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DIARY FOR DECEMBER.

1. Tuesday .. .The Clerk of every Municipality except County to return number of resident ratepayers to Receiver General.
6. SUNDAY.....*2nd Sunday in Advent.*
8. Tuesday .....Quarter Sessions and Co. Court Sittings in each County.
12. Saturday..... Last day for service for York and Peel.
13. SUNDAY.....*3rd Sunday in Advent.*
14 Monday .Collector to return Roll to Chamberlain or Treasurer. Last day for collection of money for School Teachers.
20. SUNDAY.....*4th Sunday in Advent.*
21. Monday.....Nomination of Mayors Recorder's Court sits.
22. Tuesday.....Declare for York and Peel.
24. Thursday .....Sittings of Court of Error and Appeal commence.
25. Friday..... ....CHRISTMAS DAY.
27. SUNDAY.....*1st Sunday after Christmas*
30. Wednesday ..Last day for not. of Trial for York and Peel.
31. Thurday.....End of Mun. year. Last day on which rem. half of Grammar School Fund payable.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

DECEMBER, 1863.

SUMMARY PROCEDURE BEFORE MAGISTRATES.

Our attention has been directed to the very imperfect state of the law in reference to procedure before Magistrates, in cases in which they are authorized to convict summarily.

No branch of criminal administration is more frequently brought into operation than this, and the very extensive powers committed to Magistrates are little understood and very seldom exercised in the manner required by law. Occasionally cases are reported in the Superior Courts exhibiting this fact; but a vast number come before the Quarter Sessions in the form of appeals from the convictions of Justices, and in nearly every case the convictions are found to be insufficient in form or in substance, and are accordingly quashed. In some instances this arises from ignorance or carelessness of the convicting Justice, but in the great majority of cases the fault does not lie at the door of the Magistrates, but is in the system under which he is authorized to act.

The Magistracy are increasing in number, and the mischiefs we allude to increase in at least the same ratio. It is a great evil, when offenders are allowed to escape by reason of informality in the proceeding to convict them, and the constant recurrence of the evil is calculated to weaken the force, if not of all laws, at least of those for the prevention and punishment of small crimes and misdemeanors. A notorious offender, a wilful Sabbath breaker, or one who violates the wholesome restrictions on innkeepers, for example, is charged with the offence before a Magistrate. He is summoned, appears, and, the evidence taken bringing the charge home to him, is convicted of the offence and a fine imposed upon him. The Magistrate from some cause fails to put the conviction in legal form. The defendant appeals to the Quarter Sessions, and the conviction is quashed. Surely this is calculated to encourage opposition to authority and to foster crime, and yet these things may occur without much fault on the part of the convicting Justice. True, it may be urged that men should not be appointed to an office the duties of which they are not fitted by education to perform; but if that rule were acted on in the present state of the law, not two Magistrates in each county in Upper Canada would be found equal to their work.

Attempts have been made by enactments from time to time to simplify procedure, and it was partially done up to a certain period; but there never has been *any general law of procedure* governing *all* cases of summary conviction, and no full set of forms has ever been given by the legislature, applicable to the various cases within the Magistrates' jurisdiction. If it be said that a treatise on the duties of Magistrates would remedy the evil, our reply is at best it would only do so in part, for few who have not been regularly trained can apply general rules and principles (which only could be given) laid down in a text book, to particular cases, if at all complex in their nature.

What would be the remedy? The first and most obvious one is to amend the law by establishing an uniform mode of procedure in all cases of summary convictions, and giving a full set of forms of convictions, or providing for the framing of such forms by authority. Another mode would be to transfer the jurisdiction in these cases to the Division Courts, leaving to Magistrates the ministerial duties of the office, including the arrest of offenders about to escape. And still another method we find suggested in the *English Law Times* (for in England, with a better educated and more experienced magistracy, the evil is felt, as well as with us), the leading feature of which is the appointment of a clerk, a barrister of five years' standing, in each petty sessional division, at a fixed salary.

We follow the course of the *Law Times* in drawing attention to the subject, soliciting suggestions from persons of experience as to the reform necessary.

Any one who has taken the trouble to examine the convictions returned by Magistrates will bear us out in the assertion that in nine of every ten special cases the convictions are bad, void or voidable for some defect. Magis-

trates should not exercise their office in peril of actions against them at every step, nor be feeble as ministers of justice because imperfectly informed as to the nature and limits of their powers, and the mode in which their judgments are to be rendered effective.

It may be mentioned, without any reflection upon the magistracy as a body, that the present fee system is not without serious objections, and that even the *suspicion* that a Magistrate may act with too keen an eye to his profits from a case, is not calculated to strengthen the respect due to the administration of this branch of the criminal law.

DAYS FOR DELIVERY OF JUDGMENTS.

QUEEN'S BENCH.

Monday, 14th December.....10 o'clock.
Saturday, 19th December..... 2 o'clock.

COMMON PLEAS.

Monday, 14th December ..... 2 o'clock.
Saturday, 19th December.....10 o'clock.

LAW SCHOLARSHIPS.

The examination during last term for the scholarship of the third year, resulted in the award of the scholarship to Mr. J J. Stephens. The maximum number of marks was 380, and of these Mr. Stephens obtained 342. The examination for the scholarship of the fourth year resulted in the award of the scholarship to Mr. Geo. H. Holmstead. The maximum number of marks was 350, and of these Mr. Holmstead obtained 294. Mr. Richard Walkem obtained 293 *marks; and it is said that a second scholarship* was awarded to him.

AMENDMENTS OF MUNICIPAL LAW.

Two Acts of last session of Parliament deserve immediate attention on the part of those concerned. The one, cap. 16, entitled, "An Act to extend the provisions of the 275th section of the Act respecting the Municipal Institutions of Upper Canada, and to provide for the election of Councillors in the several townships of Upper Canada, whenever the same may be divided into Electoral Divisions under the authority of the said section." The other, cap. 19, entitled, "An Act to amend the Consolidated Assessment Act of Upper Canada, in respect to arrears of taxes due on non-resident lands, and for other purposes respecting Assessment." The former was treated by some of the lay press as abolishing the division of townships into wards. There can be no greater mistake. Townships divided into wards are not intended to be affected by it. Its only application is to townships not divided into wards, but for convenience of electoral purposes divided into Electoral Divisions. The latter Act has for its chief object the prevention of the sale for taxes of occupied or improved lands, and throws upon county treasurers, township clerks and assessors additional duties to those hitherto performed by them. It also removes all doubt as to the liability to assessment of unpatented lots of land sold or agreed to be sold by the Crown. Both Acts are subjoined :—

CAP. XVI.

An Act to extend the provisions of the two hundred and seventy-fifth section of the Act "respecting the Municipal Institutions of Upper Canada," and to provide for the Election of Councillors in the several Townships of Upper Canada, whenever the same may be divided into Electoral Divisions under the authority of the said section.

[Assented to 15th October, 1863.]

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

1. Whenever a township in Upper Canada is divided into Electoral Divisions, and polling places established therein, and Returning Officers appointed therefor, under and by the provisions of the two hundred and seventy-fifth section of chapter fifty-four of the Consolidated Statutes for Upper Canada, a meeting of the Electors for such township shall take place on the last Monday but one in the month of December, before the Annual Election, as provided by the said Act, at ten of the clock in the forenoon, for the nomination of candidates, for the Councillors to be elected for the said township, at the Township Hall, if there be one in the said township, but if there be no Township Hall, then at the place where the first meeting of the Council of the said township was held for the then current year; and the Township Clerk shall give the notice required by section ninety-seven, of chapter fifty-four, of the Consolidated Statutes for Upper Canada.

2. The Township Clerk shall preside at such meeting, or in case of his absence, through sickness or otherwise, the Council shall appoint a person to preside in his place; and if the clerk or the person so appointed does not attend, the electors present shall choose a chairman, being an elector, to officiate from among themselves.

3. Such clerk or person so appointed, or chairman so chosen, shall have all the powers of a Returning Officer.

4. If only five candidates have been within one hour proposed by any of the electors present at such meeting, the clerk or person so appointed to preside, or chairman so chosen, as the case may be, shall declare such candidates duly elected Councillors to serve for the then next following year.

5. If more than five candidates shall be proposed at such meeting, and any candidate proposed after the first five, or any elector on his behalf shall demand a poll, the said clerk or person so appointed, or chairman so chosen shall, on the following day, post up in the office of the clerk the names of the candidates so proposed, and give notice of the names to the Returning Officer appointed for each and all the said Electoral Divisions.

6. In case of the nomination of more than five candidates, and no candidate nominated after the first five, or no elector on his or their behalf then demanding a poll as aforesaid, the clerk or person so appointed, or chairman so chosen, shall declare such five candidates first nominated, duly elected Councillors to serve as aforesaid.

7. In case of a poll being so demanded, the Returning Officer for each Electoral Division, in such township, shall cause a poll to be opened at the polling place appointed in such division, on the first Monday in January following, and shall take the votes in the same way and keep the poll open for the full time required by law for taking the votes, in cases where no Electoral Division shall be established.

8. Every Returning Officer shall, on the day after the close of the poll, return the poll-book to the Township Clerk, verified under oath before the said clerk, or any Justice of the Peace, for the

county or union of counties in which the said township may lie, as to the due and correct taking of the votes for the said Electoral Division.

9. The Township Clerk or person so appointed, or chairman so chosen as aforesaid, shall add up the number of votes set down for each candidate in the respective poll-books, and ascertain the aggregate number of votes, and shall at the Township Hall or such other place at which the nomination was held, at noon of the day following the return of the poll-books, publicly declare the same, beginning with the candidate having the greatest number, and so on with the others, and shall thereupon publicly declare elected the five candidates respectively standing the highest on the poll.

10. In case two or more candidates have an equal number of votes, the said clerk, whether otherwise qualified or not, shall give a vote for one or more of such candidates so as to decide the election; and except in such case, no Township Clerk shall vote at any such election.

11. This Act shall be taken and read as part of the Act entituled *An Act respecting the Municipal Institutions of Upper Canada.*

CAP. XIX.

An Act to amend the Consolidated Assessment Act of Upper Canada, in respect to Arrears of Taxes due on non-resident Lands, and for other purposes respecting Assessments.

[Assented to 15th October, 1863.]

For the greater protection of persons owning non-resident lands in Upper Canada, and also for the more sure collection of the taxes thereon: Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The treasurer of every county in Upper Canada shall furnish to the clerk of each municipality in the county a list of all the lands patented or described for patent in his municipality, in respect of which any taxes shall have been in arrear for five years preceding the first day of January in any year, and the said list shall be so furnished during the month of January in every year, and shall be headed in the words following:—"List of Lands liable to be sold for arrears of taxes in the year 18—." And for the purposes of this Act, the taxes for the fifth year preceding shall be deemed to have been due for five years, although the same may not have been placed upon a collection roll until some month in the year later than the month of January.

2. The clerk of every municipality in each county is hereby required to keep the said list so furnished by the county treasurer on file in his office, subject to the inspection of any person requiring to see the same; and he shall also deliver to the assessor or assessors of the municipality each year, as soon as such assessor or assessors are appointed, a copy of such list; and it shall be the duty of the assessor or assessors to ascertain if any of the lots or parcels of land contained in such list are occupied, and to notify such occupants and the owners thereof, if known, of the amount of taxes due on each such lot, and enter in a column (reserved for the purpose) the words "occupied, and parties notified," or "not occupied, and parties notified," as the case may be; all such lists shall be signed by the assessor or assessors, and returned to the clerk with the assessment roll, and the clerk shall file the same in his office for public use; and every such list, or copy thereof, certified by the clerk, shall be received in any court as evidence in any case arising concerning the assessment of such lands; and the duties hereinbefore imposed upon the treasurer of any county or union of counties, and the clerk and assessor or assessors of any municipality, or counties, shall be performed by the chamberlain or treasurer, and the clerks and assessors of cities and towns withdrawn from the jurisdiction of the council of the county in which such cities and towns are situate.

All assessors shall attach to each such list a certificate signed by them, and verified by oath or affirmation, in the form following:

"I do certify that I have examined all the lots in this list named, and that I have entered the names of all occupants thereon, as well as the names of the owners thereof, when known, and that all the entries relative to each lot are true and correct, to the best of my knowledge and belief."

3. The clerk of each municipality shall, after the assessment roll for the current year shall have been returned to him by the assessors, examine the roll, and ascertain whether any lot embraced in the said list last received by him from the county treasurer is entered upon the roll of the year as then occupied; and the said clerk shall, on or before the fifteenth day of May in each year, furnish to the county treasurer a list of the several lands which shall appear on the resident roll to have become occupied, and the said county treasurer shall, on or before the first day of July in the then current year, return to the clerk of each municipality an account of all arrears of taxe due in respect of such occupied lands; and the clerk of each municipality shall, in making out the collector's roll of the year, add and include such arrears of taxes to the taxes assessed against such occupied lands for the then current year, and such arrears shall be collected by the collectors of the municipalities in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll.

4. The treasurer and sheriff of every county shall not be required to inquire before sale of lands for taxes whether there is any distress upon the land, nor shall they be bound to inquire into or form any opinion of the value of the land; and if any taxes in respect to any lands sold by the sheriff after the passing of this Act, shall have been in arrears for five years, as in the first section of this Act mentioned, preceding the first day of January in the year in which the sheriff shall sell the said land, and the same shall not be redeemed in one year after the said sale, such sale and the sheriff's deed to the purchaser of any such lands (provided the said sale shall be openly and fairly conducted) shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them.

5. The said treasurer of the county shall not issue his warrant to the sheriff for the sale of any lands which have not been included in the list furnished by him to the clerks of the several municipalities, in the month of January of the year in which he shall issue his warrant, nor of any of the lands which have been returned to him as being occupied under the provisions of the third section of this Act.

6. If the clerk of any such municipality shall neglect to preserve the said list furnished to him by the county treasurer for the year in which the same shall be furnished, or to furnish such lists as aforesaid to the assessor or assessors, or shall neglect to return to the county treasurer a correct list of the lands which have come to be occupied, as directed in the third section of this Act, or if any assessor or assessors shall neglect to examine such lands as are entered on each such list, and make return in manner hereinbefore directed, every person making such default shall, on summary conviction thereof before any two justices of the peace having jurisdiction in the county of which the municipality shall form a part, be liable to the penalties imposed by sections one hundred and seventy-one and one hundred and seventy-three of the act relating to the assessment of property in Upper Canada, chapter fifty-five of the Consolidated Statutes for Upper Canada, to be recovered by distress and sale of any goods and chattels of the party making default.

7. That part of section ninety-eight of the said Act, commencing with the words, in the fifth line, "*or in case of*" to the end of the section, is hereby repealed.

8. All that part of section three of the Act passed in the twenty-fourth year of Her Majesty's re. , intituled: *An Act to amend the Assessment Act*, after the words, "Municipal Council," in the fifth line, to the end of the section, is hereby repealed, and the following words shall be inserted instead thereof: "at any time before the first day of May in the year next following that in which the assessment is made, it shall be lawful for such council to try such complaint and decide upon the same; provided always, that this clause shall not affect any assessments made prior to the present year one thousand eight hundred and sixty-three.

9. Unpatented land, vested in or held by Her Majesty, which shall hereafter be sold or agreed to be sold to any person, or which shall be located as a free grant, shall be liable to taxation from the date of such sale or grant, and any such land which has been already sold or agreed to be sold to any person, or has been loca-

ted as a free grant, shall be held to have been liable to taxation since the first day of January, one thousand eight hundred and sixty-three, and all such lands shall be liable to taxation thenceforward, under the Act respecting the assessment of property in Upper Canada, in the same way as other land, whether any license of occupation, location ticket, certificate of sale, or receipt for money paid on such sale, has or has not been, or shall or shall not be issued, and (in the case of sale or agreement of sale by the Crown) whether any payment has or has not been, or shall or shall not be made thereon, and whether any part of the purchase money is or is not over-due and unpaid; but such taxation shall not in any way affect the rights of Her Majesty in such land.

10. The one hundred and thirty-eighth section of the said Act respecting the assessment of property in Upper Canada shall apply to all sales and conveyances which may be hereafter made under the authority of this Act.

11. Section one hundred and eight of the said Act, chapter fifty-five of the Consolidated Statutes for Upper Canada shall be amended, by inserting after the word "granted," in the third line, the words "sold, or agreed to be sold by the Crown."

12. Section one hundred and three of the said Act, chapter fifty-five of the Consolidated Statutes for Upper Canada shall be amended, by substituting "May" for "March," in the third line.

REGULÆ GENERALES.

MICHAELMAS TERM, 27 VICTORIA.

The following Rules shall come into force and take effect upon and after the first day of Hilary Term next, but shall not apply to any rules granted or issued before that day.

NEW TRIAL, &c. LIST.

1. The party who obtains any rule *nisi* for a new trial, or for entering a nonsuit or a verdict, or for increasing or reducing a verdict on leave reserved, may, on or after the fourth day inclusive after the serving such rule, file the same, together with an affidavit of service, with the Clerk of the Court granting such rule.

2. The party served with any such rule may (if the same has not been already filed by the party who obtained the same), on or after being served therewith, file the copy served, with an affidavit of the fact and time of such service, with the Clerk of the Court granting such rule.

3. In case the party to whom any such rule is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or before the fifth day after the granting such rule, and upon filing with the Clerk an affidavit that the rule has not been served, enter a *ne recipiatur* with such Clerk; after which the Clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

4. The Clerk shall, immediately on the receipt of any rule or copy under the first or second rule, enter a memorandum thereof in a book to be kept for that purpose, in the order in which the same shall be delivered to him; such memorandum to be according to the following form:

——— TERM, (year).

Plaintiff's name.	Defendant's name.	Description of Rule.	When filed with the Clerk	How disposed of.

5. On the first Saturday, the second Tuesday, and the second Friday of every Term, the Court of Queen's Bench, after going through the bar to hear motions for rules *nisi* or motions of course, will hear the rules so entered, according to the order in which they stand, in preference to any other business. And on the first Friday, second Monday, and second Wednesday of every Term, the Court of Common Pleas will, after going through the bar to hear motions for rules *nisi* or motions of course, hear the rules so entered according to the order in which they stand, in preference to any other business.

6. Each Court, in its discretion, will hear any rule so entered, when both parties are present and prepared to proceed.

7. If, when a rule is called on in its proper order, the party who obtained the same does not appear to support it, and the opposite party attend and applies to have it discharged, such rule may be discharged accordingly.

8. If the party called upon to show cause does not appear when the rule is called on in its proper order, the Court will hear the other side *ex parte*, and dispose of the rule.

9. If neither party appear, the rule may, in the discretion of the Court, be treated as having lapsed, and be struck out of the Clerk's books.

10. In the absence of other business, the Court may in their discretion hear rules so entered on any other days during term besides those mentioned in the fifth rule—the parties to the rule being present and desirous to proceed.

11. Each court will, on sufficient ground shown upon affidavit, enlarge a rule so entered to a subsequent day in the same Term, or to the following Term, and the Clerk shall alter the entry accordingly, and place the enlarged rule at the foot of the list.

12. All rules entered by the Clerk as aforesaid, which remain unheard at the end of any term, shall be enlarged as of course on filing a motion paper to that effect, to the following term, and shall be forthwith re-entered in the Clerk's book in the order in which they then stand, for hearing in the next ensuing term.

PLEADING SEVERAL MATTERS AND DEMURRING.

In all cases in which a judge's order to plead and demur, or to plead several matters, is rendered necessary according to the Consolidated Statutes of Upper Canada, chapter 22, sections 109 and 110, the original order or a copy thereof shall either be attached to the Nisi Prius record or demurrer book, or shall be copied in the margin thereof; and in case of non-compliance with this rule, the Clerks or Deputy Clerks of the Crown shall not pass the record, nor shall the demurrer be argued.

(Signed) W. H. DRAPER, *C. J.*
WM. B. RICHARDS, *C. J. C. P.*
JOHN H. HAGARTY, *J. Q. B.*
JOS. C. MORRISON, *J. Q. B.*
ADAM WILSON, *J. C. P.*
JOHN WILSON, *J. C. P.*

Michaelmas Term, Nov. 28, 1863.

SELECTION.

THE PRESENT STATE OF THE LAW OF COPYRIGHT IN LITERATURE AND THE FINE ARTS, WITH A VIEW TO ITS AMENDMENT.

[*A paper by Mr. Serjeant Parke, read at a General Meeting of the Society for Promoting the Amendment of the Law, held on Monday, 1st June, 1863, and ordered to be printed.*]

Of all matters connected with legislation, one of the easiest, apparently, would be to give property and protection, in the production of his genius, to the author of a work of literature or the fine arts. And so it has proved in almost all civilized countries except this. In France, that law, which we term the Law of Copyright, has been established and successfully maintained by a few decrees of the Republic and the Empire, and by a few sections of the Code Napoleon and its supplement. The whole French law would not occupy more than a page or two in print. In Belgium, Holland, Austria, Russia, and even Spain, the law is equally brief, explicit, and effective. Unfortunately this has not been the case in this country. The acts of Parliament which form our law of copyright, would fill of themselves a good sized octavo volume, and anything more confusing or conflicting than their contents, can scarcely be imagined. Exceeding the usual defects of piecemeal legislation these acts, with their provisoes, restictions, and contradictions, seem to delight in marring the objects they have in view; and while with one hand they deal out grudgingly benefit and protection to the author, they curtail or spoil the gift with the other. Heavy, constant, I may say, almost unceasing litigation has been the result—litigation in its nature so perplexing and so depressing, that many have preferred to abandon their rights altogether, or to only partially enjoy them, than to incur the difficulties and dangers of a copyright law suit.

In proof of what I advance, I will, with leave of the Society, take a cursory view of our copyright acts of Parliament, and I will then proceed to another evil of our present copyright system, viz., the want of a proper tribunal for ordinary copyright questions, and for obtaining ready redress in cases of piracy.

To place the acts in intelligible order, I will refer to them as respectively relating to the different branches of the copyright law, viz.:—

1. Literature.
2. The Drama, Music, and Lectures.
3. Painting and Photography.
4. Engraving and Prints.
5. Sculpture Models and Casts.
6. Foreign Copyright.

And here, before I go further, I cannot but remark upon the ill luck that has given rise to fourteen or fifteen acts of Parliament,* for what might be included in a single act of no very long dimensions. Now, the literary author has one act for himself only, while the sculptor, the painter, and the engraver are driven each to some other, and sometimes two other acts of Parliament for their protection, and I may add confusion also.

In *Literature*, my first head, I may begin by stating that, for a long series of years after the introduction of printing, authors were without any protection beyond some claims put forward under the Stationery Company and the Licensing Act of Charles II., and beyond a notion of the existence of copyright at Common Law, which, after long litigation, remains very much of a problem to the present day.* At length the first copyright act was passed, the 8 Anne, c. 19, of which, as it is repealed, I need say no more than that from a doubt upon its construction, the great cases of *Millar and Taylor*, 4 Burr., 2303, and *Beckett* v. *Donaldson*, 4 Burr., 2408, ensued when the question of copyright at common law was discussed, and though in the latter case brought to the House of Lords, and the judges' opinion taken, was not definitively settled. In amendment and enlargement of the statute of Anne came the 12 Geo. II., c. 36; the 15 Geo. III, c. 53; the 41 Geo. III., c. 107; and the 54 Geo. III., c. 156; and so the copyright law remained until a comparatively recent date, but its condition was most unsatisfactory. The protection granted—a period of 28 years, or the author's life—was found to be too limited, and not a sufficient boon to the great works with which our writers were enlightening and delighting the world. There was also no protection whatsoever for the dramatist, the musician or the lecturer, in the performance or delivery of his respective productions. A remedy with regard to the drama and operatic music was procured by Sir Edward Bulwer Lytton through the 3 William IV., c. 15, and with regard to lectures by the 5 & 6 William IV., c. 65. Of these acts I shall presently speak. Some few years after that, the literary world obtained their chief Copyright Act, the 5 & 6 Vic., c. 45, repealing the previous literary acts, and stating in its preamble, that it was "expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world." And here I cannot refer to this statute without paying due homage to the memory of that poet, statesman, lawyer, and judge, Thomas Noon Talfourd, whose eloquence and untiring energy in this good cause, both in and out of Parliament, led to the enactment. Unfortunately, Serjeant Talfourd was not in the House when the act actually passed, and much was allowed to creep into it, which he would no doubt have prevented. The act was in the end passed in a hurry, as time pressed to save the works of Sir Walter Scott and others from the then too speedy termination of their copyright. As it is, however, the 5 & 6 Vic., c. 45, is generally admitted to be the best act that has passed in this country on copyright, but it has, in my humble opinion, some serious defects. The obscurity of sec. 18, giving copyright in encyclopædias and periodicals, has given rise to expensive litigation, such as the case of *Sweet and others* v. *Benning and another*, 19 Jur. 543; 20 L. J. R. (N.S.) C. P. 175, and does not yet seem to be capable of clear explanation by the courts. The machinery in the act for the purpose of registration at Stationers' Hall is somewhat cumbrous, and has this further defect, that its management is left entirely to ministerial officers, who, in effect, register any thing brought to them without resorting to investigation, or affording explanation. This defect is the more serious, as from the case of *Cassell* v. *Stiff*, 2 Kay and Johnson's Rep. 279, it would appear that a neglect to register on the part of officials at Stationers' Hall, prevents the author having the benefit of the International Copyright Act, as against the public. It has, I am informed, more than once happened that the same work has been registered by different parties, or under different titles, when a moment's inquiry might have prevented it. True it is, the 14th section provides that persons aggrieved by any entry in the book of registry, may apply to a court of law in term, or a judge in vacation, who may order such entry to be varied or expunged. But that at best, is a remedy after the mischief is accomplished, and after much injury have been done; it is also leaving the innocent party

* It has been very truly remarked, that further and numerous variations of the copyright law have been created by another act, the 10 & 11 Vic., c. 95, which gives power to the Crown to suspend the prohibitions against the admission of pirated books into such colonies as make provision for protecting the rights of British authors.

* *Boosey* v. *Jefferys*, 20, L. J. R. (N. S.) Ex. 354; 6 Exch. 580. "In the United States, copyright rests wholly upon the legislation of Congress; and Lord Brougham, in *Jefferys* v. *Boosey*, said it did not exist at common law: it was the creature of statute."—*Peters-dorff's Abridgment, Title, Copyright*, vol. 3, p. 246, *note*.

no resource but a law suit, often when the slightest previous caution from a legal referee would have pointed out and prevented the danger. This defect in the statute might be avoided by appointing at Stationer's Hall, a Registrar of legal standing and acquirement, and with discretionary powers, who would not blindly make entries in the book of registry, but look to the real rights and claims of the parties registering.

But there is another and a very serious defect in the registration enacted by this statute, which is, that, by the 24th section, no omission to make entry shall affect the copyright of a book, but only to sue or proceed at law. Why should this be? Is it not most unfair to thus allow the title to copyright, in itself a thing of all others most incorporeal and invisible, to remain a mystery until infringed? It is unfair in the first place, to the author himself, as it leads him not to attend the registry, and often to omit it even when he begins a law suit. Such omission to register may seem odd, but from some experience I have had in copyright cases, I have seldom found, even after a solicitor has been called in and the work of law has begun, that the book has been registered. The question, "have you made an entry in the book of Registry?" comes usually upon the parties with the utmost surprise. I may add to this the fact, that in the important case of *Sweet* v. *Benning* already alluded to, I, as one of the counsels for the defendant, actually, though counsel and solicitor were engaged for the plaintiff, and the declaration had been delivered, put a stop to the first action, and made the opponents recommence, by causing our solicitor to enquire at Stationers Hall if there was registration. He thought the omission so unlikely that he would hardly go to the Hall, but when he did so, he found the thing as usual, had been never thought of. But if this is unfair to the author, it is still more so to those who may be led to make use of his book. How are they to know, in many instances, whether they are committing piracy or not? Take for example the case of a book close upon the expiry of its copyright. No information as to the state of its copyright at Stationers' Hall is likely to be got, because no registration of it need be there; but if any one attempt to have recourse to the book—a book, perhaps, in itself of no great value as a whole—out may pop the author from some obscurity and come down upon the party, and bring upon him all the pains and penalties of a proceeding for piracy. Now it seems to me that this injustice might be avoided by simply enacting that no title shall accrue until registration, and that the word "registered," with the date of registration, be imprinted on the title page of every book.

As a specimen of the contradictory character of these copyright acts, by the 7 & 8 Vic., c. 12, the International copyright act, no author is to have the benefit of that act without registration within three calendar months of first publication. Thus a party may make himself at once sure of a copyright in a foreign book, but can know nothing about those at home.

With regard to the procedure under this act and the other copyright acts, I will have something to say when I come to the subject, of a want of a proper tribunal for questions of copyright.

As to my second heading. The *Drama and Music*, as far as performance was concerned, were totally without protection until 1833, when Sir E. Bulwer's Act, the 3 & 4 Wm. IV., c. 15, gave, it would seem, a perpetual copyright in the representation of "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, not printed or published, and twenty-eight years copyright from time of publication, in the representation of such tragedies, comedies, plays, opera, &c., as should be printed and published.

This was clear enough, but the copyright act, the 5 & 6 Vic., c. 45, in extending the term of copyright in performance to that accorded to literary works, and in giving such copyright to all musical compositions, creates some obvious confusion, and may give rise to the important question as to what is the effect of the two statutes combined, with regard to the exclusive right of performing dramatic or musical productions that have not been printed and published. It is clear that the 1st section of the 3 & 4 Wm. IV., c. 15, gives to their author or his assignee, a sole liberty of performing them, without affixing any limitation of time. By printing and publishing, he exchanges this perpetual monopoly for a new one, viz., the sole right of performance for the author's life, or twenty-eight years from the time of publication. Now the 5 & 6 Vic., c. 45, s. 20, which includes musical compositions, professes to extend the term given in the former act, and this it cannot mean to effect by reducing that which is already perpetual. Yet it would seem to do so when it enacts that "the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this act to the first publication of a book." This I mention, as clearly shewing that the first act could not have been closely consulted when the second was composed.

But there is one hardship with regard to dramatic, or rather literary copyright, which I think should be remedied by a special enactment. It is this. The dramatist or musician, whether he publish or not, has the representation of his play or opera protected, but the author who produces a romance, novel, or tale of a striking character, and dramatic in its form (as indeed many of Sir Walter Scott's productions are) has no protection against his work being, by a mere little mechanical skill, converted into a play, and the profits due to his own genius and labour being at once lessened by his work being presented to the public in another and, to many not given to reading, a far more agreeable form. He, in fact, furnishes the incidents, the characters, and the very language, and another is at perfect liberty to take possession of them and convert them into his own property, (see *Reade* v. *Conquest*, 30 L. J. R., C. P. 209.) It has been asserted that the drama does not interfere with the novel, but gives it greater vogue. This I deny; because where the novel is eminently successful, it needs no help, and where it is moderately so, the dramatic form is far more likely to supersede and shelve the original work. And at any rate, it should be left to the author himself whether he will choose, during the existence of his copyright, to have his work dramatised or not; and if he wish it, then let some certain benefit accrue to him whose genius has in effect given life both to the novel and drama.

With regard to *Lectures*, I leave the Society to judge of the following well intended, but singular act (consequent on the case of *Abernethy* v. *Hutchinson*, 3 L. J. R., ch. 209.) By this statute, the 5 & 6 Wm. IV., c. 65 (an act for preventing the publication of lectures without consent), sec. 1, the author or his assignee, of lectures to be delivered in any school, seminary, institution, or other place, has the sole right of publishing them; and every person who obtains, by taking down in shorthand, or through any other means, a copy of the lectures, and publishes them without leave of the author, or his assignee, and every person who knowingly sells or offers for sale lectures so unlawfully published, shall forfeit the illegal copies of the lectures, together with one penny for every sheet of them found in his custody, one moiety to the crown and the other moiety to the party sueing for it, to be recovered by action. This is all very good; but the 5th section provides that the act shall not extend to lectures of the delivery of which notice in writing has not been given to two magistrates living within five miles of the place of delivery, two days at least before delivery; nor is it to extend to lectures delivered in a university or public school, or college, or on a public foundation or by an individual in virtue of any gift, endowment, or foundation. Now I cannot understand why a lecturer's copyright is made to depend on his hunting up two justices of the peace to serve each with a, to them, useless notice, or why, if he delivers his lecture in the public places mentioned, he is to be deprived of

his copyright. Thus, those recent fine copyright lectures on "Edmund Burke," by Mr Napier, and on "The Irish Parliament," by Mr Whiteside, M.P., would be forfeited, were the authors to re-deliver them in a single instance, forgetful of the two justices, or to do so through kindness in the hall of some public foundation or charitable institution.

My third and fourth heading I may include together, viz.: —*Painting and Photography*, and *Engravings and Prints*.

It is a fact no less startling than true, that until the July of 1862, there was no statutable copyright in a painting or drawing. To remedy the defect, attempts were made to establish a copyright at common law, but not successfully. The last endeavour—a case of much litigation and much argument in the courts of Dublin: (*Turner* v. *Robinson and Egy*, better known as the "Death of Chatterton Case," 10 I. Rep. 510) ended in a side-winded and doubtful decision. This glaring wrong has at last in some measure been set right by the 25 & 26 Vict., c. 68, and copyright established in paintings, and in copies and engravings from them; but as framers of that act have not amalgamated it, or even made it tally with the previous engraving acts, the 8 Geo. II., c. 13, the 7 Geo. III. c. 38, and the 17 Geo. III. c. 57, I have my fears that much difficulty of interpretation and no small amount of litigation will ensue.

In the first place, the terms of copyright differ. The last act gives a very uncertain term—the author's life, and seven years after his death—which, in some cases, may not amount to eight years copyright. The former acts give twenty-eight years, and thus as to the engraving, the later legislation gives the painter who engraves his own picture a possibly less benefit than did the former; and it may now happen that the original painting, if unengraved by its author, may have but eight years' copyright, at the expiration of which, any one who engraves it may have a twenty-eight years' copyright in his engraving. By the 25 & 26 Vic., c. 68, a register is to be kept specially at Stationer's Hall for paintings, drawings, and photography, but nothing is said as to engraving from them, nor does it appear whether all the harrassing formalities of the old acts are to be observed with regard to them, or whether they are to be published without any mark upon them to show the existence or non-existence of a copyright. But I need go no further, for I am sure I have only to ask any lawyer to read the 8 Geo. II., c. 13, the 7 Geo. III., c. 38, and the 17 Geo. III., c. 57, the prior engraving acts, and this new painting and engraving act, and he will at once observe how utterly conflicting and contradictory to each other they are.

Of the fifth head, *Sculpture*, I may mention that the first act in its favour, the 38 Geo. III., c. 71, (Godson on Copyright, *Gahagan* v. *Cooper*, 3 Camp. 111,) was found on trial to be so defective, that it was held to be no offence under it to make a cast of a bust, provided it were a *perfect fac simile* of the original. Consequently, the 54, Geo. III., c. 56 was passed, and it is the act now in force on this subject. This act gives the sculptor fourteen years' copyright, and fourteen years more if he be still living at the end of the first fourteen, and have not assigned. There is no registration, and nothing required to secure copyright beyond the name and date of the first publication to be engraved on the piece of sculpture, so that whether the author be living or not at the end of the first fourteen years, or whether he have assigned, are matters his copier may find out as best he can. The power and mode of assignment under this act is not very clear, but few, if any cases have (possibly from the rarity of good sculpture) arisen on the construction of the act, and I should say fortunately so for those who might be litigants.

On my last heading, *International Copyright*, I have only to remark that conventions with foreign countries are not likely to be made, or to be much employed in our favour, once the state of our law, as understood to be decided in *Boosey* v. *Jefferys*, 20 Law Journal Rep., Exchequer 354; *Jefferys* v. *Boosey*, 4 H. of L. C. 815; *Ollerdonf* v. *Black*, L. J. R. (N. S.) C.P. 165, becomes generally known, viz., that a foreign author if resident in this country has a copyright in a work which he, while so resident, first publishes here. Now, as by the American law, a citizen of the United States, and by the French law, a French subject obtains copyright in his own country whenever he publishes there, without regard to prior publication elsewhere, all the American or French author has to do is to come over and make a short stay here, and during his stay first publish his work here, and lo! he has an English copyright. This plan, I may further state, was acted upon by Mrs. Beecher Stowe in the production of "Dred," the copyright of which was never disturbed in this country. Our law being so, the Americans naturally laugh at any idea of an international copyright convention between them and us. One other defect in our International Copyright Act, or rather in its Amending Act, the 15 & 16 Vic., cap. 12—a defect specially unfair to France—is this, viz., that, by sec. 4, it forbids the representation here of unauthorized translations of dramatic works represented in foreign countries. This, under the convention with France, would be, as we well know, a great boon to French dramatists, but section 6 of the same act takes the boon away, by enacting that "nothing herein contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country." Now as most, I might say all, versions of foreign dramas are adaptations rather than translations, the whole of this piece of legislation becomes a simple absurdity.

Having thus shewn not anything like all, but only some of the most striking defects of our copyright statutes as to the title and rights they pretend to establish, I would draw the Society's attention to what is a still greater evil, viz., the utter want of a proper tribunal for the easy settling of copyright questions, and for affording ready redress in cases of piracy. At present, be the question ever so trifling, the only means parties have of establishing their rights is, except in one single instance, by a suit in Chancery, or an action or proceeding in one of the superior courts, or possibly in a few instances by county court plaint. For instance, as I have shewn, an author goes to Stationers' Hall to register; there is no one there to give him any information or instruction beyond a merely ministerial officer; yet if he make the slightest slip, a suit or action may follow that will cost him hundreds, perhaps thousands of pounds.

But if this is hard towards those establishing title, it is downright monstrous towards those seeking protection or redress in most cases of piracy. A copyright pirate is no better than any other pirate, though less dignified. He is, in fact, a mere pickpocket, and, like pickpockets generally, he is a pauper. Well, one of these pauper pirates pounces on and plunders some new work of literature or art; and it is vital—vital, I may indeed say in such matters—that the author or owner of the work should stop him at once; but he cannot do so. Let the rogue be ever so daring, ever so openly unjustifiable, yet there is no remedy to resort to but an action at law or a suit at equity. Just conceive a thief taking your watch or your handkerchief, and you have no redress but to serve a writ or summons upon, or to file a bill against him! I need not go through all these copyright acts again, but I am sure I am quite safe in stating, that with the exception of the new Painting Copyright Act, the 25 & 26 Vic., c. 68, no Copyright Act gives a summary remedy in piracy. The result to authors, artists, and publishers, and to all concerned, has been deplorable, in fact so much so, that it amounts, in nine cases out of ten, to leaving their property unprotected. The action at law or the suit in equity in copyright matters is, moreover, by these acts, encumbered with many extra formalities, and the proceedings are rendered so difficult and complicated, that copyright business has become quite a separate department

of the law, requiring, like patents, agents and counsel specially educated for the purpose; and this, in most cases, to maintain a right that a child might understand. The system is, I am informed, still worse since the recent Bankruptcy Act; for now the pirate defendant has only to resist the action if he sees the shadow of a chance, or to let it go by default if he see none, and then become a bankrupt and set his opponent at defiance; and, may be, before proceedings can be brought to bear upon him, this defendant has made hundreds of pounds by his piracy. That this is now going on, I have only to refer to the case of *Gambart* v. *Ball*, which has ended by Mr Gambart successfully defeating, at a large expense, a mere pirate, which pirate, unable to pay the taxed costs of £133 against him, comes before the Bankruptcy Court and obtains his discharge. Mr. Gambart, deservedly eminent as a print publisher, has just brought out a pamphlet on the subject, which I recommend *every one here to read. But not only Mr. Gambart, but most* publishers in London are sufferers from this intolerable state of things. I have the authority of Messrs. Stevens, Son, & Haynes, of Bell Yard, Mr. Harrison, of Pall Mall, Messrs. Hurst & Blackett, of Malborough Street, to state as much with regard to them, and I am certain that if I canvassed all the respectable publishers in the realm, there would be but one opinion amongst them.

I should, however, in fairness, refer to the new act, (the 25 & 26 Vic., c. 68) giving copyright in paintings, drawings, and photographs which does, in its 8th section, provide a summary redress before two justices for piracy; but as the framers of that statute have left the former artistic or Engraving Act (the 17 Geo. III., c. 57) untouched or unreferred to, the curious state of circumstances arises that one act drives you to a suit at law or equity to protect an engraving, while you may go before a magistrate for a photograph. This is graphically shewn in Mr. Gambart's pamphlet:—

"Let me now," says Mr. Gambart, "point out an anomaly, created by the act of last session on this subject, which is so extraordinary as to be beyond belief, had not recent events in different courts of law fully demonstrated its existence. Whereas the engraver has the most precarious protection against the photographer, the photographer can obtain an efficient remedy by summary proceedings in a police court for the infringement of copyright in even so trifling a production as a carte-de-visite. Upon such a thing as this he can bring the offender to instant punishment! Messrs. Southwell, publishers of Miss Lydia Thompson's carte-de-visite, have stopped the career of several persons who pirated it; yet all my efforts to stop piracy of works of high art have been as yet fruitless. Let us see how much further this anomalous state of things will effect a given case, and thus show the extraordinary state of the law. Supposing Messrs. Colnaghi should commission Mr. George Doo to devote a year of his ability to reproducing Miss Lydia Thompson's carte-de-visite by line engraving, they would, when brought before Mr. Tyrwhitt, receive instant punishment for so infringing Messrs. Southwell's copyright. No plea of the value of the artistic skill employed would shield them from this prosecution. But should the offence go the other way, and Messrs. Southwell copy in photography Mr. George Doo's magnificent engraving of *S. del Piombo's* "*Raising of Lazarus,*' upon which he has been already engaged for six years, Messrs. Colnaghi, the proprietors of that plate, would have to endure all the uncertainty and expense attending my proceedings against Mr. Ball and others, and might be compelled to chase Messrs. Southwell from court to court, having to prove the meaning of an Act of Parliament during the process! If there ever was a case of two ways and two measures, here is one."

"The power," continues Mr. Gambart, "of proceeding by summary process before two justices of the peace granted to publishers of photographs, should also be given to publishers of engravings. It is the greatest evil of the late act, that engravings are not dealt with so favourably as photographs are. Lastly, it is necessary to devise some means of bringing to justice offenders who have no domicile, and hawk piracies from house to house, or station themselves in the public thoroughfares." Mr. Gambart in this is, I am sure, expressing a universal opinion.

I have, I repeat, given in this brief space only the salient defects of our present copyright law; and in so doing, I have not touched on any thing approaching the whole amount of the difficulties and hardships that arise from this law's actual confused condition. Our magazines and periodicals teem with complaints about it, and in particular I would point to many able letters and articles on the subject that have appeared recently in the *Athenæum*. There is, indeed, but one feeling on the part of every one interested in such matters, that the copyright system must be thoroughly reformed, and to effect *that, does not seem to be any great difficulty after all.* The plan I would humbly sugest is simply this:—

Take the whole of these copyright acts and consolidate them into one statute; form them in fact into a single code. After what has been achieved in this way with the criminal law—a giant undertaking—the consolidation of the copyright law would be comparatively easy. In that consolidation I would further suggest that the following principles and measures be adopted,* viz:—

1st. One term of copyright to be established in all works of literature, the drama, music, and the fine arts.

2nd. One mode of registration for all kinds of copyright, and no copyright to accrue until registration. Some visible mark, such as the word "registered," with the date of registration to appear prominently on all articles enjoying copyright. This may seem difficult in the case of unpublished dramas or musical compositions, but the word "registered" and date might appear on the bills announcing their performance.

3rd. A literary author to have such copyright in his work that it shall not be dramatised without his consent during the existence of his copyright. And as to foreign copyright, no foreign play, of a country in convention with us, to be dramatised or adapted here without the author's consent, while his copyright exists.

4th. No person but a native or naturalised subject of the British empire to have copyright in it, except under an International Copyright convention.

5th. An assessor of legal standing and experience to be appointed at Stationers' Hall, with discretionary and judicial powers as to registration, and the decision of ordinary matters connected with copyright law. There might, in graver questions, be an appeal from him to a superior court.

6th. A summary jurisdiction in all minor copyright matters, and particularly in cases of piracy. Such jurisdiction might be given to the assessor at Stationers' Hall in London, and to the judges of the county courts, and in mere piracy and the seizure of pirated copies to two justices, or one stipendiary magistrate in the country.

7th. A power (under an order from the assessor or the justices) of immediate seizure of printed articles in glaring cases of piracy.

8th. Fine and penal imprisonment in such glaring cases.

9th. A brief summary of the copyright law, together with the rules and regulations to be published by the assessor, to be delivered at Stationers' Hall to any party applying, on payment of a small fee.

* It has been suggested that we should defer this reform until we could, at some international congress, induce all civilized nations to agree on one system of copyright. I fear if we were to wait till then, the thing would never be accomplished. Such delay seems to me much as if it were to defer our conventions for the arrest of criminals in foreign countries, until the criminal law of every state could be assimilated.

A code upon such a basis would, I am sure, be an invaluable boon to that class, which so well merits reward and protection —the men who produce (to borrow from the preamble of our present copyright act) those works which are of lasting benefit to the world. Nay more, genius is proverbially improvident, and as with Otway and Goldsmith, too often but a mere child in the ways of the world. The defensive structure, therefore, wherewith we are to shelter it should be of the plainest build and the readiest access: no labyrinth, no intricate paths should be around it. We in England, at least, should guard and foster that sinew of our greatness—the works of authors and artists—with the same jealous care and intelligible means that characterise copyright legislation in other countries. It is only when we do so, that we can proudly announce in the words of the poet—

"—Sunt hic etiam sua præmia laudi."

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 289).

[*Correction.*—Add, after "county," 7th line from the bottom of page 289 (*Reg.* v. *Davies*, 8 Cox, C.C. 486)].

SPECIAL PROTECTION OF BAILIFF.

Secs. 195, 196, 197 and 198, contain provisions for the protection of Bailiffs and persons acting in their aid, similar to those in the Imperial Statute 24 Geo. II. cap. 4, for the protection of Constables, slightly altered so as to adapt them to the Division Courts; and the cases decided in the Imperial Statute will for the most part be found authorities in point in the construction of the above named sections of the Division Courts Act.

The leading object of these enactments is to protect the Bailiff in what he has done in obedience to a warrant under the hand of the Clerk and seal of the Court, that he may not be responsible when he acts in obedience to such warrant, shows it and gives a copy of it when required, leaving the Clerk to answer for any defect of jurisdiction or other irregularity in or appearing by the warrant he has issued to the Bailiff for execution (see *Jones* v. *Vaughan*, 5 East. 445; *Atkins* v. *Kelly*, 11 Ad. & E. 777; *Price* v. *Messenger*, 2 B. & P. 185).

Section 195 of the act provides that "No action shall be brought against the Bailiff of a Division Court, or against any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand of the clerk and seal of the Court, until a written demand, signed by the person intending to bring the action, of the perusal, and a copy of such warrant has by such person, his attorney or agent, been served upon or left at the residence of such Bailiff, and the perusal and copy have been neglected or refused for the space of six days after such demand."

The protection is strictly confined to the "Bailiff of a Division Court," or any person acting by his order and in his aid, under a warrant from the Court bearing the Clerk's signature and the seal of the Court. It does not extend to Constables executing a warrant of attachment issued by a Magistrate, nor would it extend to the protection of Constables enforcing a Magistrate's warrant for any penalty made recoverable before them under the Division Courts Act.*

The question came up in a recent case, *Gray* v. *McCarty et al.*, 22 U.C.Q.B. 568. A Magistrate gave a warrant to a Constable, under section 200 of the Division Courts Act, to attach the goods of one E. in the possession of the plaintiff. Under this certain goods were seized, and an action was brought against the Magistrate, the Constable, and the creditor. The Constable pleaded not guilty by the 196th, 197th and 198th sections of the act, and the question whether the Constable was within the protection of these clauses, with others, came up upon an application for a new trial. The particular point does not appear to have been urged in argument, but, on delivering the judgment of the Court, Draper, C. J., observed, "The only doubt that can arise is whether the Magistrate is liable. As to defendant Keys, his plea of not guilty is stated to be founded on the Division Courts Act, sections 196, 197 and 198. These sections, however, are limited to the protection of the Bailiffs of the Division Courts, and of persons acting by the order and in aid of the Bailiffs, '*for anything done in obedience to any warrant under the hand of the Clerk and seal of the Court.*' No such warrant appears to have been issued here; and the warrant of which evidence was given was directed to the defendant Keys, a constable, and there was not any proof offered that he was a bailiff of any Division Court. He does not therefore bring himself within the protection of the sections referred to by his plea of not guilty. He does not invoke the protection of the 193rd and 194th sections of the Division Courts Act, to which, if to anything in that statute, he might have appealed. Nor has he relied on the act to protect justices of the peace and other officers from vexatious actions. (Consol. Stat. U. C., ch. 126, secs. 9, 10, 11, 20.) His case therefore rests simply on not guilty, and the evidence, which is conclusive against Whelan the creditor, is equally so against him."

* In such cases the general law for the protection of Constables, or the provisions in sections 193 and 194 might be made available.

It is quite clear that even the Bailiff of a Division Court is liable if he has not a warrant signed and sealed as required by the 195th section; or if he has acted beyond its authority he is liable for the excess, and no demand of a copy of warrant is necessary. (*Peppercorn* v. *Hoffman*, 9 M. & W. 618; *Postlethwaite* v. *Gibson*, 3 Esp. 26; *Barns* v. *Luscome*, 3 Ad. & E. 589; *Crozier* v. *Cundey*, 6 B. & C. 232) It has been held that where a justice of the peace, who issued a warrant to a constable, could not be sued for the wrong done, the plaintiff was not bound under the Imperial Act to demand a copy of the warrant before commencing his action, for that the object of the statute in making a demand of the warrant necessary was that the justice might be properly joined or made a defendant. (*Starch* v. *Clark*, 4 B. & Adol. 113, *Crozier* v. *Cundey*, 6 B. & C. 232; *Collar* v. *Kadwell*, 2 N. & M. 399.) And the same principle would apply to the enactment under consideration. If the Bailiff take the wrong person; or if the warrant be to take the goods of A. and he takes the goods of B., or if he execute the warrant beyond the local limits of the jurisdiction, he is not within the protection of the clauses referred to in the act. (*Haye* v. *Bush*, 1 Man. & G. 789; *Crozier* v. *Cundey*, 6 B. & C. 232; *Kay* v. *Grover*, 7 Bing. 312; *Milton* v. *Green*, 5 East. 233.) Although a party injured may proceed against the plaintiff as the immediate wrong-doer for the excess, where he has exceeded the authority given to him by the terms of the warrant; yet if the warrant itself was clearly illegal he can also of course proceed against the clerk, and in some cases against the party also who caused the warrant to be issued.

Assuming that a Bailiff has acted on a proper warrant from the clerk, a written demand of the copy is a condition precedent to any right of action at all. No action shall be brought until a written demand, &c., has been served, being the language of the clause. The demand must be in writing, and signed by the person intending to bring the action, but it has been held that the signature of the attorney on behalf of the party is sufficient. (*Joy* v. *Orchard*, 2 Bos. & P. 39; *Clark* v. *Woods*, 2 Exch. 395.)

DANGER OF NOT SELECTING THE CLERK TO ISSUE ATTACHMENTS.

Under the Division Courts Act, the creditor has a choice in cases of attachment to apply to any Magistrate, or to the Clerk of the Court, to issue the warrant. The divisions are so small throughout the country, and the clerk's office is usually so near a creditor's residence, generally in the same or an adjoining township, that rarely is there any cogent necessity for applying to a Magistrate rather than the Clerk, and the saving of a few miles against the risk of error is rather heavy odds for a plaintiff to take. Applying to a clerk, he comes to an officer experienced in the work, one who has all the forms before him, and whose friendly word of caution will often save a plaintiff from getting himself into difficulty.

It is not so when he applies to a Magistrate, who is not and cannot be expected to be familiar with the Division Court procedure. The propriety therefore of employing the Clerk seems obvious enough. Let no suitor be persuaded by a Magistrate to come to him on such a business, and perhaps it may somewhat damp ardour in this particular if we mention the fact that a Magistrate is not entitled to any fee under the statute for doing the work.

But to come to a case in point, we refer to *Gray* v. *McCarty, Keys and Whelan*, decided in Trinity Term last. (22 U. C. Q. B. 568.) The defendant Whelan applied to the defendant McCarty for a warrant of attachment, who issued it as he thought in the regular manner; but it turned out that the Magistrate had not observed the requirements of the statute, and Whelan as well as the Magistrate was held liable in damages for the seizure made under the warrant.

Chief Justice Draper, in giving judgment in the case, observed, the authority of a Magistrate "is not derived "from the general authority vested in him as being in the "Commission of the Peace, nor from any special authority "conferred on Justices of the Peace by statute, in any "criminal or quasi criminal matter. His power to issue a "warrant of attachment to seize the personal estate and "effects of an absconding, concealed or removing debtor, "is conferred exclusively by the 199th and 200th sections "of the Division Courts Act;" observing afterwards, in his judgment, that until such an affidavit (as required by the statute) was filed with the Justice, "*he has no jurisdiction whatever.*" If creditors, after the decision in this case, go to Magistrates for attachments, they incur the risk with their eyes open to the danger!

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., *Barrister-at-Law, Reporter to the Court.*)

IN RE MCCUTCHON AND THE CORPORATION OF THE CITY OF TORONTO.

Sewers—By-law to regulate—22 Vic. ch. 99 (1858), sec. 290, sub-secs. 18, 20.

Held, that the 22 Vic. ch. 99 (1858), sec. 290, sub-secs. 18, 20, giving power to municipal corporations relating to sewers, applies to sewers already constructed by general taxation, not to those only which might afterwards be built.

The 18th sub-section authorises a by-law to compel the draining "of any grounds yards, vacant lots, cellars, private drains, sinks, cess-pools, and privies," and to assess the owners with the costs thereof if done by the council on their default; and the 20th sub-section "for charging all persons who own or occupy property which is drained" or required to be drained into a common sewer, with a reasonable rent for the use of the same. The by-law in question enacted that "all grounds, yards, vacant lots, or *other properties* abutting on any street" should be drained, and fixed the rent to be paid *Held*, no objectionable as including other properties than those mentioned in the statute, for if the word "property" in the 20th sub-section could include only the kinds of property mentioned in the 18th, it might receive the same construction in the by-law.

The court inclined to think that the owner or occupier of the property might legally be allowed to commute for the annual rent by payment of a fixed sum, and refused therefore to quash the clause authorising such an arrangement.

The sewer rent not being a charge upon the land, *Held* that payment of it could not be enforced by the same means as the ordinary assessments.

The 6th section of the by-law required all grounds, &c., not already drained, abutting on any street with a common sewer, to be drained into the same within fourteen days from the advertising of the by-law for one week: the 7th section imposed a penalty on any one of not less than $1 nor more than $10 for each month he should omit to do so; and the 8th section provided for enforcing payment by distress or imprisonment not exceeding thirty-one days.

Held that these sections must be quashed, for the 16th sub-section above mentioned shewed how the parties should be compelled to drain, i. e. by the council doing the work and assessing them for the cost; and the infliction of a penalty for each month, and imprisonment for thirty-one days, were wholly unauthorised.

A subsequent by-law added to the 8th section above mentioned, a proviso that any person thereby required to construct a drain who should not do so, but should be willing to pay the same rent as if he did use the sewer, should be exempt from the penalties: *Held*, that as the penalties were held illegal, this clause, founded on the assumed liability to pay them, must also be quashed.

[Trinity Term, 27 Vic.]

Robert A. Harrison, on behalf of the relator, obtained a rule nisi to quash the first, third, fourth, fifth, sixth, seventh, and eighth sections of by-law No. 295, or to quash the said by-law *in toto*, and also to quash the whole of the by-law No. 304 of the city of Toronto, or sections 1 and 2 thereof.

By-law No. 295 is set out as by-law No. 28, in the case of *Moore* v. *Hynes et al.* (22 U. C. Q. B. 107.)

By-law No. 304 was passed to amend by-law No. 295, first, by adding to the third section thereof the following words: "But where a ground, yard, vacant lot, or property is situate at the intersection of two streets, or at the intersection of a street with any lane or alley, upon each of which streets, lanes or alleys there is a common sewer, the front only of such grounds, yards, vacant lots, or property, together with so much of the flank thereof as the said flank exceeds eighty feet, shall be assessed for the rental hereby imposed." And secondly, by adding after the end of the eighth section the following words: "Provided always, in case any person hereby required to construct a drain into any common sewer does not do so, but is willing to pay the like annual rental or sewerage rate as if he did use such sewer, he shall not be liable to the penalties in this act mentioned for not using such common sewer hereinbefore prescribed, so long as he pays such rental or sewerage rate; and every person desirous of paying such rental shall by signing or sealing this by-law, or any copy thereof, be bound to pay such rental, and may be sued therefor as for a debt due to the corporation, or the same may be levied by distress of his goods and chattels as for a rent, or for general taxes and assessments payable to the corporation; and any person failing to pay such rental, or any part thereof, on or before the first day of December in each year, shall be liable to the penalties hereinbefore mentioned, as if this proviso had not been made; and provided also, that nothing in this by-law contained shall repeal or be construed to repeal any sanitary by-law of the corporation, or be held to curtail or interfere with the duties or powers of the Board of Health, or any regulations thereof, or of the corporation relating thereto." This was passed on the 21st of November, 1859.

The rule called upon the corporation to shew cause "why said by-law, No. 295, should not be quashed, with costs, because the statute under which said by-law was passed was not intended to apply and does not apply to common sewers at the time of the passing thereof constructed, the costs of which had been defrayed by general taxation; and because the same is in other respects illegal and informal.

Or why section 1 of said by-law, No. 295, should not be quashed, with costs, because of excess of authority, in this, that while the statute authorises the passing of a by-law by the corporation of a city for compelling the draining of any grounds, yards, vacant lots, cellars, private drains, sinks, cess-pools and privies, the said by-law enacts "that all grounds, yards, or vacant lots, or other properties (which would include properties other than those specified in the statute) abutting on any street, or any portion of any street in the city of Toronto, through which a common sewer has heretofore been constructed, and which is opposite to such common sewer;' and because of uncertainty in this, that "the other properties" intended are not sufficiently specified in the by-law, and because the grounds, yards, and vacant lots intended, are not sufficiently designated.

Why section 3 of the said by-law, No. 295, should not be quashed, with costs, because, if the object of said section is to defray the expense of constructing said sewers, that object, for all that appears, was previously attained by general taxation, and so some citizens would be twice taxed for the construction of said sewers; and because said by-law in said section assumes to charge persons who own or occupy property required to be drained into sewers (whether the drains have been constructed or not by the city council) with a rent for the use of a thing which does not exist, and so cannot be used; and because the rent imposed in said section, instead of being a reasonable one applicable to the case of each particular property, is an arbitrary one, applicable to certain sections of the city and properties therein described.

Why section 4 of the said by-law No. 295 should not be quashed with costs, because, while the statute only enables city corporations to charge persons who own or occupy property which is drained into a common sewer (or which by any by-law of the council is required to be drained into a common sewer), with a reasonable rent for the use of the same, no power is given for the commutation of that rent into a bulk sum, which said by-law in such section assumes to be the case.

Why section 5 of the said by-law, No. 295, should not be quashed, with costs, because, while power is given to city corporations by law to charge persons who own or occupy property which is drained into a common sewer, or which by any by-law of the council is required to be drained into such sewer, with a reasonable rent for the use of the same, and for regulating the time or times and manner in which the same is to be paid, no remedy other than the ordinary one of action is given in the event of non-payment; and certainly not assuming power of distress and sale, as in the case of the collection of ordinary taxes unpaid, which the said by-law assumes to be the case.

Why section 6 of said by-law, No. 295, should not be quashed, with costs, because of objections thereto similar to those enumerated as applicable to section 1 of the same by-law, and because the said section (6) does not direct by whom said grounds, &c., are to be drained, and because the said section is unreasonable, in requiring all grounds, yards, vacant lots, and property mentioned in said section to be drained within fourteen days from the publication of the by-law by advertisement in any public newspaper in the city for one week; and because the said section is in other respects illegal and informal.

Why section 7 of said by-law, No. 295, should not be quashed, with costs, because the only penalty under the statute upon persons neglecting to drain grounds, yards, &c., required to be drained, is that the city council may cause the drains required to be constructed, and assess the parties chargeable therewith with the costs thereof, and it confers no authority upon city corporations to make such neglect a penal offence, punishable by continuing fines for all time to come, for each month that the person chargeable shall omit to do what is required of him, which said section assumes to be the case.

Why section 8 of said by-law, No. 295, should not be quashed, with costs, because the same is dependent entirely upon section 7 of the same by law, and if section 7 be illegal and quashed, section 8 must follow it, and be likewise quashed.

And why by-law No. 304 should not be quashed, with costs, because the same is dependent entirely upon by-law, No. 295, and a part thereof, and if by-law No. 295 be illegal and quashed, by-law No. 304 must follow it, and be also quashed.

Or why section 1 of by-law No. 304 should not be quashed, with costs, because the same is entirely dependent upon and a part of section 8 of by-law No. 295, and if section 8 of by-law No. 295 be illegal and quashed, section 2 of by-law No. 304 must follow it, and be also quashed."

J. H. Cameron, Q. C., shewed cause.

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

Both these by-laws were passed before the Consolidated Statutes of Upper Canada came into force, and after the passing of the Municipal Institutions Act, 22 Vic., ch. 99 (1858). Sec 290, sub-sec. 18, of this act gives power to the council of every city to pass by-laws "for *compelling* or regulating the filling up, *drain-*

ing," &c. &c., "of any grounds, yards, vacant lots, cellars, private drains, sinks, cesspools and privies; and for *assessing* the owners or occupiers of such grounds, yards, or of the real estate on which the cellars, private drains, sinks, cesspools and privies are situate, with the costs thereof if done by the council on their default." And sub-sec. 20, "For *charging* all persons who own or occupy *property* which *is drained* into a common sewer, or which by any by-law of the council is required to be drained into such sewer, with a reasonable rent for the use of the same, and for regulating the time or times and manner in which the same is to be paid."

The general objection taken to the whole by-law is, that the statute was not intended to nor does it apply to common sewers constructed at the time of the passing thereof, the costs of which had been defrayed by general taxation.

We do not perceive that the fact (admitting it to be shewn) that there were common sewers constructed when the act was passed, and that the general taxes or funds of the city had defrayed the costs thereof, necessarily or even reasonably leads to the conclusion that the statute does not refer to such existing sewers. The power as expressed refers to property which "is drained or by any by-law is required to be drained." These words may apply to an existing as well as to a future state of things, and may include property drained or required to be drained at the time the act was passed, as well as that regarding which a by-law may be subsequently passed. And if the general funds, to which all rate-payers had contributed, had defrayed the cost of existing common sewers, those general funds would be reimbursed by the reasonable rent, and so the whole body of rate-payers would be proportionally benefited.

The objection taken to the first section of this by-law is not in our opinion tenable. It is true the word property is not used in the 18th sub-section, which gives power to compel draining, but it is used in the 20th sub-section, as to property which by any by-law is required to be drained into a common sewer. The word property as used in the 20th sub-section may perhaps include only the kinds of property enumerated at length in the 18th. If so, it may receive the same construction in the by-law, and if it be attempted to enforce the by-law as against any kind of property not specified in the 18th sub-section, the owner or occupier may raise the question that neither the statute nor the by-law touch him.

The general objection to the whole by-law is again taken to the third section. We confess we do not see what is the meaning of the objection which follows, that this section assumes to charge persons who own or occupy property required to be drained into sewers with a rent for the use of a thing which does not exist, and so cannot be used. This section speaks of property which is drained into any common sewer, or which is required to be drained into such sewer. It seems to us a perverse ingenuity to construe this expression to apply to a sewer *in posse* and not *in esse*, and if it is limited to the latter the objection disappears. And the last objection to this section is founded on a misapplication of the language used in *Aldwell and The City of Toronto*, 7 U.C. C. P. 104.

We have felt more doubt as to the fourth section, which permits the owner or occupier of any property so required to be drained to commute within one year for the payment of the annual rent. The case of *Moore* v. *Hynes* (22 U.C. Q.B. 107), does not expressly decide the point but it apparently recognises the existence of a right to pay off the annual rent by the payment of one commutation sum in gross.

The inclination of our mind is in favour of the legality of such an arrangement, and we therefore think we should disallow this exception also.

The objection to the fifth section should in our opinion prevail. In *Moore* v. *Hynes*, this court held that the sewer rent charged "is not a tax or charge upon the land," but upon the owner or occupier in respect of the land; and therefore it seems to follow that the summary remedy given by the statute for the collection of ordinary rates and assessments cannot be extended to these sewerage rents.

The sixth section is, in addition to objections which we do not think entitled to prevail, also impeached from the unreasonable requirement that all properties not already drained, which abut on any street or portion of a street in Toronto through which a common sewer has been constructed, and which are opposite such common sewer, shall within fourteen days from the publication of this by-law by advertisement in any public newspaper in this city for one week be drained into such common sewer. The seventh section imposes a penalty on the owner or occupier of property who does not comply with section six of not more than $10 nor less than $1 for each month he shall omit to do so; and the eighth section provides for the enforcement of the penalty, to be recovered by distress and sale of the goods and chattels of the offender or by imprisonment in case of non-payment, not exceeding thirty-one days.

In our opinion these provisions taken together are illegal, because the statute, though authorising the passing of a by-law to compel the drainage of the property specified, couples it with a power to assess the owner with the cost thereof, if it be done by the council, on the owner's default—thus pointing out how the "compelling" is to be carried out; and because the payment of rent for the use of the common sewer is a personal charge, creating a debt; and it appears to us to be straining the powers conferred by the statute to hold that the corporation can virtually enforce payment of debts by compelling their creation under a by-law, by monthly penalty, which would or might soon exceed the limit of $50, appointed by the legislature. We do not think that the continued omission to do an act, which the council on such default are authorised to do, and to assess the owner for the costs thereof, authorises the infliction of a penalty or of imprisonment, which by the way, cannot according to the statute, exceed twenty-one days. If there can be a penalty for each month, *pari ratione* there can be an imprisonment also for non-payment of each penalty, a consequence sufficiently monstrous to prevent a construction of the statute which would give such powers. We think the provision compelling drainage within fourteen days an unreasonable requirement not falling within a legitimate use of the powers conferred as to this matter, but designed as the foundation for the two following sections, which we think illegal.

The objections to section 1 of by-law No. 304 rest, first, on the assumption that the whole by-law No. 295 will be quashed, but fails, as the whole by-law is not quashed; secondly on the assumption that section 8 of No. 295 will be quashed, which also fails.

As to section 2 of No. 304, we think it bad. As the penalties imposed by sec 7 and 8 of the by-law No. 295 are held illegal, and those sections are quashed, an alternative founded on the assumed liability to those penalties must fall through. The framer of this section appears to have overlooked the distinction between the authority of municipal councils and that of the legislature, or he would scarcely have drawn up the proviso with which it concludes.

The result is, that so much of the rule as relates to quashing the by-law No. 295 as a whole or the first, third, and fourth sections thereof, must be discharged; and so much relates to quashing the fifth, sixth, seventh, and eighth section thereof must be made absolute. And as to by-law No. 304, so much of the rule as relates to the first section is discharged, and so much as relates to the second section is made absolute.

Rule accordingly.

PATTON v. EVANS.

Overholding tenant—Con. Stat. C. C., cap. 27, sec. 63.

Held, that a tenant whose term can only be put an end to by a notice to quit, is not a tenant for a term within the meaning of the statute.

(T. T., 27 Vic., 1863.)

Leys applied under sec. 68, cap. 27, Con. Stats. U. C., for a precept to the sheriff to place the landlord in possession, the jury having found in his favour.

The application was referred to the full court from Chambers.

F. Osler shewed cause in the first instance, citing *Adverant* v. *Shriver*, Trin. Term, 6 & 7 Wm. IV., (E. and H., Dig., 263); *Adams* v *Bain*, 4 U. C. Q B., 157; Con. Stat., U. C., cap. 27, secs. 57, 63.

DRAPER, C. J.—I gather from the evidence that the defendant has been in possession for a considerable time as a tenant to the

plaintiff, paying rent monthly, but not holding for a definite term; for, as I understand, either party could put an end to the tenancy by giving a month's notice, and without a month's notice the plaintiff cannot eject the defendant, nor can the defendant relieve herself from the obligation to pay rent, without a similar notice of her intention to leave, followed by her leaving the premises.

The question then is whether, having received notice to quit in due form, she is to be deemed "a tenant after the expiration of her term" wrongfully refusing to go out of possession upon demand made.

It appears to me, that a tenancy which may be put an end to by a notice to quit, and which, as far as appears, can only be put an end to in that way, is not a tenant for a term within the meaning of the act; that the words "expiration of his term" mean that the term comes to an end by the effluxion of a stipulated period, or, possibly, by the happening of a stipulated event—as a tenant taking for the term of the life of the lessor, who has only a life interest, and dies I say possibly, because I am not now called upon to say whether the statute would apply in that case.

But a tenancy put an end to by notice to quit seems to me a different thing, such notice being an act necessary to be done, and for doing which no certain date is fixed. The expiration of a term in its plain sense depends on a contract or stipulation made by the parties when the term was created, and the time will arrive when the term will cease, without any further act of either party. Then if a proper notice to quit be given, the right of possession accraes to the landlord without other demand in writing, while the statute speaks of such a demand as a thing to be done at or after the expiration of the term before the special remedy can be claimed.

I think the proper construction of the act is to confine its operation to cases where the tenant holds over after the expiration of his term and becomes a trespasser and liable to be ejected without notice or demand. I am strengthened in this conclusion by observing that in the special remedy granted to a landlord under the 58th section of the Ejectment Act, the affidavit there must shew "That the interest of the tenant has expired or been determined by regular notice to quit (as the case may be)" drawing the very distinction between an expiration of the term, and a determination of the tenants interest, by a notice to quit.

I think the rule for a precept to put the landlord into possession should be refused.

Per cur.—Rule refused.

COMMON PLEAS.

(Reported by E. C. Jones, Esq., Barrister-at-Law, Reporter to the Court.)

Jacomb v. Henry.

Ejectment—County court—Fi. fa. lands—Division court judgment.

Upon ejectment brought to try the title to land which had been sold and conveyed by the sheriff under a *venditioni exponas*, issued upon a county court judgment based upon a division court judgment, the sale was held void inasmuch as the transcript of the judgment from the division court did not conform to the requirement of the 142nd section of the division court act, by stating the proceedings in the cause in the court below. [T. T., 27 Vic.]

Summons in ejectment, issued the 27th December, 1862, to recover possession of lot No. 87, on Yarmouth street, in the town of Guelph, in the county of Wellington.

On the 13th January, 1863, the defendant appeared, and defended for the whole of the land mentioned in the writ.

The plaintiff stated in his notice of title that he claimed the premises in the summons mentioned under a deed to him from John Harris, the younger, who was the vendee of George John Grange, and by virtue of a deed from said Grange, as sheriff of the county of Wellington, the defendant Harris, in his notice, besides denying the plaintiff's title, asserted title in himself, by virtue of a deed to him from Henry Orton.

The cause was tried before the judge of the county court of the county of Wellington, sitting for Chief Justice McLean, at the last spring assizes for the county of Wellington.

The plaintiff claimed, as assignee of the purchaser at sheriff's sale, under a *fi fa* against lands and *venditioni exponas*, issued out of the county court of the county of Wellington. The *fi. fa.* against lands was based upon a transcript of a judgment in the first division court of the county of Wellington, filed in the county court, with the view of issuing a *fi. fa.* against the lands of the defendant thereon.

The transcript was as follows:

Seal of L. S. "In the First Division Court of the County of Wellington.

No. 1, the Div'n Court. Between { *John Harris, Jun.*, Plaintiff, and *Hugh Henry*, defendant.

"I certify that judgment was rendered in this cause against the above defendant, at the suit of the said plaintiff, for fifty-five dollars and eighty-eight cents, for debt, and two dollars and seventy-three cents for costs, on the twenty-sixth day of April, A.D., 1859.

(Signed) Alfred A. Baker, *Clerk.*"

"Execution issued on the above suit on the eighteenth day of July, A.D., 1861. Returned on the twenty second day of July, A.D., 1861. (Signed) Alfred A. Baker, *Clerk.*"

"No. 85.
First Division Court.
Harris v. *Henry.*
Transcript.
Filed 23rd July 1861.
(Signed) J. H."

The *fi. fa.* against lands of defendant was issued on the 23rd July, 1861, directed to the sheriff of the county of Wellington, and as to the return of the writ concluded as follows: "And have you that money before our said judge of our said county court, at Guelph, immediately after the execution hereof, to be rendered to the said plaintiff, for damages aforesaid, and have then there this writ."

The writ was received by the sheriff on the 23rd July, 1861, and was renewed for one year, from 18th July, 1862.

The *fi. fa.* against lands was returned, that the sheriff had levied lands of Henry, to the value of 5s., which remained in his hands for want of buyers, and "no lands" for the residue. The defendant's lands were advertised on 1st May, 1862, under the *fi. fa.*, to be sold on the 2nd of August. The lot now sued for was advertised; that advertisement was in the paper in the town of Guelph; the first advertisement in the *Canada Gazette* was on the 23rd May, 1862. The land was exposed for sale on the 2nd of August, and it was not shewn there were any bidders present,

A writ of *venditioni exponas* was issued on the 5th of August, 1862, to the sheriff of the county of Wellington, which commenced by reciting that whereas he was lately commanded that of the lands and tenements of Hugh Henry he should cause to be made £14 13s. 1d., which John Harris, the younger, had recovered in the county court of Wellington against him in assumpsit, and should have that money before the county judge at Guelph, immediately after the execution thereof, and at a day then past the sheriff returned that by virtue of the said writ he had seized and taken in execution goods and chattels of the defendant to the value of 5s., which remained in his hands for want of buyers, and the sheriff had returned *nulla bona* for residue. The writ then commanded the sheriff to expose to sale, and sell the said goods and chattels of the defendant, for the best price he could get for the same, and at least for 5s., and have the money before the judge, at Guelph, immediately after the execution thereof, to render to the plaintiff. There was then a *fi. fa.* against goods for the residue of the damages. This writ was placed in the sheriff's hands on the 5th August. The sale under the *venditioni exponas* took place on the 13th of October, 1862. The lot was sold for £51 7s. to John Harris, jun. There was an incumbrance spoken of as being on the land.

On the 12th of November, 1862, the sheriff of the county of Wellington executed a deed to John Harris, the younger, of the land in question, reciting that by virtue of a writ of *venditioni exponas*, issued out of the county court, tested the 5th of August, 1862, at the suit of John Harris, the younger, commanding him that of these lands and tenements of Hugh Henry, he should cause to, &c. He had seized the land in question, which since the seizure made by him, by virtue of a writ of *venditioni exponas*, after due notice, was sold on Monday, the 13th of October, 1863, to John Harris, the younger, being the highest bidder, for £51 7s. Then the sheriff, as

sheriff by virtue of the writ of *venditioni exponas*, and by force of the statute, and in consideration of the said sum, granted, bargained, and sold the same to Harris, to have and to hold the same to him, his heirs and assigns, as fully and absolutely as he, the sheriff, as aforesaid, could or ought to grant, bargain, and sell the same by force of the statute, and the said writ of *venditioni exponas*, or otherwise.

The conveyance of the same land from Harris to the plaintiff in fee, in consideration of £104 17*s.* 6*d.*, was put in. The deed was subject to the limitations in the original grant from the Crown, and to certain mortgage debts secured by certain indentures of mortgage made by Henry and wife in favour of the Wellington Permanent Building Society, and which the purchaser was to assume and pay off and satisfy.

Demand of possession signed by plaintiff, served on the defendant on the 2nd of December, 1862.

The defendant was present at the sale. There was over £90 due on the mortgage to the building society,

The defendant at the trial raised the objections to plaintiff's recovering, mentioned in the rule *nisi*.

There was a verdict entered for the plaintiff with leave to the defendant to move to enter a nonsuit on the objections taken.

During Easter Term last *Palmer* moved, pursuant to leave reserved, to enter a nonsuit on the following grounds:

1. That the sale by the sheriff of the lands in question in this cause under which the plaintiff claims title is not founded upon any sufficient judgment to support a writ of execution against lands, or a sale thereunder, the document offered in evidence by the plaintiff as a transcript of a judgment in the division court not being such a transcript as is required by section 142 of the Upper Canada Division Courts Act, nor containing the particulars of the proceedings in the cause as required by that section.

2. That if the document were such a transcript no proof was given that a memorandum thereof had been entered in the proper book by the clerk of the county court as required by section 143 of the same act, and which entry was necessary before the plaintiff could avail himself of the said judgment under sec. 145 of the same act.

3. That the writ of *venditioni exponas* for part, and *fieri facias* for residue was issued in the name of a different plaintiff from the writ of *fieri facias*.

4. That the sheriff's deed is invalid, as it professes to be made solely under a writ which on the face of the deed appears to have been less than twelve months in the sheriff's hands, and recites a seizure and sale under such writ.

Or why the said verdict should not be set aside and a new trial had between the parties on the grounds aforesaid, and on the further ground that the writ of *venditioni exponas* for part and *fieri facias* for the residue produced by the plaintiff and recited in the sheriff's deed as the writ under which the said sale was made, was not a writ of execution against lands and tenements, but against goods and chattels.

This rule was enlarged until Trinity Term, when *M. C. Cameron*, Q. C., shewed cause against, and *Palmer* supported the rule. Sections 142 to 146 inclusive of the Division Court Act, Con. Stat. U.C. ch. 19; *Farr* v. *Robins*, 12 U. C. C. P. 35, and *Roe* v. *McNeill*, 13 U. C. C. P. 189, were referred to.

RICHARDS, C. J.—*Farr* v. *Robins* seems to be a clear authority in favour of the defendant that there can be no sufficient judgment of the county court to bind lands based on a division court judgment, unless the transcript under section 142 of the Division Court Act is filed in the county court, and contains what the section requires This transcript does not contain a statement of the proceedings in the cause, which is required by that section, and therefore the filing of it did not constitute a sufficient judgment in the county court, nor warrant the *fi. fa.* against lands or the subsequent writ of *ven. ex.* against goods.

This objection seems to me to establish that the title set up by the plaintiff derived through that judgment must fail. It is therefore unnecessary to consider the other points raised in the rule, but it would require great ingenuity to sustain a sale of lands after the return of the *fi. fa.* against lands on the *ven. ex.* and *fi. fa.* for residue produced at the trial of this cause.

As to the third objection, I think in the absence of proof to the contrary, that it would be presumed that the clerk of the county court filed the transcript of judgment, and made the necessary entries to enable the plaintiff to take the same remedies to enforce it as he would have to enforce a judgment of the county court;

The rule will be absolute to enter a nonsuit.

Per cur.—Rule absolute.

CHAPMAN v. BOULTBEE.

Attorney—Negligence—Action against for—Evidence.

B (an attorney) having been employed by C. to prosecute a suit against M. in the C. C. of Y. & P., undertakes the action, and M. was subsequently arrested and discharged without bail, and the writ of capias and all proceedings set aside for irregularity.

Upon an action brought against B. for negligence.

Held, that the production of the order of the judge of the C. C setting aside the capias was not sufficient evidence upon which to sustain an action against an attorney for negligence; that the negligence must be gross, and evidence of the negligence itself must be given to entitle the plaintiff to succeed.

(T. T. 27 Vic.)

The writ was issued in this cause on the 14 of May, 1863.

Plaintiff in his declaration alleged the retainer for reward of defendant as an attorney to bring an action in the County Court of York and Peel against one William Morely to recover money due to the plaintiff. And defendant promised to conduct the action with proper care, skill and diligence; and that in the course of the conduct of the action it was necessary to sue out a writ of *capias* to hold the said Morely to bail to answer the plaintiff for the money claimed. Yet defendant did not conduct the action with due and proper care, skill and diligence, whereby after the arrest by the sheriff and the confinement of Morely in the county gaol at plaintiff's suit an application was made to the judge of the county court on behalf of Morely to be discharged form the said arrest and custody without bail, and on that occasion, to-wit, the 2nd of June, 1858, the said judge ordered that the said writ of *capias*, and the arrest made thereunder and all proceedings had thereupon should be set aside for irregularity with costs, whereby the plaintiff not only lost the costs and expenses incurred by him in the prosecution of the action and was obliged to pay the costs incurred by Morely in defending the same, but was prevented from bringing any other action against Morely for other claims that the plaintiff had and has against Morely, and plaintiff has been delayed in recovering the said money and wholly lost the same.

Defendant pleaded the 19th of March, 1863,

1. That he did not promise as the declaration alleged.

2. That he did conduct the said action with due and proper care, skill and diligence, on which pleas the plaintiff joined issue.

The cause was taken down for trial before the late Mr Justice Connor at the assizes for York and Peel, held in the month of April last, when a verdict was rendered for the plaintiff for £159 7*s.* 6*d.* damages.

In Easter Term last *Eccles, Q. C.* obtained a rule *nisi* to set aside the verdict, and enter a non-suit pursuant to leave reserved on the grounds,

1. That no negligence on the part of the defendant as charged in the declaration was proved at the trial.

2. That if the arrest of the defendant in the county court suit, or the writ under which he was arrested was set aside by the order of the judge of the county court, the grounds of such order or the the defendant's connexion therewith were not shewn.

3. That the order of the judge of the county court was not proved to be signed by him.

4. That the plaintiff's evidence at the trial shewed he had not sustained any damage whatever for the causes assigned in the declaration: or why a new trial should not be had on the ground that the verdict is contrary to law and evidence, and the charge of the learned judge, and on the ground of excessive damages.

The rule was enlarged until Trinity Term last, when *R. P. Crooks* shewed cause and contended that the production of the order setting aside the arrest for irregularity was *prima facie* evidence that such irregularity was that of the attorney, and if he wished to relieve himself from that inference he must shew what the irregularity was, and that he was not guilty of such negligence or want of skill as would render him liable in this action. He further contended that the court would, under Con. Stat. of Canada, ch. 80, sec. 6, take judicial notice of the signature of the county judge to the order which was produced.

That the facts shewn at the trial were sufficient to go to the jury and to warrant the verdict, which therefore ought not to be disturbed. He referred to *Reed* v. *Jones*, 4 U.C.C.P. 424; Con. Stat. of Canada, ch. 80, sec. 6; *Pitt* v. *Yalden*, 4 Burr, 2060; *Keece* v. *Rigby* 4 B. & Ald. 202; *Ireson* v. *Pearman*, 3 B. & C. 812; *Godfrey* v. *Dalton*, 6 Bing. 460; *Long* v. *Orsi*, 18 C. B. 610; *Swannell* v. *Ellis*, 1 Bing. 347; Saunders on Pleadings and Evidence, vol. 1, p. 212.

Eccles, Q. C., contra, contended that the mere fact of the *capias* and subsequent proceedings having been set aside for irregularity, was no evidence that such irregularity arose from the want of care or skill of the defendant.

From the notes of the learned judge at the trial and exhibits put in and the argument of counsel, it would seem that defendant was employed by plaintiff to take proceedings in the County Court of the United Counties of York and Peel, against one Morely to recover a debt amounting to between two and three hundred dollars. That Morely was arrested in May, 1858, in plaintiff's suit, and was about a week after his arrest discharged from custody, and the writ and arrest and all subsequent proceedings in the cause were set aside for irregularity with costs by an order of the learned judge of the county court, dated the 2nd of June, 1858. That subsequently Morely went to England and came back to this country with some two or three thousand dollars in money. He returned to Holland Landing, but was not successful in business, and plaintiff failed to recover the amounts of his demand from him.

It further appeared from the copy of the process served on plaintiff, and the bill of particulars attached thereto, that defendant sued plaintiff in the division court for costs as between attorney and client in a suit of *Chapman* v. *Morely*, in which there were no charges made for issuing a *capias* against the defendant, and in which it appeared a *fi. fa.* had been issued, and the same statement of claim in the division court showed that the now defendant claimed of the now plaintiff the "costs of the previous suit against William Morely, paid by note to Chapman, £14 10s., and interest from date of note November 10, 1858, until May 12, 1862." This document was filed by the plaintiff.

RICHARDS, C. J.—The retainer to bring the action in conducting which the negligence complained of occurred does not appear to be established by very clear evidence so far as the same was taken down, on the judge's notes, or by the bill of costs sued for in the division court. It is probable that the point was satisfactorily established at the trial as it is not suggested that a nonsuit was moved for on that ground. The only evidence to establish negligence on the part of the defendant was the production of the order of the county court judge discharging Morely from the arrest and setting aside the *capias* and all subsequent proceedings for irregularity. I think that evidence fails to establish negligence on the part of the attorney of any kind. We are not now informed nor were the jury, what the irregularity was that was complained of. We cannot say whether it occurred under such circumstances as would show that the attorney had possessed and exercised a reasonable amount of skill in the conduct of the plaintiff's suit or not. It seems to be conceded in the modern cases that the attorney is only responsible for gross negligence. The head note in *Purves* v. *Landell*, 12 C. & F. 91, lays it down in effect that an attorney is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional duties. The declaration must contain an allegation of facts from which the inference is inevitable that the defendant has been guilty of the one or the other.

If the declaration ought to contain allegations from which the inference of negligence is inevitable, *a fortiori* the evidence should shew such facts. But the evidence does not show any act of omission or commission which either the court or jury could say indicated want of skill or want of care. A result was shewn, viz., the setting aside of a proceeding for irregularity; whether such proceeding became improper from any default of this defendant for which he should be held liable we cannot say, for we do not know what the vice in the proceeding was that was complained of. I think we may apply the words of Martin, B., in *Dickson* v. *Jacobs* to this case: "We do not know what the mistake complained of consisted in or under what circumstances it occurred, or whether it amounted to negligence or any thing at all about it." I have therefore no doubt this verdict ought to be set aside. Though it is not noted that leave was given to the defendant to move to enter a nonsuit, yet it was so stated by the learned counsel in moving the rule, and on the argument, and his statement was only met on the other side by the observation that the counsel did not recollect if leave were given or not. From what is noted by the learned judge it is obvious that he entertained strong views against plaintiff's right to recover, and we have no doubt, looking at his notes and from the statement by both counsel, that the leave to enter the nonsuit was given. The case in 12 C. & F. 91, is in some respects like the present, the warrant under which the defendant was arrested in the original action having been declared *void*, and some of the grounds on which it was so declared are shewn, but the judge held there was not sufficient shewn to make out gross negligence. The case, though arising out of an appeal from Scotland, is decided on the principles of law common to both Scotland and England, and is an instructive one as applicable to the subject of the liability of attorneys.

The rule will be made absolute to enter a nonsuit.

Per cur.—Rule absolute.

CHANCERY.

(Reported by ALEX GRANT, Esq., *Barrister-at-Law, Reporter to the Court.)*

LAWRENCE v. POMEROY.

Crown patent—Costs—Crown lands department.

It is the duty of parties dealing with the Crown lands department to be fair and candid in all their communications and statements. Where, therefore, a bill was filed to set aside a patent which had been issued to a purchaser of a clergy reserve lot, on the ground that the same had been so issued in ignorance of the opposing claim of the plaintiff, upon the fraudulent misrepresentations of the patentee, and the concealment of the facts by him from the Crown lands department, the court, although unable to afford the plaintiff the relief sought, dismissed the bill without costs as against the defendant, who had thus dealt with the department.

This was a bill to have a patent issued to the defendant Pomeroy rescinded, and the cause came on to be heard before his Lordship the Chancellor, at the sittings of the court held at Cobourg, in October, 1863. The facts material to the points disposed of are stated in the judgment, which was delivered at the close of the argument.

Roaf, for the plaintiff.

Cameron and *Blake*, for the defendant.

VANKOUGHNET, C.—I think the plaintiff must fail. The only ground on which he, in his own right, could ask to have the patent rescinded is, that he had an equity to the consideration of the Crown, of which they were in ignorance when the patent issued, and which, if known to them, might have influenced their judgment in his favour. I do not understand any of the cases to carry further than this the right of a private individual to question the validity of a patent, and I am not disposed to carry it further, but rather to limit it, as I have a strong opinion that the Attorney-General is the proper party to invite the action of the court. Then was the Crown, when the patent here issued, ignorant of the plaintiff's alleged rights? It seems to me not; all that the plaintiff says here now was then known to the Crown. By petitions and affidavits furnished by the plaintiff and others, and by the report of the local Crown lands agent made some four months before the patent issued, the department of Crown lands was put in possession of all the facts connected with the plaintiff's claim. They knew that one Julius Warner was the original purchaser of the lot (a clergy reserve) in 1837; that he had paid but one instalment, one-tenth of the purchase money; that he had many years ago left the country and, apparently at all events, abandoned the lot; that he had never during a long series of years asserted any claim to it, and only at last by the execution of the assignment of it, in the October previously to the issue of the patent, to one Barnard, from whom defendant Pomeroy obtained an assignment; they knew of the plaintiff's long possession and improvements, and yet with a knowledge of this, the original sale never having been cancelled, and the assignee having paid up the balance of the purchase money in full, a patent was issued to him, and the plaintiff informed of it, and that his claim was rejected. There is no room in this state of facts to infer that the Crown has or may have been deceived, or that they overlooked the plaintiff's claim. Had the defendant desired to show this he should have produced direct evidence of it, as the facts furnished lead in the

opposite direction. But the plaintiff insists that Pomeroy, the defendant, concealed from the Crown the fact that Warner said to him, when he applied to purchase the lot, that he had never intended looking after it, and offered it to him for nothing, and then sold it to him for $30, whereas the assignment expresses $50, and the assignment from Barnard $500, though nothing was ever paid to him, he having been a mere go-between in the transaction, The Crown, however, knew from the report of the Crown land agent, and from the affidavits before it, that Warner had so far abandoned the lot, and knowing this, they recognised his assignment, the sale still standing in his name: they would have learned nothing farther if Pomeroy had mentioned to them what Warner said. As to the statement of a false representation in the deed, this I fear is a common, though a very improper practice. All dealings with the department, so much at the mercy of individuals, should be fair and above board, and I cannot too strongly condemn the conduct of the defendant Pomeroy in his attempt to embarrass the department, and keep open the question of the claim to the lot by asserting in a letter written to the department in the name of another party, one Higgins (though with his consent), that he, Higgins, had an assignment from Warner's heirs, when Pomeroy well knew that such an assignment never existed. If the statement of the false consideration could or would have influenced the department had they known the falsehood, I think the Attorney-General and not the plaintiff must seek relief, if any can be had on that ground. On the other head of equity on which Mr. Roaf sought to rest the plaintiff's case, viz., that the defendant Pomeroy had, by means of knowledge derived in confidence from the plaintiff, secured the patent, I think the case is not made out. Even if the pleadings were so shaped (and they are not) as to sustain it, I do not see that the defendant derived any information from the plaintiff's papers of importance to him, or which he in any way used to his own advantage. Those papers merely shewed the plaintiff's case, and were in the possession of the government at the time of the issue of the patent. Nor do I see that the defendant put himself in the position of trustee as to the plaintiff. The plaintiff shewed him his papers, and left them with him to examine, asking (as he alleges) defendant for a loan of a few dollars on the security of them, and defendant returned him his papers, refusing the loan. The defendant learned this much, that the plaintiff was prosecuting a claim to the land; and he immediately sets to work to prevent its success by hunting up the original nominee and purchasing from him, though there is evidence to shew that he had been making some enquiries after him before he saw defendant's papers. There is evidence of a conversation, not the one referred to or stated in the bill, which shews that defendant acted a most disingenuous part towards plaintiff, who had consulted him as a friend upon the sufficiency of his claim. It is sworn that defendant said to plaintiff not to concern himself about his claim, that it was all right, and not to be in a hurry to pay the purchase money to the government, as they would call for it when they wanted it, and yet almost immediately after thus disarming the plaintiff, he sets to work actively to secure the lot for himself. This conduct, and his mode of dealing with the government, are so reprehensible that while I refuse the plaintiff any relief, I dismiss the bill as against the defendant Pomeroy without costs. The other defendant must have his costs, as no case whatever is made against him.

COMMON LAW CHAMBERS.

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

HAWKINS v. PATERSON ET AL.

Security for costs—When demandable in the case of a plaintiff within the jurisdiction of the court—Rule to be followed in case of conflict of decisions between the English Courts of Common Law.

Held, that if the plaintiff be actually a resident of the province at the time of the application for security for costs, and intend to remain here until trial or judgment in the cause security for costs ought not to be ordered.

Semble—If a resident in the province were to declare his intention of leaving for abroad at once, and had sold off his property, and made other preparations for an immediate departure, with the intention of residing abroad, that upon these facts being shewn, the party might be called upon to give security, according to the general practice.

Held also, that we are not to adopt as a rule the decisions of the court of Queen's Bench in matters of practice, more than those of the courts of Exchequer or Common Pleas, but exercise our own judgment as to which is the best practice to adopt, and adopt that which will be the most convenient and suitable for ourselves, whether it be the decision of the one court or the other.

Gill v. *Hodgson*, 1 U. C. Prac. R. 381 doubted.

(Chambers, October 5, 1863).

The defendants obtained a summons calling on the plaintiff o shew cause why proceedings herein should not be stayed until sufficient security be given to answer the defendant's costs, in case the plaintiff discontinue, &c., on grounds disclosed in the affidavits and papers filed.

The summons was obtained on the following affidavits, viz.: the affidavit of Mr. Paterson, one of the defendants, who stated—That he was informed and verily believed that the plaintiff was staying merely temporarily in Upper Canada, and would leave permanently before the defendants (if successful herein) could enter judgment for their costs; that since the commencement of the action he (deponent) had spoken to Mr. Doyle, plaintiff's attorney, on the subject of security for costs, and asked for the same, and he said he supposed the plaintiff would give such security, and that he did not see how the plaintiff could get out of it, and he said to the deponent that he (deponent) had, however, better demand it; that such demand had been made, but security had not been given, and that issue was not yet joined. 2. The affidavit of J. O Heward, who stated—That in a conversation he had with plaintiff in September last, he stated to the deponent that he was about going to England, that he had proceeded as far as Quebec, when he learned of certain proceedings being taken against him, to commit him to gaol for not attending to be examined pursuant to order, that he had merely come back to Toronto to attend to the matter, and that he intended to bring an action in consequence of his arrest; a. d that plaintiff also gave deponent to understand, from the purport of his conversation, that he was merely staying temporarily in Toronto, in consequence of the matters aforesaid, and in order to institute and prosecute the said action, and would then go to England as soon as he saw the matter through.

Mr. Heward made a further affidavit on the plaintiff's application respecting the subjects contained in his previous affidavit, under the 188th section of the C. L. P. Act, to the following effect—That as near as he could recollect the words made use of by the plaintiff were as stated in the former affidavit, viz.: "I understood him to say he was going to prosecute this action, and see the matter through, and that he intended to stay in the country for that purpose;" that plaintiff had no dwelling-house that deponent was aware of; and that "from what he said I thought he intended to return to this country again; he was in Quebec when he heard of the order made against him for his arrest, and he stated he was determined to come back and face the music, as he had friends in this country as well as in England.

The affidavit of Mr. Kenrick, one of the defendants, sets forth—That before the commencement of this action the plaintiff gave up his house and disposed of his effects, removed his wife and family from Yorkville to Quebec, with the intention of going to England, there permanently to reside, as the deponent was informed and believed; that the plaintiff himself went to Quebec for the same purpose, and shortly before this action returned to Toronto; that the plaintiff in an affidavit made lately stated—"That my residence is not, nor has it since the 18th of July last, been within the united counties of York and Peel, but I am now a temporary sojourner in this city (Toronto) and within the said united counties; that the plaintiff, as the deponent believed, was remaining here to prevent the defendants obtaining security for costs, and that his intention was to leave Canada permanently after he considers it too late to move for such security, or, at all events, before judgment could be entered against him for costs of defence, in case the defendants succeeded in the action; and that he believed the plaintiff was insolvent, and had no property in this country, or had so disposed of it that it cannot be reached by an execution.

The defendants also put in a copy of plaintiff's affidavit, which he filed on applying for the *habeas corpus* which was lately issued on his behalf,* in which the following statements appeared:

"I, Geoffrey Hawkins, of Hitchin, in England, gentleman, make oath and say, &c. "That for some years previously to the last mentioned day (the 11th of June, 1863), my residence had been in

* *In re Hawkins*, 9 U. C. L. J. 295.

the county of York: that before judgment was signed in this action (*Hawkins* v. *Kenrick*), I had, in accordance with my pre-arranged purpose, given up my house and sold my furniture preparatory to leaving this province, returning to England, my domicile, with my wife and children: that in May, and before judgment was signed against me, I sent my wife and children to Quebec, en route for England, and went into lodgings here, intending to follow them so soon as I had arranged some matters of business: that on the 18th of July, I left this city (Toronto) for Quebec, there to rejoin my wife and children, intending to go thence direct to England: that hearing that an order had been made by the judge of the county court for my committal, I returned to Toronto: that my residence is not, nor has it since the 18th day of July been, within the united counties of York and Peel, but I am now a temporary sojourner in this city (Toronto) and within the said counties.

M. C. Cameron, Q. C., shewed cause to the summons, and contended, according to the cases of *Dowling* v. *Harman*, 6 M. & W. 131, *Tambisco* v. *Pacifico*, 7 Exch. 816, and *Drummond* v. *Tillinghist*, 16 Q.B. 740, that security for costs could not be directed, because plaintiff was a resident in this province, and because he had no intention of leaving until the present action was entirely settled.

Robert A. Harrison, contra, insisted that it distinctly appeared the plaintiff's domicile is in a foreign country, and that he was only here temporarily, intending to leave in a very short time, and before judgment (if he should fail in the action) could be entered against him: that under these circumstances it was only reasonable plaintiff should be called upon to give security for costs: that according to the decision of the court of Queen's Bench in England, he was under the circumstances bound to give such security (*Oliva* v. *Johnson*, 5 B. & Al. 908; *Gurney* v. *Key*, 3 Dowl. P. C. 559; *Drummond* v. *Tillinghist*, 16 Q. B. 740.) That there is a difference between the English court of Queen's Bench on the one side and the English courts of Common Pleas and Exchequer on the other, as to the practice in such a case, but that in this country it had been determined by the late Sir John B. Robinson that we should follow the practice of the court of Queen's Bench (*Gill* v. *Hodgson*, 1 U. C. Prac. Rep. 381). He also referred to *O'Grady* v. *Munro*, 7 Grant. 106; *Barrett* v. *Power*, 25 L. Eq. Rep. 524, Story's Conflict of Laws, ss 41-45. He adverted to the fact that plaintiff had not filed an affidavit of any kind in answer to the summons and the affidavits on which it had been granted, and argued that his conduct was most suspicious.

ADAM WILSON, J.—The practice with respect to the granting of security for costs has varied a good deal from time to time.

In 2 Sellon's Pr. 570, it is laid down that such security will only be granted in two cases.

First. When an infant sues as plaintiff.

Second. When the plaintiff resides abroad.

The rule is now extended to third persons suing in the names of insolvent plaintiffs, and to convicts under sentence, and perhaps to other cases.

In *Parquot* v. *Eling*, 1 H. Bl. 106, security was refused to be ordered, although the plaintiff resided abroad, because it did not appear he had gone abroad to avoid the payment of his debt. But in *Ganesford* v. *Levy*, 2 H. Bl. 118, the practice was altered and security was ordered, upon the ground of a foreign residence alone.

Several cases have been decided since these cases. The following are the principal ones, and are those which are generally referred to as applicable to this question:

Cragno v. *Hassan*, 6 Taunt. 20, decides that security for costs will not be exacted so long as the plaintiff remains in the country.

The Anonymous case, 8 Taunt. 737, is to the same effect, even although the plaintiff usually resides abroad.

Oliva v. *Johnson*, 5 B. & Al. 908, determined that where it was shown the plaintiff carried on business abroad, at Quebec, and had no house or permanent residence in England, and was a Canadian by birth, and had permanently resided at Quebec (except during occasional visits to England, on matters of business), that he would be ordered to give security for costs. And the court said the plaintiff's affidavit should state, first, that the plaintiff has been and in now a resident in England; second, that he intends to continue to reside in the country.

In *Gurney* v. *Key*, 3 Dowl. P.C. 559, it appeared that the plaintiff was in England when the action was commenced, but that he was abroad when the application for security for costs was made. The plaintiff stated he was temporarily resident abroad for the education of his children, that he was in England, and had a residence there when the action was commenced, and that he had been in England since, when he made an affidavit describing himself there as of Trevilian House, Tregony, in the county of Cornwall; from which it was agreed that it appeared that he was a resident in England, although frequently abroad, and that he therefore came within the rule laid down in the Anonymous case, in 8 Taunt. 737, and could not be ordered to give security for costs. It was also agreed for the defendant that the plaintiff had not sworn that he resided in England. That in an affidavit which he had lately made for the purpose of getting his discharge from an arrest for debt, on the ground of privilege as a witness, he had stated himself to be resident abroad. Mr. Justice Williams said, "Upon the affidavit, I have no doubt that the residence of the gentleman is now abroad. He does not state himself in his affidavit to be resident in this country, but merely describes himself as of Trevilian House, &c. In his former affidavit to be discharged from arrest, he stated himself to be resident abroad, and in the present case, if he had a domicile here, I must presume he would have stated it. I must therefore take it as a fact that he had not a domicile here, but that he has only been in this country for certain temporary purposes, there being nothing to show that his residence abroad is merely temporary. I therefore think that on that ground he ought to give security for costs."

This case has no particular bearing upon the main question now before me, because the plaintiff in it was residing abroad at the time of the application.

Dowling v. *Harman*, 6 M. & W. 131, shews that although the plaintiff be a foreigner, and be in the habit of frequently going abroad, and was abroad at the commencement of the action, yet, if he be in England at the time of the application for security for costs made, and intends to remain until after the trial, that security for costs will not be ordered.

Tambisco v. *Pacifico*, 7 Exch. 816, maintains the decision in *Dowling* v. *Harman*, 6 M. & W. 131, and the practice of the court of Common Pleas, against the decision of the Queen's Bench in *Oliva* v. *Johnson*, although that case was strongly pressed upon the attention of the court. The Chief Baron says, "the plaintiff states that he came from Greece for the purpose of bringing the action, and that he is now here, and that he intends to remain here until judgment is obtained in it." Alderson, B., says, "it is suggested the plaintiff's affidavit should also have stated that he intends to take up his permanent residence here, but such a statement would have been of very little avail, for he might change his intention the moment judgment had been given. The fact of his being actually resident here is the true criterion by which the question is to be settled."

Drummond v. *Tillinghist*, 16 Q. B. 740, determines that it is not sufficient ground for requiring security for costs, that the plaintiff is a foreigner lately come to England, having no family connexions or permanent abode in it, and likely soon to leave it, if it be not sworn that he has a permanent residence abroad. Lord Campbell, Chief Justice, says, "No case goes beyond this, that a foreigner being in England, but having his domicile out of the country, may be called upon to give security. Here no such domicile is shown. The presumption must be that the party will continue to reside where he is."

In the latter case the plaintiff was a cook on board an American vessel, and was a native of the United States. The vessel came to England. The plaintiff brought this suit against the captain. It was only sworn that the plaintiff had no family connexions in England, and had no permanent residence there, but had merely a temporary residence in Middlesex; and that when the plaintiff's wages were spent he would have no means of obtaining a livelihood but by going to sea; and that after putting the plaintiff to considerable expense, it was believed he would abscond before payment of the costs could be enforced against him, unless he was compelled to give security. Mr. Justice Earle says, in *Oliva* v. *Johnson*, it appeared that the plaintiff had a permanent residence abroad, except during occasional visits to England.

O'Grady v. *Monro*, 7 Grant 106, does not apply, because the plaintiff who was a native of the province, swore he had returned to the province with the intention of becoming a settled resident,

and that he had no idea of withdrawing from the jurisdiction of the court.

Gill v *Hodgson*, 1 U. C. Prac. Rep. 381, decided in Chambers, shews that upon its being sworn that the plaintiff's residence was in England; that he usually resided there, that he was, at the time of the application, or was quite lately a merchant in business in Manchester; that he had no house or permanent residence in Upper Canada, and had permanently resided in Manchester, and that although at present in Upper Canada, yet he had no intention of permanently residing here; and that he had informed the defendant he had come to Upper Canada solely to attend to the suit; and that he did not intend to reside here permanently, but only until the suit was decided; and that he had only come to Upper Canada within the past few weeks, and had no property in Upper Canada, as it was believed—that it was a fit case for security for costs to be given; although the plaintiff answered this affidavit by shewing that he had been in Toronto for about three months, that he had no intention of returning to England to reside at any definite period; that Toronto was his place of residence; that he had no permanent place of residence; and that he had brought out a quantity of merchandise with which he intended trading in Toronto.

Sir John Robinson pronounced his judgment in the following words:—"Following the authorities in the Queen's Bench in England, as it is proper we should when the courts differ, I order the security to be given; the plaintiff does not contradict what the defendant has sworn, he told the defendant he was only come out to collect the debt and would go home as soon as the case was decided. The plaintiff's affidavit is made in evasive terms."

From the decisions which I have referred to, the rule in the Common Pleas and in the Exchequer seems to be this:—"That security for costs will not be required from the plaintiff, if it appear that he is a resident in the country, even although he is frequently abroad, if it appears he intends to remain in the country until the trial or judgment in the cause."

It is not necessary, according to the decisions in the Exchequer, that the plaintiff should declare his intention permanently to reside in the country, for as Mr. Baron Alderson remarks:—"Such a statement would be of very little avail, for he might change his intention the moment judgment had been obtained Perhaps something more may be required of a plaintiff than his *mere residence* in the country to excuse him from giving security for costs, although the words of Mr. Baron Alderson would seem to imply that mere residence in the country is alone sufficient to preclude security for costs from being demandable, for he says—"The fact of his being actually resident here is the true criterion by which the question is to be settled."

Now, I am inclined to think if a resident of the country were to declare his intention of leaving for abroad at once, and had sold off his property and made other preparations for an immediate departure, with the intention of residing abroad — that upon these facts being shewn the party might be called upon to give security, according to the general practice, notwithstanding the plaintiff was still actually a resident here; for if the plaintiff could not under such circumstances be called upon to give security, neither could he be required to give it, even if he were actually on his journey for abroad, nor until he had passed the boundaries of the province; and this, I think, would be permitting an unreasonable relaxation of the rule which was framed for the benefit of defendants, and which ought to apply as much when the plaintiff is *en route* for abroad, as if he were then actually abroad.

His presence here for some time appears to be the object of the rule, and the declared intention of the plaintiff to absent himself at once and reside abroad should entitle a defendant to call for security, as much so as the declared intention of a defendant to abscond forthwith should entitle him to arrest him to secure his appearance.

If then the plaintiff must not only be a resident at the time when the application for security is made, but should intend to remain in the country for some time after the application is made, the question is for how long should it appear that the plaintiff will be a resident here?

In the Exchequer it is held to be sufficient "that he intended to remain until after the trial, or that he intended to remain here until after judgment."

The rule in the Queen's Bench as collected from what the Chief Justice said in the case of *Drummond* v. *Willoughist*, 10 Q. B. 740, may perhaps be this, although it is not very clear that any positive rule was laid down in that case—"That a foreigner in England, having his domicile out of the country may be called upon to give security for costs." *Domicile* is probably used rather loosely, and may be intended for "general or permanent residence;" for Mr. Justice Erle says—"*Oliva* v. *Johnson* was the only case supporting Mr. Greenwood's position, but the party was shewn to have had a permanent residence abroad, except during occasional visits to this country."

There may, therefore, be said to be a conflict between the courts in England. The Common Pleas and Exchequer hold it a sufficient answer to a demand for security for costs that the plaintiff, although a foreigner, is an actual resident in England, and intends to remain in England until after the trial or after judgment, while the Queen's Bench may be said to hold that if it appear the plaintiff is an actual resident in England, and has not his domicile or permanent residence in a foreign country, although he has no domicile or permanent residence elsewhere he will not be called upon to give security for costs.

It will thus be seen that in the Queen's Bench a person who has no domicile or permanent residence is in a better position than one who has a fixed domicile or permanent residence; for Lord Campbell says—"The plaintiff seems to have no domicile either at California or elsewhere, which, with much reason, gave cause for the complaint of Mr. Greenwood, that a person having no permanent place of residence or domicile was thus much better off than a person who had one, while the rule, one would think, ought to operate more stringently against a mere vagrant, as the plaintiff seemed to be, than it should against a person having a permanent abode." Mr. Greenwood said—"In reason it cannot be that if a man is brought here from China, and his domicile not known, that should exempt him from giving security, when otherwise it would be required. According to the rule which has been suggested the more a foreigner is itinerant, and the less that is known of his former residence and connexions, the less shall be liable to find the security."

It is better by far to adopt the rule of the two courts, that if the plaintiff be in England and intend to remain there till the trial or judgment no security shall be demandable, than the rule of the Queen's Bench, founded upon the case referred to, which excuses a mere vagrant from giving security at all, simply because he is in England and is not a vagrant. Justly considered, the practice of the Queen's Bench operates more advantageously to defendants than the practice of the other courts does in those cases where security is the most required, and on the other hand it operates more harshly against plaintiffs who are not itinerants and vagrants, but who have fixed domiciles and permanent places of residence abroad, for it compels them to find security for costs, although they may intend to reside in England until the litigation has been entirely finished, merely because they are not permanent residents in the country.

One may say what a permanent residence is, but it may be much more difficult to say what is not a permanent residence; and if it mean for a longer time than the termination and settlement of the particular suit, it is not reasonable that the court should require more than the purpose itself requires.

In every way, then, in which the question can be considered, I think the rule of the Common Pleas and Exchequer is, in this particular the most satisfactory and most reasonable, and the one which I shall feel disposed to follow, unless I am controlled by the practice of our own courts.

The only case which has been referred to as applicable in this country is the case of *Gill* v. *Hodgson* before mentioned, decided before Sir John Robinson in Chambers. Now this, although only a Chambers' decision, is, nevertheless, the decision of a very able judge. The Chief Justice there expressed the conflict of opinion between the courts in England, and felt the difficulty he was under in determining in the face of such difference. He had, therefore, to decide which course of practice he would follow; and he took the rule of the Queen's Bench as the one which, in his opinion, should govern us in this country under such circumstances.

I am not prepared, I must say, to adopt as a rule that we are to follow the decisions of the Queen's Bench in England more than

those of the other courts, and more particularly as the effect there is not to diverge from the decisions of each other, but to reconcile their differences, and to have a common and harmonious rule, decision and practice in every case. I think we should exercise our own judgment as to which is the best rule and practice to adopt, if there be a difference in the English courts, and adopt that which will be the most convenient and suitable for ourselves, whether it shall be the decision of the one court or the other.

It is singular too that in the case just quoted, which was decided in December, 1855, the cases of *Tambisco* v. *Pacifico*, 7 Exch. 816, and *Drummond* v. *Tillinghist*, 16 Q. B. 740, although decided about four years before that time, do not appear to have been cited, which necessarily lessens for the present day the effect of the judgment which was then given. But even in that case it is not at all certain that security was properly demandable according to the decision of the court of Queen's Bench in England, in *Drummond* v. *Tillinghist*, for it was distinctly sworn to by the plaintiff, in *Gill* v. *Hodgson*, "That the plaintiff had no other permanent place of residence than Toronto," which brings the case most expressly within the rule of the English court of Queen's Bench, that upon such a statement security would be refused, and which decision, as has been seen, goes far beyond what is required by the other courts, for the plaintiff to strive to exempt himself from giving security.

I am therefore of opinion that there is no decision in this province binding upon me, or contrary to the view which I have expressed, that if the plaintiff be actually a resident in the province at the time of the application for security for costs, and intend to remain here until after trial or judgment in the cause, security for costs should not be ordered to be given to him.

The question then is, does it appear here that the plaintiff is a resident in the province, and that he intends to remain here until after trial or judgment? Mr. Paterson says the plaintiff is here temporarily, and he believes the plaintiff will leave permanently before the defendants (if successful) could enter judgment for their costs. Mr. Heward says "I understood the plaintiff to say he was going to prosecute this action and see the matter through, and that he intended to stay in the country for that purpose." Mr. Kenrick does not add to this, excepting the fact that the plaintiff has sold his effects and removed his family to Quebec, on their way to England, and that the plaintiff himself also intends to go there. But, he adds, "he believes the plaintiff is remaining here to prevent the defendants obtaining security for costs," which, perhaps unintentionally altogether, disposes of the effect of his affidavit. The defendants further rely on the plaintiff's own affidavit filed on a former occasion, in which he describes himself in this last month as of Hitchin in England, and in which he says he had purposed to go to England, his domicile, with his wife and children. He also says, "My residence is not, nor has it since the 18th of July been, within the united counties of York and Peel, but I am now a temporary sojourner in this city, and within the said counties." From this same affidavit it appears plaintiff's residence has for some years previously been in the county of York, and that, excepting for the time he was absent in Quebec on his way to England, as he had intended, he does not seem to have had any other residence.

The mere description by the plaintiff of himself as of "Hitchin in England" cannot I think operate against him contrary to the facts of his actual residence in Upper Canada, any more than the description by the plaintiff of himself in the case in *Gurney* v. *Key*, 3 Dowl. 559, as of Trevilian Hall, Tregony, Cornwall, was allowed to help him against the fact of his actual foreign residence on the continent.

The plaintiff then speaks of England being his domicile, and probably it is so. But the domicile is very distinct from the place of residence, or even the place of permanent residence of a person One may be many years abroad without ever losing his former domicile, and I cannot therefore lay any stress upon this statement.

The whole case then is reduced to this, whether the statements of Mr. Paterson or of Mr. Heward, or of both together, are sufficient to make out—

1. That the plaintiff is not a resident here, or

2. That he does not intend to reside here until the trial, or until judgment.

My opinion is they do not. It is quite clear the plaintiff is a resident here. I think it does appear very strongly that the plaintiff does intend to stay in this country to see "the matter through" as the witness calls it, which "matter," I understand, means this suit, and "seeing it through," I presume, must mean seeing the end of the suit, which is certainly after the trial, and probably after judgment.

I think, then, upon the whole facts I cannot order security for costs to be given, although it is quite possible plaintiff may see the judgment entered against him, if it be adverse to him, and then remove himself from the country which (as suggested in *Tambisco* v. *Pacifico*, 7 Exch. 816) a plaintiff may do, even if it had been before shewn that he had intended to be a permanent resident in the country.

In many cases it is, perhaps, of very little consequence whether a plaintiff against whom judgment be entered for costs is or is not within the country. He was formerly required to be personally within it, or to give security in substitution for it, because his person was liable to be taken for the costs of the action. In *Pray* v. *Edie*, 1 T. R. 267, Mr. Justice Buller says the reason why security for costs is given is, that if a verdict be given against the plaintiff (who is abroad) he is not within the reach of our law so as to have process served upon him for the costs So in *Barrett* v. *Peour*, above referred to, Baron Alderson says—"The reason why security for costs is required from a person abroad is, that if a judgment is obtained against him, it cannot be enforced against him by process of the court." In *Earl Ferrars* v. *Robins*, 2 D. P. C. 636, security for costs was not ordered, because, as the plaintiff was a peer, the substitution for personal responsibility could not be ordered when the person of the peer was protected from arrest.

A different rule in this respect prevails in Chancery (see *Lord Aldborough* v. *Burton*, 2 M. & K. 401) because it is said, although he cannot from his privilege be arrested for costs, that his absence nevertheless lessens the defendant's chance of getting payment of them.

But if the plaintiff in any action be an insolvent so that nothing can be made upon any process sued out on judgment against his supposed property, and if his person be safe from arrest for costs, as it is in this province, the practical difference to a defendant of such a plaintiff being actually in the country to answer in contemplation of law the costs, in case of a judgment being recovered against him, and of such a person being out of the country and beyond the process of the court altogether is scarcely appreciable, although it would be a great advantage to the defendant if he could procure security in such a case of absence, as it would be equally an advantage to him if he could procure security for his costs against an insolvent plaintiff resident in the country.

Some modification might properly be made in the law on this subject, by which, in certain cases, both plaintiffs and defendants might be ordered to give security against the costs which their litigation may be supposed unjustly to occasion; for if there be such persons in fact as ill-used plaintiffs and honest defendants, the opposites of such persons are not altogether unknown to the law: but I have only to administer in the law as I find it; and what I decide in this case is that, according to my view of the law as it is, the defendants cannot call upon the plaintiff to furnish security for costs upon the materials laid before me; and, therefore, I discharge their summons, and direct that the costs of this application shall be costs in the cause for the plaintiff.

Summons discharged.

MANARY v. DASH.

Order postponing trial—Costs—Counsel fee when taxable.

Where, before the commission day of an assize, an order had been obtained to postpone the trial of a cause on payment of costs, and plaintiff afterwards, on taxation of costs, claimed the right to tax against defendant a counsel fee as having been paid to the partner of plaintiff's attorney, without shewing when or under what circumstances it had been paid; and it appearing that the record had not been entered for trial, the master refused to tax the counsel fee; and a summons for a revision of his taxation, by directing him to tax the counsel fee, was discharged with costs.

(Chambers, Nov. 16, 1863.)

This was an action of ejectment. The venue was laid in the county of Wentworth.

On 10th October last defendant obtained a summons calling on plaintiff to shew cause why the trial of the cause should not be

postponed till the next Spring assizes, on the ground of the absence of a material witness.

On 14th October last, upon the undertaking of defendant's attorney to pay costs, an order was made postponing the trial of the cause.

On 15th October the assizes for the county of Wentworth commenced; but the trial having been postponed on the day previous, the record was not entered for trial.

On the same day an appointment for the taxation of plaintiff's costs, under the order, was obtained and served by defendant.

The appointment was twice enlarged.

On the taxation of costs in the principal office in Toronto, an affidavit was produced by the agent of plaintiff's attorney, in which it was sworn that plaintiff had paid Mr. Freeman, the partner of plaintiff's attorney, a counsel fee, but it was not shewn when or under what circumstances the fee had been paid.

The master declined to tax the counsel fee as costs payable by defendant, under the order of 14th October, and made a certificate to that effect.

T. H. Spencer thereupon obtained a summons calling on defendant to shew cause why the master should not be directed to revise his taxation of the costs, with the view to the allowance of a counsel fee or refresher to the plaintiff on such taxation, and why the master should not be directed to allow a reasonable counsel fee or refresher.

Robert A. Harrison shewed cause. He objected that the summons was insufficient, as it did not state the grounds upon which a revision of taxation was desired, and that no affidavits showing the grounds were filed (*Aliven* v. *Furnival*, 2 Dowl. P. C. 49; *Cleaver* v. *Hargrave*, *Ib.* 689; *Daniel* v. *Bishop*, McClel. 61.) But, assuming that the materials were sufficient, he argued that the question raised was one peculiarly for the master to decide, and that in such a matter there could be no appeal from his decision (*Hingston* v. *Whelan*, 8 U. C. L. J. 72). If the matter were appealable, he argued that, under the circumstances, the master had properly disallowed the counsel fee (*Ib.*) and submitted that, as defendant was upholding the decision of the master, in the event of the summons being discharged, it should be discharged with costs.

T. H. Spencer, *contra*, in support of the summons, argued that the materials before the court were sufficient; that the subject matter of the master's decision was appealable; and that the fee having been paid to counsel, although the partner of plaintiff's attorney, and although record had not been entered, should have been allowed on taxation of costs against defendant. He referred to *Grindall* v. *Goodman*, 5 Dowl. P. C. 378; Arch. Prac. 11 Edn. 511, 1478, note 2.

MORRISON, J., discharged the summons with costs.

Summons discharged with costs.

BIGGAR v. SCOTT ET AL.

Con. Stat. U. C. cap. 42 sec. 23—Action against a maker and endorser of a promissory note—Common counts struck out.

Where plaintiff, the holder of a promissory note made by one defendant and endorsed by the other, sued both defendants in one action, under Con. Stat. U. C cap 42 sec. 23, and at the same time declared against the defendants on the common counts for money paid and on an account stated, the latter counts, on the application of defendants were struck out of the declaration.

(Chambers, Nov. 20, 1863.)

The declaration in this cause contained a count on a promissory note, made by one defendant and endorsed by the other.

It also contained the common counts for money paid and on an account stated.

M. B Jackson obtained a summons calling on plaintiff to shew cause why the common counts should not be struck out of the declaration with costs.

John Paterson shewed cause.

JOHN WILSON, J.—It is not pretended that plaintiff has any but the one cause of action against defendants. That cause of action is the promissory note made by the one defendant and endorsed by the other. It is, in fact, a several cause of action, but sued as joint under the statute. None but causes of action joint in substance as well as form can be proved against defendants under the common counts. I do not, therefore, see the necessity of the common counts, and so will give effect to defendant's application to strike them out of the declaration.

Summons absolute. Costs to be costs in the cause.

ADAMS v. GRIER.

Statute 23 Vic. cap. 42 sec. 4—Not applicable to a cause made a remanet.

Where a record had been entered for trial at an assize and made a remanet, it was held that so long as the order for a remanet remained in force, the cause could not, under statute 23 Vic. cap. 42 sec. 4, be sent to the county court for trial.

(Chambers, Nov. 28, 1863.)

This was an action on the common counts for goods sold and delivered, goods bargained and sold, work, labor and materials.

Pleas—never indebted and payment.

The record had been entered for trial at the last assizes for the united counties of Huron and Bruce, and made a remanet.

John Paterson afterwards obtained a summons calling on the defendant to shew cause why the issues joined in the cause should not be tried before the judge of the county court of the united counties of Huron and Bruce at the next sittings thereof.

J. A. Boyd shewed cause, and contended, among other things, that the cause having been once entered for trial at the assizes, and made a remanet, the case was not one within the operation of statute 23 Vic. cap. 42 sec. 4.

JOHN WILSON, J.—The order of the court where the cause was entered for trial is, that the record remain for trial. Until that order be rescinded or discharged the plaintiff cannot, in my opinion, have the cause tried in the county court. I shall, therefore, discharge the summons, but without costs.

Summons discharged without costs.

COUNTY COURTS.

In the County Court of Wellington, before A. MACDONALD, Judge.

(*Reported by* CHARLES LEMON, *Student-at-Law.*)

SANDILANDS v. BATHGATE.

Negligence—Highway—Obstruction by verandah.

In case of damage done to a verandah on a street by runaway horses, the question of negligence is for the jury, but what facts may by them be considered is a question of law.

Plaintiff sued for damages sustained by defendant's horses running away, and knocking down a verandah.

The facts were as follows:—Defendant is a farmer: came into town and drove his waggon up to the sidewalk in front of B's store, and jumped off the waggon and ran inside of the door to make some inquiry, but not losing sight of the horses. Whilst so inside, the horses took fright, by the flapping of an adjacent awning, and ran away down the street some distance, coming in contact with the plaintiff's verandah, knocking it completely down.

Plaintiff declared for that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, a certain messuage or inn and premises in the Town of Guelph, with the appurtenances, was in the possession of a certain person, to wit, one J. L., as tenant thereof to the plaintiff (the reversion thereof then and still belonging to the plaintiff); yet the defendants, knowing the premises, did wrongfully and injuriously, and with culpable negligence, leave in the public highway, near to the said messuage, inn, and premises, with the appurtenances, a certain two-horse waggon or carriage, with two horses yoked and harnessed thereto, without any person being in the immediate proper charge thereof, and without in anywise tying up or fastening the said horses, so as to guard against their running away, whereby the said horses taking fright and being entirely unrestrained did start and run with the said waggon with great speed in the direction of the said messuage, inn, and premises, with the appurtenances; and the said horses and waggon, thereupon, in such running, came into violent collision with the said messuage, inn, and premises, with the appurtenances, and greatly injured and damaged the same.

Defendants separately pleaded not guilty; and for a second plea each pleaded "that the said horses and waggon did not during

any portion of the time in the declaration mentioned leave or depart from the said highway, but continued always in the same as they lawfully might. And that certain posts and a certain verandah, which had been annexed and fastened to the said messuage, inn, and premises, having been placed, and there unlawfully standing, and being on the said highway, the said horses and waggon did slightly and gently and without any great violence, because the said posts and verandah were so placed, and, standing on the said highway, necessarily in passing along the said highway graze against and touch the said posts and verandah, so unlawfully being on the said highway, which are the grievances in the declaration mentioned. And the defendants further say that the said horses and waggon did not come into collision with or touch any portion of the said messuage, inn, and premises, with the appurtenances, lying and being outside the limit of the said highway, and not being then unlawfully thereon.

Issue being joined on these pleas, the case went down for trial in December, 1862, and a verdict was rendered for defendants.

Plaintiff moved for a new trial on the ground that the verdict was contrary to law and evidence in this, that it was shown that the horses were negligently left by the driver, who entered a store, and that the horses ran with the waggon from the road into the sidewalk; and that the verandah in the declaration mentioned was lawfully on the highway, if not by the express authority of the municipal county council, yet, with its leave and license, the negligence being therefore all on one side, the plaintiff was entitled to recover. Secondly, on the grounds of misdirection by the learned judge before whom the case was tried in telling the jury that if they found that the posts of the verandah were unlawfully on the highway that the plaintiff had no right to recover notwithstanding negligence on the defendant's part was proven, and in refusing to direct the jury that even if they found that the verandah was unlawfully constructed upon the highway, and that it was no obstruction to the defendants in the proper and ordinary use of the street for horses and vehicles, that then the defendants had no right, being private persons, to treat it as a nuisance, and abate it. And in refusing to tell the jury that the fact of the verandah being where it was, was no answer to the charge of negligence; and that if the verandah and posts could have been avoided by reasonable care it was evidence of negligence having been struck at all, and that the negligence was all on the side of the defendants, the plaintiff not having contributed in any degree, much less an equal degree. And the further ground that there was no evidence to sustain the defendant's second plea.

Messrs. Fergusson & Kingsmill, in support of the rule.

Lemon & Peterson, contra.

MACDO..LD, Co. J.—This case was tried before me. The following were the objections made to the charge:

1st. That the jury should have been directed that if the horses left the roadway, and were on the sidewalk (as was the case with one of them) under the town by-law, they had left the highway.

2nd. That the horses being left, and not being tied, the defendant going inside the store door was guilty of an act of negligence, and that the question of negligence should not have been left to the jury.

3. That the construction of the verandah, and the tacit acquiescence of the council as against a party guilty of negligence it was lawfully there.

4. That as the verandah and posts could have been avoided by reasonable care, having been struck is evidence of negligence.

On the first point I had told the jury that the whole roadway was the highway, and, under the by-law, the owner driving on the sidewalk might be fined; on the second point I left it for the jury to say if the defendant was guilty of negligence in leaving the horses untied as he did, he being a short distance from them. On the third objection I told the jury that the supposed acquiescence of the town council to the verandah being built if it was unlawfully on the highway. As to the fourth objection, that the plaintiff claimed damages for an act of negligence, committed previous to the arrival of the horses and waggon at the plaintiff's property, the fact that there was room enough to pass with reasonable care could not affect the question of previous negligence.

The damages are claimed as the result of a previous act of negligence. It would be different if the defendants were in charge at the time of the collision. If they were in charge at the time, and could have passed if they had used ordinary care, it would be negligence if they came in collision with the obstructions in the road.

The case of *Quarman* v. *Burnett* (6 M. & W. p. 499), is cited to show that the defendants were guilty of negligence, but the case of *Lynch* v. *Nurdin* (1 Q. B. 29) shows that it is proper to leave the question of negligence to the jury, who would inquire "whether "the horses were vicious or steady; whether the occasion required "the servant to be long absent from his charge; whether no "assistance could be procured; whether the street at that hour "was likely to be clear, or thronged with a moving multitude."

In this case the whole facts were left to the jury to say, whether the defendants were guilty of culpable negligence, in consequence of which the horses had started off. They were told to consider the natural dispositions of the horses, whether requiring more or less care. The evidence of Massey, who saw the defendant drive up in front of his store, and, on the sidewalk, spoke to him about plaster. Massey told him where to go, and he would send a man. Massey went in at one of the front doors, and defendant went into the shop at the other front door to inquire about the man, when the horses started. A clerk was putting up an awning at the shop adjoining, when the wind suddenly raised one end of it. This might have been the cause of their starting, but it was still for the jury to consider whether it was not necessary to guard against such accidents to horses, which might be quiet in the country but requiring more care in the town.

The verdict was generally for the defendants. On the plea of not guilty is the verdict contrary to law and evidence? As the case went to the jury it is a question whether they should not have found for the plaintiff on this plea. I left it for the jury to say if the cause of the horses starting might not have been the sudden flapping of the awning which was being put up, and whether it was not necessary to guard against such accidents happening to horses, which might be quiet enough ordinarily, but requiring more care in the town. (*Illidge* v. *Goodwin*, 5 C. & P., 190.) If the injury resulted from circumstances over which defendants had no control, they are not answerable. *Wakeham* v. *Robinson*, 1 Bing., 213, cited for the defendants, admitted the rule laid down in *Gibbons* v. *Pepper*, 1 Ld. Raym. p. 88, which is against defendants in this case, as the accident was occasioned by the default of the defendant, he being in charge at the time, and not managing his horses properly.

No doubt the question of negligence is one strictly within the province of the jury, but what facts may be considered by the jury in determining the negligence is a question of law. *Gibbons* v. *Pepper* is not authority to show that if the horse had been left unfastened that the defendant would have been relieved from the risk of any damages which might be done if frightened by the clap of thunder, for he would not be without blame. In this case the starting of the horses may have been attributed by the jury to the sudden flapping of the awning by the wind, and may have considered that the defendant was thereby relieved from blame, but they should have been directed that the defendants were not thereby relieved from blame for not tying or fastening their horses where they left them, for when they left them they saw the risk of all mischief which might follow, even though it might result from the act of a third party.

As to the grounds of misdirection the jury were not directed as requested, because the act complained of was not wilful. The damage complained of was in consequence of defendant's alleged previous negligence. The jury were given to understand that if the defendants had been driving they could have avoided the plaintiff's structure.

The case of *Davies* v. *Mann* (10 M. & W. 546) is relied on to show defendants' liability. There it was held that although the ass was wrongfully on the road, the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods in the public highway, or over a man lying asleep there, or purposely running against a carriage going on the wrong side of the road. There ordinary care in driving would have avoided the mischief. In the present case nobody was in charge at the time, and it was not the defendants' intention that the horses should be put in

motion. Admitting that horses got off by his negligence, they came against an unlawful obstruction, put up without protection against accident.

The plaintiff has taken issue on the second plea of each defendant, which admits the negligence in leaving the horses unfastened. In considering the question whether the second and fourth pleas were proven at the trial I was of opinion that the plea in effect set up the right to pass along any part of the highway, although it may be unlawfully obstructed, not, however, wilfully to destroy such obstruction, but, as in this case, when, by negligence, horses may have escaped against the will of the owner, they had a right to the whole roadway, unobstructed by a permanent erection. If that was a proper construction to put on the second and fourth pleas, they were proved—and, taking that view of them at the trial, they were, in my opinion, a good defence, and in my charge to the jury I so stated the law. On consideration of the cases cited, and of the *Mayor of Colchester* v. *Brook* (72 B. 339. E. C. L. R 38) and *Dimes* v. *Petley* (15 Q B. 276) I think this charge was wrong. In this case, the property could not be damaged wilfully without being responsible for the damage, so the defendants must be held responsible for damage, although occasioned by his negligence.

It is laid down, as to nuisances in a public highway, that an individual cannot abate it, unless it does him special injury. If he cannot abate it wilfully he cannot justify damage to other property, a nuisance on the highway, if avoiding it he might have passed on with reasonable convenience. I think the second and fourth pleas were not proved. To sustain them it would be necessary for the defendants to show that the horses and waggon touched the posts unavoidably, and so caused the damage. As there was no one in charge or control the posts were not avoided as they might have been, as there was plenty of room to pass along the highway. I think the pleas in this case sufficiently bring in issue the necessity of defendants' horses passing over that part of the highway where the posts were placed. No such necessity appears, as there was ample room to have avoided them.

I think there must be a new trial, as the verdict is set aside on the ground of misdirection. Following the usual course it will be without costs.*

PARLIAMENTARY ELECTION CASES.

Reported by THOMAS HODGINS, ESQ., LL. B. *Barrister-at-Law.*

WEST ELGIN ELECTION.

(Committee:—JOHN CRAWFORD, Esq., M. P. P., for East Toronto, *Chairman;* ALEXANDER MCKENZIE, Esq., M. P. P., for Lambton, GEORGE JACKSON, Esq., M. P. P., for Grey, MICHAEL HARCOURT, Esq., M. P. P., for Haldimand, and FRANCIS JONES, Esq., M. P. P., for North Leeds and Grenville.)

Held, 1st. That the Assessment Rolls and not the Voters' Lists are binding upon Election Committees, in all contested elections, and that the votes of persons entered upon such lists who have not the property qualification required by law entitling them to vote, may be struck off the Poll-books by such Election Committees.

2nd. That in the "list of voters intended to be objected to," the several heads of objection must be clearly and specifically set forth and distinguished against the names of the voters excepted to.

3rd. That naturalized subjects are not required to procure certificates of naturalization in order to entitle them to vote.—[Quebec, 2nd session Parliament, 23rd February, 1863.]

The Petition in this case was presented by John Scoble, of Glenbanner, in the County of Elgin, Esquire, one of the candidates at the General Election held in July, 1861, alleging that at the election of a member to represent the West Riding of the County of Elgin in the Parliament of Canada, one George Macbeth, of London, Esquire, and the Petitioner were candidates; that the said George Macbeth was declared elected by a majority of thirteen votes; that said majority was only colorable, inasmuch as the votes of divers persons were received and recorded in favor of said George Macbeth who had not the necessary qualifications in respect of property, separate interest in partnership or joint property, subjects of Her Majesty, &c.—(See Petition in Journals, Legislative Assembly, 1862) The sitting member, after an unsuccessful attempt to contest the validity of the recognizance, and to compel the petitioner to prove his qualification to be returned as a member, answered the petition, alleging bad votes in favor of the petitioner.

The petition was presented in March, 1862, and in June of the same year was referred to a select committee.

Upon the petition being read, the sitting member filed a preliminary answer, which was overruled, and he then asked for time to file his lists of objected votes owing to their non-receipt from his agent. The Committee required him to file an affidavit accounting for the delay, which he accordingly did, and annexed to it the following telegram:

"ST. THOMAS, 6th June, 1862.

"To G. Macbeth, Quebec:—Fowler promises list to-morrow; I expect Munro's also from Aldboro, and Dunwich list at same time; will forward at once.

"(Signed) C. C. ABBOTT."

Upon reading the affidavit and extracts, the Committee directed the lists of both parties to be filed in the office of the clerk of the Contested Elections, on or before the 1st July, 1862.

On the re-assembling of Parliament, in February, 1863, the Committee met on the 13th, and proceeded with the case until the 23rd February, when their report was presented.

During the session of 1862 but little was done, except the appointment of the Committee.

Hodgins (of the Upper Canada bar), for the petitioner, contended that by the several sub-sections of s. 4, Election Act, cap. 6, Con. Stats., Canada, the qualifications of electors were determined; that by sec. 61, the votes of unqualified persons were declared null and void; that in this case, the votes of persons not possessed of the requisite property qualification ($200 assessed value, or $20 yearly assessed value) had been received in favor of the sitting member; also the votes of persons described as partners, joint tenants, &c., who had not established their right to their separate part or share in such joint property before the Court of Revision or County Judge, as required in sub-section 3 of section 4 of said Act. That the validity of all such votes must be determined by the Assessment, Roll as provided by sub-section 6 of section 6 of the Election Act.

Irvine (of the Lower Canada bar) argued that the Committee were bound by the voters' lists, and that the votes of all entered there could not be questioned as to property qualification or otherwise.

The Committee, after deliberation, sustained the petitioner's argument, and ordered that the votes of all persons who, according to the assessment rolls, had not the requisite property qualification should be struck off the poll-books. Under this resolution the petitioner struck off 65 names from the votes in favor of the sitting member.

The petitioner being now in a majority of 52, called upon the sitting member to prove a majority in his favor; and the sitting member under the same resolution struck off 31 from the votes in favor of the petitioner.

Irvine, for the sitting member, then offered to proceed with that portion of his list entitled "List of persons irregularly and improperly assessed—names not given in full—consequently ineligible and objected to by Mr. Macbeth," and to show that the persons so objected to were similar to those described in Mr. Scoble's list in class III., "as partners, joint tenants, tenants in common, &c.

Hodgins, for the petitioner, opposed the application. An offer had been made at the opening of the case to withdraw the petitioner's class III. if the sitting member would withdraw this, but

* The case was again tried at the last June County Court sitting, and a verdict was again given for the defendants. In July term following plaintiffs again moved for new trial, and a rule nisi was granted on the grounds that such verdict was contrary to law and evidence and the judge's charge in this, that under the said charge the negligence of the defendants was proven, and the verdict should have been for the plaintiff. Macdonald, Co J, in giving judgment said (after commenting upon *Illidge* v. *Goodwin* (5 C & P. 190), *Robinson* v. *Bletcher* (15 U. C. Q B 159), *Gibbons* v. *Pepper*, and other cases before alluded to) "I cannot say that the evidence of negligence on the part of the defendant, who drove the horses in this case, is so clear as to warrant an interference by the court. In this case, the question of negligence or no negligence admits of a good deal of argument and which it is proper for the jury to determine. I cannot come to the conclusion that there are proper grounds for interference with the verdict of the jury." Rule discharged.

the offer was refused. The petitioner's lists had been prepared in accordance with precedents, and he had set forth his objection to this class of votes thus: "These voters are objected to on the ground that the parties so represented as voting in favor of the said George Macbeth at said election were, before and at the time of their so voting, entered upon the Assessment Rolls of the Townships forming the West Riding of the County of Elgin as partners in business, joint tenants, or tenants in common, or *par indivis*, and were assessed jointly with one or more other persons or owners, tenants or occupants of real property, but the value of whose share or interest had not been determined, and was not sufficient to entitle them or any of them to vote or be entered upon the list of voters in respect of the property for which they were jointly rated; and because they had not previously established their right to vote at said election, or their right to their part or share in said real property before the Court of Revision or County Judge, according to the provisions of the election and assessment laws, so as to entitle them to be entered on the Assessment Rolls and Voters' Lists as by law required, and because they were not in any manner entitled to vote at said election." He cited Warren, p. 277, 324, and *Erdsforth* v. *Farrer*, 4 C. B. 9; and *Woollett* v. *Davis*, 4 C. B. 115.

Irvine, in reply, contended the list was sufficient, inasmuch as it appeared from the names given in that the parties were joint owners.

The Committee then deliberated for several days, when the learned chairman delivered the following judgment, which was unanimously concurred in by the Committee:—

THE CHAIRMAN.—The list of voters intended to be objected to by the sitting member has unquestionably not been prepared with that care and accuracy which the petitioner's list exhibits: but notwithstanding this the Committee have up to the present time been able to do substantial justice without giving effect to technical objections; and I must say that I am not disposed to give effect to such objections unless I find the law regulating the proceedings of election committees in this respect, as construed and expounded by able text writers and by legal authority in analogous cases, to be clear upon the point. It would certainly have been an easy matter for the party preparing the sitting member's list to have introduced into the heading of this class the objections that are now raised to the legality of such votes, viz.: that the voters are not qualified by reason of the parties being assessed as joint tenants or partners only, and the interest of the party voting in the joint estate has not been defined and his name entered separately in the assessment roll. The heading of this class of objections appears to me vague and uncertain, and unless we import into it words of explanation I do not see that we can make out precisely what is meant. To assess two or more persons jointly cannot be said to be an irregular or improper assessment. It is the usual and proper course followed by assessors and is not open to any objection that I can perceive. To have the interest of joint tenants or partners in the joint estate defined and entered on the assessment roll, for the purpose of qualifying such persons to vote, is another matter.

I refer to the proceedings of this Committee in scrutinizing votes objected to on both sides to show that in our judgment the names of voters need not be given in full, and the contraction of of a Christian name does not of itself render the voter ineligible. No reference whatever is made in the whole list to joint tenants or partners, nor any objection made to votes on the ground that joint tenants or partners voted on the joint estate without having their interest defined and entered on the assessment roll, are at liberty now to supply omissions or import into this document language to define its meaning. The law as construed by those who have given to questions of this kind the most careful attention, and who have considered and written upon it, without reference to party prejudice and party feeling, appears to me to be clear upon the point; and if we are to be guided in our proceedings by authority and precedent we are bound to give effect to the technical objection and refuse to go into any scrutiny of these votes. To support this view of the case I cannot do better than quote from Warren's Law and Practice of Election Committees. He says: "The 'list of voters intended to be objected to,' is a document of equal importance with the petition, and requires great care in the preparation of it. The fundamental statutory requisite as to the character of it is that in the said lists must be given the several heads of objections, distinguishing the same against the list of voters excepted to." After stating what are substantially the provisions of the Election Petitions Act, Mr. Warren proceeds as follows: "It is necessary, therefore, for a petitioner first to consider whether a proposed objection be a valid one in point of law, and whether in point of fact it can be sustained by evidence. Secondly, to specify and distinguish it against the voter's name on the list. In these requisites are involved correctness of the name and description of the voter, and especially in respect of his number on the Register, together with a printed and precise statement of the objection intended to be insisted on. This is for the purpose of at once guiding the Committee and of enabling the opponent to meet the case fairly and fully, and deprive him of any pretence for alleging that he has been resisted by a vague defection or erroneous statement; one, moreover, which may have been, perhaps, designedly such. It is better to be over-scrupulously precise than hazardously compendious, for it is a logic often strenuously urged in committees that it is hard for a voter to be disfranchised on technical grounds not brought forward with technical sufficiency, and if there be any leaning it ought surely to be in favor of the franchise. Were committees to be lax in enforcing accuracy in these cases, they would fritter away the great and beneficial provisions of the statute, open the wide door to fraud, and offer a premium on negligence." Apply the language used by the distinguished writer whom I have quoted to the case before us, and in my judgment it disposes of the question and sustains the technical objection which has been made. All text writers on the subject concur in this view of the practice. There are also cases which have been decided by the Court of Common Pleas in England bearing strongly in favor of this objection, the force of which sustained and supported as it has been by such authority I have felt myself unable to resist. On behalf of the sitting member no case has been cited by his counsel in favor of the argument he addressed to us when endeavoring to uphold the sufficiency of this heading; and from the careful consideration which he has given to his client's case, I am persuaded that could such a case have been found he would not have overlooked it. The objection that partners or joint owners of property cannot vote unless their interest in the joint estate be defined on the assessment roll—although qualified in all other respects—I regard as a technical objection, and we are I think not called upon to disfranchise voters on technical grounds not brought forward with technical sufficiency. For these reasons I feel myself compelled to uphold the objection of the counsel for the petitioner.

The petitioner then withdrew his list of objected votes under this head.

The sitting member then offered to strike off certain votes in favor of the petitioner, on the ground that the said voters "had not obtained certificates of naturalization." The Committee resolved that such was not a valid objection. He then applied for a Commission to show that the petitioner was ineligible, and that a voter had been intimidated by the petitioner or his agents, and that intimidation would, under the Election Act, disentitle the petitioner to the seat. On reading the 23 Victoria, cap. 17. the Corrupt Practices Prevention Act, the Committee determined the point against the sitting member. This exhausted the sitting member's list, and the petitioner (John Scoble, Esq.,) being in a majority, was declared duly elected and took his seat accordingly.

IRISH REPORTS.

(*From the "Law Times."*)

HUGHES v. MURRAY.

Attorney—Costs—Reference to taxation after twelve months—Special circumstances.

Where an action had been brought by an attorney for a sum of 68*l*., balance of untaxed costs, more than twelve months after the delivery of the bill thereof; and it appeared that before action brought, the attorney had offered to take a sum of 40*l*., in full:

Held, that it was a proper case for a reference for taxation, and the special circumstances were sufficient, under the 12 & 13 Vict. c. 33. s 2.

O'Driscoll, on behalf of the defendant, moved that the proceedings in the action be stayed, and for a reference to taxation of the bill of costs, the subject of the action, the defendant offering to

lodge the money. The costs were incurred, and the bill duly delivered, upwards of twelve months prior to the commencement of the action; but it appeared from the affidavit of the defendant, that prior to the bringing of the action, the plaintiff had offered to take 40*l.* in full of the amount claimed, and had afterwards served his summons and plaint for the full balance, viz., 68*l.* The affidavit also relied on the ill-health of the defendant, and his absence on that account from town; but this was contradicted by the plaintiff's affidavit, but the offer to settle for the 40*l.* was not denied.

Lawless, Q. C. (with him *McKenna*), submitted that no special circumstances were shown, sufficient to justify an order under the statute 12 & 13 Vic c. 53. *Re Barnard*, 2 DeG. M. & G. 359; *Re Whicher*, 13 M. & W. 549, were cited. They also urged that, if the order should be made, it should provide that the plaintiff should have the costs of taxation and the costs of the motion, even though more than one-sixth should be taken off.

MONAHAN. C. J.—The mere circumstance of the attorney here offering, just before he brought his action, to take a sum of 40*l.* in full, of a sum of 68*l.* and then bringing his action for the latter sum, is, in my judgment, amply sufficient "special circumstance" to bring the case within the statute. Let further proceedings be stayed; the defendant to bring in and lodge the sum of 68*l.* within a week; refer the bill of costs to taxation; and reserve the costs of taxation and of the motion for the court.

GENERAL CORRESPONDENCE.

Absconding debtors—Land only—Division Courts—Costs.

TO THE EDITORS OF THE LAW JOURNAL.

St. Thomas, 23rd November, 1863.

DEAR SIRS,—I take the liberty of asking your views on the following case.

B. owns a valuable farm in the county of Elgin, but no chattel property of any description. He absconds to the United States, having first let his farm for three years, being paid the rent for the whole term in advance. He leaves various creditors behind, to whom he is indebted in sums from $40 to $90, none as much as $100.

Have the creditors any remedy in the Division Courts? (See Form of Attachment, page 180 Consol. Stat. U. C.; also section 199, page 182, same statute.)

It does not appear to me that a creditor can make the affidavit necessary to take out an attachment where lands only, and not goods, are left behind the absconding debtor.

Is not the only remedy through the County and Superior Courts?

If so, could the Clerk tax County Court costs? or could the Judge properly grant a certificate for costs?

Your answer through the *Law Journal* will much oblige.

Yours respectfully, H.

[It does not appear to us that upon the facts stated by our correspondent a Division Court would have power to issue an attachment.

It would however, we apprehend, under sec. 4 of Con. Stat. U. C., cap. 25, be within the jurisdiction of the County Court to do so.

If attachment were issued from the County Court, though the amount be under $100, we should think that the Judge would, under the circumstances, certify for County Court costs.—EDS. L. J.]

Staying second action till costs of first paid.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I believe it is the established practice for the court to stay a second action of ejectment between the same parties, till the costs of the first are paid. But I have some doubts as to whether this practice is applicable to actions other than ejectment. If not too much trouble, I should like to know if in an action for slander, where plaintiff (a worthless man) accepts a nonsuit, and afterwards brings a second action for the same slander without paying the costs of the first, his proceedings can be stayed till the costs of the first are paid? Your opinion will greatly oblige

Yours, &c., AN OLD SUBSCRIBER.

Kingston, Nov. 27, 1863.

[Where a second action is oppressive and vexatious, the court has a discretionary power to stay it till the costs of the first action be paid. But it does not necessarily follow that because a plaintiff failed in his first action, his second must be oppressive. The circumstances under which he failed in the first action must be known to the court on an application to stay the second action. If the first action were withdrawn from the jury on the eve of a verdict for defendant, and plaintiff be wholly unable to pay costs, the court no doubt would stay the second action (See *Prouse* v. *Loxdale*, 8 L.T.N.S. 314). It is impossible, however, to lay down a rule which will apply to all cases. The application is one to the discretion of the court, and each case must depend on its own peculiar circumstances (*Ib.*). The application, however, to be successful, must be made with reasonable promptitude (*Ib.*).—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. BAILEY AND OTHERS v. EDWARDS.

Bill of exchange—Consideration—Accommodation—Renewal.

Defendant being indebted in a certain amount, gave his creditor acceptances for a large amount, which the creditor endorsed to third parties for their accommodation, and they endorsed them to the plaintiff's for value. One of them was dishonoured and twice renewed, and while the last renewal was in the plaintiff's hands, they were parties to a deed of arrangement with their endorsers, in which they covenanted, not to sue any of the other parties on bills upon which, as between such parties and their endorsers, such parties would not be liable. Previously to the last renewal, the defendant had paid the bills to the amount he owed the drawer, and the plaintiffs then sued upon the last renewal of the bill.

Held, that the question was, not whether there was value for the original acceptance, but whether it was a bill on which, as between the endorsers and the plaintiffs, the endorsers would be liable.

Q. B. PINARD v. KLOCKMAN.

Bill of exchange—Foreign bills—Drawn in "sets"—Loss of first "set"—Liability of endorser.

Where a foreign bill is drawn in sets in the usual way, and the first "set" is lost by the holder, he cannot sue a prior endorser, who neither endorsed to him, nor has the other sets in his possession, although he may be entitled to recover them from any party who has possession of them, and

Semble, that any remedy he may have, if any, is against his own immediate endorser.

EX. CAINE AND ANOTHER V. COULSON.

Contract—Payment—London banker's draft—Attorney—Costs

In support of a plea of payment it was proved, that the plaintiff's attorney wrote to the defendant, requesting the remittance of a debt, and 13s. 4d., for the attorney's costs. The defendant sent a banker's draft for the amount of the debt, but took no notice of his attorney's charges. The attorney kept the draft. The jury found a verdict for the defendant on the plea.

Held, that the evidence was sufficient to support the plea.

Q. B. MORGAN V. BOULT AND ANOTHER.

Award—Arbitration—Umpire—Election by lot—Award agreed to in the absence of one arbitrator.

Where the umpire and one of the arbitrators, in the absence of the other (without any default on his part) arrived at a decision, though they informed him of it, and afforded him an opportunity of objecting thereto, before finally and formally making their award.

Held, that it was bad.

Although the election of an umpire by lot, may not be necessarily bad, where the arbitrators have previously agreed, that either of two parties proposed, are fit and proper persons for the office; yet this must be made out plainly and clearly, or the ordinary rule will be adhered to.

EX. THORPE V. THORPE.

Devise—Right-heirs of testator's name.

Under a devise of an estate, after the death of a testator or of a tenant for life to testator's right-heirs of his name, if any such there be, a person not right-heir at the time of the death of the testator or tenant for life cannot take, but the estate in default of a right-heir of the testator's name will then vest in the right heir.

EX. DAVIES AND ANOTHER V. JONES.

Bill of sale—Interpleader—Apparent ownership—Actual delivery—Continued possession of grantor.

Where there is an assignment, with actual delivery, and visible change of ownership and possession, the Bill of Sales Act does not apply, and although some portion of the assignor's family remain on the premises, that is only evidence on the question of possession, which is for the jury.

EX. HELLIWELL V. HEYWOOD.

Sheriff—Execution—Extortion—Possession money—Valuation.

It is extortion for a bailiff on a *fi fa* to charge costs of a second man in possession, and of a valuation of the goods.

EX. IN RE AN ATTORNEY.

Attorney—Practice—Irregularity—Criminal imputations—Form of will.

On an affidavit imputing criminal conduct to an attorney, the form of the rule in the first instance is to show cause why he should not be struck off the rolls, or be suspended from practice for so long a time, as the court shall think fit.

EX. HOWARTH V. BROWN.

Costs—Pleading—Jurisdiction—Continuance—22nd and 23rd rules of pleading.

Where the defendant, after pleading by leave of a judge, withdraws his plea, and pleads a matter of defence arising afterwards, and the plaintiff confesses such plea, the plaintiff is entitled under the 22nd and 23rd rules of pleading, Hil. 7, 1853, to his costs up to the time of pleading such plea, although it is neither pleaded together with pleas of defence arising before the commencement of the action, nor contains any allegation that the matter of defence arose after the last pleading.

Q. B. BINGHAM V. CORBETT.

Guarantee—Taking security from debtor—Discharge of surety.

The defendant having given to the plaintiff a continuing guarantee for goods, to be supplied on a credit of two months, and a liability having accrued thereon, the plaintiff, the creditor, took from the debtor (without the privity of the defendant) a legal mortgage of certain property as security, not only for the sum then due, but for any further sums which might become due on the guarantee, with a covenant by the debtor, to pay the same within six months after they should have so become due. In an action brought to recover sums which became due subsequently—

Held, that the subsequent supplies were under a new contract, on an extended credit, and that the defendant as surety, was not liable.

Q. B. REG V. PEARCE.

Perjury—Indictment—Jurisdiction—Judgment in County Court—Judgment summons—Amendment of—Effect of adding husband's name.

A woman having obtained judgment against the defendant, in a County Court, married, and afterwards, in her maiden name, took out a judgment summons against him in another district, which on the hearing, the judge amended by inserting her husband's name, and the defendant was then sworn and examined, and was afterwards indicted and convicted for perjury at that hearing.

Held that he was improperly convicted, as he had been sworn in a cause in which there was no judgment, and in which the County Court judge had no jurisdiction.

C. P. CHAMBERS V. MILLER AND OTHERS.

A cheque payable to bearer, was presented for payment at a bank. The cashier placed the money on the counter and went away. The bearer commenced counting the money, and while so doing the cashier returned, and said the money could not be paid. The bearer refused to refund the money. It was thereupon taken from him. In an action for assault and trespass, it was

Held, that the property in the money passed at the time the cashier placed the money on the counter, and therefore an action would lie.

Q. B. WATKINS AND ANOTHER V. FIGG, EXECUTOR.

Promissory note—Payable on demand—Memorandum on back of the note—Extending time for payment—Effect of—Statute of Limitations

A promissory note was given more than six years before action, with a memorandum indorsed on the back, by the payees, to the effect that they undertook, that no demand should be made for payment during the life of the maker. An action being brought, within six years after the death of the maker, against his executor, he pleaded the Statute of Limitations.

Held, that the plaintiff's were entitled to recover, if not upon the note itself, at all events, on a special court setting forth the effect of the arrangement.

EX. FLEMING V. FLEMING.

Devise—Latent ambiguity—Admissibility of parol evidence.

On a devise to the testator's son for life, and at his death to descend to the testator's grandson Henry, it appearing that there were two grandsons of that name, parol evidence was held admissable to show which of them the testator meant.

EX. WALKER V. OLDING.

Interpleader order—Sale under—Liability of execution creditor.

Where goods have been wrongfully seized under a *fi. fa.*, and are afterwards sold under an interpleader order, the execution creditor is not liable for any loss that may accrue by such sale, or by any proceedings subsequent to the interpleader order.

CHANCERY.

V. C. S. CLARKE v. MACINTOSH.
MACINTOSH v. CLARKE.

Vendor and purchaser—Misrepresentation—Caveat emptor.

If there be anything in the nature or circumstances of the representations made by a vendor, calculated to excite suspicion, or to require explanation or investigation, the purchaser is bound to be on his guard, and must bear the consequence of any negligence on his own part.

If the purchaser, not satisfied with the representation, proceeds to investigate and inquire for himself and has a fair opportunity of testing the accuracy of what the seller has represented, he must abide by the consequences C. advertised a brewery and leasehold property for sale, and M. with a view to purchasing the same, visited the brewery, saw the books, signed an agreement to purchase, accepted the title, and paid part of the purchase money. Subsequently, on taking further advice, he refused to complete on the ground of misrepresentation. Previously to the agreement, conflicting statements of the value had been made.

Held, that the statements were such as to put the the purchaser on inquiry, and specific performance was decreed.

V. C. W. RE ERA ASSURANCE SOCIETY.
WILLIAMS CASE.
ANCHOR COMPANY'S CASE.

Joint stock company—Amalgamation—Object and scope of company—Acquiescence—Creditors representative—Costs.

Although an amalgamation and purchase of the business and liabilities of one joint stock company by another established for similar purposes may be *ultra vires*, as a transaction not within the general scope and purpose of the business of such a company, and unauthorized by the deed of settlement; there may have been such an amount of subsequent acquiescence as to render the attempted amalgamation, though invalid in its inception, binding as between the two companies.

Observations upon the creditors representative and his costs of appearance.

M. R. CLARKE v. MALPAS.

Practice—Taxation—Costs between party and party—Expenses of witnesses summoned but not examined—Attendance of county solicitor—Shorthand-writer's notes—Enrolment of decree.

Where the costs of a suit were ordered to be paid by the defendant as between party and party, they were held to include the expenses incurred by the plaintiff, in bringing up the defendants witnesses to be cross-examined in court, when their attendance was reasonably necessary, notwithstanding they were not cross-examined, and also the expense of the shorthand-writer's notes of the evidence given in court, taken at the suggestion of the judge; but they were held not to include the expenses of the attendance in town of the county solicitor, for the purpose of superintending the cross-examination, in court, of the plaintiff's witnesses, nor the costs of the enrolment of the decree by the plaintiff.

L. C. THOMAS v. JONES.

Power—Survivorship—General equitable power—Appointment by married woman—General devise—Will act (1 Vic. ch. 26) ss. 8, 24, 27.

A general equitable power of appointment over real estate, was given to the survivor of A and B.

A. who was a married woman (with testamentary capacity under her settlement) by her will made in 1838, in the lifetime of B, who afterwards died in A's lifetime, made a general devise of her real estate.

Held, that the general devise by A. was to be taken as if executed immediately before her death, and was a good execution of the power given to the survivor of A and B.

The effect of the will's act ss. 8, 24, 27, on such a devise by a married woman, considered.

V. C. S. WARNER v. SMITH.

Partnership—Division of profits—Parol agreement.

Where two persons carrying on business together, and one carrying on business alone, agreed by parol to join in a particular adventure which was carried out by contracts, in which they were described as of their respective houses of business.

Held, that in the absence of any stipulations or evidence of dealing to the contrary, that the three individuals were entitled to participate equally in the profits.

V. C. W. KNIGHT v. CORY.

Practice—Security for costs.

A defendant before moving that the plaintiff be ordered to give security for costs, is bound to make inquiries of the plaintiff's solicitor, as to the plaintiff's address, a refusal by the solicitor to give such information, being a material reason for inducing the court to make the order.

An accidental mistake in the address given by the plaintiff, without any intention to mislead, will not entitle a defendant to security for costs, especially where the plaintiff has a fixed place of residence which might have been obtained from the solicitor upon inquiry.

M. R. LANCASTER v. ELCE.

Deed of arrangement with creditors—Admission by trustees of creditor to execute deed—Evidence before execution—Refusal to pay dividends after execution—Suit to compel payment—Costs.

Although trustees of a creditor's deed may refuse to allow any creditor to execute the deed until he has produced satisfactory evidence of the existence of his debt, yet, after they have permitted a creditor to execute, they cannot refuse to pay him his share in the dividends, except upon grounds such as fraud or forgery, which would be sufficient to justify them in coming to this court to have the name of such creditor expunged from the list of creditors executing the deed.

In a suit by a creditor who had been allowed to execute a creditor's deed against the trustees, to have the trusts of such deed carried out, the trustees having, as the court thought, without sufficient reason, refused to allow him to participate in the dividends declared in respect of the estate, the court made the trustees pay so much of the costs of the suit as had been occasioned by their having contested the plaintiff's right as a creditor.

L. C. TALBOT v. STANIFORTH.

Expectant heir—Contingent reversionary interest—Inadequate price.

This was an appeal from a decision of Vice-Chancellor Wood. The object of the suit was to set aside a sale by the plaintiff of his reversionary interest in certain real estates, on the ground of inadequacy of price. The Vice-Chancellor held that the sale must be set aside. The defendant, whose interest it was to uphold the sale, appealed.

V. C. K. BLAKE v. PETERS.

Will—Construction—Waste—Fully estated—Timber leaseholds—Dilapidations.

A., testator, by his will devises freehold, leasehold, and copyhold property to his sister E, absolutely, on condition that she dispose of it by deed, will, or otherwise, and a devise of the property in default of due disposition to J. W. P., with an executory devise over in a certain event, with a restriction upon cutting timber, except for necessary repairs. E., by her will, disposes of the property in question, with other property, and gives certain portions to J. W. P., with a like devise over, and a like restriction against cutting timber, and also a proviso that he shall keep the leasehold property fully estated with three lives. J. W. P. remains in possession for twenty-eight years, and commits various acts of waste by cutting large quantities of timber, suffering the buildings to become dilapidated, and omitting to renew leases. On bill filed by the person taking under the executory devise over,

Held, that J. W. P.'s estate was liable for the timber cut, beyond what was necessary for repairs, and also for omitting to renew the leases, but not for the permissive waste, and inquiries as to portions of the buildings alleged to have been taken away, and as to whether the property could be kept fully estated.

M. R. SHARP v. LEACH.

Voluntary settlement—Undue influence—Unmarried woman—Cancellation—Burden of proof—Sale of reversion—Inadequacy of price—Lapse of time—Relationship between the parties.

A voluntary settlement, executed by a lady under the influence of her brother, she having no independent professional advice, by which the property was settled upon herself for life, remainder to her children, and, in default of issue, upon her brother and his family, set aside at the instance of the lady and a husband with whom she afterwards intermarried.

The Court considered that independently of the relation in which the parties stood to each other, the contracts of the deed threw the burden of proof upon the defendant to prove its fairness.

A purchase by the other brother of a reversionary interest of his sister at an undervalue, set aside after the lapse of upwards of ten years, the Court considering that the lapse of time which would have been most material if the transaction had been among strangers, was not a bar to relief in consequence of the influence exercised by the brother over the sister, which did not cease till about two years before bill filed.

M. R. GOSLING v. GOSLING.

Will—Construction—Bequest of residue—Trust of reference—Remoteness—Executory trust.

The testator, by his will, directed certain estates to be purchased by his trustees, and the trusts thereof, in a certain event, were declared to lie to his nephew A. for life; remainder to his first and other sons in tail male; remainder to the younger brothers of such nephew successively for life; remainder to their respective first and other sons in tail male, remainder to the testator's brother for life; remainder to his first and other sons in tail male; remainders over.

The testator then bequeathed his residuary personal estate to his trustees, upon trust, to invest and hold the same upon the same trusts as were declared of the estates to be purchased, or as near thereto as the rules of law and equity would permit. Then followed the following proviso:—"Provided, nevertheless, and I hereby declare, that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years." There was no trust to invest and accumulate the intermediate income.

Held, that the proviso was an integral part of the gift of the residuary personal estate, and was not simply a superadded limitation, inconsistent with the previous absolute gift, and that as the trusts under it were not limited to take effect within twenty-one years after the testator's death, the whole gift was void.

A trust to invest property and hold the same upon the same trusts as are previously declared of other property directed to be purchased, so far as the rules of law and equity will permit, is not an executory trust.

V. C. K. ELLISON v. THOMAS.

Settlement—Construction—"Except an eldest or only son for the time being."

E. C., by two deeds of settlement of even date, limits lands to himself for life, with remainder to his eldest son, R. E. C., for life, with remainder to R. E. C.'s sons in tail male, with like limitations in succession to his second, third, and every other of his (E. C.'s) sons and their issue in tail male. There is then a limitation of the D. estate for 1,000 years to trustees to raise £13,000 for portions for younger children, the words being "upon trust for all and every the children of R. E. C. then born and hereafter to be born other and besides an eldest or only son, for the time being entitled under the indenture, &c., to the estates thereby settled in possession or remainder immediately expectant on the decease of E. C. and R. E. C." The eldest son of R. E. C. having died, his fifth son became his eldest son, and the question arose between the younger children and the representatives of the deceased eldest son of R. E. C. whether such representatives were excluded under the words of the clause.

Held, that words applied not to a single individual, but to more than one, and not to a single period, but to a succession of periods, and that therefore the representatives of the eldest son of R. E. C. were excluded.

REVIEWS.

A HANDY BOOK OF THE LAW OF DOWER, WITH STATUTES, FORMS, PLEADINGS, &c. By W. G. Draper, Barrister-at-Law. Toronto: W. C. Chewett & Co., King-street East.

The law of Dower is of more importance in Upper Canada than in England; for in England the husband may and generally does destroy his wife's right to dower by a declaration to that effect, with or without her concurrence. So far from this being the case in Upper Canada, the right of the widow to dower is strictly preserved, and the remedies to enforce it have of late been facilitated.

The want, therefore, of a handy book on the law of dower was a want which we could not expect to be supplied by a writer in the mother country. It has, however, been supplied, and well supplied, by Mr. Draper, in the small volume that is now before us.

The volume contains only 140 pages, and yet, so far as we can ascertain, omits nothing that is really pertinent to a work of the kind. The references to Upper Canadian statutes and Upper Canadian decisions are numerous. The work is in fact thoroughly Upper Canadian in its purpose, and should receive a thorough Upper Canadian support.

The main body of the work is divided into twelve chapters. These are headed "Dower," "Marriage," "Seisin," "Death of the husband," "Of what estate a woman is dowable," "How dower may be barred or defeated," "The measure of damages on dower," "Of assignment of dower," "Practice on Dower," "Costs." Then follow several useful Forms, Rules of Court, Statutes, and an article from this journal on the Act for the better Assignment of Dower. The whole is preceded by an ample and well arranged Index, and a Table of Cases. No less than 125 cases are noted.

We are much pleased with the practical style of the author, and we are no less pleased with the mechanical execution of the work by its publishers. The book itself is creditable to Canada, and we hope the day is near at hand when such works can be said in Canada to be not only honorable but profitable to the authors. The circulation hitherto of law books has been anything but encouraging. With the steady and continued increase of the number of the profession, there must be a corresponding increase in the number of those who purchase law books.

We do not imagine that the prefix of "handy" (so common of late) will give to a law book in Upper Canada any circulation beyond the limits of the profession. Attempts to convert law books into light literature for use on railways and steamboats, have not been successful. Those who want amusement consult books of a different class. Those who need information on questions of law, if not themselves lawyers, find it to their advantage to take the advice of those who are competent to give it.

We can safely recommend Mr. Draper's work on the law of dower to the patronage of the profession in Upper Canada. It is well written, well arranged, and well got up. The price is $3. We have tested the work, and can with confidence say that it is reliable. It is designed to supply a want long felt, and is equal to its design. We congratulate its author upon having so creditably acquitted

himself, and having produced a work that will prove of real service to the profession to which he belongs.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet-street.

The number for November is received. Its contents are, 1, "The Rights, Disabilities and Usages of the Ancient English Peasantry;" 2, "Indefeasibility of Title;" 3, "Criminal Procedure;" 4, "On the Economical effects of the Patent Laws;" 5, "On American Secession and State Rights;" 6, "Gifts in Equity;" 7, "International Law;" 8, "On Legal Procedure;" 9, "Bankrupt Law of Scotland;" 10, "Extract from Lord Brougham's Letter to the Earl of Radnor." The first is a continuation of a series of papers of much interest to the curious. The second deals with a subject of great advantage in theory, but most difficult in practice. The third advocates several reforms in the administration of criminal justice, including the appointment of county Crown attorneys—a step which we in Canada took in 1857, and which we have since had no cause to regret. The fourth is a valuable paper, read at Edinburgh on the 9th October last, before the National Association for the Promotion of Social Science, by W. Hawes. The fifth is a letter from Judge Redfield of the United States, combatting many arguments contained in a recent article of the Law Magazine in favor of the right of secession. The sixth is an elaborate and really valuable paper, on the subject of gifts in equity, or rather the application of the rule that equity will give no assistance to a volunteer in the case of an incomplete or imperfect gift. The seventh is a letter from the Hon. Wm. Beach Lawrence, of the United States, which was intended to be read at the meeting of the National Association for the Promotion of Social Science, in Edinburgh, but through some accident did not reach the hands of the Secretary till the meeting had closed. The eighth is a paper which was read before the Association by Robert Stuart, Esq., barrister-at-law. The ninth is a paper which was read before the same Association by James McClelland, Esq., President of the Institute of Accountants and Actuaries, in Scotland. The tenth is an extract from Lord Brougham's annual letter to the Earl of Radnor, wherein the veteran law reformer laments the death of Lord Lyndhurst, and shows to what a great degree he was indebted to the deceased for important law reforms that he carried. The number is replete with good reading from talented pens. We recommend all who take an interest in things beyond the mere routine of the profession, to become subscribers to this most useful and most able magazine.

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

The number for October is received. The titles of the different articles are sufficiently indicative of the contents These are, "The French Conquest of Mexico;" "Romala;" "Miracles;" "Gervinus on Shakspeare;" "The Treaty of Vienna;" "Wit and Humour;" "The Critical Character;" "Victor Hugo;" "Mackay's Tubingen School." We have read the paper on "Wit and Humour," and greatly admire the train of philosophic thought which pervades it. The lover of philosophy will also find much to admire in the article on "Critical Character."

THE EDINBURGH REVIEW. New York: Leonard, Scott & Co.

The number for October of this standard Review is also received. The contents are, "Queensland;" "Gregorovius-Mediœval Rome;" "Cadastral Survey of Great Britain;" "Macknight's Life of Bolenbroke;" "Austin on Jurisprudence;" "The Royal Academy;" "Chinchona Cultivation in India;" "Phillimore's Reign of George III.;" "Tara, a Mahratta Rule;" "The Colonial Episcopate." The latter covers ground recently occupied by us, when we discussed the validity of commissions appointing bishops in this colony. The writer points out the difference between the English Church in England and the English Church in the colonies. In England it is the church of the state, supported by the state; in the colonies it is a voluntary association of Christians of a particular denomination, having no greater legal rights than those enjoyed by other denominations. Indeed the writer goes farther than we conceived it necessary to go. He argues that the act of the Imperial Government in constituting bishoprics of the English Church in a colony, in no manner differs from the act of the Roman see in recently parcelling out England into territorial dioceses—an act which at the time excited much comment in the mother country. He shows, however, that English bishops in the colonies have no more coercive powers than Roman Catholic bishops in England, or Anglican bishops in Scotland; and the sooner the Church of England realizes its true position in the colonies, the better will its members work, and the better will it be supported.

THE LONDON QUARTERLY REVIEW. New York: Leonard, Scott & Co.

The number for October of this standard Review is also received. The first paper in it is a very learned and interesting essay on the Progress of Engineering Science. The second paper does honor to the memory of the talented but unfortunate Thomas Hood. It is said by the reviewer that in spite of poverty and pain, Hood shed on the world such a smile of fun and fancy as will be a merry memory forever. The third is a learned dissertation on the much vexed question of the antiquity of man, according to the evidences of geology. The remaining papers are headed "Co-operative Sciences;" "Japan;" "Anti-Papal Movement in Italy;" "Froud's Queen Elizabeth;" "The Church of England and her Bishops."

GODEY'S LADY'S BOOK.—We acknowledge the receipt of the December number of this popular magazine. It has now been in existence for more than thirty-three years, and during all that period has been under the control of the present publisher. His connection with the magazine has resulted in a yearly increase of subscribers, so that at present we believe it has the largest monthly list of any magazine published in the United States. The number now before us opens with a brilliant Fashion plate, containing seven figures, among which are a dress for a bride and dresses for bridesmaids. The steel engravings are, "The Daily Governess," "Telling Christmas Stories," "Juvenile Amusements" "Youth," and "Old Age." Besides these are "An Opera Hood," printed in colors, "A Skating Frame," and other things most suitable for the present season. The annual subscription for one copy is only $3, for two copies $5, and for three copies $7.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

THOMAS F. McLEAN, of the Town of Goderich, Esq., M.D., to be Associate Coroner for the United Counties of Huron and Bruce. (Gazetted Oct. 31, 1863.)

COUNTY CROWN ATTORNEY.

DONALD FRASER, of the Town of Perth, Esq., Barrister-at-Law, to be County Crown Attorney for the United Counties of Lanark and Renfrew, in the room of Daniel MacMartin, Esq., superseded. (Gazetted Oct. 31, 1863.)

NOTARIES PUBLIC.

WILLIAM HAMILTON JONES, of Prescott, Esq., Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted Oct. 31, 1863.)

TO CORRESPONDENTS.

"H."—"AN OLD SUBSCRIBER."—Under "General Correspondence."