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THE

UPPER CANADA LAW JOURNAL

AND

MUNICIPAL AND LOCAL COURTS' GAZETTE;

VOLUME VIII.

FROM JANUARY TO DECEMBER, 1862.

EDITED BY
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BARRISTERS-AT-LAW.

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GENERAL INDEX.

TABLE

OF THE

CASES REPORTED AND CITED IN THIS VOLUME.

DIARY FOR JANUARY.

1 Wednesday .. . Circumcision Taxes to be computed from this day.
5 SUNDAY. *2nd Sunday after Christmas.*
6. Monday ... .. *Epiphany* County Court Term begins Surrogate Court Term begins Heir and Devisee Sittings commence. Municipal Elections
8. Wednesday .. . Election of School Trustees.
9. Thursday .... York and Pe l Winter Assizes commence.
11 Saturday .. ... County Court and Surrogate Court Term ends.
12. SUNDAY .. 1*st Sunday after Epiphany.*
13. Monday ... .. Recorder's Court sits Election of Police Trustees in Police Villages
15. Wednesday . .. Treasurer or Chamberlain of Municipalities to make returns to Board of Auditors
18 Saturday ..... Articles, &c., to be left with Secretary of Law Society.
19 SUNDAY . . *2nd Sunday after Epiphany*
20 Monday .. ... Members of Municipal Councils (except Counties) and Trustees of Police Villages to hold their first meeting
21. Tuesday .. .. Heir and Devisee Sittings end. Last Day for Notice Chancery Examinations Toronto
26 SUNDAY . *3rd Sunday after Epiphany*
28. Tuesday . .. Members of County Council to hold their first meeting
31. Friday .. .. Last day for Cities and Counties to make returns to Government Day for Grammar School Trustees to retire.

IMPORTANT BUSINESS NOTICE.

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

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

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

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 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 vessel. The Trent is then allowed to proceed. It is believed that these two gentlemen were accredited agents of the government of the Confederate States, and it is supposed they carried despatches from the government of the 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.

The law of nations is what lawyers term *lex non scripta* 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 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 appear to be agreed.

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 search. (Vattel, 339.) A neutral ship refusing to be searched, would from that proceeding alone be held condemned as a lawful prize. (Vattel, 339.)

The visitation 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. (Wheaton, 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 exists 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 carrying 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 carry 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 vessel 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 an 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 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.

EASTER 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 Euity intertere 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 endorsement, 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 affected by recent statutes?

2. What are the statutory requirements with reference to leasehold interests?

3. How far 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 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?

EXAMINATION FOR CALL.

TAYLOR ON EVIDENCE.

1 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 seal, but not otherwise.

BYLES ON BILLS.

1. In cases of conflict between the English and Foreign law as 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 he 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 defeated?

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 contain?

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 garnishment?

8. What is the effect of a verdict for the defendant in replevin on the single issue of *non cepit*?

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.; BURNS, J.

16th December, 1861.

Murray v. *Bridges*.—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 sealed contract to deliver on cars of Northern Railway 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. *Carpenter*.—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 gave leave to plaintiff to amend his claim, so as to bring it within jurisdiction of division court. The plaintiff's case, as shown by the first statement, showed the action was not within the jurisdiction of the division court. The judge then allowed the amendment. If there was any irregularity in granting the amendment, that is no reason for awarding the prohibition, if case now within division court; and as the defendant has moved for a new trial in the court below, case allowed to go on as it now stands. Rule 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 part of the defendant, in the way in which the plaintiff and his family were treated Verdict for plaintiff; and defendant moved for a new trial, or verdict for defendant. *Jones* v. *Chapman*, 2 Ex. 203, case in point 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 damaged, and plaintiff's legs broken Trial at Brantford 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 municipality. 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 corporation to keep roads and bridges belonging to them in proper repair, and gives an action for neglect of so doing. The verdict, 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 denied 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. At the trial the defendant and his witnesses were not present, although subpœnas had been sent through the post office in good time 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. *Goumlock*.—Trover. Trial at Brantford. Defendant had obtained judgment against Henry Harmer, and sought to attach certain chattels The plaintiff, 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.

Iler 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 absolute for non-suit.

McLachlin v. *McHenry*.—Rule *nisi* 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 made 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 forfeiture of certain lands. 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.

Cataraqui Bridge Company v. *Holcomb et al.*—Declaration states that plaintiffs were owners and in possession of bridge called the 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 greatly injured. Defendants contended at the trial that plaintiffs should shew want of care, negligence or misconduct on part of defendants. Plaintiffs contended that it was sufficient for them to shew 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 shew that defendants' steamer was found drifted against the plaintiffs' bridge; and that the burden of proof lay on defendants. 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.; BURNS, J.

21st December, 1861.

Wisconsin Bank v. *Commercial Bank*.—Rule *nisi* discharged.

Corporation of County of Lambton v. *Pounsett*.—Stands.

Churchwardens of St. George's Church, Owen Sound v *Corporation of Grey et al.*—Judgment for plaintiffs on demurrer, with leave to move to amend in one month. Plea held bad: 1st. Because no justification of trespass without a by-law; 2nd. Because county has no power to pass a by-law affecting a road in the town.

M'Kay v *Smith* —Judgment roll to be amended, and then judgment of verification for plaintiff. Stands as to costs.

Chapman v *Dubrey* —Judgment for plaintiff upon demurrer, with leave to move to amend within one month.

Hayes v. *O'Connor.*—Rule absolute to enter verdict for defendant

Watts v. *Howell* —Assignment for benefit of creditors. Held bad on several grounds. Appeal dismissed with costs.

Patton v. *Melville.*—Postea to plaintiff

Aylsworth v. *Paterson and wife* —Judgment on demurrer for plaintiff Writ of revivor proper remedy.

Widderfield v. *Metcalfe.*—Appeal from county of Elgin Dismissed with costs.

Billington v. *Bastedo* —Action against attorney for negligence. Verdict for plaintiff under 1st count for 1s Damages to stand Verdict for defendant on second count: also to stand. Rule discharged.

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

Justin v *Snyder* —Rule 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 Hay, vel.*—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 plaintiff with leave to defendant to move to enter a verdict for him. Rule *nisi* for leave to enter a verdict or for new trial, on ground of misdirection by judge, and on the ground that judge should have amended pleas Rule discharged. Plaintiff allowed to amend his *nisi 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 accommodation maker of note, and that plaintiffs gave time, and therefore discharged defendant. Plaintiffs demurred. Judgment for plaintiffs on demurrer.

Vidare v. *Great Western Railway Company.*—Appeal allowed.

Jenkins v *Wilcock* —Action for amount of stock held by defendant. Defendant demurs to declaration raising several objections: one was that a *fi. fa.* should have been issued 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 Plaintiff 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.*—Postea to plaintiff.

Turnbull v *Insurance Co. of Johnstown District* —The rule is strong against receiving affidavits of jurymen. Rule granted for new trial, on condition of defendant paying £400, and costs of former trial and of this application, into court within one month; which plaintiff is to be allowed to take out and defendant to amend his pleas, by striking out all relating to fraud, and retaining those only relating to value.

Allan v. *Alexander* —Action on promissory notes, for which mortgage was taken. Defendant pleaded the giving of a mortgage for the debt, merger Rule absolute for non suit.

Chisholm v *Morse.*—On looking at the notes of Burns, J., and Hagarty, 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 desertion of plaintiff, 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 criminal charge for desertion of child, causing its death. Rule for new trial.

Scott v. *Millar.*— Rule absolute for new trial without costs.

Moore v *McLaren.*—Action against a shareholder. Judgment for defendant.

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

Kerr v. *Parsons* —Action against executors of Benjamin 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 affidavits 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 affidavits 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 defendants' 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.

Devlin v *Bayne* —Action for injuries sustained by plaintiff, 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 certain issues left to the decision of the court. Verdict should be entered for plaintiff on issues under common counts of declaration for $1,325 05, and for defendants on first count. Rule accordingly.

Morson v. *Hunter* —Action by the assignee of a mortgage against the original mortgagee, on a covenant contained in the assignment to pay the amount of mortgage money The declaration set out the facts Defendant demurred to plaintiff's declaration, on the ground that the declaration did not show that they endeavoured to collect the amount from the original mortgagor, or that the plaintiff had exercised his remedy against the land, and on other grounds. Judgment for plaintiff on demurrer.

Holton v *Sanson* —First count—trover; second count—that on warehouse receipt, given by defendant to Clarkson, Hunter & Co., for 500 bushels of wheat, which was endorsed by Clarkson, Hunter & Co. to plaintiff, defendant 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 the second and third counts. Judgment for defendant on demurrer to the second count; for plaintiff as to first and third. Verdict to be entered for plaintiff on first and third counts

Rutherford v. *Stovel.*—Special case. Questions submitted by arbitrator for the opinion of the court. Action on a covenant by defendant to save harmless plaintiff from debts of partnership to a certain amount. Plaintiff says that defendant must pay the whole amount of his indemnity, irrespective of debts due to plaintiff. 1st question by arbitrator—Is this so, or is the defendant only to pay the balance of his indemnity, after deducting the several amounts due him (the plaintiff); that is, is the defendant entitled to the benefits of the debts due plaintiff, or must he (defendant) 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.

Holden v. *Jackson.*—Question, whether auctioneer is bound to accept a bid of any one who comes in. *Held*, auctioneer is not bound to do so. Judgment for defendant on demurrer.

Bull v. *Patesgrave.*—Rule discharged.

McLeod 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 possession 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.

McNab v *Howland* —Rule nisi for new trial, on ground that verdict against law, evidence, and the judge's charge; and for excessive damages, and on the ground of the absence of a material witness. Rule absolute on payment of costs by defendant Fitch.

Dean v. *Warren* —Rule nisi 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 the duties which its members are required to perform, and therefore I shall simply content myself with repeating what I have on various occasions for something more than ten years past said to other Grand Juries. This repetition ought not to be thought wearisome by me, first, because as presiding over the court in which you are called upon to take an active part, you have the right to expect proper legal instructions as respects the part you are to perform, and the interests of society demand it, and it should be always considered a pleasure to discharge a duty, which one filling a public situation owes to his fellow citizens; and secondly, though I myself may know quite well what should be done by the Grand Jury, yet I must consider that I am not always addressing the same individuals; the Grand Jury is always the Grand Jury after the requisite number is obtained and sworn in, but the individuals composing that jury are ever changing and varying, and perhaps some of you were never upon a Grand Jury before and may not be again for years to come.

Nothing tends stronger to preserve the institutions of a country which society has established and built up from time to time for the good government of the whole body, from being destroyed or their efficiency from being weakened in the affections or good sense of the people, than a pure, impartial, speedy and equal administration of its laws. It is the prompt obedience to, and if it be not voluntary it must be the authorization of enforced obedience to the laws by individuals which preserves society at large in the free, mutual and confiding dealings of its different members with each other. This is no new idea, nor has this language been now used for the first time. The principles which it inculcates are as ancient as the existence of civilization itself, and it is a subject we cannot too often have presented to our minds. The present 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 without 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, peril either life, liberty, or property, it is because an offence 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 punishment 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 knows and feels that he himself is assisting in the dispensation of justice, to see that it be dealt out with impartiality and justness, for upon that impartiality and justness his own security or the security of those near and dear to him may possibly at some time depend. It has been the object of many, from time to time, while preserving the wisdom of our ancestors, so to modify the use of the people in the administration of justice as that its use should not be abused. Hence proceeds all the enactments upon the subject of juries which have taken place from the Great Charter downward. It is impossible to trace any time when the system can be said to have been introduced into England, for it seems to be of Teutonic origin. Sir William Blackstone says "the truth seems to be that this tribunal was universally established over all the northern nations, and so interwoven in their very constitutions that the earliest account of the one gives also some traces of the other."

In the administration of the criminal law, every accusation against an individual must first be established to the satisfaction of a body of persons selected from the locality within which the jurisdiction to try the accused is assigned, before any one can be placed upon trial. This body is denominated the Grand Jury, and the duty consists in seeing that the accusation made, is, at least, founded upon something which warrants and justifies the accused being tried for the offence of which he is accused. The evidence offered to the Grand Jury is evidence of accusation only; it is to be given and heard in secret as your oath has explained to you. The accused has no right to appear before or be heard by the Grand Jury, either for the purpose of examining his accuser,

or of offering exculpatory evidence. Thus you will perceive that the proper position which the Grand Jury fills is that of being the public accuser. Upon a commitment following your accusation, the accused is deprived of the protection afforded him by an examination of the witnesses offered against him, no depositions are seen, and it is impossible to say in many cases whether the accused is entitled to be bailed. From the secrecy with which the evidence before the Grand Jury is clothed doubtless arises many of the objections which have been made to the existence of such a body at all in the administration of justice. There is no doubt that it is open to the objection that designing persons make use of the Grand Jury for their own individual purposes: and I could, if necessary, point to cases within my own observation where the Grand Jury was unconsciously made the instrument of accusation, proceeding from revenge and an unworthy motive of stifling and preventing civil actions and remedies sought to be enforced. Indictments have been obtained upon a supposed state of facts which would not warrant a commitment of a person in any other form. The Grand Jury was not designed to be converted into the instrument of private cupidity or revenge.

I consider it no derogation to borrow from the labors of others in the disquisition of legal subjects and matters connected with the administration of justice any more than on anything else. That principle is constantly acted upon in all the various business of life. Each one is ready to adopt and apply the inventions or improvements of another whether in science, arts, manufactures or agriculture. So without more I will read you a passage from the report of the Commissioners upon the Criminal Code of the State of New York on the subject of Grand Juries, shewing the extent of the power of that body and in some respects how it may be abused.

"Within the sphere of what they consider to be their duties the Grand Jury is omnipotent. Accusations in which the public are deeply concerned may be dismissed without a question. Indictments may be preferred upon slight evidence or upon no evidence, and the action of the Grand Jury is beyond the reach of the laws. From the abuses of which it is susceptible and which have been too often practised under its unconscious sanction, it is not to be disguised that its moral power is waning. These remarks are made in no unfriendly spirit to the existence of this institution but from a firm conviction that some restraint must be thrown around its action. To effect this the first principle that the Commissioners assume is that the functions of the Grand Jury as an accuser and as a Judge should be separated. It is not proposed to abridge these powers in respect to the inquiry into the commission of crime. These seem to be an inherent element in its composition. But the proceedings which are taken upon them should be essentially different. When the accused is arrested and brought before a magistrate an opportunity is afforded him of answering the charge; a responsible accuser is presented to whom he may look for redress, if the accusation be malicious or unfounded. But where he is accused by the Grand Jury this protection is denied him, and he is dragged before the bar of justice to answer a charge possibly as false in its substance as it may be malicious in the motive by which it is prompted. A course of practice which results in this injustice is not to be defended upon any principle sanctioned by the wisdom of the common law. Its theory is that every man shall have a full opportunity to meet an accusation against him, and it is a violation of that theory that he should be subjected to any stage of condemnation without the privilege of being heard in his own defence."

This passage points to what I repeatedly have brought to the attention of Grand Juries, which is this—that in the discharge of their duties in making enquiry into crime, two classes of cases will present themselves, one class where the subject matter of accusation has been inquired into before a Justice of the Peace, and he has exercised a preliminary judgment upon it already, and the matter is then presented again to the Grand Jury that they may make an inquiry whether the accused should further answer and be put upon trial: and another, which has never been before any other tribunal, and which the individuals accused may first hear of when arrested upon the accusation of the Grand Jury. In the first class the Justice of the Peace cannot dispose of the accusation without confronting the accuser with the accused, and hearing fully what the accused has to say. In the second class the Grand Jury may accuse on an enquiry originating in their body among themselves, or upon the representations made by others in secret, behind the back of the accused, and the first time the accused may hear of it is when he is arrested by the process of the Court. He is utterly ignorant of the evidence upon which it is founded, and thoroughly powerless to obtain it. Now, surely there was good and sufficient grounds for my telling Grand Juries, seeing the enormous power with which the body is invested, that upon the one hand it behoved them to act with great care and caution in cases which were presented to them for the first time, to ascertain from what motive prosecutions were prompted, to discover whether society at large was interested in the inquiry, and particularly to understand why it was and for what reason was it that the complaints were laid before the Grand Jury for the first time, rather than being placed before the ordinary channel, that of a Justice of the Peace—and on the other hand, justice and discretion were required in balancing the scale between a proper accusation and innocence, least the Grand Jury should assume the functions which properly belonged to the Court and Jury who were to try the guilt or innocence of the accused. The Legislature, during the last session of Parliament, has interfered and relieved the Grand Jury in a number of cases from being perplexed with the considerations I have just stated. It is enacted by chap. 10 that no Bill of Indictment for any of the offences following, viz: perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault, shall be presented to or found by any Grand Jury, unless the prosecutor or other person presenting such indictment had been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a Judge of one of the Superior Courts of Law, or of Her Majesty's Attorney General or Solicitor General, or of a Judge of one of the County Courts, or Recorder of a city. This enactment came into force on the 1st September last.

In all cases in which you are asked to investigate into crime, the evidence to sustain the charge, whether offered upon a bill of indictment or otherwise, can only be received by you under the sanction of an oath, so that if any false statement be made before you, the person making such, may be punished for it. The oath may be administered by the Foreman of the Grand Jury, but that can only be done during the time the Grand Jury are assembled as such, and the law requires that twelve members should be present for the purpose of any inquiry: and, further, it is required that twelve of your number assent to any accusation. When an accusation is made against any one the first inquiry should be whether the accused be capable of committing crime, and this involves the question whether the accused be of such tender age, or from mental deficiency, that capability of committing crime presupposes an act of the understanding and an exercise of the will to do it. Upon this point, however, it is sufficient for you to draw a reasonable conclusion from the evidence of accusation, leaving the further investigation to the jury who are to pro-

nounce upon guilt or innocence. The next inquiry is into the charge made. You must be satisfied that there is reasonable cause for saying that there has been a violation of the law, and that the evidence points to the accused as the person who has violated the law. The next material subject for consideration is the intent laid or charged against the accused. That should clearly appear either expressly or by necessary implication from the circumstances, acts, and conduct of the accused. Where an unlawful act is proved to have been committed, the legal presumption flowing from that is that the person who is proved to have committed the act intended to do it, and it must be further presumed that no one is ignorant of the law, and it must also be assumed that every one understands the effect of his actions. The result of these presumptions is that it must be cast upon the person proved to have committed an unlawful act, to make out to the satisfaction of those who are to pronounce whether there be guilt, that there was no intention of committing an unlawful 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 efficiency or otherwise, and in this report the Grand Jury has a right to bring 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 1st 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.

Before I leave you to perform your duties, I would, according to an ancient 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 convulsed, both as respects the Government of the whole of that portion of this continent, and also as respects the bonds of society, which has hitherto held the individual members of that community together. The destruction of the one and the severing of the bonds of the other, presents a sad spectacle to the world, and affords a vast field for comment and contrast. It is not for us, however, to speculate on the probabilities of the government of the whole becoming again united, or upon the alternative presented, that is of a complete separation into distinct and separate governments. We see the fact that for months past distinct governments, *de facto*, do exist, and that both parties are in deadly strife with each other. So far, we, in this country, have been enabled to keep ourselves free from being mixed up in this strife, and happy will it be for us if this can so remain. But who can answer the question whether this state of things will or can continue, or how soon our hitherto quiet and happy condition may be terminated?

We are an integral portion of the greatest empire the world has ever seen—one upon which the sun never sets. Within the last few weeks we have seen how the North American difficulties may be complicated by injudicious or indiscreet interference with the affairs of the British empire. Whatever England may consider as necessary to be done to uphold her position in dealing with an international question, I am fully persuaded the whole of Canada goes heart and hand with every other part of the empire. Should the time arrive—and if it does arrive, it would be an unfortunate thing for all parties—to evince the feeling by action on our part—there cannot 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 county of York in England; the one will be as ready and willing to repel a foe as the other, and whatever may be necessary to maintain the integrity of the empire will, beyond all question, or fear of contradiction, be thought of as much 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 sincerely with her Majesty in this her hour of trial. 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 in 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 "Law Magazine."*)

In the southern part of New South Wales, in the direct line (it cannot be called road) between the township of Yass and the frontier of Victoria, is a small mining district or gold field, which bears the name of Lambing 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 congregate at the season of parturition. For some reason or other Lambing Flat became the favourite resort of a number of Chinese, and in the latter end of 1860, or beginning of 1861, certain feuds arose between the Europeans and Celestials, which led to disturbances. A determination on the part of the Europeans to expel the Chinese was evinced at the time we have mentioned, and various steps were taken by the New South Wales Government to protect the weaker party, but without any marked result. In July last the police had arrested a few Europeans who had been unusually demonstrative in their opposition to the Chinese, and they were confined in the lock up of the police-station. Hereupon an armed organization on the part of the Europeans took place, in order to liberate the accused. The police numbered about fifty, the insurgents about three thousand. The parties came to blows, and five or six of the rioters, or "rowdies," as we find them called, were killed and several wounded, and some three or four of the police were also wounded. This excited the Europeans to a sort of indignation frenzy. A new "organization"

was initiated, the results of which was, that the police abandoned the place and retreated to Yass. This naturally alarmed the Government. Troops were sent from Sydney to Lambing Flat, and to give this little band, numbering it is said not more than 125 men, a degree of moral force beyond the mere military display, the Governor of the colony proclaimed 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; Sir 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 resistance of the invasion of his *mana*, or tribal right, 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 repugnant to all our constitutional notions, that we propose to devote a few pages to the consideration—not 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 Ballaarat 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 us—great, at the time, to the colonies—as an introduction 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 wields 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 bowels of the kingdom, and were governed by martial law. The King gave commissions to the lords lieutenants, 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 the army in the field *flagrante bello* (*Dawcin* v. *Keppel*, 2 Wils.) Yet although confined to persons under the military law when in the field, and therefore, in that day, having some colour of legality, the commissions for the exercise of martial law within the realm were condemned as illegal by the Petition of Rights. This great bulwark of our liberties, "which every Englishman carries with him to the colonies as part of his birthright," (Chalmers' Opinions) commences by reciting the "grievance and vexation" of having "great companies of soldiers dispersed into divers countries of the nation," and of 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." It 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, . . . by pretext whereof some of your Majesty's subjects have been . . . put to death, when and where, if 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 franchises 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. III., c. 9, 25 Edw. III., st. 5, c. 4, 28 Edw. III., c. 3,) which, however, had been habitually violated by succeeding sovereigns, and almost forgotten by the people. This celebrated Act is said to have been drawn by Sir Edward Coke, and, so far 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 equity*. This doctrine appeared to their lordships 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 peace, *when recourse may be had to the King's Courts*, (Parl. Hts., 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 insurrection—there 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 and *flagrante bello*. They also show that the test of war or peace within the kingdom is whether the King's Courts are open or closed, and they lay down the principle that insurrection or rebellion is not war, for if one be taken in, rebellion, he must be tried in the King's Courts. The speeches in full will be

found in Rushworth, vol iii., app 81. Here is an abstract of them:—

Lord Coke said, "I shall maintain *jus belli*. But God send me never to live under the law of convenience or discretion Shall the soldier and the justice sit on one bench? The trumpet will not let the crier speak in Westminster Hall *Non licet contenanti* The time of peace is when the Courts at Westminster are open, for when they are open you may then have a commission of oyer and terminer, and when the common law can determine a thing the martial law ought not Drake slew Doughty beyond sea. Doughty's brother desired an appeal to the constable and marshal's courts, and Wray and the other judges decided that he might there sue We make no law. We must not meditate *ubi lex non distinguit*. To hang a man *tempore pacis* is dangerous: I speak not of prosecution against a rebel. He may be slain in the rebellion, but if he be taken he cannot be put to death by martial law (Year Book, 28 Edw. II., M. 13) When courts of law are open, martial law cannot be executed, (5 Hen IV., 30 Williamson's case) The constable and marshal desired an addition to their commissions and they proceeded against some according to that power; but because it was not according to their ancient power it was void, for they cannot do anything according to the additional power, (*i. e.*, power to exercise martial law,) and there was a (writ of) prohibition to stay their proceedings under the additional power. How shall the soldier know how to obey them; they are not under the great seal?"

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: but he asserted that a rebel taken ought to be tried by his peers. "We have now," (1628,) he continued, "no army in the 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, afterwards Chief Justice, followed. "If," said he, "the chancery and Courts at Westminster be shut up, it is time of war: but if 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 slain at the time of his rebellion—he is to be tried after the common law."

The illegality of martial law, even for the government and discipline of the military, is annually reiterated in the preamble of the Mutiny Act: and every school-boy is taught to lisp this as one of the constitutional safeguards of personal liberty: "And whereas no man can be forejudged of life or limb, 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 Parliament: 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 been proclaimed without such authority. The former is legal, as Parliament is omnipotent—the latter is illegal. Lord Loughborough, in the case of *Grant* v. *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 William Blackstone, does not exist in England at all. When martial law is established in any country, it is of a totally different nature from that which, by inaccuracy, is called martial law, merely because the decision is by a court-martial; but which bears no affinity to that which was formerly attempted to be exercised in this country, which was contrary to the constitution, and has been for a century (this was said in 1792) totally exploded." Another century has nearly elapsed, and we find the "exploded" expedients revived in a part of the empire considered, perhaps, too remote to be within the reach of the public opinion of the mother country.

Such, then, was the state of the law long before the oldest of the Australian colonies was established. These colonies took the law of England in force at the date of their establishment, respectively, "so far as the same was suited to their circumstances and condition,"—which would include all those guarantees of personal security and freedom which have been, from time to time, wrested from the Crown by the courage, and sometimes by the blood, of our ancestors. The martial law which we are now condemning, and which Lord Loughborough so clearly distinguishes from the military law authorized by Parliament for the government of the army, is similar—nay, identical—with that which is exercised when our armies are in the field in a foreign country, when our armies are in an enemy's country, *flagrante bello*, the troops are governed by the Royal prerogative. In a foreign country we cannot have courts. But even in this case the Queen's regulations are followed as nearly as possible. In the case of *Barnes* v. *Keppel*, 2 Wils. 314, the Court said, "By the Act of Parliament to punish mutiny and desertion, the King's power to make 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 leges*. 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 the declaration of independence, the governors were empowered 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 the Crown has such power in Ireland and the colonies, and may therefore still delegate it to lords-lieutenant and colonial governors. Let us examine these two opponent precedents. As to the case of Ireland, what reader of history does not recall to mind the noble conduct of Lord Kilwarden in the case of Theobald Wolf Tone? Tone had been taken in open rebellion 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 sitting, 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 client 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 gaol.

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

though not a case of martial law, but rather of the abuse of military law, deserves a place here. In the year 1746, one Lieutenant Frye, of the Royal Marines, had been illegally punished under the sentence of a court-martial lawfully held: the sentence, however, being in excess of the power of the court. He brought an action against Admiral Ogle, and recovered £1,000 damages. In the course of the trial, Lord Chief Justice Willes intimated an opinion that every member of the court was liable to an action for the illegal sentence. Upon this, Lieutenant Frye issued writs against Admiral Mayne and Captain Renton, two of the members of the court, and they were served with the writs as they were returning from another naval court martial upon Admiral Lestvey. This was resented "as an insult" by the members of the last-named court, and they passed some resolutions highly derogatory to the Chief Justice. These they forwarded to the Lords of the Admiralty, by whom they were reported to the King, George II., who signified to their lordships, through the Duke of Newcastle, "His Majesty's great displeasure at the insult offered to the court-martial, by which the military discipline of the navy is so much affected." But the Lord Chief Justice was not a man to be overawed in doing his duty, even by the frowns of royalty; and as soon as the resolutions were communicated to him, he ordered all the members of the court into custody for their contempt, and was proceeding to uphold the dignity of the Court in a very decided manner, when the whole affair was terminated in November, 1746, by the members of the court-martial signing and sending to the Chief Justice a very ample written apology and submission for their conduct. The paper was read aloud in the Court of Common Pleas, and was ordered to be registered among the records of the Court, where it is still to be found, "as a memorial," said his lordship, "to present and future ages, that whoever set themselves up in opposition to the laws, and think themselves above the law, will, in the end, find themselves mistaken." The proceedings and the apology were published in the *London Gazette* of the 15th November, 1746, and will also be found in the *Gentleman's Magazine* for that year.

As to the case of the old colonies in America, there can be no doubt that the old commissions did contain a clause empowering the governors to exercise martial law, but it was expressly limited to "times when *by law* it may be exercised." But it should be remembered, that before the declaration of independence, wars had frequently been carried on between the "provincials" and the French of New France, without much aid from the parent state; it was, therefore, considered necessary to give to the provincial governors ample powers to levy troops, to command them when levied, and to govern them at all times. Accordingly the governors were clothed with full power and authority to "levy, arm, muster, command, and employ all persons whatsoever residing in our province of ——, and other territories under your government, and, as occasion shall serve, to march them from one place to another, and to embark them for the resisting of all enemies, pirates, and rebels, both at sea and land, and to transport such forces to any of our plantations in America, if occasion shall require, for the defence of the same against all enemies, . . . and to execute martial law in *times of invasion* and other times *when by law it may be exercised*."

It cannot fail to strike the constitutional reader, that great care has been taken to confine this power within legal boundaries. Can it be supposed that the clause was intended to convey, what it could not convey, powers which the King himself has not possessed since the Petition of Rights? It was meant to authorize the governors to exercise one of the royal functions, which, without authority under the Great Seal, he could not exercise—namely, to raise troops, recruit them, move them from place to place, even out of the territorial jurisdiction, and govern them according to military law—that is, by the articles of war when at home, and by the prerogative when in a foreign colony, and when in the field *flagrante bello*. The commission to General Murray, after the conquest of Canada, contained a similar clause; but it was dropped out soon after the American troubles commenced. Why? Not because it was illegal, as every lawyer knew, not because it had been illegally exercised, not because the people of America had included it among their grievances, not because it had ever been used to oppress the people; nor, indeed, out of any tender consideration for popular liberty, but simply because the jealous policy of the Government of that day deemed it wiser to employ regular troops, and even foreign mercenaries, than to train angry colonists to the use of arms, and teach them the art of war. It was under the authority of this clause that Washington was converted from a district surveyor into a provincial soldier. It was in one of the border wars that he gained his first renown.

The whole language of the clause in the old commissions—which will be found printed at length in Baron Maseres's collection entitled "Quebec Commissions," 8vo, 1772—as well as the mode in which it was interpreted and exercised by the provincial governors, shows that it was not intended to operate—and did not, in fact, operate—beyond the legal powers of the King. But if it were so intended, either wilfully or by misconception, there is no trace of it in any governor's commission for nearly a century. If the King of that day usurped a power in the colonies, the Queen of this day certainly does not.

As the power of proclaiming and exercising martial law is not expressly given to the governors of the Australian and other colonies, have such governors any such authority, irrespective of their commissions?

The extent of the powers of the governor of a colony has been determined by a great number of judicial decisions. He is not the general representative of the Queen. He does not exercise all the prerogatives of the Crown. He can only exercise such powers as are delegated to him by his commission, or in some instance by the charter of the colony, or by some equally binding instrument, under the Great Seal of England, by which alone the Queen can confer powers upon her colonial governors. Beyond the powers thus specifically conferred upon him, he cannot legally travel; and if he exceed them, he renders himself liable to an action at the suit of the party injured, and even to an indictment, if the infraction of his powers amount to a criminal offence. We proceed to support these propositions by judicial decisions.

In the case of *Fabrigas* v. *Mostyn*, 20 State Trials, Governor Mostyn had taken upon himself to arrest and banish the plaintiff from Minorca to the Spanish Main, under an imputation of alleged treasonable practices. The plaintiff followed the Governor to England, brought an action against him, and recovered £4,000 damages. The Court refused to set aside this verdict, and Lord Chief Justice de Grey, in the course of his judgment, observed, that "the governor is the King's servant, his commission is from him, and he is to exercise the powers he is invested with by his commission, which is to execute the laws of Minorca."

The next case to which we shall refer in which this limitation of a governor's power is judicially asserted, is *Cameron* v. *Kyte*, 3 Knapp, P. C. Cases 332. The principle had been laid down by Lord Mansfield in *Campbell* v. *Hall*, Cowp. 210, that the King can make laws for a conquered colony. The Governor of Demerara had assumed that, as the King's representative, he could do so likewise; and he exercised that power by an ordinance increasing the commission of the vendue master, or official auctioneer of the colony. The plaintiff brought an action for the excess of commission levied by the vendue master, and the case came before the Judicial Committee of the Privy Council. The Committee, in deciding that the governor had no such power, said, "The governor has not, by virtue of his appointment, the sovereign authority delegated to

him; and an act done by him on his own authority, unauthorized by his commission, or expressly or impliedly by his instructions, is not equivalent to an act done by the Crown itself, and is consequently not valid." The language of Lord Brougham, in delivering judgment in *Hall* v. *Bugge*, 3 Moore P. C., 476, is to the same effect. "If it be said that the governor of a colony is *quasi*-sovereign, the answer is, that he does not even represent the sovereign generally, having only the functions delegated to him by his commission, and being only the officer to execute the specific powers with which the commission clothes him."

Numerous cases might be cited in which colonial governors have been sued with success in the Courts at Westminster for acts done in excess of the powers conferred upon them by their commissions, or under an erroneous estimate of their own authority. In *Wall* v. *Macnamara*, cited 1 T. R., 536, the plaintiff recovered damages against the defendant, who had been Governor of Senegambia, for false imprisonment, attended 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 Goree, and not warned by his own cause of complaint against Governor Macnamara, he punished a soldier under colour of military law, but without any regular trial, so severely, that the man died under torture. Governor Wall, on his return to England, was brought 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 baseness has brought into use, and which is calculated to convey very erroneous notions of the powers of governors to themselves and others. We every day hear the governor called the 'King's representative.' Nothing is more inaccurate than the expression in the sense in which it is used. Constitutionally the King is the fountain of all office, honour, and power, and each officer of the Government, deriving his authority from the King, represents the King in the exercise of his legal powers. This is true as well of the lowest as of the highest officers. It is as true of a constable as of the Lord Chancellor. In no other sense can it be rightly applied to the governor of a colony. None of the peculiar attributes of 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, inherent, perpetual. Those of a governor are derivative, temporary, and dependent on the will of him who conferred them. Constitutionally, the King is responsible to God alone for his acts. The governor is answerable to his royal master. The King is answerable to no human tribunals for the discretion which he exercises in displacing public officers. The governor is answerable to the King's Courts at Westminster for the suspension or removal of any subject of the King holding an office of emolument in the colony. That an expression 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 a British Province*, by A. Stewart, Advocate, Montreal, 1832.)

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, are to be governed by the Mutiny Acts and the Articles of War.

3. This military law is distinct from, and therefore not to be confounded with, what is called martial law, which is illegal.

4. When the Queen's troops are in the field in a foreign country and *flagrante bello*, they are to be governed by the royal prerogative.

5. These rules do not extend to civil persons not amenable to military authority.

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 representative of the Queen, and can only exercise the powers lawfully delegated to him by the Queen's commission.

8. Hence:—the exercise of martial law by the governor of a colony is illegal, and would even be so if such power were included in his commission. Not being so included, its exercise amounts to a double usurpation.

* And see *Glynn* v. *Houston*, 2 Man. & Gr. 337; *Wyatt* v. *Gore Hall*, N. P. 299; *Bradley* v. *Arthur*, 4 B. & C. 292; *Oliver* v. *Bedtuck*, 5 Taunt. 456

DIVISION COURTS.

TO CORRESPONDENTS.

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

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THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page 262.*)

CHAPTER IV.

OF THE JUDGE AND OFFICERS.

Legal proceedings in the Division Courts are of a summary kind as distinguished from regular, that is, the intervention of a jury is not essential; but the determination of actions between parties and questions of law and fact in relation thereto, is left to the persons designated or authorized by the Statute to execute the office of Judge.

As we have seen, every Judicial District is separated into from three to twelve Divisions, each Division having a Court of its own. A sole Judge in each Judicial District presides over all the Division Courts therein—not appointed specially to these Courts, but the Act points out who are to be Judges. Sec. 16 enacts that the senior or acting Judge of the County Court of each particular Judicial District (County or United Counties) shall preside over the Division Courts therein, and as Judge, therefore, he possesses 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 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 effect to the jurisdiction. But though these capacities

centre in the one individual, they remain as distinct as if they were vested in two different persons *

Their 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 other County—the last three named acting only on certain 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, secs. 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 (Ib, 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 Barrister to act for him in case of emergency—"the Judge's Deputy," as he may be called—or the Judge of another County may act. Sec. 17 enacts as follows:—"In case of "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 "act as his deputy; and the person so appointed shall, as "Judge of the Division Court, during the time of his "appointment, have all the powers and privileges and be "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. Secs 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 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 law, such as exists at Common Law (2 Roll. Abr. 277—ib. 260; Com Dig Justices 1, 1); while in matters 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 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 advert.

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-

* 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, and in addition to their Common Law powers to hold plea 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 difference 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 practice in 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 Superior Courts, and possessing a large special jurisdiction in some cases concurrent with the Superior Courts, in others original, as well as appellate and peculiar. 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 an erroneous judgment, or is guilty of any mere irregularity. (*Dicas* v. *Lord Brougham*, 1 Jn. and Rel. 369.)

We published some time since the report of a case tried 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 that it should do so. We now give below a very long judgment, the subject of which is a cat; and which, apart from the interest which must be felt in it by the owners of tabbies, will be read by our subscribers generally, not only on account of its relative importance, but for the considerable research it displays.

SEFTON, FRIDAY, October 27th, 1854.

(Before J. J. LONSDALE, Esq., Judge.)

WHITTINGHAM v. IDESON.

Animals "feræ naturæ" reclaimed—Right to kill—Measure of damages.

Reclaimed animals "feræ naturæ" are the subjects of civil remedies for property. Therefore, where the plaintiff's cat strayed from the premises, and was shot at and killed by defendant,

Held that plaintiff having a property in the cat, an action would lie to recover damages for killing it, the measure of such damages being something beyond the market value of the thing destroyed, if the destruction was attended by circumstances of aggravation.

HIS HONOR.—This is an action brought by the plaintiff to recover damages for the loss of his cat, killed by defendant, a gamekeeper. The cat was intentionally killed by the defendant; and at the time it was killed was off the premises 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 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 cats, as some authorities hold, and as was argued by the defendant's attorney to belong to the class of animals *feræ naturæ*, yet as they are reclaimed animals, there can be no pretence for saying that, because the cat in question had wandered 200 yards from the plaintiff's house (being in the habit, as was stated in evidence, of returning home daily), it had, 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. But whether *feræ naturæ*, or as other authorities consider them, *domitæ naturæ*, the point to be decided is, whether cats 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, hawks and falcons, "on account of their noble and generous nature and courage and as serving *ob vitæ solatium* of princes, and noble and generous persons, and as making them fitted for great employments," is the subject of theft, whether *domitæ naturæ* or *feræ naturæ*, 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 Misdemeanors why such animals have been held not to be the subjects of theft is "that creatures of this kind, for the most part wild in their nature, and not serving when reclaimed for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law that for their sakes a man 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 punished with death, dogs, cats, ferrets and other like animals 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 far as I know it has 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 information are the text writers of authority; and the only one who supports the view urged for the defendant at the trial, is Mr. Chitty in his work on the Practice of Law. He there lays it down that "Trespass in general lies for taking any animal or bird out of the actual possession of a person who has secured the same: but no action lies for enticing from the premises of the owner, and and afterwards killing or injuring a cat which is not considered of 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 cat 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 cat 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 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 infer that he intended that as soon as a cat leaves its owner's premises it ceases to be his property. And this might be good law if cats were not reclaimed animals; but this at all events those authorities who class cats amongst animals *feræ naturæ* allow them to be, so that they cannot regain their natural liberty so long as they have *animum revertendi*, 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 as he states it, is not altogether intelligible, at all events it is not 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 *feræ naturæ*, though reclaimed, as "are only kept for pleasure, curiosity or whim, as dogs, bears, cats, apes, parrots and singing birds, because their value is not intrinsic, but depending only on the caprice of the owner," adds, 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 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 lies 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 cats 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 reason. 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) lies 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 only for pleasure, curiosity or whim, as lap-dogs, squirrels, parrots 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 cats; but there cannot be a doubt 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 animals *feræ naturæ* which are not fit for food are not the subjects of larceny, although reclaimed, say:—"It would seem that the rule upon this subject arose from the circumstance that the animals above specified, viz, bears, foxes, apes, monkeys, pole-cats, cats and dogs, &c, being unfit for food, were not formerly marketable 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 granary, it was protected by the following curious law:—"If any one shall steal or kill a cat being the guardian of the king's granary, let the cat be hung up by the tip of its 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 liable.

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 injury must be unintentional; if wilfully occasioned that would be a circumstance of aggravation, and would justify a jury in 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 something for damages on that account, beyond the few shillings which otherwise I should 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.

BAILIFF.—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 v. Sceitzer*, 19 U. C. Q. B., 199.

U. C. REPORTS.

QUEEN'S BENCH.

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

THE CORPORATION OF THE COUNTY OF ESSEX V. STRONG.

Treasurer—Appointment—Date of bond—Wild land tax.

A municipal council elected B as their treasurer on the 25th of January and by-law passed on the 28th appointed him and directed that he should enter on his duties as soon as he should have executed the necessary bond. On the same day they passed a resolution accepting his bond which was dated on the 26th.

Held, that no objection would lie to such bond, as having been executed before his appointment.

Held also that the treasurer was clearly liable for defalcations in the wild land tax, being the proper person to receive it.

(T. T. 25 Vic.)

ACTION against defendant as surety for the treasurer of the county of Essex, upon a bond, dated the 26th of January, 1854.

The suit was referred to arbitration at the assizes, held at Sandwich, in November, 1859, and an award made on the 23rd of March, 1860, that defendant was indebted to the plaintiff in £516 10s. 11d.

This award was upon defendant's application referred back to the arbitrator, with directions to certify certain facts to the court, to enable them to determine questions of law raised 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 counties 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 bond for the due performance of the office.

2 A copy of the bond sued on was returned, dated the 26th 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 hands 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 resolved that a certified copy of it be put in the registry office for safe keeping

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

Prince obtained a rule *nisi* 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 surety, prevented the plaintiffs from recovering 2. That the defalcations alleged were in funds which the plaintiffs were not entitled to recover against defendant.

Connor, Q. C, and *M. C. Cameron*, shewed cause.

Eccles, Q. C., and *Prince*, supported the rule.

BURNS, 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 office, whereas 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 Treasurer on the 25th of January, and appointed him, and directed that he should enter on the duties of his office so soon as he should have executed the necessary bond. The bond bears date the 26th of January. The council by a by-law dated the 28th of January, formally appointed Bullock the treasurer, and by resolution of the same date

accepted the bond, which had been delivered before then, though the particular time is not shewn. Under these circumstances, and with the recital in the bond signed by the defendant, there is nothing in the objection.

With respect to the next objection, the whole of the defalcation has been found to be the wild land taxes. Scarcely any thing was said by the defendant's counsel in support of any objection that this was not properly chargeable against M. Bullock. Indeed there could not be any thing urged that would be available, for the treasurer is the proper person to receive those taxes for all the townships in the county.

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

The rule must be discharged with costs.

McLEAN, J., concurred.

The CHIEF JUSTICE having been absent during the argument, gave no judgment.

Rule discharged.

AARON McDONALD v. JAMES McDONALD AND ROBERT McDONALD.

Action under Division Courts Act by execution creditor on securities seized—Pleading—Evidence—Security for costs.

In an action on a promissory note, payable to plaintiff or bearer, brought in the name of the plaintiff under the Division Courts Act, sec. 152, by a person who had obtained execution against him in that court, defendants pleaded, among other pleas, that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection.

Held, that it was not sufficient that the declaration should show the suit to be brought under the statute, but that defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to entitle the real plaintiff to shew his right under the statute, to sue in the name of the nominal plaintiff, the facts should have been specially replied.

It is safer in such actions to issue and prove a judgment to support the execution, but *semble* that it is not essential.

The real plaintiff need not shew upon the trial that security for costs has been given, as required by sec. 151. It no-given, defendants may move to stay proceedings, or perhaps may plead it in bar of the action.

Quære, as to the meaning of that clause in the statute.

(T. T., 25 Vic.)

The plaintiff sued on a promissory note made by the defendants, on the 1st of February, 1856, payable on or before the 1st of February, 1859, to the plaintiff or bearer.

The defendants pleaded, 1. *Non fecerunt*. 2. Payment. 3. Set-off, and, 4. That the plaintiff was not the legal holder of the note, and as such holder entitled to sue for the payment.

The defendant James was the father, and the other defendant, Robert, was a brother of the plaintiff.

The declaration was in the common form on a note payable to bearer.

At the trial, at Toronto, before *Robinson*, C. J., it was proved that a bailiff of the division court, having two executions from the court against the goods of this plaintiff, seized this note and other notes in the hands of one Thomas, to whom the plaintiff had delivered them for collection, or, as there was reason to suspect, to put them out of his hands merely for the time.

No evidence was given of judgments to support the executions, nor any evidence that security had been given for costs, in case the action brought by an attorney in the payee's name, but for the benefit of the execution creditors, should fail.

The action was brought under the Division Courts Act, Consol. Stats. U. C., ch. 19, secs. 151-4.

The defendants objected. 1. That the plaintiff ought to have declared specially, setting forth the particular circumstances of the seizure in execution, and founding his action upon the statute.

2. That he should have proved judgments 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.

The learned Chief Justice reserved leave to the defendants to move for a nonsuit on any of these objections, or to enter a verdict for defendants on the fourth plea, and the defendants then went into evidence to prove that in the course of transactions between them and the plaintiff this note had been taken into account, and allowed for by the plaintiff in a settlement, and thus been paid before the bailiff seized it in Thomas's hands, with whom it had been deposited by the plaintiff.

They called the plaintiff to prove that defence, but he failed to satisfy the jury of payment of the note, or of any part of it, and they found for the plaintiff for the note and interest.

Cameron, Q. C., obtained a rule *nisi* to enter a nonsuit or verdict for defendants, relying on the objections stated, or for a new trial on the evidence, contending further that the defendants were entitled to a verdict on the fourth plea, which denied that the plaintiff was the holder of the note when this action was commenced.

Read, Q. C., shewed 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 verdict. That plea denies that at the time of bringing the action, the plaintiff, Aaron McDonald, was the legal holder of the note. Undoubtedly he was not then the holder in point of fact, for the note had been taken out of the hands of his bailee upon an execution out of a division court, and was held by the bailiff, not for him, but for the execution creditor.

It is unnecessary to set out the other objections, as they will be found in the judgment of the Common Pleas, to which this court conformed.

If the execution under which it was seized had issued from a superior court, or from a county court, then under the Common Law Proc. Act, ss. 261 to 266 the action might have been brought in the name of the sheriff or officer who seized it. That statute, however, does 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 payee 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 sheriff or any one else to sue in his name. When the note is one payable to bearer, then, under the provisions we are now referring to, the sheriff might sue as bearer, without setting out the special circumstances which entitled him to sue under the statute.

This note is payable to bearer, and being seized under an execution from a division court, by a bailiff of that court, we are to look at the Division Courts Act, Consol. Stats. U. C., ch. 19, secs. 151-4, for the authority to sue upon it for the benefit of the execution plaintiff. By the 151st section the bailiff, or other officer, having an execution to levy, may seize any promissory note or security for money belonging to the defendant. By section 152 the bailiff may hold any promissory note, &c., so seized, as a security for the amount to be levied: "and the plaintiff, when the time of payment thereof has arrived, may sue *in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured, or made payable thereby*."

By section 153 it is provided, that the defendant in the original cause shall not discharge such suit in any way without the consent of the plaintiff or of the judge; and section 154 enacts that "the party who desires to enforce payment of any security seized or taken as aforesaid, shall first pay or secure all costs that may attend the proceeding;" which I suppose means, what is not stated that the payee or holder of the note, &c., whose name is to be used in the action as plaintiff, must be secured against liability for costs, if the defendant 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 costs, for the expression is very general—that the person who desires to enforce payment (who may be either the bailiff or the execution plaintiff,) "*shall first pay or secure all costs that may attend the proceeding.*" The provision has not been carefully

framed, for as the amount of costs can not be known till the suit is at an end, they cannot be *first* paid—that is, before the suit is begun—although they may be secured.

But first, as to the defendants' right to a verdict on the fourth plea. We think he was entitled to succeed on that issue, for in fact the plaintiff was not the holder at the time of this action; and to entitle the execution creditors, or the bailiff, to give the evidence which was given in support of the action in the payee's name, those facts should have been replied which gave the right under the statute to use his name, though he was not the holder of the note; or the special facts might have been set out in the declaration, as the defendants indeed contend they should have been.

As to the other objections, I do not at present think it would be 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 legislature 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 directs, we apprehend that was not necessary, but that if security had not been given, the proper course would have been to stay proceedings till it had been given. The Common Law Procedure Act, sec. 265, being a provision in *pari 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 security 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, furnishes an argument in favour of what has been contended for, that when a security 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 indispensable that the declaration should have set forth the special facts, shewing 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 shew 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 advised.

GLASS, SHERIFF, v. WIGMORE.

Conveyance of prisoners to Penitentiary

It is the duty of the sheriff of the county in which a city is, and not of the high bailiff of such city, to convey to the penitentiary prisoners sentenced at the Recorder'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., 1858, sheriff of the county of Middlesex, and has since his appointment had the care 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 in and for the said city, and a recorder for the said city duly appointed, who presides at the sittings of the said court.

The jail of the said county of Middlesex is used as a jail for the said city, and prisoners are committed thereto by the mayor and other magistrates for the said city, the council thereof not having directed otherwise, and an annual sum is paid for the use of the said jail by the said city of London.

The defendant has, whenever the said court is in session, by the order of the court, taken the prisoners committed for trial at the said court from the said jail to the court, and when prisoners have been sentenced by said court to be imprisoned in the provincial penitentiary, has upon receipt of the commitment conveyed them to the said penitentiary, and has charged and received payment 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 said defendant had the right to take the said prisoners to the court for trial, and when sentenced to the penitentiary to convey them there and receive payment therefor.

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 affirmative, then judgment of *non pros*, with costs of defence, shall be entered for the defendant.

Burns for the plaintiff, cited Consol. Stats. U. C., ch. 54, secs. 391, 367, 379, 401, 420; ch. 31, sec. 132 sub-sec 4; ch. 129, sched.; ch. 127; Consol. Stats. C., ch. 111, sec 11; *Rex* v *Weir et al.*, 1 B. & C. 288.

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

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

We are of opinion that while the law remains on its present footing it is the sheriff of the county in which the City of London is, and not the high bailiff, who is to convey to the penitentiary the prisoners sentenced to that prison by the recorder's court of the city.

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 Consolidated Statutes of Canada, it appears to us, commits the duty clearly 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. Stats. C.) it is true is confined to convicts sent from Lower Canada, but it equally serves to shew the intention of the legislature, for there are local bailiffs in cities in Lower Canada as well as in Upper Canada; and the 16th clause is not confined to Lower Canada, but applies to the whole province, and shews 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 RAILWAY COMPANY v. THE CORPORATION OF THE TOWN OF GODERICH.

Harbour—Assessment—Consol. Stats. U. C. ch. 55, sec. 3.

Land covered with the waters of a harbour is not taxable.

Held that for the purposes of the Buffalo and Lake Huron Railway Company could not be taxed for the Goderich Harbour.

This was an action brought to recover $254 for taxes collected by defendants from the plaintiffs for the Goderich Harbour, for the year 1860, and a case was stated for the opinion of the court, in substance as follows:—

The Canada Company, under the act of Upper Canada 7 W. IV. ch. 59, acquired a right to improve the Goderich Harbour, so as to make it navigable for vessels, and by that act, on the harbour being so rendered navigable and fit for the reception of vessels frequenting the same, were entitled to exact tolls at certain rates prescribed on all such vessels and the goods contained in them

That company having made certain improvements in the said harbour, by an indenture bearing date the 14th of June, 1858 made between them and the plaintiffs, under the authority of 19 Vic., ch. 21 agreed to sell the plaintiffs the said harbour and the premises connected therewith, to be improved and held by the plaintiffs on the terms specified in the said indenture, and used by them in connexion with their railway. The plaintiffs by this indenture covenanted 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 tolls upon vessels using the harbour, except such tolls as should be necessary for repairs, lights, and police, for the period of fifteen years from the 30th of 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 Goderich assessed all the portion of the harbour lying within the limit of the town at the value of $40,000, and the annual value at $2400, being at the rate of six per cent., and rating the tax on the whole valuation at $251, which the plaintiffs have been compelled to pay by distress upon their property.

The plaintiffs contend that the defendants were not entitled to 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 judgment shall be entered against the defendants for $251 and interest, from the 15th of November, 1863, and costs: if the court should be of a contrary opinion, then judgment shall be given for the defendants with costs.

F. B. Wood, for the plaintiffs, cited *Great Western R. W. Co. v. Rowe*, 15 U. C. R. 168; *Municipality of London v. Great Western R. W. Co.*, 16 U. C. Q. B. R. 500; *In re The Great Western R. W. Co.*, 4 U. C. L. J. 23; 7 W. IV., ch. 54; 19 Vic., ch. 21.

Richards, Q. C., for defendants, cited *Rex v. Birmingham Gas Light and Coke Co.*, 1 B. & C. 506; *Rex v. Brighton Gas Light and Coke Co.*, 5 B. & C. 466; *Rex v. The Corporation of Bath*, 11 East 610; *Rex v. Rochdale Waterworks*, 1 M. & S. 641; *Regina v. Cambridge Gas Light Co.*, 8 A. & E. 75; *Regina v. West Middlesex Waterworks Co.*, 32 L. T. Rep. 388; S. C., 28 L. J. M. C. 175; *Electric Telegraph Co. v. The Overseers of the Poor of the Township of Salford*, 11 Ex. 181; *Regina v. East London Waterworks Co.*, 18 Q. B. 705; *Chelsea Waterworks Co. v. Bowley*, 17 Q. B. 358; *Regina v. Southwark and Vauxhall Water Co.*, 6 E. & B. 1008; *Lewis v. The Town of Swansea*, 5 E. & B. 508; *Regina on the prosecution of the Overseers of Bishopwearmouth v. Lord of Durham*, 5 Jur. N. S. 1306; S. C., 1 L. T. Rep. N. S. 30.

McLEAN, J.—By the Consolidated Assessment Act of Upper Canada, ch. 55, sec. 9, it is declared that all land and personal property in Upper Canada shall be liable to taxation, subject to certain exemptions, and by the 3rd section "the terms "Land," "Real Property," and "Real Estate," include all buildings or 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 the realty, and all trees and underwood growing upon the land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to Her Majesty." This I should think must be taken to shew with sufficient clearness that water on the surface of the ground is not considered as part of the realty, and 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 *land* for all purposes except taxation, and I imagine that vessels in the harbour would scarcely be considered *aground* when *floating* in the water ten feet deep *over* the *land*.

The waters of the river and harbour every man has as much right to as the defendants, and they are entitled to be used as a *public highway* by any one who has occasion to enter the harbour at Goderich with a boat or vessel. How then can the water and the land upon which it floats form *a part* of the *harbour*, which all vessels are entitled to use in the pursuit of their ordinary business, and the land be the separate property of the plaintiffs, subject to be taxed by the corporation of Goderich, for whose benefit, amongst others, it is to be *improved*? In granting the harbour to the plaintiffs, the land and water must necessarily go together, and it would indeed be strange that land which could not possibly be applied to any other purpose but to sustain the water necessary to constitute a harbour, should be separated 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 taxation 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 advantages 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 appears to me, apply to a case like this. The harbour is not of an artificial character, but has existed by means of the outlet of the river Maitland 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 from that to which most of these cases refer, and the question must be how much land have the plaintiffs in occupation in the harbour of Goderich, including all piers, buildings and premises necessarily forming a part of the harbour, but being a part of the freehold.

There is in my mind no doubt whatever that under our present Assessment Act the water-covered part of the land cannot be taxed as 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.

BURNS, 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 act 7 W. IV., ch. 59, authorising the Canada Company to improve the harbor at Goderich, in such manner as should render it accessible to, and fit, safe, and convenient for the reception of such description and burthen of vessels as commonly navigate Lake Huron. The company were authorised to levy tolls not exceeding a certain amount. The legislature also reserved leave to the province to purchase the harbour from the company after the expiration of thirty years.

It does not appear that the Canada Company ever exacted any tolls at all, and during all the time that company has been possessed of the harbour no taxes have ever been imposed upon the harbour as such.

In the deed of the 14th of June, 1859, by which the Canada Company has transferred the harbour to the plaintiffs, under their charter, the plaintiffs are bound to levy no more tolls, either under the 7 W. IV., ch. 59, or any act of the parliament of this province, upon vessels using the harbour, except such tolls as shall be necessary for repairs, lights and police, for the period of fifteen years from the 30th of October, 1858.

Now that the harbour has passed into the hands of the railway company, the corporation of the town of Goderich assume the right to tax it for municipal purposes. They have assessed all the land and water lots, wharves, &c., against which the railway company make no complaint, but the company complains of being assessed for the harbour—that is, that part of it which is comprised of water. The question is whether the harbour *qua* harbour is within the meaning and intention of the Assessment Act, ch. 55, of the Consolidated 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 tolls.

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 that it shall include all buildings or 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 the realty. So far the evidence of meaning is plain, that land, with what is upon it, is something tangible. I have no doubt, if the company should fill in a portion of the water and make dry land of it, and erect buildings 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, thus carrying out the idea that the term, so far, means something visible and tangible. Then comes the expression, that it shall include all mines, minerals, quarries and fossils in and under the same, except mines belonging to her Majesty. This last shews 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 visible and tangible. I have no doubt if 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 mineral which would be taxed, and not the land *qua* land, and it would be so because the legislature has declared that the expression land shall include 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 taxation.

In the present case the land at the bottom of the harbour is not and cannot be used, so far as disclosed, unless it is for the anchorage of vessels. The right to impose tolls is not said to be for anchorage, 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 some 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 necessity for our extending that meaning in any way by the application of legal doctrines. The mentioning of mines, minerals, fossils, &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 support the water upon it, because that water may be made useful in commerce. Nothing was easier than for the legislature to have said that harbours should be taxed, if it were intended to be so, and it nothing had been said in defining what should be considered as land, the argument might have been much stronger in the defendants' favour.

I think that judgment should be entered for the plaintiffs.

The CHIEF JUSTICE, having been absent during the argument, gave no judgment. Judgment for the plaintiffs.

COMMON PLEAS.

GEROUX v. YAGER *

Costs—Final judgment without a trial—Order for full costs—Jurisdiction.

Where final judgment is obtained without a trial a judge in Chambers has power to make an order for full costs.

Quære—Should the order be *ex parte*?

Where a cause is decided by the award of an arbitrator, the cause is one proper for an application of the kind.

The order may be made unless it appear that the cause was one which the plaintiff was bound to sue in an inferior court.

A plaintiff in order to bring his cause within the jurisdiction of an inferior tribunal is not bound to give credits. It is a 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 cause by McLean, J., for the taxation of full county court costs to the plaintiff, and that the taxation should be revised and the defendant be allowed his costs against plaintiff, pursuant to the statute in that behalf—the debt sued for in this action being within the jurisdiction of the division court.

From the affidavits filed on both sides it appeared that this action was brought in the inferior jurisdiction for an amount claimed by the plaintiff, as amounting to upwards of £36, the principal item of which was thirty seven weeks' board and washing amounting to £22 6s. 3d. The residue was made up of small charges for hay and grain, day's work, use of team, pasturing &c.

The defendant advanced a set-off, in which he claimed £61 16s. 9d.; the largest items being a promissory note, £10 15s. 9d; nine head of cattle and six sheep, £10 6s. 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, 1850: costs of the action to abide the event of the award; costs of reference and award in the discretion of the arbitrator.

The arbitrator awarded that the defendant should pay the plaintiff £1 11s. 7d. in full satisfaction of the plaintiff's claim, being the balance due him after deducting the defendant'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 fees, and £1 for drawing award.

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

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

The defendant in his affidavit 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 further sworn that the order for county court costs was granted without notice to the defendant, and that the costs originally were taxed at £37 3s. 4d.

The plaintiff put in a sworn copy of the notes of evidence taken before the arbitrator, 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 evidence 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 for a balance due, after all the plaintiff's demand had been allowed for, against the rent of the premises of which plaintiff was tenant, and that plaintiff was obliged to prove this payment of the residue of the rent, £50 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 defendant, 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 our determining that the plaintiff should not have county court costs.

The amount stated to have been taxed certainly appears large. The arbitrator's fees, however, and the charge for award amount to £8 10s., 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 nine witnesses were examined for the plaintiff. From the expression in the affidavit "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 prepared to differ from my brother McLean in ordering county court costs.

Then the only question 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 of this case among the cases reported in the sixth revised series of the Common Pleas Reports. Probably the reporter did not consider the case of sufficient importance to publish it. But knowing that it is often referred to, though long since decided, we have with the permission of the taxing master of the court, procured a copy, and now give it to our readers.

when the amount or balance claimed does not exceed £25: but any plaintiff having a cause of action above £25, on which a suit might be brought in the division court, if the demand were not above £25, whenever he shall claim or demand only the balance or sum of £25, may, on proving his case, recover to that amount only

I regard this as a privilege conferred on a plaintiff, and not a right granted to defendant to insist that the plaintiff shall give credit for any set off which the defendant may or may not choose to advance, and to submit to the judgment of the court.

The 78th section of the Division Court Act (13 & 14 Vic. cap 53) enacts that if any action be prosecuted in any county court or superior court for a cause which might have been entered in a division court, and the plaintiff shall obtain judgment for a sum within the jurisdiction of the division court, no more costs shall be taxed against the defendant than would have been incurred in the division court, unless the judge who presides at the trial of such action shall certify in open court, immediately after the verdict is recorded, that it was a fit case to be withdrawn from the division court and commenced in such county court or superior court, with a provision for taxing the costs of defence, and allowing them to be set-off against plaintiff's costs in such cases

This case, from the fact of the reference to arbitration, does not fall within the foregoing section. There has been no trial 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 Trinity Term, 20 Vic., orders that in any action of the proper competence of the county court, in which final judgment shall be obtained *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 plaintiff 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 "inferior jurisdiction"

If, therefore, this case be within the jurisdiction of the county court, it is properly brought in the inferior jurisdiction of the Court of Common Pleas; but as the papers are marked "inferior jurisdiction," the order granted is not within the meaning of this rule.

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 where 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, 20 Vic., which provides that the practice of the courts and the services to be allowed for in all proceedings 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 Bench in England.

There is, strictly speaking, no established practice in England upon a question 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 entered 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 shew affirmatively that the plaintiff was bound to 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 defendant has shewn that in the present case the plaintiff was *bound* to bring his action in the division court? If not, then he certainly *might* bring it in the county court or at his option in the inferior jurisdiction of either of the superior courts

Looking at the affidavits and the evidence given before the arbitrator, I think it does not appear the plaintiff was under any such obligation. Nay, I am not satisfied that if he had so brought it he would not have failed by reason of the necessity of going into an inquiry exceeding the jurisdiction; and I have already said I do not think that if his evidence shewed a claim beyond the jurisdiction of the division court, he was compelled to abandon the excess, or to give credit for a cross demand of the defendant in order to bring the case within the division court.

Admitting, therefore, that it may be doubtful whether, in the first instance an order to tax county court costs could go on an *ex parte* application, for want of a statute or rule of court such as there is in regard to actions apparently of the proper competence of the county court, but brought in the superior court, I think the plaintiff was, on the facts shewn, entitled to have county court costs taxed to him, and therefore that the rule ought to be discharged.

Per cur.—Rule discharged.

McINNES v. HAIGHT.

Assignment for benefit of creditors—Registry—Execution.

Where an execution is placed in the Sheriff's hands against the goods of a debtor after an assignment made by him for the benefit of creditors before its registry, though within five days, the execution is entitled to prevail.

Feehan v. *Bank of Toronto*, 10 U. C. C. P. 32. *Shaw* v. *Gault Ib.* 236; upheld

Where the Court of Common Pleas exercises an appellate jurisdiction it will decide according to its own 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. If we uphold our own judgment in *Feehan* v. *The Bank of Toronto*, 10 U. C. C. P. 32, the decision in the Court below must be reversed.

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 Sheriff within the five days.

In deciding what was the intention of the Legislature, we must look at the whole course of legislation 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 Sheriff'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 liable to be seized under the writ, they would be held so liable if the mortgagee had not registered his mortgage until after the Sheriff had 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 registered. 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. 3, intend to give to the holders of these bills of sale and mortgages any advantages they had not previously possessed. They had before them the 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 distavor by the Legislature.

I cannot therefore come to the conclusion that, by requiring it to be registered within five days from the execution thereof, they intended to give an advantage to the holder of such an instru-

ment over what he had before, but rather, being void during that period as against creditors having executions to get in the Sheriff's hands, they intended to make it absolutely null and void against creditors if it was not registered within the five days mentioned, though it might be registered afterwards.

In this view, I think the judgment of this Court in *Feehan* v. *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 if they were then registered that they should be valid thenceforward, their judgment 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 *Marples* v. *Hartley*, 3 L. T. N.S 474, makes any difference, that being no doubtedly in accordance with the English Act, and with the view I should probably take of our own Consolidated 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.

DRAPER, C. J.—I continue of the opinion expressed in *Feehan* 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 upon 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, followed by an award in favour of plaintiffs, 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 arbitrators for the amount of their fees.

Upon this it was contended 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 several causes—Discharge for non-payment for weekly allowance—Costs of former application.

Where a defendant is arrested and has the weekly allowance ordered in several causes, he is under sec. 4 of Cons. Stat. U. C. cap. 26 entitled to one sum of 10s. a week but in default of payment of that sum, he can properly claim to be discharged in all the causes.

The fact of non-payment of the costs of a former application to be discharged from custody, which was dismissed with costs is no reason for refusing a second application made upon proper and sufficient materials.

(December 1, 1861.

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

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

On the 16th March last he obtained orders for the payment of the weekly allowance of ten shillings in each of these suits; he was regularly paid the allowance at 10s. a week under these orders until the 27th day of May last.

On the 1st June he was charged in execution in the suit of *Kerr et al* against himself. No application was afterwards made for the payment of the weekly allowance, and no allowance was afterwards 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 *Kerr et al* after they had charged him in execution, the plaintiff in this action might contend with a greater show of reason that defendant could not properly be discharged because the weekly sum of 10s was still paid him. But the facts 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, he can properly claim to be discharged in all.

On the point raised I therefore 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 attempt to that a party should be kept in custody for non payment of costs only, and certainly not for such a trifling sum as the costs of discharging a summons.

It is not explicitly shown in the papers produced before me when the order directing the payment of the weekly allowance in this cause was served; I assume, from all the affidavits, that it was served long ago, and it was probably filed in chambers on the application made 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 ceased and has not since been made. This sufficiently shows the orders were made and the default in the payment required under them.

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

CLARK V. IRWIN ET AL.

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

2 W. & M ch. 5, sec. 4—*Treble damages and costs—Right to, how affected by reference to arbitration—"Recover."*

A reference to arbitration dissevers a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under the statute of 2 W. & M. ch. 5 sec. 4. The word "recover" used in the statute means "recover by the verdict of a jury."

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 against the defendants, under the statute 2 W. & M. ch. 5, sec. 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

all matters in difference therein between the parties to be referred to the award of the Judge of the County Court of the County of Wellington, and that the costs of the cause should abide the event, and that the costs of the reference should be in the discretion of the referee.

On the 5th of December, 1859, the arbitrator made his award, finding all the issues in the plaintiff's favour, and the damages to be paid by defendants to plaintiff in respect thereto and the matters in difference therein at the sum of £16 2s 11d The master in taxing the plaintiff his costs allowed the plaintiff treble costs in the usual manner and multiplied the amount awarded by three and allowed the same to the plaintiff

O'Brien for plaintiff. ——— for defendant.

BURNS, J.—I find there is a difference in the practice between the 4th and 5th sections of the act 2 W & M ch 5, with regard to 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 Pleas 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 sum 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 statutes have placed the facilities of enforcing payment of award upon the same footing with a verdict, and as respects which I should say the legislature never intended by the more recent enactments 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 statutes.

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 tenant of Thompson one of the defendants, occupied a house for some six years during which period he paid his landlord's taxes

Held that plaintiff could not in his action deduct the taxes so paid out of the last quarter's rent under the 26th clause of the Assessment Act although there was no agreement as to payment of taxes between him and his landlord.

LEGGATT Co J.—By the 26th clause of the Assessment Act, Con. Stat., U. C., page 655, it is provided that an occupant may deduct from his rent the amount of taxes paid by him, if the same could also have been recovered from the owner unless there be a special agreement between the owner and the occupant to the contrary

It is admitted that there was no agreement between the defendant Thompson, the landlord, and the plaintiff as to payment of taxes, and the only question is whether the tenant, the plaintiff, can, under the facts stated, deduct the taxes which he paid from year to year during the continuance of his tenancy out of the last two quarters' rent accruing due to the landlord, having failed to deduct the taxes from the current year's or quarter's rent as it fell due.

The English Land Tax Act, as quoted in *Thibbs* v. *Parsons*, 3 B. & A, 516, is the same in effect as our Assessment Act with reference to the deduction of taxes by the tenant 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 *Thibbs* 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 construed 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 defendant, Thompson, distrained was neither due nor accruing due, and the plaintiff cannot 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, cannot 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 *postea*. See *Thibbs* v *Parsons*, 3 B. & A, 516; *Sprague* v *Hammond* 4 Moore, 431 See also notes to *Lampleigh* v. *Braithwaite*, Smith Leading Cases.

Postea to defendants.

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

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 placed 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, McInnes, 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, Esq; 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 filing 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 morning.

Donald McInnes, sworn:—I was in plaintiff's employment last August; I recollect John Stephen making an 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 concealment made use of; did not, that I know of, say anything about it from that time; and I remained in possession of the goods continuously, until I had disposed of them for McInnes.

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 far as I recollect, whether he was in possession of the goods for any but himself; I was not placed in possession of the goods for the sheriff on the morning of the 29th; the sheriff did not ask me to keep possession 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 far as I recollect; I did not try to conceal about the assignment; I might have spoken to Mr. Murtagh; I found fault with Mr Murtagh 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 hands 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 *Haight* v *Stephen*, and under that of Haight I seized again, and kept the goods, and subsequently under the *fi. fa.* of Benedict & Vann; I considered that I held the goods under the *fi fa.* of the Bank of Montreal on a previous seizure, 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 last 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 time, 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 in 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 creditors; 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 his 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 transaction, 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 sale 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 hands 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 them.

Upon the first question submitted to them, *Mr. Sadlier* contended that if an execution be placed in the sheriff's hands 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 act 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. *Carrel*, 9 U. C. C. P. 442.

3rd. 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 shewn 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 showed cause.

Horton for the defendants

HAGARTY, C. J.—The material question between the parties, irrespective of that raised by the affidavits filed, is the same as that between *McInnes* 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 Consolidated Stat. of Upper Canada, cap. 45, according to my construction of it; and the same objections were urged by the respective counsel for the defendants 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 refuse a new trial, as I think the verdict for the plaintiff upon 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 Titles 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 *five* 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, if 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 land 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 devisee, 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 order to spare and protect innocent and *bona 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 sec of stat of U. C., 4 Wm. IV., cap. 1; *Doe Stafford* v *Brown*, 3 O. S. 92; *Doe ex dem Adkins* v. *Atkinson*, 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 may 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 *Vaughan ex dem Atkins* 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 several parts and ceremonies 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.

5th. My other reasons are set forth in my judgment in *McInnes* v. *Haight*, which is reported in the 7 U. C. L. J. 104, and to which I still adhere.

6th. With regard to the other questions, *i. e.*, that there was a general verdict whereby the jury found that there was an immediate delivery accompanying the sale, followed by a continual change of possession, which rendered the registry of the bill of sale unnecessary. 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 court case of *Cochrane* v. *Shepard*. The evidence of young McInnes being, as shewn by Mr. Horton's affidavit, contrary to expectation ('I 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 manifestly 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 trial.

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 Pleas in *McInnes* v. *Haight*, and to bow to that judgment without further words on the subject; but the unrevised judgment of the Court of Queen's Bench, *Feehan* 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 void 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 Legislature 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 illegal.

2nd. I regard the course of legislation on the subject to have been this: The common law said to a creditor, provided the transaction be an honest one, you may take a bill of sale upon your debtor's goods, and keep it in your pocket so long as you like, until you are paid your debt, and you need not let the rest of the world know anything about it. Then the Legislature interposed and said, you shall do this no longer; secrecy is prejudicial to the public; and henceforward if you wish to take such a security, not only shall the transaction have a *bona fide* purpose, but if you wish to hold such a security upon your debtor's goods, 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 not have such a length of time within which you may register your security as heretofore; you shall have no option or discretion as to when you shall register; after the first five days from the date of the instrument you shall have that time to register in, and no longer; if you fail to register within those five days your security shall be void against subsequent purchasers and creditors; your keeping secret the existence of your bill of sale, as you might previously do, will be now effectually put a stop to, and your option of registry beyond the five days 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 bargainor or mortgagor from getting further credit on the strength and apparent ownership of goods in his possession, 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 liabilities might be another £500, whilst all he would be worth if brought to sale would be perhaps £500; he might purchase other goods at three months' credit 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 be registered, so that there would be nothing left for the judgment creditor to seize upon to satisfy his execution, but the remnant or unsold portion of his own goods. I think this was the mischief intended to be avoided by the last act of the Legislature on the subject, that is *secrecy* beyond five days, and not that it was the purpose to make it more difficult to take security by means of these instruments. If the security afforded by them was the mischief of the statute, a much shorter enactment and more effectual words would have been employed. The Legislature is omnipotent and would probably have exercised its supremacy over the subject 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 when we read an act of Parliament, I think it fair, if it be possible to do so, so to construe its language and its intentions, and endeavour to give effect to it in such a way that it may effect and be made available by, and equally advantageous to, all persons alike, so far as their circumstances will permit.

5th. Fixing the five days within which to register was curtailing an advantage formerly possessed; for as the law stood under the now repealed statutes, the bill of sale might be kept in abeyance and unregistered, until the debtor might find himself getting so embarassed in circumstances, when it might be an advantage to himself to keep off some pressing or importunate creditor by telling the mortgagee to register his security.

6th. The debtor would always know if a judgment was likely to be recorded against him and execution issued against his goods, and then in order to bring the judgment creditor to terms, the bill of sale might be presented for the first time to his notice. In this way the bill of sale kept secret might be a snare on the one hand to the judgment creditor, and a positive advantage to the debtor on the other, although at the time of its execution it might be perfectly honest and *bona fide* and otherwise unexceptionable in point of law.

Lastly. As the matter now stands, I find myself awkwardly placed, whichever way 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 that although it was so it was wrong to do it. If 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 term, it will be contrary to my own convictions. My own two judgments would be inconsistent the one with the other, and the Court of Queen's Bench would probably send me down an order to revise my judgment — new trials being granted in both by different courts—I should have at the next trial sittings a rule from each court giving directions diametrically opposite to each other. In the one case I should be required to charge one way upon the law, and in the other case in an opposite manner, which would be an incongruity that I must avoid by adhering to my former decision.

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 exclusively used in hotels, public laundries, &c; the office 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 many other purposes, as to convey sound, &c.

Not having great capital of his own, Mr. Goodyear, or persons who had bought his patent, had parcelled out the invention among many licensees; granting to one person the right to use it for one purpose and to another the right to use it for another. To the complainants in this case, the Washing Machine Company, he had granted the exclusive use of it in its application "to or in combination with all wringing, washing and starching machines," while to a company, called the Boston Belting Company, he had granted the use of it for making "hose, pipe and tube," and "*no further*;" the hose, 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 opening through the whole length for the metalic shaft, but much smaller than the shaft, so that the rubber, when the iron shaft has been forced through it, gripes and clings to it, and turns *with it*, instead of turning upon it; thus wringing the clothes as they are passed between the two rollers. The smallness of the aperture through the rubber, and the consequent force and closeness with which it clings to the iron, make the shaft and the rubber, in effect, one entire solid roll."

The Boston Belting Company, whose right to make and sell "hose, pipe and tube," was not disputed, did not attempt to make

"wringers." They made hose, pipe and tube alone. But a firm named Colley & Co., who had a patent of their own for making washing machines, bought this hose, pipe or tube, and out of it they made "wringers" for their washing machines, by cutting the hose into short pieces, running iron shafts through the pieces and fastening them to the iron with cement. The result was that the firm of Colley & Co., made wringers nearly as good, out of 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 vulcanized rubber in making *wringers*, while the Belting Company had the privilege of making *hose* for two.

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

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 authorities 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 filling 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 machines, "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 perfect 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, "*conduit* 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 Lixicographers 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*, *pipe* and *tubing*; showing that the intention was to convey the right to that form of rubber for all the uses 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 wheel because it forms a part of the waggon. So with a roller of the wringing machines. It cannot be called a tube in the aggregate, but nevertheless a tube was used in the construction of it, and does not cease to be a tube because it forms a part of the roller.

2d. A tube is *cylindrical*, and that is the form which is required in the wringing machines. It has this form before being used in that machine, and it retains that form when in and part of it.

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 *stretched 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 license to make and sell an article of a certain form and function, if the purchaser, instead of using that form and function, *destroys* 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 rubber 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 machines, 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, but 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 my property.

But, says the complainants, although it is true that a "tube" is defined to be a hollow cylinder, 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 rubber. 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 who 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. If his licensees do not perform their agreements, his remedy is by action against them on his covenants, and not by recourse to a chancellor to restrain third persons who have 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 may sell to whom he pleases, or apply it to any purpose, unless 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 licensed 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 use the process in their manufacture of belting, packing, hose, 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 rollers 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 refused, with costs.

GENERAL CORRESPONDENCE.

Master and Servant—Misconduct of Servant.

To the Editors of the Law Journal.

Gentlemen,—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 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.—Eds. 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 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 principle 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 Vic., 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 reprint 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.—Eds. L. J.]

MONTHLY REPERTORY.

L. C. & 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 more than twenty years does not bar a *cestui que trust* of a fund which has been misapplied, of his remedy against such a trustee.

A *cestui 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 acquiescence in a breach of trust as will release the trustee from liability.

M. R. BUCKLEY v. HOWELL. *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 appurtenances thereto belonging, upon trusts in strict settlement; and he empowered them, at the request of the person or persons 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 thereinbefore 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 same, 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 plaintiff'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.

Held, a present interest in the plaintiff on which he could maintain an action.

Semble (*per* WILLES, J.) 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 plaintiff'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 witnesses gave 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 these may be mentioned *Grant* v. *The Ætna 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 *confreres* 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?" "Plato 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;" "Cunningham's Church History of Scotland;" "The Story of Burnt Nial;" "English Jurisprudence;" "Thiers' Revolution of the Hundred Days;" "The Works of Elizabeth Barrett Browning;" "Dr. Hessey's Bampton Lecture;" "The Disunion of America."

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

THE ECLECTIC, for January, 1862 (New York: W. H. 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, Attorney-at-Law, to be a Notary Public in Upper Canada.—(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.

"BAILIFF"—Under "Division Courts."

"C."—"G. W. WICKSTEED"—Under "General Correspondence."