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DIARY FOR JULY.

1. SUN... *5th Sunday after Trinity.* Long Vacation com.
2. Mon... Co. Court and Surrog. Court Term begins. Heir [and Devisee Sittings commence.
7. Satur. County Court and Surrogate Court Term ends.
8. SUN... *6th Sunday after Trinity.*
14. Satur. Last day for Judges of Co. Ct. to make return of
15. SUN... *7th Sunday after Trinity.* [ap. from assessm'ts.
17. Tues... Heir and Devisee Sittings end.
22. SUN... *8th Sunday after Trinity.*
25. Wed... *St. James.*
29. SUN... *9th Sunday after Trinity.*
31. Tues... Last day for County Clerk to certify County rate [to municipalities in counties.

THE

Upper Canada Law Journal.

JULY, 1866.

OUR JUDGES.

It is physically impossible for any man to work, work, work, from day to day without rest, cessation, or relaxation. There appears to be a sort of popular delusion that judges are different in this respect from ordinary mortals—a fast fading fallacy which appears to have had its origin in the badly read history of the overtasked but almost unexampled endurance, nearly inexhaustible vigour, and unimpeachable rectitude of a "race of giants," who have given a character to the Canadian Bench of which the country may well be proud.

We have already spoken of this subject with reference to the Common Law judges. What is true of their position is also true of that of the judges of the Court of Chancery; and overwork there is also beginning to tell its tale, replete with injustice to the judges, inconvenience and annoyance to the profession, and great loss and injury to the public.

It is idle now to speak of the late lamented Vice-Chancellor Esten, whose life might have been prolonged if he had attended more to the preservation of his health and less to the business of his office; but it will be of more practical use to speak of those left behind him.

The Chancellor whose untiring energy and great abilities were the means of infusing new life into the Court of Chancery was forced to leave the country to recruit his shattered health. He left last autumn, and is not expected to return for some months, probably not till September. Mr. Vice-Chancellor Spragge, to whom the name of a holiday has for many years been but a hollow mockery, has left the country on six months leave of absence. Mr. Mowat alone is left to grapple as best he may with an accumulated mass of business, which should have been worked off long ago, (and which would have been done if in the power of any two men to do it), besides such other special business as may require attention during vacation—and all this during that period of the year, which the law and the immemorial practice of the courts has set apart *as holidays.*

If the only Equity judge now left in the country should think fit to leave town for a well earned respite from work, who can or who will blame him. The system which forces men to do or attempt to do more than human beings can do, is alone worthy of blame. We do not abate one iota of what we said on this subject in May last, and desire to add that what was and is applicable to the business and judges the Courts of Common Law is quite as applicable to the business and judges of the Court of Chancery. We then and there suggested a remedy, namely, an increase in the number of the judges. Now, when Parliament is sitting, is an appropriate time again to bring the matter before the public; and though some may say that it is inexpedient to make any change "until after confederation," few will have the hardihood to say that no change is necessary. Some thing should be done at once, confederation or no confederation. Humanity and the business of the country demand it.

Since the above was written, we notice that a Government bill has been introduced to give permission to the Chancellor, or one of the Vice-Chancellors, to appoint a Queen's Counsel to hear causes at any sittings of the Court of Chancery. This may be very useful occasionally, but it is a slipshod way of doing things. If the business of the country requires another Equity Judge, the country can surely afford to pay his salary.

DEBTOR AND CREDITOR.

The provisions of the proposed bankruptcy amendments in England have drawn forth considerable discussion as to the advisability or non-advisability of stringent provisions for the punishment of frauds and fraudulent concealment of property by debtors. We have

often stated our opinion that some such enactment as that contained in what is popularly known as the "91st clause" is absolutely necessary for the proper and legitimate protection of the creditor, and when referring to the proposed alteration of the bankrupt laws in England, we noticed the apparent want of any sufficient means of punishing fraudulent and obstinate debtors.

Several of the leading English periodicals have taken the same view of the matter, and argue strongly in favor of the beneficial effect of some provision analogous to that which forms a part of our Division Court system. We publish in another place an article taken from a leading paper in England on this subject. It has the advantage of containing none of that clap-trap sentimentalism which has been too much the fashion of late years, and whilst it puts the case very strongly—much more so than we ever did—it cannot be denied that there are many truths contained in it, well worthy of consideration.

A certain class, or rather two classes of people in this country—one composed of honest and humane, but as we think one-idead and wrong-headed men, and the other of persons likely to be affected by the stringent provisions of the "91st clause"—by dint of much writing and talking, disproportioned to their actual numbers or intelligence, some years ago brought a considerable pressure to bear, by means of which an alteration was made in the then existing law. This was, as it appeared to us, an absurd alteration, and has been so far as we have been able to ascertain, a failure—and it would seem necessarily so, for it simply had the effect of throwing a stumbling-block in the way of the creditor (who surely has a right to recover his debt, if it can be recovered), without affecting materially the position of the willing but insolvent debtor, who is, we are willing to admit, *next to the creditor*, entitled to protection; whilst, at the same time, the alteration admits the justice and propriety of the former enactment. The principle was in fact admitted, but the machinery for carrying it into effect was made more cumbrous and less effective.

A bill has been introduced this session, which has a bearing on this subject, and which it may be useful to notice. It is proposed to repeal section 172 of the Division Courts Act, which provides that no protection of any insolvent act shall be available to discharge any defendant from any order of commitment under the sections already referred to. At first sight this might seem a reasonable amendment, in view of the changes effected by the Insolvent Act; but upon further consideration may it not be said that it is in effect doing away with the benefit operation of the clauses of the act which we are upholding. We venture to say that not in one case out of a thousand has an honest, *bona fide* insolvent debtor been imprisoned under these clauses, whilst as a means of punishing recklessly-dishonest or fraudulent debtors, the powers given by them are most useful. To use a simile brought to our minds by these warlike times—will not the repeal of section 172 take, as it were, the ball from the cartridge and leave it *blank*.

ACT FOR QUIETING TITLES.

In furnishing the necessary documents in order to obtain certificates of title under this Act, amongst other requisites, is an affidavit that the land is not charged with any debt to the Crown, and in order to save trouble and loss of time as well to the applicants as to the referee, in reporting to the judges that a certificate may be granted, it should be understood that this affidavit must be punctiliously correct as shewing that the land is free from such debt under the provisions of the statute chapter 5 Consolidated Statutes of Upper Canada.

To prevent future difficulty to the profession and applicants we have procured the following form from the referee as one that will be accepted:

In Chancery.

In the matter of Lot No. ——, &c.

I, A. B., of ——, &c., make oath and say that I have carefully searched the register in the office of the clerk of the Court of Queen's Bench in Toronto, and that there has not been registered therein any deed, bond, contract or other instrument whereby any debt, obligation or duty was incurred or created to Her Majesty on the part of* ——, his (or their, or any or either of their, as the case may be) heirs, executors or administrators.

Sworn, &c. (with the usual Chancery Jurat).

It will be noticed, however, in reference to this, that an act (of which we give a copy in

* Name here all the persons who at any time since have had any estate in the land liable to a crown debt.

another place) has been introduced which will if passed relieve land from the burden imposed by the act above referred to.

We understand that some such suggestion as was made some time ago in this Journal* with reference to giving a judge in Chambers the same powers as the full Court in matters of partition, is likely to be acted upon during the present session, if time permits. Such an amendment is necessary, and will be appreciated by the profession, particularly by those on the Common Law side.

The alteration needed is very slight, and one to which there can be no possible objection, whilst the benefit to be derived therefrom will be very great, both as regards economy to suitors and convenience to practitioners.

Our readers will be glad to learn that Mr. Leith is engaged in the preparation of annotations upon the real property statutes of Upper Canada. Mr. Leith is a most competent person for the task,—a very arduous one by the way,—and we doubt not he will be as successful in this as he was in his edition of Blackstone.

PROPOSED LEGISLATION.

We copy, for the information of our readers, the following bills introduced during the present session.

Hon. J. H. Cameron is the author of the first four, which with the others will be of much interest to the profession.

An Act to amend the Common Law Procedure Act of Upper Canada.

Whereas, it is desirable to make certain amendments in the Common Law Procedure Act of Upper Canada; Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. In addition to any cases in which a defendant in any suit is now entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any suit or proceeding in which it is made to appear satisfactorily to the Court in which such suit or proceeding has been instituted or taken, or to any Judge in chambers, that the plaintiff has brought a former suit or proceeding for the same cause which is pending either in Upper Canada or in any other country, or that he has judgment, or rule or order passed against him in such suit or proceeding, with costs, and that such costs have not been paid, and such Court or Judge may thereupon make such rule or order staying such proceedings until such security be given, as to such Court or Judge shall seem meet.

2. In any suit or action in which any verdict is rendered for any debt, or sum certain, on any account, debt or promises, such verdict shall bear interest at the rate of six per cent. per annum from the time of the rendering of such verdict, if judgment is afterwards entered in favor of the party or person who obtained such verdict, notwithstanding the entry of judgment upon such verdict has been suspended by the operation of any rule or order of Court, which may be made in such suit or action, and in all cases damages shall be assessed only up to the day of the verdict.

3. Whereas doubts exist as to the effect of equitable defences pleaded in suits at law, and it is desirable to remove such doubts;—if the defendant in any suit at law shall plead any equitable defence, and judgment shall be given against such defendant upon such equitable plea, such judgment shall be pleadable as a good bar and estoppel against any bill filed by such defendant in equity against the plaintiff or representative of such plaintiff at law, in respect to the same subject matter which has been brought into judgment by such equitable defence at law; but nothing in this section shall apply to any suit or action commenced and pending before the passing of this Act, which shall be decided upon as if this Act had not been passed, and this Act shall not be construed as declaring that such judgment at law on an equitable defence has not been heretofore a good bar to a suit in equity on the same subject matter.

4. If any suit or action is brought in any Court of Law or Equity for any cause of action for which any suit or action has been brought and is pending between the same parties or their representatives in any place or county out of Upper Canada, such Court or any Judge thereof may make a rule or order to stay all proceedings in such first-mentioned Court of Law or Equity, until satisfactory proof is offered to such Court or Judge that the suit or action so brought in such other place or country out of Upper Canada is determined or discontinued.

5. Sections numbers two hundred and seventy and two hundred and seventy-one of the said Common Law Procedure Act are hereby repealed and the following clauses substituted in lieu thereof, which substituted clauses shall be read and construed as if they originally formed part of the said Common Law Procedure Act, instead of the said clauses hereby repealed:

"270. Upon any execution against the person, lands or goods, the Sheriff may, in addition to the sum recovered by the judgment, levy the poundage and milage fees, expenses of the execution, and interest upon the amount

10 U. C. L. J., 61.

so recovered according to law; but in case a part only be levied or made on or under any such execution, the Sheriff shall be entitled to poundage upon the amount so levied or made only, whatever be the sum endorsed upon the writ; and in all cases where satisfaction shall be obtained of the debt or any part thereof, after an actual levy upon the debtor's property while such execution remains in the hands of the Sheriff to be executed, the Sheriff shall be entitled to poundage as aforesaid; Provided always, that upon any judgment or decree appealed against, on which any execution shall be issued, before the Judge's *fiat* to stay the execution shall have been obtained under the seventeenth section of the Statute chaptered thirteen of the Consolidated Statutes for Upper Canada, no poundage shall be allowed against the appellant unless a Judge of the Court appealed from shall see fit to order otherwise."

"271. In cases of writs of execution upon the same judgment to several counties wherein the real or personal estate of the judgment debtor has been seized or advertised but not sold, by reason of satisfaction having been obtained under or by virtue of a writ in some other county, and no money has been actually levied on such execution, the Sheriff shall not be entitled to poundage, but to mileage and fees only for the services actually rendered and performed by him, and the Court out of which the writ issued, or any Judge thereof may allow him a reasonable charge for such services, in case no special fee therefor be assigned on any table of costs."

6. No execution shall issue against lands to the Sheriff of any County until after a return of *nulla bona* in whole or part with respect to an execution against goods, in the same suit by the same Sheriff.

7. No Sheriff shall make any return of *nulla bona* either in whole or in part, to any writ against goods, until the whole of the goods of the execution debtor in his county have been exhausted, and then such return shall be made only in the order of priority in which the writs have come into his hands.

An Act to amend the Law of Upper Canada relating to Crown Debtors.

Whereas, by law in Upper Canada, the property real and personal, of any person entering into any bond or covenant, or being indebted to the Crown, is bound by such bond or covenant from the date thereof, and from the incurring of such debt; and whereas it is desirable that such bonds, covenants and debts made or due by a subject to the Crown, should be placed on the same footing as if they were made or due from a subject to a subject: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. No bond, covenant, or other security, hereafter to be made or entered into by any person to Her Majesty, Her Heirs or Successors, or to any person on behalf of or in trust for Her Majesty, Her Heirs or Successors shall bind the real or personal property of such person so making or entering into such bond, covenant, or other security to any further, other or greater extent that if such bond, covenant, or other security had been made or entered into between subject and subject of Her Majesty.

2. The real or personal property of any debtor to Her Majesty, Her Heirs or Successors, or to any person in trust for or on behalf of Her Majesty, Her Heirs or Successors, for any debt hereafter contracted, shall be bound only to the same extent, and in the same manner as the real or personal property of any debtor where a debt is due from a subject to a subject of Her Majesty.

3. The Statute chapter five of the Consolidated Statutes of Upper Canada, shall be and the same is hereby repealed, except as to such securities as are mentioned in the first section of that Statute, which had been made or entered into before the passing of this Act.

An Act to amend an Act respecting the Superior Courts of Civil and Criminal Jurisdiction in Upper Canada.

Her Majesty by and with the advice and consent of the Legislative Council and Assembly of Canada enacts as follows:—

1. The sixteenth section of the Act of the Consolidated Statutes for Upper Canada, chaptered ten, and intituled, "An Act respecting the Superior Courts of Civil and Criminal Jurisdiction," shall be and the same is hereby repealed, and the following section shall be substituted in lieu thereof:

"16. In case any Judge of either of the Courts of Queen's Bench or Common Pleas has continued in the office of Judge of one or more of the Superior Courts of Law or Equity in Upper Canada for fifteen years, or becomes afflicted with some permanent infirmity disabling him from the due execution of his office, and in case such Judge resigns his said office, Her Majesty may, by Letters Patent under the Great Seal of this Province, reciting such period of service or permanent infirmity, grant unto such Judge an annuity equal to two-thirds of the salary annexed to the office of such Judge, to commence immediately after the period of his resignation, and to continue thenceforth during his natural life."

2. The eighteenth section of the said recited Act shall be, and the same is hereby repealed, and the following subtituted in lieu thereof:

"18. The term of the said Courts of Queen's Bench and Common Pleas shall annually be as follows: Hilary Term shall begin on the first Monday in February, and shall end on the

Saturday of the ensuing week; Easter Term shall begin on the third Monday in May, and shall end on the Saturday of the second week thereafter; Michaelmas Term shall begin on the third Monday in November and end on the Saturday of the second week thereafter; and Trinity Term shall be abolished."

An Act to amend the Act respecting Attorneys-at-Law.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. The sections of chapter thirty-five of the Consolidated Statutes for Upper Canada, intituled, "An Act respecting Attorneys-at-Law," numbered forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty-three, fifty-three, fifty-four and fifty-six, shall be and the same are hereby repealed.

PROVISIONS FOR RAISING FUNDS FOR SALARIES OF REPORTERS.

Annual Certificates.

2. In order to provide for the salaries of the reporters in the Superior Court, the Benchers of the Law Society of Upper Canada may, by rule, appoint a sum not exceeding fifteen dollars, in respect of all of the Courts of Queen's Bench, Chancery, and Common Pleas, to be annually paid to the Treasurer of the said Society by every practising Attorney or Solicitor of all or any of the said courts.

3. Each practising attorney and solicitor shall obtain from the clerks of the Courts of Queen's Bench and Common Pleas, and the Registrar of the Court of Chancery, if practising in such court annually, before the first day of Michaelmas Term, a certificate under the seal of such court, stating that he is a practising attorney in such court, and upon the production of such certificate to the Secretary of the Law Society, annually, in Michaelmas Term, and the payment of all fees and dues payable by such attorney or solicitor to the said Society, the said Secretary shall write his name on the margin thereof, with the date thereof, and such certificate shall be taken as issued only from that date.

4. No such certificate shall be issued to any attorney or solicitor who is indebted to the said Society for any term or other fee payable to the Society, nor till the annual fee for each certificate prescribed by the rule of the said Society is paid.

5. If any attorney or solicitor omits taking out such annual certificate in Michaelmas Term, he shall not be entitled thereto until he pays to the said Treasurer, not only the certificate fee, so appointed as aforesaid, together with any fees or dues which he owes to the said Society, but also an additional sum by way of penalty, in respect of each of such courts, as follows:

If such certificate be not taken out before the first day of Hilary Term, the further sum of *two dollars*. If not before the first day of Trinity Term the further sum of *four dollars*.

SERVICE OF CLERKS WHEN ENGAGED IN VOLUNTEER OR GENERAL MILITIA SERVICE.

6. The Benchers of the Law Society shall at all times have full power and authority to allow to any clerk under articles to a practising attorney or solicitor, as part of his term of service, all and every period of time that such clerk may be employed in the Volunteer or General Militia Service when such Volunteer or General Militia are called out for actual service.

An Act to amend the Law of Crown and Criminal Procedure and Evidence at Trial in Upper Canada.

Whereas it is expedient that the law of Evidence, and the practice on Crown prosecutions and trials for Treason, Felony and Misdemeanors should be assimilated to that on trials at *Nisi Prius;* Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. On all trials to which the Crown is a party either directly or through the Attorney General, and in all criminal prosecutions, whether for treason, felony or misdemeanor, the addresses of counsel or of parties to the jury, the examination and contradiction of witnesses, comparison of handwriting, and the calling of attesting witnesses, shall proceed in the same manner, and with the same effect, as is provided in civil suits by sections two hundred and nine to two hundred and fifteen, both inclusive, of "The Common Law Procedure Act;"—Provided always that the right of reply shall be always allowed to the Attorney and Solicitor General, and to any Queen's Counsel having written authority from either of them for that purpose.

2. This Act shall apply only to Upper Canada.

Mr. Angus Morrison has also introduced a bill respecting evidence at *nisi prius*. It is the commencement of what must come sooner or later, and that is, throwing open our courts to the reception of the evidence of parties to the suit on their own behalf.

An Act to amend chapter thirty-two of the Consolidated Statutes for Upper Canada, intituled, "An Act respecting Witnesses and Evidence."

Whereas it is desirable to amend the Act chapter thirty-two of the Consolidated Statutes for Upper Canada, intituled, "*An Act respecting Witnesses and Evidence*," and to extend the provisions thereof; therefore, Her Majesty, by and with the advice and consent of the

Legislative Council and Assembly of Canada, enacts as follows:

1. The following proviso shall be inserted in the fifth section of the said Act; after the words "at the instance of the opposite party," and immediately before the words, "provided always," and shall make part of the said section:

"Provided always, that in any suit or proceeding in which there is more than one plaintiff or more than one defendant, and any one or more of such plaintiffs, and any one or more of such defendants, is examined as a witness at the instance of the opposite party, then any co plaintiff or co-defendant of the party so examined may examine any other or others of his co-plaintiffs or co-defendants as a witness or witnesses in the cause, or may offer himself as a witness and give evidence in the cause; and the words "plaintiff" and "defendant" in this proviso, shall include any party who, under the foregoing provisions of this section, can be called and examined as a witness at the instance of the opposite party, but no other."

Mr. Smith (Durham) has brought in the following amendent to the Mortgage Act, giving power to the executors of a mortgagee to discharge the mortgage or assign the mortgage debt.

An Act to amend and extend the provisions of the fifth section of chapter eighty-seven of the Consolidated Statutes for Upper Canada, respecting Mortgages of Real Estate.

Her Majesty, by and with the advice and consent of, &c., enacts as follows:—

1. The fifth section of chapter eighty-seven of the Consolidated Statutes for Upper Canada, intituled: "An Act respecting Mortgages of Real Estate," is hereby repealed.

2. The following section is substituted for, and shall be read in place of, the said fifth section hereby repealed:

"When any person entitled to any freehold or leasehold land by way of mortgage has departed this life, and his executor or administrator is entitled to the money secured by the mortgage, or has assented to a bequest thereof,—such executor or administrator, if the mortgage money was paid to the testator or intestate in his lifetime, or on payment of the principal money and interest due on the said mortgage, may release and discharge the said debt and the legal estate in the mortgaged land; and such executor and administrator shall have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the whole or any part of the mortgaged lands, without payment of money; and such executor or administrator may also sell and dispose of the said mortgage debt to any purchaser thereof, and assign, transfer and convey the said mortgage debt and security and the legal estate in the mortgaged land to such purchaser; and every such conveyance, release, assignment or discharge, shall be as effectual as if the same had been made by the person having the legal estate."

Mr. Macfarlane brings in the following:—

An Act relating to Suits removed from the County and Division Courts of Upper Canada to the Superior Courts by certiorari

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. In any action, cause, suit, plaint or proceeding, removed from any County or Division Court in Upper Canada into any of the superior courts of law, according to the practice now or hereafter to be in force, the same proceedings may be taken, by either the plaintiff or defendant, in the court to which the said action, cause, suit, plaint or proceeding, may be removed, and with like consequences, as if the same had been originally commenced in the said superior court.

Mr. Wood is responsible for the following proposed amendments in Chancery practice.

An Act to amend the practice of Court of Chancery for Upper Canada.

Whereas it is expedient further to facilitate proceedings, and to prevent unnecessary delays and expenses, in Her Majesty's Court of Chancery for Upper Canada; Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. Whenever a defendant cannot, after due diligence, be found, to be served with the Bill of Complaint, the Court shall order such person to be served by publication, according to the present practice of the Court; and an application to the defendant's nearest relatives, or those with whom he last resided before he disappeared, for information as to his present residence or place of abode, shall be deemed due diligence, without examining any party under oath.

2. A married woman shall, in all cases, sue by her next friend, save that, in a suit against her husband, the Court may allow her to sue alone, upon being satisfied that she is rightly entitled so to do. But in no case shall any order be made, directing the husband to pay *interim* alimony or any costs of suit to the wife, before decree, unless the Court shall be satisfied by the evidence given, that the application is just and reasonable, under the circumstances.

3. In the case of infant defendants, it shall not be necessary to serve a copy of the Bill of

Complaint on any of them; and it shall be sufficient, before applying for an order to appoint a guardian *ad litem*, to serve a copy of the Bill and the notice required by the practice of the Court, upon the party with whom the infants or some of them reside. After a guardian *ad litem* has been appointed, a copy of the Bill shall be served on him, along with the order appointing him guardian; and this shall be deemed good service on the infant.

4. It shall not be necessary, before making an application for the sale or leasing of land in which an infant is interested, that the infant consent to such application; but the Court shall decide as to the propriety of such sale or leasing, and the second clause of the fifty-second section of the Consolidated Statutes for Upper Canada, chapter twelve, requiring such consent, is hereby repealed.

5. Whenever the answer of the defendant sets forth matter to which the plaintiff may desire to reply; he shall do so by a Replication, as at the Common Law, and not by amending his Bill of Complaint. The defendant may also set forth any defence which he may have to the replication by a rejoinder; and so on, each party having the right to answer the last preceding pleading of his opponent, by a new pleading, according to the practice at the Common Law. But this section shall not affect the right of any party to amend or re-amend his Bill of Complaint, or file a supplemental answer, in order to rectify any error or defect therein, according to the present practice of the Court.

6. The court shall, at any time, upon a proper application for that purpose, direct such amendments of any pleading as the furtherance of justice or the due conduct of the suit or matter may require, upon such terms as the court shall deem meet; but any error or defect of pleading which has not misled or injured the adverse party, shall be amended without costs.

7. Upon every examination of witnesses, all the evidence of either party, pertinent to the real object at issue, shall be received, although owing to some error or defect of pleading, the same, or some portion thereof, may be inadmissible by the present practice of this court; the erroneous or defective pleading shall be amended accordingly, as directed by the last preceding section of this Act. But nothing herein contained shall authorize the admission of any evidence irrelevant to the real question intended to be raised for decision, and wherever, in the opinion of the court, the adverse party has been surprised, or his rights might otherwise be injuriously affected by the admission of any evidence of which, owing to the said defect or error in the pleading, he may not have been duly forewarned, he shall be allowed to give further evidence, at such time and place, and on such terms, as the court may think fit.

8. After the parties have closed their respective cases upon an examination of witnesses, if the evidence involve difficult questions of fact or law, the court shall defer hearing the argument thereon till the witnesses in all the other causes have been examined: and the cause shall be argued at such time and place as the court may direct.

9. The Court of Chancery is hereby empowered to make such orders as they may deem expedient for the purpose of carrying this Act into effect.

10. The decisions of the court, under this Act, shall be subject to appeal as in other cases.

11. Upon the hearing of any appeal from the Court of Chancery, the Court of Error and Appeal shall have and exercise the same powers relative to amendments of pleadings and future proceedings in suits as shall be possessed by the Court of Chancery, either under this Act or otherwise.

12. This Act shall take effect from the time of the passing thereof; but it shall not affect the validity of anything done previously to that time.

The following bill is introduced by Mr. Morris. If there should be a full discussion and a careful consideration of its provisions it may assist the legislature in forming a correct opinion on the important subject involved at a future time, but at present we do not think that it has been sufficiently considered, even in England, where so much has been said and written on the subject, or that there is as yet sufficient data to act upon.

An Act to prevent the execution in public of the Sentence of Death.

1. All executions of the sentence of death shall hereafter take place within the walls, or within the enclosed yard of the gaol of the district or county, or union of counties, as the case may be, and not in public view.

2. The sheriff shall, in all cases, require the presence thereat of as many as six (if so many there are) of the *employées* of such gaol, including among them the gaol surgeon or physician (if any) and the gaoler; and any such *employé* being so required and failing to attend, shall be discharged of his employment unless he gives a good excuse for his non-attendance.

3. The sheriff shall further invite, by written summons, the attendance thereat of twelve persons of respectability resident within the district, county, or union of counties, one of whom, at least, (if possible) shall be a surgeon or physician.

4. The sheriff shall permit the presence at the execution of such near relations of the criminal, and of such priests or ministers of

religion as the criminal may desire, and of the criminal's counsel, if so desired by the criminal.

5. Should the criminal not have desired the attendance of any particular priest or minister of religion, the sheriff shall further invite the attendance of such one or more priests or ministers of religion as he, the sheriff, may select, in view of all the circumstances of the case.

6. Excepting the persons above enumerated and such other officers of the prison, sworn constables, assistants, and military guard, as the sheriff in his discretion may deem requisite no person shall be allowed to witness the execution; and in particular, no person under age, unless a near relation of the criminal, shall be allowed to witness the same.

7. The moment of the execution shall be publicly signified by the tolling of a bell on, or as near as may be to, the gaol buildings, and also by the hoisting of a black flag conspicuously thereon.

8. Immediately after the execution, the sheriff shall empanel a jury of not less than six, or more than twelve of the persons present thereat, who, upon their oaths, on view of the body, shall forthwith enquire and find whether the sentence was duly carried into execution; and no person present at the execution shall be exempt from service on such jury, or be allowed to leave the gaol premises until after verdict rendered by such jury; and for all purposes of such inquest and verdict, the sheriff shall have all the powers and functions of a coroner, and the jury those of a coroner's jury; and the verdict shall in all things be dealt with as the verdict of a coroner's jury.

9. The word "sheriff" in this Act shall be held to include any deputy or under sheriff, or other officer, who, in the absence of the sheriff may be charged with the duty of carrying out the execution.

Our prognostications as to the introduction of a bill for reducing registrars' fees has been verified by a bill brought in by that most competent of legislators for such a task, Mr. "Cheap Law" Scatcherd. We must congratulate him upon having, at length, stumbled upon something in the shape of fees which requires reduction. As far as registrars are concerned, they will have, in a great measure, themselves to thank if this reduction in their fees takes place. We are only sorry that the genius of the introducer of this bill is confined to measures of this attenuative description, for the excessively ill-drawn Act of 1865 requires amendment in a variety of ways that are not thought of by the following bill:—

An Act to amend the Registration of Titles (Upper Canada) Act.

Whereas it is desirable that the fees of registrars should be uniform, and it is expedient to amend the Act passed in the session of Parliament held in the twenty-ninth year of Her Majesty's reign, chapter twenty-four, intituled, "An Act respecting Registrars, Registry Offices, and the Registration of instruments relating to lands in Upper Canada:" Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The first sub-section of the sixty-eighth section of the said Act shall be and the same is hereby repealed, and the following sub-section is enacted and substituted therefor:

"1. For registering every instrument other than those hereinafter specially provided for, including all necessary entries and certificates, one dollar, but in case the same, exclusive of the necessary entries and certificates, exceed eight hundred words, then at the rate of ten cents for each additional hundred words, or the fractional part thereof, and if the memorial or other instrument embraces different lots or parcels of land situate in different localities in the same county, the registration and copying of such, including all necessary entries and certificates thereof, into the different registry books, shall be considered separate and distinct registrations of such instruments, but shall be charged for and paid at the rate of ten cents for every one hundred words, or the fractional part thereof."

2. The registrar or deputy registrar of the county in which the lands are situate shall, upon production to him, endorse the certificate required by the fifty-third section of the said Act, on the original instrument, and also on the duplicate or other original part thereof, without any charge.

3. This Act shall extend only to Upper Canada.

JUDGMENTS.—EASTER TERM, 1866.

ERROR AND APPEAL.

Present:—Draper, C. J.; Richards, C. J.; Spragge, V. C.; Hagarty, J.; Morrison, J.; Adam Wilson, J.; John Wilson, J.; Mowat, V. C.

June 23, 1866.

Hodgins v. *The United Counties of Huron and Bruce.*—Appeal from the Court of Queen's Bench *Held* that municipal corporations are not entitled to notice of action under Con. Stat. U. C., cap. 126, *per* Draper, C. J., Spragge, V. C., Hagarty, J., Morrison, J.; *contra*, Richards, C J., Adam Wilson, J., Mowat, V. C. Mr. Justice John Wilson took no part in the judgment. *Per Cur.*—Appeal dismissed with costs.

Mulholland v. *Baker.*—Appeal from the Court of Common Pleas, dismissed with costs.

JUDGMENTS, EASTER TERM, 1866.

Lynn v *Smith* — Appeal from the Court of Common Pleas, dismissed with costs.

Court adjourned till 22nd August next, to hear arguments.

QUEEN'S BENCH.

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

June 8, 1866.

Nicholson v. *Bell.*—Rule nisi discharged.

Cayley et al. v. *Foster.*—Rule nisi discharged.

Moore v. *Walker.*—Rule absolute as to part of what was asked. No costs to either party.

Jacques v. *Nichol.*—Judgment for defendant on demurrer.

Ross et al. v. *Grange.*—Judgment for plaintiff on demurrer to plea. *Held*, that a sheriff, after seizure, is liable for loss of the goods destroyed by fire.

Donelly v. *Stewart.*—Appeal from the County Court of the County of Hastings, dismissed with costs. *Held*, that an action will not lie in a Superior Court on a Division Court judgment.

Slaght v. *West.*—Appeal from the County Court of the County of Brant, dismissed with costs.

Gordon v. *Casey.* — Appeal from the County Court of the County of Hastings, dismissed with costs.

Crysdale v. *Moorman* —Appeal from the County Court of the County of Hastings, dismissed with costs.

Mulvey v. *Gore District Mutual Fire Ins. Co.*—Rule absolute to reduce verdict, or for nonsuit, in the option of the plaintiff.

Canada Company v. *McDonald.*—Rule absolute for new trial; costs to abide the event.

Clarke v. *McCullough.*—Rule absolute for new trial; costs to abide the event.

Richards v. *Liverpool & London Assurance Co.*—Judgment for plaintiff on demurrer to plea.

Clark v. *Corbett.* — Rule discharged without costs.

Farquharson v. *Knight.*—Defendant's rule absolute, and plaintiff's rule discharged; costs to be costs in the cause.

McCammon v. *Beaupre.*—Rule absolute for new trial, without costs.

Snure et al v. *Hughes.*—Rule discharged.

In re Doherty and the Township of Toronto.—Rule absolute to quash by-law, with costs.

In the matter of Bright and McLean —Appeal from the County Court of the County of Kent. Dismissed with costs.

June 23, 1866.

Meyers v. *Baker.*—Rule nisi to issue.

Miller v. *Agricultural Association.*—Rule nisi to issue.

Grantham v. *Severs et al.*—No rule.

Bank of Montreal v. *Reynolds.*—Application for leave to appeal stands.

Hepburne v. *King et al.*—Rule nisi refused.

Baker v. *Baker.* — Judgment for demandant against plea.

Connell v. *Boulton* —Rule nisi to reduce verdict discharged. Rule absolute to increase the verdict to full amount of the mortgage. Leave to appeal granted.

Molson v. *Bradburne* —Judgment for plaintiff on demurrer to plea, with leave to apply to a Judge in Chambers to amend within a month.

Montreal Assurance Co. v. *McCormick.* — Rule discharged.

Crysdale v. *McHenry* —Appeal from the County of Hastings allowed, and judgment to be given in favour of the plea.

Darling v. *Hitchcock et al* —Judgment for defendant on demurrer to replication, and rule absolute for new trial, without costs.

In re Holy and the Corporation of the Township of Broc' —Rule absolute to quash by-law under the Temperance Act, with costs.

Howland v. *Rowe.*—Rule nisi discharged, with costs.

Munson v. *Glass.*—Rule absolute without costs to return money to Mrs. Wallace, on her undertaking to bring no action.

Banting v. *Niagara Dist. Mut. Fire Ins. Co.*—Rule absolute. Leave to appeal granted.

Newman v. *Niagara District Mutual Ins. Co* — Rule absolute discharged.

In re Scott and the Corporation of the County of Peterborough.—Rule absolute to quash part of by-law.

COMMON PLEAS.

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

June 18, 1866.

Rose v. *Brown.*—Rule absolute to enter nonsuit.

Kerr v. *McEwan.* — Rule nisi to go on materials before the court, if applicant desires it.

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

Muckle v. *Ludlow.*—Rule nisi discharged.

Morton v. *Lewis.* — Rule nisi discharged with costs.

Corporation of Belleville v. *Judd.* — Judgment for plaintiffs on demurer to plea. *Held*, that a municipal corporation has power to extend the time for payment of a debt, and to take a covenant as security for the payment of it.

In re Waddell and Gildersleeve.—Appeal from the decision of the Judge of the County Court of the County of Frontenac allowed, and rule nisi for a nonsuit in court below to be discharged, and rule to be issued for judgment for plaintiff on demurrer to second plea.

Perry v. *Bank of Upper Canada.* — Rule nisi discharged.

Rowe v. *G. T. R. Co.*—Rule absolute for new trial on payment of costs.

Bruce v. *Snelgrove.*—Appeal allowed without costs and a new trial ordered in the court below, without costs.

Kuntz v. *Niagara Dist. Mutual Fire Ins. Co.*—Rule discharged.

Mason v. *The Agricultural Mutual Ins. Co.* —Rule absolute to enter a nonsuit.

Richardson v. *C. W. Farmers' Mutual Ins Co.* —Stands till Saturday.

Christie v. *Clark.*—Postea to plaintiff.

Brush v. *McTaggert* —Appeal from the decision of the Judge of the County Court of the County of Frontenac allowed, and rule nisi in court below to be discharged. *Held*, that County Courts in Upper Canada have jurisdiction to hold plea of actions to recover penalties within their jurisdiction as to amount, *O'Reilly qui tam* v. *Allen*, 11 U C Q B 111, to the contrary, owing to recent legislation, no longer law.

June 23. 1866.

Richardson v. *Canada West Ins. Co.*—Judgment for plaintiff on demurrer to pleas

Chisholm v. *Lucas* —Rule nisi discharged.

Blain v. *Mulholland* —Rule nisi refused.

Miller v. *Wiley.* — Judgment on demurrer to plea in favor of tenant, with leave to demandant to apply to a Judge in Chambers to amend

Meyer v. *Thompson.* — Rule nisi discharged, with leave to appeal.

In re Keena and O'Hara. — Appeal from the United Counties of York and Peel dismissed with costs.

Ritchie v. *Prout.*—Rule absolute to set aside nonsuit, and verdict to be entered for the plaintiff on the account stated for the amount of the first notes and interest at 6 per cent., and for defendant on the remaining counts.

Helm v. *Crossen.*—Stands.

Walcott v. *Stolicker.*—Rule discharged.

Thorne v. *Torrance.* — Rule absolute to enter verdict for defendant, with leave to appeal.—Adam Wilson, J., *dissentiente.* A special case to be stated between the parties, if any difficulty found as to appeal on the case in its present form.

Barton v. *Herbertus.* — Rule discharged with costs.

In re Morgan and Huron and Bruce.—Stands till next term.

In re Lee and Baker.—Order confirming sale.

Regina v. *Murphy* —No judgment during the suspension of Habeas Corpus Act.

PRACTICE COURT AND CHAMBERS.

June 23. 1866.

McLean v. *Jones.*—Rule discharged with costs.

Jones v. *Prentice* —Rule discharged with costs.

Snider v. *Gage.*—Rule absolute with costs.

Martin v. *Dickson.* — Rule discharged with costs.

Milligan v *Orr.*—Rule absolute to amend endorsement on writ of execution.

McIlroy v. *Hall* —Rule discharged on payment of costs by defendant.

McLellan v *McLennan.*—Rule discharged with costs.

VanNorman v. *McLellan* —Rule absolute, setting aside judgment and execution in ejectment, and writ of restitution ordered, with costs to be paid by the plaintiff to defendant.

In re Robertson —Taxation confirmed.

Campbell v. *Pettit* —Judgment in ejectment set aside and writ of restitution ordered; costs liquidated at $10.

SELECTIONS.

DEBTOR AND CREDITOR.

We understand that a good deal of dissatisfaction exists in certain quarters at a defect in the new Bankruptcy Bill, which we have pointed out in our articles on the subject. We refer to the inadequacy of the means which it provides for the punishment of fraud, and to the dangers which are likely to arise from the abolition of imprisonment for debt if no remedy analogous in its character is provided. This ought to be a matter of the most serious consideration, for there can be no doubt that the new Bill as it stands is well calculated to encourage those relaxed notions of commercial morality which prevail so widely in the present day and which are the cause of such a vast amount of intricate and widely ramified misery. The new Bill is so limited, as we pointed out in our account of it, as to confine imprisonment for debt in future to the cases in which, as the law already stands, it is the act not of the party but of the court. The most important of these cases is the power given to the County Court judges to imprison for a term not exceeding six weeks persons whom they believe to be able to pay and to refuse out of mere contumacious obstinacy. The principle of the County Court Acts appears to us to be perfectly right, except that it does not go far enough, and we cannot see why it should not be extended to all courts whatever in which debts can be recovered or assets distributed. It is worth while to consider a little the way in which the system works, and the principles on which it depends. It may be a new reflection to some of our readers, but as a matter of fact great numbers of people in very different ranks of life are thoroughly well off and to all intents and purposes are rich people, and yet have hardly any money or any property of value in the whole world. A barrister or physician may be making an income counted by thousands a-year; but if he lives extravagantly, as many men in that position do, his actual realised property at a given moment may be worth nothing or next to it. The barrister, if a single man, may live in handsome furished lodgings and do his business in chambers the furniture of which would not sell for 100*l.*, and that 100*l*, and whatever balance he happened to have at his bankers might well be all the property he had in the world. Suppose the law of imprisonment for debt abolished, and

suppose judgment recovered against him, what would his creditor be able to take? A certain number of law books, and a few tables and chairs, and perhaps a riding horse on which the livery-stable keeper would have a lien for keep. To attach such a man's fees as they came in would be almost impossible. Yet he could in all probability get almost unlimited credit from tradesmen who knew nothing of him except the fact that he was a barrister in large practice. This is no doubt an extreme case, and one which would not arise very often, but cases more or less resembling it might be found in almost every walk of life, down to the clever journeyman artisan who makes large wages, lives in lodgings, and spends his money as fast as he gets it. Such a man will often have a certain small amount of money stowed away somewhere where it is extremely difficult for his creditors to detect it. The mulish obstinacy with which he will sometimes defy the powers of the County Court, and refuse to pay, although he is perfectly well able to do so, would scarcely be believed by those who have not seen it. It is not worth while to make him a bankrupt, and go to the expense of having him examined and crossexamined and probed in all directions to find out what he has and where it is; but when the gaol doors are closed upon him, and he finds out that to protect his hoard he is foregoing wages of a greater amount and losing chances of employment which it may be very difficult to recover, he is pretty sure to pay if he possibly can. In short the plain truth is that the power of imprisonment for debt is a mild form of torture for the purpose of discovering concealed property. So long as the torture does not go beyond a reasonable and bearable degree, which must be assessed from time to time by the average feelings of the age in which it is permitted, it is not only a most efficient, but also a most proper and justifiable instrument to employ for the collection of debts. To rub red pepper into a man's eyes, or to apply red-hot plates to the soles of his feet and the calves of his legs for the purpose of making him pay what he owes, would no doubt cause many debts to be paid of the amount of which the creditors would otherwise be defrauded. These measures are identical in point of principle with the power of imprisonment which the County Court judges actually posses, and which we should wish to see extended to other judges. They are also not distinguishable in principle from pertinaceous dunning, but the difference in the degree of suffering inflicted makes all the difference in a moral point of view.

There are, however, several considerations which ought to be most carefully kept in view whenever this branch of the law is systematically regulated and set upon a solid foundation. In the first place, the power of inflicting imprisonment ought, as under the County Court Acts, to be vested in the judge, and not, as under the existing law, in the party; and in the second place the judge ought to be most careful to use it only against defaulters themselves, and not, as was so frequently the case under the old law, against solvent relations, who it is supposed will prefer paying their relation's debts to seeing him in gaol.

In the second place it ought not to be forgotten that imprisonment for debt ought to be made to serve two distinct purposes which should never be confounded. The first purpose is that of torture for the extraction of money from those who have it and will not pay their debts with it, and whom it would be expensive or otherwise inconvenient to make bankrupts. For this purpose the judge ought to have the power of giving a moderate term of imprisonment, say three or six months terminable at once on payment of the debt. It ought, however, to be provided that the mere imprisonment should not operate as the execution of the old writ of *ca. sa.* operated—as a satisfaction of the demand. The creditor should still have the power of taking in execution any assets he could get at, or of making the debtor a bankrupt, in which case he would be liable to the penalties of the law of bankruptcy if he concealed any part of his property. The debt being satisfied by any means whatever, the imprisonment should cease at once. In order to guide the discretion of the judge to whom an application might be made for the exercise af this power, he ought to have the right of making all such inquiries as he might think expedient with respect to the position of the party, and to require him to answer upon oath all questions addressed to him with regard to his means of payment.

The second object to which imprisonment for debt ought to be applied is that of punishment, and there are many cases in which such a power would be most beneficial. There is a large class of civil actions in which frauds and other iniquitous proceedings on the part of defendants are judicially proved against them, which are far worse than the ordinary run of offences tried in the criminal courts, greater in their moral guilt beyond all comparison, and infinitely more dangerous in their consequences to society. This is the case in a large proportion of actions both for tort and upon contracts. It continually appears in actions for seduction, sometimes in actions for breach of promise of marriage, now and then in actions for assault, and frequently in actions for libel and slander, that the act complained of is one in which the public as well as the party has a strong interest, and which differs from ordinary crimes rather by the way in which the parties have chosen to treat it than by the character of the act itself. In such cases the damages form a civil debt, but they also partake of the nature of a fine, and are usually assessed by the jury on that principle. The law as it stands at present makes a distinction between a debt consisting in damages for certain actions of this class and

other debts. This distinction is given up the new Bill. This, we think, is a matter of regret. There would be no difficulty in empowering the judge before whom such actions were tried to order immediate execution by *ca. sa.*, without prejudice to other remedies, and to order further that if the defendant became bankrupt he should not be discharged from custody under the *ca. sa.* till the expiration of a year or less after his arrest. This would give to quasi-crimes judicially proved a quasi-punishment, which at present they would escape, and which would be highly beneficial to the interest of good morals. It is a monstrous thing that a really bad case of seduction, or slander, or malicious prosecution should involve no other consquence than that of going throug the process of becoming a bankrupt in the easy manner provided for by the new Bill. There is also a large class of cases of fraudulent misrepresentation and fraudulent breaches of contract to which the same measure might with great advantage be applied, but the cirumstances of particular cases vary so very much that it would be much harder to lay down a general rule with respect to them than with respect to the other classes of actions which we have already mentioned. We feel, however, that the abolition of imprisonment for debt will be by no means an unmixed good, until the rough and capricious remedy which it certainly did provide for a good many cases of this sort is brought into proper shape and applied to its legitimate purposes. To treat all debts as crimes is cruel. To provide that no debt shall be a crime or be visited with any more unpleasant consequences than compulsory payment is, we think, weak and foolish. The true problem is to distinguish debts which arise from honest misfortune or innocent mistake and those which are the results of fraud, wrong, or extravagance. Punish the one and compel payment of each. As to the mode compelling payment, if the debtor is really unable to pay there is no help for it; but if he is able to pay, torture him mildly, but firmly, till he does. This we apprehend, is in a compendious form the true theory of imprisonment for debt.

If these principles had been adopted ten years ago, and consistency acted on ever since we should not now be witnessing the painful spectacle of men of perfect solvency who are unable to meet their engagements because of the extravagant overtrading of a set of gamblers who ought long since to have been viewed and treated as criminals.—*Pall Mall Gaz.*

Maxim.—The old maxim, *Ex antecedentibus et consequentibus fit optima interpretatio*, is a sound rule in the construction of instruments. To magnify words of contingency by a narrow and microscopic view, which excludes the fair operation of the context, is not consistent with established principles of construction, or likely to produce any other than an erroneous result: (*Stuart, V. C.*, 26 L. J., N. S., 642, Ch.)

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Bank of Montreal v. Reynolds and Sprowl.

Consol. Stat. C. ch. 58—Banks—Usury—Note payable at another place—Evidence.

Under Consol. Stat. C. ch. 58, if the authorities of a bank being aware that a note would otherwise be made payable where it is offered for discount, procure it to be made payable elsewhere solely for the purpose of obtaining the rate allowed by sec. 5, for the expenses of collection, in addition to the seven per cent. interest, the transaction is usurious and void. They are not called upon however to enquire as to the reason for making a note thus payable, when the parties themselves have so chosen to draw it.

Evidence of a general agreement with the bank that all notes made by defendants should be drawn favourable in that form, is admissible to support a plea of such an agreement as to the note sued on.

The maker and endorser of a note sued together are admissible witnesses for each other, though they have joined in pleading.

Remarks as to the practice in this country of taking notes for discount, not from the last endorser, but from the maker, who brings them endorsed—thus suggesting not a business transaction, but accommodation endorsements.

[Q. B., H. T., 1866.]

Declaration, upon a promissory note made by defendant Reynolds on the 30th January, 1865, payable to defendant Sprowl, or order, at the Bank of Montreal in Toronto, three months after date, for $400, and by defendant Sprowl endorsed to the plaintiffs.

Plea, by both defendants, that the plaintiffs are a banking institution, carrying on business as such in this Province, and incorporated by acts of the parliament of this Province; and that before and at the time of the corrupt and unlawful agreement hereinafter mentioned the plaintiffs had and still have an agency or branch of their bank at the town of Whitby, in the county of Ontario, where the defendants then and still reside and carry on business: that before the making or endorsing of the promissory note in the said declaration mentioned, the defendant Nelson G. Reynolds was indebted to the plaintiffs at the office of their said branch or agency in Whitby aforesaid in a certain sum of money, to wit, the sum of $401.83 on a promissory note made by the said Nelson G. Reynolds and endorsed by the said John S. Sprowl, then held by the plaintiffs, and which matured on or about the 25th day of January, 1865. And the defendant Nelson G. Reynolds being so indebted, it was, at the instance of the plaintiffs, corruptly and against the form of the statute in such case made and provided, agreed by and between the plaintiffs and the defendant Nelson G. Reynolds, that in order to discharge the said debt of $401.83 upon the said note hereinbefore in this plea mentioned, the plaintiffs should lend to the defendant Nelson G. Reynolds a certain sum of money, to wit the sum of $391.91, to be applied on account of the said debt; and that the defendant Nelson G. Reynolds should then pay the balance or remainder thereof in cash, and the plaintiffs should forbear and give day of payment of the said sum of $391.91, from the 6th day of February, 1865, until and upon a certain other time, to wit, the third day of May, 1865, and that for the forbearing and giving day of payment of the said sum

of $391.91 as aforesaid, the defendant Nelson G. Reynolds should give and pay to the plaintiffs a certain sum of money, to wit, the sum of $8.09, being more than three-eighths per centum above the rate of seven dollars for the forbearing of one hundred dollars for a year, and that for securing the payment to the plaintiffs of the said sum of $391.91, so to be lent and applied upon the said debt as aforesaid, together with the said further sum of $8.09 on the said third day of May aforesaid, the said defendant Nelson G. Reynolds should make his promissory note at Whitby aforesaid, the thirtieth day of January, 1865, for the payment of the sum of $400 to the order of the defendant John S. Sprowl three months after the date hereof, and that the defendant John S. Sprowl should endorse the same in blank for the accommodation of and as surety for the said Nelson G. Reynolds, and deliver the same to the said Nelson G. Reynolds, who should deliver the same to the plaintiffs, and that the plaintiffs should discount the same for the defendant Nelson G. Reynolds at their said branch or agency at Whitby aforesaid, and apply the proceeds thereof when so discounted in reduction of the said debt of $401.83, the defendant Nelson G. Reynolds agreeing to pay the balance of the said debt in cash as aforesaid. And it was stipulated and required by the plaintiffs as a condition of the said loan and discount, to which the said Nelson G. Reynolds was constrained to assent and did assent, that the said last mentioned note of $400 should be made payable at the branch of plaintiffs' said Bank in the city of Toronto, but that the same should be discounted by the plaintiffs at the office of their said branch or agency in Whitby aforesaid, expressly in order that the plaintiffs might exact, retain and take a higher rate of intereet than the usual and lawful discount of seven per centum per annum, to wit, in addition thereto three-eighths per centum on the amount of the said last mentioned note, and certain other charges, under color and pretence of a premium or commission to defray the expenses of agency and exchange attending the collecting of the same, and so that the proceeds of the said last mentioned note when so discounted should amount to only the said sum of $391.91, and for no other purpose or reason whatsoever. And the defendants say that in pursuance of the said corrupt and unlawful agreement the said defendant Nelson G. Reynolds thereupon at Whitby aforesaid made his promissory note in writing, being the promissory note in the said declaration mentioned, bearing date the 30th day of January, 1865, and thereby promised to pay to the order of the defendant John S. Sprowl, three months after the date thereof, at the branch bank of Montreal in Toronto, the sum of $400, and the said defendant John S. Sprowl, for the accommodation of and as surety for the defendant Nelson G Reynolds as aforesaid, endorsed the said note in blank, and delivered the same so endorsed to the defendant Nelson G. Reynolds, who afterwards, to wit, on the 6th day of February, 1865, at Whitby aforesaid, delivered the same to the plaintiffs to be discounted as aforesaid; and that in further pursuance of the said corrupt and unlawful agreement the plaintiffs at their said branch or agency in Whitby aforesaid, afterwards to wit, on the said 6th day of February, 1865, discounted the said last mentioned note to the defendant Nelson G. Reynolds, for the said sum of $391.91, as being the whole proceeds thereof, which the plaintiffs, in further pursuance of the said corrupt and unlawful agreement, then and there lent and paid over to the said Nelson G. Reynolds, by crediting and applying the same on account and in reduction of the said first mentioned indebtedness of $401.83; and the defendant Nelson G. Reyneids then paid the plaintiffs the balance or remainder of such debt in cash, together with subsequent interest thereon. And the defendants say that the said note in the said declaration sued on, and made at Whitby as aforesaid, was not *bona fide* payable at the city of Toronto aforesaid, but should have been made payable at the said town of Whitby, where all transactions in respect thereof took place, and where it was discounted as aforesaid, but that the same was made payable at Toronto aforesaid by the express stipulation of the plaintiffs as aforesaid under the corrupt and unlawful agreement, and with the corrupt and unlawful intent and design of exacting, in addition to the said rate of discount of seven per centum per annum, the said three-eighths per centum on account of the said note and other charges, under color of a premium or commission to pay the expenses of agency and exchange attending the collection of such note, and of thereby reserving, receiving and taking a higher rate of interest on the said loan than the rate of seven per centum per annum. And the defendants further say that in so discounting the said note in the said declaration mentioned, the plaintiffs did exact, receive, retain, and take, in addition to the said rate of discount or interest of seven per centum per annum, a sum equal to and exceeding three-eighths per centum on the amount of such note, amounting together to wit to the said sum of $8.09, and only lent and paid over as aforesaid to and for the said defendant Nelson G. Reynolds, as the proceeds of said note so discounted at the said branch or agency of the plaintiffs at Whitby as aforesaid, the said sum $391.91 and no more; and that the said sum of $8.09 so agreed to be given and paid by the defendant Nelson G Reynolds to the plaintiffs for such loan as forbearance as aforesaid, and so received by the plaintiffs, and taken and retained by them on said discount as aforesaid, exceeds the rate of seven dollars for the forbearing of one hundred dollars for a year, in contravention of the statute in such case made and provided.

The trial took place at Whitby in October, 1865, before Draper, C. J.

The defendants began, and called the defendant Reynolds as a witness for the other defendant. It was objected that both defendants having joined in the plea, he was inadmissible, notwithstanding the decision in *Moffatt* v. *Robertson*, 19 U. C. Q. B. 401, 1 Error and App. Rep. 459, but this objection was overruled.

He swore that both he and the other defendant resided at Whitby: that the note sued upon was a renewal of a former note dated 22nd October, 1864, and one of a series of notes beginning in March, 1863.

It was objected for the plaintiffs that under the form of the plea the defendants could not go behind the note in question. The learned Chief

Justice ruled that they might shew an agreement made before, and continued, under which the present note was given.

In 1859 he said it had been arranged between himself and the plaintiffs' agent at Whitby that he should have a standing credit at the bank, giving notes endorsed by the defendant Sprowl; and the note of March, 1863, was given in pursuance of that arrangement. The note sued upon, and all the other notes, were made payable at Toronto, not for his convenience, or at his request, but because the plaintiffs' agent at Whitby required it, saying that it was a rule of the bank, and he could not make the defendant an exception, and asking the witnesses, "How can you expect the bank to pay dividends at eight per cent. and only get seven from you" It was only in this way, the witness said, he could get his notes renewed, and he paid them all by checks drawn on his account at Whitby. He objected, from time to time, to the expense arising from this method of drawing the notes, as he had thus to pay commission in addition to the seven per cent, but he had to agree to it or the plaintiffs would not renew.

A person in the employment of the last witness since 1859, confirmed this statement, saying that the notes were not made payable in Toronto at Mr. Reynolds' instance: that he took the note sued on to the plaintiffs' bank: that there was no new understanding with respect to it, but it was made payable in Toronto because he understood the plaintiffs would not discount it if payable in Whitby: that the defendant Reynolds kept no bank account in Toronto, and would have preferred to have the notes payable in Whitby: that the witness told the plaintiffs' agent there so, but he said it was the rule of the bank to have the notes payable elsewhere than at the place where they were discounted; and having understood that such was the rule, the witness made all the notes he took to the bank payable out of Whitby. The amount credited on the discount of this note was $391.91, the sum of $1.50 or $\frac{3}{8}$ths per cent., being charged in addition to the seven per cent.

The plaintiffs called no witnesses.

The learned Chief Justice directed the jury, that any agreement by which a bank stipulates to receive more than 7 per cent. by way of discount or interest is usurious, and the question was whether they required and insisted on getting more under some colour, or pretence, or device, by which the transaction assumed a shape apparently legal, though in reality a cloak for taking more than 7 per cent.: that though there was no evidence of any agreement in relation directly to the note sued on, yet if they found an agreement proved which was intended to apply to all notes given on the defendant Reynolds' account, and that this note was made under it, they might treat such agreement as applying to it: that if this was an ordinary transaction, in which the note for the convenience or advantage, or even at the request of, the maker or endorser, was made by the defendant Reynolds, payable at Toronto, and taken by him to be discounted by the plaintiffs' agent, then the 5th section of the act, Consol. Stat. C. ch. 58, legalized it, and the charge of $\frac{3}{8}$ per cent. on this note was proper; but if the plaintiffs, as a condition of opening an account at their agency at Whitby with the defendant Reynolds, by discounting notes at Whitby drawn there and endorsed by a resident there, insisted on getting the $\frac{3}{8}$ths per cent. in addition to the 7 per cent., and in order to give the transaction a legal colour insisted the notes should be made payable at Toronto, and the defendant Reynolds agreed to this in order to get a running credit with the plaintiffs, then the plea was proved and the transaction void; and that the evidence, if fully believed, was enough to warrant a verdict for the defendants. They were reminded that the evidence of Reynolds was not applicable to his own defence, but only to that of Sprowl.

The plaintiffs' counsel objected to this charge, that if no more than 7 per cent. and $\frac{3}{8}$ths per cent. had been taken, the jury should have been directed that the bank were entitled to insist that the notes should be drawn so as to afford them that.

The jury found for the defendants.

M. C. Cameron, Q. C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection, and the reception of improper evidence—which said misdirection was in telling the jury that if the plaintiffs refused to discount the notes of the defendant, Reynolds, unless made payable at some other place than the place of discount, in order that the plaintiffs might obtain a greater rate of interest than 7 per cent. by charging a commission of one half per cent., though allowed by law to charge and receive such one half per cent. on notes payable for the convenience of the customer at a place other than the place of discount, and the note sued on was made payable at Toronto for the purpose of enabling the plaintiffs to obtain a greater rate of interest than seven per cent., through or under color of such commission, and not for the convenience of the defendant Reynolds, the note sued on was void, and the defendants were entitled to a verdict, and in not telling the jury that as the note sued on was payable at Toronto, and was presented there for payment and protested, and no greater rate of interest was reserved than seven per cent. and the commission allowed by law to be taken on notes so payable, the note was valid, and the plaintiffs entitled to recover; and in not telling the jury there was no evidence to support the plea, or to shew that there was in reference to the note sued on any such corrupt agreement as that pleaded. And which said reception of improper evidence was in permitting the defendant Reynolds and the witness Nourse to speak of the agreement entered into between the defendant Reynolds and the plaintiffs in the year 1859; and in allowing the defendant Reynolds to give evidence at all for the defendant Sprowl, he having joined in the same plea as Sprowl, and was thereby proving his own defence; or why said verdict as against the defendant Reynolds should not be set aside, and a new trial had between the parties, on the several grounds aforesaid.

C. S. Patterson and *Robert A. Harrison* shewed cause, citing *Whitlock* v. *Underwood*, 2 B. & C. 158; *Withall* v. *Masterman*, 2 Camp. 179; *Davis* v. *Hardacre*, *Ib.*, 375; *Hammett* v. *Yea*, 1 B. &

P. 144, 153, note (*a*); *Matthews qui tam* v. *Griffiths*, Pea. N. C. P. 201; *Marchant* v. *Dodgin*, 2 Moore & Sc. 632; Chy, Con., Ed. 1863, p. 613; *Moffatt* v. *Robertson*, 1 App. Rep. U. C. 459; *Palmer* v. *Baker*, 1 M. & S. 56; *Meagoe* v. *Simmons*, M. & M. 121; *Bradbury* v. *Holton*, 5 O. S. 735; *Massa* v. *Dauling*, Str. 1243; *Peachy* v. *Osbaldiston*, 7 Mod. 353; *Hamilton* v. *Holcomb*, U C. 12 C. P. 88; S. C. in Appeal, 2 App. Rep. U. C. 230.

M. C. Cameron, Q C., contra, cited *Fox qui tam* v. *Keeling*, 2 A. & E. 690; *Perring* v. *Tucker*, 4 C. & P. 70; *Seale* v. *Evans*, 7 C. & P. 593; *Tate* v. *Wellings*, 3 T. R. 531; *Commercial Bank* v. *Cameron*, 9 U. C. C. P. 378.

Hagarty, J., delivered the judgment of the court.

We think the plaintiffs fail to shew any misdirection or reception of improper evidence at the trial.

We do not see that we can narrow either the statute or the decision of our Court of Appeal by holding that the maker and endorser cannot be examined each for the other unless they plead separately. Their joining in a defence common to both does not alter the rule as to their admissibility.

It was, we think, impossible to reject the evidence as to what took place at the bank agency respecting the making of previous notes, however slight might be the connection between them and the note sued on, if any reasonable ground existed for believing that all the notes, including that in question, were affected by any general understanding as to their place of payment.

On the main question we think the issue had to be left to the jury, whether the note was drawn in its actual form under some contrivance on the part of the plaintiffs by means of that form to obtain unlawful and usurious interest.

We do not concur in the plaintiffs' construction of the statute to the extent to which it has been urged—namely, that the right of charging the commission is wholly unqualified, and unaffected by any suggestion that the place of payment is not *bonâ fide*, but contrived by the plaintiffs as a pretext and color for charging more interest than the law allows.

We think the bank is not called on to make any enquiry as to the place of payment of a note, or why the parties seeking for discount have chosen to make it so payable. They may lawfully assume that the parties concerned had their own reasons for selecting a place of payment different from the place of making or of discount.

Neither should we consider it any evidence to prove such a defence as the defendants here have thought proper to set up, that officers or agents of the bank had been heard to say that the bank preferred discounting paper payable elsewhere for the express reason that on such paper the discounters could by law charge a higher rate of interest or a statutable commission. Such a declaration we regard as perfectly unobjectionable, being merely an avowed preference for one class of negotiable security over another.

The intelligible distinction seems to us to lie in proving that the note is made so payable at the instance of or by the contrivance of the bank authorities, who, aware that the note would otherwise be made payable at the place where it is offered for discount, suggest, or manage, or contrive to have it made payable elsewhere, solely for the purpose of obtaining the usurious interest, which in such case ceases to be a statutable commission and becomes mere usury.

As before remarked, the bank have a right to assume that all notes offered for discount are drawn and payable as the parties thought proper to frame them. No enquiry is necessary, and no presumption should, we think, arise that the bank had so required them to be drawn.

Much confusion often arises from a common practice in this country of taking notes for discount not, as in the proper course of business, from the party whose name appears last thereon, and who is legally held to be the holder under prior parties, but taking them from the maker, who brings them back as endorsers, and tries to have them discounted.

The last endorser presenting a note suggests an ordinary business transaction. He offers to the discounter a security importing a good title in himself as a holder for value. The maker of an endorsed note offering it for discount suggests no such business transaction, but rather a mere attempt to raise money by accomodation endorsements.

It is possibly from this course of dealing that questions may arise as to the reason why notes are made payable in any special form in cases like the present. Between the bank and the holders of *bonâ fide* paper tendered for discount a question like this would perhaps never occur.

We may add that the mere fact of parties who intended to apply for discount thinking that the bank would prefer to negotiate paper payable elsewhere as being more profitable, and for that reason so drawing these papers, ought not in our judgment to invalidate the transaction To sustain this defence we think proof should be given that the provision for payment to be made elsewhere was the act or contrivance of the bank, for the especial purpose of obtaining usurious interest under color of a lawful commission.

It is to be hoped that the legislature will place this important question beyond doubt, as well in the interest of legal certainty as of commercial morality. The experience of years has proved too clearly that persons will always be found ready to borrow money upon any terms, and afterwards to refuse payment on any ground, with or without merits, that the ingenuity of counsel may suggest.

The point involved in this case being one of great importance, possibly understood in a clearer light after the elaborate discussion it has elicited, we think the plaintiffs may, on payment of costs within one month, be allowed the opportunity of taking the opinion of another jury. In this view we abstain from any further remark on the evidence adduced.

New trial on payment of costs. (*a*)

(*a*) This case was decided last term. On a second trial the plaintiffs obtained a verdict, which was not moved against

The Queen v. Ellis.

Certiorari—Notice—Practice.

Before applying for a *certiorari* to remove a conviction confirmed by Quarter Sessions, notice of the application must be given to the chairman and his associates, or any two of them, by whom the order affirming such conviction was made; and where a *certiorari* had been obtained without such notice, and a rule nisi obtained to quash such conviction and order, the *certiorari* was set aside.

[Q. B., E. T., 1866.]

J. A. Boyd obtained a rule during last Hilary term, calling on the defendant to shew cause why a writ of *certiorari* which had issued to remove a conviction in a matter of appeal to the Court of General Sessions of the Peace for the County of Oxford, wherein the defendant was appellant and one Thomas Cowan respondent, and the order therefor, and the allowance thereof, and all proceedings had thereunder, should not be quashed with costs; and why a writ of *procedendo* should not issue, &c., on the ground, among others mentioned in the rule, that the order for the *certiorari* was granted ex parte, and in the first instance without cause shewn, and that the writ was ordered to issue improvidently, it not been shewn to the presiding judge in chambers that notice of sush application was given to the chairman of the Court of Quarter Sessions and his associates.

It appeared that the defendant was convicted in August last, before three of the justices of the county of Oxford, of having assaulted one Cowan, a Division Court bailiff, while in the discharge of his duty, and sentenced to a fine of $12 and $8 86 costs: that the defendant appealed to the then next Court of Quarter Sessions against such conviction: that the appeal was heard and tried in September last, at the Sessions, and the conviction affirmed, and the defendant ordered to pay the costs of the appeal.

On the 15th November last the defendant applied for and obtained a writ of *certiorari*, addressed to the chairman of the Quarter Sessions, commanding him to send to this court a certain conviction found and pending in the Court of General Quarter Sessions, &c., in a certain matter of appeal between the defendant appellant and Cowan respondent, and all things touching the same. On the 20th of November the chairman returned in obedience to the writ the conviction and the order of the Court of Quarter Sessions, confirming the conviction and ordering the defendant to pay the costs and charges of the appeal. The caption stated the order to have been made by the chairman and James Kintrea and Wm. Gray, justices. It appeared also that on the ex parte application for the *certiorari* the only notices filed by the defendant were notices served on the convicting justices, Messrs. Freeman, Lardon and Muma, and that no notice was served on the chairman of the Quarter Sessions, or any two of the presiding justices before whom the appeal was tried and the conviction confirmed.

In Michaelmas term last, *Robert A. Harrison* obtained a rule (on reading the *certiorari* and the return thereto, &c.), calling on the convicting magistrates and Cowan, the complainant, to shew cause why the *certiorari* should not be quashed, on various grounds, and why the order of the Court of General Quarter Sessions, affirming the conviction with costs, should not be quashed, on grounds also mentioned in the rule.

Both rules came on for argument together, *Boyd* supporting his own rule, and shewing cause against Mr. Harrison's, and the latter shewing cause against Mr. Boyd's rule, and supporting his own.

Boyd, in support of the objection for want of notice, cited *The Queen* v *Inhabitants of Chartworth*, 5 Q. B. 201; *The Queen* v. *Inhabitants of Gilberdike*, Ib. 207; *Rex* v. *Rattislaw*, 5 Dowl. 539; *The Queen* v. *Inhabitants of Darton*, 14 L. J. M. C. 41; *Rex* v. *Justices of Newcastle*, Dra. Rep. 121; *Victoria Plank Road Co.* v. *Simmons*, 15 U. C. R. 303; *The Queen* v. *Watson*, 7 C. P. 495; *Regina* v. *Peterman*, 23 U. C. R. 516.

Morrison, J., delivered the judgment of the court.

Several objections were taken and argued on both rules, but the only one necessary for our decision is, whether the notices required by the 13 Geo. II. ch. 18, sec. 5, of the intended application for the *certiorari* ought to have been given to the justices by and before whom the order of Sessions was made.

We are of opinion that such notices were necessary. The 5th section of the statute enacts that no writ of *certiorari* shall thenceforth be granted, issued forth or allowed, to remove any conviction, order, &c., made by or before any justice or justices of the peace or the General Quarter Sessions, &c., unless it be duly proved upon oath that the party suing out the same hath given six days notice thereof in writing to the justice or justices, or any two of them (if so many there be), by and before whom such conviction &c., shall be so made, to the end that such justice, or the parties therein concerned, may shew cause against the issuing or granting the said *certiorari*. Here the *certiorari* granted was to remove a conviction and an order of the Sessions confirming the conviction, with a view of having both of them quashed. No notice of such application was served on the justices or any two of them, by and before whom the order of Sessions was made. It is settled by many decisions, upon the language of the statute, as well as from the reason of the thing, that in cases like this the justices actually present when the order of Sessions was made, should be called upon to consider whether or not they would oppose the issuing of a *certiorari*, or, to use the words of the statute, to the end that they or the parties therein concerned may shew cause against the granting of the *certiorari;* and it has been held that where a rule *nisi* for a *certiorari* has first been taken out and served on the justices, and a rule absolute obtained for issuing the writ, that such a proceeding is not notice to the justices, and in such a case the court have quashed the *certiorari* upon motion to do so.—*Rex* v. *Nicholls*, 5 T. R. 581, *n; Rex* v. *Rattislaw*, 5 Dowl. P. C. 539.

This court, in *The Queen* v. *Peterman*, 23 U. C. R. 516, the converse of this case, where it appeared that notices were only given to the justices presiding at the Sessions who confirmed the conviction, discharged the rule to quash the conviction and the order of Sessions, because no notice of the application had been given to the convicting magistrates.

At first we thought it was not competent to the respondent in the appeal to object to the want of notices to the justices of the Sessions;

but in the case of *Rex* v. *Rattislaw*, above cited, that point was before the court, and Patterson, J., said, in giving judgment: "I cannot tell but that they, the justices, may be injured, and may have wished to support their own order. However, the objection being brought under the notice of the court, I am bound to deal with it."

In *Rex* v. *Wakefield* (1 Burr. 488) Lord Mansfield held that if the *certiorari* issued improvidently, though the return was filed, it would be superseded and the return taken off the file. In Corner's Crown Practice, p. 58, it is said that if the *certiorari* has been obtained by misrepresentation, or was issued illegally or improvidently, the court may set it aside. So, in Paley on Convictions, p. 374: "If upon examination, it appears that the *certiorari* issued improperly it may be superseded, even after the return has been filed, and the return may be taken off the file."

We are, therefore, of opinion that the objection of want of notice must prevail, and as a consequence the rule obtained by Mr. Harrison to quash the *certiorari* and the order of Sessions will be charged with costs.

Discharged with costs.

The Queen v. Stewart.

C. S. U. C. ch. 123—Form of order and judgment.

The form of order given in the schedule to Consol. Stat. U. C., ch. 123, (respecting the costs of distress for rents and penalties not exceeding $80,) states the unlawful charges to have been taken from the complainant, "under a distress for (*as the case may be*)." *Held*, sufficient to say "a distress for rent," and that it was unnecessary to state such rent to have been under $80, in order to shew jurisdiction.

[Q. B., E. T., 1866.]

Robert A. Harrison obtained a rule *nisi*, which was drawn up on reading the writ of *certiorari* issued herein, and the return thereto, and the two several orders and judgments thereto annexed, calling upon the complainant and the two justices to shew cause why the said orders and judgments should not be quashed, upon grounds mentioned in the rule, among others, that the orders, &c., do not on the face of them shew jurisdiction; in this, that it is not shewn that the rent distrained for did not exceed $80; that the said orders, &c., do not on the face of them comply with the form given in the statute in that behalf.

The orders returned and annexed to the writ of *certiorari* were as follows:—

Province of Canada, United Counties of Lanark and Renfrew. } *In the matter of complaint of John Doel against John Stewart*, for the breach of the provisions of the Consolidated Statutes for Upper Canada, entitled an act respecting the costs of serving distresses for small rents and penalties; We, Robert R. Smith and Andrew W. Bell, two of her Majesty's justices of the peace for the United Counties of Lanark and Renfrew, do order and adjudge that the said John Stewart shall pay to John Doel the sum of twenty-one dollars and fifty-four cents, as compensation and satisfaction for unlawful charges and costs levied and taken from the said John Doel under a distress for rent, and the further sum of twelve dollars and sixty-five cents for costs in this complaint. Given under our hands and seals, this 27th day of May, 1865. To which was appended the signatures and seals of the two justices.

The second order was in the same words, only differing in amounts.

Richards, Q. C., shewed cause.

Robert A. Harrison supported the rule.

Morrison, J., delivered the judgment of the court.

We are of opinion that this rule should be discharged.

The only question for our decision is, whether the orders on the face of them are valid; and in pursuance of the statute. They correspond verbatim with the form given by the act, Consol. Stat. U. C., ch. 123, and which form, by the 10th section, it is imperative in the justices to follow; but it is objected that the particulars of the offence are not set out after the words "distress for;" that the order does not shew that the distress was for a sum within the statute, or for not more than $80; and it was argued that the words ("as the case may be,") pointed to those particulars being inserted. We cannot take that view of the case, or come to the conclusion that such was the intention of the legislature.

The statute begins with enacting, in the first section, that no person making any distress for rent, or for any penalty, when the sum demanded and due does not exceed $80, in respect of such rent or penalty, &c., shall take from any person, &c., any other costs than such as are set forth in the schedule to the act; and by the second section, if any person offends against any of the provisions of the preceding section, &c., the offender shall be ordered and adjudged to pay to the party aggrieved treble the amount of the money unlawfully taken. And by the tenth section, the orders and judgments on such complaints shall be in the form in the schedule annexed to the act.

This statutable form begins by reciting the complaint of A. B. against the defendant for the breach of the provisions of the statute, the title of which is set out. These provisions are only applicable to distresses for rent and penalties not exceeding $80. It then states the adjudication of the justices, and the sum awarded as compensation for unlawful charges, &c., taken from the complainant, "under a distress for (*as the case may be*)," *i.e.*, for rent, or for a penalty, *simpliciter*.

If the legislature intended otherwise, we should find the words that are usually inserted in such forms, such as: (*hereby specify the offence,*) or (*state shortly the offence*), or, as in the statute respecting the duties of justices in relation to summary convictions ("*stating the facts entitling the complainant to the order, with the time and place when and where they occurred.*"—Consol. Stat. C., ch. 103, schedule K. Such expressions would be clear, and would leave no doubt as to what was meant, but the use of words, "(*as the case may be,*)" direct in our judgment the insertion of the mere words specifying the kind of distress—rent or penalty. The object of the legislature was to have a simple, short and concise form, and it would be hard indeed if the justices should be held to have acted illegally in following the form in the very words of the statute. If we were so to hold, the act itself,

as said by Baron Parke in a like case, would form only a snare to entrap persons.

During the argument it was suggested that it was contrary to all precedent, and that the legislature never could have intended that the order should not shew on its face that the justices had jurisdiction, by stating that the rent did not exceed $80; but on looking at the English act 57 Geo III, ch. 93, from which our act was taken, (our legislature including within its provisions distresses for rent) the form is identical with the order made by the justices in this case.

We are therefore of opinion that the objections taken to these orders are unfounded, and that the rule should be discharged.

Rule discharged.

Donnelly et al. v. Stewart.

Held,—affirming the judgment of the County Court, and following *McPherson* v. *Forrester*, 11 U. C. Q. B. 362—that an action would not lie in a County Court upon a Division Court judgment.

[Q. B., E. T., 1866.]

Appeal from the County Court of the County of Hastings.

This was an action brought on a judgment recovered in the ninth Division Court of the County of Hastings.

At the trial it was objected that the action would not lie, and upon this objection the learned judge made a rule absolute in term to enter a nonsuit, holding the case to be governed by *McPherson* v. *Forrester*, 11 U. C. Q. B. 362.

The plaintiff thereupon appealed.

Ponton, for the appellant, cited *Williams* v. *Jones*, 13 M. & W. 628; *Reynolds* v. *Talmon*, 2 Q. B. 644; *Adams* v. *Ready*, 6 H. & N. 264; *Slater* v. *McKay*, 8 C. B. 556; *Albon* v. *Pyke*, 4 M. & G. 421; *Cates qui tam* v. *Knight*, 3 T. R. 442.

Hector Cameron, contra, relied on *McPherson* v. *Forrester*, 11 U. C. Q. B. 362; and *Berkeley* v. *Elderkin*, 1 E. & B. 806.

Hagarty, J., delivered the judgment of the court.

The chief point raised on this appeal is whether an action can be brought in the County Court on a Division Court judgment. This court, in *McPherson* v. *Forrester*, 11 U. C. Q. B. 362, decided in 1853, on demurrer, that an action would not lie on a Division Court judgment, and the language equally points to any higher court (as *e. g.* the County Court,) as to the superior courts.

This case was not appealed, and has apparently remained unquestioned thirteen years. As our decision in this appeal is final, we may not be necessarily bound by the case cited, but we should not depart from it except on the strongest grounds. There it was held that the provisions of the Division Court Acts for enforcing judgment would be interfered with if the plaintiff there could at once go into a higher court and sue on the judgment. The court relied much on the decision in *Berkeley* v. *Elderkin*, 1 E. & B. 808. Some of the reasons there given may not exactly apply to our execution process against goods in Upper Canada; but Lord *Campbell* points out one ground common to both systems: "Section 100," (like our section 170, Consol. Stat. U. C., ch. 19), "enacts 'that it shall be lawful for the judge, &c., if he thinks fit, whether or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendant so summoned before him, for payment by instalments or otherwise, of any debt or damages recovered, and to make any further or other order, either for the payment of the whole of such debt, or damages and costs, forthwith, or by any instalments, or in any other manner, as such judge may think reasonable and just.' This shews," he says, "that there is nothing in the nature of a final judgment in the County" (Division) "Court. The judge has still jurisdiction over this very judgment on which this action is brought. He might now rescind or alter it, and make a new order to pay by instalments, or at any other time. That power given to the judge would be defeated if this action lay. * * I rejoice that we are able to come to this conclusion by the established rules of law; for there can be no doubt that it is most desirable that such actions should not lie, * * Where new rights are given with specific remedies, the remedy is confined to those specifically given."

Another section of our act, 108, allows the judges in case of sickness or other sufficient cause to suspend or stay a judgment.

There seems no doubt that a defendant sued in the higher court, would lose several important advantages allowed him in the Division Courts.

We are not prepared to dissent from the reasoning of this English case, followed as it was by this court; and we dismiss the appeal with costs.

Appeal dismissed, with costs.

Grimm v. Fischer.

New trial—Verdict under £20.

The rule that a new trial will not be granted where the verdict is under £20, though against evidence, refers to the amount of the verdict, independent of any sum paid into court.

Where, therefore, the verdict was for $84, exclusive of $100 paid into court, and a new trial could have been granted only on payment of costs, the court refused to interfere.

[Q. B., E. T., 1866.]

Britton applied for a rule calling on the plaintiff to shew cause why there should not be a new trial; on two grounds—first, the insufficiency of the evidence given at the trial for certain purposes; and, second, on affidavits.

Cur. Adv. Vult.

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

Looking for the moment no further than the affidavits, I should readily concur in granting the rule, and (unless a satisfactory answer was given) in granting a new trial.

But there are other considerations which cannot be overlooked. The defendant was in court when this cause was called on for trial, and though aware that none of his own witnesses had arrived, resolved to make no application for postponement. He explains that he had no idea that the plaintiff was about to call one Teighmar as a witness, who, as some of the affidavits represent, is very hostile to him (defendant), and whose evidence appears to have mainly contributed to the verdict being as large as it is; but

this is not in itself a reason sufficient to repel the effect of the trial being allowed to proceed with defendant's concurrence.

Then we have the amount of the verdict, which is only $84 $\frac{4}{100}$, exclusive of $100 paid into court. The English rule is that where the verdict is under £20 (sterling) the court will not grant a new trial, though such verdict is against evidence. The case of *Bryan* v. *Phillips*, 3 Tyrw. 181, 1 Cr. & M. 26, is very much to the purpose, where in assumpsit the pleas were non assumpsit, and a tender of £12 10s., and the verdict was for defendane on the tender, and for the plaintiff on the other issue, with £19 10s. damages in addition to the £12 10s. It was pressed on the court that in effect the plaintiff recovered more than $80, and so was not within the rule as to £20. But the court said the defendant was only liable to pay £19 10s. on the verdict: that the principle of the rule was that in the absence of misdirection the defendant would have to pay costs, and that the courts made a rule not to grant a new trial when the verdict was let than £20, unless in a case where they could grant it without costs. *Bevan* v. *Jones*, 2 Y. & J. 264, is to the same effect.

We could not grant a new trial in this case except on payment of costs, as the whole question is one of evidence, wherefore, we think, there should be no rule.

Rule refused.

Ross v. Grange, Sheriff.

Action for not levying—Destruction of goods by fire—Pleading.

Declaration, against a sheriff for not executing a *fi. fa.*, alleging that there were goods out of which he could have levied the money endorsed, but that he did not levy the same. *Plea*, that before he could by due diligence have levied the moneys the goods were destroyed by fire.

Held, on demurrer, plea bad, for levying includes seizure and sale, and consistently with the plea the goods might have been destroyed in defendant's custody after seizure, in which case he would be liable.

[Q. B., E. T., 1866.]

Action against the Sheriff for not levying under a *fi. fa.*

The declaration was in the ordinary form, averring that at the time of the delivery of the *fi. fa.* to the defendant divers goods and chattels of the judgment debtor to the amount of the moneys endorsed and directed to be levied, were in the defendant's bailiwick, and that he, the defendant, might and could, and ought to have levied and made thereout the money and interest endorsed on the said writ, yet he did not nor would levy the said money, but made default in the execution of the said writ, whereby, &c.

To this the defendant pleaded that he did proceed to execute the said writ, and did endeavour with all reasonable diligence to levy the money and interest on the said writ endorsed, as by the said writ he was commanded to do; and that after the delivery of the said writ to the defendant, as in the declaration alleged, and before the defendant could by due diligence have levied the moneys and interest on the said writ endorsed, the said goods were destroyed by fire.

Demurrer, on the following, among other grounds:—

1. Because the said plea does not state that the defendant endeavoured to seize the said goods and chattels, and that before he could by due diligence have seized them, such goods and chattels were destroyed by fire.

2. Because the same plea is ambiguous and uncertain, in that it only states that the goods in the declaration mentioned were destroyed by fire before the defendant could by due diligence have levied the moneys and interest on the said writ endorsed, and does not state whether the said goods were so destroyed before the defendant could by due diligence have seized and taken the same in execution under the said writ.

McMichael, for the demurrer, cited *Drewe* v. *Lainson*, 11 A. & E. 529; *Sly* v. *Finch*, Cro. Jac. 514; *Barrow* v. *Bell*, 5 E. & B. 540; *Playfair* v. *Musgrove*, 14 M. & W. 246; *Mildmay* v. *Smith*, 2 Saund. 343.

C. Robinson, Q. C. contra.

Morrison, J. delivered the judgment of the court.

The question turns upon the meaning of the words "have levied the moneys and interest endorsed" in the concluding part of the plea. The case of *Drew* v. *Lainson*, 11 A. & E. 538, shows that those words include two acts on the part of the sheriff, a seizure of the goods and a sale; and our C. L. P. Act, sec. 253, prohibits the sale of any goods seized by the sheriff under an execution until after eight days public notice, so that before a sheriff can levy moneys under a *fi. fa.* goods there must be a seizure, and at least eight days intervening.

It is quite consistent with the plea that the defendant had seized the goods mentioned in the declaration, and that while they were in his custody they were destroyed by fire. If the sheriff seize goods he is liable for them, no matter what becomes of them, and whether he sells or not the judgment debtor after a seizure is discharged as to the plaintiff, and he is not liable to a second execution, and he may plead the taking in discharge of himself.—Bac. Abr. "Execution" D. and cases cited—*Clerk* v. *Withers*, 2 Ld. Raym. 1074.

Judgment for the plaintiff on demurrer.

COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

Brash, Qui Tam v. Taggart.

Action against Justice of Peace for a penalty—Con. Stats. U. C. ch. 124, sec. 2—County Court jurisdiction to try.

The County Courts have now jurisdiction (under Con. Stats. U. C ch. 124, sec 2) to try an action for a penalty against a Justice of the Peace, where the penalty claimed does not exceed $80.

[C. P., E. T., 1866.]

Appeal from the County Court of the County of Frontenac.

The action was *qui tam* against a Justice of the Peace for not returning a conviction, claiming the penalty of $80, under Con. Stats. U. C. ch. 124.

The defendant pleaded, Never indebted by statute, on which issue was joined.

At the close of the plaintiff's case the defendant's counsel moved for a nonsuit on the ground, among others, that the County Court had no jurisdiction to try a *qui tam* action under the above statute.

The learned judge overruled the objection, and the jury found a verdict in favour of the plaintiff for the amount claimed.

Against this verdict the defendant moved in the following term, on the same ground as that taken at the trial, and the learned judge, feeling himself bound by the decision of *O'Reilly qui tam* v. *Allan*, though in fact dissenting from it, made absolute the rule *nisi* to enter a nonsuit.

From this judgment the plaintiff appealed.

Robert A. Harrison, for the appeal, cited *Lawford* v *Partridge*, 1 H. & N. 621; *Powley* v. *Whitehead*, 16 U. C. Q. B. 589; *Campbell* v. *Davidson*, 19 U. C. Q. B. 222; Con. Stats. U. C. ch. 124, sec 2; ch. 15, sec. 1; Con. Stats. C. ch. 5, sec. 6. sub sec. 17; *O'Reilly q. t.* v. *Allan*, 11 U C Q B. 411; *Haight* v. *McInnis*, 11 U. C. C. P. 518.

John Patterson, contra, referred to Espinasse on Penal Actions, and Con. Stats. U. C. ch. 15, sec. 16, sub-sec. 5.

Richards, C. J., delivered the judgment of the Court

Since the decision of the case of *O'Reilly qui tam* v. *Allan*, 11 U. C. Q. B. 411, the statute for recovering penalties similar to those which this action was brought to recover has been somewhat changed in the consolidation, and in looking at the change and considering it in connection with that case, and the case of *Medcalfe* v. *Widdefield*, 12 U. C. C. P. 411, we think we may properly hold that County Courts have jurisdiction in Upper Canada to try actions for penalties under the Con. Stats. (22 Vic. ch. 124.)

The statute 4 & 5 Vic. ch. 12, sec. 2, after declaring that under certain circumstances justices shall forfeit and pay the sum of twenty pounds, together with full costs of suit, proceeds as follows, "to be recovered by any person or persons, who sue for the same by *bill, plaint* or *information*, in any Court of Record in Canada West."

The portion of the Consolidated Act referring to the same proceeding reads thus: "To be recovered by any person, who sues for the same, by action of debt or information, in any Court of Record in Upper Canada.

Under section 81 of the Law regulating Elections for Members of Parliament (Con. Stats. C. ch. 6) a penalty of $100 is imposed upon the keeper of a public-house who neglects to close it as required by that section; and section 87 of the same statute enacts that all "penalties imposed by this act shall be recoverable with full costs of suit by any person, who will sue for the same, by action of *debt* or *information* in any of Her Majesty's courts in this Province having competent jurisdiction.

At the time *O'Reilly qui tam* v. *Allen* was decided, the jurisdiction of the County Court, was not precisely as it is now. Then the jurisdiction was confined to debt, covenant or contract, to the amount of £50, and to debt or contract, when the amount was ascertained by the signature of the defendant, to £100; and also in all matters of tort relating to personal chattels, where the damage should not exceed £30, and where the title to land should not be brought in question.

Under the County Court Act now in force, subject to certain exceptions, (such as actions when the title to land is brought in question, or in which the validity of any demise, bequest, &c., under any will or settlement is disputed, or for libel or slander, or for criminal conversation or seduction, or an action against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto), the County Courts have jurisdiction in all personal actions where the debt or damages claimed does not exceed the sum of $200; in all causes or suits relating to debt, covenant and contract, to $400, when the amount is liquidated or ascertained by the act of the parties, or by the signature of the defendant; with certain provisions relating to bail-bonds and recognizances of bail, &c.; and in all cases unprovided for, the general practice and proceedings in those courts is to be the same as in the Superior Courts of Common Law.

The Interpretation Act (Con. Stats. C. ch. 5, sec. 6, sub-sec. 7) provides, that when no other jurisdiction is given or furnished for the recovery of pecuniary penalties, they shall "be recoverable, without costs, &c., before any court having jurisdiction to the amount of the penalty in cases of simple contract."

The authorities referred to in the case of *O'Reilly qui tam* v. *Allan* seems to sustain the conclusion arrived at by the court. The learned chief justice, in concluding his judgment, makes special reference to the proceedings mentioned in the *then* County Court Act, being by "bill, plaint or information," none of which were the ordinary and appropriate methods of proceeding in the County Court.

The case of the *Apothecaries Company* v. *Burt*, 5 Ex. 363, was not referred to in that judgment. That was an action to recover a penalty of £20, and under the statute all penalties and forfeitures exceeding £5 could be recovered in any of His Majesty's Courts of Record in England and Wales. The action was brought in the County Court, which was authorised to hold "all pleas of personal actions when the damage claimed was not more than £20, whether on balance of account or otherwise." The Court or Exchequer refused a prohibition. The ground of want of jurisdiction to try it as a personal action was not raised, the ground on which the prohibition was sought being, that the action was brought in such a form that four penalties of £20 each might be claimed.

Looking at the change in the language of the Consolidated Statute (22 Vic. ch. 124) from that used in 4 & 5 Vic. ch. 12, the proceeding now being by action of "*debt* or information in any Court of Record in Upper Canada," instead of by "*bill*, plaint or information," as the former act stood; and looking at the changes in the jurisdiction of the County Court, as well as the decision of this court, in *Medcalfe* v. *Widdefield*, sustained by the case in 5 Ex., we ought, in my judgment, to hold that this action was well brought in the County Court. In doing this we do not necessarily overrule the case of *O'Reilly qui tam* v. *Allan*, there having been some, as to this

point, not unimportant changes made in the words of the statute by the consolidation of it.

I think we may infer that this change was intentionally made; the giving the action of debt by express words, when the proceeding in *debt* was one which could be readily taken in the County Court, whilst the proceeding by bill or plaint that had previously existed was not one which was at all appropriate to that court. This would, also, harmonise with the provisions of the Consolidated Statute of Canada, authorising certain suits for pecuniary penalties to be recovered "in any court having jurisdiction to the amount of the penalty in cases of simple contract."

It certainly would seem absurd to maintain the distinction contended for in proceeding to recover penalties under this particular statute, when other penalties of a much greater amount could be sued for in the County Court, and (in determining the latter) points of quite as much difficulty would arise as in disposing of the question likely to occur under this statute.

The County Courts have now such extended jurisdiction, compared with what they formerly possessed, that I do not think it unreasonable that the legislature, when the statutes were consolidated, should consider that they might safely be entrusted with the disposal of this kind of penal action, when $80 was the sum involved, and that the change made in the law at that time was with a view of putting the matter beyond reasonable doubt, and establishing something like a uniform rule in relation to these actions.

The only point argued before us on this appeal was whether the County Court had jurisdiction, and as we are in favour of the plaintiff on that ground we shall allow the appeal without costs, and direct that the rule *nisi* to enter a nonsuit in the court below be discharged.

Appeal allowed.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law.*)

Burns v. Steel.

*Interpleader—*28 *Vic. cap.* 19, *sec.* 2—*Claim by guardian of insolvent's estate.*

An execution was delivered to a sheriff against the goods of the defendant, upon which he seized certain goods. These goods were claimed by the guardian in insolvency of the estate of the defendant, against which defendant a writ of attachment under the Insolvent Act had also issued to the same sheriff. The sheriff applied for relief under the Interpleader Act.

Held, that under 28 Vic. cap. 19, sec. 2, he was entitled to protection, and an issue was directed.

[Chambers, December 7, 1865.]

An application was made for an interpleader by the sheriff of the United Counties of York and Peel, upon a claim made by W. T. Mason, as guardian of the estate of the defendant, under a writ of attachment issued under the Insolvent Act of 1864. The sheriff seized under the execution in this cause against goods on the 31st of August last. The writ was delivered to him on the 30th of August, 1865.

The writ of attachment issued on the 7th Sept. and was delivered to the sheriff on the same day, and the notice of claim was given to the sheriff on the 8th of September.

Tilt for plaintiff. *D. McMichael* for the guardian, the claimant. *Osler* for sheriff.

Adam Wilson, J.—The question is whether an interpleader issue can be directed.

The execution creditor contends that after his execution has bound the goods, his claim cannot be affected by any proceedings in bankruptcy; and whether it can or cannot, the Interpleader Act does not apply, because that only affords relief to the sheriff when the insolvency proceedings rank first and the execution creditor claims to seize the goods as the property of the insolvent, and not to the case of the execution creditor ranking first and the insolvency proceedings coming after his writ.

The statute of 28 Vic. cap. 19, sec. 2, provides that in case any claim be made to any goods or chattels, and taken or intended to be taken under an attachment against an absconding debtor, or under any proceedings under the Insolvent Act of 1864, or in execution under any process issued by or under the authority of any of the said courts, or to the proceeds thereof, &c., by any person not being the person against whom such attachment or proceeding or proceedings or execution issued, or by any landlord for rent, or by any second or subsequent judgment or execution creditor claiming priority over any previous judgment or execution process or proceeding, then and in every such case, upon the application of the sheriff or other officer to whom the writ is directed, &c., the court or judge may by rule or order call before such court or judge, as well the party who issued such process as the party making such claim, and may thereupon exercise, &c. The claim, then, as one to be made to any property taken or intended to be taken, or to the proceeds thereof under, 1. An attachment against an absconding debtor. 2. The Insolvent Act. 3. Any process issued by or under the authority of the courts. 4. By any landlord for rent. 5. By any second or subsequent judgment or execution creditor claiming priority over any previous judgment or execution.

In this case the property has been taken by the sheriff under the execution in this cause. The sheriff has not taken it under the Insolvent Act. So far the case is not within this particular enactment. The sheriff, however, may reverse the proceedings; and although he has taken the property under the execution, he may still take, if he please, or intend to take, the property under the warrant which has been issued under the Insolvent Act; or he may, when the proceeds are in his hands, apply or propose to apply the same to the insolvency process. This would, no doubt, be within the Act entitling the sheriff to apply the protection upon any claim being made against him by the execution plaintiff But the plaintiff has not made the claim, because so far the sheriff has taken the goods for him, and while this remains so he will not be a claimant; but if the sheriff reverse the position of the parties and make the seizure, or hold the proceeds for the guardian in insolvency, the creditor will be compelled to become the claimant.

If, however, nothing of this kind should be done, there is the third case above mentioned—that of a claim being made to property taken, &c. &c., "in execution under any process issued by or under the authority of any of the said courts, * * * by any person not being the person against whom such attachment, &c., is-

sued," which appears to apply to such an application as the present in all respects, for a claim has been made to the goods which have been taken in execution under the process in question, which has been issued by and under the authority of the Court of Queen's Bench; and such claim has been made by the guardian in insolvency, who is a person not being the person against whom the execution has issued. This very general clause appears to be comprehensive enough to cover nearly every case of the kind which can arise, as, no doubt, it was intended it should.

I have no difficulty, then, in holding this claim to have been rightly made under this branch of the section.

It has been further contended that there can be no interpleader ordered when the claimant is the guardian or official assignee in insolvency, because it is said the law does not confer the title to the property upon such guardian or assignee, and an interpleader proceeding is not necessary in such a case. This is to state the case incorrectly, for such a statement would be just as applicable to every case which does arise under and can be disposed of by the Act relating to interpleader. The case is, that the sheriff is placed in jeopardy between two hostile claimants to the goods, and he desires to be protected; and if his case come within the provisions of the statute which was passed for his relief, he is entitled to protection.

In this case it is suggested and stated by the guardian in insolvency, that the plaintiff's judgment and execution were acts of insolvency, because the debtor did by these means, contrary to sub-section *d.* of section 3 of the Insolvent Act, procure his goods to be taken in execution with intent to defraud, defeat, or delay his creditors; and that the goods taken under this execution were still the goods of the debtor at the time that the insolvency warrant issued, and are therefore now the property of the guardian.

This is a fit question to be tried between the parties, and it is a difficulty which the sheriff is entitled to be relieved from, according to the statute.

An order directing an interpleader will therefore be made.

Order accordingly.

McDonald et al. v. Burton et al.

Special endorsement—Affidavit of merits.

The special endorsement in this case *held* sufficient on the authority of *Hoodsall* v. *Baxter*, 1 E. B. & E. 884, and *Fromant* v. *Ashley*, 1 E. & B. 723.

Wiley v *Wiley*, 6 W R. 649, followed in interpreting the words "disclosing a defence on the merits."

[Chambers, 1865.]

The defendants obtained a summons calling upon the plaintiffs to shew cause why the judgment signed in this case on default of appearance, should not be set aside, on the grounds that the plaintiff could not properly sign final judgment upon the special endorsement upon this writ of summons; or why the defendants should not be let in to defend on the merits.

The special endorsement was as follows: "The plaintiff claims $1,300 for debt and $20 for costs, and if the amount thereof be not paid to the plaintiffs or their attorney within eight days from the service hereof, further proceedings will be stayed."—"The following are the particulars of the plaintiffs' claim: 1865. June 10. Balance of accounts due from defendant to plaintiff for goods sold and delivered and money advanced and lent—the items whereof exceeding in all five folios—$1,129 24." The plaintiffs also claimed interest, &c.

The defendants filed affidavits of merits, which, however, were couched in general terms. A number of contradictory affidavits were filed on both sides on the subject of merits, and explanatory of the non-appearance of the defendants, and an alleged breach of faith on the part of the plaintiffs.

Draper, C. J.—It struck me at first that the special endorsement was hardly a compliance with C. L. P. A., sec. 15, but after reading the language of *Hoodsall* v. *Baxter*, 1 E. B. & E. 884, and also the particulars as stated in *Fromant* v. *Ashley*, 1 E. & B. 723, I do not find that I can properly interfere on that ground.

Then as to the alleged breach of faith. This is unequivocally denied, and the probability would seem to be in the plaintiffs favour.

Still, under the 55th section, the defendant may be relieved on "accounting for the non-appearance, and disclosing a defence on the merits." But the defendants' affidavits only swears to merits in general terms, which the Court of Common Pleas in England in *Wiley* v. *Wiley*, 6 W. R. 649, held insufficient, Mr. Justice Willes observing, "We must construe this word *disclosing* to mean, opening out the defence." This was after the decision in the Court of Exchequer in *Warrington* v. *Leake*, 25 L. J., Exch. 27. I shall follow the case of *Wiley* v. *Wiley* as more in accordance with what I conceive to be the true meaning of the act; and in this case in the Exchequer, the Court were not unanimous, the Chief Baron doubted, and Martin, B., dissented. I must discharge the summons, and with costs, as it fails on every ground urged.

Summons discharged with costs.

McNeil v. Lawless.

Reference at Nisi Prius—Award—Entering Judgment—C. L. P. Act, secs. 158, 160—Practice.

Judgment may be entered upon an award made on a reference at *nisi prius* under the compulsory clauses of the Act although no verdict has been taken, without the formalities formerly required in the case of an attachment for nonpayment of the amount awarded. An order for leave to enter such judgment is not necessary.

[Chambers, Jan. 15, 1866.]

The plaintiff obtained a summons calling on the defendant to shew cause why the defendant should not be ordered to pay to the plaintiff the sum of $255 awarded to be paid by the defendant to the plaintiff, and also $186 05 costs, being the taxed costs of the cause, reference and award, and also to pay the costs of the application, and why the plaintiff should not be at liberty to sign judgment for the amount of the award and costs in default of payment; or why such further order should not be made as the judge might direct.

The record was entered for trial at the last assizes for the County of Grey, when the case

was directed by the Chief Justice to be referred to arbitration under the compulsory clauses of the C. L. P. Act.

The order of reference was made a rule of Court, and the costs were taxed and an allocatur granted.

The defendant was served with a copy of the allocatur, and a demand was made on him, by an attorney under a power of attorney, of the amount awarded, and of the costs taxed, but they were paid.

Osler, for defendant, shewed cause, and objected that an order could not be made upon the defendant to pay until all the formalities had been observed by the plaintiff, which, under the practice, as to enforcing payment of money awarded before the C. L. P. Act, would have been required before an attachment would have been directed to issue. That the defendant should have been served with a copy of the award and of the affidavit of execution, and with a copy of the power of attorney, and of the affidavit of its execution, and that as this was not shewn to have been done, plaintiff was not entitled to the order which he asked.

C. McMichael, contra, contended that when a compulsory reference is directed, the party is at liberty to proceed upon the award, without these formalities, as upon a verdict. Harr: C. L. P. Act, 163, 181, 199, 732; Arch. Pr., 11 Edn., 1696; Ch: Forms 9 Edn. 918.

Adam Wilson, J.—The sections in the Consolidated Act which correspond to those above referred to are 158, 169, 166; but see also secs. 161, 162, 163.

The first of these sections applies to cases in which the judge may refer "at any time after the writ is issued," and it provides for the award being enforced "by the same process as the finding of a jury upon the matter referred."

The 160th sec. applies to cases which are referred "at, and during the trial." It does not clearly point out how the award is to be enforced, perhaps the judge may direct it to be enforced in like manner as he has power to do under sec. 158; or, it may be, as the arbitrator has "the powers expressed in the 161st sec.," and that section provides that the award made thereunder, shall be enforced by "such and the like proceedings as to the taxation of costs, signing judgment and otherwise, as upon the finding of a jury upon an assessment of damages;" that the award may be enforced in the same manner as it is by the 161st sec., although the mode of enforcing the award is not part of the power of the arbitrator.

In cases of voluntary submission when it is desired to enforce payment by execution, a rule is issued after the submission has been made a rule of court calling on the other party to shew cause why the money should not be paid, and if no cause, or no sufficient cause be shewn, the rule is made absolute, and the execution then issues upon the rule, but before the rule to shew cause issues "the same formalities as to personal service of a copy of the award, &c., and demand of performance are in general required as when an attachment is moved for." Arch. Pr 11 Ed., 1690.

When a verdict has been taken it is stated in the practice, p. 1691, "it is not necessary that the party against whom the award or certificate is made should be personally served with a *copy of the award, nor is it necessary to* obtain the leave of the court to sign judgment."

In compulsory cases where no verdict is taken, it seem judgment must be entered before execution can issue; *Kendal* v. *Merritt*, 18 C. B. 173; *Talbot* v. *Fisher*, 2 C. B. N. S. 471; and as it is enforceable by the same process as on the finding of a jury, I do not see that the party need serve a copy of the award, there is no more occasion for his doing so than when a verdict has been taken, and it need not be done in the latter case.

The objections taken cannot prevail There does not seem to be any object in making the order to pay the costs; judgment cannot be signed on it, but must be signed on the award after setting out all the pleadings according to the form in Harr. C. L. P. Act, 700; but there can be no objection to making the order.

The order may be granted *quantum valeat.*

ENGLISH REPORTS.

Bateman v. The Mid-Wales Railway Co. The National Discount Co. v. The Same. Overand, Guerney, & Co., v. The Same.

Railway company—Bill of Exchange—Power to accept—Form of acceptance—8 & 9 Vic. c. 16, s. 97—Pleading.

The plaintiffs, as indorsees, sued the defendants, a railway company, as acceptors of a bill of exchange.

Held, that the defendants had no power to accept a bill of exchange, and were not liable in this action, they being a corporation created for the purpose of making a railway, and the accepting of a bill of exchange not being incidental to the object for which they were incorporated.

Held, also, that the defence was properly raised by a plea denying the acceptance of the bill.

[14 W. R.—C. P., May 3, 7, 8, 1866.]

These were actions on bills of exchange accepted by the defendants and indorsed by the plaintiffs. The defendants traverse the acceptance of the bills, and at the trial verdicts were found for the plaintiffs in all three actions, leave being given *to the defendants to move for a rule nisi* to enter a verdict for the defendants or for a nonsuit.

On a former day *Karslake*, Q. C., on behalf of the defendants, had obtained a rule *nisi* accordingly, on the ground, 1st, that the defendants had no power to accept the bills. 2nd, That if they had, these acceptances were in such a form as not to bind the company.

The defendants were incorporated by a private Act 22 & 23 Vict. c. lxiii. which incorporated the Lands Clauses Consolidation Act, 1845; the Railway Clauses Consolidation Act, 1845; and the Companies Clauses Consolidation Act, 1845. The powers of the defendants were subsequently extended by several other private Acts, but none of these conferred on the defendants any express power of accepting bills of exchange.

Messrs. J Watson & Co., had contracted with the defendants for the construction of certain works which the defendants were empowered by their Acts of Parliament to construct. The bills on which these actions were brought were accepted by the defendants on account of the debt they had incurred to J. Watson & Co. in

the construction of these works; and were endorsed by J. Watson & Co. to the plaintiffs for value. The form of the acceptance was as follows:—

"Accepted by order of the board of Directors and payable at the Agra and Mastermans' Bank, Limited.

"John Wade, Secretary."

The bills were also impressed with the seal of the company

E. James, Q C, and *Sir G. E Honyman* now showed cause against the rule on behalf of Bateman and the National Discount Company.

1. The question is, has a railway company the right to accept bills of exchange? No doubt certain corporations have not that power, viz., those which are not incorporated for trading purposes. This company is incorporated to make a railway, and after that to act as carriers, for which it is necessary that they should trade by purchasing coal, carriages, &c., to be used for the purpose of their business. The true rule is stated in Storey on Bills of Exchange, s. 79. *Broughton* v. *Manchester Waterworks Company*, 3 B. & Ald. 1, is not in point, because it depended on the Bank Acts. No doubt the defendants could only accept for the purposes for which they were incorporated, but here it is not proved that these bills were accepted for any other purpose than that for which the defendants were incorporated. *Stark* v. *Highgate Archway Company*, 5 Taunt. 792 The rule is correctly stated in *East London Waterworks Company* v. *Bailey*, 4 Bing. 283, that where a company like the Bank of England, or the East India Company is incorporated for the purposes of trade, it seems to result from the very object of its being so incorporated, that it should have power to accept bills or notes. [Byles J.—The Highgate Archway Company had an express power, and the Bank of England and the East India Company implied powers of accepting bills: *Murray* v. *East India Company*, 5 B. & Ald. 204.] No power was given to the East India Company to accept; they were only a trading company. The power of the bank to accept is regulated by 9 & 10 Will. 4, c. 44. It is admitted that the defendants were carriers, and if so they would be traders, and would be liable to the Bankruptcy Act. [Erle, C. J.—Carriers were brought within the Bankruptcy Act, *eo nomine*.] Byles, J.—Lloyds' Bonds would have been unnecessary if the companies had no power of accepting bills.] Story on Partnerships, c. 7, s. 102. [Keating, J., referred to 7 & 8 Vict. c. 85, s. 19.] That was passed for the purpose of preventing the issue of loan notes. 2. The defendants say that even if the company had the power of accepting these bills, these are not accepted in the proper form, and that they should be signed by two directors as directed by 8 & 9 Vict. c. 16, s. 87. But that Act was not intended to take away any power of contracting, which companies possessed at common law, and at common law the contract might have been made under seal. 3. This objection could not be taken at *nisi prius*, but should have been raised by demurrer, inasmuch as if the defendants are right the declaration is insufficient.

Karslake, Q C., and *H. Holland*, for the defendants—The fallacy of plaintiff's argument is, that if a corporation is authorised to do anything requiring money, that money is to be raised by a bill of exchange. The defendants have no express or implied power of accepting bills—their duty is first to construct the railway and then to act as carriers, and they are not a trading company. The distinction is between a company incorporated for the purpose of trading and one which only incidentally engages in trade. 1. The acceptance of a bill is *ultra vires*, and will not bind the defendants, even though under seal. Per Parke, B., in *South Yorkshire Railway and River Dun Company* v. *Great Northern Railway Company*, 9 Ex. 84; *Chambers* v. *The Manchester and Midland Railway Company*, 12 W. R. 980, 33 L. J. Q. B. 268; *Aggs* v. *Nicholson*, 4 W. R. 376, 25 L. J. Ex. 348; *Thompson* v. *The Universal Salvage Company*, 1 Ex. 694; *Brumah* v. *Roberts*, 3 Bing. N. C. 963; *Butt* v. *Morrell*, 12 Ad. & Ell. 745. Nor is this defect assisted by the general words in the defendants' Act? *Burmester* v. *Norris*, 6 Ex. 796. In some cases a partner cannot bind another by accepting a bill: *Dickinson* v. *Valpy*, 10 B & C. 128; *Steel* v. *Harmer*, 14 M. & W. 831. 2. A corporation can only contract by deed and though this bill is accepted under seal it is not a deed: *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815. The exceptions to this rule are correctly stated by Best, C.J., in the *East London Waterworks* v. *Bailey*, *supra*. [Byles, J.—You say that the defendants may be liable for goods sold and delivered, and for work done, but not upon a bill of exchange.] Yes; 7 & 8 Vict. c. 110, s 45, points out what formalities are necessary when bills are accepted by joint stock companies; but this only applies when companies have express power to accept. At any rate the acceptance, to be binding at all, must be in the form pointed out by 8 & 9 Vict. c. 16, s. 97, which is incorporated in the defendants' private Act. *The Leominster Canal Navigation Company* v. *The Shrewsbury and Hereford Railway Company*, 26 L. J. Ch. 764; *Ernest* v. *Nichols*, 6 W. R. 24, 6 H. L. Cas. 401; *Halford* v. *Cameron's Steam Coal Company*, 16 Q. B. 442. 3. The defendants are entitled to take this objection now. If we had demurred to the declaration the plaintiff might have urged, in the argument on the demurrer that it did not appear that they had not the power to accept, and we had no power of raising the point until we proved the Acts by which they are incorporated: Byles on Bills, 62.

Bovill, Q. C., and *J. C. Matthew*, for Overend, Gurney, & Co.—1. The bill is on the face of it binding; the defendants are not prohibited by any Act of Parliament from accepting bills, and it rests with them to show that this bill is not binding on them: *Scottish North Eastern Railway Company* v. *Stewart* 7 W. R. 458, 3 Macq. 382, where Lord Wensleydale says (p. 415), "*Primâ facie* all its contract are valid, and it lies on those who impeach any contracts to make out that it is avoided:" *Bostock* v. *North Staffordshire Railway Company*, 4 E. & B. 799; Maule, J., in *East Anglian Railway Company* v. *Eastern Counties Railway Company*, 11 C. B. 792. 2. It is admitted that a railway company may incur a liability, but it is said that they may not secure that liability by a bill: *Serrell Derbyshire Railway Company*, 19 L. J. C. B. 371. It was never

doubted that a company could draw a cheque. 3. The form of the acceptance is sufficient; 7 & 8 Vict. c. 19, s. 97, is not imperative: *Wilson* v. *The Hartlepool Railway Company*, 13 W. R. 4, 34 L. J. Ch. 241.

Erle, C. J.—These were actions by the plaintiffs as indorsees against the defendants' company as the acceptor of certain bills of exchange; the defendants pleaded that they had not accepted the bills. It appeared that the defendants were incorporated for the purpose of making a railway, and possessed all the incidental powers for making one, given to them by their special Act, and by the general Acts affecting railways. The defendants company was a corporation for a distinct purpose distinctly defined in these statutes. I take it to be perfectly established in law that a corporation established for a distinct purpose cannot make a contract, as a corporation, distinct from that purpose. Such a contract does not bind because it is *ultra vires*; whether a contract binds or not when entered into by such a corporation depends on whether the contract is within the limits of the object of the corporation. The question here raised is whether a corporation created for the purpose of making a railway can bind the company by the acceptance of bills of exchange. I am of opinion that it cannot. A bill of exchange is a cause of action by itself, and a contract by itself. It binds the acceptor in the hands of any indorsee to whom it may come, and I consider it to be entirely contrary to the principles relating to bills of exchange to introduce the notion that bills of exchange may be valid or void according as the consideration for which they were given is valid or void, and whether the purpose for which they were given is in accordance with what the corporation was constituted to do or not; a portion of such bills might be valid because given for work done on the railway, and another portion of them, yet void if given for loans, and to raise money beyond the borrowing powers of the corporation given them by their statute. These were obviously circumstances not contemplated by the law as affecting bills of exchange, that one bill should be valid because given for work done, while another bill should be void because given for purposes not within the scope of the powers of the corporation. So much for the general tenour and bearing of the question. On authority I can find no case of an acceptance of a bill of exchange by a corporation of which the law enforced payment, with certain exceptions, and those exceptions prove the rule. In the *Highgate Archway case* the company were authorised by their Act to issue bills, and in the instances of the Bank of England and the East India Company referred to, the statutes creating those corporations gave them express powers to accept bills of exchange, and their acceptance of such bills was an Act within their powers, but I find no other cases in which this power was exercised. In the case of *Broughton* v. *the Manchester Waterworks Company*, Mr. Justice Bayley doubted whether the holders of a bill of exchange accepted by the company could sue without proof but the company had power to accept such bills. I think both on principle and authority that the acceptances given by this railway company were not binding acceptances, and therefore that the plea that the company did not accept" was established.

Byles, J.—I am of the same opinion. The case is one of great importance, both on account of the large sum at stake and also the position sought to be established by the plaintiff's counsel, that railway companies may accept bills of exchange. The counsel for the plaintiffs were unable to produce any precedent for us to act upon, and I feel that if we show any doubt on the matter, the market will be saturated with the bills of railway companies. This company was incorporated by statute. At common law it is clear that a corporation could not accept a bill. Three corporations have been referred to by the Chief Justice who have this power. 1. The The Bank of England who were incorporated for the express purpose of accepting bills. 2. The East India Company who had the power given to them by statute; and 3. The Highgate Archway Company, who also had express power given to them. With these exceptions no authority is to be found in favour of the plaintiffs. Then does it make any difference that the defendants were incorporated by statute? The Act of 22 & 23 Vict. gave them power to make and carry on the business of the railway, and if they might under this authority accept bills, the defendants in the case of *Broughton* v. *The Manchester Waterworks Company* might also have accepted them. The plaintiffs also say that the objection should have been taken by demurrer; but if so, it does not follow that the traverse of the acceptance will not raise the same question. This plea says "You (the directors) are not the agents of the company for the purpose of accepting bills," and that raises the question.

Keating, J.—I am of the same opinion. I think it unnecessary to go into the wider question raised by my brother Byles. I do not dissent from his judgment as to that. But the question is, can the railway company accept a bill? I say no; and I rest my judgment on the Act incorporating the company. That act guards carefully against the exercise of unlimited powers of raising money; and though it is true that the Act incorporates the general Acts, in none is any power conferred on a railway company of accepting a bill. One of the general Acts refers to the mode in which a railway company may contract; and even accepting the judgment in *The Leominster Canal Company* v. *The Shrewsbury and Hereford Railway Company* on this point as correct, still if the Legislature had intended to give this power to the defendants that intention would have been clearly expressed. It is said that a railway company are compelled to buy goods and incur debts, but it does not at all follow that they can accept a bill. It is quite a different thing to say that a company may spend its capital in necessary articles, and that they may accept a bill which passes into the hands of third persons. On the ground that the Legislature did not confer any power for this purpose, I am of opinion that the defendants could not accept these bills.

Smith, J.—I am of the same opinion. The plaintiffs are indorsees of these bills and not immediate parties to them, and they cannot recover in these actions unless the bills are good as negotiable instruments. The company was

incorporated for the purpose of making and maintaining a railway, and their capital was limited. If they could accept these bills they might accept bills to any extent, or it would be necessary on every occasion when one of their bills was taken by a third person to inquire whether it was within their power to accept it. If they could accept the bill and judgment was obtained upon it, all their previous creditors would be postponed to the judgment creditor. No authority has been found in favour of the plaintiffs, though there are many where the Courts have held that this power did not exist. The first object of a railway company is to make the railway, and, incidentally, they may become carriers. No corporation, except those established for trading purposes, have the power of accepting bills, and even with them trade must be the primary object for which they are incorporated.

Rule absolute for a non-suit.

REVIEW.

The Division Courts Act, Rules and Forms, with numerous Practical and Explanatory Notes, together with all other Acts and portions of Acts affecting proceedings in Division Courts, and many new and useful forms, and a Table shewing all the Division Courts in Upper Canada, their several limits and names of officers, with a complete Index. By Henry O'Brien, Esq., Barrister-at-Law, joint compiler of Harrison & O'Brien's Digest, and one of the Editors of the *Upper Canada Law Journal* and *Local Courts' Gazette*. Toronto: W. C. Chewett & Co. 1866. Price, $2.

The object which the Editor of this most useful work had in view was to annotate the Division Courts Act and Rules by notes explanatory of the text, as well as practically useful to professional men and others, and particularly to the officers concerned in the administration of the courts.

The Editor has thoroughly attained his object. His notes are not merely explanatory of the text, but so practical as to be of great value to the profession and all others who in any way may find it necessary to consult the Division Courts Act. The notes are couched in language terse and to the point, and yet so free from technicality as to be intelligible to all men who can read and understand the English language. Knowing the industry and ability of the Editor, we had formed high expectations as to his projected work, and we confess that high as were our expectations they have not been disappointed.

The Division Courts have now become local institutions of the country, presided over by the same judges who preside over our County Courts or inferior courts of record. The amount of business disposed of in the Division Courts is greater than many imagine, and so great as in several counties severely to tax the knowledge and patience of the judge, and occasionally such as to make it worth the while of professional men of good standing to appear in the courts. If some provision were made for the allowance of moderate counsel fees, we venture to believe that the judges of Division Courts would, in a short time, have, in all cases of intricacy the assistance to be derived from the ability of learned and trained counsel. This would not merely be a great aid to judges who, without such assistance, are frequently called upon to determine questions of much nicety without the benefit of proper legal discussion, but tend to raise the courts in the estimation of the profession and the public.

As it is, no professional man whose practice is at all extensive is free from the necessity of understanding the Division Courts Act. Questions of jurisdiction as between the several courts of inferior jurisdiction daily present themselves to his consideration. Applications for writs of *certiorari* are of frequent occurrence. The proper scale of costs to be followed in a particular case, as between the Division Court and the County Court, is at times a matter of considerable difficulty. Suits on Division Court bonds and covenants are often instituted, and in their disposal generally demand an accurate knowledge of Division Court jurisdiction and practice. Actions against Division Court bailiffs for things done by them in the execution of their office, and the appropriate remedies therefor, are as often subjects for consideration. Criminal prosecutions, under special provisions contained in the Division Courts Act, are not of unfrequent occurrence. — On all these and similar points, valuable information is to be found in Mr. O'Brien's work.

To clerks, bailiffs, agents, and others whose calling requires an intimate knowledge of the working of Division Courts, the book will be of incalculable value. Indeed we feel certain that as soon as its usefulness is known, no clerk, bailiff, or agent will venture to be without this book one day that can be avoided. It is not merely a guide, but a safe guide to all who stand in need of a guide. All may profit by the learning and care here bestowed; and all who become purchasers of the work and open it must profit by the use of it. The collection of decided cases is most complete and reliable. This we have tested with care, and have been well satisfied with the result of our test.

In order that an example may be given to the reader of the learning evinced in the preparation of the work, we transcribe a note from page 31, on writs of *certiorari*:—

"A *certiorari* is an original writ issuing out of Chancery or the King's Bench [but is under this section confined to the Superior Courts of Common Law], directed in the King's name to the judges or officers of inferior courts, commanding them to return the records of a cause pending before them, to the end the party may have the

more sure and speedy justice before him, or such other justices as he shall assign to determine the cause. (Bacon's abr.)

"The application should be made to a judge in Chambers and not to the full court. (*Re Bowen v. Evans*, 18 L. J., Ex. 38; *Soloman* v. *London & D. R. W. Co.*, 10 W. R., Ex. 59).

"To entitle a suitor to this writ it must be shewn that,

"1. The amount claimed is $40 and upwards.

"2. That the cause is a fit one to be tried in one of the Superior Courts, that it will, in all probability, bring up difficult points of law at the trial, or that it presents some other circumstance which would render a trial in the court above advisable, and,

"3. The leave of a judge must be obtained.

"As a general rule a *certiorari* only lies before judgment with a view to a trial of the cause in a Superior Court (*Siddall* v. *Gibson*, 17 U. C. Q. B. 93); and *Robinson*, C. J., in *McKenzie* v. *Keene*, 5 U. C. L. J. 225, refused an order after judgment and execution regularly issued and money made and paid over, although a new trial was subsequently granted by the county judge. But generally when a new trial has been ordered, and the case is again coming on for trial, a writ may issue. (See *Help* v. *Lucas*, 8 U. C. L. J. 184; *Corley* v. *Roblin*, 5 U. C. L. J. 225.)

"The 43 Eliz. cap. 5, provides that no such writ shall be received or allowed by the judge except it be delivered to him, before the jury, which is to try the question, has been sworn. 'The mischief,' said *Richards*, C. J., in *Black* v. *Wesley*, 8 U. C. L. J. 277, 'intended to be cured by the statute arises when the cause is gone into before the judge alone, as before a jury; for it enables the defendant, in the language of the statute, to 'know what proofs the plaintiffs can make for proving their issue, whereby the defendants that sued forth the writ may have longer time to furnish themselves with some false witnesses to impugn these proofs, which the plaintiffs have openly made by their witnesses, which is a great cause of perjury and subornation of perjury.' I think the act in spirit applies to cases where plaintiff's witnesses are sworn although no jury is called.'

"The removal of a cause under this section is entirely in the discretion of the judge to whom the application is made, upon its being shewn to him that difficult questions of law are likely to arise, and he may impose such terms as he thinks fit. Each case must therefore depend on its own merits, and the circumstances attending it. With reference to the English cases as to the *discretion* of the judge, it is to be noticed that the wording of the analogous sections of the English act is different from that before us.

"It is the practice in England to grant orders for writs of *certiorari* on *ex parte* applications. The practice was formerly the same in this country, but of late years the practice has usually been to grant only a summons to shew cause, in the first instance; and, as our Division Courts are constituted, this seems the more correct course, as it certainly is the most advisable. The writer is not aware of any authority on the point.

"Nor has it yet been decided in the full court whether the *plaintiff* can, as a matter of right, remove a cause from a Division Court by *certiorari*. Some of our judges grant such orders whilst others refuse to do so. In *Dennison* v. *Knox*, 9 U. C. L. J. 241: 3 U. C. Prac. R. 151, Chief Justice *Draper* said, that a removal of a case from a County Court by a plaintiff was open to grave objections, and that he should not facilitate it. But there were circumstances in that case which would not apply to a similar application in a Division Court suit, such for example as the right of appeal from a County Court.

"The plaintiff makes his election with full knowledge in most cases as to what points will come up at the trial. He can discontinue if he chooses in the Division Court, and commence *de novo* in a Superior Court at a trifling expense. But even if leave is granted to a plaintiff to remove his own suit, the difficulty still remains of forcing the defendant to appear in the court above. There would be more show of reason for the removal when the defendant pleads a set-off, which is likely to bring up difficult questions of law, as a set-off is in the nature of a cross action, but an application of that nature was refused by *Morrison*, J., in *Prudhomme* v. *Lazure*, 10 U. C. L. J. 330. It was subsequently expressly held by Mr. Justice *Adam Wilson*, in Chambers, in *Maney* v. *Hollinrake* (not reported), that a plaintiff cannot remove his cause by *certiorari*.

"The plaintiff cannot be compelled, when a cause is removed by a defendant, to follow his plaint into a Superior Court, nor is the defendant entitled in such case to his costs of removing it from the inferior court (*Garton* v. *Great Western R. W. Co.* 5 Jur. N. S. 595; 28 L. J. Q. B. 103); though he is entitled to his full costs of suit without a certificate if successful in the Superior Court. (*Corley* v. *Roblin*, 5 U. C. L. J. 225.)

"An interpleader issue has been held not to be within this section, and cannot be removed by *certiorari*. (*Russell* v. *Williams*, 8 U. C. L. J. 277; and see *Jones* v. *Harris*, 6 U. C. L. J. 16.)

"The affidavits to be used on applications of this kind must be entitled in the court to which it is desired to remove the suit. (*Smyth et al.* v. *Nicholls*, 1 U. C. Prac R. 355.)"

Had we space, we could reproduce many notes of equal learning and equal value from this inestimable little book. In form and size it is just what it ought to be. The mechanical execution of the book is all that can be desired, and reflects great credit on the well known publishers, Messrs. W. C. Chewett & Co.

The additions of "all other acts and portions of acts affecting proceedings in Division Courts," and the Table "shewing all the Division Courts in Upper Canada, their several limits and names of officers," are valuable adjuncts to the work. The former renders the book still more complete in the hands of the professional man, clerk, bailiff, or Division Court agent. The latter recommends the book to the patronage of all merchants and others whose dealings are extensive, and who, in consequence, must need information as to the limits of the numerous Division Courts in Upper Canada and the names of their officers, in order to the speedy and satisfactory collection of debts in the proper Courts.

The Index to the work is both full and complete. Without it the usefulness of the book

would be impaired: with it every page is available to the inquirer without loss of time. Some authors imagine that their work is done when the last line is written, and that they need not at all concern themselves about the "mere mechanical preparation of an index." Were an author to write merely for himself we should not quarrel with this idea. But as we know that most authors write for public patronage, it is their duty to do all that is necessary to make their books as widely useful as possible. Nothing to this end is more necessary in the case of a legal work than a full index. Mr. O'Brien, mindful of all that was necessary to the completeness of his work, has not forgotten this desideratum.

Robt. A. Harrison.

MONTHLY REPERTORY.

COMMON LAW.

Q. B.

Commercial Bank v. Great Western R. R. Co.

Inspection and discovery of documents—Trial at bar.

When a judge in Chambers has ordered* the the inspection and discovery of documents, the court will not interfere unless it appears that such order has not been made "with due discretion, with reference to the facts before him;" and in this case they refused to interfere.

The plaintiffs sued defendants upon a banking account, kept as they alleged upon the credit of the defendants, while the defendants asserted that it was upon the credit either of the Detroit and Milwaukee R. W. Co., for whose benefit the money went, or on the credit of Messrs. B & R., two of the defendants' directors, who acted also for that company.

Inspection and discovery was granted to the plaintiffs, 1. Of a statement or report of transactions between defendants and the D. & M. Co., made by accountants for a committee appointed by the defendants. 2 Of letters written by Messrs. B. & R. to the chairman or secretary of the defendants' company, respecting such transactions, and referred to in such report. 3. Of all letters in the defendants' custody, written or received before the controversy leading to this suit by Messrs. B. & R., as the defendants' managing and financial directors, to or from the defendants' chairman, and all the defendants' books of account, relating to the matters in question.

The defendants were also allowed inspection and discovery of letters written by the plaintiffs' cashier to a bank in New York, explaining the plaintiffs' position with the defendants, and on the subject of notes of the Detroit and Milwaukee Railway Co.

The court, under the circumstances of this case, refused to order a trial at bar. (25 U. C. Q. B. 335.)

* Ante page.—Eds. L. J.

CHANCERY.

M. R. Joyce v. Rawlins. April 26.

Motion to revive against executors who have acted but not proved—Executors must prove.

Kingdon moved in this suit to revive it against the executors of the defendant, who was dead, the executors having acted under his will without having proved it.

Lord Romilly, M R.—The executors must prove. (14 W. R. 785.)

M. R. Wilkinson v. Turner. May 28.

Absconding defendant—Bill taken pro confesso.

For the purpose of having a bill taken *pro confesso* against an absconding defendant, it must be shown that, at the time of making the application, the defendant cannot be found. (14 W. R. 813.)

L. J. Collyer v. Collyer. June 12.

Practice—Common order to revive—Death of sole plaintiff after decree—Statute 15 & 16 *Vict. c.* 86, *s* 52—*Devisee.*

When the sole plaintiff in a redemption suit dies after decree, having devised the mortgaged estate, the suit may be revived by his devisee by means of the common order to revive. (14 W. R. 784.)

APPOINTMENTS TO OFFICE.

NOTARY PUBLIC.

JAMES H. MILLS, of the City of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted June 23, 1866.)

AMZI LEWIS MORDEN, of the town of Brockville, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted June 30, 1866.)

CORONERS.

WILLIAM ROBERTSON, of the village of Lanark, Esquire, to be an Associate Coroner for the United Counties of Lanark and Renfrew.

THOMAS P. ECKHARDT, of the township of Markham, Esquire, M.D., and WILLIAM LAPSLEY, of the township of Scarborough, Esq., M.D., to be Associate Coroners for the United Counties of York and Peel.

ALEXANDER THOMPSON, of Blyth, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted June 16, 1866.)

DEPUTY JUDGES.

EPHRAIM JONES PARKE, of Osgoode Hall, Esquire, Barrister at Law, to be Deputy Judge of the County Court in and for the county of Middlesex. (Gazetted June 9, 1866.)

ISAAC FRANCIS TOMS, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court, in and for the United Counties of Huron and Bruce. (Gazetted June 16, 1866.)

CLERK OF COUNTY COURT.

JAMES MACFADDEN, of St. Mary's, Esquire, to be Clerk of the County Court, in and for the county of Perth.

TO CORRESPONDENTS.

"T. T., Wardsville" We are under the impression that it is necessary. Will answer in our next.

Mr. Riordan's Law List (fifth edition) has been received, but review crowded out.