; and in suing for any such penalty, the fact that no part of the signature of the party charged with neglecting to affix the proper stamp or stamps is written over the stamp or stamps affixed to any instrument, shall be *prima facie* evidence that such party did not affix such stamp as required by this Act.

10. If any person wilfully affixes to any promissory note, draft, or bill of exchange, any stamp which has been previously affixed to any other, or used for the purpose of paying any duty under this Act or any other Act, or which has been in any way previously written upon or defaced, such person shall be guilty of a misdemeanor, and shall thereby incur a penalty of five hundred dollars.

11. The penalties hereinbefore imposed shall be incurred in respect of each such promissory note, draft or bill of exchange, on which the duty or double duty hereby imposed is not paid as aforesaid, or to which a stamp, previously used, has been fraudulently affixed, whatever be the number of such instruments, executed, accepted, paid or delivered, or offences committed on the same day; and a separate penalty to the full amount shall be incurred by each person committing such offence, whatever be the number of such persons.

12. The penalties imposed by the foregoing sections of this Act shall be recoverable in the manner prescribed by the Interpretation Act in cases where penalties are imposed and the recovery is not otherwise provided for.

13. If any person forges, counterfeits or imitates, or procures to be forged, counterfeited or imitated any stamp issued or authorised to be used for the purposes of this Act, or by means whereof any duty hereby imposed may be paid, or any part or portion of any such stamp, or knowingly uses, offers, sells or exposes to sale, any such forged, counterfeited or imitated stamp, or engraves, cuts, sinks, or makes any plate, die, or other thing whereby to forge, counterfeit or imitate such stamp, or any part or portion thereof, except by permission of the Minister of Finance, or of some officer or persons who, under an order in Council in that behalf, may lawfully grant such permission—or has possession of any such plate, die, or other thing, without such permission, or without such permission uses, or has possession of any such plate, die, or thing lawfully engraved, cut, or made, or tears off or removes from any instrument, on which a duty is payable under this Act, any stamp by which such duty has been wholly or in part paid—or removes from any such stamp any writing or mark indicating that it has been used for or towards the payment of any such duty—such person shall be guilty of felony and shall on conviction be liable to be imprisoned in the Provincial Penitentiary, for any term not exceeding twenty-one years; and every such offence shall be forgery within the meaning and purview of chapter ninety-four of the Consolidated Statutes of Canada, intituled: *An Act respecting Forgery*, and all the provisions of that Act, shall apply to every such offence, and to principals in the second degree and accessories, as if such offence were expressly mentioned in the said Act.

14. The duties imposed by this Act, shall be duties within the meaning and purview of chapter sixteen of the Consolidated Statutes of Canada, intituled: *An Act respecting the collection and management of the Revenue, the auditing of Public Accounts and the liability of Public Accountants*, and the proceeds of the said duties shall form part of the Consolidated Revenue Fund of this Province.

SELECTIONS.

RESTRAINT OF CORRUPTION AT ELECTIONS.*

This paper has a practical object and one idea. Can a moral enthusiasm be roused, and moral influences brought to bear widely and effectively, by combined efforts of individuals, against bribery and extravagant expenditure at elections which legislation is powerless to destroy? Can this Association organize or initiate such an action?

I couple extravagant expenditure with bribery, and need hardly explain that the greater part of the expenses of expensively contested elections are virtual corruption. The expensiveness of elections, independently of bribery, may be regarded as a social question deserving the attention of social reformers, inasmuch as it restricts the area of choice of representatives, helps wealth against intellect, thwarts political earnestness, and degrades constituencies. Mr. John Mill, in denouncing the expenses of elections as "one of the most conspicuous vices of the existing electoral system," forcibly points out the importance of the ruling idea under which elections are conducted and votes sought and given, and suggest the effect on an elector's mind, auxiliary to corruption, of the simple fact of a patent large expenditure by candidates to gain a seat in Parliament. "In a good representative system," says Mr. Mill, "there would be no election expenses to be borne by the candidate. Their effect is wholly pernicious. Politically, they constitute a property qualification of the worst kind. Morally, it is still worse; not only by the profligate and demoralising character of much of the expenditure, but by the corrupting effect of the notion inculcated on the voter, that the person he votes for should pay a large sum of money for permission to serve the public. They must be poor politicians who do not know the efficacy of such indirect moral influences. The incidental circumstances which surround a public act, and betoken the expectation entertained by society in regard to it, irrevocably determine the moral sentiment which adheres to the act in the mind of an average individual. So long as the candidate himself, and the customs of the world, seem to regard the function of a Member of Parliament less as a duty to be discharged than as a personal favour to be solicited, no effort will avail to implant in an ordinary voter the feeling that the election of a Member of Parliament is a matter of duty, and that he is not at liberty to bestow the vote on any other consideration than that of personal fitness. The necessary expenses of an election, those which concern all the candidates equally, should, it has often been urged, be defrayed either by the municipal body or by the State. With regard to the sources of expense which are personal to the individual candidate, committees, canvassing, even printing and public meetings, it is in every way better that these things should not be done at all, unless done by the gratuitous zeal, or paid for by the contributions of his supporters. Even now there are several Members of Parliament whose elections cost them nothing, the whole expense being defrayed by their constituents: of these members we may be completely assured that they are elected from public motives; that they are the men whom the voters really wish to see elected, in preference to all others, either on account of the principles they represent, or the services they are thought qualified to render."†

Perfection is unattainable in this world, and a perfect representative system is an impossibility. Human nature has everywhere engendered bribery and rioting in popular

* A Paper by W. D. Christie (late Minister at Brazil), read at a Meeting of the Jurisprudence Department of the National Association for the Promotion of Social Science, held on Monday, 22nd February, 1864.

† Thoughts on Parliamentary Reform "By John Stuart Mill," 1859.

elections for places of honour, and corruption in parliamentary government. But, though perfection is unattainable, improvement is best effected by keeping a perfect system in view as a goal, which may be neared, though it cannot be reached, and moral influences have already done much to purify English government. In the seventeenth century there was not only general corruption of constituencies and notorious bribery of Members of Parliament, but there were also venal ministers of State. It is long since there was even a suspicion that an English Minister of State could be bribed. The corruption of Members of Parliament by government bribes was rampant in the last century, and there are men living who may remember traces of it; but we may say that bribery of Members of Parliament has been for many years extinct. The corruption of constituencies remains to be cured. Words used by Andrew Marvel in 1678, to describe the evil which had then suddenly assumed large proportions, are still applicable to a large number of English constituencies. "It is not to be expressed, the debauchery and lewdness which upon occasion of elections to Parliament are now grown habitual through the nation. So that the vice and the expense are risen to such a prodigious height that few sober men can endure to stand to be chosen on such conditions."*

Bishop Burnet, in the general review of the moral and social condition of England, with which he winds up the History of his own time, covering four reigns and half a century, wrote thus in 1708 on bribery at elections:—"All laws that can be made will prove ineffectual to cure so great an evil till there comes to be a change and reformation of morals in the nation. We see former laws are evaded, and so will all the laws that can be made, till the candidates and electors both become men of another temper and other principles than appear now among them."†

Since the Reform Act, and more especially since the general election of 1841, Parliament has passed a number of acts against bribery at elections; and an able historian of our own time, having passed in review this series of acts, each rapidly proved inefficacious, makes some remarks which, after the lapse of a century and a half, are an unconscious reproduction of Bishop Burnet's observation. "To repress so grave an evil," says Mr. Erskine May, in his "Constitutional History," published in 1861, "more effectual measures will doubtless be devised, but they may still be expected to fail, until bribery shall be unmistakably condemned by public opinion. The law had treated duelling as murder, yet the penalty of death was unable to repress it; but when society discountenanced that time-honoured custom, it was suddenly abandoned. Voters may always be found to receive bribes if offered; but candidates belong to a class whom the influence of society may restrain from committing an offence condemned alike by the law and by public opinion."‡

I wish to suggest whether at this moment, when a general election cannot be far distant, but while there is yet time to act on public opinion, and while, before parties are engaged in passionate contention, the voice of reason may yet be heard, an Association might not be called into existence to rouse, concentrate, and guide the moral feeling of the nation, and to arrange and superintend an extensive system of concerted practical effort, for an object which all respectable men desire, and which laws will not accomplish.

The sudden turn of feeling, which within our memories suppressed the long-cherished and strongly rooted fashion of duelling, gives encouragement to hope for good effects of a well-aimed impulse to public feeling on corruption at elections, which is not favoured, as duelling was, by opinion, but which is connived at from habit, and sheltered by charitable indulgence, and practised with compunction of conscience under the influence of circumstances, passion, rivalry, and temptation. I believe that the formation of the Anti-duelling Association in 1844 had some share in bringing about the sudden great change of public opinion on duelling which occurred shortly after, and I feel sure that the formation of an Association against corruption at elections, comprising the leading men of all parties, and perhaps combining for a social reform dignitaries of the Church and of the Law with the most eminent in political life, would be itself a great stride towards success.

Such an Association might of course act on opinion by large public meetings and circulation of suitable pamphlets; but I look chiefly to the following mode of action, aided by the enthusiasm which the existence of the Association would engender.

Endeavours should be made to include as many Members of Parliament and candidates for seats, and leading members of constituencies, as possible, of all parties. Every one in becoming a member of the Association would thereby pledge himself to abstain from corrupt expenditure by himself or friends, and to do everything in his power to discourage and prevent it.

Local committees composed of leading men of all parties should be organised through the constituencies. Endeavours should be made everywhere to procure agreements between opposing candidates, and opposing leaders of parties in constituencies, to abstain from bribery and to limit expenditure. Such agreements could probably be made without much difficulty in most cases some time before an election. All candidates have a strong common interest in abstaining from bribery, and election expenditure is for the most part a matter of forced habit and involuntary rivalry. There can be no doubt that it is generally the wish of the respectable leading men in all constituencies to put down bribery and profligate expenditure at elections. They know and regret the bad effects on the classes which furnish the bribed, and must care something for the reputation of their own communities. But in this as in other matters, what is everybody's business is nobody's; no one initiates a reform; political opponents do not naturally come together to talk of joint action; there are those interested in keeping up the system; the election comes on, candidates spend largely because they cannot help themselves, following the habits of the place, and one doing what the other does, and bribery is practised at the last to win, or to meet bribery. In many boroughs compulsion is put upon candidates by inferior persons, having influence among the poorer electors which they use for their own profit, and encouraging large expenditure for the same object; where one such middle-man of corruption exists on one side, his fellow is generally to be found on the other; these men might generally be overcome by previous concert between candidates and leading electors.

It is to be expected that these agreements deliberately made between gentleman and gentleman, and comprising the leading supporters on each side, would in general be honourably and completely fulfilled.

Public meetings might, if necessary, be held in constituencies to promote the desired end; in some cases, perhaps, a body of electors of different politics might act together to require from the candidates and leaders on both sides abstinence from corrupt expenditure. I should look for much aid from the clergy both of the Church and of the dissenting bodies for this movement in constituencies.

In many cases, parties will remain in the same relative position in constituencies after such an agreement. Candidates will save their money, the cause of public morality will gain, and the result of the election be the same. In other cases where a candidate could only gain his end by bribery, he and

* Marvel's "Growth of Popery and Arbitrary Government in England." Works, vol. 1, p. 540.

† Burnet's "History of His Own Time," VI. 208, ed. Oxford, 1823.

‡ May's "Constitutional History of England," I., p. 336.

his party will make up their minds to lose by the agreement only what could not be securely won (for there always remains the danger of an election petition and its consequences,) and what one political party loses in this way in one constituency, the other will probably lose in another. The balance of parties will probably be little affected on the whole. In some of the many boroughs, where parties are nearly balanced, and a small corrupt phalanx turns the scale (and some of these are among the worst cases of corruption), there will probably be compromises, by which each party will obtain an uncontested seat. Here again the cause of public morality will gain, and the peace of the borough will be secured; and in these cases of nearly balanced parties a large minority, which a few accidents or more care in succeeding registrations might convert into a majority, has a fair claim to a share of the representation. Such compromises occurring in several constituencies would probably not disturb in the end the balance of parties. This may be considered a low mode of treating the subject, but it is well to endeavour to conciliate political partisanship.

All the money comes from candidates and wealthy supporters. If these can be got by agreement to abstain from spending money there will be no corruption.

A witness before the Committee of the House of Commons of 1860, on the Corrupt Practices Prevention Act, a gentleman of large experience in elections, Mr. Philip Rose, used a phrase in recommending suspension of writs for corrupt boroughs, which I would appropriate. Mr. Rose said, "I should treat a venal constituency as I would a drunken man, I would take away the stimulant in the hope that it would recover, and if Wakefield or Gloucester, for instance, were kept without their members for five or ten years, a new class of voters would arise in those boroughs, and corruption would be very much lessened." Now this is my plan, to take away "the stimulant." I propose to invite and incite candidates through the country to co-operate and combine to keep "the stimulant" in their own pockets. The suggested agreements and compromises will take away "the stimulant." Habits of corruption may then die away by disuse, and the appetite for bribes decay for want of the food which it has fed on.

Let us ascend from the leaders of constituencies to the leaders of parties. It is generally known that there is an organization for promotion of elections at head quarters in each party, and that, on the occasion of a general election, there have been always large subscriptions on the side of the Government and on the side of the Opposition. The Association might begin by addressing itself to the head of the Government and the leader of the Opposition, in order to obtain their co-operation in this movement, and assurances that they will urge those, with whom respectively a word from either would be a command, and who influence many others, to abstain from everything which can excite or facilitate corrupt expenditure, and to give every aid in promoting agreements and compromises, whose object is to prevent corruption.

Patronage provides other modes of influencing votes at elections, less gross and palpable than bribery, and "lends corruption lighter wings to fly." This brings us to the subjects of our administrative system and party-government, admitted, I believe, to be within the limits of social science, but whose bounds are divided by thin partitions from the questions of passionate politics, which here must be avoided. There are thoughtful men who regard the rivalries of party and the possession of large patronage by the Government for distribution among political supporters, as necessary to good parliamentary government. I cannot think this. I regard these things as defects and blots. One of the chief advantages, I conceive, of the system of examinations for appointments which has of late years made progress among us, is its tendency to purify representative government. The full advantage can only be derived from free competitive examinations. The small places given away in all the boroughs and counties by the great public departments, the Treasury and General Post Office for instance, through political supporters, might be given as prizes of local examinations; a suggestion of this sort was made in 1844, some years before the first introduction of examinations into our administrative system, by the present Lord Grey (then Lord Howick) in the House of Commons, on the occasion of a motion by Mr. William Ewart, on public education. Lord Grey urged the institution by Government of periodical examinations in districts, for the benefit of schools of the lower orders, and added:—"Government might bring candidates to their examinations by holding out more substantial rewards to a few of the children. This could be done at no expense whatever. They all knew how earnestly situations in the lower ranks of the public service were looked for among the classes likely to send their children to these schools, and if a few such situations as those of tide-waiters for example were made prizes for perseverance, attention, and ability, the hope of winning them would attract great numbers of persons to the examinations. By a small sacrifice of patronage this important object might be attained."* I remember that I myself recalled attention to this suggestion in the House of Commons, on the occasion of another motion of Mr. Ewart's in 1846, and then read an excellent passage in recommendation of it from a letter of Mr. Dawes, the present Dean of Hereford, then a clergyman in Hampshire, zealously promoting public education in his parish, which is printed in the Minutes of the Committee of Council on Education for 1845 † I believe this to have been one of the earliest, as it is one of the most practical, suggestions of a plan which combines the advantages of extension of education, improvement of local administration, and lessening of electoral corruption. This plan of giving local appointments to local examinations has never been adopted. The plans which have been generally adopted, of appointment subject to an examination, and of nominations for limited competition, fall short of producing all the desired good. The patronage system remains. Patronage is even increased by the system of nominations for limited competition, each nomination being a favour. Members must still go to the Treasury to ask favours for their constituents, like the Roman clients thronging the patron's doorstep for the well-filled basket.]

"Nunc sportula primo
Limine parva sedet, turbæ rapienda togatæ."

Constituencies can only be made thoroughly pure by removing all sources of corruption. So long as nominations can only be got by application to the Government, how can voters and Members help, or how can they be blamed for making applications? How can the Government be expected, while the system remains, to favour their opponents?

When, eighty years ago, Mr. Pitt had defied a large adverse parliamentary majority, and successfully appealed to a general election, and stood by the result on a supereminent pinnacle of personal ascendency, one of his most attached and most celebrated friends, Mr. Wilberforce, thought (as it is recorded in his life) that "he was then able, if he had duly estimated his position, to cast off the corrupt machinery of influence."‡ "Party on one side," said Mr. Wilberforce, "begets party on the other." The ungoverned fury of contending parties begets and perpetuates corruption.

The leader of a great party is in this matter in the same position and difficulty as a great many candidates for seats in Parliament, that he does not know all that is done by others. But this can hardly ever be altogether an innocent ignorance. Friends and supporters will not in the end do what the chief is really determined shall not be done. As it is, leaders and

* Hansard, July 19, 1844. † Hansard, July 21, 1846.

‡ "Life of William Wilberforce," vol. I., p. 64.

candidates are not told what goes on, and they do not inquire, contented, like Wordsworth's poet—

> "Contented if they may enjoy
> The things which others understand."

They resign themselves not without reluctance and misgiving to this contentment; and the action of public opinion is needed to save them from it and its consequences.

To return to the subject of agreements to abstain from corruption; where any candidate or his committee should refuse on being formally applied to for the purpose, to join in such an agreement, he will be an object of suspicion. Amid the hubbub of a general election, the suggested Association may be a central eye to watch everywhere, and a central head and hand to aid in exposure and punishment through existing laws.

I have not mentioned coercion and intimidation, but these also may be regarded as forms of corruption, and the proposed agreements should include all illegitimate influences, such as of customer over tradesman, landlord over tenant, &c.

In a paper read by Mr. Chadwick before the Law Amendment Society, in February, 1859, the collection of information on a large scale by a Commission as to existing constituencies in order to lay a basis for a measure of parliamentary reform was powerfully recommended. I have only to do here with so much of Mr. Chadwick's proposal as concerns corrupt proceedings. Men of all opinions on parliamentary reform will concur in an observation of Mr. Chadwick's that the Legislature cannot be in the best position for extending or lowering franchise until it has obtained full knowledge of the kinds of corruption prevailing in constituencies, and while so much corruption exists, and is even in some places increasing. A similar opinion was intimated before the Corrupt Practices Prevention Committee by a gentleman, whose profession, experience, and well-known political opinions, give peculiar value to his statement. I refer to Mr. Joseph Parkes, who said, "A certain class of boroughs are much influenced by attorneys on both sides, and also by the licensed victuallers and beerhouse keepers, which latter I consider the most growing evil of the day, *particularly if the franchise is to be lowered.*" The suggested Association may do the work of Mr. Chadwick's proposed Commission, as regards corrupt practices, by collecting information about bribery and corrupt expenditure. By printing and widely circulating facts as to corruption in constituencies, it will do further good—strengthen the feeling against the existing evils. The misdeeds of corrupt constituencies may thus be widely made known for shame, and in the same way the conduct of pure boroughs returning members in the public-spirited manner mentioned by Mr. Mill, may be held up in tracts widely circulated for general admiration and example.

In constituencies like the large metropolitan boroughs, where there is no purchasing of votes with coarse money bribes, it would well become leading men to combine to regulate and limit expenditure, the greater part of which leads to virtual corruption, and which has often notoriously become so large in amount as to deter candidates. In the evidence already referred to, taken by the Committee of the House of Commons of 1860 on the Corrupt Practices Prevention Act, there are many interesting and instructive particulars as to the corruption involved in general expenditure, showing what perhaps does not need to be shown, how voters who let carriages are secured by hiring their conveyances, printers by lavish printing, publicans by refreshments to supporters and hire of committee-rooms, and how an unnecessary number of voters and their relations are engaged as paid canvassers, messengers, &c., &c. These expenses which the fury of election rivalry carries beyond bounds might, by agreement between the leading men of a large borough solicitous for its political reputation, some of them be got rid of, and others reduced to the limits of necessity.

Mr. James Vaughan, who was the Chief Commissioner for the inquiry in 1859 at Gloucester, strongly recommended the prohibition of paid canvassers, and limitation of messengers. A great deal of this might be effected by agreement. It would be in the long run, the same for both parties. "In the evidence we received," Mr. Vaughan said, "we found 112 messengers employed on the one side, and 150 on the other, and it was stated that ten or twenty could do the work."

Mr. Vaughan also conducted an inquiry at Tynemouth, in 1852, and says, "There were 882 on the register, and 669 polled; the publicans who voted were 108, and in that case we found scarcely a single instance where there were not either refreshment orders, or dinners, or suppers provided by the publicans, and the publicans were wavering backwards and forwards as they received a good order from one party or the other."

Mr. Vaughan says of paying expenses of voters from a distance, "We found at Gloucester there were a great number of voters brought up upon either side, and the result was that the expenses to the candidate were largely augmented, with no practical result as regards the success of the candidate: there would be ten men brought up on the one side and ten on the other."

I should think that in large boroughs where public spirit prevails, there might often be no difficulty about the appointment of a Committee, having the confidence of the whole constituency, to regulate the mode of conducting elections, with a view to limitation of expenses and suppression of corruption; and he would be a rash candidate who would not thankfully abide by the rules.

The limitation of the number of attorneys employed to one for each candidate was strongly recommended by Mr. Pigott, the present Judge. Of the employment of attorneys, he said, "I am sure that it leads to undue influence. If you employ attorneys, they have influence over a great number of voters; in a borough particularly. Some are debtors, some have mortgages, some expect a lawyer's letter; in one way or another there are numerous modes in which an attorney has influence over voters." Mr. Vaughan said on the same subject, "We found that there were a large number of solicitors employed at Gloucester. Solicitors know a great deal about people in a town, and they are no doubt employed in consequence of the influence which they can bring to bear. I recollect that one voter mentioned he felt he must vote on a particular side, because the solicitor on that side had a mortgage on his cottage." Mr. Joseph Parkes, a distinguished member of the profession, and most experienced manager of elections, strongly protested against payment of attorneys as agents, and made the following statement. "I think that it is an evil to the public and an evil to themselves [to pay solicitors as agents] nearly all the professional men in towns and counties act gratuitously. I myself, after 1826, never took a fee in my life, and I never would. I know all the valuable agents in Warwick, in Coventry, and at Birmingham, and I know that at the town and county elections most of them, whether upon the Conservative side, or upon the Liberal side, are volunteers; they are the men who do the work, and it is the class of the young solicitors, and the class of generally inferior men, who do a great deal of mischief, and incur useless cost. I should wish to state only one reason why I should object to the employment of solicitors. It is notorious that every agent causes more people to vote in consequence of the fee given to him, and I think it is a gross anomaly, that, because he is a lawyer, he is to be receiving the candidate's money; you might just as well give a fee of fifty guineas or five guineas a day to a medical man, who would be equally influential. A general practitioner, from his influence among families, would bring up more people to vote than even the lawyer could. How absurd it would be that you should retain

a surgeon! Why should the legal profession alone be a paid class? I take it to be a custom fraught with evil."

There is no class of men whose co-operation would be so important as that of solicitors in a general movement for the diminution of election expenditure and the destruction of corruption. Other eminent solicitors versed in elections gave evidence before the Committee, Mr. Rose, Mr. Clabon, Mr. Drake, and others. The members of the profession throughout the constituencies, animated by the spirit and example of these witnesses, would be invaluable aids for the proposed Association.

I will only mention the notorious fact of a great increase of corruption in many boroughs by corrupt practices at the annual municipal elections. Mr. Philip Rose speaks of the municipal contests as the "nursery of the evil." He says, "These oft-recurring contests have led to the establishment of what I might almost term an organised system of corruption in the municipal boroughs throughout the kingdom, which provides a machinery ready made to hand, available when the parliamentary contest arrives. I am sure that if Members of Parliament on both sides of the House will inform the Committee accurately, it will be admitted that the great strain upon them by their constituents is not so much for the support of charities or public institutions, as it is for the support of the municipal contests in November, the argument invariably being, on the part of the local agents, that £10 spent at a municipal contest is better and more advantageous than £100 spent at the parliamentary contest." Other witnessess called attention to this subject. Boroughs rapidly get worse and worse under an annual administration of "the stimulant" at municipal elections; and a strong impulse from without for local organization against corruption becomes more and more necessary.

Mr. Erskine May's condensed account of the general results of the inquiries which have been prosecuted by Commissions since 1852, is a painfully striking statement:

"At Canterbury, 155 electors had been bribed at one election, and 79 at another; at Maldon, 76 electors had received bribes; at Barnstaple, 255; at Cambridge, 111; and at Kingston-upon-Hull, no less than 847. At the latter place, £26,606 had been spent in three elections. In 1858, a Commission reported that 183 freemen of Galway had received bribes. In 1860, there were strange disclosures affecting the ancient city of Gloucester. This place had been long familiar with corruption. In 1816, a single candidate had spent £27,500 at an election; in 1818, another candidate had spent £16,000; and now it appeared that at the last election in 1859, 250 electors had been bribed, and 81 persons had been guilty of corrupting them. Up to this time, the places which had been distinguished by such malpractices had returned members to Parliament prior to 1832; but in 1860, the perplexing discovery was made, that bribery had also extensively prevailed in the populous and thriving borough of Wakefield, the creation of the Reform Act; 86 electors had been bribed, and such was the zeal of the canvassers, that no less than 98 persons had been concerned in bribing them."*

And how many more boroughs may there be equally steeped in corruption which have escaped inquiry? Let the leaders in all such boroughs, if they care for the reputation of their towns, bethink themselves that detection may another time fall on them. The above statement, in a work which will live, casts discredit on English civilization. Should not every effort be made to diminish such an evil? Every Act of Parliament proves inoperative. May not the evil increase?

The Association might also make it one of its objects to consider, prepare, and urge measures for restraining bribery and expenditure, which require the interposition of the legislature; and among such measures which have been from time to time suggested, are a comprehensive declaration for members on taking their seats, so framed as to prevent evasion by a man of honour, and the plan of taking votes by voting-papers collected from the voters' houses, which has been often strongly pressed by Mr. Chadwick, and was recommended by Mr. Philip Rose in his evidence before the Corrupt Practices Prevention Committee, which was the subject of a bill proposed by Lord Shaftesbury in 1853, and was introduced into the Reform Bill proposed in 1859, by Lord Derby's Government.

But the great object is to rouse an enthusiasm against electoral corruption, and to cover the country with it, and to carry it into every constituency. We have this advantage to begin with, that the moral sense of the nation already unmistakably condemns bribery. There is no need to create a feeling; we have to intensify it, and to make it conquer. It is only among the inferior people who profit by corruption, and whom temptation and habit have degraded, that there is any insensibility or want of conscience on this subject. The classes from which candidates for seats in Parliament come, are entirely opposed to bribery. Suggestions have latterly often been made for the application of degrading punishment to candidates convicted of bribery, which could never have been put forward, if bribery were not condemned by opinion. Such punishments were recommended by several witnesses before the Corrupt Practices Prevention Committee, among others by the present Baron Pigott. This distinguished witness recommended that the punishment should be incapacity from holding any office of trust or public employment. Even stronger measures had been previously suggested by one whose name occupies the highest place of authority, and whose opinions must ever be most valued here. There is in print a letter written in 1856 by Lord Brougham to Mr. Hastings on the occasion of an anniversary meeting of the Law Amendment Society, from which I will make an extract. "With our distinguished colleague, Sir John Pakington," said Lord Brougham, "I have long been in co-operation upon this important subject, and I retain, as I believe he does, confidence in the beneficial tendency of a stringent declaration exacted from members on taking their seats. But I conceive that we should also go to the root of the evil as regards the agents of corruption. Why may we not deal with this as five and forty years ago I dealt with the execrable slave trade? For the gains of that infernal traffic we found that men would run the risk of heavy pecuniary penalties, but they shrunk from the risk of being transported as felons, and the traffic ceased. So the prize of a seat in Parliament will tempt some men to run the risk of being unseated on petition, and even of being exposed as having furnished the means of corruption to their agents; and the guilty profits will induce those agents to accept the employment with the comparatively trifling hazard that now attend it. But neither the candidate nor his supporters will encounter the danger of the treadmill or transportation; and we may see bribery, as we have seen slave-trading, cease to bring disgrace on the country." *

Let us hope that such strong measures may not be necessary. Let us make one great endeavour to attain the desired end by a large plan of co-operation for prevention by persuasion and agreement. I have thought that such an effort might well be made, at this moment, under the auspices of an Association, whose object is to utilize social science and promote all social reform, which numbers among its members leading men of all the parties that divide the State, and the name of whose President is already conspicuously associated with this question.

* See "Constitutional History of England," I., p. 364.

* "Law Amendment Journal," vol. 3, p. 115

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

RECENT LEGISLATION—A VALUABLE REFORM IN PROCEDURE.

A valuable bill of Mr. McConkey (the member for North Simcoe) was passed through the House at the very close of the session, having been read twice and finally passed the same day—it is now law. A friend has sent us a copy of the Act, the substance of which we subjoin. The preamble declares "That it is desirable to lessen the expense of proceedings in the Division Courts, and to provide, as far as may be, for the convenience of parties having suits in these Courts." Section 1 enacts "That any suit cognizable in a Division Court may be entered, tried and determined in the Court, the place of sittings whereof is the nearest to the residence of the defendant or defendants, and such suit may be entered and tried and determined irrespective of where the cause of action arose, and notwithstanding that the defendant or defendants may at such time reside in a county or division other than the county or division in which such Division Court is situated and such suit entered." Section 2 enacts that the summons in such case may "be served by a bailiff of the court out of which it issues, in the manner provided in the 57th section of the Act, and upon judgment recovered in any such suit" execution against goods and other process "to enforce the payment of the judgment, may be issued to the bailiff of the court, and be executed and enforced by him in the county in which the defendant resides, as well as in the county in which the judgment was recovered." Section 3 incorporates the Act with the Division Court Act, the foregoing provisions to be read as inserted immediately after section 71, and the power to make rules vested in the judge is extended to the provisions of the Act.

This brief and plain enactment is a most decided improvement in the law, and the objects indicated in the preamble—to lessen expense and convenience parties—we believe this new law is eminently calculated to secure. It is sound in principle, and we are only surprised that an alteration so desirable was not effected long since.

It is obvious enough that the court to which litigants and their witnesses may most conveniently go to trial is the court in which a suit in the Division Courts should be commenced. The venue clauses in the statute had this in view in providing that suits might be entered where the defendant resided, or where the cause of the action arose. Section 72 had this object also in view, but it could only be done on a judge's order founded on affidavit previous to action brought, and the proceeding was consequently dilatory and cumbrous. The Act under consideration enables a cause to be instituted (without any previous order) of right in the court most convenient to the defendant, irrespective of county lines. Every one acquainted with the country knows that it would be a physical impossibility to set off Upper Canada into divisions of a uniform size, with the place of holding the court in the centre of each; and so, all over the country, a man may reside in one division while the nearest court to him is in another division in the same or an adjoining county. Thus, a man may live within a mile of a court but out of his division, while the court for the division in which he lives is twenty or thirty miles distant—and the expense and inconvenience of suing him in his own division would be consequently great. This Act gives an appropriate and safe remedy. One effect will be to throw more work on some of the judges, but the public will be the gainers. This is a "law reform" of the right kind, and its benefits will be found decided and lasting.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

BIGGER v. HOWIE.

Dower—Offer to assign under C. S. U. C. ch. 28, sec. 7—Evidence.

The offer to assign dower required by Con Stats. U. C. ch. 28, sec. 7, to deprive the demandant of costs, is proved by a *bona fide* offer, shewing a concession of demandant's right, and a readiness to do what is requisite to render it; it is not necessary that the land should be staked out or assigned

The issue being upon such offer, it appeared that a demand having been made under the statute the tenant served a notice on demandant admitting her right, and appointing a day on which he would be upon the land to assign her dower. On that day no one appeared, but on the next day demandant's son and another person sent by her came, and the tenant pointed out to them a cleared field, which he said he would give, with one-third of the bush land. This was not accepted, nor did they tell the tenant what they required

Held, that the evidence was sufficient to go to the jury, and the court refused to disturb a verdict for the tenant.

Remarks upon the uncertainty of the present law as to dower.

[Q. B. E. T. 27 Vic.]

Dower, *unde nihil habet*, in lot No 155, in the township of Stamford, as widow of William Bigger, heretofore her husband, with averment of demand in writing of the dower before the commencement of this suit, according to the statute, and that the tenant hath not offered to assign it. Declaration entitled, October 17th, 1863.

Plea.—That the tenant did within one month after the service of the demand, and before the commencement of this suit, offer to assign to the demandant her dower in the said lands, and has always been ready and willing to render her dower to the demandant, and rendereth the same here in court.

Replication, traversing both allegations in the plea, concluding with a verification and prayer of judgment for the dower, and damages for the detention. Issue.

The trial took place at Welland, in March last, before *Hagarty*, J.

The defendant began. It was admitted that the demandant served her demand of dower on the 16th of May, 1863. On the 8th of June following, the tenant caused a notice in writing to be served on the demandant, admitting her right to the dower claimed, and stating her willingness to assign dower to her, and appointing Wednesday the 10th of June, 1863, at 1 o'clock p m., at which

day and time he would be on the lot to assign her dower, and for that purpose he requested her attendance

On the day named the tenant attended, with a neighbour, whom he had asked to come to set out the dower. No one appeared on the demandant's part. On the next day this neighbour was sent for again, and the demandant's son was there The tenant said he was ready to set off the portion the law allowed—to give what he thought the law would give: that he would give a field, pointing it out, and one-third of the bush land. The demandant's son said he had no authority to take it, but would go home and consult his mother; he made no objection. McCurry, who served the notice on demandant, was present. The demandant had a claim against him also for dower. McCurry asked her son if he had any written authority from the demandant, and learning there was none, said tenant ought to see his lawyer and meet next day, to which the tenant apparently assented.

A witness called by the demandant stated that he was asked to go and receive the dower for the demandant, and was present on the occasion above stated, that on the next day they (this witness and the son) went to the tenant's at the tenant's request, that he pointed out what land he would assign, but did not stake off or ou. to stake off any specific portion. He said there were about forty-five acres of woodland, and he would give one-third of that: that when demandant's husband sold the property there were only three or four acres cleared, and he would give three acres of that, which he said was more than the commissioners would give, and he asked them to accept that, which they refused to do. The witness said the tenant seemed to wish the demandant to have her dower, but not to have to pay costs. They did not tell the tenant what they wanted. The husband died seven or eight years before the trial, and there was about the same quantity of land cleared as at present.

The learned judge left the question in the words of the issue to the jury, to be decided by them according to their view of the evidence, and they gave a verdict for the tenant.

Robert A. Harrison obtained a rule calling on the tenant to shew cause why a new trial should not be granted, on the ground of misdirection, in this, that the learned judge refused to tell the jury, that in order to constitute a good offer to assign the dower the tenant should have staked out the land offered, or have done some act on the ground sufficient to entitle the demandant at once legally to take and retain possession of the land intended to be offered, and that the learned judge refused to tell the jury that there was no evidence of an offer by the tenant according to law to assign dower; or on the ground that the verdict is contrary to law and evidence, because it was not shewn that the tenant had staked out the land intended to be offered, nor done any act on the ground sufficient to enable the demandant to take and retain possession: that the offer proved was of one third of the wood land and only three or four acres of the cleared land, whereas there was about sixty acres of cleared land, in respect of which the demandant was entitled to dower; and because the offer was not made to the demandant. He cited *Quin* v. *McKibbin*, 12 U. C. Q. B 329; *Ryckman* v. *Ryckman*, 15 U. C. Q. B. 266, *Read* v. *Foster*, 19 U. C. Q. B. 298.

James Miller shewed cause, citing *Rishoprick* v. *Pearce*, 12 U. C. Q. B. 306.

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

As to the alleged misdirection we do not find in the notes of the learned judge that he was asked or refused to give the direction stated in the rule, though it does not appear that he told the jury that to constitute a good offer to assign, the land offered must be staked out, or some act be done on the ground sufficient to entitle the demandant to enter and retain possession. The same point, however, is taken on the objection that the verdict is against law and evidence.

As to the last ground for a new trial taken in the rule, we do not remember that it was mentioned on moving for the rule, and we are clearly of opinion it should not be entertained; first, because a notice in writing was personally served on the demandant, stating the tenant's willingness to assign dower to her, and, secondly, because she was represented when the proposal to assign certain portions of the land was made by a person who swore that he was sent to receive the dower.

The plea in this case is not confined to the averment that the tenant did within one month after the demand, and before the commencement of the suit, offer to assign the dower. It also contains the substantial averments of a plea of *tout temps prist*, which under the old law, if duly pleaded, excused the tenant from damages. (Co. Lit. 32*b*.) But such a plea cannot *primâ facie* at least be treated as tendering an immaterial issue. It is similar to that in *Cook* v. *Philips*, 23 U. C. Q. B. 69, in which we granted a new trial.

As an answer to the statement contained in the declaration of a demand made in order to give the demandant a right to costs under the statute, it follows the words of the section, (Consol. Stats. U. C., ch. 28. sec. 7,) which provides that "if it appears on the trial that the tenant offered to assign the dower demanded before action brought, the demandant shall not recover costs." There certainly was evidence to go to the jury of such an offer. We do not construe the words "offered to assign" to mean "made a complete assignment," which is the interpretation put on them when it is contended that the land must be staked out, or some other act be done so that the demandant may at once enter into possession. No doubt the offer must be *bonâ fide*—not illusory, but so made as to indicate, first, a concession of the demandant's right to dower, and, secondly, a readiness to do what is requisite to render it. The determination of metes and bounds, of the giving and accepting certain specific parcels of land or premises, must be a question of discussion and agreement on both sides. The tenant has no abstract right to insist that a particular parcel shall be accepted, nor the demandant that some other parcel shall be assigned. If the circumstances shew that the offer to assign was made in bad faith, without any real intention to assign dower, the jury would doubtless treat it as no offer to assign, but we cannot accept the proposition that an offer to assign is only proved by the making an actual assignment. A *bonâ fide* offer to assign is all that the statute requires to exempt the tenant from costs where the demandant has no legal right to recover damages. Where that right exists, the right to costs follows the recovery of damages, though the tenant did offer to assign, because we do not construe the statute (sec. 7) to take away any right to costs which before its passing the demandant had, but to confer a new right not existent before, though in hazarding that opinion we are free to confess that as the clause is framed there is an opening for a contrary conclusion.

The whole matter involved in this issue is the right to recover costs, and unless there was a most palpable miscarriage, we ought not to grant a new trial to determine such a question. We think there was evidence to go to the jury, and that the question being for them, we should not disturb their finding, in order to give the demandant the chance of burdening the tenant with costs, besides obtaining her dower, which this verdict does not affect.

We all feel the law is not in a satisfactory state, and the frequent litigation on the subject shews the difficulty that is found in its administration. We content ourselves, however, with expressing an earnest hope that the legislature, in mercy to suitors, will so alter or explain it as to make their rights and liabilities more readily ascertainable.

In our opinion this rule should be discharged.

Rule discharged.

PERRY v. THE CORPORATION OF OTTAWA.

Municipal Corporation—Liability of for work, without corporate seal or by-law.

A committee of the corporation was appointed in June, 1860, with power, among other things, to treat with and recommend to the council an engineer to make the requisite surveys, &c. for supplying the city with water, and making application to the government for a site for the reservoir. The chairman of this committee employed the plaintiff to make plans, which the commissioner of public works required to see, and one of the aldermen being in Quebec wrote to the plaintiff to come down, and assist in pressing their application for a site, which he did, the chairman having also told him to go. The report of their proceedings there was adopted by the council.

Held, that the plaintiff was entitled to recover for his work, and the journey to Quebec, though there was no contract under seal, and no by-law relating to the matters out of which his claim arose.

Draper, C. J., and Morrison, J., *held* that the case was governed by *Pim* v. *The Municipal Council of Ontario*, but for which they would have thought a by-law indispensable under the municipal act.

Hagarty, J., thought the plaintiff entitled, without reference to that decision as employed by a duly appointed committee, whose proceedings had been reported and adopted by resolution.

[2 B E. T. 27 Vic.]

Declaration for work and labor as civil engineer in drawing plans, maps and sections, and the appraisement and valuation of

certain works, and for journeys and attendances, for goods sold and delivered, and on the common money counts.

Plea—Never indebted.

The trial took place at Ottawa, in October, 1862, before Hagarty, J.

It was proved that in January, 1861, the council of the corporation appointed a committee of five of their members, on streets and improvements in the city; and on the 5th of February, 1861, a petition was presented to the council, complaining that alderman Perkins held possession of certain property belonging to the corporation, and praying that steps might be taken to test his title, which petition was referred to the committee on streets and improvements, with instructions to take such action as they might deem advisable, and report to the council.

In the previous year a committee of the council of the corporation had reported to the council, making certain recommendations, among others, that the same or some other committee should be appointed, with power, among other things, to treat with and recommend to the council an engineer to make the requisite survey, plan and estimates of the intended expenditure for supplying the city with water, for applying to government to grant a site for a reservoir and water power, and generally to superintend the matter. The report was adopted, and a committee appointed in June, 1860.

On the 31st of August, 1861, alderman Skead, being in Quebec, wrote to urge the plaintiff to come to that city, to assist in pressing for the site for the proposed reservoir, &c. Alderman Goodwin was a witness at the trial, and stated that he was a member of the waterworks committee, and acted as chairman: that they (the committee) employed the plaintiff to make plans, to be laid before the commissioner of public works, of the hill and of the reservoir proposed to be constructed on it. The commissioner had required these plans. The witness told the plaintiff to go to Quebec. The plaintiff had previously drawn a plan of the city of Ottawa for the defendants, for which he got £500. Mr. Bouchon, the chairman of the street committee in 1861, proved that by authority of that committee he employed the plaintiff to make a copy of a certain plan which was in the registry office, which he did, and which had not been paid for. The plaintiff also proved a report prepared by him for the water-works committee, which they submitted to the council of the corporation, with their own report; and he called two civil engineers to prove the value of his services.

For the defence, it was objected that no contract under the seal of the corporation was proved, and that they were not therefore bound to pay the plaintiff. It was agreed that the value of the plaintiff's services should be left to the jury, and a verdict for the amount so found should be entered, and that the defendants should have leave to move to enter a verdict or nonsuit, and that the court should be at liberty to draw inferences of facts, as a jury might do. The verdict was entered for $282.

In Michaelmas Term, 26 Vic., *S. Richards, Q.C.*, obtained a rule to shew cause why a nonsuit should not be entered pursuant to leave reserved, on the ground that the contract alleged by the plaintiff was not shewn to have been made by defendants under their corporate seal, that no contract binding on the defendants was shewn, nor any liability on them for the plaintiff's claim.

During Hilary Term last *McBride* shewed cause.

Draper, C. J.—I feel precluded from entering into any discussion on this question, by the strong decision in *Pim* v. *The Municipal Council of Ontario*, 9 U. C. C. P. 304, decided by the Court of Appeal. Looking at the Municipal Corporations Act, sec. 294, sub-sec. 5; sec 298, sub-secs. 4, 5 and 9, and sec. 299, I should have thought a by-law indispensable, as the foundation for the proceedings on which the plaintiff's claim is founded; but that case has decided that the building committee of the council of the corporation might authorise the taking out of the hands of a contractor, who held a contract under the corporate seal, the building partially completed, and might further authorise the employment of a party to finish the building, without any specific authority being shewn from the corporation to take this step, and without any sealed or written contract, or any agreement for a certain price. The act of the building committee in taking the building out of the hands of the contractor, and entrusting its completion to others, to be employed by the architect, was approved and adopted by the council, but so far as the report shews not by by law

I cannot, on comparing the facts of that case as reported with those before us, find any satisfactory ground to distinguish between the two, and, therefore, am of opinion that this rule must be discharged.

Hagarty, J.—I do not understand that the decision in *Pim* v. *The Municipal Council of Ontario* necessarily decides this case.

I think the plaintiff here entitled to recover for his plans and reports, on the ground that he was employed to make them by a duly appointed committee of the council, which committee reported what had been done by them, and by the plaintiff, under their orders, to the council; and the latter body, by resolution, adopted and approved the action of the committee.

I feel some difficulty as to the plaintiff's claim for expenses to Quebec, to which he proceeded on the summons of Mr. Skead, chairman of the committee, to attend the commissioner of crown lands respecting the water-works.

Unless I can satisfy myself that the evidence points to a direct recognition of this alleged service by the defendants as a council, I see grave reasons against allowing it. I deem it all important to prevent claims being advanced against municipal bodies for services rendered at the request or order of any one or more members individually. The journey to Quebec was in September. The committee's report was adopted in October, and therein the interviews of the chairman and engineer with the commissioner of crown lands are stated as on the 17th of September, in such a manner that the council must have known that they took place in Quebec and not in Ottawa.

I think the verdict may be allowed to stand. No objection as to the want of a by-law was specially urged at the trial.

Morrison, J., concurred with the Chief Justice.

Rule discharged.

Kelly and the Corporation of the City of Toronto.

By-law—Markets—Sale of butcher's meat—C. S. U. C., ch. 54, sec. 294, sub-secs. 7, 10.

A by law enacting "that no butcher or other person shall cut up or expose for sale any fresh meat in any part of the city, except in the shops or stalls in the public markets, or at such places as the standing committee on public markets may appoint;" *Held*, good, as being clearly within the powers given to the corporation.

The corporation not having appeared to the rule to quash such by-law, it was discharged without costs.

[Q. B. E. T. 27 Vic.]

Robert A. Harrison, during last term, obtained a rule *nisi* to quash so much of the section 19 of by-law number 313 of the Corporation "Respecting the public markets and weigh-houses," as follows: "No butcher or other person shall cut up or expose for sale any fresh meat in any part of the city, except in the shops or stalls in the public markets, or at such places as the standing committee on public markets may appoint," as being in restraint of trade, having a tendency to create a monopoly, and in excess of the powers conferred by law upon city corporations.

No cause was shewn, and in this term *Harrison* moved absolute and supported the rule, citing *Baker and The Municipal Council of Paris*, 10 U. C. Q. B. 621; *Barclay and The Municipal Council of Darlington*, 11 U. C. Q. B. 470, 12 U. C. Q. B. 86; *Greystock and The Municipality of Otonabee*, Ib. 458; *Shaw* v. *Pope*, 2 B. & Ad. 468; *Lockwood* v. *Wood*, 6 Q. B. 38: *Wiltshire* v. *Willett*, 11 C. B. N. S. 240; *Caswell* v. *Cook*, Ib. 637; *McKenzie* v. *Campbell*, 1 U. C. Q. B. 241; Com. Dig. Trade D. 4.

Draper, C. J.—The affidavit of the complainant or relator sets forth a differently expressed grievance from that stated in the rule, namely, that butchers and others not being farmers are prohibited from selling fresh meat *in any part of the public market*, except in the shops and stalls in the market: that all the stalls and shops for selling meat are rented and occupied, so that it it not possible to procure one; and that under this by-law many persons have been hindered from following their trade as butchers, although there is abundant space therefor in said public market outside the shops and stalls.

The object and expectation, therefore, in getting this portion of the by-law quashed is to enable those desirous of so doing to expose meat for sale in some portion or portions of the public market other than the shops and stalls appointed for that purpose

The 21st section of the by-law contemplates the opening butchers' shops not within the market, but not less than six hundred yards distant from it.*

The power of regulating markets is expressly given by sub-section 7 of section 294 of the Municipal Institutions Act. Regulation must of necessity include the appropriation of one or more parts of the market for one purpose, and other part or parts for other purposes, of providing for free passage through the market being kept open for ready access to shops, stalls or other places where different commodities are exposed for sale. Sub-sec 10 confers authority for regulating the place and manner of selling and weighing butchers' meat.

We think that the section of the by-law moved against is clearly within the powers given to the corporation, and unless in conforming to the letter they have gone beyond the spirit of the act, and have passed a by-law manifestly unreasonable and calculated to produce injury to the community, we should not interfere, and then our interference would be under the statute, but in the exercise of our common law jurisdiction.

We are not prepared to say there is anything unreasonable in requiring that fresh meat shall only be sold in the market in the shops and stalls provided for that purpose, nor is it at all established that the accomodation proved is not reasonably sufficient or proportioned to the wants of the general community. There is no duty on the Corporation to find a stall for every man who wants to set up as a butcher, and that trade is not restricted to the market alone, as it may be carried on in houses, &c., not within six hundred yards of any of the public markets.

The corporation, it is true, have offered no resistance to this rule, but it is incumbent on us not to exercise the statutory authority to quash by-laws without sufficient cause. We do not think this is a case calling for its exercise, and think the rule should be discharged. We do not see that the Corporation, not appearing, can claim any costs.

Rule discharged, without costs.

COMMON PLEAS.

(*Reported by* E C JONES ESQ., *Barrister-at-law, Reporter to the Court*)

VANDELINDER v. VANDELINDER.

Ejectment—Deed poll—Mortgage—Legal estate passed.

Held, that a deed poll to secure a sum of money in which the words passing the estate were "mortgage all that certain parcel of land, &c., to have and to hold the aforesaid land unto the said J. R, his heirs, executors, administrators and assigns," was sufficient to pass the right of possession to the grantee.

[C. P. H. T. 27 Vic]

Ejectment to recover possession of the front 40 acres of the east half of lot no No. 14, in the 3rd concession of the township of Mountain, in the county of Dundas. The plaintiff's notice of title stated that he claimed the same by virtue of a conveyance by way of assignment of mortgage to him from John Rennick, who claimed the same under an indenture of mortgage from one Joseph Pére.

The defendant appeared and defended for the whole land claimed, and besides denying the plaintiff's title, he set up title in himself by deed from Joseph Pére to him. the defendant.

The cause was tried at the last Cornwall assizes, before J. Wilson, J., when a verdict was rendered for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit in case the court should be of opinion the plaintiff was not entitled to recover upon the construction of his deeds produced Accordingly, in last Michaelmas Term, *Kerr* moved for and obtained a rule *nisi*, to which *S Richards*, Q. C., during this Term, shewed cause, and contended that the mortgage of the 18th of April, 1860, from Joseph Pére to John Rennick, was a deed poll by which for better securing the latter in the sum of $601 31, payable in certain instalments with interest at 12 per cent, the former did thereby "mortgage all that certain piece of land, &c., to have and to hold, &c, unto the said John Rennick, his heirs, executors, administrators and assigns." The instrument then proceeded—"the condition of the above mortgage is, that if payment is made by Joseph Pére then this mortgage shall be void, and hereby giving and granting unto the said John Rennick, his heirs, executors, administrators and assigns, full power and authority to sell the aforesaid lands and premises, or a sufficient portion of the same to satisfy the aforesaid payments, &c, and in case the property so mortgaged is not redeemed, the said John Rennick, or his legal representatives, may sell the said lands and premises, and grant to the purchaser or purchasers a good and sufficient deed or deeds of conveyance in law of the said premises in fee simple." And the question was, whether that instrument conveyed any title or estate in the land to John Rennick, and whether the word "mortgage" in the following words, "I do hereby *mortgage* all that land" is a good operative word of transfer? He cited *Nicholson* v. *Dillabough*, 21 U. C. Q B. 591; *Watt* v. *Feader*, 12 U. C. C. P. 254; 4 Cruise's Dig. ch. 4 sec 36; also ch. 19, secs. 38, 39, [the American edition of 1834]; *Goodtitle* v. *Bailey*, Cowper, 597. At any rate the assignment executed by Rennick to the plaintiff was a good execution of the power of sale under this document, which clearly conferred a power.

Kerr, in support of the rule, referred to Doe dem. *Ross* v. *Papst*, 8 U. C. Q B. 574; 4 Cruise's Dig ch. 21, secs. 67, 73, 75, 76; also ch. 9, secs 4, 19, 22, 23, 26; Wood's Conveyancing. 212; Touch. 76, 221, 517; Watkins on Conveyancing, 355, note; Doe dem *Meyers* v. *March*, 9 U. C. Q. B. 242; *Bartels* v. *Benson*, 21 U. C. Q. B. 143.

ADAM WILSON, J.—The case in our own court of *Ross* v. *Papst*, 8 U C. Q B. 574, is in some respects very similar to the present one. There the lessor of the plaintiff conveyed the land in fee to the defendant, and the defendant for securing the payment of a certain sum therein mentioned, agreed as follows, that is to say, and for securing the said sum the defendant "doth hereby specially bind, oblige, mortgage and hypothecate the said land above described and hereby granted." And the Chief Justice said "it cannot be held that any estate passed to the plaintiff by these words—they shew an intention to create a charge or lien, but they pass no interest. *Hypothecate* is a term proper to the civil law, and contemplates possession of the thing pledged remaining with the debtor. We cannot hold that under these words an estate was reserved to the plaintiff or passed to him by grant from the defendant. Unless we could hold that if A. should execute a deed by which he declared that he thereby *mortgaged* certain lands to B. for a certain time, without other words of limitation, B. could set up the deed as creating an estate in him, which entitled him to disposses A." The decision then is that *hypothecate* passed no estate, and that *mortgage* did not either *without other words of limitation*—are there then, in the case in hand, these *other words of limitation?*

Joseph Pére did thereby *mortgage* to Rennick, "to have and to hold the same unto Rennick, his heirs, executors, administrators and assigns." The other words of the instrument are rather words of a power being granted than of any interest being passed by them. It speaks however "of the property so mortgaged" There can be very little doubt that the parties intended to execute an instrument which would pass the fee simple of the land by way of mortgage, and this purpose should be given effect to if it can be done consistently with the rules of law. We have here certainly "the other words of limitation," which the Chief Justice thought might create and pass an estate in the land expressed to be *mortgaged*, and although no other operative word was used to create or to pass such an estate than the word *mortgage;* we conceive this to be an authoritative expression of opinion in favour of the validity of this instrument, even if it be not a direct decision of the point. It is an established rule that a deed shall never be laid aside as void, if by any construction it can be made good. Hob. 277; Doe dem. *Wilkinson* v. *Tranmer*, 2 Wils. 78 As where one granted land in fee to his kinsman, but a person who was not the tenant made the attornment, and so the land could not pass that way; it was adjudged that as the deed was made to a relative it might operate as a covenant to stand seised. *Sanders* v *Savile*. 8 Lev. 372. So a deed made by way of bargain and sale to a daughter, which failed as such for want of a money consideration,

* This section is as follows —"No butcher's shop, or any shop or place to cut up or expose for sale any fresh meat in the city, shall be granted to be opened, kept or used, which is not in a proper public market, or which is less than six hundred yards from any proper public market building hereafter to be established"

was held to operate as a covenant to stand seised *Crossing* v. *Scudamore*, 1 Vent. 137. So a feoffment to a relation, which was not accompanied with livery, was held to operate as a covenant to stand seised. *Tomlinson* v *Deighton*. 1 P. Wms. 163; 2 Wm. Saund. 9b, (a) note (1). The words "limit and appoint" may operate as words of grant, so as to pass a reversion. *Shove* v. *Pincke*, 5 T R. 124 The proper words of a grant [it is said in 4 Cruise's Dig. Title XXXII. "Deed," ch. 4, sec. 37,] are *dedi et concessi*, but any other words that shewed the intention of the parties will have the same effect. Thus where A. entered into an article with B. by which he granted and agreed that in consideration of a certain rent, B. *should have* a way for himself and his heirs over certain lands of A.; this was held to be a good grant of a right of way, not merely a covenant for enjoyment; Citing *Holms* v *Seller*, 3 Lev. 305. See also *Sorrel* v. *Grove*, Vin. Abr. "Grant's" H. 7 pl. 8.

If the words *shall have*, and *limit and appoint*, are good words of of grant, I think it will be found there is quite sufficient in the deed in this case to pass the land according to the plain intent of the parties, which we should try to give effect to. "Mortgage" is a term well known to the law, it is described in *Termes de la Ley*,—"when a man makes a feoffment to another on condition that if the feoffor pay the feoffee at a certain day a sum of money, then the feoffor may re-enter, and in this case feoffee is called tenant in mortgage." And when the owner says, "I mortgage my land to have and to hold the same to A. B., his heirs and assigns, as security, &c." The intent is plain not only that the land shall be mortgaged or charged with the debt, but that A. B. is *to have and to hold* the land itself in fee in security for the payment of the debt. A declaration that the party mortgages his land would pass nothing, it would be a declaration quite ineffectual for any purpose at law, but when he says in additon to this, "and you A. B. [the creditor] are to have and to hold the land in fee in security," there is something more than a mere declaration to create a charge, there is a direct charging of the land by the creation of an estate upon which the charge can take effect, and which the party himself afterwards describes in this document, as the "property so mortgaged."

It is true the tendency of maintaining such loosely drawn documents may be to encourage ill-drawn and carelessly worded instruments; but this we cannot help. We should do infinitely more harm by trying to establish a stereotyped form of conveyance, and by compelling every such document to be conformable to this standard at the peril of its being vacated if it varied from it in any respect. The law must be adapted to common exigencies, for it has been well said by *C. B Pollock*, in *Renshaw* v. *Bean*, 18 Q. B. 112, the law is a practical and not a pure science.

We think the defendant's rule should be discharged, and the postea be delivered to the plaintiff.

Per cur.—Rule discharged.

DEWAR ET AL. DEFENDANTS, APPELLANTS, v. CARRIQUE, PLAINTIFF, RESPONDENT.

Judgment—Costs—Revision of—Execution—Want of reasonable and probable cause for enforcing same—Demurrer.

The declaration stated, that defendant, S., recovered a judgment in the Queen's Bench against the now plaintiff, for one shilling damages, and that the taxing master of the court improperly allowed the costs of the now defendant, S., at £39 3s. 1d., for which judgment was entered. Proceedings were afterwards taken, and the costs were revised and allowed at £11 3s. 9d., and that for the latter amount, S. was entitled to execution Yet the defendants wrongfully and maliciously, and without reasonable and probable cause, caused a *fi. fa.* to be enforced by the sheriff for £39 3s. 1d.

Demurrer, because the declaration did not allege that the judgment was altered, &c., or that the amount was levied on an execution improperly sued out &c

Held, that the declaration as framed was sufficient, and that plaintiff was entitled to recover thereon.

[C. P., H. T., 27 Vic.]

This was an appeal from the County Court of the County of Halton, for a judgment on demurrer to the declaration, given in favor of the plaintiff below.

The declaration stated that Spiers, for whom his present co-plaintiff Dewar was acting as his attorney in an action in the Queen's Bench, in which Spiers was plaintiff and Carrique defendant, recovered in the action one shilling damages, and that the taxing officer erroneously and improperly allowed Spiers the sum of £39 3s. 1d. costs, for which judgment was entered, and that such proceedings were afterwards had, that the costs were reviewed, and the master moderated and allowed to Spiers costs at the sum of £11 3s. 9d. only, and certified that this sum was the full amount of judgment in this cause, and that for that amount only Spiers was entitled to execution, of all of which the defendants had notice.

Yet they wrongfully and maliciously, and without reasonable or probable cause, caused a *fi. fa.* [which they had before then sued out] to be acted on by the sheriff for £39 3s. 1d, although they well knew that £11 3s. 9d. was all they were entitled to by virtue of the judgment; whereupon the sheriff seized and sold under the execution the goods of the plaintiff of more value than the amount that Spiers was entitled to under the judgment, and the plaintiff also lost, &c.

Spiers and Dewar pleaded seperately.

Spiers also demurred to the declaration; the substance of the demurrer being that the declaration did not allege the judgment was altered, or set aside, or varied, or that the amount was levied on execution improperly sued out, or without a judgment to support it.

Dewar stated the same exceptions, and added: that the master could not by his certificate alter the effect of the judgment; and, that he, this defendant, could not be held liable for enforcing a judgment remaining of record unaltered and unsatisfisd.

Dewar also pleaded, Firstly, that no proceedings were ever taken in the Queen's Bench whereby the judgment was altered or reduced in amount; and, thirdly, that the costs were reviewed by the master, and £2 15s. 7d. only deducted upon such review, and the *fi. fa.* was not enforced for the £2 15s. 7d., and no proceedings for reviewing the execution or reducing the costs were ever lawfully had or taken except as aforesaid.

Spiers pleaded a second plea as follows: that the seizure and levy of the goods of the plaintiff was under a *fi. fa.* issued on a judgment which was, at the time of the seizure, levy and sale, in full force against the plaintiff.

The plaintiff demurred to Dewar's first and third pleas, and also to Spiers' second plea; for that his complaint is not for any irregularity in the judgment or execution, but for wilfully, &c. causing it to be enforced for too large an amount.

The Judge of the court below held, that the declaration stated a good cause of action; that the case of *Reid* v *Ball*, 15 U C Q. B 568 was the same in principle as the present; he also referred to *Churchill* v. *Siggers*, 3 E & B 929; *Locke* v. *Wilson*, 6 U. C. Q B. 600; *Auckland* v. *Adams*, 7 Ib. 139, as in favor of the plaintiff

The case was argued during last Term *C. S Patterson* for the appellants, referred to *Brown* v. *Jones*, 15 M & W. 191; *Prentice* v. *Harrison*, 4 Q B. 852; *Rankin* v. *De Medina*, 1 C B 183; *Codrington* v. *Lloyd*, 8 A & El 448; Bullen and Leake's Prec. 653.

McMichael, contra, referred to *Saxon* v. *Castle*, 6 A. & El. 652; *Leyland* v. *Tancred*, 16 Q. B. 664; *Porter* v. *Weston*, 5 B. N. C. 715; *Hewood* v. *Collinge*, 9 A. & El. 269; *Barber* v. *Danell*, 12 U. C P. C. 68.

ADAM WILSON, J.—Upon the authorities it is well settled that an action will not lie against a party or his attorney for enforcing a judgment by execution against the debtor's person or goods for the full amount of the judgment, although it has been reduced by payments made since judgment entered, and although the person or goods of the debtor has or have been taken in execution for such larger sum; because the party's remedy is only to the equitable powers of the court to obtain relief, "*prima facie*, the plaintiff has a right to take out execution upon an unsatisfied judgment for the amount recovered."

The complaint in such a case is only "that the party has levied for too much," which is not actionable.

But when in addition to this levy for too much, it is alleged that the larger claim has been made "maliciously, and without reasonable or probable cause," *these* facts constitute *the cause of action*, and the excessive claim is only a circumstance to be taken into consideration in the action

The cases of *De Medina* v *Grove*, 10 Q B 152, 172; *Churchill* v. *Siggers*, 3 El. & Bl 937; *Gilding* v *Eyre*, 10 C. B N. S. 592; and *Barber* v. *Danell*. 12 U. C. C. P. 68, fully establish this.

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The question then here is, whether it appears the plaintiff was claiming for too much, and seized for too large a sum; the declaration containing the proper averments of malice and want of probable cause?

The judgment was entered for £39 3s. 1d. costs. These costs were reviewed, and on such review the master allowed them £11 3s. 9d., and certified that this was the full amount of the judgment, and that for that amount only Spiers was entitled to execution; but the judgment itself was not altered, and continued to stand, and still appears to stand at the original sum, notwithstanding such reduction upon review.

If, therefore, this declaration were founded only upon the seizure for too much, omiting all allegations of malice, &c. no action could have lain against these defendants; but as malice, &c., are alleged, does it or does it not sufficiently appear that they have levied for too much, although the judgment has not been reduced or corrected?

In the case of *payments* reducing the amount of the judgment no reduction appears either by the roll or by the execution, why then should a different rule prevail as to these costs so taxed off?

We know as a fact that the master is the proper officer of the court to settle what the quantum of costs shall be; and this he has done, although the roll has not been corrected. No doubt, upon these facts relief would be afforded by the court, in the exercise of its equitable powers, but upon what ground? Upon the ground that the judgment creditor was entitled to no more than the amount allowed by the master. Now, in such a case, if the defendants, knowing that they are not entitled to more than the reduced sum, proceed "maliciously, and without reasonable or probable cause," to enforce payment of the larger sum, why should they not be liable for this *malicious* proceeding, although they are not responsible for the merely excessive demand and seizure?

The case of *Saxon* v. *Castle*, cited in the argument, was also a case where the costs included in the judgment were reduced on a review, and there the judgment roll does not appear to have been altered, yet an action was held to be maintainable in that case.

I think, therefore, that the reduction of the costs included in the judgment by a re-taxation, does prevent the creditor from claiming more than the reduced amount, although the judgment has not been corrected to correspond with the last taxation, and does subject the creditor and his attorney to an action, for enforcing such larger sum, by seizure of the debtor's goods under an execution, when it is alleged that such proceedings are conducted "maliciously, and without any reasonable or probable cause" This view is also supported by *Johnson* v. *Harris*, 15 C. B. 357, where judgment technically was *recovered* for £500, but to secure the sum of £16, and the court held that the £16, being the sum upon payment of which the defendant would be entitled to be discharged, must be considered to be the sum recovered.

The plaintiff has apparently dropped the *shilling damages*, in his computations, but I am not disposed to notice this, for by intendment the sums may perhaps be read as correctly stated.

I therefore think the declaration states a sufficient cause of action. For the reasons already stated, I think Dewar's first plea, and Spiers' second plea, bad; as to Dewar's third plea, I do not see why this should not be a good defence.

He says no proceeding were ever had or taken for reviewing the costs, than the one which he speaks of in his plea, when £21 5s. 7d. only was deducted from the costs included in the judgment.

This surely is a traverse of the alleged review in the declaration stated to have taken place, and appears to be fully warranted by the case of *Saxon* v. *Castle*.

I think, then, the judgment of the learned judge of the court below should be affirmed, excepting as to his judgment upon the demurrer to Dewar's third plea, and as to that, his judgment should be reversed, and judgment be directed to be entered thereon for the defendant Dewar.

JOHN WILSON, J.—The plaintiff, in his declaration, in substance, alleges that the defendant, Spiers, recovered a judgment in the Court of Queen's Bench for one shilling damages, and £39 3s 1d. costs, and thereupon issued a *fi fa* against the goods of Carrique, and so far the conduct of the defendants is not questioned, but he says that afterwards, and before this *fi. fa.* was put in force, on a revision of taxation, the costs were reduced to £11 3s. 9d.; yet that after this revision, and notice of it, the defendants wrongfully and maliciously, and without reasonable or probable cause, enforced the *fi fa* for the greater instead of the less sum whereby his goods were sold and he was damnified.

Had there been no express decision on the point, we should have had no doubt of the plaintiff's right to recover for the injury of which he complains. True, there was an existing judgment and writ of *fi fa*, but the right to enforce this judgment to the extent, they did, had ceased, nevertheless they did wrongfully enforce it.

In the case of *Churchill* v. *Siggers*, 3 El. & B., 929, it seems in the argument to have been conceded that if the case had been the enforcing of a *fi fa.* against goods, instead of a *ca sa* against the person as in that case, there would have been no doubt as to the plaintiff's right to maintain his action. There it was argued, be it for a large sum or a small one, the plaintiff was liable to arrest, and the amount made no difference, but it would have been otherwise with a *fi fa* against goods, for if the execution was endorsed to levy a large sum, the sheriff would take goods sufficient to satisfy it, whereas, if the sum had been small he would but seize enough to satisfy it The court held, that the action would lie for maliciously endorsing the warrant to arrest for an amount more than was due, for it made a great difference to a man in procuring his release, whether he was arrested for a large or small sum. The cases in *Locke* v. *Wilson*, 6 U. C. Q B. 600; *Auckland* v. *Adams*, 7 Ib. 139; and *Reid* v. *Ball*, 15 Ib. 568, affirm the same principle On the authority of these cases, as well as on our opinion of the plaintiff's right to maintain his action on the grounds he states, I am of opinion the declaration is good in substance, and I concur in the judgment of my brother Wilson.

Per cur.—Judgment in the court below affirmed except as to Dewar's third plea, upon which the appeal is allowed.

DUFFIL v. DICKENSON.

Appeal—Bond—Judgment.

Held, that the right to appeal from a decision of a judge of the County Court must be exercised before the entry of judgment in the cause. A bond having been allowed, and the appeal books set down for argument, after judgment entered, the case was struck out upon motion to that effect. [C P., H. T., 27 Vic]

R. A. Harrison, in last Trinity Term, obtained a rule calling upon the appellant to show cause why the appeal in this cause should not be dismissed by this court with costs, or be struck out of the paper with costs:

1 Because final judgment was regularly entered, and execution regularly issued in this cause in the County Court, before the appeal bond was allowed or any proceedings had by the appellant with a view to the appeal of this cause; which judgment and execution are still in force.

2. Because no grounds of appeal have ever been filed, served, or stated, in said appeal books, and no grounds are disclosed in the affidavits or papers filed.

The affidavit on which the rule was moved, stated: That judgment was entered on the 7th of May last, and an execution issued thereon the same day; that the appeal bond was filed on the 23rd of the same month, and that the appeal was set down on Saturday, the 30th of the same month, to be heard on the first Saturday of Trinity Term thereafter.

M. C. Cameron, Q. C, shewed cause this term.

R. A Harrison supported the rule.

The following authorities were cited: *Murphy* v. *The N. R. Co.* 13 U C. C. P. 32; *Simpson* v. *G. W. R. Co.* 17 U. C. Q. B. 57; *Smith* v. *Foster*, 11 U. C. C. P. 161; the Cons. Stat. of U. C. ch. 15, ss 67,68; the Rule in 22 U. C Q B 166.

ADAM WILSON, J.—The decision in 13 U C. C.P. 32, is that in the case of a judgment entered on the 30th of January, and an appeal bond put in on the 2nd of February, the judge of the County Court could not be compelled to certify the proceedings by way of appeal to this court, under the statute, as "the right of appeal should be exercised before the entry of the judgment." This is a decision expressly in point, and here the delay has been much longer. The appeal must therefore be dismissed with costs.

Per cur.—Appeal dismissed.

PRACTICE COURT.

(Reported by ROBERT A. HARRISON, *Esq., Barrister-at-Law)*

ROBSON v. ARBUTHNOTT.

Service by mail—Computation of time.

Where it was agreed between the attorney of the parties to a cause (the one resident in Whitby and the other in Collingwood), that papers should be served by mail, it was *held*, that the time of the service of notice of trial commenced to count from the time it was mailed by plaintiff's attorney, and not from the time of its receipt by the defendant's attorney

Semble.—Where such a mode of service is agreed upon, the paper mailed, in the event of loss or miscarriage, is entirely at the risk of the attorney to whom sent.

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

Sampson, for the defendant, during last Easter term, obtained a rule *nisi*, calling on the plaintiff to show cause why the verdict for the plaintiff should not be set aside on the ground of irregularity, the plaintiff having proceeded to trial on a notice served too late for the assizes.

The notice of trial was served, as the defendant says, on the 17th March, for the assizes to be holden on the 23rd of the same month, accompanied with a letter from the plaintiff's attorney, dated 15th March.

There was no argument on the question of merits, the rule not calling upon plaintiff to answer some statements made in the defendant's affidavit on that subject.

O'Brien showed cause. He filed the affidavit of Mr. Billings, the plaintiff's attorney. Mr. Billings stated that on the 19th September, 1863, he wrote to the defendant's attorney, sending him particulars of the plaintiff's claim, and concluding as follows: "I will file any papers for you and send declaration by post if you like." And that a few days afterwards he received an answer from the defendant's attorney, desiring the plaintiff's attorney to send declaration by post. Mr. Billings further stated, that from letters received by him from the defendant's attorney, he always understood he (defendant's attorney) would accept service of papers by mail in this cause, and upon such understanding he (plaintiff's attorney) acted; and that he served the notice of trial by mailing it on the 15th, in consequence of the understanding he had with the defendant's attorney. *Mr. O'Brien* cited *Warren* v. *Thompson*, 2 Dowl. N. S. 224

Sampson supported the rule, and referred to *Allen* v. *Boice*, 10 U C L. J 70; *Francis* v. *Breach*, 9 U C. L. J. 266; *Cuthbert* v. *Street*, 6 U. C. L J. 20; *Bremer* v *Bacon*, Rob. & Har Dig 327; *Consumers' Gas Co.* v. *Kissock*, 5 U C Q. B 542; *Grand River Navigation Co* v. *Wilkes*, Har. & O'Br. Dig. 554; *Lyman* v. *Snarr*, 9 U C. C P 64.

ADAM WILSON, J.—I have examined the different cases referred to, but none of them are directly to the point The facts here are not disputed; there is no doubt that the defendant's attorney did desire service of papers in this cause to be made by mail. But the question is, whether the time should be reckoned from the time of their being mailed by the plaintiff's attorney, or from the time of their being received by the defendant's attorney—whether the time of the transit is to be deducted from the plaintiff or defendant, and at whose risk the transmission is to be.

When an attorney has desired papers to be left for him at a particular place, service at that place is sufficient, and of course counts from the time when left at that place.

In this case, if any paper, after having been mailed, had been lost, or had never reached its destination, I incline to think that it would have to be at the risk of the defendant's attorney; that the plaintiff's attorney would have done all that he had engaged to do; and that, notwithstanding its loss or miscarriage, it would be a good service on the defendant's attorney.

If not then, when would it be a good service? How could the plaintiff's attorney know whether the defendant's attorney received the paper, or whether he ever received it? By taking the time of the deposit in the post office as the time from which to reckon the service as having been made, he knows the time precisely; and by the defendant accepting this *mode* of service, he has, I think, accepted as a part of it the *time* of its deposit as the time of its service.

Notice of dishonor of a bill or note is duly given by sending a letter by post at and from the time the letter is posted.

So where parties carry on a contract by communication through the post, the contract is completed upon the posting of the letter of acceptance, although the letter never reach its destination. (See *Duncan* v. *Topham*, 8 C. B. 225, and the cases there cited.

The defendant's attorney was not obliged to accept of this manner of service; but having agreed to it, the mode and the time of the service must go together, and be at his risk, as the plaintiff's attorney could have done no more than he did do under such an agreement.

The defendant has sworn to merits, and probably his attorney was *misled as to the effect of the arrangement he had made with* the plaintiff's attorney for service of papers. I shall therefore discharge the rule as to irregularity with costs, and give leave to the defendant to move for a new trial on the merits next term, unless the plaintiff consents to the defendant getting a new trial on payment of costs at once.

Rule discharged accordingly.

COMMON LAW CHAMBERS.

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

REYNOLDS v. STREETER.

Setting aside fi. fa. lands—Spent writ—Feigned issue.

A *fi fa* lands had been renewed on 25th August, 1862, and nothing done under it till the last day of its currency, 24th August, 1863. On this day a list of defendant's lands was given by plaintiff's attorney to the sheriff, and the latter on same day sent the usual advertisement thereof to the *Canada Gazette* and a local paper. On September 2nd following it appeared in local paper and in the *Gazette* on a subsequent day. *Held*, that the writ was spent, and that the lands could not be legally sold under it. There being the utmost difficulty in deciding whether the judgment had been paid or not, the learned judge decided that the parties should proceed to the trial of a feigned issue on that ground.

(Chambers, Feb., 1864.)

Foster obtained a summons calling on plaintiff to shew cause why the *fi. fa.* lands in the hands of the sheriff of the county of Hastings, and all proceedings thereunder, should not be set aside, and further proceedings in the judgment stayed on the grounds that no action had been taken on the writ until after it had expired, and that the judgment was paid before the issuing of the writ.

Many affidavits were filed on each side, bearing chiefly on the question of payment or non-payment of the judgment, and the decision of the learned judge turned chiefly on the question whether or not the writ had expired. The facts on that point were undisputed. The writ was renewed on 25th August, 1862. Nothing had been done under it till the last day of its currency, 24th August, 1863. On that day a list of defendant's lands was given by plaintiff's attorney to the sheriff. The latter on same day sent the usual advertisement to a local newspaper and the *Canada Gazette*. On 2nd September, 1863, it appeared in the local newspaper, and not until a subsequent day in the *Canada Gazette*.

M. B. Jackson showed cause, citing Doe *Tiffany* v. *Miller*, 6 U.C. Q. B, 426; Doe *Tiffany* v. *Miller*, 10 U. C. Q B. 65.

Lewis Wallbridge, Q C., supported the summons.

HAGARTY, J.—The first question is, whether the lands can legally be sold on this *fi fa.*, or whether it is a spent writ.

Unless bound by some decisions to the contrary, I should have no hesitation whatever in deciding that in my judgment it is clearly a spent writ. I cannot understand upon what principle it can be held that the act of a sheriff in drawing up an advertisement on the last day of the currency of the writ, and sending it for publication on a day necessarily long after that day, can be such an inception of execution as to give force and vitality to all subsequent proceedings.

The C. L. P. act, sec 268, enacts "that the advertisement in the official Gazette of any lands for sale under a writ of execution during the currency of the writ, (giving some reasonably definite description of the land in such advertisement,) shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the land after the writ has become returnable;" and the next clause provides for the case of the sheriff going out of office during the currency of the writ before the sale, and directs the new sheriff to execute, sell

and convey, but allowing the outgoing sheriff to execute any conveyance of land sold by him while in office.

I certainly understand that these sections were intended to reduce to reasonable certainty the very unpleasantly vague state in which the law previously stood. Section 268 gives an intelligible definition of what shall be a legal inception of an execution against lands. It is pressed upon me by counsel that the act leaves the law as enunciated in Doe *Miller* v. *Tiffany* untouched. In the absence of any express decision to that effect, I am unwilling to believe that the section in question is so apparently useless.

But even without the intervention of the C. L. P. act, I do not think that enough was done in this case to bring it within the decision of Doe *Tiffany* v. *Miller*, and I do not understand that case as going the length required by the present plaintiff.

Sir J. B. Robinson says (Ib. 6 U C. Q B. 437): "We have here the sheriff going with a writ (as may be fairly presumed); which commanded him to sell Miller's lands, entering on lands which he saw him in possession of, and which he knew he owned, and which it was therefore, as we may suppose, in his mind to seize and sell as being subject to the writ. When we consider that he went to Miller for that purpose, which in the nature of things he must have declared, and took from him a list of his lands, both in the town and out of it, omitting only those which he saw him actually seized and possessed of, and which he knew the extent of, &c., I think we should, in support of the execution which the law favours, and in protection of the purchaser, look upon him as declaring to defendant, 'I come under the authority of these writs, which I hold, to seize your lands, both those on which I see you living, and of which I have knowledge, and any others which you may possess in this district of which I have no knowledge, which lands I shall proceed in due course to sell under these writs.' That is, I think, the plain construction and effect of Mr. Jarvis's conduct according to his evidence, and it is as formal an act of seizure as we have any reason to suppose takes place in all or any of such cases."

Macaulay, J.: "Upon the best consideration, I think that if a sheriff, before leaving office and before the return day, takes proceedings under a *fi. fa.* lands, which constitutes an overt act towards execution, and equivalent to seizure of goods sufficient as between the creditors and debtors, as by entry, with the declared purpose of seizing, taking possession of the title deeds, or adopting some other symbol, as laying hold of the knocker of the door, the limb of a tree, &c, acts usual in giving livery of seizin in feoffments, which I consider would be a laying on of the executions that he may proceed to advertise and sell afterwards, though out of office, and after the return day. * * If he entered, not meditating any proceeding against those lands, but merely inquiring of the defendant what land he had, and took a note of these as returned by him, it would not be a seizure; but if he entered knowing the lands to be the defendant's, and with intent thereby to commence the execution; if he entered on these lands as defendant's, and also so entered in order to inquire of other lands, it would be evidence of a seizure. * * I think the evidence warranted the inference that the ex-sheriff did by actual entry seize and levy on these lands with defendant's knowledge while in office, and long before the return day, and that such incipient proceeding was duly kept alive until the sale."

Draper, J., dissented from these judgments. "I understand these two very learned judges to have arrived at their conclusion on the special facts of the case, and that the acts of Mr. Sheriff Jarvis were evidence of a seizure of the lands and a laying on of the executions."

Their language, quoted above, seems clear as to that view. I am far from thinking that they would have held it sufficient for the sheriff to have sat down in his office the day before the writ expired, copy out a list of lands he heard defendant owned, and send it to the *Gazette* and another paper to be advertised long after the writ was spent. I have wholly misconceived their expressed views if they support plaintiff's contention.

In another ejectment between same parties, in 10 U. C. Q. B., the same point is again noticed. The court adheres to its former view. Mr. Justice Burns, who had in the interval joined the court, gave a judgment agreeing with that formerly delivered. Some of his expressions are quoted by plaintiff as in his favour, *e. g.*: "I do not see that the sheriff could well have done anything more towards a beginning of the execution, short of making an actual and formal entry upon the lands, and that I think he was not bound to do. It seems that he followed up his first act by publishing an advertisement of the sale before the expiration of the writ, though of course that was done after he ceased to hold office. If he had remained in office, I think the publication of the advertisement would, without any other act done by him, have been an inception of the writ, and it appears to me there may be other modes of beginning an execution against lands besides the publication of the advertisement, and otherwise than by an actual and formal entry upon the land."

I repeat that, in my judgment, even before the C. L. P. act, there was no legal inception or laying on of this writ against lands during its currency sufficient to support any subsequent advertising or sale thereunder.

I further think that the C. L. P. act clearly defines what shall be an inception, and that in either view the plaintiff fails, and that the summons must be made absolute to set aside the writ, or rather, I suppose, all proceedings thereunder.

I feel the utmost difficulty in deciding (if necessary so to do,) whether the plaintiff's judgment has been paid or not. Having given it the best consideration in my power, I think it a case in which the opinion of a jury should be taken if possible. and following the course adopted in cases where a judgment is attacked as fraudulent, I should direct that the parties should proceed to the trial of a feigned issue; that defendant, Streeter, should be plaintiff, and the now plaintiff, Reynolds, the defendant.

That the question to be tried shall be, whether the judgment recovered was paid or not before the issuing of the *fi fa.* against lands, and that the trial take place at the next fall assizes for the county of ———. All question as to costs reserved.

If I had the power I should direct that plaintiff and defendant be admissable as witnesses.

Order accordingly.

Grimshawe v. White et al.

Writ of summons in ejectment—Issued in blank—How taken advantage of—Precipe—Second action stayed while former pending—Practice.

The practice of issuing writs of summons in blank by officers of the court is not to be sanctioned or approved.

Where a ground of objection to a writ of summons is that it was issued in blank, the facts connected with its issue must be clearly laid before the court, for nothing will be intended in favor of such an objection.

The fact that a writ of summons in ejectment in some respects varies from the precipe on which it issued is no ground for setting aside the writ, for the precipe is no step or proceeding in the cause.

Where an action of ejectment was brought by plaintiff against three defendants, whereon a verdict was rendered for plaintiff, and plaintiff afterwards, without discontinuing his action, commenced a second action of ejectment against two of the defendants for the recovery of the same premises, an order was made that unless plaintiff elected to discontinue one or other of the two suits, and gave the costs of the suit discontinued, the proceedings in the second action should be stayed.

(Chambers, March 18, 1864.)

Defendants obtained a summons calling on plaintiff to shew cause why the writ of summons herein and the services and copies thereof upon the said defendants should not be set aside with costs for irregularity in the following particulars;—

1. That the said writ was not duly issued by the deputy clerk of the crown and pleas for the United Counties of Northumberland and Durham, by whom it purports to have been issued.

2. That no precipe on sufficient precipe for the said writ was filed with the said deputy clerk before the same was issued.

3. That the said writ was altered without authority (after the same was issued,) by the plaintiff or his attorney.

4. That no sufficient venue is stated in the margin of the said writ, the venue being laid in the United Counties of Northumberland and Durham, instead of the proper county of the said united counties.

Or why all proceedings in the action should not be stayed on the ground that at the time of the commencement thereof another action for the same cause was and still is pending against the defendants at the suit of the plaintiff.

Or why all proceedings herein should not be stayed on the ground that the costs of a former action for the recovery of the

same lands and premises brought by the plaintiff against the defendants have not been paid.

The affidavits on which the summons was issued shewed that some officer in the office of the deputy clerk of the crown told the defendant's attorney that he, the officer, issued the writ in this cause without filling it up himself, and had given a blank writ to a clerk from the office of the plaintiff's attorney upon a precipe in the following form:

IN THE QUEEN'S BENCH.

Thomas Grimshawe v. Josiah Chas. White and Catherine White, of the Town of Cobourg, in the County of Northumberland, defendants.

Required a writ of summons in ejectment in the above cause.

JAMES COCKBURN,
Plaintiff's Attorney.

Dated 27th Feb'y, 1864.

It was also shown that an action of ejectment was brought in October, 1862, by the above-named plaintiff against defendants and one Zaccheus White to recover possession of the same land as described in the writ of summons in this cause, plaintiff in that action claiming title in like manner as in this action; that in that action a verdict for plaintiff was obtained at the last fall assizes for the United Counties of Northumberland and Durham; that a rule *nisi* for setting aside the same was granted, which rule was still pending at the time of the commencement of this action.

Osler for plaintiff. *Moss* for defendant. Cole on Eject. 80; *Cotton* v. *McCulley*, 7 U. C. L. J. 272, were cited.

DRAPER, C. J.—In what I am about to say, I do not wish to be understood as giving sanction or approval to any of the officers of the court letting writs of summons go out of their hands in an incomplete form.

The first objection, that the writ was not "duly issued," might be a very solid objection if maintained. It depends for validity on what follows. First, that the writ varies from the præcipe. This, if true, is not I think any ground for setting the writ aside. The præcipe is no step or proceeding in the cause. Second, that the writ was altered after it was issued. This means that some officer in the office of the deputy clerk of the crown told the defendant's attorney that he had not filled up the original himself, but had given to the clerk of the plaintiff's attorney a blank writ upon the præcipe. Until addressed to some one, and until the land to recover possession whereof it was desired to bring ejectment was inserted, it was in truth no writ. By whom or where it was filled up is not shown. For all that appears, it was done in the office of the deputy clerk of the crown, and under his supervision. I shall not intend anything in support of this objection.

The remaining objections were given up.

As to irregularity, therefore, the objection fails.

As to staying proceedings because there is another action pending.

There were three defendants in the former action; there are only two of them made defendants in this action. But the notice of title by which the plaintiff claims appears to be the same in both. That another suit is pending for the same cause of action is ground for a plea of abatement in other actions, but in ejectment there are no pleadings, and in that shape the defendants cannot raise the question. The plaintiff offers no denial to the facts asserted in the affidavits on which this summons was granted, and I think I must take it to be admitted, therefore, that this action is brought to recover the same premises and on the same title as a former action brought and still pending against these two defendants and a third person. Whether he appeared to defend the former action is not shewn. I do not see why it was deemed necessary to bring a second action, and on this assumption of facts it seems a vexatious proceeding.

I have not met with any case since the new ejectment which decides the question raised, but by analogy to the proceedings in the old action I think the plaintiff should not be allowed to proceed in this cause until he pays the costs of the former action, if he determine to abandon it.

If he determine to proceed with it, then the proceedings in this case should be stayed, as it is unnecessary and vexatious. It is in the power of the plaintiff to discontinue either action, and it appears to me he should be compelled to take this course in one cause or the other.

I think, therefore, an order should go that unless the plaintiff elects to discontinue one or other of the two suits, and to pay the costs of the action so discontinued, the proceedings in the present action should be stayed.

Order accordingly.

TURLEY v WILLIAMSON ET AL.

Ejectment—Notice of title—Application to amend.

Leave was given to plaintiff in ejectment to amend his notice of title by setting up a double claim, notwithstanding delay on his part in making the application. If such an application were refused, plaintiff would only have to discontinue, pay costs and bring a new action; and the application ought not to be refused merely to cause delay and increase costs

(Chambers, March 25, 1864.)

This was an action of ejectment. Plaintiff obtained a summons calling on defendants to show cause why plaintiff should not have leave to amend his notice of title by claiming title by length of possession in addition to the claim set up.

The summons was granted upon an affidavit made by the attorney for plaintiff, in which he stated that the plaintiff gave notice with the writ that he claimed title by deed from Jas Williamson, deceased, the former husband of the said Mary Williamson, the defendant; that judgment by default was signed against the said Mary, which judgment was afterwards, on application of the defendant, Johnson, set aside by order of the Honorable Mr. Justice John Wilson, and the said Johnson let in to defend as landlord of the said Mary, and he had appeared and given notice of claim as heir at law of one James Johnson; that as deponent was advised and believed plaintiff had a good title to the land in question by length of possession as against the said Johnson, and that it was important and necessary for the plaintiff that he should be permitted to claim title in addition to the claim aforesaid, by length of possession; that deponent was aware from personal acquaintance with the proceedings in two actions brought by the said Johnson and one William Johnson, now deceased, for the same lot of land now in question, in one of which actions one Abraham Maybee defended for one half of the lot, and in the other whereof one Sylvester McKenna defended for the other half, which is the same part of the lot for which this action is brought; Maybee established his title by possession against the Johnsons, and McKenna proved also upwards of twenty years possession, but failed because he was then unable to prove that Johnson knew of the possession; and the Johnsons therefore in the said last mentioned action obtained judgment in the year 1852, but never executed any writ of possession thereupon until the year 1863, the possession having in the meantime continued in McKenna and those in priority of title with him; that plaintiff in this action claimed under the same chain of title as McKenna and Maybee, and was entitled to the same right by possession as they were entitled to; that the the venue in this action is in the United Counties of Northumberland and Durham, and notice of trial had not been given.

Defendant Johnson, in answer, filed an affidavit in which he stated, that the land was granted by the Crown to one James Johnson; that he deponent was the eldest son and heir at law of James Johnson; that in the year 1852 deponent brought an action of ejectment in the Court of Queen's Bench for the land against Sylvester McKenna, then being in possession of the said land; that the action was tried at the Fall Assizes in Cobourg in the year 1852, and a verdict was rendered in his favour; that a motion was made for a new trial in the cause, which was refused by the Court of Queen's Bench;* that by the verdict and judgment of the Court deponent's right to the land was fully established; that one Adam Henry Meyers was his attorney in the said suit, and from his ceasing to practice his profession shortly after the trial of the said cause deponent was unable to get possession of the land until the first day of June, 1863, when having employed another attorney to get him possession of the said land the Sheriff of the United Counties of Northumberland and Durham put deponent in possession of the land under an alias writ of *Habere facias possessionem* issued in the said cause; that Mary Williamson was in possession of the said land when the said Sheriff so put deponent in possession; that she having

* 10 U. C. Q. B. 529.

attorned he left her on the said land; that the plaintiff was present at the time possession of the said land was so given to deponent and was aware thereof; that afterwards an application was made on behalf of the plaintiff in this suit to set aside the said writ of possession, and to order restitution of the said land, which application was refused; * that thereupon this action was commenced against the said Mary Williamson, whom the plaintiff, at the time he commenced this action, well knew was in possession of the said land as deponent's tenant, and the said Mary Williamson having, as I believe, purposely and at the suggestion of the plaintiff or of some one on his behalf, neglected to inform deponent of the service of the writ of summons in this cause judgment was obtained herein, which was afterwards on his application set aside and he let in to defend as landlord; that he accordingly entered an appearance in this suit on the 22nd day of December in 1863, that the plaintiff in this suit was well aware of his bringing the suit against McKenna, and of deponents recovering judgment therein for the said land and took the deed from James Williamson, mentioned in his notice of title in this suit with full knowledge of the said suit and of deponents recovery therein; that Sylvester McKenna against whom he recovered the judgment was worthless, and deponent was obliged to pay his own costs of the said suit, it not being possible to recover the same from McKenna; that this suit was brought oppressively and vexatiously against him by the plaintiff, he being well aware before he acquired his alleged interest in the said land that the said land had been determined to belong to deponent in my said suit against McKenna.

C S Patterson for plaintiff.

S. Richards, Q.C. for defendants.

The following cases were cited during the argument:—*Johnson* v. *McKenna*, 9 U. C. L J. 293; *Coltman et al* v. *Brown*, 16 U. C. Q. B. 133: *McCallum* v. *Boswell*, 15 U C. Q B 343, *Hill* v. *McKinnon*, 16 U. C. Q B. 216; *Canada Company* v. *Weir*, 7 U C. C P 341; *Kenny* v *Shaughnessey*, 3 U C L. J. 29; *Morgan* v. *Cook*, 18 U. C Q B 599; *Johnson* v. *McKenna*, 10 U. C Q B. 520.

DRAPER, C. J.—If I refused this application, and the plaintiff could not in consequence go on with the action, he would be obliged to discontinue, and then on payment of costs he might bring a new action I think I ought not to refuse the application merely to cause delay and increase costs. The only substantial objection to the application is the delay in making it, and the probability that the time may be too short to enable defendants to prepare for their defence. But the whole burthen of the affirmative is on the plaintiff. If the defendants find it necessary to apply to put off the trial on the grounds above suggested, and succeed in the application, they may well urge the plaintiff's delay as an answer to defendants being made to pay the costs of the day. Let the order go.

Order accordingly.

WARD, Judgment Creditor; VANCE, Judgment Debtor; THOMPSON, Garnishee.

Attaching order—Order to pay—Suggestion of death of Garnishee—Execution.

There is no power in the court or judge to order or permit a suggestion to be entered of the death of a garnishee so as to legalize execution against his executors or administrators.

(Chambers, March 27, 1864.)

The judgment creditor obtained a summons calling upon Thomas Brunskill and Andrew Stoddart, the executors of the last will and testament of David Thompson, deceased, the garnishee in this cause, to shew cause why George Ward should not be at liberty to enter a suggestion on the order made in this cause on the twenty-fourth day of June, A D. 1863, for the garnishee to pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as would satisfy the judgment debt, to the effect that it manifestly appears to the court that the said George Ward is entitled to have execution thereupon, or why the said George Ward should not have execution against the said Thomas Brunskill and Andrew Stoddart, as such executors, in any other manner that the presiding judge should think fit.

* 9 U.C. L.J., 293.

The affidavit on which the summons was granted showed that on 2nd August, 1862, the judgment creditor recovered a judgment against the judgment debtor for the sum of $1,007; that the judgment was still unsatisfied; that the judgment creditor attached a debt due from the garnishee, David Thompson, and on 26th June, 1863, obtained an order directing the garnishee forthwith to pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as would satisfy the judgment debt; that the garnishee did not pay the amount directed to be paid, or any part thereof, and before execution issued died; that Thomas Brunskill and Andrew Stoddart were executors of the deceased garnishee.

Robert A. Harrison shewed cause, contending that no suggestion could be entered where there is no roll upon which to enter it; that an attaching order is not a judgment, and even if a judgment, there is no roll; that there can be no suggestion entered on a judgment order. He referred to Eng. Stat. 1 & 2 Vic. cap. 110 s 18, and *Farmer* v. *Mottram*, 1 D. & L. 781.

Tilt supported the summons. He argued that for all purposes the order to pay must be deemed a judgment. Con. Stat U. C. cap. 24 s. 15. He also referred to *Swan* v. *Cleland*, 13 U. C. Q. B., 335; *Moor* v. *Roberts*, 3 C. B. N. S., 830.

DRAPER, C. J.—I am satisfied that I have no authority to order or permit a suggestion to be entered of the death of a garnishee so as to legalize execution against his executors or administrators. Very extensive powers to enter suggestions are given by law, but I find none applicable to such a case as this. I must discharge the summons.

Summons discharged.

MASON v. MORGAN.

Certiorari—Declaration for a different cause of action—Setting aside.

Held, 1. That although a plaintiff may, after removal of his plaint from a division court, declare in the superior court in a different form of action he cannot declare for a different cause of action

Held, 2. That if a plaintiff in such case vary his cause of action in his declaration the declaration may be set aside as irregular with costs.

Held, 3. That where plaintiff sued in the division court for injuries done to a filly by a bull, alleged to belong to defendant, and afterwards declared in the superior court for entry by defendant on land of plaintiff with the bull, and tearing up the earth and soil, &c., the cause of action was va. id.

(Chambers, March 29, 1864).

During the month of October last plaintiff had a filly, which was gored, as he supposed, by a bull belonging to the defendant, the defendant and the plaintiff, at the time, being adjoining farmers in the township of Scarborough.

On or about the 27th January last plaintiff caused defendant to be summoned before a magistrate to answer a charge "for that he the defendant did on or about the 20th October, 1863, in the township of Scarborough, wilfully, negligently and maliciously commit damage to the personal property of the plaintiff."

Defendant appeared before the magistrate, and objected that the magistrate had no jurisdiction, to which view the magistrate accceded, and so dismissed the complaint.

Plaintiff then, on 8th February last, caused defendant to be sued in the twelfth division court of the United Counties of York and Peel, for the same alleged wrong, claiming "the sum of $99 for damages sustained."

On 17th of same month of February, defendant obtained and issued a writ of *certiorari*, directed to the judge of the division court for the removal of the plaint.

The *certiorari* was duly returned into the court of Queen's Bench, and so the plaint was removed from the twelfth division court of York and Peel.

Plaintiff thereupon declared in trespass—"For that the said defendant broke and entered a certain close of the plaintiff called and known as lot thirty-one, in the third concession of the township of Scarborough, in the county of York, one of the united counties aforesaid, and then and there with a certain bull of the defendant's tore up, damaged, and spoiled the earth and soil of the said close; and also then and there with the said bull cut, gored, wounded and killed divers, to wit, two horses of the plaintiff's, then and there found and being quietly depasturing in the

plaintiff's said close, and other wrongs to the plaintiff did, to the plaintiff's damage of three hundred dollars. and, therefore, he brings this suit, &c.

Robert A. Harrison, for defendant, obtained a summons, calling upon plaintiff to shew cause:

1. Why the declaration, copy and service thereof should not be set aside, upon the ground that the declaration was not for the cause of action in respect of which the plaintiff sued in the inferior court.

2. Or why the declaration should not be set aside or struck out as tending to embarrass the fair trial of the action.

3. Or why the declaration should not be amended, so as to make the same conform to the plaint laid by plaintiff in the inferior court, on grounds disclosed in affidavits and papers filed.

John Bell, Q.C., shewed cause. He contended that the declaration was for the same cause of action as in the court below: that it might be in a different form, but that so long at the cause of action was the same the difference in the form of action was of no consequence. He cited *Gunn* v. *Machenry*, 1 Wils. 277; *Bowerbank* v. *Walker*, 2 Chit. R. 517; *Blacklock* v. *Millikan*, 3 U. C. C. P. 34.

Robert A. Harrison, in support of the summons, argued that the cause of action in the court below was the entry of the bull, to sustain which proof of scienter would be necessary; but that here the cause of action was the entry of the defendant *with* the bull—a cause of action in respect of which plaintiff could not sue in the division court, and a cause of action, which, under the circumstances, he calculated could not at all be maintained in any court. He cited *Beckwith* v. *Shordike*, 4 Burr. 2092; *Coward* v. *Boddeley*, 4 H. & N. 478; 2 Chit. Archd. 9 edn. 1247.

DRAPER, C. J.—The first summons to the defendant states the cause of action to be that the defendant did "wilfully, negligently and maliciously commit damage to the personal property" of the plaintiff.

This was issued by a magistrate, and on the hearing dismissed.

The plaintiff then sued out a summons from the division court, to answer "in an action for damages, for the causes set forth in the plaintiff's statement of claim hereunto annexed." That statement was—"William Mason claims of John Morgan the sum of ninety-nine dollars for damages sustained."

The affidavit on which the writ of *certiorari* was granted shews distinctly that the plaintiff was complaining that defendant's bull had gored a filly belonging to the plaintiff.

The plaintiff has now declared, "for that defendant broke and entered a close of the plaintiff, called, &c., and then and there with a certain bull of defendant's tore up, &c., the earth and soil, and there with the said bull gored, wounded and killed two horses of the plaintiff's, then and there found and being depastured in plaintiff's close."

It seems to me that this is not merely varying the *form* of action in the court below, but varying the *cause* of action, and stating one not only not instituted in the court below, but which could not have been instituted there.

If the plaintiff had sued in the division court for damages for breach of contract, and had, on the cause being removed by *certiorari*, have declared for breach of promise of marriage, he would, according to the argument relied on for the plaintiff, have been regular, though the Division Court Act expressly enacts that those courts shall not have jurisdiction in cases of breach of promise of marriage.

I have not overlooked the provision in the C. L. P. Act, that a plaintiff may join different causes of action in the same suit; but I apprehend it applies to suits instituted irregularly in the superior courts, and not to such as are removed by *certiorari*. Here, too, the plaintiff has not joined different causes of action, but professes to declare on the cause of action in the court below. I think the declaration is irregular, and must be set aside with costs.

Summons absolute with costs.

GORE DISTRICT MUTUAL FIRE INSURANCE CO. v. WEBSTER.

Setting aside judgment on payment of costs within a time limited—Effect of tender of costs within the time—Right of plaintiffs to costs after refusal through error—Sharp practice condemned.

On the 1st March an order was made setting aside a judgment on payment of costs within a week. On the 8th March the costs were tendered, and through error refused. On the same day the defendant, treating the judgment as set aside, filed and served his pleas, together with a demand of replication. Plaintiffs afterwards demanded the costs, and on non payment issued execution.

Held, 1, That the tender of costs was in sufficient time.

Held, 2, That the tender was a compliance with the order setting aside the judgment on terms.

Held, 3, That the effect of the order, followed by the tender, was to set aside the judgment and execution, so as to make the filing and service of the pleas regular.

Held, 4, That where the conduct of the defendant's attorney was vexatious, this was a ground for refusing costs of the application.

Plaintiffs afterwards, to avoid judgment of non pros, took issue on the pleas, and then executed a power of attorney authorizing a party to demand payment of the costs, payment of which was refused on the ground that the power of attorney was not countersigned by the President of the Company.

Held, 1, That the duty to pay the costs continued, notwithstanding the refusal to receive them when tendered.

Held, 2, That the filing of the replication was not, under the circumstances, a waiver of plaintiff's right to costs.

Held, 3, That the plaintiffs were entitled to a substantial order directing the payment of the costs, and the costs of the application.

Quære: Plaintiffs' right, under the circumstances, to costs between attorney and client, to be paid by the attorney for the defendant, as a punishment for his vexatious conduct.

(Chambers, March 29 and May 8, 1864.)

The declaration in this cause contained a count on a promissory note made by defendant in favor of plaintiffs, and the common money counts.

On the 20th February last, final judgment was signed, in default of a plea.

On the 24th February defendant's attorney obtained a summons from Mr. Justice Adam Wilson, calling on the plaintiffs to show cause why the final judgment should not be set aside on the ground that an application had been made by the defendant's attorney for the defendant, residing in Dundas, to the attorney for the plaintiffs, residing in Galt, for further time to plead; to which application no answer was received until the 20th February, the day on which judgment was signed, and on the merits.

On the 1st March last, Mr Justice Adam Wilson made an order setting aside the judgment on payment of costs within one week, the defendant undertaking to go to trial at the then next assizes for the county of Waterloo, and to plead issuably within the same period of one week.

On the 4th March the master taxed the costs under the order of the 1st March at the sum of £6 6s. 2d.

On the 8th March the agent for the defendant's attorney tendered the costs to a clerk in the office of the plaintiffs' attorney, the plaintiffs' attorney being at the time temporarily absent in Berlin, which costs the clerk refused.

On the same day the agent for defendant's attorney filed pleas of non-fecit and never indebted, and served the same, together with notice to reply.

On the 9th March, the attorney for the plaintiffs having returned from Berlin to Galt, attended the office of the agent of the attorney for defendant, explained to him that the costs had been refused by the clerk through error, and that he (the attorney) was willing at once to join issue and go to trial on the money being paid; whereupon the agent for defendant's attorney stated he had returned the money to his principal in Dundas, but that he (the agent) would write for it.

On the same day the plaintiffs' attorney sent a telegram to the defendant's attorney, informing him that the costs had been refused through error, and would be accepted; of which telegram no notice was taken by defendant's attorney.

On the same day the plaintiffs' attorney instructed his agent in Dundas, by letter, to call upon the defendant's attorney and explain what had occurred, and at the same time receive the amount of costs if the defendant's attorney would pay the same.

On the 10th March the agent of plaintiffs' attorney at Dundas called upon the defendant's attorney for the costs, but the latter refused to pay them, stating that he was not acquainted with the handwriting of the plaintiffs' attorney, and expressing an opinion that a power of attorney was necessary before he would pay the amount.

On the 11th March the plaintiffs' attorney caused a written notice to be served upon the defendant's attorney, demanding pay-

ment of the costs, and directing payment of the amount to the agent of the plaintiffs' attorney in Dundas; but of this demand the defendant's attorney took no notice.

Plaintiffs' attorney thereupon treated the order of Mr. Justice Adam Wilson as abandoned, and placed a writ of execution in the hands of the sheriff.

On the 19th March defendant obtained a summons from the Chief Justice of Upper Canada, calling upon the plaintiffs to show cause why all proceedings on the execution should not be set aside or stayed, and why the filing or serving of the pleas and of the notice to reply should not be deemed a good filing and service under the order of Mr. Justice Adam Wilson, on the ground that the costs under the order having been tendered and refused, the order had been complied with.

On the 21st March the assizes for the county of Waterloo commenced, and terminated shortly thereafter.

Robert A. Harrison showed cause to the summons. He argued that tender on the 8th March was not "in a week" from the 1st March, within the meaning of the order; that "in a week" meant in seven days; that the first and last days were inclusive (*Moore* v. *Grand Trunk Railway Company*, 2 U. C. Prac. R. 227; *Ridout* v. *Orr*, 1b. 231; *Cameron* v. *Cameron*, 1b. 259; Rule Pr. No. 166; Con. Stat U. C. cap 22, sec. 342); and that under any circumstances defendant's subsequent conduct showed he was not ready and willing to pay the costs, and so he was entitled to no relief. (*Cook* v. *Phillips*, 23 U. C Q. B. 69)

S Richards, Q.C., in support of summons, contra, argued, that the tender was in time (1 Arch. Prac. 11 Edn. 160, 161); and if so, that defendant, in strict law, was entitled to have his summons made absolute, and with costs (1b).

DRAPER, C. J.—I take the tender and refusal of the costs taxed to be, for the purpose of fulfilling the terms of the order imposed upon the defendant, equivalent to payment, and therefore that he had done all that was required for setting aside the judgment.

The plaintiffs' attorney admitted that the refusal of his clerk to receive the costs was an error; and he, by a telegram, and through an agent, to whom he wrote for the purpose, applied to the defendant's attorney for them. But, owing to an ill-feeling between them, arising from earlier proceedings in the cause, the payment has been hitherto evaded by excuses which, in the mildest term of expression with which I can characterize them, are not such as a man of professional respectability should condescend to rely upon. If I felt that the question which I have to dispose of rested on their sufficiency, I could not be induced to grant this application.

In my view of the facts, the judgment was, by force of the order, and of the taxation and tender of the costs and the filing and service of the pleas, at an end. The plaintiffs should have taken issue, and have served notice of trial immediately. They would have had no difficulty in getting the costs paid, after a proper demand and refusal. The course the plaintiffs' attorney elected to take, after he became aware of the error his clerk had committed in refusing the costs, has, it seems, thrown him over the assize; but though this is to be regretted, I do not think I can impose any new conditions on the defendant. The proceedings on the execution, whatever they are, must be set aside. As for the writ itself, the order of Mr. Justice A. Wilson extended to it as well as to the judgment.

As I think the conduct of the defendant's attorney not to be approved, in reference to his withholding payment of the costs, I shall give no costs of this application.

On the 29th March the Chief Justice made an order directing that all proceedings under the execution should be set aside, and that the filing and service of the pleas should be deemed a good filing and service, and of the notice to reply under the order of Mr. Justice Adam Wilson.

On the same day the Toronto agent of the plaintiffs' attorney sent a telegram to plaintiffs' attorney of the result, and advised him, in order to avoid judgment of non-pros., at once to take issue upon defendant's pleas.

On the 31st March plaintiffs' attorney at Berlin took issue on the pleas, by filing and serving joinder in Berlin. On the same day the agent of defendant's attorney at Berlin received papers from the defendant's attorney to sign judgment of non-pros if joinder not filed, but too late to enable him to do so, as the joinder had been previously filed.

On the 2nd April last, plaintiffs executed, under their corporate seal, a power of attorney in favor of the agent of plaintiffs' attorney in Dundas, authorizing him to demand from defendant and his attorney payment of the sum of £6 6s. 2d., taxed under the order of Mr. Justice Adam Wilson.

On the 9th April a copy of the power of attorney and affidavit of execution were served on defendant, who said he had paid the costs to his attorney and referred the party to him; and the attorney, on the ground that the power of attorney was not countersigned by the president of the corporation, refused payment.

On the 3rd May last, plaintiffs' attorney obtained from Chief Justice Draper a summons calling on defendant, his attorney or agent, to show cause why defendant should not be ordered forthwith to pay to the plaintiffs or their attorney the costs taxed to the plaintiffs under and pursuant to the order of Mr. Justice Adam Wilson; why, in default of payment, the summons, obtained by defendant on or about the 24th day of February last past, should not be discharged with costs, the said order of Mr. Justice Adam Wilson and all proceedings had thereunder be set aside and vacated with costs, the pleas filed by defendant be set aside, and plaintiffs be at liberty to withdraw the joinder filed by them herein, and sign judgment as against defendant for want of a plea; or why such other order should not be made in the premises as to the presiding judge in Chambers may seem meet, on grounds disclosed in affidavits and papers filed; and why such order as to the costs of the application should not be made, as to the said presiding judge should seem meet, on grounds disclosed in affidavits and papers filed as aforesaid, with liberty to plaintiffs to refile, on the application, such affidavits and papers pled on former applications herein, as he might be advised.

Plaintiffs' attorney filed, on moving the summons, affidavits and papers disclosing the foregoing facts.

S Richards, *Q C*, showed cause. He contended that as the order of Mr. Justice Adam Wilson did not absolutely direct the payment of the costs, there never was at any time an obligation on the part of defendant to pay them; but even if there was, it had been forfeited by refusal to accept the costs when tendered; or that plaintiff, by joining issue on the pleas filed under and pursuant to the order, had waived the costs, and could not now recover them He also argued that the power of attorney was insufficient.

Robert A. Harrison, in support of the summons, argued, that plaintiffs had a right to the costs; that their right was inchoate till defendant availed himself of the terms of the order; that thereupon the right became and was absolute; that the right continued till discharged by payment; that tender is not payment; that the duty of defendant is reciprocal with the right of plaintiffs; that there was no waiver by filing the joinder, because that was done with intention to avoid a judgment of non-pros., and not with the intention of abandoning the costs of pleading the pleas; that the right is one thing and the remedy another: that if plaintiffs had not a remedy under the order of Mr. Justice Adam Wilson as framed, the court or judge had power to afford plaintiffs a new remedy, by making a new and substantive rule or order upon defendant or his attorney for the payment of the costs

DRAPER, C J.—The point for decision is, whether an order should be made that the defendant pay certain costs.

An interlocutory judgment had been signed, and A. Wilson, J., set it aside, and gave the defendant leave to plead on payment of costs. On the last day for pleading, the costs were tendered to a clerk of the agent for the plaintiffs' attorney, who, knowing nothing about the matter, declined to accept them. The pleas were nevertheless filed, and a notice to reply served. The next day the agent for plaintiffs' attorney, who was absent when the the costs were tendered, telegraphed to the defendant's attorney that the refusal of the costs was a mistake, and requested their payment, that the cause might proceed. He wrote also to another attorney to demand them But the defendant's attorney refused to pay them, setting up that the latter attorney was not legally authorized to receive them. Execution was then issued on the judgment. An application was made in Chambers to set aside the proceedings under the execution, and for the allowance of the pleas and demand of replication This was granted, on the ground that the defendant, having tendered the costs, had acquired the right to plead under the order of A. Wilson, J., and that his proceeding was by nature of that order regular, and the interlocutory

judgment at an end. A formal power of attorney was then sealed with the corporate seal of the plaintiffs, countersigned by their secretary, and the costs have been demanded of the defendant, who referred the matter to his attorney, stating that the money was in his hands; and the attorney, being applied to, refused, because the power-of-attorney was not countersigned by the president of the corporation. In the meantime the plaintiffs' attorney, apprehensive that a judgment of non-pros. might be signed for want of a replication, took issue on the pleas, and, as appears, just in time, as the defendant's attorney had prepared to sign judgment against him.

It is now contended, on an application for a peremptory order to pay these costs, that the order of A. Wilson, J., in that respect has been waived by the plaintiffs' taking another step (filing a replication), and that by the refusal to take the costs when tendered the right to them was forfeited; and also that no sufficient demand of them has been made, if the plaintiffs are entitled to recover them.

I think nothing can be more vexatious than the conduct of the defendant's attorney in this matter. It is endeavored to palliate or excuse it by representing that the plaintiffs' attorney had been guilty of sharp practice in a preceding stage of the cause, and that the defendant's attorney was only retaliating, and has a right to insist on the strict adherence to rules and forms of procedure, and is doing no more.

I have not been able to take this view of his conduct; for I think that though technically he had a right to treat the interlocutory judgment as set aside, the duty of paying the costs when subsequently demanded remained; and that his repeated refusals to do so, on the most futile pretences, render it proper not only that he should pay them, but should also pay whatever costs the plaintiffs have been put to in trying to obtain them.

I take a strong view of the duty of the judges to put down this style of proceeding, which is a prostitution of the rules and practice, in place of making a proper use of them for the due regularity of proceedings, and the proper protection of the interests of clients.

I will give the attorney a *locus penetentiæ*, by allowing him forty-eight hours to pay the costs already demanded, and those of this application; the time to be computed from the serving of my order. If he does not comply, then I recommend the plaintiffs to apply to the full court next week.

I am much inclined to order the subsequent costs to be taxed as between attorney and client; but I think it better, on the whole, as the matter stands, to leave this to the court above, in case it became necessary for plaintiffs to make application to the court.

Order accordingly.*

DICKSON v. GRIMSHAWE.

Plea against good faith—Striking out—Terms.

Defendant contracted to sell and convey to plaintiff certain real estate, and covenanted to give possession within certain times specified. Defendant found it necessary, in order to recover possession of the property from a third party, to require from plaintiff an assignment of all his interest in the land. The deed of assignment was accordingly made by plaintiff to defendant, and only for the purpose of the proposed action of ejectment. Afterwards plaintiff, not having received possession of the land according to the terms of the contract, commenced an action against defendant on his covenant. Defendant pleaded, that before breach plaintiff, by the deed already mentioned, bargained, sold and assigned to defendant all his interest in the land. Plaintiff, with a full knowledge of the facts, in order to get down at the then approaching assizes for Northumberland and Durham, took issue and served notice of trial. Afterwards plaintiff obtained a summons to set aside the plea with costs, and to be allowed to sign judgment as for want of a plea, without prejudice to his notice of trial, and that such notice of trial should stand as a notice of assessment of damages, the plea being against good faith, or that plaintiff should, without prejudice to the notice of trial, have leave to reply on equitable grounds the facts above stated. An order was made to strike out the plea, and giving plaintiff leave to sign judgment unless he preferred to take an order to add the proposed equitable replication; but, under the circumstances, the judge refused to go further, and allow the notice of trial to stand for the amended state of the pleadings.

(Chambers, March 29, 1864.)

The declaration in this cause was on covenant in a deed, dated 11th March, 1862, to give plaintiff immediate possession of a mill, and full possession of another mill and of a house within two months, and to give plaintiff a conveyance thereof in fee simple, and to protect him against the dower of Catharine White, widow, in the premises. Averment: That defendant gave plaintiff possession of one mill, as agreed; that by deed made between plaintiff and defendant, the time for giving possession of the house was extended until the 1st December, 1862, and of the residue until within a month from the 17th April, 1862; that defendant gave plaintiff possession of all but the dwelling-house and orchard. Breach: That defendant had not given plaintiff possession of the house, &c., nor had he given the conveyance, nor protected plaintiff against the dower of Catharine White, but that she had recovered her dower against defendant, which had been assigned to her, and plaintiff had been evicted from the third part of the lands, and from possession of the mills. There were also the common counts for money paid, &c.

Plea to first count: That before breach of the covenant complained of, plaintiff, by deed, dated 19th September, 1862, bargained, sold, assigned and granted to defendant, his heirs and assigns, all his right, title, interest and possession in and to the said lands and premises in the first count mentioned, to hold in fee simple. This plea was filed and served on the 21st March, 1864. Issue was joined on the same day, and notice of trial was given on that day for the next assizes at Cobourg, which began on the 29th March.

On the 23rd March, the plaintiff made affidavit setting forth a copy of the agreement on which he sued, and of the above declaration and plea, and stating further that in March, 1862, the defendant brought an ejectment for these premises against Josiah Charles White, Zaccheus White and Catharine White, tenants in possession, and failed; that another action was about to be commenced against the same parties, but in consequence of plaintiff being in possession of a portion of the premises under the agreement, the letter following was written by the attorney for Grimshawe, the plaintiff in the ejectment, to the now plaintiff:

"Cobourg, Sept. 29, 1862.

"Dear Sir,—We require your assignment back to Mr. Grimshawe, in order that an ejectment may be brought in his name against White, otherwise the action will have to be brought in your own, which I suppose you would rather avoid. Please sign it at once. This is not to affect the bargain between you."

Plaintiff swore that upon receipt of this letter he signed the deed in the first plea mentioned, but only for the purpose of the ejectment.

On the 24th March the plaintiff obtained a summons, returnable on the 26th (Good Friday intervening), to set aside this first plea with costs, and to allow plaintiff to sign judgment as for want of a plea, without prejudice to the notice of trial already given; and that such notice should stand as a notice of assessment of damages on the first count, the plea being against good faith; or that plaintiff should, without prejudice to the notice of trial, have leave to reply on equitable grounds to the plea as shown in the abstract of replication annexed:

The abstract stated that the deed pleaded was given as pointed out in the affidavit charging that the use intended to be made of such deed was contrary to equity and good faith.

This summons was served on the 24th, and was enlarged by the parties (not by the judge in Chambers) until the 29th March last. No affidavit was filed for the defendant on shewing cause.

Moss for plaintiff. *Osler* for defendant.

DRAPER, C. J.—The plaintiff, no doubt with a view to prevent his being thrown over the present assizes at Cobourg, which begin to-day, took issue on the plea he now moves to strike out, and gave notice of trial of that issue, as well as on the plea of "never indebted" to the common money count. He might at the same time, instead of taking issue on the first plea, have replied to it on equitable grounds, or have moved to strike it out, as he has now done.

He seeks, therefore, now to abandon so much of his proceeding as relates to the taking issue, and to hold good his notice of trial as applicable to the proposed equitable replication, to which the defendant will be entitled to the usual time, in order to rejoin or to strike out the plea, and to sign judgment on the first count, with leave to treat the notice of trial as a notice of assessment of damages.

* The attorney availed himself of the *locus penitentiæ*, and paid the costs; so that no application to the court became necessary.—EDS. L. J.

I am not prepared to say that if the facts on which this application is grounded had not all existed and been known to the plaintiff when he took issue on the first plea, that I should not have been strongly inclined to strike out the plea and let the notice stand as prayed. But what the plaintiff did, he did with full knowledge of the state of facts, and I think I cannot properly allow him to change the position he deliberately assumed in order to entitle himself to give notice of trial in that first particular, and yet allow the notice to stand.

At the same time I think the plaintiff has made a strong and an unanswered case against the plea. It seeks to raise an issue which in conscience and good faith the defendant, after his attorney's letter, ought not to be permitted to set up; and I am willing to make an order to strike it out, and give the plaintiff leave to sign judgment, unless he prefers to take an order to add the proposed equitable replication. In either event the costs to be costs in the cause. I think I ought not to go further.

It is true that the plaintiff will most probably lose the assize. Parties very often press this consideration for or against an application, and it is under certain circumstances to be weighed; but it is only to be considered as secondary to the other matters urged and submitted.

Order to strike out the first plea.*

McNider v. Baker.

Judgment—Satisfaction—Interpleader—Setting aside proceedings—Parties.

On the 25th February, 1858, defendant gave a cognovit to plaintiff. On the 27th February, 1858, judgment was entered on the cognovit. On the 31st March, 1858, defendant made a chattel mortgage in favor of plaintiff. On the 12th January, 1859, plaintiff gave defendant a certificate of the discharge of the judgment. In 1859, defendant's brother executed a mortgage in favor of plaintiff for $2000. Defendant left Canada in 1859. On the 8th September, 1859, an *alias fi. fa.* goods was issued on the judgment of 7th June, 1852, an *alias pluries fi. fa.* goods was issued on the same judgment. A quantity of flour was seized under *alias pluries* execution. This flour was claimed by K. & S. Thereupon an interpleader issue, between K. & S. as plaintiffs, and the execution creditor as defendant, was directed. The jury found that the flour was not the property of K. & S., and so found against them. A summons was obtained, calling on plaintiffs to show cause why satisfaction should not be entered on the roll, the writs of execution and interpleader order and proceedings thereunder set aside, and to declare the interpleader bond given by K. & S. to be part and parcel of the assets of defendant.

Held, 1. That the execution debtor was not entitled to move, in the cause in which judgment was obtained against him, to set aside the interpleader order, &c., the same being between the execution creditor and strangers to the cause.

Held. 2. That the execution debtor had no right to be heard in the interpleader suit, the result of which established nothing to affect his interest.

Held. 3. That the authority to use the execution debtor's name to make the application did not either extend the execution debtor's right in the matter, or enable the persons authorized to move for their own relief in a cause to which they were no parties.

Held. 4. That under the special circumstances of the case, defendant was not entitled to have the summons made absolute, even to the extent of having satisfaction entered on the roll.

Held. 5. That the application to declare the interpleader bond assets of the execution debtor, would, if granted, be not only an extension of the equitable jurisdiction of a common law judge, but in itself utterly unwarrantable.

(Chambers, March 31, 1864.)

The defendant obtained a summons, calling on the plaintiff to show cause why a writ of *alias pluries fi. fa.* against defendant's goods, issued in this cause, and all proceedings had thereunder, should not be set aside, and satisfaction entered on the judgment roll; and to set aside an interpleader order herein granted, and dated 15th January, 1863, which directed an issue between Benj. Stedman and Thomas Kelso as plaintiffs, and John McNider as defendant; and to rescind all proceedings had, and the judgment entered thereon; and to declare the interpleader bond given by Stedman and Kelso to be part and parcel of the assets of the defendant; and that McNider should be precluded from enforcing that bond, on the grounds that the judgment in this cause was discharged by McNider before the issuing of the said *alias pluries fieri facias*; and that the judgment was fraudulently prosecuted by McNider as against defendant, and as against Stedman and Kelso.

It appeared that judgment in this cause was entered on the 27th February, 1858, on a cognovit dated the 25th of the same month; that on the 8th September, 1859, an *alias fieri facias* issued against goods; and on the 7th June, 1862, an *alias pluries fieri facias* was issued, under which, it would seem, fifty-two barrels of flour were seized; that Stedman and Kelso claimed them, and on the 15th January, 1863, an interpleader order was made to try their right to this flour, in which they were made plaintiffs, and the above named plaintiff was made defendant; that at the following assizes the trial was postponed by Stedman and Kelso, on the ground that the defendant Baker was a material witness for them; that the cause was tried at the then following assizes, but without defendant's testimony, and a verdict was rendered for the plaintiff in this case against Stedman and Kelso, and judgment was entered thereon on the 1st December, 1863, and execution issued for costs.

The principal foundation for this application was, that the plaintiff signed and gave to the defendant a paper in these words: "I do hereby certify that a judgment rendered in the Queen's Bench in favor of John McNider against William Baker, for the sum of £213 5s, and registered in the Registry office of the county of Hastings, has been discharged. Dated Belleville, 12th January, 1859." This was witnessed by Morgan Jellett, who made affidavit of its execution on the same day, before his brother R. P. Jellett, in whose writing the original was drawn.

The defendant also, on the 31st March, 1858, executed a chattel mortgage to the plaintiff, covering a large amount of personal property, among which was all his household furniture, to secure the full sum of £244 9s. 1d. with interest, payable on the 30th June then next, which mortgage was filed the next day in the proper office.

The defendant represented in his affidavit that he gave this mortgage, at plaintiffs' request, in satisfaction of the judgment, and not as collateral security; and that the plaintiff thereupon gave him the above discharge. The defendant swore he neglected to register this discharge, though it was sworn to for registration by the very attorney who issued the writs of execution in favor of plaintiff against him.

The defendant also swore that this chattel mortgage was afterwards fully satisfied, and that he recollected distinctly having a settlement with the plaintiff early in 1859; that he procured his brother-in-law to give plaintiff a mortgage for about $2000, which plaintiff accepted in full payment of all defendant owed him, as well as to cover certain advances which plaintiff was to make, and did make; and that he (defendant) left Canada in November, 1862, and was then largely indebted to Stedman and Kelso.

The summons was granted on two affidavits; one merely stating the proceedings in an interpleader suit; the other, made by Kelso, stating the fact of plaintiff's judgment, and that it was "fully paid and discharged," as appears by the writing already set out; that the defendant absconded from the Province about the 21st November, 1862, being then largely indebted to Stedman and Kelso, and that he is still indebted to them in the sum of $7000; that when he absconded he left behind him, among other things, about fifty-two barrels of flour, all of which were seized under the *alias pluries fi. fa.* in this cause, which was issued by Morgan Jellett while plaintiff and defendant were absent from this Province; that he and Stedman claimed the flour; and, after stating the result of the interpleader suit, he said that Robert P. Jellett, who was attorney and counsel for the present plaintiff, threatened to sue them on behalf of plaintiff, on the bond which they gave to the plaintiff under the terms of the interpleader order for the payment of the value of the flour, if the issue were decided against them. He further stated that he applied to defendant for authority to use his name in an application to set aside the *alias pluries fi fa*, and received an answer giving him authority, and stating that the judgment had been paid and satisfied.

The defendant, in his affidavit, stated he had authorized Stedman and Kelso to use his name in this application.

H. B. Morphy for plaintiff. *John Boyd* for defendant.

Draper, C. J.—I have not been able to find any authority for an execution debtor moving, in the cause in which judgment has been recovered against him, to set aside an interpleader order, the issue and judgment thereon, and the execution founded on such judgment; which order and subsequent proceedings were between his judgment creditor and certain strangers to the first cause, who

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* Plaintiff after the entry of the record struck out the plea, and had a verdict; but his proceedings in the term following (last term) were set aside for irregularity.—Eds. L. J.

claimed to own goods which had been taken in execution as the property of the execution debtor.

The execution debtor has not, that I can perceive, the slightest right to be heard in the interpleader suit, the result of which can establish nothing to affect his interest, or that of any one but the parties to it.

As this is the defendant's application, it must, I think, as to all relating to the interpleader suit, be discharged.

It need hardly be said that the authority given to others to use the defendant's name to make the application, will not either extend his right in the matter or enable Stedman and Kelso to move for their own relief in a cause to which they are no parties.

I disclaim all idea of treating this as the application of any one but the defendant, or as enabling other questions to be raised, excepting such as it is competent for him to raise.

Moreover, if I felt at liberty to deal with the application in reference to the interests of Stedman and Kelso, which I do not, I should hold that the application must fail; because it is found by the jury that the flour in question was not theirs; and it is sworn by W. S. Bowes that the grain of which this flour was made was bought from one Woodward by the plaintiff (*qu.*, if defendant be not meant), and that it was out of this lot of grain that the flour was made, and not out of any grain of Stedman and Kelso.

It remains, therefore, for me to consider the first branch of the summons.

The judgment was for £213 5s. The chattel mortgage was for £244 9s. 1d. The affidavits of R. P. Jellett and of the plaintiff explain this difference by stating in substance that the mortgage was for the same debt as the judgment, with interest and costs, and $100 which plaintiff paid Mr. Jellett on defendant's account. The fifth paragraph of Mr. Jellett's affidavit, though confusedly expressed, leaves no doubt in my mind on this subject. The plaintiff's affidavit throws no light on the subject. It appears that the plaintiff went to Europe in the spring of 1859, as he says, soon after the giving of the chattel mortgage. I think he must mean, after the giving of the discharge, which is dated 12th January, 1859; whereas the chattel mortgage bears date 31st March, 1858. The conclusion I draw from these facts is, that the plaintiff, in January, 1859, was content to rely for security on the chattel mortgage, and thereupon gave the discharge of the judgment; and if the matter rested there, I think the plaintiff could not resist successfully the application to set aside all or any executions subsequently issued to enforce payment of the judgment. But in the seventh paragraph of Mr. Jellett's affidavit, he swears that some months after the plaintiff's departure from Canada, he had a conversation with the defendant as to the chattel mortgage running out, and as to the impracticability of renewing it in the plaintiff's absence, and as to it not covering cordwood, which was constantly replacing that mentioned in the mortgage (the mill being driven by steam as well as by water power), when defendant said, "Why not issue an execution on the judgment? I have never discharged it and it is still in force." Whereupon, with the full knowledge and consent of the defendant, he (R. P. Jellett) did, on the 8th September, 1859, issue on the said judgment an *alias fi. fa.* against defendant's goods, and caused it to be placed in the sheriff's hands, and he allowed the chattel mortgage to run out. In the ninth and tenth paragraphs of Mr. Jellett's affidavit, he states, upon information, certain declarations of the defendant, quite inconsistent with his present contention. I do not accept this as proof that the defendant made such declarations; but the defendant, in his affidavit in reply, passes the statement without notice: nor does he deny the conversation stated by Mr. Jellett, further than by swearing that he never gave Morgan Jellett or any one else authority to seize on or sell the goods or any part thereof in dispute in the interpleader suit, nor to seize or sell any goods under the writ of execution under which said goods were seized and sold. If this be taken, as I think it must be, as an admission that the plaintiff was at liberty to proceed to recover on the judgment, and to abandon the chattel mortgage, there is an end of the defendant's case, which rests on the written discharge of the judgment alone. Again, in the defendant's letter of the 14th December, 1863, written to plaintiff's brother, defendant, while asserting that the judgment was satisfied, never once alludes to the chattel mortgage.

But the defendant further swears, as already set out, that early in 1859 he got his brother-in-law, William Gould, to give the plaintiff a mortgage; and he says that the money then advanced by plaintiff to him, together with his previous indebtedness, amounted to a sum between £400 and £500, which mortgage "he believes the plaintiff has foreclosed." In reply the plaintiff swears that when he took the Gould mortgage, which seems to have been early in 1859, he advanced £200 in addition to the defendant's previous indebtedness, and as a security for this advance, and an additional security for the other sums due, and not as a payment or discharge of the securities on defendant's chattels; that the Gould mortgage contained no covenants, and it was agreed that on sale of the mortgaged property plaintiff was to account to defendant for the amount realized, and no more. that the defendant continued to pay interest half-yearly on the whole debt, up to August 1862, in the latter part of which year he left Canada.

There are statements in the affidavits which are well calculated to give rise to a suspicion that the defendant, besides giving security to the plaintiff, had in view the covering his property from other creditors. The conversation sworn to by Mr. Jellett, and not denied by the defendant, and some expressions in defendant's letter to the plaintiff's brother, tend strongly that way.

If it were so, it would not help the defendant's present application, nor indeed any application having his relief in view.

But I feel it unnecessary to enter into a closer consideration of such statements, as, after all, the defendant's claim to the relief sought by the first part of the summons rests upon the efficacy of the discharge. There can be no doubt the defendant might waive it, and, according to Mr. Jellett's statement, he did waive it. He never registered it nor advanced it till quite recently, and even now he furnishes it as a weapon for others to use in his name, rather than set it up on his own behalf. Though he professes to have paid the amount of the chattel mortgage, he does not say either how or when. *If before he absconded, why did he continue* to pay the interest up to the end of the last half-year prior to his leaving? If since, he could not have forgotten by what channel he remitted the money. Added to which, his letter of the 14th December, 1863, shows pretty clearly he had no means of payment after he left.

To my mind the *primâ facie* cases of the discharge of the judgment is so far met and displaced that I ought not to act upon it; and so far as, by a comparison of the different and conflicting statements, it is possible to arrive at a conclusion, I think the weight of the testimony is in favor of holding that the chattel mortgage never was paid, but lapsed or expired, and the judgment remained as security in lieu of it.

I am of opinion, on the whole, that this summons must be discharged with costs.

I have omitted to notice one part of the summons, which asks that the interpleader bond given by Stedman and Kelso (and, as I gather, to the plaintiff) should be declared part and parcel of the assets of the defendant Baker. This would be an extension of the equitable jurisdiction of a common law judge, not only unprecedented, but, it appears to me, utterly unwarrantable

Summons discharged, with costs.

CHANCERY.

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

AUSTIN v. STORY.

Mortgagor and mortgagee—Destruction of buildings by fire—Application of insurance money.

As between mortgagor and mortgagee, where buildings on mortgaged premises covered by insurance are destroyed by fire, and the insurance money is paid to the mortgagee with the consent of the mortgagor (there being no provision in the mortgage as to its application) *before* the principal money becomes due (and in this case after some interest had accrued due) the mortgagee is not bound to apply this money on the mortgage, as of the time he receives it, but may expend it on the property or may hold it in lien of so much of the security as it covers, being, however, in the latter case, bound to apply it eventually on the money found due on the mortgage.

On the 13th April, 1864, the plaintiff filed a bill for the foreclosure or sale of certain property, setting out two several mortgages made by the defendant to the plaintiff. It appeared from the bill that the buildings on the premises were insured for $1200, and the

policy assigned to the plaintiff; that these buildings, subsequent to the assignment of the policy to the plaintiff, and after some instalments of interest had become due, were destroyed by fire, that the sum of $1000 was paid to the plaintiff in full of the policy by an arrangement between the parties. That the time for payment of the principal money secured by the mortgage had not expired, but that certain instalments of interest, amounting to $620 were overdue and unpaid.

The defendant demurred to this bill for want of equity, in that the amount of insurance money received by the plaintiff should have been applied by him in payment of the interest due, and if so applied there would be nothing due on the mortgage, and no right of foreclosure.

The demurrer was, however, overruled. The defendant then filed a notice disputing the amount of the plaintiff's claim.

On settling the minutes of the decree before the registrar, there being no incumbrancers, it was contended by the plaintiff that the account should be taken of the whole amount of the mortgage moneys and interest up to the day ordered for payment, and that the $1000 should then be credited. The defendant, on the other hand contended that the first gale of interest which had accrued due before the $1000 was received, should be paid out of that money, and the balance of it applied to the reduction of the principal so far as it went, or that this $1000 should bear interest in the hands of the mortgagee for the benefit of the mortgagor, at the rate of ten per cent. per annum, being the rate of interest reserved in the mortgages, or at the ordinary rate of six per cent.

The mortgages were in the common form There was, however, a covenant in one of them to insure the buildings on the premises, and keep them insured. There was no covenant to rebuild in case of destruction by fire.

The point being, as was considered by the registrar, a new and important one, he desired that it might be spoken to by counsel before his lordship the Chancellor, before whom the demurrer was argued, which was accordingly done on the 14th June, 1864.

Roaf, for the plaintiff, referred to an unsupported note in David son's Precedents, vol. ii. p 784. But it was acknowledged on both sides that no direct authority could be found upon the point.

O'Brien for the defendant.

VANKOUGHNET, C.—I agree with Mr. Roaf that, under the circumstances of this case, the mortgagee is entitled to interest, without any abatement in consequence of his holding the insurance money paid over to him in respect of a portion of the mortgaged premises. The insurance money stands, or should stand, in lieu of so much of the security as it covered. It should properly be used to replace the property in the position, as nearly as possible, in which it was at the time of the fire. The mortgagee is entitled to have it expended on the property The mortgagee, unless by express stipulation, cannot, I apprehend, himself lay out the money, at all events when he is not in possession of the premises. Neither, I think, can he invest it in any other way without the assent of the mortgagor. Here the mortgagor consents to the mortgagee taking the insurance money. No arrangement was made in regard to the use or application of it. It remains idle in the hands of the mortgagee, who, if he retains it, will be bound, however, to apply it in reduction of the amount found due to him on his mortgage.

Decree accordingly.*

GENERAL CORRESPONDENCE.

The U. C. Reports—Money had and received.

TO THE EDITOR OF THE UPPER CANADA LAW JOURNAL.

GENTLEMEN,—*Logan* v. *Heward et al*, tried in the County Court of Wellington, judgment for plaintiff, defendant appealed to Common Pleas, argued in Easter or Trinity term, 1863, and judgment given sustaining the appeal. The judgment has not been reported. It is a very important case, and as we brought the action we should like to know the grounds of failure. Will you have it published for us. We find your paper is of a vast deal more service to us, country practitioners, than the reports, such as they are, of the reporters. We would except the reporter of the Q. B.

Yours truly. SUBSCRIBERS.

Guelph, June 8, 1864.

We have not space for the decision to which our correspondent refers. It will probably be published by the regular reporter of the Court. We have seen the judgment and have no objection for the information of our correspondents to state the substance of it. The Court held that there was no money received by the defendants, Heward and Roche, for the plaintiffs use. The money never was in their hands. All they had was authority, the one as director and the other as manager of the Canada Agency Association, to draw in favor of parties entitled to receive it, upon the funds of that association lodged in the bank, in this instance for $800 in the whole. Defendants, in doing what they did, in no wise acted as individuals personally responsible, but solely as the officers of the company. The evidence wholly failed to establish any privity between plaintiff and defendants in respect of the money claimed, and without such privity the action could not be maintained. If the money sued for was wrongfully detained it was so detained by the company. The action should have been brought against the company and not against its officers —EDS. L. J.

Right of Colonial barristers to be called to the bar in England.

TO THE EDITORS OF THE UPPER CANADA LAW JOURNAL.

1. I believe that in England, as well as in Canada, there has to be a preliminary examination passed before call to the bar? Could you say what kind of an examination it is—what are the subjects?

2. I understand that after having served the requisite term under articles in any of the Colonies and passed the examination there, one can get admitted to practice in England by paying the difference between the fees in the Colonies and in England? Could you say whether the costs of the stamp on the articles, which I think is about £80 sterling, is included, as well as the fees paid at the time of admission or call?

If you would answer the above questions you would much oblige

Yours obediently,

WM. WILDE.

June 27th, 1864.

[1. We believe that in England there is no preliminary examination of a compulsory character before call to the bar. We have some recollection of a voluntary examination being required, with a view to prizes, &c., but we are unable to state the nature of the examination or anything about it.

* If the mortgagor produced to the mortgagee an unquestionable security for the amount of the insurance money, he would probably be obliged to accept it so that the mortgagor might have the benefit of interest. Mortgagors should however, protect themselves by inserting a provision in the mortgage that insurance money should be applied when received.

2. We are not aware of the right of a colonial barrister to be called to the bar in England. We know that something of the kind was at one time contemplated by one or more of the Inns of Court, but whether anything was actually done or not we cannot say.

We trust some of our English cotemporaries, or others better informed than ourselves, will be good enough to enlighten us.—Eds. L. J.]

REVIEW.

A Practical Treatise on the Office and Duties of Coroners in Upper Canada, with an Appendix of Forms. By William Fuller Alves Boys, LL.B., of Osgoode Hall, Barrister-at-Law. Toronto: W. C. Chewett & Co. Price $2.

In the first year of the *Law Journal* (1855) we gave to the public a brief treatise on the Office of Coroners to meet an acknowledged want. We sought at the time to induce some medical gentleman, who had served in the office, to assist us with some practical hints, such as his professional knowledge and experience would have enabled him to do. Such assistance was not given, and the work, a serial publication limited as to space, was necessarily an outline, and many important branches of the subject were not noticed. English works on the subject are of little practical value to us in Canada, and none of them keep pace with the progress in the science of medicine. Jervis on Coroners', the best of the English works does not embrace all the subjects connected with the office, and up to this time there has been no reliable *vade mecum* for coroners. It is with peculiar satisfaction we direct the attention of our readers to Mr. Boys' work just published. It embraces the whole subject of the Coroners' judicial duties, and supplies all that is necessary for a Canadian Coroner to know. Were it in our power to aid the circulation by any testimony of our approbation we would almost be at a loss for terms sufficiently strong and emphatic. In our judgment it is one of the most comprehensive works on Coroners extant, for no English work contains all the subjects Mr. Boys has dealt with. We cannot do more than give a very brief analysis of its contents, but the most cursory examination will show the ability with which it is executed.

Part I. is divided into five chapters as to the office and duties of Coroners generally. It treats of the antiquity of the office, their qualification and mode of appointment, the duty and authority of Coroners as conservators of the peace, in inquests of deaths, fire inquests, &c., of their general jurisdiction and Jurisdiction in particular cases, their fees, exemptions, rights, privileges, &c., and their liabilities for misconduct in office.

Part II. deals with the office and duties of Coroners in particular, and contains thirteen chapters.

Chapter 1 treats of offenders, who may commit crimes, infants, and as to ignorance, misfortune, &c. Chapter 2, of principals and accessories; and, Chapter 3, of crimes which come under the notice of coroners, as murder, manslaughter, infanticide, excusable homicide, justifiable homicide, &c.

Chapter 4. A most important chapter on poisons, mineral, vegetable and animal, classified and treated of in detail.

Chapters 5, 6 and 7, treat of wounds and bruises, the hydrostatic test and the blood test.

Chapters 8 and 9, relate to deodands, flight and forfeiture.

Chapter 10 contains a very valuable condensation of the law of evidence, under the usual heads: competency of witness, primary evidence, presumptive evidence, hearsay evidence, relevancy of evidence, leading questions, proof of hand-writing, proof of documents, &c.

Chapter 11, on the Coroner's courts, seems to exhaust the subject, and the particulars are too long for enumeration. The section in this chapter, "Viewing the Body," will be found of eminent practical value, and the same may be said of the long section on medical testimony.

The proceedings subsequent to the inquest, and the subject of fees, are fully treated of in Chapters 12 and 13, and the appendix furnishes no less than 126 valuable forms required for the Coroner's use. Reference to the work is facilitated by a very good index. In fine, we must congratulate Mr. Boys on having given to the public a work of no ordinary merit, and containing in a small compass so much information on the subject of which it professes to treat.

Not only to the Coroner, but to the medical man and to the Magistrate will the work be of great value. Chapters 1 and 10 contain matter most necessary to be known by Magistrates, and which is scarcely noticed in works accessible to them. We are sorry, however, to learn that only a small edition has been struck off—not more than sufficient to supply two-thirds of the Coroners in Upper Canada, and the price is put far too low to secure a money compensation to the author on such an issue. A second edition we are satisfied must be speedily called for. Parties desiring the work should make early application.

The book is well and clearly printed, and indeed got up in a style equal to English publications, and does much credit to the enterprising and eminent law publishers, Messrs. Chewett & Co.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

GEORGE J. L. SPENCER, Esquire, M.D., Associate Coroner, United Counties of Frontenac, Lennox and Addington. (Gazetted June 11, 1864.)

LLEWELLYN OLIVER, Esquire, M.D., Associate Coroner, County of Simcoe. (Gazetted June 18, 1864.)

REGISTRARS.

DONALD FREDERICK CAMPBELL, Esquire, to be Registrar of the County of Peel, in the room and stead of Solomon Brega, Esquire, resigned. (Gazetted June 18, 1864.

TO CORRESPONDENTS.

"F. W. K." Thanks—shall publish it next issue.

Scribe," and "Wm. Wilde," under General Correspondence, p. 195.