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# UPPER CANADA LAW JOURNAL

AND

## MUNICIPAL AND LOCAL COURTS' GAZETTE;

VOLUME VIII.

## FROM JANUARY TO DECEMBER, 1862.

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

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DIARY FOR JANUARY.	The law of nations is what lawyers term lea non scripta
1 Wednesday Chamberson Taxes to be computed from this day. 5 SUDAY 2nd Sunday ofter Chardmas. 6, Mon lay Epiphany County Court Term begins Surrogate Court Term begins Surrogate Court Term begins Surrogate Court Term begins 1. Chardway The top of School Trustees. 9, Thursday York and Per Winter Assigns commence. 11 Saturday County Court and Surrogate Court Term cods. 12 SUDAY 14 Sanday ifter Epiphany. 13 Monday Reserve Court sits Election of Police Trustees in Police Villages. 15 Wednesday Trusturer or Chardwellou of Municipalities to make setting to Pourd of A differs. 15 Saturday Articles &c. to be best with Secretary of Law Society.	or unwritten law. It is not to be found written in any code or set of statutes. It in this respect resembles the common law of England. Its source is the law of reason. Traces of it may be found in the writings of eminent authors of acknowledged international authority. Where these are silent, reference is made to the conduct and practice of nations. Where this fails, reference is made to the principles of natural justice which are common to all mankind, of whatever language, colour or creed.  No court exists for the administration of this law. No tribunal has jurisdiction, unless by consent, to adjudicate
28. Tuesday Members of County Council to held their first meeting	upon the jarring interests of contending powers. The de-
28. Tuesday Members of County Council to held their first niceting	upon the jarring interests of contending powers. The de-

#### IMPORTANT BUSINESS NOTICE.

31. Friday .. .... Last day for Cities and Countries to make returns to Govern-

Day for Grammar School Trustees to retire.

Persons and elted to the Properture at the Journal are requested to remember that all our past duraccounts have been placed in the hands of Mesers. Pollon & Ardono. Attorneys, Barrie, for collection; and that only a prompt remittince to them will

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

Now that the usefulness of the Journal is so generally admitted at would not be unreasonable to expect that the Profession and Others of the Courts would be end it a liberal support, instead of allowing throwselves to be such for their subseriptions

## The Upper Canada Law Journal.

#### JANUARY, 1862.

#### THE MASON AND SLIDELL CASE.

Questions of right and wrong are of daily occurrence between individuals, and attract little attention beyond the circle of those immediately interested. But where the question raised is one between nations, not only the subjects of these nations, but often the whole civilized world, is interested in the proper solution of the question.

Just such a question was lately pending between Great Britain and the United States of America.

A British mail steamer called the Trent sails from appear to be agreed. Havanna to England. She has on board, among other passengers, two gentlemen called Mason and Slidell. She is intercepted on the sea by a United States vessel of war called the San Jacinto. She is boarded by Captain Wilkes the commander of the San Jacinto, who takes into custody Messrs. Mason and Slidell and removes them to his own The Trent is then allowed to proceed. of the government of the Confederate States, and it is supposed they carried despatches from the government of the I demned as a lawful prize. (Vattel, 339.) Confederate States, but the contents of the despatches are unknown.

The question was whether the conduct of Captain Wilkes was justified by international law or the law of nations.

upon the jarring interests of contending powers. The decision of such questions is too often left to the god of battles.

War is a great evil. It usually arises between two nations. It sometimes extends to several nations: but at all times there are nations which take no part or let in the dispute. These are neutrals. The belligerents have their rights and neutrals have their rights. The rights of the one are the obligations of the other.

It is the obligation of a neutral power in all things to show strict impartiality to the belligerent powers. If she actively favor one of the parties to the prejudice of the other, she is no longer a neutral.

But commerce between nations is not to be stopped because two nations are at war. Commerce no doubt may suffer, but is to suffer as little as possible consistent with the rights of the belligerents.

It is the right of a belligerent nation to deprive her opponent of every thing which may enable her to resist or injure. It is her right to intercept every thing relating to war, whether carried by neutral vessels or not.

In order that commerce may subsist in as great a degree of freedom as consistent with the laws of war, there are certain rules to be observed on which most civilized powers

One rule is that a belligerent may, on the high seas, intercept goods contraband of war, such as arms, ammunition, timber for shipbuilding, naval stores, and even provisions under certain circumstances. (Vattel, 337; Chitty's Law of Nations, 119, 128.). This is a right fully acknowledged by Great Britain. (Barker v. Blakes, 9 East. 283.)

The right to intercept necessarily involves the right to believed that these two gentlemen were accredited agents search. (Vatte', 339.) A neutral ship refusing to be searched, would from that proceeding alone be held con-

> The visitatica must be limited to an inquiry with a view to the seizure of such contraband goods as may be on board, and to ascertain the vessel's neutrality. (Wheaton, 591, note a.)

If the vessel violate her neutrality she is liable to confiscation. (Wheaton, 567; Phillimore, 370)

Of the same nature with the carrying of contraband goods is transportation of military persons or the carrying of despatches in the service of the enemy. (Wheat in, 562.)

Military persons are in the nature of contraband of war. The transportation of a person not upon military service is an innocent act. (6 Rob. 428-9.)

Despatches are defined as "all official communications of official persons in the public affairs of the government. (6 Rob. 65.) But it is not every despatch that is contraband of war. The right to seize a despatch, if it exis s at all, is only to seize when because of its character it is calculated to promote the cause of the enemy. (6 Rob. 457.)

Nor does the mere earrying of despatches, even if hostile in their character, affect a vessel's neutrality. The despatches must be fraudulently that is knowingly carried, or the vessel be specially hired to earry them. (Wheaton, 565.)

What did Captain Wilkes seize? Not goods contraband of war, for there were none such. Not despatches, for were none such discovered. He seized two persons, so far as shown, without any military position in the Confederate States.

The United States has admitted the right in time of war to search their merchant vessels, not only for goods contraband of war, but even for persons in the military and naval service of the enemy; but always denied the right to search for mere subjects on an American ship.

The right which she always denied to others is not one which she could with reason have claimed to herself.

What Great Britain disputed, however, was not so much the right to search as the right to seize. The one was a mere inquiry, the other was an act of judgment. What right had Captain Wilkes to decide upon the liability of Messrs. Mason and Slidell to arrest? Who made him the judge to determine a question involved in so much doubt, and of such international magnitude?

No despatches were found. There was nothing shown to justify a well grounded suspicion. It was said the owners of the vessel knew they were violating international law by carrying these men. If so the vescel should have been seized. The questions involved would in that case have been quietly determined in an admiralty court of competent jurisdiction.

The want of ra international court is a disgrace to our present boasted state of civilization. Courts are constituted for the determination of questions, both great and small. among subjects of the same state. In this way peace is preserved and society is preserved. But where questions arise between contending states-for the want of a properly | affected by recent statutes?

constituted tribunal--appeals are made to armies, reason set aside, and society outraged.

Happily, owing to the prudent conduct of the United States government, war between Great Britain and the United States is for the present averted. We are thankful for the result. Instead of upbraiding the government of the United States for its weakness, all friends of peace will admire its firmness. An error acknowledged is a victory won,—a victory none the less glorious because bloodless—a victory which belongs to neither party but to both-a triumph-not of arms, but of reason and justice.

#### MR. JUSTICE BURNS.

We make room in this number for the admirable address delivered by this learned judge to the Grand Jury at the late Assizes for the City of Toronto.

It is seldom that we find an address so able and so learned delivered on such an occasion. When we do find one such it is a duty which we owe to the profession to preserve it in, and to make it known through, the columns of the Law Journal.

## LAW SOCIETY, UPPER CANADA.

DASTER TERM, 1861

#### ADMISSION FOR ATTORNEYS.

#### STORY'S EQUITY JURISPRUDENCE.

- 1. Under what general heads does Story treat this subject?
- 2. When is a cross bill proper?
- 3. What should an answer contain?
- 4. Give instances of the "Auxiliary" Jurisdiction of Equity.
- 5. How far does Enity interfere in matters of rent?
- 6. What exceptions prevail to the general rule, as to parties to suits?
- 7. What is the right of contribution, and between whom will it be enforced?

#### BLACKSTONE'S COMMENTARIES.

- 1. In what does the right of property con t?
- 2. What are the four chief relations in which persons stand to each other in private life?
- 3. What are the three points to be considered in construing a remedial statute?

#### SMITH'S MERCANTILE LAW.

- 1. To what limitations is the right of an undisclosed principal to sue on a contract made by his agent subject?
- 2. Upon what does the negotiability of bills of exchange and promissory notes respectively depend?
- 3 What is an endorsement in full, in blank, a restrictive endersement, and an endorsement "sans recours," and what is the effect of such endorsements respectively?
  - 4. What is a charter party, and a bill of lading.

#### WILLIAMS ON REAL PROPERTY.

1. What was the effect of a warranty, and how has it been

- hold interests?
- 3. How fir is a covenant affected by a license once given for a breach of it?
- 4. What limitations exist with respect to executory interests in land?
  - 5. What are the requisites of a Will of realty?
  - 6. How may estates tail be effectually barred?
  - 7. Give examples of vested and contingent remainders.

#### STATUTES, PLEADINGS, AND PRACTICE.

- 1. What statutory provisions exist with reference to the Court of Chancery?
  - 2. When will a discovery be enforced?
  - 3. What old forms of bills have the general orders abolished?
- 4 Sketch the ordinary proceedings in a suit in Chancery, from the beginning to its termination.
- 5. When infants are party defendants to a bill, how can the defeated? plaintiff proceed against them, notwithstanding their disability?
- 6. What is necessary in entering an appearance to a writ of ejectment when the defendant intends to set up title in himself?
- 7 In what cases and at what period of the suit has a court or judge power to refer to arbitration compulsarily?
- 8. Under what circumstances will an amendment be allowed at the trial in case of misjoinder of defendants?
- 9 In what cases of replevin is an order of a judge unnecessary before issuing the writ?

### ENAMINATION FOR CALL.

#### TAYLOR ON EVIDENCE.

- I What are the rules relating to secondary evidence, and its reception ?
- 2. Distinguish between evidence, competent evidence, and satisfactory evidence.
- 3. What exceptions are there to the rule, that communications between attorney and client are privileged?
  - 4. What are the rules respecting the right to begin and reply?
- 5. What is the effect of judgments, both as regards parties and strangers?
  - 6. What are the proper functions of judge and jury respectively?

#### STEPHEN ON PLEADING.

- 1. What construction will be put on the language of a pleading which admits of two constructions?
- 2. Are there any, and if so what class of pleas which neither traverse nor confess, and avoid the declaration?
- 4. What is a departure, and what is the first stage in pleading at which it can occur?

#### ADDISON ON CONTRACTS.

- 1. How would an ordinary contract and a bill of exchange respectively be affected by the consideration being partly legal and partly illegal? Give your reasons.
- 2. What will be a sufficient acknowledgement in writing to take a debt out of the Statute of Limitations.
- 3. Mention any contracts which will be binding if under scal, but not otherwise.

#### BYLES ON BILLS.

1. In cases of conflict between the English and Foreign law as | nishment?

- 2. What are the statutory requirements with reference to lease- to bills of exchange, what are the principal rules which are to govern?
  - 2. In what cases may notice of dishonour be excused?
  - 3. What is the general right acquired by the transferee of a bill, and what exceptions exist thereto?
  - 4. When does the Statute of Limitations begin to run in the case of a promissory note payable on demand?
  - 5. If the holder of a bill agrees to renew it when it becomes due, is ne bound to do so?
  - 6 How far is a renewal bill affected by the character of the consideration for the original bill?

#### SMITH'S MERCANTILE LAW.

- 1. What warranties on the part of the insured are implied in a marine policy?
- 2. When does the right to stop in transitu arise? What is its effect on the property in the goods seized? and how may it be
- 3. What is the difference between a factor, a broker, and a del credere agent?

#### STORY'S EQUITY JURISPRUDENCE.

- 1. " Qui priar est in tempore, potior est in jure." Is this principle of universal application in Equity?
- 2. How must trusts be evidenced? and what exceptions are there to the general rule?
- 3. What difference is there in the nature of a contract at Law and in Equity?
  - 4. Give examples of the jurisdiction of "Auxiliary Equity"?
- 5. Under what circumstances may a discovery be compelled, notwithstanding a forfeiture or penalty may result therefrom?
- 6. Mention some of the principles laid down by Story, as to " Equity pleading."

#### WILLIAMS ON REAL PROPERTY.

- 1. How may the estate of a tenant for life be forfeited?
- 2. Explain the effect of the statutes passed in the 13th and 27th years of Queen Elizabeth upon alienations of property.
- 3. Under what circumstances has a specialty creditor priority over a simple contract creditor ?
- 4. How can an interest in a term of years be surrendered?
- 5. Wherein does the Law of Canada differ from that of England as to a wife's dower?
- 6. How far have statutory provisions affected the Common Law modes of alienation of estates.

### STATUTES, PLEADING, AND PRACTICE.

- 1. What discretionary jurisdiction was given to the court of Chancery, by the Act which first established it in Upper Canada?
- 2. How must a defence to a suit in Equity be set up? and distinguish between the present and the former practice.
  - 3. What jurisdiction has Chancery over infants and their estates?
- 4. What is the affidavit of production, and what should it
- 5. In what cases will the Court of Chancery still commit by the writ of attachment?
- 6. What is the present course (instead of attachment) to enforce an award for payment of money where the order of reference has been made a rule of court?
- 7. What must be the nature of a debt to be the subject of gar-

- 8. What is the effect of a verdict for the defendant in replevin! on the single issue of non-copit?
- 9. What is the effect of withdrawing a record, withdrawing a juror, and the jury being discharged, respectively?

#### JUDGMENTS.

#### QUEEN'S BENCH.

Present: Robinson, C. J.; McLean, J.; Bunns, J.

16th Pecember, 1861.

Murray v. Brydges -No rule

Drew v. Finlayson.—Rule refused.

Burke, assignee of sheriff v. Glover and McTavish - Rule to stay proceedings on a replevin bond. Rule absolute

Shedden v. Worthington - Action on a scaled contract to deliver on cars of Northern Radway certain stone, according to specification Payments to be made monthly Pleas: 1. Non est factum; 2. Did not deliver; 3. Did not deliver as required. Verdict for plaintiff; and rule for new trial, on the ground of verdict being contrary to evidence and judge's charge. The judge was dissatisfied with verdict. Rule absolute for new trial on payment of costs.

Vanwart v. Curpenter. - Action on guarantee - Trial at Hamilton, before Hagarty, J. Pleas: 1. Non assumpsit; 2. Goods not goods of plaintiff; 3. After goods delivered, agreed that plaintiff; should give time to creditor; 4. That creditor delivered bills of exchange, &c., in full of debt. Issue. Rule absolute for new trial without costs.

In re Higginbotham and Moore. - Rule on judge of county court of Wellington for a prohibition restraining him as judge of division court from proceeding on claim not within jurisdiction. Plaintiff did not attend, but instructed counsel to attend trial; and objections were made as to jurisdiction, but overruled by the judge. Plaintiff in division court sued for ±25, abandoning £1 3s. 8d Before the six days for moving for new trial, judge give leave to distiff to amend his claim, so as to bring it within jurisdiction of division court. The plaintiff's case, as shown by the first stace ent, showed the action was not within the juri-diction of the division court. The judge then allowed the amendment. It there was any irregularity in granting the amendment, that is no reason for awarding the prohibition, if case now within division that plaintills were owners and in possession of bridge called the court below, case allowed to go on as it now stands. discharged.

Grey v Harding -Trespass. Plaintiff was ejected at a time of great severity of weather. The plaintiff's children were driven to take shelter in a barn, totally unfit to shelter them. There was an appearance of great cruelty, on the past of the defendant, in the way in which the plaintiff and his family were treated dict for plaintiff; and defendant moved for a new trial, or verdict Jones v. Chapman, 2 Ex. 203, case in point for defendant. in favor of the defendant. Rule absolute to enter verdict for defendant on second plea-

Fraser v. Fralick - Ejectment. Trial at Kingston, before Richards, J. Question submitted was, whether deed voluntary or for good consideration. Jury found for plaintiff. Rule absolute for new trial. Costs to abide the event.

Colebrooke v. Corporation of Township of Brantford .- Action for not keeping bridge in repair, by which plaintiff's carriage and horses were damiged, and plaintiff's legs broken Trial at Brant-ford before Burns, J. Defendants pleaded that they had passed by-laws to keep roads in repair, and had employed overseers for the proper keeping in repair of all roads and bridges in the muni-The municipality are the owners of the roads and bridges, and are bound to keep them in repair, and are therefore not like trustees or commissioners, who have only charge of such roads and bridges. 337th section of municipal act requires every repair, and gives an action for neglect of so doing. The verdict, 1 therefore, allowed to stand. Rule for non-suit or new trial discharged.

Swanston and Trust and Loan Company v. Strong - Ejectment. Defendant defended for whole lots and claimed for improvements, but the plaintiff demed the right, and contended that this was not a proper case for assessment of improvements. The jury found £125 for improvements, and £150 for land, being at £6 per acre. Shown that there was no proper survey. Per cur.-The assessment must be set aside, and rule absolute.

Addison v. Burrell - Action of replevin after distress for rent. It the trial the defendant and his witnesses were not present, although subpoenas had been sent through the post office in good The letter enclosing them was not received by defendant until 6th November, and trial had taken place on 16th October in its turn. Rule absolute for new trial. Costs to abide the event.

Harmer v. Goundeck - Trover. Trial at Brantford. Defendant had obtained judgment against Henry Harmer, and sought to attach certain chattels. The plaintift, his son, Robert Harmer, claimed the goods, and under an interpleader in county court. Verdict for Robert Harmer. After this the plaintiff then brought this action. The interpleader is an estoppel. Rule discharged.

Her v Nolan and Fox -Trespass. Motion to enter a non-suit for defendant, or for new trial. The court think the plaintiff ought to be non suited on the ground that the whole of the lot was granted by the first patent. Rule ab-olute for non-suit.

McLachlin v. McHenry .- Rule nist to set aside judgment and all proceedings thereunder, on ground that judgment signed against good faith, after plaintiff's attorney had said that he would not go on with the suit, and on the merits. The motion was nade two years after judgment was signed, and when defendant's lands were about being sold under fi. fa. lands. Rule absolute on payment of costs.

Mewburn v. Street .- Motion on behalf of one Spalding, for leave to appear and defend. Information filed for the forfesture of cermin lande. Rule absolute.

Smith v. Paisley .- Action of trespass. Motion on behalf of defendant for new trial on ground of excessive damages, and on law and evidence; and on ground that case was taken in absence of defendant's witnesses, who arrived a day too late, in consequence of not receiving a letter by post in time. Rule absolute on payment of costs. Costs to be paid within ten days.

Rule Cataraqui bridge, and that defendants were in possession of steamer Comet: that by great negligence, misconduct and want of care of defendants ran their steamer against the plaintiff's bridge, thereby grently injured. Defendants contended at the trial that plaintiffs should show want of care, negligerce or misconduct on part of defendants. Plaintiffs contended that it was sufficient for them to show that defendants' steamer was found drifted against the bridge. Judge ruled that the burden of proof lay on plaintiffs. Plaintiffs took a non-suit; and this term moved to set the non suit aside. The court think that it was sufficient for plaintiffs to show that defendants' steamer was found drifted against the plaintiffs' bridge; and that the burden of proof lay on detendants. Rule absolute to set aside non-suit.

Queen v. Brown - Motion for a new trial, on the ground of rejection of material and admissable evidence on the part of the prisoner. Evidence of Dolan ought to have been received. New trial granted.

Present: Robinson, C. J; McLean, J.; Bunns, J.

21st Debember, 1861.

Wisconsin Bank v. Commercial Bank .- Rule nist discharged. Corporation of County of Lambton 7. Pounsett .- Stands.

Churchwardens of St. George's Church, Ouen Sound v Corporation of Grey et al .- Judgment for plaint ffs on demurrer, with corporation to keep roads and bridges belonging to them in proper leave to move to amend in one month. Plen held had: 1st. Because no justification of trespass without a by-law; 2nd. Because county has no power to pass a by-iaw affecting a road in tic town.

judgment of verification for plaintiff. I tands as to costs.

Chapman v Dubrey - Judgment for plaintiff upon demurrer, only relating to value. with leave to move to amend within one month.

Watts v. Howell -Assignment for benefit of creditors. Held for the debt, merger Rule absolute for non suit. bad on several grounds. Appeal dismissed with costs.

Patton v. Melville. - Posten to plaintif"

Sylvworth v. Paterson and wife -Judgment on demurrer for plaintiff. Writ of revivor proper remedy.

Verdict for plaintiff under 1st count for 1s. Dariages to stand ; for new trial. Vertice for defendant on second count; also to stand. Rule; discharged.

Lucas v. Gzowski -Rule absolute for new trial upon payment for defendant. of costs. Special jury suggested.

Aust n v Suyder -Rute discharged. McLean, J., dubitanet. Ruttan v. Beamish .- Stands.

Austin v. Hewson -Rule discharged.

Watson v. Callaway .- - Rule discharged.

In re Portman and Patterson .- Appeal dismissed with costs. The Queen v. George Ha, vet .- Conviction affirmed.

#### COMMON PLEAS.

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

16th December, 1861.

King v. Dougherty .- Postea to defendant.

King v. Glassford - Action on bills of exchange. Declaration contained common counts. Pleas-payment, and statute of limitations. Defendant objected that plaintiff could not proceed on common counts, as writ was specially endorsed for bill of exchange Case was tried at county court, under an order of judge in chambers Defendant applied at trial to amend his pleading. Judge refused, on the ground that he had not power to do so. Verdict for plaint if with leave to defendant to move to enter a verdict for him. Rule mist for leave to enter a verdict or for new trial, on ground of mi-direction by judge, and on the ground that judgshould have amended pleas Rule discharged. Plaintiff allowed to amend his usi prius record, and judgment for plaintiff on first count.

Fortier v. Wilson -Judgment for defendants on demurrers. No amendment allowed.

Bank of Upper Canada v. Thomas - Action on note. Plea on equitable grounds, that defendant was surety for A. B., an certain issues left to the decision of the court. Verdict should accommodation maker of note, and that plaintiffs gave ac, and the entered for plaintiff on issues under common counts of declatherefore discharged defendant. Plaintiffs demurred. Judgment ration for \$1,325 05, and for defendants on first count. Rule for plaintiffs on demurrer.

Vilure v. Great Western Railway Company .- Appeal allowed.

Jenkins v Wilcock -Action for amount of stock held by defend- ! ant. Defendant demars to declaration raising several objections: one was that a fi. fa. should have been is-ued against the Company to every county through which their road ran. Judgment for plaintiff.

Brown v Osborne. - Action on covenant in mortgage. Defendant pleaded an equitable plea Plantiff demurred Verdict for defendant. Plea bad. Judgment for plaintiff on demurrer. Rule for new trial absolute.

Patterson v. Thomas. - Action against sheriff for a false return. Plaintiff demurred to defendant's plea. Plea held bad. Judgment for plaintiff on demurrer.

Dunkin v Crombie. - Posten to plaintiff.

Turnbull v Insurance Co. of Johnstown District -The rule is strong against receiving affidavits of jurymen. Rule granted for the second and third counts. Indement for defendant on demurnew trial, on condition of defendant paying £400, and costs of former trial and of this application, into court within one month; | dict to be entered for plaintiff on first and third counts

MKm/y Smath - Indigment roll to be amended, and then which plaintiff is to be anowed to take out and defendant to a nead i his pleas, by striking our ail relating to fraud, and retaining those

Allan v. Alexander - Action on promissory notes, for which Hayes v. O Connor .- Rule ab olute to enter verdict for defendant | mortgage was taken. | Defendant pleaded the giving of a mortgage

> Chishalm v Marse .- On looking at the notes of Burns, J , and Higarty, J, the court came to the conclusion to make the rule absolute for new trial, costs to abide the event.

Black v Alcock - Action for slander, that death of plaintiff's infant child, a bastard, was caused by the descriton of plaintiff, Wolderfield v. Metcalfe. - Appeal from county of Elgin Dismissed | its mother. The pleader sets out the anguish of mind and loss of character of the plaintiff, but not that plaintiff was subject to a Billington v. Bustedo -Action against attorney for negligence, criminal charge for desertion of child, causing its death. Rule

Scott v. Millar .- Rule absolute for new trial without costs.

Moore v McLaren .- Action against a shareholder. Judgment

Healey v. Coummer. - Action for seduction. Plaintiff not entitled to recover. Rule absolute for non-suit.

Kerr v. Parsons - Action against executors of Benjimin Parsons. Verdict for plaintiff. Rule to enter non-suit discharged.

Warwick v. Park.-Rule absolute for new trial on payment of costs; and if costs not paid by first day of next term, then rule to be discharged

Wilson v Huron and Bruce .- Application to set aside an award. The affidavirs deny notice to the defendants of the publication of the award. It would have been more proper to have shown that the officers making the affi lavits had no notice, as notice to them would be notice to the corporation. Per C. J .- I am satisfied that Mr. Wilson and his firm were agents for the defendints' attorney, and had notice of the award. Mr. Wilson as either counsel or agent had authority to make the agreement of 17th August, 1861 Swinfen v. Lord Chelmsford, 6 Jur., N.S., followed. Rule discharged with costs.

Declin v Bayne - Action for injuries sustained by plain-tiff, by improper driving of defendant. The jury found for the plaintiff, and that the plaintiff did not turn out. Rule absolute for new trial. Costs to abide the event.

Warwick v. Park -Rule absolute for new trial on payment of costs.

In re-one, &c -On consulting the master the court discovered that the name of this attorney is not on the rolls, and therefore no rule to strike him off the rolls.

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

21st December, 1861.

Brown v. Wythes .- Application to enter verdict for plaintiff, on accordingly.

Morson v. Hunter - Action by the assignee of a mortgage igninst the original mortgagee, on a covenant contained in the assignment to pay the amount of mortgage money tion set out the facts. Defendant demurred to paintiff's declaration, on the ground that the declaration did not show that they endeavoured to collect the amount from the original mortgigor, or that the plaintiff had exercise this remely against the land, and on other grounds. Judgment for plaintiff on demuirer.

Holton v Sanson -First count-trover; second count-that on varehouse receipt, given by defendant to Chrkson, Hunter & Co., for 500 bushels of wheat, which was endorsed by Chirkson, Hanter & Co. to plaintiff, detendant refused to give plaintiff wheat; third and fourth counts. Verdict for plaintiff for \$400. Motion to set aside verdict on ground that it was against law and evidence, and for misdirection in that the learned judge said that the endorsement of receipt would pass the property. Demurrer to rer to the second count; for plaintiff as to first au I third. Ver-

Rutherfield v Storel. - Special case. Questions submitted by the first time. The principles which it inculcates are as ancient defendant to save barmless plaintiff from debts of partnership to a amount of his indemnity, irrespective of debts due to plaintiff 1st question by arbitrator-1s this so, or is the defendant only to pay the balance of his indemnity, after deducting the several amounts due him (the i buntiff); that is, is the defendant entitled to the benefits of the debts due plaintiff, or must be (detendant) pay the whole amount of his indemnity - under his (defendant's) covenant-or only balance. Second-Was the \$1,000 mentioned in the covenant a penalty or liquidated damages. Judgment of court is - 1st. That defendant had no right to take advantage of debts due plaintiff: 2nd. That the \$1,000 is only a penalty. Rule accordingly.

Commercial Bank v. Wilson - Judgment for defendant on demurrer to the replication to the equitable plea.

Bolden v. Jackson. - Question, whether nuctioneer is bound to accept a bid of any one who comes in. Held, anctioneer is not bound to do so. Judgment for defendant on demurrer.

Bull v. Palsgrave. - Rule discharged.

McLead v. Matheson .- Rule discharged.

Austin v. Dickson - Motion to enter non-suit on leave reserved, on the ground that there was no evidence that plaintiff had posression of any land whereby he would be entitled to the use and flow of the stream in question, or for new trial. Rule discharged

Austin v. Shaw .- Same as last. Rule discharged.

Jones v. Jones .- Motion for new trial. Rule absolute on payment of costs.

excessive damages, and on the ground of the absence of a material witness. Rule absolute on payment of costs by defendant Fitch.

Doan v. Warren - Rule n'si refused.

#### CITY OF TORONTO ASSIZES.

ADDRESS OF HON, MR. JUSTICE BURNS TO THE GRAND JURY.

I do not suppose that any one will imagine anything new can be said to a grand jury in the way of instructing them in knows and feels that he himself is assisting in the dispensathe duties which its members are required to perform, and there- tion of justice, to see that it be dealt out with impartiality fore I shall simply content myself with repeating what I have and justness, for upon that impartiality and justness his own on various occasions for something more than ten years past security or the security of those near and dear to him may said to other Grand Juries. This repetition ought not to be possibly at some time depend. It has been the object of thought wearisome by me. n. st, because as presiding over the many, from time to time, while preserving the wisdom of car court in which you are called upon to take an active part, you ancestors, so to modify the use of the people in the adminishave the right to expect proper legal instructions as respects tration of justice as that its use should not be abused. Hence the part you are to perform, and the interests of society; proceeds all the enactments upon the subject of juries which demand it, and it should be always considered a pleasure to have taken place from the Great Charter downward. It is discharge a daty, which one filling a public situation owes to impossible to trace any time when the system can be said to his fellow citizens; and secondly, though I myself may know have been introduced into England, for it seems to be of quite well what should be done by the Grand Jury, yet I must Teutonic origin. Sir William Blackstone says "the truth consider that I am not always addressing the same individuals; seems to be that this tribunal was universally established over the Grand Jury is always the Grand Jury after the requisite | all the northern nations, and so interwoven in their very number is obtained and sworn in, but the individuals compos- constitutions that the earliest account of the one gives also ing that jury are ever changing and varying, and perhaps some traces of the other." some of you were never upon a Grand Jury before and may not be again for years to come.

country which society has established and built up from which the jurisdiction to try the accused is assigned, before time to time for the good government of the whole body, from any one can be placed upon trial. This body is denominated being destroyed or their efficiency from being weakened in the the Grand Jury, and the duty consists in seeing that the affections or good sense of the people, than a pure, impartial, accusation made, is, at least, founded upon something which speedy and equal administration of its laws. It is the prompt warrants and justifies the accused being tried for the offence obedience to, and if it be not voluntary it must be the of which he is accused. The evidence offered to the Grand authorization of enforced obedience to the laws by individuals Jury is evidence of accusation only; it is to be given and which preserves society at large in the free, mutual and heard in secret as your oath has explained to you. The confiding dealings of its different members with each other, accused has no right to appear before or be heard by the

arburator for the opinion of the court. Action on a coverant by as the existence of civilization itself, and it is a subject we cannot too often have presented to our minds. The present certain amount. Planniff says that detendant must pay the whole occasion is one of those where we are called upon to put in practice the maxims deducible from the theory.

> The first duty of every good citizen is voluntary obedience to the laws. So long as we are imperfect beings, it is vain to expect that we can be so perfect in our legislation as that every law will always in every particular instance satisfy each individual. We must bear in mind also that individual interests must be governed by, and must succumb as circumstances may require for the interests of the whole body, otherwise it would be impossible to unite a mass of individuals into a congregate body. The power of altering any law is vested in the people themselves through their representatives in Parliament, and whenever any particular law is unsuited to the community, or injuriously affects individuals vithout being beneficial to the body at large, that power should be invoked and the remedy applied, but individual members of the community should obey the law, though complained of whilst it exists.

If voluntary obedience to the laws always took place neither you nor myself would be called upon to occupy this room for the purpose we are now here assembled, but it is the authoritative enforced obedience required, which occasions one in my public duty to call you here as representing the body of your community to assist in compelling obedience. The protection of life, liberty, and property, forms the spirit and genius of our laws, and when individuals, from misconduct of their own, MrNob v Howland --Rule mist for new trial, on ground that | peril either life, liberty, or property, it is because an offence verdict against law, evidence, and the judge's charge; and for or crime has been committed, and here for the security of society at large, it becomes necessary that the law should be vindicated, that it should stand supreme over all and above all, and that puni-liment should follow, for the double purpose of correcting the individuals guilty of the offence or crime, and to operate as examples to others not to commit like offences. Our ancestors wisely deemed it of great importance that in the administration of the law the people themselves should take a prominent part. An interest is created in the breast of every good member of the community when he

In the administration of the criminal law, every accusation against an individual must first be established to the satisfac-Nothing tends stronger to preserve the institutions of a tion of a body of persons selected from the locality within This is no new idea, nor has this language been now used for Grand Jury, either for the purpose of examining his accuser,

or of offering exculpatory evidence. This you will perceive Justice of the Peice, and he has exercised a preliminary state of facts which would not warrant a commitment of a person in any other form. The Grand Jury was not designed revenge.

abused.

its composition. But the proceedings which are taken upon the County Courts, or Recorder of a city. This enactment them should be essentially different. When the accused is came into force on the 1st September last, arrested and brought before a magistrate an opportunity is In all cases in which you are asked to investigate into crime, privilege of being heard in his own defence."

that the proper position which the Grand Jury fills is that of judgment upon it already, and the matter is then presented being the public accuser. Upon a commitment following your again to the Grand Jury that they may make an maniry accusation, the accused is deprived of the protection afforded, whether the accused should further answer and be put upon him be an examination of the witnesses offered against him, trial; and another, which has never been before any other no depositions are seen, and it is impossible to say in many tribunal, and which the individuals accused may first hear cases whether the accused is entitled to be bailed. From the of when arrested upon the accusation of the Grand Jury. secresy with which the evidence before the Grand Jury is. In the first class the Justice of the Peace cannor dispose of the clothed doubtless arises many of the objections which have accusation without controlling the accuser with the accused. neen made to the existence of such a body at all in the and hearing fully what the accused has to say. In the second administration of justice. There is no doubt that it is open class the Grand Jury may accuse on an enquiry originating in to the eligetion that designing persons make use of the Grand their body among themselves, or upon the representations Jury for their own individual purposes; and I could, if made by others in secret, behind the back of the accused, and necessary, point to cases within my own observation where the first time the accused may hear of it is when he is arrested the Grand Jury was unconsciously made the instrument of by the process of the Court. He is utterly ignorant of the accusation, proceeding from revenge and an unworthy motive evidence upon which it is founded, and thoroughly powerless of stiffing and precenting civil actions and remedies sought to to obtain it. Now, surely there was good and sufficient be entorced. Indictments have been obtained up in a supposed grounds for my telling Grand Juries, seeing the enormous power with which the body is invested, that upon the one hand it behaved them to act with great care and caution in to be converted into the instrument of private capidity or cases which were presented to them for the first time, to ascertain from what motive prosecutions were prompted, to I consider it no derogation to horrow from the labors of discover whether society at large was interested in the inquiry, others in the disquisition of legal subjects and matters and particularly to understand why it was and for what reason connected with the administration of justice any more than was it that the complaints were laid before the Grand Jury for on anything else. That principle is constantly acted upon in the first time, rather than being placed before the ordinary all the various business of life. Each one is ready to adopt channel, that of a Justice of the Peace-and on the other and apply the inventions or improvements of another whether hand, justice and discretion were required in b lancing the in science, arts, manufactures or agriculture. So without scale between a proper accusation and innocence, least the more I will read you a passage from the report of the Grand Jury should assume the functions which properly Commissioners upon the Criminal Code of the State of New belonged to the Court and Jury wh... were to try the guilt of York on the subject of Grand Juries, shewing the extent of unnocence of the accused. The Legislature, during the last the power of that body and in some respects how it may be session of Parliament, has interfered and relieved the Grand Jary in a number of cases from being perplexed with the "Within the sphere of what they consider to be their duties considerations I have just stated. It is enacted by chap. 10 the Grand Jury is omnipotent. Accusations in which the that no Bill of Indictment for any of the offences following, public are deeply concerned may be dismissed without a viz: perjury, subornation of perjury, conspiracy, obtaining question. Indictments may be preferred upon slight evidence money or other property by false pretences, keeping a gamor upon no evidence, and the action of the Grand Jury is bling house, keeping a disorderly house, and any indecent beyond the reach of the laws. From the abuses of which it is assault, shall be presented to or found by any Juand Jury, susceptible and which have been too often practised under its unless the prosecutor or other person presenting uch indictunconscious sanction, it is not to be disguised that its moral mere had been bound by recognizance to prosecute or give power is waning. These remarks are made in no unfriendly evidence against the person accused of such offence, or unless spirit to the existence of this institution but from a firm the person accused has been committed to or detained in conviction that some restraint must be thrown around its accuration. To effect this the first principle that the Commissioners answer to an indictment to be preferred against him for such assume is that the functions of the Grand Jury as an accuser roffence, or unless such indictment for such offence be preferred and as a Judge should be separated. It is not proposed to by the direction or with the consent in writing of a Judge of abridge these powers in respect to the inquiry into the compone of the Superior Courts of Law, or of Her Majesty's mission of crime. These seem to be an inherent element in Attorney General or Solicitor General, or of a Judge of one of

afforded him of answering the charge; a responsible accuser; the evidence to sustain the charge, whether offered upon a bill is presented to whom he may look for redress, if the accusa- of indictment or otherwise, can only be received by you under tion be malicious or unfounded. But where he is accused by the sanction of an oath, so that if any false statement be made the Grand Jury this protection is denied him, and he is before you, the person making such, may be punished for it. dragged before the bar of justice to answer a charge possibly. The oath may be administered by the Foreman of the Grand as false in its substance as it may be malicious in the motive by Jury, but that can only be done during the time the Grand which it is prompted. A course of practice which results in this Jury are assembled as such, and the law requires that twelve injustice is not to be defended upon any principle sanctioned members should be present for the purpose of any inquiry: by the wisdom of the common law. Its theory is that every and, further, it is required that twelve of your number assent man shall have a full opportunity to meet an accusation to any accusation. When an accusation is made against any against him, and it is a violation of that theory that he should one the first inquiry should be whether the accused be capahe subjected to any stage of condemnation without the ble of committing crime, and this involves the question whether the accused be of such tender age, or from mental This passage points to what I repeatedly have brought to deficiency, that capability of committing crime presupposes the attention of Grand Juries, which is this—that in the in act of the understanding and an exercise of the will to do discharge of their duties in making enquiry into crime, two it. Upon this point, however, it is sufficient for you to draw classes of cases will present themselves, one class where the treasonable conclusion from the evidence of accusation, subject matter of accusation has been inquired into before a leaving the further investigation to the jury who are to pro-

nounce upon guilt or anocence. The next isomry is into the rant of the law, and it must also be assumed that every one! understands the effect of his actions. The result of these satisfaction of those who are to pronounce whether there be guilt, that there was no intention of committing an unlawful all question, or fear of contradiction, be thought of as much act.

You will apply these principles to the cases mentioned on the calendar, and any others which may be presented to your notice, and I think you will have little difficulty in discharging your duties.

Since I last sat here the Legislature has separated the City of Toronto from the United Counties of York and Peel, and constituted the city into a county for judicial purposes distinct. from the other. In consequence of the juries being distinct from those of the United Counties, it has been deemed more satisfactory to hold the Assizes for the county at the city, at a different time from the time of holding for the United Counties. Hence the reason for fixing the holding of this Court on the 30th December. The Court for the United Counties will be held at the time fixed by law, viz the 9th January.

One of the duties asked by the Court to be performed by the Grand Jury is to visit the Jail and report upon its efficient ciency or otherwise, and in this report the Grand Jury has a right to bying to the notice of the Court any matter connected with the administration of justice. The Jail used for the city is the property of the United Counties, but by the act for the separation of the city from the United Counties of York and Peel, it is provided that all arrangements in existence on the 1st July last, whereby the public buildings may be used for public purposes, shall continue in force until they would expire by their own terms, and after the Iso July the buildings may be used as the public buildings of and for the city, according to any arrangement which may be agreed upon by the Municipal Councils of the two corporations.

ing to an abeient custom, when any unusual occurrences happen, make a few remarks upon the circumstances of the day ! During the present year, which is now so near its close, we ! have seen a large portion of the North American continent gate at the eason of parturition. For some reason or other convulsed, both as respects the Government of the whole of Lambing Flat became the favourite resort of a number of that portion of this continent, and also as respects the honds. Chinese, and in the latter end of 1860, or beginning of 1861, of society, which has hitherto held the individual members of certain feuds arose between the Europeans and Celestods, that community together. The destruction of the one and which led to disturbances. A determination on the part of the severing of the bonds of the other, presents a sad spect he Europeans to expel the Chinese was evinced at the time tacte to the world, and affords a vast field for comment and we have mentioned, and various steps were taken by the New contrast. It is not for us, however, to speculate on the proba-South Wales G overnment to protect the weaker party, but bilities of the government of the whole becoming again united, without any marked result. In July last the police had or upon the alternative presented, that is of a complete sepa 1 arrested a few Europeans who had been unusually demonstraration into distinct and separate governments. We see the tive in their opposition to the Chinese, and they were confined fact that for months past distinct governments, Ac facto, do a the lock up of the police-station. Hereupon an armed exist, and that both parties are in deadly strife with each organization on the part of the Europeans took place, it order other. So far, we, in this country, have been enabled to be becate the accused. The police numbered about lifty, the keep ourselves free from being mixed up in this strife, and insurgents about three thousand. The parties came to blows, happy will it be for us if this can so remain. But who can! and five or six of the rioters, or "rowdies," as we find them answer the question whether this state of things will or can called, were killed and several wounded, and some three or continue, or how soon our hitherto quiet and happy condition | four of the police were also wounded. This excited the Euromay be terminated?

We are an integral portion of the greatest empire the world charge made. You must be satisfied that there is reasonable, has ever seen-one upon which the sun never sets. Within cause for saying that there has been a violation of the law, the last few weeks we have seen how the North American and that the evidence points to the accused as the person who idifficulties may be complicated by injudicious or indiscrect has violated the law. The next material subject for consideral interference with the affairs of the British empire. Whatever tion is the intent laid or charged against the accused. That | England may consider as necessary to be done to uphold her should clearly appear either expressly or by necessary imply position in dealing with an international question, I am fully ention from the circumstances, acts, and conduct of the ac- persuaded the whole of Canada goes heart and hand with Where an unlawful act is proved to have been every other part of the empire. Should the time arrive-and committed, the legal presumption flowing from that is that it does arrive, it would be an unfortunate thing for all parthe person who is proved to have committed the act intended ties—to evince the feeling by action on our part—there cannot to do it, and it must be further presumed that no one is ignor be a doubt the county of York in Canada, within which the city is situate-as well as all other counties no doubt will do -will consider itself as much a portion of the empire as the presumptions is that it must be east upon the person proved county of York in England; the one will be as ready and to have committed an unlawful act, to make out to the willing to repel a fee as the other, and whatever may be necessary to maintain the integrity of the empire will, beyond interest to the one as the other.

Another matter to be noticed, and I am done. The recent arrivals from England bring us the information that our beloved Queen has met with severe family affliction. It is our duty as good subjects to sympathize succeedy with her Majesty in this her hour of mial. May God grant her health and strength to bear up against her bereavement-that her mind may be calmed to look quietly upon the event as a dispensation of Providence to which others are subject, and to bear on remembrance, that the Almighty never afflicts any of His creatures except for their own good. May she yet live long to reign over the British empire.

The Attorney General of England has refused the judgeship rendered vacant by the resignation of Sir Hugh Hill. The Lord Chancellor has chosen Mr. Mellor, Q.C., and it is said the selection has received the approval of Westminster Hall.

#### SELECTIONS.

#### MARTIAL LAW IN THE COLONIES.

(From the " Isne M gazine.")

In the scuthern part of New South Wales, in the direct line (it cannot be called road) between the township of Yess and Before I leave you to perform your duties, I would, accord the frontier of Victoria, is a small mining district or gold field, which bears the name of Lambin; Flat. It acquired that name, we presume, because it happened to be that part of some squatter's domain where his ewes were wont to ngrepeans to a sort of indignation frenzy. A new "organization"

Flet, and to give this little band, numbering it is said not more than 125 men, a degree of moral force beyond the mere martial law.

This expedient has often been resorted to by colonial governors, especially in the Southern colonies, during the last twenty years. Sir George Grey did so in New Zealand, in 1845; Sie Charles Hotham did so in 1854, on the occurrence of certain disturbances at Ballaarat in Victoria; Governor Gore Browne resorted to the same expedients in New Zealand on the occasion of the celebrated Wirimu Kingi's armed tesistance of the invasion of his mana, or tribal eight, or manorial right, or by whatsoever name it may be called, in February, 1860.

This ready resort to the proclamation of martial law, on the part of four of our governors in three of our Southern colonies, seems to be so repognant to all our constitutional notions, that we propose to devote a few pages to the considerationnot of the policy, but of the legality of the expedient. For this purpose, we have nothing more to do with the merits of the Chinese dispute at Lambing Flat. The land question at Taranaki is equally besides the purpose. The Balliarat riot -serious enough at the time to frighten a Colonial Secretary from his post, and to generate a batch of colonial State trials -has been forgotten in the subsequent orderly state of Victoria, and the greater practical importance of subsequent events: and we only allude to these little great events-little to usgreat, at the time, to the colonies-as an intoduction to the somewhat momentous question upon which we propose to enter. Is the proclamation and exercise of martial law in our colonies legal or illegal?

The governor of a colony exercises a delegated authority. All the power which he worlds and exerts he derives from the Queen. He does not, as we shall see hereafter, exercise all the powers and prerogatives of the Crown, but only such parts thereof as he is authorized to administer. His powers are limited and defined by the instruments by which these powers are communicated to him. Of course the Queen cannot confer upon him powers which she herself does not constitutionally possess. What, then, are the Queen's powers and prerogatives as to the exercise of martial law? because, if she hath none, she can communicate none.

The non-existence of this power in the Crown seems to have been completely settled by the Petition of Rights, (1628;) and on the eve of that great enactment during the injudicious and unpopular Spanish war, (1626.) we find, from a passage in Rushworth, that "the companies of soldiers (who had then recently returned from Cadiz) were scattered here and there in the howels of the kingdom, and were governed by marcial law. The King gave commissions to the lords heutenants, and their deputies, in case of felonious robberies, murders, outrages. and misdemeanours, committed by the marines, soldiers, and other disorderly persons joining with them, to proceed according to certain instructions, to the trial, judgment, and execution of such offenders, as in time of war; and some were executed under these commissions."-Rushworth, vol. i. 419.

It will be observed that these commissions, so far as we can rely upon the authority of "Master Rushworth, a young clerk of the Parliament," were confined to soldiers and marines, who would be subject to the military law in England, and to "other disorderly persons joining with them," who would have been subject to military authority if composing part of law within the realm were condemned as illegal by the Petition | be tried in the King's Courts. The speeches in full will be

was initiated, the results of which was, that the police aban-pol Rights. This great balwark of our liberties, "which every doned the place and retreated to Yass. This naturally alarmed | Englishman carries with him to the colonies as part of his the Government. Troops were sent from Sydney to Lambing | birthright," (Chalmers' Opinions ) commences by reciting the "grevance and vexation" of having "great companies of soldiers dispersed into divers countries of the nation," and of military display, the Governor of the colony proclaimed the inhabitants "being compelled to receive them against their will." It then recites the statute of Edw. III., whereby it is "declared and enacted that no man shall be prejudged of life or limb against the great Charter and law of the land." then complains that "divers commissions had issued, giving to certain persons power and authority to proceed within these lands according to the justice of martial law, . . . pretext whereof some of your Majesty's subjects have been . . put to death, when and where, it by the laws and statutes of the land they deserved death, by the same laws and statutes also they might, and by no other ought to, be judged and executed." The petition then prays that the aforesaid commissions for proceeding by martial law may be revoked and annulled, and that hereafter "no commissions of a like nature may issue forth, . . . . lest by colour of them any of your Majesty's subjects be destroyed or put to death, contrary to the laws and tranchises of the land."

To this petition Charles very reluctantly assented, and it became part of the law of the land. Strictly, however, it enacted nothing new. It was declaratory of the law which had been in existence—we can hardly venture to say in force -for centuries, under a succession of Charters (5 Edw. HL, c. 9, 25 Edw. 111, st. 5, c. 4, 28 Edw. III., c. 3.) which, however, had been habitually violated by succeeding soveteigns, and almost forgotten by the people. This celebrated Act is said to have been drawn by Sir Edward Coke, and, so tay as martial law is concerned, it has never been violated since the "Great Rebellion."

There is a curious anecdote connected with the debates on the Petition of Rights, which further illustrates the subject. In a conference between the two Houses of Parliament, Serjeant Ashley, the King's serjeant, advanced the dangerous and unconstitutional doctrine of the existence of a species of law which he called "the law the State," or "the law of State necessity," (as a justification of the obnoxious commissions,) which proceeded not by the law of the land, but by natural capity. This doctrine appeared to their lord-hips so very mischievous, that, upon the motion of the Earl of Warwick, Ashley was ordered into custody for advancing it. Yet he admitted that martial law was not to be exercised in time of veace, when recourse may be had to the King's Courts, (Parl. His., vol. ii, pp. 315, 329.) This last sentence really defines the state of war and peace. So long as the King's Courts are open there is no state of war. There may be insurrectionthere may be rebellion-but it is not war. But inter arma silent leges; and it is said that when a country is completely disorganized by war, and the courts of justice have been violently closed, or cannot possibly continue to sit, the exercise of martial law becomes legal. But what meaning has the word "legal" in the above sentence? During such a state of anarchy, silent leges, there is an end of all law. What is called the law of the strongest then must prevail. But this is no law at all; and it is fortunate if force, not law, is so used as to become a tolerable substitute for the law which has been silenced, and afford some protection to the people.

The opinions of the best lawyers in the debate on the Petition of Rights, were decidedly against the legality of martial law. They all assert that the exercise of martial law in time of peace is illegal, and that it is only capable of being exercised out of the King's dominions, over military persons the army in the field flagrante bello (Dancin v. Keppel, 2 Wils ) and flagrante bello. They also show that the test of war or peace Yet although confined to persons under the military law within the kingdom is whether the King's Courts are open or when in the field, and therefore, in that day, having some closed, and they lay down the principle that insurrection or colour of legality, the commissions for the exercise of martial rebellion is not war, for if one be taken in rebellion, he must found in Rushworth, vol. ni., app. 81. Here is an abstract of at is of a totally different nature from that which, by inaccu-

common law can determine a thing the martial law ought not / country. prosecution against a rebel. He may be slain in the tehellion, guarantees of personal security and freedom which have been, but if he be taken he cannot be put to death by martial law from time to time, wrested from the Crown by the courage, (Year Book, 28 Edw. H., M. 13) When courts of law are: and sometimes by the blood, of our ancestors, addition to their commissions and they proceeded against some rized by Parliament for the government of the army, is similar according to that power; but because it was not according :- nat, identical-with that which is exercised when our armies to their ancient power it was void, for they cannot do anything are in the field in a foreign country, when our armies according to the additional power, (i.e., power to exercise are in an enemy's country, flagrante bello, the troops are martial law.) and there was a (writ of) prohibition to stay governed by the Royal prevogative. In a foreign country we their proceedings under the additional power. How shall the soldier know how to obey them; they are not under the great scal?"

Mr. Banks said, "We have no time of war when the King's Courts are open;" and Mr. Noy laid down a similar proposition. Mr. Mason, of Lincoln's Inn, admitted that in time of war, when the King's Courts are closed, the common law allows the exercise of martial law when an army is in the field; i but be asserted that a rebel taken ought to be tried by his peers. "We have now," (1628.) he continued, "no army inthe field. We have no enemy except among ourselves, and it is no time of war, therefore the commission (to exercise martial law) is not fit nor warranted by law." Mr. Rolle, afterif the Courts be open, it is otherwise . . . If an enemy come into any part where the common law cannot be executed there martial law may be executed; but if a subject be taken in rebellion-not sharn at the time of his rebellion-he is to be tried after the common law."

discipline of the military, is annually reiterated in the preamble of the Mutiny Act: and every school-boy is taught to liberty: "And whereas no man can be forejudged of life or hmb, or subjected in the time of peace to any kind of punishments within the realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm."

Military law and martial law are sometimes confounded Military law is exercised by the authority of Parliament, and the Munity Act annually passed, together with the Articles of War framed by Her Majesty, and the printed regulations from time to time issued for the government of Her Majesty's troops. Martial law may, no doubt, be established by an Act of Pahament: but what we are now considering is the authority of the Crown in that behalf. Martial law has been established in Ireland by authority of Parliament, and it has sometimes be in proclaimed without such authority. The former is legal, as Parliament is omnipotent—the latter is illegal. Lord Loughborough, in the case of Grant's, Gould, 2 Hen. Bl. 69 draws this distinction very clearly. "Martial law," says that able Judge, "such as is described by Hale, and such, also, as is marked by Sir Wuliam Blackstone, does not exist in Eng and at all. When martial law is established in any country,

they, is called martial law, merely because the decision is by Lord Coke said, "I shall maintain jus lelli, But God send a court-martial; but which bears no affinity to that which was me never to live under the law of conveniency or discretion formerly attempted to be exercised in this country, which was Shall the soldier and the justice sit on one bench? The contrary to the constitution, and has been for a century (this trumpet will not let the crier speak in Westminster Hall was said in 1792) totally exploded." Another century has Non-bene contenual. The time of peace is when the Courts nearly clapsed, and we find the "exploded" expedients reat Westminister are open, for when they are open you may vived in a part of the empire considered, perhaps, too remote then have a commission of over and terminer, and when the to be within the reach of the public opinion of the mother

Drake slew Doughty beyond sea. Doughty's brother desired: Such, then, was the state of the law long before the oldest an appeal to the constable and marslad's courts, and Wrist of the Australian colonies was established. These colonies and the other judges decided that he might there suc. We wook the law of England in force at the date of their establishmake no law. We must not meditate abs lex non distinguit; ment, respectively, "so far as the same was suited to their To hang a man tempore paris is dangerous; I speak not of circumstances and condition,"-which would include all those oven, martial law cannot be executed, (5 Hen. IV., 30 law which we are now condemning, and which Lord Lough-Williamson's case ) The constable and marshal desired an Dorough so clearly distinguishes from the military law authocannot have courts. But even in this case the Queen's regulations are followed as nearly as possible. In the case of Barrers v. Keppel, 2 Wils, 314, the Court said, " By the Act of Parliament to punish mutmy and desertion, the King's power to m ke articles of war is confined to his own dominions. When his army is out of his dominions he acts by virtue of his prerogative, and without the statutes and articles of war, and therefore you cannot argue upon either of them, for they are both to be laid out of the case. Inter arma silent I ges. We think, as at present advised, that we have no jurisdiction at all in this case."

Martial law has sometimes been proclaimed in Ireland without the authority of Parliament. In America, before wards Chief Justice, followed. "If," said he, "the chancery the declaration of independence, the governors were empowand Courts at Westminster be shut up, it is time of war: but ered so to do by a clause in their commissions, since omitted. From these two precedents it may be concluded that, although no power to exercise martial law in England exists, yet t o Crown has such power in Ireland and the colonies, and may therefore still delegate it to lords-heutenant and colonial governors. Let us examine these two opponent precedents. The illegality of martial law, even for the government and As to the case of Ireland, what reader of history does not recall to mind the noble conduct of Lord Kilwarden in the ease of Theobald Wolf Tone? Tone had been taken in open lisp this as one of the constitutional sifeguards of personal tebellion on board a French ship of war. He had been tried by a court-martial under a proclamation of martial law, had been condemned to death, and was actually in the hands of the provost marshal, as the military hangman is called. Curran, in breathless haste, rushed into the Court of King's Bench, then suting, and in Tone's name demanded of Lord Kilwarden a writ of habeas corpus. It was at once granted. "But, my lord," urged Curran, "while the writ is being prepared my chent dies;" whereupon the sheriff was ordered to repair to the place of execution and command the provost marshal to produce his prisoner. The functionary pleaded the orders of his commanding officer, and refused to obey the mandate of the Court. Upon this being reported to Lord Kilwarden, the commanding officer and the provost marshal, with his prisoner, were ordered to be arrested and brought into Court. Tone thus being saved from the rope of the military hangman, was committed to the custody of the civil power for trial, for there was plenty of evidence against him to justify his detention; and he afterwards anticipated the inevitable result of a trial for high treason, by committing suicide in gaok

> Another case in which the dignity and authority of the King's Courts was nobly upheld against military usurpation,

tory to the Chief Justice. These they forwarded to the Lords, gained his first renown. of the Admiralty, by whom they were reported to the King. affair was terminated in November, 1746, by the members of not. the court-martial signing and sending to the Chief Justice a. As the power of proclaiming and exercising martial law is was ordered to be registered among the treords of the Court, irrespective of their commissions? the Gentleman's Magazine for that year.

expressly limited to "times when by lar it may be exercised." coed them, he renders himself liable to an action at the suit But it should be remembered, that before the declaration of of the party injured, and even to an indictment, if the infrastrodence, wars had frequently been carried on between tion of his powers amount to a criminal offence. We proceed the transport of the proceed that the control of the proceed that the control of the proceed that the proceed the proceed that the proceed the "provincials" and the French of New France, without to support these propositions by judicial decisions. forces to any of our plantations in America, if occasion shall execute the laws of Minorea." require, for the defence of the same against all enemies,

times when by law it may be exercised."

through not a case of martial law, but rather of the abuse of when in a foreign colony, and when in the field thinging both, cultury law, deserves a place here. In the year 1746, one. The commission to General Marray, after the compuest of then can't Five, of the Royal Maines, had been allegally Canali, contained a sum of clause but it was dropped out purashed under the senience of a court-martial lawfully hold (sorre the America's troubles commerced. Why? Not the sentence, however, being in excess of the nower of the precise it was illegal, as convenienced, not because it had court. He brought an action against Admiral Ogle, and resobeen allegally executed, not become the people of America covered £1,000 damages. In the course of the trial, Lord had included it among their grievances, not because it had Chief Justice Willes intimated an opinion that every member, ever been used to oppress the people; not, indeed, out of any of the court was hable to an action for the illegal sentence tender consideration for pipular liberty, but samply because Upon this, Lieutenant Pryc issued writs against Admiral the jedous policy of the Government of that day documed it Mayne and Captain Renton, two of the members of the court, wiser to employ regular troops, and even foreign order maries, and they were served with the writs as they were returning than to train angry colonists to the use of arms, and teach from another naval court martial upon Admiral Lestvey, them the art of war. It was under the authority of this clause This was resented "as an insult" by the members of the last (that Washington was converted from a distinct surveyor into named court, and they passed some resolutions highly derogas a provincial soldier. It was in one of the harder wars that he

The whole language of the clause in the old commissions-George II., who signified to their lordships, through the Dake, which will be found printed at length in Broon Mickee's of Newcastle, "His Majesty's great displeasure at the insuit of discrementation Commissions," by, 1772-18 weil offered to the court-martial, by which the multiry discipline as the mode in which it was interpreted and exercised by the of the may is so much affected." But the Land Chief Justice provincial governors, shows that it was not intended to operate was not a man to be overawed in doing his duty, even by the - ind did not, in fact, operate-fevoral the legil powers of frowns of royalty; and as soon as the resolutions were come the King. But if it were so intended, either wilfully or by municated to him, he ordered all the members of the court into misconception, there is no trace of it in any governor's comcustody for their contempt, and was proceeding to uphold the mission for nearly a century. If the King of that day usutged dignity of the Court in a very decided manner, when the v hole a power in the colonies, the Queen of this day certainly does

very ample written apology and submission for their consulet, not expressly given to the governors of the Australian and The paper was read aboud in the Court of Common Pleas, and other colonies, have such governors any such authority,

where it is still to be found, "as a memorial," said his lord. The extent of the powers of the governor of a colony has ship, "to present and future ages, that whoever set themselves been determined by a great number of judicial decisions. He up in opposition to the laws, and think themselves above the us not the general representative of the Queen. He does not law, will, in the end, find themselves mistaken." The pro-exercise all the prerogatives of the Crown. He can only ceedings and the apology were published in the Low on Gt exercise such powers as are delegated to him by his commis! zette of the 15th November, 1746, and will also be found in sion, or in some instance by the charter of the colony, or 1 y Isome equally binding instrument, under the Great Seal of As to the case of the old colonies in America, there can be England, by which alone the Queen can confer powers upon no doubt that the old commissions did contain a clease em, her colonial governors. Beyond the powers thus specifically powering the governors to exercise martial law, but it was conferred upon him, he cannot legally ravel; and if he ex-

much and from the parent state; it was, therefore, considered. In the case of Fabrigas v. Mostyn. 20 State Trials, Governor necessary to give to the provincial governors ample powers to Mostyn had taken upon himself to arrest and banish the levy troops, to command them when levied, and to govern plaintiff from Minorea to the Spanish Main, under an impulathem at all times. Accordingly the governors were clothed tion of alleged treasonable practices. The plaintiff followed with full power and authority to "levy, arm, muster, com-the Governor to England, brought an action against him, and mand, and employ all persons whatsoever residing in our recovered £4,000 damages. The Court refused to set aside province of -, and other territories under your government, this verdict, and Lord Chief Justice de Grey, in the course of and, as occasion shall serve, to march them from on; place to his judgment, observed, that "the governor is the King's another, and to embark them for the resisting of all enemies, servant, his commission is from him, and he is to exercise the pirates, and rebels, both at sea and land, and to transport such powers he is invested with by his commission, which is to

The next case to which we shall refer in which this limitaand to execute martial law in times of invasion and other tion of a governor's power is judicially asserted, is Cameron v. · Kyle, 3 Knapp, P. C. Cases 332. The principle had been laid It cannot fail to strike the constitutional reader, that great down by Lord Mansfield in Campbell v. Hall, Cowp. 210, that care has been taken to confine this power within legal bound- the King can make laws for a conquered colony. The Goveraries. Can it be supposed that the clause was intended to nor of Demerara had assumed that, as the King's representaconvey, what it could not convey, powers which the King tive, he could do so likewise; and he exercised that power by himself has not possessed since the Petition of Rights? It an ordinance increasing the commission of the vendue master, was meant to authorize the governors to exercise one of the or official auctioneer of the colony. The plaintiff brought an royal functions, which, without authority under the Great Seal, action for the excess of commission levied by the vendue he could not exercise—namely, to raise troops, recruit them, master, and the case came before the Judicial Committee move them from place to place, even out of the territorial of the Privy Council. The Committee, in deciding that the jurisdiction, and govern them according to military law—that governor had no such power, said. "The governor has not, by is, by the articles of war when at home, and by the prerogative virtue of his appointment, the sovereign authority delegated to

him; and an act done by him on his own authority, unauthor are to be governed by the Mutiny Acts and the Articles of rized by his commission, or expressly or impliedly by his War. instructions, is not equivalent to an act done by the Crown 3. This military law is distinct from, and therefore not to itself, and is consequently not valid." The language of Lord be confounded with, what is called martial law, which is illegal. Brougham, in delivering judgment in Hilly, Burge, 3 Moore! 4. When the Queen's troops are in the field in a foreign P. C., 476, is to the same effect. "It it be said that the country and flagrante bello, they are to be governed by the governor of a colony is quasi-sovereign, the answer is, that he royal prerogative, does not even represent the sovereign generally, having only the functions delegated to him by his commission, and being to military authority. only the officer to execute the specific powers with which the commission clothes him.'

Numerous eases might be cited in which colonial governors have been sucd with success in the Courts at Westminster for tive of the Queen, and can only exercise the powers lawfully acts done in excess of the powers conferred upon them by delegated to him by the Queen's commission. their commissions, or under an erroneous estimate of their been Governor of Senegambia, for filse imprisoment, attended torse amounts to a double usurpation. with cruelty, the act being in excess of the governor's powers given to him by his commission. The plaintiff, Captain Wall, ! was afterwards appointed Governor of Gorce, and not warned by his own cause of complaint against Governor Machamara, he punished a soldier under colour of military law, but without any regular trial, so severely, that the man died under All Communications on the subject of Davison Courts, or having any relation to torture. Governor Wall, on his return to England, was brought the England, was brought the total to the addressed to The Eddies of the Law Journal, there that there to trial at the Old Bailey for murder, and was convicted and hanged at Tyburn, in 1802. (28 St. Tr. 51.)

This branch of the subject may be appropriately concluded by an extract from the work of a very able colonial lawyer. written before the two last decisions had placed the subject beyond all doubt.

"I cannot close this paper," says the writer referred to, "without making some observations on an expression which provincial biseness has brought into use, and which is calculated to convey very erroneous notions of the powers of the highest officers. It is as true of a constable as of the Lord authorized by the Statute to execute the office of Judge. Chancellor. In no other sense can it be rightly applied to the governor of a colony. None of the peculiar attributes of inherent, perpetual. Those of a governor are derivative. governor is answerable to the King's Courts at Westminster for the suspension or removal of any subject of the King pression such as this should have obtained currency is of itself pregnant evidence of the servility of that class of the colonial society, where it has long been, and still continues to be in daily use."- (On the Functions and Duties of the Governor of

The principles which we have endeavoured, and we trust successfully, to establish, may be thus recapitulated :-

1. The Queen of England has no power or authority to exercise martial law either in Great Britain or in the colonies.

2. Within the limits of the Queen's dominions the army and all persons belonging thereto, and under military authority,

- 5. These rules do not extend to civil persons not amenable
- 6. The Queen cannot impart to a colonial governor powers which she does not possess, and she has not done so.
- 7. The governor of a colony is not the general representa-
- 3. Hence:-the exercise of martial law by the governor of own authority. In Wall v. Macnamara, cited I T. R., 536, the a colony is illegal, and would even be so if such power were plaintiff recovered damages against the defendant, who had included in his commission. Not being so included, its exer-

#### DIVISION COURTS.

TO CORRESPONDENTS.

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

#### THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(Continued from page 262.)

CHAPTER IV.

OF THE JUDGE AND OFFICERS.

governors to themselves and others. We every day hear the governor called the 'King's representative.' Nothing is more many kind as distinguished from regular, that is, the interinaccurate than the expression in the sense in which it is used. Constitutionally the King is the fountain of all office, honour, vention of a jury is not essential; but the determination and power, and each officer of the Government, deriving his of actions between parties and questions of law and fact of his legal powers. This is true as well of the lowest as of in relation thereto, is left to the persons designated or

As we have seen, every Judicial District is separated sovereignity, under the constitutional law of England, are applicable to that officer. The King can do no wrong. Is that true of a provincial governor? The King's powers are original, presides over all the Division Courts therein—not appointed in horsest property. temporary, and dependent on the will of him who conferred specially to these Courts, but the Act points out who are them. Constitutionally, the King is responsible to God alone to be Judges. Sec. 16 enacts that the senior or acting The King is answerable to no human tribunals for the dis-Judge of the County Court of each particular Judicial cretion which he exercises in displacing public officers. The District (County or United Counties) shall preside over the Division Courts therein, and as Judge, therefore, he holding an office of emolument in the colony. That an expossesses the rights and powers incident to the offices—the manner and means by which it is to be exercised, being for the most part specified in the Statute.

Thus the County Judges have acquired two capacities of a British Province, by A. Stewart, Advocate, Montreal, 1832.) distinct natures—have two jurisdictions—the one original, embracing their judicial authority in the Courts of Record to which they are specially appointed; the other collateral, which vests in them the power of hearing and determining causes and suits cognizable in the Division Courts, and the doing such things as are necessary to carry out and give \* And see Glynn v. Houston, 2 Man. & Gr. 207: Weatt v Gore Hol. N P 209; effect to the jurisdiction. But though these capacities

they were vested in two different persons &

That qualifications for office, appointment, tenure and functions, as Judges of the Superior Court, do not come within the present design, but some provisions of the law relating to the office of County Judge must be referred to, as an acting as well as a senior Judge is authorized to preside over the Division Courts. Indeed, there are several functionaries allowed to act-first, the Senior Judge of the County Court, or the Junior Judge of the particular County, the right with both of whom is absolute, not depending upon any contingency; then the Deputy Judge of the County, or a Barrister appointed for a limited time, to hold particular Courts; and lastly, the Judge of any contingencies.

One or two Judges may be appointed to each County (Consolidated Statutes, cap. 15, sec. 2.) The second of these Judges may be a Junior Judge, having the same duties, power and authority as the Senior Judge in respect to Division Courts (ib , sees. 5 and 6), or where a Junior is not appointed, the second Judge may be the "Deputy Judge," having like powers as the Senior Judge. In case of the death or illness or absence of the latter (1b, sec 8.) Both Junior and Deputy Judge act under commission from the Crown, and act in their own right, and of course as occasion requires; but the Judge may depute a Barris-Deputy," as he may be called—or the Judge of another " the illness or unavoidable absence of the County Judge, " the County Judge of the Court of any other County " may hold the Court, or the first mentioned Judge may " appoint some Barrister of the Bar of Upper Canada to "Judge of the Division Court, during the time of his "appointment, have all the powers and privileges and be

centre in the one individual, they remain as distinct as it "subject to all the duties vested in or imposed by law on " the Judge by whom he has been appointed "

> The appointment must not be for a longer period than a month, and notice of it is to be given to the Governor. Sees 18 and 19 contain provisions as follows:-" The " County Judge, or the Barrister so appointed Deputy, "shall forthwith send to the Governor notice of such "appointment, specifying the name, residence and pro-" fession of such Deputy Judge, and the cause of his "appointment" And "No such appointment shall be " continued for more than one month without a renewal " of the like notice; and in case the Governor disap-" proves of such appointment, he may annul the same."

The powers and duties of the Judges acting in the other County-the last three named acting only on certain Division Courts are so numerous and of such a varied character, and are moreover so completely interlaced with the proceedings of the Courts, that it would be inconvenient to treat of them in this place. They will be set out in detail and considered in the future parts of this work, under the heads to which they may be appropriately referred and more properly belong It may be observed briefly, that the judicial authority conferred by the Statute must be exercised in the manner specified and within and yet up to the limits prescribed Houldon v. Smith, 14, Q. B. 481.) That where such jurisdiction is given, and the manner in which it is to be exercised not expressed, the manner and means will be implied by ter to act for him in case of emergency-"the Judge's law, such as exists at Common Law (2 Roll. Abr. 277ib. 260; Com Dig Justices 1, 1); while in matters of County may act. Sec. 17 enacts as follows :- " In case of practice the Judges may adopt and apply the general principles of practice in the Superior Courts of Common Law to actions and proceedings in the Division Courts. (Sec. 69.) That for carrying out the powers entrusted to them by the Act, the Judges are bound to know and take "act as his deputy; and the person so appointed shall, as notice of the Common Law and Statute Law of the country, and of the general rules of practice framed under the Act (9 Coke 30 c.; Br. Abr. Trials, pl. 143; Vin. Abr. Trials, F 9; 12 Mod. 68); and Judges are bound to declare and decide what is the law, and ought not to give a judgment contrary to that, though by consent of parties, nor impose unusual terms between parties, but may fairly mediate an accommodation between them. (Vin. Abr. Judge's D 8; Vern. 479.) When no rule of law exists (said an able writer) a sense or feeling of general expediency, which is in other words common sense, may fairly be applied; but where a rule of law interferes, these are considerations to which a Court of law is not at liberty to

> The subject of the Judge's liability for illegal or improper conduct is beyond the limits of this work, and we would only observe that a Judge acting within his juris-

<sup>\*</sup> The English County Courts and County Courts in Upper Canada have little in common except the name. The County Courts of Upper Canada are Courts of Record of Civil Jurisdiction, as d in addition to their Common Law powers to hold plex in personal actions, have an equitable jurisdiction. They have four terms in the year, and sittings after each term for the trial of issues of fact before a jury. Their process mesne and final directed to Sheriffs and Coroners runs to every part of Upper Canada. The pleadings are written. Indeed, the chief dif ference between them and the Superior Courts at Toronto is a limit in the matter of jurisdiction and a reduced scale of fees to Counsel and Attorney-the practicin both being alike. Our County Courts perhaps more nearly resemble the Court of Common Pleas of Lancaster and the Court of Pleas of Durham. Moreover, each County Judge presides over five distinct tribunals, civil and criminal, besides having an auxiliary jurisdiction in aid of the Superlor Courts, and pis sessing a large special jurisdiction in some cases concurrent with the Superior Courts, in others original, as well as appellate and p-cultur. Such reference therefore, as may be made to English County Court cases must be received with an understanding of the difference between the system of administration here and in England

diction incurs no liability if he mistakes the law or gives wild in their nature, and not serving when reclaimed for food, but an erroneous judgment, or is guilty of any more irregu-

in one of the English county courts, where the action was brought to recover the value of a canary bird; and we at the same time referred to it as a proof that the law took. cognizance of the smallest matters where justice required who supports the view urged for the defendant at the trial, is Mr. that it should do so. We now give below a very long Chitty in his work on the Practice of Law. He there lays it down judgment, the subject of which is a cat; and which, apart from the interest which must be felt in it by the owners of but no action lies for enticing from the premises of the owner, and tabbies, will be read by our subscribers generally, not only and afterwards killing or injuring a cat which is not considered of on account of its relative importance, but for the considerable research it displays.

SERVEN, Firley, October 25th, 1801,

(Before J. J. Levsburg, 1sq., Judge)

#### WHITTINGHAM V. IDESON.

Animals " for a natura" reduced - Right to hell - Measure of daying s.

Reclaimed animals " to report upon are the subjects of civil remedies for property

Held that plantiff having a property in the cat, an action would lie to recover damages for falling it; the no issue of each namings being something levond the market value of the thing destroyed, if the destruction was attended by an cumstances of aggravation.

recover damages for the loss of his cat, falled by defendant, a follow them to he, so that they cannot regain their natural liberty and at the time it was killed was off the premi-es of the defendant about 200 yards from his residence. As regards the facts there is no dispute; but it was objected at the trial that a person can have as he states it, is not altogether intelligible, at all events it is not no property in a cat, or at all events, only a qualified property, so long as it remains in his actual possession; and that the cat in question, at the time it was killed, being off the premises of the plaintiff, he had no property in it at that time, and therefore is precluded from recovering damages for its destruction As regards the latter objection, taking cuts, as some authorities hold, and as was argued by the defendant's attorney to belong to the class of animals ferw natura, yet as they are reclaimed animals, there can be no pretence for saying that, because the cat in question had as was stated in evidence, of returning home daily), it I ad, by so | doing, reverted to its wild state, and thereby divested the plaintiff of any right of property he might otherwise have had in it; it is therefore unnecessary to consider that objection further whether fero naturo, or as other authorities consider them, domitæ naturæ, the point to be decided is, whether cuts being, as well as dogs and certain other animals, what the law terms, of a base nature, by reason of their not being fit for the food of man, are or are not the subjects of property. For if they are, there is no doubt that trespass will lie for killing them, since damages may be recovered in that form of action for any injury of a forcible kind done to anything whatever in which a man has property At common law, no animal, with one or two exceptions, such as horses and other beasts of draught, swans, because they are royal birds, bawks and falcons, "on account of their noble and generous nature and courage and as serving ob vito solatium of princes, and noble and generous persons, and as making them fitted for great employments," is the subject of theft, whether domita natura or fera natura, unless it be fit for food. But it does not follow from ! this that there can be no property in animals which are not fit for food, and that they are not the subject of civil remedies. The reason given by Sir William Russell in his Treatise on Crimes and

only for pleasure, ought not, he wever the owner may value them, an erroneous inegment, or 15 guilty of any more irregu-to be so highly regarded by the law that for their sakes a man larity. (Deens v. Lord Recoglam, I In. and Rel. 309.) should die? This, no doubt, is the true reason why, in a simple state of society, and when all thefts above the value of a shilling were painshed with death, degs cats, terrets and other like ani-We published some time since the report of a case tried mats were excluded from the law of larceny, and not because a person could have no property in them. But what say the authorities on the point? So tar as I know it his never been the subject of a judicial decision in any of the courts at Westminster.

The only sources, therefore, to which we can have recourse for that "Trespass in general hes for taking any animal or bird out of the actual possession of a person who has secured the same; any value in law." He quotes no authority for this statement. and so far as I have been able to ascertain it is wholly unsupported by any. The reason he gives why no action will lie for enticing a eat from the premises of its owner and then killing it is, that it is not considered of any value in law; but if this be so, one does not see why it should be actionable to take a cut out of the actual possession of a person, since the cat must be equally valueless in the one case as in the other. Perhaps, however, by "out of the ! actual possession" he means from off the premises or out of the manual possession of the owner, and that in those cases the action is really for the trespass against his premises or person, and not Therefore, where the plantiff seat strived from the premises and was slot at | for the taking of the cat. If it were not that he gives as a reason why an action will not lie, that a cat is of no value in law, one might inter that he intended that as soon as a cat leaves its · owner's premi-es it ceases to be his property. And this might be good law if cats were not reclaimed animals; but this at all events His Hoxon. - This is an action brought by the plaint of to those authorities who class cats amongst animals feroe naturo gamekeeper. The cut was intentionally killed by the defendant; so long as they have animum revertends, of which the mere fact of their straying from the owner's premises is no evidence to the contrary. This reason given, therefore, by Mr. Chitty for the law clearly expressed. On the other hand, Blackstone, J, in his Commentaries, after remarking that it is not felony at common law to steal such animals ferw nature, though reclaimed, as "are only kept for pleasure, emiosity or whim, as dogs, bears, cats, apes, parrots and singing birds, because their value is not intrinsic, but depending only on the captice of the owner," alds, but "it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action." So also in another passage he says:-"As to those animals which do not serve for wandered 200 yards from the p'aintiff's nouse (being in the habit, food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim or pleasure, though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny." It is clear, therefore, that it was the opinion of Blackstone, J, that there may be a property in cats. In Bacon's Abridgment of the Law it is also laid down, that "an action of trespass hes for taking or killing a dog; because as a dog is a tame animal, there may as well be a property therein as in any other animal." This, though dog only is mentioned, is equally an authority for a cat being property; for cuts and dogs are always treated as belonging, in law, to the same class of animals, and are held not to be subjects of larceny for one and the same But in addition to this passage there is another, in the same author, which clearly includes cats. It is there said, "If a beast or bird which is feræ naturæ, have been reclaimed, this action (trespass) hes for the taking or killing thereof; because there is a property in the beast or bird." Toller in his Law of Executors also says :- "Since the executor's interest is co-extensive with that vested in the testator, the property in all his animals, however minute in point of value, shall go to the executor, as house-dogs, ferrets and the like, or although they were kept Misdemeanors why such animals have been held not to be the only for pleasure, curiosity or whim, as lap-dogs, squirrels, parsubjects of theft is "that creatures of this kind, for the most part rots and singing birds." The description in this passage of the

animals which will go to the executor is almost in the words of Blackstone J, which I have quoted. It is true that it does not make special mention of eats; but there cannot be a fould they were intended to be included under the expression " and the like." Lastly, the Criminal Law Commissioners, one of whom was the present Wightman, J., and two others, the late Mr. Starkie and the late Mr. Amos, both very learned lawyers, and both of them judges of county courts, and Downing Professors of Law at Cambridge, in their first report in observing upon the reason why an mals feet natura which are not fit for food are not the subjects of largeny, although reclaimed, say :- " Inwould seem that the rule upon this subject arose from the circumstance that the antmals above specified, viz , bears, toxes, apes, monkeys, pole-cats, eats and dogs, &c , being unfit for food, were not farmerly matketable and of a determinate value. But they are all now the subject of a civil remedy for property. With this great weight of authority against Mr. Chitty's single dictum, I have no hesitation in giving it as my opinion that a person may have a property in a cat, and, therefore, that an action will lie to recover damages for killing it. There may be circumstances under which it would be justifiable to kill a cat; but it is not justifiable to do so merely because it is a trespasser, even though after game These facts alone were not sufficient, in my opinion, to justify the defendant in killing it. As connected with the question of property in cats, I may mention that cats were looked upon by our ancestors, the ancient Britons, as creatures of intrinsic value, and the killing or even stealing of them a grievous crime, and subjected the offender to a fine. And if the cat belonged to the king's household, and was kept for the purpose of destroying the rats or mice in the royal grammy, it was protected by the following emious law :-"It any one shall steal or kill a cat being the guardian of the king's grantry, let the cat be hang up by the tip of it- tail, with its head touching the floor, and let grains of wheat be poured upon it until the extremity of its tail be covered with the wheat As much wheat as would be required for this purpose was the measure of the forfeiture to which the offender was hab e.

Being of opinion that this action is properly brought, I have next to consider whether the amount of damages claimed, £2, is warranted by the facts proved in evidence. In actions of trespass, unattended by circumstances of aggravation, the proper measure of damages, where any article of property has been destroyed, is the market value of the article so destroyed; but in the case of an ordinary domestic cat, like the one to which the present action refers, it is very difficult to say what is its market value, such cats being seldom sold. There can be no doubt that as a general rule, even in the case of good mousers, a few shillings would be considered a sufficient price. Was then the killing of the cat in question attended by any circumstances of aggravation? Where the measure of damages is the mere worth of the thing injured, the mjury must be unintentional; if wilfully occasioned that would be a circumstance of aggravation, and would justify a jury m giving damages beyond the mere money value of the thing injured. In the present case the killing of the cat was intentional: I must therefore give semething for damages on that account, beyond the few shillings which otherwise I sh uld have considered sufficient; but as the defendant may have thought, in the present not very clear state of the law on the subject, that he was justified in killing the cat for the protection of his master's game, I should not go so far as I should otherwise have done or as I should have done if he had killed it to annoy the plaintiff, or to gratify any feeling of spite or revenge. Under all the circumstances I think if I direct judgment to be entered for 10s. I shall do all that the justice of the case requires. Let judgment, therefore, be entered for that amount.

Balliff.—We have not sufficient space for the insertion of your letter. The question which you put, divested of irrelevant facts, is, however, easily answered. In effect, you ask if the Bailiff of a Division Court can sue the sureties of the Clerk for fees, on the service of summonses and other process, received for the bailiff by the clerk and not paid over. Our answer is that the bailiff can do so. Our authority is Cool y. Switzer, 19 U. C. Q. B., 199.

#### U. C. REPORTS.

#### QUEEN'S BENCH.

Reported by Coulst owner Boarsson, Esq., Barrister at Law.

THE CORPORATION OF THE COUNTY OF ESSEX V. STRONG.

Treasurer-Approximent-Date of bond-Weld land tax.

A municipal connect elected B as their treasurer on the 25th of January and by twee way could not 12th appropriate him, and directed that he should enter an insolutions as soon as he should have executed their cossery board. On the same day they presed a resolution accepting his hand which was stated on the 25th. It but, that no algorithm would be to such bond, as having been executed before his appointment.

H(a) as a other the transmer was clearly hable for defideations in this will find tax, being the proper person to recove it.

(T T. 25 Vic )

Action against defendant as surely for the treasurer of the county of Essex, upon a bond, dated the 26th of bandary, 1854.

The suit was referred to arbitration at the assizes, held at Sondwich, in November, 1859, and an award made on the 23rd of March, 1860, that defendant was in lebted to the plaintiff in £51640s, 11d.

This award was upon defend out's application referred back to the arbitrator, with directions to certify certain facts to the court, to enable them to determine questions of law ruised under the submission.

Among other information thus required was,

- 1. The date of all appointments and re appointments of B as treasurer of the united countres of Essex, Kent and Lambton, of Essex and Lambton, and of Essex and copies of the instruments or proceedings by which such appointments or re-appointments were made by the councils
- 2 A copy of the original bond sued on, with memoranda or any endorsements thereon
- 3. Copies of the resolution or resolutions (if any) of the counties or county council, accepting or otherwise relating to the bond.
- 5. The fund to which the moneys in default belonged.

The arbitrator accordingly reported as follows:

1. The corporation of Essex by by law passed on the 28th of January, 1854, appointed B. treasurer. The by-law recited that the corporation in council had on the 25th of January elected B. as treasurer, and then appointed him, and directed that he should enter upon the duties of said office as soon as he should have executed the necessary band for the due performance of the office.

2 A copy of the bond sued on was returned, dated the 20th of January, 1854, reciting that B was required to give security for the faithful performance of the duties of his office, and more especially for the due accounting for and paying over all moneys which might come into his bands by virtue of his office.

3 A copy of the resolution of the council of the 28th January, 1854, shewing that B, handed in his bond, and that it was reso velthat a certified copy of it be put in the registry office for safe keep-

4 The report shewed that the defalcations were all for wild land taxes for the county of Essex

Prince obtained a rule nest in the Practice Court, returnable in this court, to set aside the award, on the following grounds, among others. 1. That the want of any valid appointment of B. as treasurer for the period during which the defendant was surely, prevented the plaintiffs from recovering 2. That the defalcations alleged were in funds which the plaintiffs were not entitled to recover against detendant.

Conner, Q. C., and M. C. Cameron, shewed cause. Eccles, Q. C., and Prince, supported the rule.

Bunns, J.—With regard to the first objection, the contention on the part of the defendant is that the treasurer should give his bond with surety for his performance of the duties of treasurer after his appointment to the the office, where is it is contended that in this case he gave his bond with surety before his appointment. The facts are, that the council elected Bullock to be Treasure; on the 25th of January, and appointed him, and directed that he should enter on the daties of his office so soon as he should have eve uted the necessary bond. The bond bears date the 26th of January. The council by a by-law dated the 28th of January, formatly appointed Bullock the treasurer, and by resolution of the same date

accepted the band, which had been delivered before then, though them and the plaintiff this note had been taken into account, and the particular time is not shown. Under these circumstances, and with the recital in the bond signed by the defendant, there is no long in the objection.

With respect to the next objection, the whole of the defalention has been found to be the wild land taxes. Scarcely any thing was a satisfy the jury of payment of the note, or of any part of it, and and by the defendant's counsel in support of any objection that, they found for the plaintiff for the note and interest. this was not properly chargeable against M. Ballock. Indeed there could not be any thing urged that would be available, for

With respect to the other objections, they have been discussed in the Court of Common Pleas, in the case of The Corporation of Loca v. Park, and have been disposed at in the plaintiffs' favour Therefore we will dispose of them here in the same manner. 1: have had the advantage of reading the judgment, and I quite concurtherein.

The rule must be discharged with costs.

McLEAN, J., concurred.

The Uniter Justice having been absent during the argument, gave no judgment,

Rule discharged.

#### AARON McDONALD V. JAMES McDONALD AND ROBERT McDox vlo.

Artion under Diction Courte Act by serve from cordifor on securities seized— Plending—Ecolence—Security for c 5/5.

In an action on a promissor, a de, parcello to plaintiff or better, brought in the name of the pid stiff under the Director Courts act see 152 by a p tson who had also aced execution against him in that court defending pleaded quantum other plans that the plaintiff was not the lead holder. It appeared that the note had been a treat by the habiff in the hands of one f<sub>a</sub> to whom the plaintiff had been handed to fine extraction. has handed it for collection

If it that it was not endispensible that the declaration should show the suit to

is easer in such actions to axer and prove a judgment to support the execution but so while that it is not essential.

The r al plaintiff mean for the upon the trist that security for costs has been given as required by sec 151. It no given decidants may move to stay proceedings, or perhaps may plus it in his of the setion.

Quare, as to the wraning of that clause in the statute.

(T. T., 25 Vic.)

on the 1-t of February, 1856, payable on or before the 1st of the fiff might sue as hearer, without setting out the special cir-February, 1859, to the plaintiff or hearer,

The defendants pleaded, 1. Non freerunt, 2. Payment. note, and as such holder entitled to sue for the payment.

Robert, was a brother of the plaintiff.

bearer.

that a hathff of the division court, having two executions from the security for the amount to be levied; "and the plaintiff, when court against the goods of this plaintiff, serzed this note and other the time of payment thereof has arrived, may sue in the name of notes in the hands of one Thomas, to whom the plaintiff had the defendant, or in the name of any person in whose name the delivered them for collection, or, as there was reason to suspect, defendant might have sued, for the recovery of the sum or sums to put them out of his bands merely for the time.

No evidence was given of judgments to support the executions, ben at of the excetion creditors, should tail,

Stite U C, ch 19, secs 151-4.

the seizure in execution, and founding his action upon the statute

2 That he should have proved ju igments to support the executions, or one of them.

3 That he should have proved that he had given security for costs, as the statute directs

allowed for by the plaintiff in a settlement, and thus been paid before the bainfi se zed it in Thomas's hands, with whom it had been deposited by the plaintiff

They called the plaint it to prove that defence, but he failed to

Cameron Q C, obtained a rule nest to enter a non-uit or ver-liet the treasurer is the proper person to receive those taxes for all the on the evidence, contending further that the defendants were for detendants, relying on the objections stated, or for a new trial entitled to a verdict on the fourth plea, which denied that the plaintiff was the holder of the note when this action was commenced.

Rend, Q. C., showed cause, and cited Chitty's Statutes, Vol. III. p. 502; 1 & 2 Vic., ch. 110, sec. 12, (Imperial Act.)

The clauses of the statute bearing upon the question are referred to in the judgment.

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

We think, upon the evidence, the jury cannot be held to have given a wrong verdict, in finding against the defendants upon the plea of payment,

The only question that remains upon the evidence is, whether upon the fourth plea the defendants were not entitled to a verdet. That plea denies that at the time of bringing the action, the plainteff. Aur n McDonald, was the legal holder of the note doubtedly he was not then the holder in point of fact, for the note had been taken out of the hands or his badee upon an execution out of a division court, and was held by the battiff, not for him, but for the execution creditor.

It is unarcessary to set out the other objections, as t'ay will be found in the judgment of the Common Pleas, to which this court

If the it was not indispensible that the desiration shows measure the bought in der the south, but this defendants were cutified to increed on the plantiff we in it in fart the hider and to entire the real plantiff we in it in fart the hider and to entire the real plantiff which will explain the status, to such the name of the nominal process to the following the status to such the name of the nominal process to the following the status associate realized. a sme of the sheroff or officer who seized it. That statute, however, loes not say that it shall be brought in his name, though we take that to be meant, for it is not to be supposed that the payer or endorsee would in general sue on the note for the benefit of the execution creditor and no power is given by that act to the cherist or any one else to sue in his name When the note is one payable to The plaintiff sued on a promissory note made by the defendants, chearer, then, under the provisions we are now referring to, the cumstances which entitled him to sue un ler the a neute.

This note is payable to bearer, and being seized under an Set-off, and, 4 That the plaintiff was not the legal holder of the execution from a division court, by a harbff of that court, we are , to look at the Division Courts Act, Causal Stats U. C., ch. 19, The defendant James was the fither, and the other defendant, sees 151-4, for the authority to sue upon it for the benefit of the execution plaintiff. By the 151st section the bribil, or other The declaration was in the common form on a note payable to officer, having an execution to levy, may seize any promissory note or security for money belonging to the defendant. By section 152 At the trial, at Toronto, before Rollmson, C. J., it was proved the bailiff may hold any promissary note, &c., so seized, as a secured, or made payable thereby "

By section 153 it is provided, that the defendant in the original not any evidence that security had been given for costs, in case cause shall not discharge such suit in any way without thee assent the action brought by an attorney in the payer's name, but for the of the plaintiff or of the judge; and section 151 exacts that "the party who desires to enforce payment of any security seized or The action was brought under the Division Comts Act, Consol. taken as afore-aid, shall first pay or secure all costs that may attend the proceeding:" which I suppose means, what is not stared The detendants objected. I That the plaintiff ought to have that the payer or holder of the note, &c , whose name is to be declared specially, setting forth the particular circumstances of used in the action as plaintiff, must be seemed against liability for costs, if the def adant should succeed in the action. It may, however, mean that the real plaintiff shall make the defendant secure as to his costs, in case the action shall fail, for the person whose name is used may be worth nothing, and he is not in fact the real plaintiff; or it may mean that both are to be secured in the The lemmed Chi f Instice reserved leave to the defendants to costs, for the expression is very general-that the person who move far n usua on any of these objections, or to enter a verdict descres to enforce payment (who may be eather the builffor the for defendants on the barth plea, and the defendants then went execution plaintiff.) "shall first pay or secure all costs that may into evidence to prove that in the course of transactions netween attend the proceeding." The provision has not been carefully

framed, for as the amount of costs can not be known till the suit begun-aithough they may be secured.

But first, as to the defendants' right to a verdict on the fourth; which was given in support of the action in the payer's name, the said jult by the said city of London. those facts should have been replied which gave the right under tion, as the defendants indeed contend they should have been.

necessary to prove a judgment to support the execution, though it would be safer to aver and prove the judgment in such a case, as the legi-lature has not dispensed with the necessity.

With respect to the real plaintiff being bound to make it appear? upon the trial that security had been given for costs as the statute had not been given, the proper course would have been to stay and receive payment therefor. proceedings till it had been given. The Common Law Procedure Act, sec. 265, being a provision in part materia, though regarding proceedings upon seizure of securities under executions from higher courts, says that the sheriff shall not be bound to sue in such cases unless he is indemnified as to costs. Under that act the sheriff clearly might waive security if he chose. The section 154 of the Division Courts Act, it may be urged, means nothing more, but the question applies differently under the two statutes, and in reason the recurity in such a case as the present may, we think. be insisted upon, and perhaps the want of it might be pleaded, with proper averments, in bar of the maintenance of the action.

This provision, as to costs, farnishes an argument in favour of what has been contended for, that when a scenrity is being enforced under these clauses in the Division Courts Act the record ought to disclose it, in order that both parties to the action may be aware of the special facts, which otherwise they might not be.

Upon the whole, however, admitting that it was not in bepeasable that the declaration should have set forth the special facts, showing that this was an action brought under the 152nd clause of the act, yet it was necessary in our opinion, when the defendants denied that the plaintiff was holder of the note, which must mean, in this case what the same plea would mean in any other case, that the plaintiff should reply in such a manner as would show the purpose for which the action had been brought, and which gave authority to use the plaintiff's name without his privity, and not for his benefit.

But as this, so far as we know, is the first occasion that has arisen for discussing the provisions of this statute, we have made up our minds that although in strictness the defendants' main objection is entitled to prevail, we will not conclude the plaintiff. but will direct that a new trial be had on payment of costs by the plaintiff, with liberty to him to amend his pleadings as he may be સલેકાંક્ટલે.

#### GLASS, SHERIFF, V. WIGMORE.

Conveyance of prisoners to Pententary

It is the duty of the sheriff of the county in which a city is, an i not of the high banisfing such city, to course to the pointentiary p isoners sentenced at the Re corder's Court. (T T. 25 Vic)

This action was brought by the plaintiff against the defendant to recover a sum of money which the plaintiff alleged the defendant had received for the plaintiff's use, and by consent of the parties, and by order of a judge, according to the Common Law Procedure Act, the following case was stated for the opinion of the court:

The plaintiff is and has been since the first day of September. A.D., 1853, sheriff of the county of Middlesex, and has since biappointment had the one of the jail of the said county, and the appointment of keepers thereof.

The defendant is high bailiff of the city of London, duly and regularly appointed.

There has been a recorder's court established it and for the said is at an end, they cannot be first pand—that is, before the suit is city, and a recorder for the said city duly appointed, who presides at the sittings of the said coart.

The jud of the said county of Middlesex is used as a jail for the plea. We think he was entitled to succeed on that issue, for in said city, a d prisoners are committed thereto by the mayor and fact the plaintiff was not the holder at the time of this action; and other magistrales for the said city, the council thereof not havto entitle the execution creditors, or the builiff, to give the evidence my directed otherwise, and an annual sum is paid for the use of

The detendant has, whenever the said court is in session, by the the statute to use his name, though he was not the holder of the order of the court, taken the prisoners committed for trial at the note or the special facts might have been set out in the declara- and court from the soid juil to the court, and when presoners bare theen sentenced by said court to be impresented in the previncial As to the other objections. I do not at present think it would be penitoutury, has upon receipt of the commitment conveyed them to the such penitentiary, and his charged and received proment therefor, which has been paid by the provincial government from the fund for the administration of criminal justice.

The question for the opinion of the court is whether the sail defendant had the right to take the said personers to the court for directs, we apprehend that was not necessary, but that if security treal, and when sentenced to the pennentury to convey them there

> If the court shall be of opinion in the negative, then judgment shall be entered for the plaintiff, and costs of suit.

> If the court shall be of opinion in the affirm a ive, then judgment of non pros, with costs of defence, shall be entered for the deten-

> Barns for the plaintiff, cited Consol. Stats U C., ch. 54, secs. 391, 367, 379, 401, 420; ch. 31, sec. 132 sub-sec. 4; ch. 126, sched.; ch. 127; Consol. Stats. C., ch. 111, sec 11; Rex v Weir et al., 1 B & C. 258.

> M. C. Cameron, contra. cited Consol. Stats. U. C., ch. 55, sec. 177, et seg ; ch. 31, sec. 138.

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

We me of opinion that while the law remains on its present faoting it is the sheriff of the can ty in which the City of London is, and not the high brilliff, who is to convey to the penitentiary the prisoners sentenced to that prison by the recorder's court of

The legislature would probably, in reviewing the subject, not think it expedient to change this arrangement; but whether they would or not the Penitentiary Act, as it now stands, ch. 111 Consolulited Statutes of Canada, it appears to us, commits the duty elearly to the sheriff, and the chapter 120 of the Consolidated Statutes of Upper Canada provides that the sheriff shall be paid for such duty, when it is his duty, and when he has done it

The 12th section of the statute, ch. 111, (Consol State, C) it is true is confined to convicts sent from Lower Can ela, but it equally serves to show the intention of the legislature, for there are local ballitis in cities in Lower Canada as well as in Upper Canada; and the 18th clause is not confined to Lower Canada, but applies to the whole province, and shows that the legislature intends that the sheriff of the county in which the city is, is the officer who is to have the powers necessary for carrying the prisoners through all parts of the province to the penitentiary.

Our judgment is for the plaintiff.

Judgment for the plaintiff.

THE BUFFALO AND LAKE HURON BAILWAY COMPANY V. THE Corporation of the Town of Goderica.

Hirland - Assessment - County, State U. C ch, 55, sec. 3.

fand covered with the witness of a burbons is not encable. 11-1d ther fire, that the Buffels and Lake Huron Reilway Company could not be mard for the Goderich Harb ur.

This was an action brought to recover \$254 for taxes collected by defendants from the plaint. Its for the Goderich Harbour, for the year 1860, and a case was stated for the opinion of the court. m substanc - as follows :---

The Canada Company, under the act of Upper Canada 7 W. IV. ch 50, acquired a right to improve the Goderich Herbour, so as o make it assignable for vessels, and by that act, on the burbony being so rendered unvigable and fit for the reception of vessels frementing the same, were enritted to era t tolls at certain rates prescribed on all such vessels and the goods contained in them

That company having in ole certain improvements in the said harbour, by an indenture heating date the 14th of June, 1858 made between them and the plantiffs, under the authority of 19 Vic. ch. 21 agreed to sel, the plaintiffs the said burbour and the premises connected therewith, to be improved and held by the plantiffs on the terms specified in the said colenture, and used by them in connection with their radway. The plaintiffs by this indentare conveninted that they would not use or exercise any power vested or to be vested in them under the said indenture, or by act of the Provincial Parliament, or otherwise to raise, levy or collect any toll or talls up a vessels using the harbour, except such talls as should be necessary for repairs lights, and police, for the period of litteen years from the Oth at October, 1858, and they have never imposed any tolls on goods or vessels frequenting the harbour, nor have they ever derived any revenue therefrom.

In the assessment of 1863 the corporation of the town of limit of the fown at the value of \$10,000, and the annual value at \$2400, being at the rate of six per cent, and rating the tax on the whole value on at \$251, which the plantiffs have been compelled

to pay by distress upon their property.

tax that portion of the harbour composed of land covered with water, which they have done, and that they are entitled to recover the same back from them. The parties agree that if the court should be of opinion in the affirmative, then judement shall be freehold entered ng finst the defendants for \$254 and interest, from the 13th [ of November, 1866, and costs: if the court should be of a contrary opinion, then judgment shall be given for the defendants with

F. B. Wood, for the plaintiffs, cited Great Western R. W. Co., v. Rouse, 15 U. C. R. 1682 Manierpality of London v. Great Wistera R W Co., 16 U C. Q B B 500; In ce Tre G ent Western R W Co., 4 U C. L. J 23; 7 W. W., ch. 53; 19 Vio., ch. 21.

Light and Coke Co., 1 B & C 500; Rex v. Brighton Gos Loghe 11 East 6:11; Rex v. Rochdale Waterworks, 1 M & S. 1131; Region, of vessels as commonly havigate Lake Huron. The company were v. Combridge Gas Light Co., 8 A. & E. 74; Regina v. West Middlesex Waterworks Co , 32 L T Rep 388; S. C , 28 L J M 135; E'ectric Telegraph Co. v The Overseers of the Pour of the Township of Salford, 11 Ex. 181; Regina v. Eist London Waterworks Co., 18 Q B 705; Chel ea Waterworks Co. v. Bowley, 17 Q B 3'S; Repna v. Southwark and Vauxhall Water Co , 6 E & B 1008; Lewis v The Town of Suansen, 5 E & B 508; Regina harbour as such on the prosecution of the Overseers of Bishopwearmouth v. Earl of Durkim, 5 Jun. NS 1806 ; S C , I L T. Rep. N S 30

McLean, J .- By the Consolulated Assessment Act of Upper Canala, ch 55, sec 9, at is declared that all land and personal the 7 W. IV, ch 50, or any act of the parliament of this province, property in Upper Canada shall be liable to taxation, subject to upon vessels using the harhour, except such talls as shall be necescervain exemptions, and by the 3rd section "the terms "Land," "Real Property," and "Real Estate, 'include all huildings or from the 30th of October, 1858. other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of and all mines, in nerals, quarries and tossis in and under the same, except mines belonging to Her Majesty". This I should think must be taken to show with sufficient clearness that water on the for the harbour sthat is, that part of it which is comprised of water. surface of the ground is not considered as part of the realty, and The question is whether the harbour qua hurbour is within the that wherever land is covered with water it is not such "land," " real property," or "real estate" as is declared by the statute to be liable to taxation. The waters of the river Maitland, and of the lake adjoining its outlet, which are constantly flowing in and out of the harbour, must have some bottom to support them, which must be called band for all purposes except tax ition, and I imagine that ressels in the harbour would sencely be considered aground wh a floating in the water ten feet deep over the land.

The waters of the river and harbour every man has as much right to a the detendants and they are entitled to be used as a public highway by any one who has occasion to enter the harhour of Goderich with a heat of ressel. How then can the water and the Land upon which it flows form a part of the harhour, which it

be taxed by the corporation of Goderich, for whose benefit, amongst others, it is to be improved! In granting the barbons to the plantiffs, the land and water must necessarily go together, and it would codeed be strange that bin I which could not possible be applied to any other purpose but to sustain the water necessary to constitute a harbour should be segmented from the water and looked upon as land only for the purpose of taxation. It is not because the land covered with water is granted to the plaintiffs, and they at some period may derive advantage from the harbour, which must be composed of both land and water, that the plaintiffs should be subject to taxition on land only. It is not for the use of the land that parties may be called upon to pay tolls, but for the use of the land and water together, and the advartages derived from the construction of a commodious harbour where none such existed before

The cases cited by Mr. Richards on the argument do not, as it Goderich assessed all the portion of the harbour lying within the appears to me, apply to a case like the . The harbour is not of an arrificial character, but has existed by means of the outlet of the river Maitiand at that particular place and may be greatly improved by improving that outlet and increasing the depth of water. When that is done a different question entirely will be presented The plaintills contend that the defendants were not entitled to from that to which most of these eases refer, and the question unist be how much land have the plaintiffs in occupation in the harbour of Golerich, including all piers, buildings and premises necessarily forming a part of the harbour, but being a part of the

> There is in my mind no doubt whatever that under our present Assessment Act the water-covered part of the land cannot be texed is part of the land, and cannot be looked upon apart from the Water for the purposes of taxation.

Judgment must be given for the plaintiffs.

Bunns, J -It appears that in the year 1835 the Government leased the water lots around the harbour to the Canada Company, and then in 1837 the legislature passed the net 7 W 1V., ch. 50, Rachards, Q. C., tor defendants, cited Rex v. Beem ugham Gas, authorising the Canada Company to improve the harbor at Goderich, in such manner as should render it accessible to, and fit, safe, and Coke Co., 5 B & C 466; Rez v. The Corporation of Bith, and convenient for the reception of such description and burthen authorised to levy tells not exceeding a certain amount. The legislature also reserved leave to the pravince to purchase the harb ur from the company after the expiration of thirty years.

It does not appear that the Canada Company ever exected any tolls at all, and during all the time that company has been pas--essed of the hubour no taxes have ever been imposed upon the

In the deed of the 14th of June, 1859, by which the Canada Company has transferred the harhour to the plaintiffs, under their charter, the plaintiff are bound to levy no more tolls, either under -uy for repairs, lights and police, for the period of fitteen years

Now that the harbour has passed into the hands of the railway company, the corporation of the town of Goderich assume the right the realty, and all trees and underwood growing upon the band, to tax it for municipal purposes. They have assessed all the land and water lots, whorves, &c , against which the railway compray make no complaint, but it a company conclains of being assessed me ming and intention of the A-sessment Act, th 55, of the Consoli lated Acts of Upper Canada.

The argument for the defendants' assumption is, that the land, though covered with water is still land, and comes within the meaning of the 9th section of the act, and notwithstanding that the public has an easement in the use of the water covering that land, yet, as the plaintiffs might exercise a right to exact tolls from the owners of vessels, or owners of produce or goods who use the waters, so the defendants may tax that land, taking into consideration the plaintiffs' right to impose those toils.

My opinion is that the legislature never intended, in the language they have used, to go so far as that. They have told us in the third section what the term land shall include. First, they say vessels are entitled to use in the pursuit of their ordinary business, that it shall include all buildings or other things created upon or and the land be the separate property of the plaintiffs, subject to affixed to the land, and all machinery or other things so fixed to

any building as to form in his part of the realty. So for the ever court costs to the plaintiff, and that the tixation should be recessed portion of the water and make dry hand of it, and erect buildings being within the jurisdiction of the division court thereon with machinery, such would become liable to taxation. Then the legislature goes on, and declares that all trees and underwood growing upon the land shall be included within the term. visible and tangible. Then comes the expression, that it shall include all mines, minerals, quarries and tossils in and under the same, except mines belonging to her Majesty. This last shows the desire that lands made profitable in the use for such purposes should be taxed, but still it is all the time carrying out the same idea, that the land intended to be taxed is something that is visibie and tangible. I have no doubt it it were discovered that a valuable mineral could be obtained at the bottom of the harbour, and means were devised either to exclude the water in working for it or otherwise it would be subject to taxation, but then that would not be upon the ground that it was land covered with water, but it would be because the mineral was extracted from it, and it would be the inmeral which would be taxed, and a d the land qua land, and it would be so because the legislature has bee ared that the expression land shall metude minerals. I do not think it would make any difference in taking such things from under the surface. whether it came through a body of water or through land, in order to get it to the surface, for the purpose of bixation

In the present case the land at the bottom of the harbour is not and cannot be used, so tar as disclosed, unless it is for the anchorage of vessels. The right to impose talls is not said to be for anch rage, nor do I suppose such a thing ever entered the mind of the legislature, but the right is given to impose tolls for the use of the harbour by vessels, and we must understand that to mean the use of the water and not the land, unless we go back to the days of the ancients, when they frequently, to avoid storms, or for other purposes, drew up their ships at pleasure upon the land on rollers; or adopt the story of the Argonauts who it is said by so he transported their ships by land from the Black Sea across either to the Baltic or North Sea.

The legislature has defined what was meant by land, and there is no mecessity for our extending that meaning in any way by the application of legal doctrines. The mentioning of mines, minerals, tossils, &c., convince me the legislature never intended to tax the use of water.

The defendants have acted upon a false principle in supposing they could tax land of no earthly value except to susport the water upon it, because that water may be made useful in commerce Nothing was e sier than for the legislature to have said that harbours should be tazed, if it were intended to be so, and it nothing had been said in defining what should be considered as and, the argument might have been much stronger in the defendants' favour.

I think that judgment should be entered for the plaintiffs.

The Cuter Justice, having been absent during the argument, gave no judgment. Ju igment for the plaintiff.

#### COMMON PLEAS.

#### Geroux v. Yager \*

Oists-Penal judgment without a trial-Order for full oists-Jurishction.

Where hard judgment is admined without a trial a judge in Chambers has power to make an order or ful costs

Quarr-Should the order be expuried. Where a cutter is decided by the award of an arbitrator, the cause is one proper for an applicate nof the kind The order may be mad . unless it appear that the cause was one which the plan-

tiff was bound to see in an interial court,

A plantiff to order to his the cause within the juri-diction of an inferior tribu-nal is not be und to give credits. It is is privilege to do so, but there is no legal obligation upon him to do so.

Wallbridge, Q. C., obtained a rule nisi to set aside an order made in this gaine by McLean, J., for the faxation of tail county

dence of meaning is plain, that and, with what is upon it, is some and the defendant be allowed his costs against plaint. If, pursuant thing time ble. I have no doubt, if the company should fill in a to the statute in that behalf-the debt such for in this netion

From the affoliavits file t on both sides it appeared that this action was brought in the interior jurisdiction for an amount claimed by the plaintiff, as amounting to upwards of £36, the thus carrying out the idea that the term, so far, means something principal dem of which was thisty seven weeks' board and washing arrounting to £22 fee. 3d. The residue was made up of mall charges for buy and grain, day's work, use of team, pasturing &c.

The defendant advanced a set-off, in which he claimed Ltd 165. ad; the largest items being a pravissory note, £10 15-, 9d; nine head of cuttle and six sheep, £10 bs. 3d.; a stack of hay, £7 10s. The residue of the charges were similar in character to those made by plaintiff.

The action was referred to arbitration by a judge's order. made 1st March, 1879; costs of the action to abi e the event of the award; costs of reference and award in the discretion of tho arbitrator.

The arbitrator awarded that the defendant should pay the plaintiff £1 11s. 7d. in tall satisfaction of the plaintiff's claim, being the balance due him after deducting the detendant's set off, and that the defendant should pay the costs of the award and of the reference after taxation of the same, and £7 10s arbitration tees, and Li for densing award.

On the 11th July Barns, J., made an order to tax a counsel feat of £5 to the plaintiff on the proceedings before the arbitrator.

On the 23rd July, McLean, J., made the order companied against, as follows: -" Let the master tax to the plaintill in this cause full county court costs,

The defendant in his affi Livit swore that the plaintiff's account was what is usually called a trumped up account, such as charging day's work done by farmers, when the same had, in fact, been returned. That this being the nature of the plaintiff's account, when such items were proved they were struck out. It was tarther sworn that the order for county court costs was granted without notice to the defendant, and that the costs originally were taxed at £37 5s. 4d.

The plaintiff put in a sworn copy of the notes of evidence taken before the artificator, by which it appeared that each party gave, apparently, all the evidence in his power to prove the various items in his respective account; each seemed to have given in evid ace that which had been settled or paid for by the other side.

But the plaintiff and his attorney swore, and the notes of the evidence gave support to their statement, that the defendant endeavoured to make it appear that the promissory note held by him was given in a balance due, after all the plaintiff's demand had been allowed for, against the rent of the premises of which darntiff was tenant, and that plaint if was obliged to prove this payment of the residue of the rent. Lot per annum, exclusive for which the note was given; and then to shew his account, otherwise proven, was independent of any claim for rent due to defend. ant, so that in effect the plaintiff was obliged to give evidence of the account, and of the payment of the greater part of the rent as his side of the account,

J B Read shewed cause.

DRAPER, C. J - Upon the merits I do not see any ground to warrant on determining that the plaintiff should not have county court costs.

The amount stated to have been taxed certainly appears large. The armirator's fees, however, and the charge for award amount to £8 10 . , and a judge's order for a counsel fee of £5 was made, which indicate that in his view at least it was not a division court case; and from the notes of evidence it appears the arbitration occupied two days, and that nice witnesses were examined for the From the expression in the affi favit "originally taxed" there has probably been a revision, at all events it is not the amount of costs that is in question, but the scale by which they are to be ascertained; and so far as the merits are concerned, I am not p epared to differ from my bother McLean in ordering county conri costs.

Then the only sucction is as to authority

The jurisdiction of the division court extends to all cases of debts, accounts, breach of contract, covenant, or money demand.

We can find no report or this case among the cases reported in the sufficiency series of the Common Leanth reports. Probably the dependent of the case of sufficient importance to path shift. But knowing that it often retor ed to though long some decided we have with the permission of the taxing master of the court, procured a copy, and now give it to our readors.

might be brought in the division court, if the demand were not courts above £25, whenever he shall claim or demand only the bal in e or sum of £25, may, on proving his case, recover to that amount only

right granted to defendant to insist that the plaintiff shall give it he would not have failed by reason of the necessity of going into credit for any set off which the defendant may or may not choose an inquiry exceeding the juri-diction; and I have already said I to advance, and to submit to the judgment of the court.

53) enects that if any action be presecuted in any county court or excess, or to give credit for a cross demand of the defendant in su, crior court for a cause which might have been entered in a order to bring the case within the division court. division court, and the plaintiff shall obtain judgment for a sun! within the jurisdiction of the division court, no more costs shall be first instance an order to tax county court costs could go on an taxed against the detendant than would have been incurred in the expacte application, for want of a statute or rule of court such as division court, unless the judge who presides at the trial of such there is in regard to actions apparently of the proper competence action shall certify in open court, immediately after the verdict is of the county court, but brought in the superior court, I think the recorded, that it was a fit o use to be withdrawn from the division | plaintiff was, on the facts shewn, entitled to have county court court and commenced in such county court or superior court, with a provision for taxing the costs of defence, and allowing them charged. to be set-off against plaintiff's cos's in such cases

This case, from the fact of the reference to arbitration, does not fall within the toregoing section. There has been no trul before any judge of either of the superior courts, in the inferior jurisdiction of one of which this action was brought.

Rule No. 115 of Trimty Term, 20 Vic., orders that in any action of the proper competence of the county court, in which final judgment shall be abtained without a trial, and in which the papers shall not be marked "inferior jurisdiction," no more than county costs! shall be taxed without the special order of the court or a judge.

This rule became necessary in consequence of the statute 13 & 14 Vic. cap. 52, which gave plaistiff a right to institute actions within the jurisdiction of the county court in the superior courts, at the costs allowed in the county court, provided the papers were marked "interior juri-diction"

If, therefore, this case be within the jurisdiction of the county court, it is properly brought in the interior jurisdiction of the Court of Common Pleas; but as the papers are marked "inferior v. The Bink of Toronto, 10 U. C. C. P. 32, the decision in the jurisdiction," the order granted is not within the meaning of this | Court below must be reversed.

The rule No. 168 of Trinity Term 20 Vic., orders that in all cases unprovided for by statute or rule of court, the practice as it existed in the superior courts before the passing of the C. L. P. Act, 1856, shall be followed. But I find no rule of practice as to the allowance or disallowance of division court costs whe e final judgment is obtained without a trial, and where the action being of the proper competence of the division court, has been brought in the superior court, and the papers marked "inferior jurisdiction" So that as far as I perceive the only rule touching the case is No. 154 of Trinity Term, 29 Vic., which provides that the practice of the court- and the services to be aboved for in all pr ceedings in the taxation of costs, shall be governed in all cases not otherwise provided for by the established practice of the Court of Queen's Beach in England.

There is, strictly speaking, no established practice in England upon a que, tion like the present; but some analogy may be found to exist in interpreting our own acts. Thus, under the English statute 9 & 10 Vic. cap. 95 sec. 129, by which if any action shall be commenced in any of her Majesty's superior courts of record for any cause other than those lastly hereinbefore specified in sec 128, "for which a plaint might have been entired under this act," and the plaintiff shall recover less than, &c., the plaintiff shall recover no costs unless the judge who tries the cause shall certify. Under this section the Court of Common Pleas in Bailey v. Robson 5 C B 934, held that in order to deprive the plaintiff of costs, the defendant must show affirmatively that the plaintiff was bound to tages they had not previously possessed. They had have them have recourse to the inferior jurisdiction, and not simply that he might have sued thereon

The words of the Division Court Act are exactly similar depriving the plaintiff of costs in actions brought in the county court or superior courts for a case which might have been entered in a division court; and adopting the decision just referred to as a safe guide, we may ask if the detendant has shown that in the present to be registered within five days from the execution thereof, they case the plaintiff was bound to bring his action in the division intended to give an advantage to the holder of such an instru-

when the amount or behance claimed does not exceed £25; but court? If not, then he certainly might bring it in the county court and plaintiff having a cause of action above £25, on which a suit for at his option in the inferior juris liciton of either of the superior

Looking at the affiliavits and the evidence given before the arbitrator, I think it does not appear the plaintiff was under any I regard this as a privilege conferred on a plaintiff, and not a such obligation. Nay, I am not satisfied that it he had so brought do not think that if his evidence shewed a claim beyond the juris-The 78th section of the Division Court Act (13 & 14 Vic. cap diction of the division court, he was compelled to abandon the

> Admitting, therefore, that it may be doubtful whether, in the costs taxed to him, and therefore that the rule ought to be dis-

> > Per cur .- Rule discharged.

#### MCINNES V. HAIGHT.

Assignment for lanefit of creditors-Registry-Execution.

Where an execution is placed in the Sheriff's hands against the goods of a debtor after awassi, muent made by him for the benefit of coeditions before its registry,

though within five days, the execution is entitled to prevail. Behan's Bank of Toronto, 10 U. C. C. P. 32. Show's Graft 16, 236; upheld Where the Court of Common their exercises an appellate purishetion it will decide according to its 0+n view of the law, notwithstanding an adverse decision in the Court of Queen's Bench.

This was an appeal from the decision of the Judge of the County of Elgin.

The decision and the facts upon which it is grounded are

reported in 8 U. C. L. J. 104.

HAGARTY, J.—This case, as far as this Court is concerned, turns on a simple point. It we uphold our own judgment in Feehan

Taking secs. 1 & 3 of the Con. Stat. U.C. cap. 45, by themselves alone, they would well warrant the conclusion that the registry of the assignment at any time within the five days allowed by the act would make it valid from the beginning, and would therefore cut out any execution delivered to the Speriff within the five days.

In deciding what was the intention of the Legislature, we must look at the whole course of legi-lation on the subject, to the repealed acts as well as to those now in force.

The act of 12 Vic. cap 74, declares these conveyances void against execution creditors, &c , unless registered. No time was fixed for the registry, and the Courts held that if registered before an execution was placed in the Sh ruff's hands against the goods of the assignor, the assignment would still be valid.

I do not think there can be any doubt that, under that statute, if the Sheriff received an execution against goods which if the owner had not given a mortgage on them would have been hablo to be seized under the writ, they would be held so liable if the mortgagee had not registered his mortgage until after the Sheriff and levied on and taken possession of the goods.

Such a view would be quite consistent with the intention of the legislature, that the mortgage should be void unless regis cred. Not being registered until a new writ attached by the placing the execution in the Sheriff's hands, it would be void as to such creditor.

Then did the Legislature by the act of 20 Vic. cap. 8, intend to give to the holders of these bills of sale and mortgages any advanthe experience of several years and the decisions of the courts. The whole scope of that act, so far from facilitating the taking security on or the transfer of property by means of these instruments, was intended to make it more difficult. They were undoubtedly viewed with distayor by the Legislature.

I cannot therefore come to the conclusion that, by requiring it

ment over what he had before, but rather, being void during that against creditors if it was not registered within the five days men, orders notif the 27th day of May last, tioned, though it might be registered afterwards.

the Bank of Toronto correct.

I cannot say that I am free from doubt, but I think this view best accords with the intention of the Legislature.

In the judgment of the Court of Queen's Bench, in a suit between the same parties, 19 U.C. Q B 474, that Court arrived at a different conclusion; and assuming that the Legislature intended that these instruments should be valid from the beginning, and should only be void after five days, and it they were then registered that they should be valid thenceforward, their jud\_ment is correct. I have not been able to bring my mind to this conclusion.

In my opinion, the judgment of the Court below should be reversed and the appeal allowed.

I do not think Marple, v. Hartley, 3 L. T. N.S. 474, makes any difference, that being as doubtedly in accordance with the English Act, and with the view I should probably take of our own Consolubited Statute if we had had no previous legislation on the subject.

This being a case in appeal, we are bound to decide according to our view of the law, notwithstanding the judgment of the case in the court of Queen's Bench.

DBAPER, C. J -1 continue of the opinion expressed in Fechan v. the Bank of Toronto, and concur in reversing the judgment of the Court below.

Per Cur.-Judgment reversed.

#### IN CHAMBERS.

#### TYRRELL ET AL. V. WARD.

Arbitrators' fees-Proof of payment.

Where the Master refused to tax against the unsuccessful party an arbitrator's fee up in proof only that a promissory note had been given to the arbitrator for the amount, a Judge in Chambers refused to interfere.

(November 8, 1861.)

On taxation of the bill of costs in this cause it appeared that there had been an arbitration between the parties, for owed by an award in favour of plaint ffs, and that the sum fixed by the arbitrators as their fees was \$160.

Before allowing the arbitrators' fee as against the defendant. the Master of the Court of Common Pleas required proof of payment

There was no evidence of actual payment, but it was sworn that one of the plaintiffs had given his promissory note to the arbi rators f r the amount of their fees

Upon this it was confended that the Master was bound to tax the fee against defendant. The Master refused to do so.

R. Moore applied for a summons for a revision of taxation of costs in this taxation in this particular.

DRAPER, C. J., refused the summons.

#### McINNES V. WEBSTER

Indigent Debtor-Custody in serveral causes-Ducharge for non-payment for weekly whowave-tosts of former application.

Where a defendant is arrested and has the weekly all-wance ordered in several causes, he is under sec. 4 of Cons 1 "lat U C. cap. 20 entitled to one sum of 10s, a week har in default of payment of thet sum, he can properly claim to be discharge d in all the enuser.

The fact of n n payment of the cars of a former applicating to be discharged from custed, which was alsoned with costs is no reson for reliabing a second application made upon proper and sufficient materials.

(Derember 1, 1861.

This was an application to discharge defendant from custody for non-payment of weekly allowance, juryable by order of Mr Ju-tice Burns granted on the 11th February last, or to supersede him because not charged in custody in due time,

Detendant was arrested in this cause and in one in favour of Kerr et al. on mesne process in December last.

On the 16th March iast he obtained orders for the payment of period as against creditors having executions to ged in the the weekly allowance of ten stallings in each of these suits; he Shortf's family, they intended to make it absolutely null and void, was regularly paid the allowance of 10s. a week under these

On the 1st June he was charged in execution in the suit of Kerr In this view, I think the judgment of this Court in Feehan v. et al against himself. No apparention was afterwards made for the payment of the weekly allowance, and no allowance was

afterward- paid,

On the 25th July last the defendant applied for his discharge from custody for non-payment of the weekly allowance, and the summons was discharged and costs ordered to be paid by defendant. These costs were not paid.

Jackson for plaintiff objected that defendant was not entitled to his discharge for non-payment of the weekly allowance, because subsequently to his obtaining the order for weekly allowance, he was charged in execution at the suit of Kerr. He also objected that the defendants did not show sufficient cause for his being superseded.

#### A. Cameron, contra.

RICHARDS J .- If the defendant had been paid the weekly allowance of 10s, by Kere et al after they had charged him in execution, the plaintiff in this action might contend with a greater show of reason that detendant could not properly be discharged because the weekly sum of 10s, was still paid him. he faces clearly show that defendant has not been paid the weekly allowance he was ordered to receive in this cause, nor has he been paid the 10s a week, since the 27th of May last, in any cause in which he was confined

The 5th section of Con. Stat. U. C., cap. 26, seems to me to provide that where a defendant is arrested and has the weekly allowance ordered in several causes, he is only entitled to one sum of 10s, a week, but in default of payment of that sum, be can properly claim to be discharged in all.

On the point rused I to erefore think defendant entitled to the order discharging him from custody.

Though he has not paid the costs which he was ordered to pay on discharging a former summons, I still think he is entitled to his discharge, for the Legislature does not seem to entempt to that a party should be kept in custody for non payment of costs only, and certainly not for such a trifing sum as the costs of discharging a summons.

It is not explicitly shown in the papers produced before mo when the order directing the payment of the weekly a lowance in this cause was served; I assume, from all the affidavits, that it was served long ago, and it was probably filed in chumbers on the application in de by defendant for his discharge in July last

The affidavit filed on behalf of the plaintiff clearly admits the orders were obtained in this suit and the suit of Kerr et al against the same defendant, and the payment of 10s weekly under the orders until the 27th of May last, and that the payment then crased and has not since been made. This sufficiently shows the orders were made and the default in the payment required under

I think the order directing defendant's discharge should go.

#### CLARK V. IRWIN ET AL.

(Reported by HENRY O'BRIEN, Esq., Birrister-al-law)

2 W. & M ch. 5, sec. 4 - Proble demanges and oute-Right to, have affected by reference to arbitration - Recover."

A ref rence to arbitration discuttles a plaintiff from recovering troble damage and costs in cases where he would otherwise be entitled to them und r the statute of 2 W. & ...ch. 5 sec. 4. The wird "recover" used in the statute meaning "recover by the verdist of a jusy."

This was an application to revise the costs taxed on the part of the plaintiff, and to disallow the plaintiff treble damages awarded to him by the master under the following facts :-

The plaintiff, on 21st January, 1857, commenced an action again t the detendants, under the statute 2 W. & M ch 5, see 4, and declared therein, on the 4th March, 1858, for the rescue of certain goods seized as and for a distress for rent The defendants pleaded to the declaration on the 7th March, 1858.

On the 1st December, 1858-by the consent of parties, a judge in chambers made an order of reference, ordering the action and

to the award of the Judge of the County Court of the County of could also have been recovered from the owner unless there be a Wellington, and that the costs of the cause should abide the event, special agreement between the owner and the occupant to the and that the costs of the reference should be in the discretion of contrary the referee.

ters in difference therein at the sum of £16.2s. 11d. The master | year to year during the continuance of his tenancy out of the last in taxing the plaintiff his costs allowed the plaintiff trebie costs in two quarters' rent accruing due to the landlord, buying failed to the usual manner and multiplied the amount awarded by three and deduct the taxes from the current year's or quarter's rent as it allowed the same to the plaintiff

O'Brien for plaintiff. - for defendant.

the manner of computing and awarding the increased damages

The 4th section enacts that the person grieved shall in a special action upon the case for the wrong thereby sustained "recover his and their treble damages and costs of suit against the offender," and the 5th section enacts that in case of a distress and sale for rent pretended to be in arrear and due, when in truth no rent is in arrear or due, the person bringing the action "shall recover double of the value of the goods or chattels so distrained and sold together with the full costs of suit."

All the books of practice state and the authorities cited bear out the allegation that in an action on the 4th section the court order. if necessary, and in entering judgment the master as a matter of course adds twice the full amount of the verdict to that found by the jury, thus trebling the damages; but in an action on the 5th section the court of Common Ple is laid it down that the double value should be found by the jury, and that the jury should be directed in case of finding for the plaintiff that their verdict should be for double the mount of value of the goods. See Masters v. Farris, 1 C B 715

The point now raised is whether an award made under a reference by consent of parties is a recovery within the meaning of the statute 2 W & M I am of opinion it is not such a recovery as the legislature contemplated. At the time the statute was passed an award of itself was no recovery of a debt or sun, of money, but required to be enforced by action or an attachment for disobedience of an order of court to pay the amount. It is only since the passing of the C. L Pro Act and other recent statutes that awards may be enforced by the same process as the finding of a jury upon the matter referred.

Besides the general question whether in any case of compulsory reference, an amount awarded by a referee can be said to be a recovery within the meaning of the Statutes, because the newer sta ares have placed the facilities of enforcing payment of award upon the same tooting with a verdict, and as respects which I should say the legislature never intended by the more recent emictin-nts to do more than facilitate the remedy of enforcing payment of the sum awarded there is this consideration in the present case that it was not a compulsory reference, but one made by consent of the parties. Indeed no compulsory reference could have been made of the matters, and though the reference was made after issue joined. yet the recovery by the award cannot be said to have been the consequence of, or the result of the process of the court in the sense meant as a recovery in inbitum as when used in the old sta

The order therefore must be made for revision of taxation of the costs and disallowance of the addition of treble damages.

#### COUNTY COURT CASES.

(In the County Court of the County of Essex, before His Honor Judge LEGGATT.)

#### WADE V. THOMPSON ET AL.

The plaintiff Wade, as tensut of Thompson one of the defendants, occupied a hold for a me are years during which period he publish land order baxes.

Held that plaintiff order of in his action deduce the taxes a past out of the
last quarties cont under the 2 th classe of the Assessment A t although there was no agreement as to paymene of taxes between him and his hodford.

LEGGATT Co J. - By the 26th clause of the Assessment Act. Con. Stat., U. C., page 655, it is provided that an occupant may de- morning.

all matters in difference therein between the parties to be referred, duct from his rent the amount of taxes paid by him, if the same

It is admitted that there was no agreement between the defend-On the 5th of December, 1859, the arbitrator made his award, and Thompson, the landlord, and the plaintiff as to payment of finding all the issues in the plaintift's tayour, and the damages to taxes, and the only question is whether the tenant, the plaintiff, be paid by defendants to plaintiff in respect thereto and the mats can, under the facts stated, deduct the taxes which be paid from

The English Land Tax Act, as quoted in Thibbs v. Parsons, 3 B. Burss, J.-I find there is a difference in the practice between & A. 516, is the same in effect as our Assessment Act with the 4th and 5th sections of the act 2 W & M ch 5, with regard to reference to the deduction of taxes by the ten int . It is not stated in either the English Land Tax Act or our Assessment Act what rent the taxes are to be deducted from In Thubbs v. Parsons it was held that the tenant under the English Act is required to deduct the taxes from the rent due or accruing due at the time the taxes are paid. The 26th clause of our Assessment Act may be construct in the same way as to the particular rent the taxes are to be subtracted from. If that construction is adopted, then at the same time the plaintiff paid his landlord's taxes for the years 1856, 1857, 1858, and 1859, the last quarter's rent for which detendant, Thompson, distrained was neither due nor accruing due, and the plaintiff carnot now be permitted to deduct the taxes for those years out of the rent distrained for, whether the tenant can or cannot recover the taxes paid by him in an action against his landlord for money paid to his use.

> I think there can be no doubt that the payment of taxes by the plaintiff during his occupancy, as admitted, connot now be looked upon as payment to the landlord under the Statute.

> The defendants are clearly entitled, I think, under the authorities quoted, to the postca. See Thibbs v Parsons, 3 B. & A, 516; Sprague v Hammond 4 Moore, 431 See also notes to Lamplingh v. Beathwaite, Smith Leading Cases.

Postca to defendants.

(In the County Court of the County of Elgin, before His Honor Judge Hugues)

#### McINNES V BENEDICT.

Assignment for benefit of creditors-Registry-Execution-Conflict between Queen's Bench and Common Pleas.

Where an assignment for the benefit of creditors is filed within the five days allowed by law, it relates to its date so as to prevent the effect of an execution possed in the sheriff's hands within the five days.

When the Courts of Queen's Bench and Common Pleas are at issue on the construction of an act of Parliament, the duty of a county judge is to decide according to his own view of the law Remarks on the anomalous state of the law regulating appeals from county courts

so far as the questions involved in this case are concerned This was an interpleader issue, brought to try whether certain

goods were, on 30th August, 1860, the property of the claimant, Melnues, or of J. Stephen, the assignor. The issue was tried at the December sittings of the county court.

The assignment was put in and admitted. It was dated 28th August, from J. Stephen to D. McInnes.

Peter Murtagh, sworn: - I am Clerk of the County Court; I produce a duplicate of an assignment from Mr. John Stephen to D McInnes, E-q; I received it on the morning of the date on which it is filed: I filed it at the regular hour of opening the office; it came into my actual possession at the Post Office, about 9 o'clock; it might be before 9; I think it was before 9; I did not come direct to the office; I came to the office about half-past nine; I cannot positively say whether or not I did any business on that morning; I did not enter any judgment in any case that morning before fining this; the execution may bear date that morning: I occasionally give blank executions to the professional gentlemen who require them; I think the sheriff did not open his office that morning until 10 a m ; I believe his hours are from 10 to 3

Cross examined: - If my name is to the execution, it was signed that morning or before it; Mr. Horton got the execution that

Donald Mclanes, sworn :- I was in plaintiff's employment last! August: I recollect John Stephen making av assignment on the 28th August of the goods described in the stock book produced; I had been here previously; I got instructions to come to St. Thomas immediately, and take possession of Mr. Stephen's store;; I left on the evening of the 28th, and I came over on the morning of the 29th; I drove up from the cars about 8 a m, and reached Thompson's Hotel at 20 minutes past 8; I had breakfast there. and went immediately to the store and took possession, to the best of my belief, I think, before 9 a.m.; it was, I am certain, before half-past 9: Stephen was in Hamilton; his brother slept in the store, and I got possession from him of the keys of the store; from that time I remained in the store the whole time, until the goods, stock, &c, were disposed of, and thenceforward John Stephen exercised no acts of ownership over the goods, stock, &c.; . there was no concentment made use of; d d not, that I know of, say anything about it from that time; and I remained in poss s-1 sien of the goods continuously, until I had disposed of them for

Cross examined: — I left Hamilton on the day the assignment was executed — i e, the 28th; the sheriff was not there when I reached the store on the 29th; he came in on the morning of the 30th, and told me he had an execution; he did not ask me, as he as I recollect, whether he was in possession of the goods for my but himself: I was not placed in possession of the goods for the shriff on the morning of the 29th; the sheriff did not ask me to keep posses ion of the goods for him before that time; I did not tell the sheriff on the morning of the 29th or 30th that I had nothing to do with the goods, in so firms I recollect; I did not try to conceal about the assignment; I might have spoken to Mr. Muntagh; I found that with Mr. Muntagh for telling Mr. Horton; I was blamed throughout the town for telling; I did not give out that I was in charge of the property.

Re-examined —I was sent up expressly to take possession of that property; the sheriff had been previously in possession of the goods on an execution of one Lorimer, which I paid previous to the assignment; I was not aware of the seizure under the fi. fa. of the Bank of Montreal.

This closed the plaintiff's case.

Sheriff, Colin Munro, sworn: - The execution of Benedict et al v. Stephen, came to my possession about half past nine in the morning; I received it in Mr. Stephen's store; I had a previous execution under which I seized the goods, under a fi. fa from the Bank of Montreal, which came into my bands on the 16th July; I told Mr. Stephen of the seizure and left him in possession; it was on the 29th August or on the morning of the 30th that I seized again, under the execution of Hoight v Stephen, and under that of Haight I seized again, and kept the goods, and subsequenty under the fi. fa. of Benedict & Vaun; I considered that I held the goods under the fi fa. of the Brak of Montreal on a previous seiz ure, as that fi. fa. was not paid till some time after: I sold some goods under the Bank of Montreal execution; I saw McInnes, the hast witness, there on the morning of the 30th; I asked him if he was there in charge of the goods under McInnes, and he said that he was not; I then put him in charge for me, under the execution; he agreed to take charge, and to let no one take the goods away without my knowing it; I think young Stephen was present; I am not sure that he heard the conversation; I had previously seized under Haight's execution; I looked at my watch at the me, it was half-past 9; the Benedict execution is tested on the 30th day of August, 1860, and would have been issued that morning; my office hours are from 9 to 4; the reason of my being in the store that morning was, that Messrs. Stanton & Warren, the evening before-i. e., on the 29th, came to my house, and said that I had better seize, as things were not all right and I had better look after the goods; I went round that same evening as early as 9 o'clock.

Cross examined:—When I seized in July for the Bank of Montreal, I told Mr. Stephen of it, and I left Mr. Stephen in possession; that execution has since been settled. McInnes did not tell me what he was up for or of the assignment; so far as I know he was not aware that I had an execution for the Bank of Montreal against Stephen.

After reading the statute, the learned judge told the jury there were two points for their decision.

First Was there an immediate delivery, followed by a continued change of possession of the goods assigned or so'd, and if there was, there was no need of a writing or registry at all; that the immediacy of the delivery was to be governed by the circumstances m which the parties are placed; so long as there are no executions in the sheriff's hands, every man had, before the statute 22 Vic. cap 26, sec. 18, was passed, the control of his property, and could legally dispose of it as he thought right for the benefit of his creditor; since that statute he can only make an assignment for the benefit of his creditors generally, or continue to dispose of them in the usual way until an execution comes in. That if he exercise the discretion an arrangement for the benefit of all has creditors, the sale or transfer may be in one place, and the delivery in another, so soon-i. e., as immediately as the delivery can be accomplished; but, if before the delivery is accomplished, the sheriff steps in and makes a seizure, or it, before it comes to the assignee's hands, the execution will take the goods. And upon this point he submitted the following questions, viz :-

1st Was the delivery effected before the fi. fa. reached the sheriff's hands?

2nd. Was that delivery followed by a continued change of possession?

If yea on both these points, to find for the plaintiff.

Second. Upon the point of the registry of the instrument of assignment, he told the jury he thought it being registered within five days of its execution would protect the goods against all other claims; that the sheriff could only seize the goods and chattels of J. Stephen under his execution; and then the question arose whose were the goods that the sheriff seized under Benedict's execution: the goods in question had undoubtedly been the property of J. Stephen, but had that property in them been legally changed? That he thought that property might be so changed if, upon a valid and good consideration o carry out an honest purpose, the debtor making away or transferring his goods to pay his debts, provided it be done in a way that the badge of fraud, such as the act declares shall be a fraud, does not attach to the crausaction, and provided the sale and delivery be completed before the sheriff receives the execution in his hands to satisfy the judgment of some bona fide creditors, or provided a bill of side be registered within five days of the execution of the instrument. He also told the jury that it was of no moment that the goods were already in the sheriff's bands to satisfy previous executions, because a subsequent execution would take the goods subject to the previous ones, and would attach so soon as they were satisfied; that in the same way the judgment debtor. Stephen, might make a valid sale of the goods, subject of course to the incumbrance existing against

Upon the first question submitted to them, Mr. Sadler contended that if an execution be placed in the sheriff's hand-between the date of the bill of sale and its filing, though within five days, it is not entitled to prevail

Mr Horton objected to the charge, and contended-

1st. That the sheriff holding executions in his hands, and holding the goods under seizure under those executions, that no net of Stephen could take possession of the goods from the sheriff until those executions were satisfied.

2nd That the possession of the goods could not be given to the plaintiff until the fi fas. then in the sheriff's hands were satisfied, and entirely out of the sheriff's hands: Potter v. Carred, 9 U. C. C. P. 442.

8rd. That no act of Stephen, nor of any other party, could give possession until the executions had been satisfied, as they were in custodia legis.

4th. That there was no evidence to show that the witness McInnes was authorised to take possession of the goods, and no authority from Stephen or from the plaintiff was shown whereby he took possession.

The jury found a general verdict for the plaintiff.

During the following March term Horton moved to set aside the verdict on the points reserved at the trial, and on affidavits.

Abbott she wed cause.

Horton for the defendants

Heaties, Co. J.—The material question between the parties, irrespective of that raised by the affidavits fixed, is the same atthat between Melanes v. Haight, in which I gave judgment in April term last.

I charged the jury the same in both as to the effect of the 4th section of Consolidate I Stat. of Upper Canada, cap. 45, according to my construction of it; and the same objections were arged by the respective coursel for the detendants in both cases; and in this it was mutually agreed, after my charge to the jury, that, irrespective of the verdict, the question of law might be disposed of by the court in term

In the argument in term, however, in this case, the defendant's counsel took a ground, which I shall advert to in the next paragraph, that was not urged in the argument of the case.

I must give the same decision in this which I did in the other, and reduce a new tind, as I think the verdict for the plaint flupon this point should stand undisturbed, and judgment be given for the plaintiff upon the points reserved.

My reasons for doing so are the following, viz. :-

1st. That I do not see any analogy between this statute and the 44th section of that for the Registry of the littles to Land, (Con Statutes of U.C., cap. 89.) because there is nothing in the 44th section of the last named statute which leads one to suppose that fice or any number of days are specified or given, within which to register a deed or conveyance to land, in order to hold a title against the claim of a subsequent purchaser or mortgagee. Were such words as "within five days" introduced after the words "unless a memorial thereof be registered," instead of the words "in manner hereby directed, &c.," there would no doubt be a complete analogy between the two sections of the respective statutes. I doubt much, however, it a subsequent purchaser or mortgagee's title would be considered good for much, or if he would not be at some hazard in taking a title to I and until the lapse of the specified number of days within which the first purchaser might register.

2nd. In the case of a will under the 46th section of the statute for the registry of titles to land, it is sufficient to register the devise within 12 months after the death of the devisor, and a registry within that time is as valid as if it had been recorded immediately after the death. Now between that section and the 4th section of the Chattel Mortgage Act there is, in my opinion some analogy because there is time given within which to register in both cases. The title under a will dates from the death of the devisor, by relation, and not from that of the registry An innocent purchaser of land from an heir whose executor devised the estate to another person, could, therefore, never be considered as holding a valid title against the devisce, under an unregistered will, within 12 months of the death of the testator, although the provisions and object of the Registration of Deeds Act is to secure registry of all titles, in or to spare and protect innocent and bonu fide purchasers for value from loss of title being made to others under conveyance previously executed.

3rd. It was never necessary to register a conveyance of lands in Upper Canada in order to complete a title or make it a valid conveyance, in the same way as it is necessary in England to complete a title to land by enrolment. Nor is registration intended to supply the place of enrolment, but simply to guard against a subsequent purchaser of the same lands obtaining the lands by prior registry. (See 47th see of stat of U. C., 4 Wm. IV., cap. I; Doe Stofford v Beown, 3 O. S. 92; Doe ex dem Adkins v. Alkinson, 4 O. S., 140.) and if no such registration in the case of lands be necessary to complete a title, I am at a loss to understand why it is so in the case of goods which ma, be conveyed by a simple writing not under seal.

4th. I think the right to these goods became absolute in the bargainee at the time of the execution of the bill of sale, subject of course to be held void and fraudulent, as against creditors and others, if the bargainee did not register within five days; and that having so registered, his title became effective by relation. In Varylan ex dem Alkins v. Atkins, 5 Bur 2787 the court are said to have expressed themselves thus:—"There is no rule better founded in law, reason and convenience than this, that all the soveral parts and readily by making all such instruments itlegal.

and ceremouses necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." The substantial, i.e., the part which affected the parties to the instrument in this case, and the claim to the goods under it, was all performed when the bill of sale was executed, and provisional upon its registry, it was good against all the world: the registry was to affect other parties, when registered according to law; all provisional considerations, and the claims of those other parties were shut out absolutely; if it had not been registered according to law the claims of those parties would prevail.

6th. My other reasons are set to than my judgment in McIanes v. Haight, which is reported in the 7 U.C. L.J. 104, and to which I still achieve.

6th. With regard to the other questions, i. c., that there was a general verdict whereby the jury found that there was an immediste delivery accompanying the sale, followed by a continual change of possession, which rendered the registry of the bill of -ale unm cessary. I must say I was not quite satisfied with the verdict, because from the evidence of the sheriff and the clerk of the county court, the testimony of young McInnes was rendered somewhat questionable; but as there is quite substantial ground enough to sustain the verdict, irrespective of this, I think it should not be disturbed, although had the plaintiff's claim to the goods rested solely upon the immediate delivery accompanying their sale, followed by the necessary continual change of possession, so as to make a bill of sale unnecessary, I might, in the exercise of the discretion which I possess, have ordered a new trial upon payment of costs, because this case is distinguished from the cases of Woodruff v. Campbell, 5 O S. 305; and Elmslie v. Wildman, 8 Taunt. 236, whereon I grounded my refusal of a new trial in the county coart case of Cochrane v. Stepard. The evidence of young Molnues b ing, as shewn by Mr. Horton's affiliavit, contrary to expectation (.1 do not think it was what is technically called a case of surprise;') but I do not deem it necessary to speak decisively upon how I might have disposed of this question under other circumstances, because the exercise of that discretion now would be no ife-tly unjust, when there are other substantial grounds to uphold the verdict.

I therefore order the verdict shall stand for the plaintiff; that defendants' rule be discharged; and judgment entered for the plaintiff upon the points reserved and the questions raised at the real.

The foregoing part of my judgment was written for delivery last term, but neither of the parties having appeared to hear it read, it was not delivered. Since that I find that my judgment in McInnes v Haight has been reversed by the Court of Common Pleas (ante p. 20).

If there were only one court of appeal from the judgments of the county courts, or if only one of the two courts of appeal had given judgment on the subject discussed here, it would be my obvious duty to give my decision in harmony with that of the Court of Common Ple is in McInnes v. Il nght, and to how to that judgment without further words on the subject; but the unrevised judgment of the Court of Queen's Bench, Fechan v. Bank of Toronto, compels me either to adhere to, or give, a judgment contrary to my own convictions of what is right.

I think it, therefore, my duty to adhere to what, after unusual care and thought. I have concluded to be the fittest judgment to give in the premises. After reading the reasons given by the Court of Common Pleas for revising my judgment, I think it proper to say—

1st. I do not consider that the legislature had any intention to put a stop to the taking or making bills of sale and chattel mortgages. The old system, sanctioned by the common law, of allowing them to be taken and made and kept secret, was undoubtedly viewed with disfavor. Then the first statute passed (12 Vic. cap. 74) declaring these conveyances voil against execution creditors, unless registered, it is right to assume that the keeping them secret, and not the taking security by means of them, was the mischief intended to be cured. It was the secrecy intended to be made difficult, and not the taking or making of them. For if the Logislature had wished to remedy more than the secrecy. I must suppose they would have effected their intention more certainly and readily by making all such instruments illeral.

been this: The common law said to a creditor, provided the transaction be an konest one, you may take a bill of sale upon your debtor's goods, and keep it in your pocket so long as you to be recorded against him and execution issued against his goods, like, until you are paid your debt, and you need not let the rest and then in order to bring the judyment creditor to terms, the bill of the world know anything about it. Then the Legislature interposed and said, you shall do this no longer; secreey is prejudicial to the public; and henceforward if you wish to take such a to the judgment crediter, and a positive advantage to the cell tor security, not only shall the transaction have a bong fide purpose, on the other, although at the time of its execution it night be perbut if you wish to hold such a security upon your dehter's goods, teetly honest and tona fide and otherwise unexceptionable in point you shall not keep the bill of sale concealed, nor shall you keep the transaction close between yourself and your debtor; you shall register it; at the same time expose as much of the nature of the subject as shall be necessary to make an assurance and guarantee that it is not fraudulent or made to delay creditors; you may register your security when you please, but it shall have no force until it is registered; and you shall register it every year at least and show that the debt you intended should be secured is still subsisting. This is what I take to be the effect of 12 Vic. cap 74. Then the Legislature interposed again, and said you shall would be inconsistent the one with the other, and the Court of not have such a length of time within which you may register your security as heretofore; you shall have no option or discretion as my judgment - new trials being granted in both by different to when you shall register; after the first five days from the date courts-I should have at the next trial sittings a rule from each of the instrument you shall have that time to register in, and no court giving directions diametrically opposite to each other longer; it you fail to register within those five days your security the one case I should be required to charge one way upon the law, shall be void against subsequent purchasers and creditors; your and in the other case in an epposite manner, which would be an keeping secret the existence of your bill of sale, as you might incongruity that I must avoid by adhering to my former decision. previously do, will be now effectually put a stop to, and your option of registry beyond the five thys curtailed; so that whilst it is still lawful for you to take such a security, it is unlawful for you to keep it a secret beyond five days; and as you may require that time to reach the registry office and perfect the papers, you have five days for purpose of registering.

3rd. I think, too, that the five days was intended to limit the time within which the holder might register, and the remedy was intended to prevent the bargamor or mortgagor from getting further credit on the strength and apparent ownership of goods in his pos-e-sion, whilst an unregistered bill of sale might be kept secretly over them by some creditor which might have force for months. Under 12 Vic. cap. 74, a debtor might execute a bill of sale to his creditor to secure a debt of £500, less or more, on goods in his possession to the value of £500, his other hal ilities might be another £500, whilst all be would be worth if brought to sale would be perhaps £500; he might purchase other goods at three months' creait from persons entirely ignorant of the existence of the chattel mortgage to the value of £250, more or less; failing to pay for these goods, he might be sued and judgment recovered, but before execution the chattel mortgage might many other purposes, as to convey cound, &c. be registered, so that there would be nothing left for the judgment creditor to seize upon to satisfy his execution, but the remnant or in the way best calculated to meet its behests.

4th. Were it otherwise, the creditors being at a distance more remote from the place where the debtors reside, or their goods are, would be placed in a position of less advantage for registering within five days than those being less remote would be in; and endeavour to give effect to it in such a way that it may effect and alike, so far as their circumstances will permit.

now repealed statutes, the bill of sale might be kept in abeyance entire solid roll." and unregistered, until the debtor might find himself getting so

2nd. Uregard the course of legislation on the subject to have "himself to keep off some pressure or in portunate creditor by telling the nortgagee to register his security.

6th. The debtor would always knew it a judgment was likely of sale might be presented for the first time to his notice. In this way the bill of saie kept secret might be a spare on the one hand

Lastly. As the matter now stands, I find myself awkwardly placed, whichever may I decide this case there will be an appeal. The case of McInnes v. Haight, was decided by me in accordance with a decided case of one of the Superior Courts. The Court of Common Pleas have, however, ruled ti at although it was so it was wrong to do it. It I now give a judgment contrary to what I did in that case, and as I made up my mind to do in this, last a im, it will be contrary to my own convictions. My own two judgments Queen's Bench would probably send me down an order to reviso

#### UNITED STATES LAW REPORTS.

#### U. S. CIRCUIT COURT.

THE WASHING MACHINE CO. V. EARLE.

Disintegration of Patent Rights.

This was a bill for injunction; the case being as follows: Goodyear was the patentee of what is known as Vulcanized India Rubber; an invention of undoubted originality, and which had been applied by him to a vast number of useful purposes. Among these were the following:

1. Making "wringers" for different kinds of washing machines, now execusively used in hotels, public hundries, &c; the effice of these "wringers" being to press water, starch or other liquid out of clothes, after they had been washed.

2. Making hose, pipe and tube; now extensively used for carrying water to fires, gardens, streets, mills, &c.; though used for

Not having great capital of his own, Mr. Goodyear, or persons who had bought his pater , had parcelled out the invention among unsold portion of his own goods. I think this was the mischiet many licensees; granting to one person the right to use it for one intended to be avoided by the last act of the Legislature on the purpose and to another the right to use it for another. To the subject, that is secrety beyond five days, and not that it was the complainants in this case, the Washing Machine Company, he had purpose to make it more difficult to take security by means of granted the excusive use or it in its apparation to be in purpose to make it more difficult to take security by means of granted the excusive use or it in its apparation to or in purpose to make it more difficult to take security by means of granted the excusive use or it in its apparation to or in purpose to make it more difficult to take security by means of granted the excusive use or it in its apparation. chief of the statute, a much shorter enactment and more effectual to a company, called the linston Belting Company, he had granted words would have been employed. The Legislature is omnipotent, the use of it for making "hose, pipe and tube." and "no further;" and would probably have exercised its supremacy over the subject, the hove, pipe and tube described in one part of this deed of license being described, in another, as "conduit hose-pipe and tube."

That part of the washing machines above referred to as "wringers," were in fact iron shafts covered with India rubber. "The rubber"—to use the language of one of the workmen. "is constructed in rolls of a certain length, with an opining through when we read an act of Parliament, I think it fair, if it be pos- the whole length for the metalic shaft, but much maller than the sible to do so, so to construe its language and its intentions, and shaft, so that the rubber, when the iren shaft has been forced through it, gripes and clings to it, and turns with it, instend of be made available by, and equally advantageous to, all persons turning upon it; thus wringing the clothes as they are passed between the two rollers. The smallness of the aperture through 5th Fixing the five days within which to register was curtailing the rubber, and the consequent force and closeness with which an advantage formerly possessed; for as the law stood under the it clings to the iron, make the shaft and the rubber, in effect, one

The Boston Belting Company, whose right to make and sell embarassed in circumstances, when it might be an advantage to "hose, pipe and tube," was not disputed, did not attempt to make they made "wringers" for their washing machines, by cutting roller. the hose into short pieces, running iron shafts through the pieces and fistening them to the iron with cement. The result was that in the wringing machines. It has this form before being used in the firm of Colley & Co., made wringers nearly as good, out of that machine, and it retains that form when in and part of it. hose, as the Washing Machine Company could out of rubber expressly prepared for the purpose; good enough at any rate to undersell the Washing Machine Company, who were bound to Goodyear three cents a pound for the right of using the vulcamzed rubber in making wring rs, while the Belting Company had the privilege of making hose for two.

The Washing Machine Company now filed this bill, Goodyear being co-complaiment, against certain agents or vendees of Colley & Co., proying a preliminary injunction against the sale of any washing machines of which the wringers were made by the use of bose.

Mr Jenks for the complainants, cited great numbers of Dictionaries of the English language, from Johnston down to Webster, and Dictionaries of Science, both Latin, French, and English, to prove that each of the words "hose," "pipe," and "tube," meant essentially the same thing, and but one thing; st. a long hollow body, generally and in common parlance, cylindrical, and in the nature of a conduit for fluid; though neither of these qualities was of the essence of pipes or tubes. They might, he admitted, be of any substance, clay, wood, glass or what not, but that they should be hollow, and not solid, was of the essence of hose, pipes and tubes alike; and this point he abundantly made out on the authornes which he cited, with great research and learning This being so, he admitted that as long as the fabrics of The Boston Belting Company were used for any purpose for which hose, pipes or tubes could, in their proper nature, be used-that is to say, so long as they were left hollow and as conduits, whether for water, air, steam or any other substance or element capable of transmission through them-neither Goodyear, Colley & Co, nor the Washing Machine Company nor any one else could complain. But there was an abuse; they take tubes, and permanently filing them up with an iron axis larger than the hollow of the pipe, and so stretching them, make them solid bodies. The case states that in the wringers of all washing mrchines, "the shaft and the rubber form, in effect, on solid roll." Can a man purchase one kind of patented articles, cut them up-in fact destroy their identity and nature-and then use the fragments in a way never contemplated in regard to the whole things while in a per fect state, and in a way which directly interferes with the reserved rights of the patentee, or with those to whom he has granted them? In the present case the expression is, "conduct hose, pipe and tube," which shews plainly that the words " hose, pipe and tube," were used in their strict sense, as pipes or channels for the conveyance of fluid.

Mr. Grifford for the defendant.—The use of vulcanized rubber for making couduit hose, pipes or tubing, was conveyed by the strongest terms; there is no restriction on the use of them; and therefore the grant carries a right to use them for any purpose to which they are applicable. The grant conveys the right for conduit. The word conduit is a noun, and is defined by Lixicogart hers to be "a conducting pipe or tube." The conveyance, therefore, does not stop with granting a right to conducting pipe, but after doing that, by the well-selected term "conduit," it goes on and conveys also the right to hose, p pe and tubing; showing that the intention was to convey the right to that form of rubber for all the us es to which it is applicable. The complainants, to avoid this result, are driven to the necessity of distorting the language by a violation of common rules of grammar, and calling the word " conduit" an adjective which in English is a noun, and was never anything else. But the complainants contend that the rollers in the wringing machines are not tubes; let us look at that,

1st. The complainants substitute in their treatment of the subject the aggregate thing, to wit: the roller in which the tube is used, and then ask whether such aggregate thing is a tube. A waggon is not a wheel, but a wheel was used in its construction, and such was a proper use of the wheel, and it is none the less a whice because it forms a part of the waggon. So with a roller of my property.

"wringers." They made hose, pipe and tube alone. But a firm, the wringing machines. It cannot be called a tube in the aggrenamed Colley & Co., who had a patent of their own for making gate, but nevertheless a tube was used in the construction of it, washing machines, bought this hose, pipe or tube, and out of u and does not cease to be a tube because it forms a part of the

2d. A tube is cylindrical, and that is the form which is required

3d. A tube has a caliber, and a caliber is indispensable to put the iron rod through in its use in the wringing machine, as much as it would be to conduct water.

4th. It is therefore plain that the use of a tube or pipe to put the iron rod through to make a roller, is a direct and proper use of it, employing all the functions of a tube, and continuing to employ them, and without those functions no such use could be made of it.

5th. The roller is composed of the tube of rubber and a rod of iron, and neither, after their union, ceases to be what it was before. The rod of iron is still a rod of iron, and the rubber tube is still a rubber tube, and in the aggregate they are a rod of iron through a rubber tube. When the man makes the roller, by putting the rod of iron through the tube, he is simply using, and in a useful and proper way, a rubber tube, and no other form of rubber would answer his purpose. He is not destroying the tube and using the material of it for some other purpose; on the contrary, he is using the tube by filling it with iron, which is as legitimate a use as if he were to fill it with water.

But the complainants say that in using the tube as a part of the roller, the tube is more or less stretched. If this be so, then it is simply a stretchea tube. The tube is not destroyed. If filled with water it might be stretched; but who would contend that for that reason it had ceased to be a tube? Where a party has a licenso to make and sell an article of a certain form and function, if the purchaser, instead of using that form and function, des'roys such form and function, and uses the material, to wit, the vulcanized rubber, to make a rubber article of different form and function, and for which the form of the article purchased was not adapted, a very different question arises from any question in this case, and one which, it is submitted, is not necessary for the court to trouble itself with in deciding this case. To illustrate. If a man purchase India Rubber boots of a party having a license only to use vulcanized subber for boots, and after so purchasing them, instead of using the function of a boot, were to destroy that function by cutting them up in strips and using them for springs, or to make shirred goods out of, the question then would be, whether he would have a right to destroy the licensed form and function of the rubber instead of using that form and function, and to make some other form of a rubber article out of the material. But in this case there is no such question; the tubular form of the rubber is not destroyed, but it is used, and necessarily used, and continued in use; and such form and function is indispensable for the use to which it is applied.

The opinion of the court which goes upon grounds not taken by either counsel, was given by

GRIER, J - The right of the Boston Belting Company to manufacture pipes or tubes is not disputed. They pay a certain tariff per pound for the right to use the patented process: the material thus manufactured by them belongs to them, and not to Goodyear. Any covenant between them and him that they will not manufacture certain articles, may be valid as between the parties, but it does not run with the rubber, like a covenant on land. Colley & Co., when they purchased their tubes are absolute owners of them, and may convert them into rolls for wringers to their washing michines, or put them to any other use. They might have bought belting or overshoes, or any other article made by the licensees of Goodyear, and converted the material to any purpose that suited them. I may purchase a tobacco pipe made of this material, out I am not bound to smoke with it, and may convert it into an inkstand. The agreement between the licensees that A shall make all the pipes, and B all the inkstands, gives neither of them a right to the interference of a chancel or to compel me to smoke my pipe, or to put ink alone in my inkstand They cannot oblige me to use, in subservience to their arrangements, that which has become

But, says the complainants, although it is true that a "tube is defined to be a hollow cylindor, yet it is generally used to convey water, and is called a water pipe. In addition, the Boston Belting Co. pay a tariff of but two cents; whereas, the complaining corporation pay three cents, and therefore ought to have a monopoly of making rollers.

The perfect answer to this is, that the complainants have no patent or exclusive monopoly of making rollers of vulcanized jubbor. Goodyear, by virtue of his patent, might have manufactured it all himself, and sold it for such price as he could get; but his patent gives him no power to control the use which persons wh. purchase may make of it. Vulcanized rubber may be applied to a thousand purposes, from a tube to a steam engine, but this patent gives no power to the patentee to parcel out his one monopoly into a thousand monopolies. He may make any covenant he pleases with his licensees, and by that means may dispose of his special licenses to great profit, but he cannot compel the public to notice or regard such agreements, or the rights conferred or reserved by them. It his licensees do not perform their agreements, his remedy is by action against them on his covenants, and purchased vulcanized rubbers from his licensees from using it, when it is their's, for any purpose they please.

The bill does not complain that the machines sold by defendants are made out of rubber purchased from one who has perverted the patented process, but that the manufacturer who made them did ; not buy them from the complaining corporations on whom Goodyear assumes to have the power of conferring a monopoly to apply his rubber to that purpose. But the patent conferred no such power on him or them. Every person who pays the patentee for a license to use his process becomes the owner of the product, and he bind himself by covenants to restrict his right of making and vending certain articles that may interfere with the special business! of some other licensees. The contrivance of the patentee to destroy competition may be valid, but the covenant binds only the parties to it. If a stranger purchase the product from one heensed to use the process, he need look no further, and may use ! use it for his own purposes, without inquiring for or regarding; any private agreement of licensers not to compete with one another.

In conclusion, the right of the Boston Belting Company to uses the process in their manufacture of belting, packing, bosc, pipe and tubing, is admitted. Consequently that company may sell their manufactures to whom they please, without inquiring the purpose of the purchaser, or imposing any condition on him as to how he shall use his own property.

As a corollary from these propositions, it follows that Colley & Co. may convert any of those articles, when purchased by them, into tollers for their wringing machines, without infringing the rights of the complainants, whose arrangements to create a monopoly cannot affect the right of Colley & Co. to do as they please with that which is their own.

Injunction refuse !, with costs.

#### GENERAL CORRESPONDENCE.

Master and Servant-Misconduct of Servant.

To the Editors of the LAW Journal.

GENTLEVEN, - Magistrates in new counties being frequently at a loss for advice upon questions pertaining to their duty, may I take the liberty of asking your opinion upon the following case, which came before us :-

A, summonses B, to appear before magistrates. In evidence it appears that A. was engaged by B. to work for five months for a stipulated sum. A. serves a portion of the time, and then, without leave, absents himself from the employment of has been misapplied, of his remedy against such a trustee.

B. Is the contract violated? and is B. bound to pay A. for the term of time he has served?

I am, Gentlemen, yours respectfully, C. Southampton, 23rd Dec., 1861.

[Upon the facts stated by our correspondent, we are of opinion not only that A, has no right to recover against B, for the portion of time mentioned, but that, under sec. 4 of Consol, Stat. U. C., cap 75, A is liable, upon complaint of B., to be punished for leaving B.'s service before the expiration of his term of engagement.-Eps. L. J.]

Re Copyright-10 and 11 Victoria, chapter 28.

To the Editors of the Law Journal.

DEAR SIRS,-I believe your informant is in error. The not by recourse to a chancellor to restrain third persons who have Provincial Act 10 & 11 Vic., cap. 28, was not disallowed, and is rightfully incorporated in cap. 31 of Con. Stat. Can. There can be only two sources of good authority as to the disallowance of an Act-a Proclamation, or a Message to the Provincial Parliament. In this case there is neither. But there is, in the Appendix to the Journals of the Legislative Assembly for 1849, letter N, a despatch from Lord Grey of 7th July, 1848, about this Act, wherein his Lordship says he "hopes the Legislature of Canada will adopt the same prinmay sell to whom he pleases, or apply it to any purpose, unless ciple of justice towards British authors as the Legislature of New Brunswick," &c. This was done by the 13 & 14 Vic., cap. 6, (sanctioned by the Queen in Council, 3rd May, 1851) under which a duty is levied on reprints of British works, and the proceeds remitted for the authors. But the 10 & 11 Vie., cap. 28, remains in force for those British authors who choose to avail themselves of it, by printing their works in Canada, and so getting the benefit of our Copyright law, instead of the protection of the duty on Foreign reprints, under 13 & 14 Vic., cap. 6. This latter may be generally preferred on account of the obligation to regrint in Canada, in order to obtain the former; but it is easy to conceive that cases might arise where the right given by 10 & 11 Vic., cap. 28, would be more valuable and effective.

I am, dear Sirs, very truly yours.

G. W. WICKSTEED.

Quebec, 27th Dec., 1861.

[We thank Mr. Wicksteed for his communication. He is certainly at issue with the gentleman who gave us the information upon which our remarks in our last number were based. We shall be glad to hear from that gentleman in reply to Mr. Wicksteed's communication .- Eps. L. J.1

#### MONTHLY REPERTORY.

L. C. & L. L J.

Feb. 9.

LIFE ASSOCIATION OF SCOTLAND V. SIDDALL.

COOPER V. GREENE. Express trust-Trustee de son tort-Reversionary interest-Length of time-Acquiescence.

A trustee de son tort is an express trustee, and the lapse of moro than twenty years does not bar a cestui que trust of a fund which

A cestur que trust whose interest is reversionary, is not bound to assert his title until it comes into possession.

The mere knowledge and non-interference of a cestui que trust, particularly while his interest is reversionary, does not amount to such acquie-cence in a breach of trust as will release the trustee from liability.

#### M. R.

#### BUCKLEY V. HOWALL.

March 19.

Will—Construction—Trustees—Power of sale and exchange—Mines
—Sale of land excepting the minerals under it—Improper
exercise of power.

A testator by his will devised to trustees certain manors, lands, tenements, hereditaments and premises, with the mines, and quarries, and appartenances thereto belonging, upon trusts in street settlement; and he empowered them, at the request of the precision for the time being entitled to the actual possession of the rents and profits thereof, to sell or convey in exchange, all or any part or parts of the manors, lands, tenements, hereditaments and premises thereinhefore devised, and the inheritance thereof, and hold the lands purchased or taken in exchange upon the same trusts.

Held, that under this power, the trustees could not sell the land with an exception or reservation of the mines and minerals under the sune, but that the land and minerals under it must be sold together

#### COMMON LAW.

#### C. P. BELL V. MIDLAND RAILWAY CO.

April 23.

Railway - Private branch - Obstruction to right - Evidence - Injury to reversion - Damages

The plaintiff having lands adjoining defendants' railway under a clause in their special act acquired the use of a siding which he used as a coal wharf. By agreement with the plaintiff, the defendants used to supply engine power for conveying plaintiff's coal to the wharf. Disputes arising, the defendants refused to convey the coal any longer, and also denied the plaintiff's right to use the siding; and with the intention of preventing his doing so, obstructed the entrance to the siding by a line of carriages constantly kept there, and by other means. Plaintiff did not try to exercise his right of conveying trucks on to the siding by means of engines of his own, nor did he put himself in a condition to do so by complying with certain regulations prescribed by the act.

Held, sufficient evidence to go to jury of an obstruction of the plaintif's right,

Part of the wharf was let to tenants at a minimum rent, to be increased by a royalty of so much per ton of coal sold beyond a certain amount.

H-ld, a present interest in the plaintiff on which he could maintain an action.

Semble (per Willes, I) that the obstruction was sufficiently permanent to give the plaintiff a right of action as reversioner, and that he had a right of action on the ground that his tenants had determined their tenancies in consequence of the wrongful act of the defendants.

Held, also, that this was a case where the jury might give exemplary damages.

#### C. P. FREEMANTLE V. THE L. & N. W. RAILWAY CO.

Negligence-Sparks from locomotive engine.

In an action against a Railway Company for injury done to plantiff s land by sparks emitted from their locomotive engine, the evidence for the defendants was to the effect that the engine was of the best known construction. The plaintiff's witnessegave their opinion to the effect that with the engine in question the risk of causing mischief by sparks was not improbable, and that the engine was so constructed as to be dangerous without a precaution of some kind.

The judge left it to the jury to decide whether they believed either the plaintiff's or defendants' witnesses on this point; and also left to them to consider whether each set of witnesses might not have been mistaken in the degree of excellence or of defect imputed to the engine, and if so, it was evidence for them to decide either for the defendants, that no further precaution would be with reason required, or for the plaintiff if it were in reason requisite.

Held to be a proper direction.

#### REVIEWS.

Lower Canada Reports. Edited by M. LeLievre. Publisher, Augustus Cote, Quebec.—Nos. 3 & 4 of vol. XI. are received. It contains some very important decisions. Among tness may be mentioned Grant v. The Elna Insurance Company, in which the law of insurance on property is investigated at great length. There are eleven other cases in the number, the majority of which are of interest only to our conferers in Lower Canada.

The North British Review. New York: Leonard, Scott & Co.—The November issue of this well known quarterly is received. The contents are, "Pascal as a Christian Philosopher;" "What is Money?" "Plito and Christianity;" "Spain:" "Poets and Poetry of Young Ireland;" "Edmund Burke;" "Scottish Humour;" "Comets;" "Mott on Representative Government."

The Edinburgh Review (same publishers) is also received. Contents: "Macaulay's History of England (5th vol.);"
"Montalambert's Monks of the West;" "Lavergue on the Agriculture of France;" "O'Donaghue's Memoirs of the O Briens;" "Cunningbam's Church History of Scotland;"
"The Story of Burnt Nial;" "English Jurisprudence;"
"Thiers' Revolution of the Hundred Days;" "The Works of Elizabeth Burnett Browning;" "Dr. Hessey's Bampton Lecture;" "The Disunion of America."

Blackwood for December (same publishers) is also received. Contents: "Clutterbaste's Campagne;" "Augustus Welby Pugin;" "Chronieles of Carlingford;" "Wassail;" "A Word from a New Dictionary;" "Flunkeyism;" "Fletcher on Hamlet and Othello;" "A Month with the 'Rebels;" "S. me account of both sides of the American War."

The Eclectic, for January, 1862 (New York: W. II. Bidwell), is received. It opens with two plates—the one "The Wife of Bunyan interceding for his release from prison;" the other "The Battle of Bunker's Hill"—both engraved by Sartain, and possessing the peculiar combination of softness and brilliancy for which that artist's engravings are celebrated. The contents are various, including "Life and Times of Cavour;" "The Geneology of Creation;" "Kings and Queens of Diamonds;" "Meeting of the British Association;" "Revolutions of English History;" "The Constable of the Tower;" "Fire-doomed Cities."

#### APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

JOHN BELL GORDON, of Goderich, Esquire, Attornevat-Law, to be a Notary Public in Upper Counda—(Gazetted December 28, 1861.) ROBERT SMITH, of Stratford, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada—(Gazetted December 28, 1861.)

#### TO CORRESPONDENTS.

<sup>&</sup>quot;BARLIFF"—Under "Division Courts,"
"C."—"G. W. Wiczstzzn"—Under "General Correspondence."