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VOL. VII. TORONTO, NOVEMBER, 1861. No. 11.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

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REMITTANCES

W O, St Clements, $4. D G, London, $4. F E M, Frin, $4. J A P, Paris, $5

DEPARTMENT OF CROWN LANDS,

Quebec 31st October, 1861

NOTICE is hereby given that those lots in the township of Proton, in the County of Grey, U. C., remaining unoccupied and unimproved, the purchase of which shall not be completed within three months from the date hereof, will be resumed and again offered at public sale.

Occupants of lots must furnish evidence of their improvements to the Agent of the Department at Durham.

P. M. VANKOUGHNET,
Commissioner.

10—6 in.

CROWN LANDS DEPARTMENT,
Quebec, 2nd November, 1861.

NOTICE is hereby given, that persons who may have purchased (Crown or School) lands in the County of Bruce, in the Townships of Ashfield, Grey, Howick, Morris, Turnberry and Wawanosh, in the County of Huron; in the Townships of Elma and Wallace, in the County of Perth; in the Townships of Artemesia, Bentinck, Derby, Egermont, Glenelg, Holland, Melancthon (New Survey), Normanby, Osprey, Sullivan and Sydenham, in the County of Grey; in the Townships of Arthur and Minto, in the County of Wellington, U. C.; and have not complied with the condition of the sales, as regards settlement on the land, are required to complete their purchases forthwith, at the rate of 10s ($2) an acre, with interest thereon from the dates of the respective sales, and with the addition of 1s. 2d. (25 cents) an acre, so that Patents may be issued, when no adverse claims exist.

In default of payment before the FIRST of FEBRUARY next, the Lands will be resumed and offered at Public Sale.

Persons having made the necessary improvements are required to furnish the Agents of the Department with evidence thereof.

P. M. VANKOUGHNET,
10—6 in. *Commissioner.*

DEPARTMENT OF CROWN LANDS,
Quebec, 8th November, 1861.

NOTICE is hereby given that the undermentioned Crown Land Agencies in Upper Canada, will be closed on the FIRST of JANUARY next, after which date, parties having payments to make, or any business to transact connected with the Public Lands therein, must communicate direct with the Department.

AGENCY	AGENTS.
Stormont, Dundas and Glengary	S. HART,
Prescott and Russell	N STEWART,
Carleton	J. DURIE,
Lanark	G. KERR,
Leeds and Grenville	W. J. SCOTT,
Prince Edward	N BALLARD,
Hastings, (South part of)	F. MCANNANY,
Northumberland and Durham	W. WALLIS,
Peterborough, (South part of)	W. CRAWFORD,
Wentworth	T A. AMBRIDGE,
Lincoln, Haldimand and Welland	H. SMITH,
Norfolk	D CAMPBELL,
Oxford and Brant	J CARROLL,
Kent	R. MONCK,
Lambton	A. SCOTT,
Waterloo	H. S HUBER.

Parties desiring to claim through any of the above Local Agents should do so at once

ANDREW RUSSELL,
10—6 in *Assistant Commissioner.*

DEPARTMENT OF CROWN LANDS,
Quebec 18th October, 1861.

NOTICE is hereby given that parties having payments to make, or any business to transact connected with the Public Lands, in the counties of York, Ontario, Peel, Halton, Middlesex, Elgin and Essex, must communicate direct with the Department, the agencies for those Counties having been closed.

ANDREW RUSSELL,
10—6 in. Assist. Com.

WORKS BY R. A. HARRISON, Esq.

THE COMMON LAW PROCEDURE ACT OF 1856. The New Rules of Court, &c., with Notes of all decided cases. Price, $8 in parts, $9 Half Calf, $10 Full Calf.

THE COUNTY COURT RULES, with Notes Practical and Explanatory, $1 00.

THE MANUAL OF COSTS IN COUNTY COURTS, with Forms of Taxed Bills in Superior Courts, 50 cents.

THE MUNICIPAL MANUAL for Upper Canada, with Notes of Decided Cases, and a full Analytical Index. Price, $3 Cloth. $3 50 Half Calf

W. C CHEWETT & Co., *Publishers*, King St., Toronto.

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspayer in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. WM. B. LINDSAY, Clk. Assembly.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL.—This well conducted publication we are glad to learn, has proved eminently successful. Its contents must prove of great value to the profession in Canada, and will prove interesting in the United States.—*American Railway Review*, September 20th, 1860.

THE UPPER CANADA LAW JOURNAL.—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession, but also to Magistrates, Bailiffs, &c., and in fact every person who wishes to keep himself posted in law matters. It has been recommended not only by the highest legal authorities in this Province, but also in the United States and England. The present number is replete with useful information.—*Weekly Reporter*, Sept. 20th, 1860.

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 25th.*

THE UPPER CANADA LAW JOURNAL, for May. Messrs. Maclear & Co, King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well-written original articles on Municipal Law Reform; responsibilities and duties of School Trustees and Teachers; and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazette, May 10th*, 1859.

UPPER CANADA LAW JOURNAL.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs. Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 10th* 1859.

The Upper Canada Law Journal. Maclear & Co., Toronto. This well conducted publication, we are *glad* to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal.—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co., of Toronto, and edited by the talented Robert A. Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4.00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 19, 1859.

The Law Journal of Upper Canada for January. By Messrs. ARDAGH and HARRISON. Maclear & Co., Toronto, $4.00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co, King Street East, Toronto.

This is the first number of the Fifth Volume and the publishers announce that the terms on which the paper has been furnished to subscribers, will remain unchanged,—viz., $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province, so it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadain public.—*Thorold Gazette. January 27*, 1859.

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co, Toronto.—It is conducted by W. D. Ardagh, and R. A. Harrison, B. C. L., Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator*, October 14th, 1858.

LAW JOURNAL, for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford, it *should be taken*, however by every member of the Bar, in town as well every Magistrate and Municipal Officer. Nor would politicians find it unprofitable, to pursue its highly instructive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The publishers have our sincere thanks for the present number.—*Brant Herald*, Nov 10th, 1858.

The *Law Journal* is beautifully printed on excellent paper and indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas*

UPPER CANADA LAW JOURNAL, Maclear & Co, Toronto, January.—We have so frequently spoken in the highest terms of the merits of the above periodical, that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

THE UPPER CANADA LAW JOURNAL for March. By W. D. Ardagh and Robt. A. Harrison, Barristers at Law. Maclear & Co., Toronto. $4 a year cash.—Above we have joined together for a single notice, the most useful periodical that any country can produce, and happy are we to add, that it appears to be well and deservedly patronised. We have so repeatedly alluded to its merits, that the reader will readily excuse any longer make-mention.—*Whig, May. 18th* 1859.

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette.*

The August number of this sterling publication has been at hand several days. It opens with a well written original paper on "Law Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy:—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order, and will be found worth a careful persual. A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," is continued from the July number; it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects. All questions are answered by the Editors; and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to themselves, as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina v. Cummings," by Robert A. Harrison, Esq., decided in the Court of Error and Appeal, is very full, and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

THE UPPER CANADA LAW JOURNAL, &c.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (Vol 4) commencing with January last. Its pages have been looked over by us with much interest. It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importanec to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept. 4th*, 1858.

THE LAW JOURNAL, for February, has been lying on our table for some time. As usual, it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister.s office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs.—*Hope Guide, March 9th* 1859.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance, after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz: that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July* 7, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," are well worthy of a careful persual. This work should be found in the office of every merchant and trader in the Province, being in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator.*—*June* 8, 1858.

U. C. Law Journal, August, 1858. Toronto: Maclear & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Cobourg Star, August 11th*, 1858

UPPER CANADA LAW JOURNAL.—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student, and carefully read, and referred to by every intelligent Canadian who would become acquainted with the laws of his adopted country, and see how those laws are administered in her courts of Justice.—*Stratford Examiner, August 12th*, 1858

DIARY FOR NOVEMBER.

2. Saturday ..... Articles, &c, to be left with Secretary Law Society
3. SUNDAY ..... *23rd Sunday after Trinity.*
6. Tuesday ..... Chancery Examination Term. Goderich and Cornwall com.
8. Friday ..... Last day for setting down for hearing Chancery
10. SUNDAY ..... *24th Sunday after Trinity.*
11. Monday ..... Last day for notice of hearing Chancery.
13. Wednesday ..... Last day for service of Writ County Court.
17. SUNDAY ..... *25th Sunday after Trinity.*
18. Monday ..... MICHAELMAS Term beg. Chan. Hearing Term. com. Recorder's Court sits.
22. Friday ..... Paper Day, Q. B.
23. Saturday ..... Paper Day, C. P. Last day to declare County Court.
24. SUNDAY ..... *26th Sunday after Trinity.*
25. Monday ..... Paper Day, Q. B.
26. Tuesday ..... Paper Day, C. P.
27. Wednesday ..... Paper Day, Q. B.
28. Thursday ..... Paper Day, C. P.
30. Saturday ..... Michaelmas Term ends. Chancery Hear. Term ends. Clerks of Municipal Councils to return No. of resident Ratepayers to Receiver General.

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

NOVEMBER, 1861.

RIGHT OF BRITISH AUTHORS TO COPYRIGHTS IN CANADA.

The Imperial Legislature by the act 3 & 4 Vic., cap. 35, commonly called the Union Act, empowered Her Majesty the Queen, within the Province of Canada, by and with the advice of the Legislative Council and Assembly of the Province, to make laws for the peace, welfare, and good government of the Province—such laws not being repugnant "to any act of Parliament made or to be made, which does or shall by express enactment or by necessary intendment extend to the Provinces of Upper and Lower Canada, or to the Province of Canada" (sec. 3).

The Queen, by and with the advice of the Legislative Council and Assembly of the Province, on 18th September, 1841, made a law entitled, "An Act for the protection of Copyrights in this Province" (4 & 5 Vic., c. 61).

By section 2 of the act last mentioned, "any person or persons resident in the Province, who shall be the author of any book or books, &c., which may be now made or composed and not printed or published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, * * * any print or engraving, * * * shall have the sole right and liberty of printing, re-printing, publishing, and vending such book or books, &c., in whole or in part, for the term of twenty-one years from the time of recording the title thereof in the manner after mentioned."

By section 5 of the same act it is enacted, that "no person shall be entitled to the benefit of this act unless he shall, before publication, deposit a printed copy of the book or books, &c., in the office of the Rigistrar of the Province, which officer is hereby directed and required to record the same forthwith, in a book to be kept for that purpose," in a given form of words; and by section 6, that "no person shall be entitled to the benefit of the act, unless he shall give information of copyright being secured, by causing to be insertrd in the several copies of each and every edition published during the term secured, on the title page or page immediately following it if it be a book, the following words, "Entered according to act of the Provincial Legislature in the year ——, by A. B., in the office of the Rigistrar of the Province of Canada."

It is manifest upon a perusal of the act, that it was intended for the sole benefit of authors being residents of the Province; British and Foreign authors, so far as this act was concerned, were left without protection.

On 28th July, 1847, the 10 & 11 Vic, cap. 28, was passed by the Provincial Legislature. It was entitled, "An Act to extend the Provincial Copyright Act to persons *resident* in the United Kingdom *on certain conditions*," and enacted, that "for and notwithstanding any thing in the said Provincial Act contained, the provisions thereof shall be, and the same are hereby extended to any person or persons being British subjects, and residing in Great Britian or Ireland, as if such person or persons were residents in this Province. *Provided always*, that to entitle any such literary production or engraving, as in the said act mentioned, being the work of any such person or persons so residing in Great Britain or Ireland, to the protection of the said act, it *shall* be printed and published in this Province, and *shall*, in addition to the words directed to be inserted by the 6th section of the said Provincial Act, and immediately following thereafter, contain the name and place of abode or business in this Province, of the printer or printers and publisher or publishers of every such literary production or engraving."

So far, protection was given to British authors resident in Great Britian or Ireland; but the protection was only given upon certain specified conditions. Neglect to comply with these, was an answer to any claim of protection. The conditions were reasonable, viz, that no non resident, even though a British subject, should have copyright in this Province unless he printed *and* published his work in the Province, thereby giving some employment to the people of the Province, and in order to avoid mistake,

stated in a conspicous place the name and place of abode or business in the Province of the printer and publisher.

No difficulty could arise in the practical application of this act, were it not for the fact that five years previously to its passing, the Imperial authorities had passed an act with which it appears to be in conflict. We refer to the English Act 5 & 6 Vic., cap. 45, passed on 1st July, 1842. It enables British authors residing in England there to obtain copyright of their works, and enacts that "if any person shall, in *any part of the British dominions* after the passing of the act, print or cause to be printed either for sale or exportation, any book on which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, * * * such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in that part of the British dominions in which the offence shall be committed;" and by section 23 it further enacts, "that all copies of any book on which there shall be copyright, &c., and which shall have been unlawfully printed, &c., without the consent of the registered proprietor of such copyright, shall be deemed to be the property of the proprietor of such copyright," &c.

This act is not restricted to Great Britian. It is made expressly to extend "to the United Kingdom of Great Britain and Ireland, and to *every part* of the *British dominions*" (section 29). By section 2 it is expressly declared that the words "British dominions," shall be construed "to mean and include all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and *all the colonies, settlements, and possessions of the Crown*, which now are or may hereafter be acquired."

The Provincial Act 10 & 11 Vic, cap. 28, entitles no work of a British author resident in Great Britain to any protection in Canada, unless upon compliance with the terms and conditions mentioned in the act already noticed. Thus, so far as the Provincial Act is concerned, copyright in England is clearly not copyright in Canada. The act allows Canadians to print and publish the works of non-resident British subjects when not copyrighted in Canada, quite as much as the works of non-resident foreigners. The English Act makes such printing or publishing an offence for which the offender is liable to be punished by action at the suit of the English author, and forfeits the edition printed or published to the English author.

The Imperial, delegated to the colonial authorities powers of legislation, but these powers are not supreme. Power, as we have seen, was given to the Colonial Legislature to make laws for the peace, welfare, and good government of the Province—"such laws not being repugnant to any act of Parliament made or *to be made* (by the Imperial Legislature), which does or shall by express enactment or by necessary intendment extend to the Provinces of Upper and Lower Canada, or to the Province of Canada."

Two questions therefore arise. Does the English Act 5 & 6 Victoria, cap. 45, by express enactment or by necessary intendment extend to the Province of Canada? Is our 10 & 11 Vic., cap. 28, repugnant to the 5 & 6 Vic., cap. 45?

It is abundantly clear that as Canada was at the time of the passing of the 5 & 6 Vic., cap. 45, not merely a part of the British dominions but a British colony, Canada is bound by that act, and inasmuch as that act makes it an offence in the colonies to re-print or re-publish a book copyrighted in Great Britian or Ireland, it would seem the British copyright proprietor is entitled to the protection of that act, although he neglect to comply with the provisions of our 10 & 11 Vic., cap. 28. Some persons may read our 10 & 11 Vic, cap. 28, as being cumulative to the 5 & 6 Vic., cap. 45, instead of being repugnant to it. It is possible that the acts may be so read, but we do not clearly see our way to that conclusion.

REPORTS OF THE COURT OF ERROR AND APPEAL.

Several subscribers have urged upon us the necessity of regularly reporting in the columns of this journal the decisions of the highest court in Upper Canada. The expense of so doing would be great, but rather than continue to allow important decisions of that court to remain unpublished we would be inclined to undertake the burthen of publishing them ourselves. With that object in view we have caused inquiries to be made in the proper quarter, and learnt with much satisfaction that Mr. Alex. Grant, the Reporter of the Court of Chancery, is about to *commence a complete and regular series of Error and* Appeal cases, including all cases already decided and not as yet published. We hope that his enterprise will receive proper support. All are interested in the decisions of that court which sits in appeal on the decisions of the two Superior Courts of Common Law and the Court of Chancery.

SELECTIONS.

FICTITIOUS LEGAL CASES.

Courts of justice are established for the purpose of solving questions which actually and bonâ fide are brought before them for the purpose of obtaining a decision which will, whatever may be the result, unless reversed by the judgment of a higher tribunal, be binding upon the litigant parties. Courts of

justice are not bound to decide, and will not decide, merely fictitious cases; they will not permit the tricks of the stage to be played on the judicial forum. However ardent might be the desire of two ingenious conveyancers to have a knotty point of real property law decided, no Courts would entertain the question if they were aware that the actors in the proceedings were merely imaginary, the facts fictitious, and that the whole suit was taken, not from real life, but was a mere scene, got up to gratify the impertinence of learned curiosity.

Moreover although the facts of a case brought before the Court be true, the plaintiff must not appear in a fictitious character, for, when discovered, he will not be allowed to obtain that relief to which he might have been entitled had his character been real, and not assumed. To no class of suits, perhaps, do these remarks more forcibly apply than to those relating to public companies. In a proper case one shareholder is allowed to institute a suit on behalf of himself and the other shareholders of a company; but, ex necessitate, that constructive representation of one can only with propriety be allowed when the suit is intended to be bonâ fide for the benefit of those whom the plaintiff represents; otherwise nothing would be easier than for a person having a large stake in one company to obtain a small interest in another, and institute a suit ostensibly to obtain relief as a member of the latter company, when in reality it was intended merely to subserve the interests of its rival, and obtain for it indirectly, under a false character what such rival company could not obtain if it were to appear as plaintiff in its true colours. The mere fact that a person has a share in one company is not, of itself alone, enough to enable him to sustain a suit nominally on behalf of the other shareholders, when he in reality is acting for and on behalf of the interests of another company.

These principles have been clearly laid down and acted upon by the Lord Chancellor in the recent case of *Forrest* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (7 Jur., N. S., part 1, p. 887). There it appeared that the plaintiff, a Mr. Forrest, *suing on behalf of himself and the other shareholders*, instituted a suit against the defendants, the Manchester, Sheffield, and Lincolnshire Railway Company, to obtain an injunction against their employing certain steam-boats (which they were obliged to keep for the purposes of a ferry on the river Humber) in excursion trips down the river. The bill alleged not only that these excursions were ultra vires, but were also greatly prejudicial to a certain steam-packet company called "The Gainsborough United Steam-packet Company, Limited." of which the plaintiff was a large shareholder. The defendants submitted that the suit was not for the benefit of of the other shareholders of the company on whose behalf the plaintiff sued, but was instituted solely to promote and serve the interests of the steam-packet company, and that all the other shareholders of the defendant's company were opposed to the suit

The motives which actuated the plaintiff in filing the bill, which to a certain extent are frankly stated in the bill, appear in rather an amusing and somewhat complex form in his cross-examination. In the first place, he admitted that his interest in the packet company was much greater than his interest in the railway company. He admitted that the excursion traffic had been continued for eight or ten years. One objection he had to the excursion traffic was, that *the boats were running on Sundays which he disapproved of from a moral and religious feeling.* His *principal objection*, however, was to the injury done to the packet company, of which he was a director. *The directors of the packet company had "directed" the institution of the suit, and indemnified him against the costs.* Sir. J. Romilly M. R., dismissed the bill with costs, upon the ground that what had been done was within the scope and powers of the defendants. Upon an appeal to the Lord Chancellor, his Lordship, but on entirely different grounds to those upon which the Master of the Rolls founded his judgment, refused the application with costs. "I have nothing to do," said his Lordship, "with the motives of men suing in this court. If they come here in a bonâ fide character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into. But if a man comes here representing to me that he is a bonâ fide shareholder in a company, and that it is the bonâ fide suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin, and in its very birth and creation, the suit of another company, then, I repeat, that is an illusory proceeding, and ought not to be attended to by the Court. The well known words, the trite quotation, will occur to the minds of those who hear me—'Fabula non est judicium, in scenâ non in foro res agitur.' If the plaintiff be permitted to assume, merely for the purpose of coming into this court, the garb of a shareholder, but at the same time announces—'This suit is not directed to the purposes of that company; I have nothing in common with the shareholders of that company; it has not emanated from the wish of the shareholders; it does not emanate from me as a shareholder; it is not my act; I am directed to do it by another party and another body of men'—then, in point of fact, the suit is not the expression of his own will, nor is it the legitimate prosecution of his own interests or his own objects, but it is the prosecution of the interests and objects of persons who have no right whatever to invoke the interference of this Court. It is most desirable that suits in this court should really be that which they profess to be, *and whenever they are found to be illusory proceedings of the character I have described*, I hold it the bounden duty of the Court to treat them as a mockery, and an imposition on the Court, and to deal with them accordingly." We entirely agree with the principles laid down by the Lord Chancellor in this important judgment, and we think that much good will result from their being carried out on all occasions to their fullest extent. Their application may not be devoid of difficulties in many instances, because, in cases of large companies, where directors, and perhaps a large and influential body of their supporters, are doing all in their power to divert the capital of the company from its legitimate purposes, and to employ it in speculations which were never intended upon its formation, it is but just that individual shareholders should have perfect freedom of action, and should have power, even though possessing shares in a rival company, to come into a court of equity, and ask for an injunction to restrain the directors from such misemployment of the capital of the company; but if they are really only agents of another company, then the mere possession of shares in the company against which they seek relief should not give them a right to it.

The case before the Lord Chancellor, both upon the pleadings and on the cross-examination, was a very clear one. The plaintiff's interest in the rival company, from his holding a larger stake in it than than in the other, was evident. The suit was directed by the rival company, and the plaintiff was indemnified by them against costs, so that he could indulge in the luxury of litigation without dread of the usual and greatest drawback to its enjoyment. The principles laid down by the Lord Chancellor might, however, be well applied to cases where the facts against the plaintiff do not stand out in such bold relief.

Suppose, for instance, it appears that one company wishes to restrain another company from carrying on a business which it considers to be prejudicial to its own interests, and, not being able to do so directly, does so indirectly, by *instigating* a shareholder to take proceedings for that purpose; ought such a suit, according to the principles laid down by the Lord Chancellor, to be successful? In the case of *Colman* v. *The Eastern Counties Railway Company* (10 Beav. 1) this objection was taken to the plaintiff, but it was not successful; and Lord Langdale, M. R., held that it was no ground of personal exception to a shareholder coming forward as plaintiff in such a case, that "*he had been instigated to institute his suit by another*

company." With regard to that case, the Lord Chancellor, without certainly expressing any approval of it, distinguishes it from the case before him, observing, that if the proposition of Lord Langdale were limited to the extent to which the words in which it is expressed go, there might be no exception to that proposition; but undoubtedly he would not assent to it if carried one jot beyond those limits.

From these observations of the Lord Chancellor we hope to see the principle he has laid down in *Forrest* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* acted upon in the decisions of the Court of Chancery, as far and as extensively as they possibly can be, consistently with the right which individual members of a company have to protect their own interests by bonâ fide proceedings; and that companies, whether they are actuated by religious or commercial motives, or both of them, will be warned that they cannot, by assuming the garb of a shareholder of a rival company, or by employing him as their tool, attain those ends which they could not do in their real character.

The principle might also, we think, be more extensively acted upon by the Legislature than it has been, and that every means should be taken to prevent suits in courts of justice being commenced, except for the interests of those on whose account they are nominally instituted. Administration suits, for instance, in the Court of Chancery, have not always been, and are not always now, instituted either for the benefit of creditors or the estate to be administered. But perhaps the most iniquitous law proceedings ever tolerated by courts of justice, or borne for a long period by a patient people, are those in which *companies are wound up*. *Can no additional security* be imposed against such proceedings being wantonly undertaken and recklessly carried out? How often have they been commenced and carried on by the mere nominees of those who profit by them, ostensibly, indeed, for the payment of creditors but in reality for the creation of costs, the apparent movers in the proceedings being the mere puppets of those undertaking the profitable process of winding up the affairs of shareholders unfortunate in the object of their speculation, but doubly unfortunate in falling into the hands of the winding up fraternity.

A correct return of all the cases in which the operation of winding up companies has been performed, giving the names of the operators, the amount distributed, and the cost of distribution, with, perhaps, a few other details, would form a very instructive commentary upon the evils of allowing any person constructively to represent others, except in those cases where, to use the words of the Lord Chancellor, the suit is a bonâ fide one, faithfully, truthfully, and sincerely directed to the benefit and interest of the persons whom the party originating such proceedings claims a right to represent.—*Jurist.*

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 P.O

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 262.)

The power to hold a court is nothing but a delegation of an authority, and when the time and place for holding it is appointed, in the delegation thereof, the direction must of course be followed, or all acts not in accordance with the provision will be void.

In the old Court of Requests Act the days of sitting were fixed by statute. By the Act regulating the Division Courts, neither the times nor places of holding the courts are appointed. If no provision respecting sittings was contained in the Act the judges, by their authority as judges, would doubtless have the determining when and where courts were to be held, subject to the control of the superior courts of common law. But the Act expressly confers the necessary power, as will be seen.

The general provision as to the times when and the places where the courts are to be held is contained in sec. 6, which enacts as follows:—

A court shall be holden in each division *once in every two months*, or oftener, in the discretion of the senior or acting county judge; and the judge may appoint and from time to time alter the times and places within such divisions when and at which such courts shall be holden. Section 3 also provides, that there shall be a court in every city and county town; and section 7, before noticed, enables the Governor to make special order respecting the holding of certain courts where the amount of business in the division, or its peculiar situation, renders frequent courts unnecessary.

Where no order has been made under section 7 for holding the courts, the appointment of sittings or days when the courts in each judicial district are to be holden belongs to the judge, and are fixed at his discretion, subject to the direction (in sec. 6) that in each division a court shall be holden once in every two months. In like manner the judge has the sole power of appointing the places where the courts are to be held within each division.

The direction in sec. 6 calls for some observation, viz.: "A court shall be holden for each division once in every two months," that is to say, not in every three months, nor in every six months (quarter or half year), but one in every two months, or in every sixth of a year. The year is thus regarded as divided into six parts or periods of two months each; and at some convenient time in each of these periods a court is to be held, but not necessarily at regular intervals or a periodicity of two months fixed. This is the plain and ordinary sense of the words "once in every two months," i. e. calender months (Interpretation Act, sec. 13). Indeed it would not be possible to comply strictly with a provision to hold sittings at regular intervals and stated days, for the day might fall on a Sunday or legal holiday, and besides the judge is also sole judge of the local courts of record, the terms and periods of sitting of which are fixed by statute, and no arrangement could be made for so holding the Division Courts that would not conflict therewith. Therefore the necessity for leaving to the judge the power of appointing the sittings for such days in the

two months as will not conflict with his engagements in other courts of superior jurisdiction,—such days as will best square with local considerations and the public interests. In general the practice is so to arrange the sittings as to avoid as much as possible having them at the busy times of the year—seed-time and harvest—in country places.

A court may in certain cases be held on a day different from that appointed, and if the judge or acting judge does not arrive at the appointed hour parties should wait until eight o'clock in the afternoon of the same day, when an adjournment will be made by the clerk.

The 20th section of the Act provides as follows, viz.:—In case the judge or the acting judge, from illness or any casualty, does not arrive in time, or is not able to open the court on the day appointed for that purpose, the clerk or deputy clerk of the court shall, after eight o'clock in the afternoon, by proclamation adjourn the court to an earlier hour on the following day, and so from day to day adjourning over any Sunday or legal holiday until the judge or acting judge arrives to open the court, or until he receives other directions from the judge or acting judge.

The places where the Division Courts are to be held are appointed by the judge, and may by him be altered from time to time, but not, it is apprehended, while summonses are current for the attendance of parties at a particular place, unless indeed it becomes impossible to hold a court there. For in such case even where the place of holding the court is appointed by Act of Parliament the judge would have the power by implication of law to remove it, (3 Bulstr. 268,) and under the Division Court Act having himself the power of appointing, the judge it is apprehended would clearly have authority to alter or remove;—but in either case due notice should be given to the parties who are bound to attend the court, and the place should be within the limits of the particular division.

In acting under this clause the convenience of those having business in the court should be a chief consideration in determining the position and the centre of population, rather than the spot equally distant from the outside limits of a division, seems the most eligible place for holding the sittings.

If there be a town or village in the division it will in general be found the best place; if a city or county town lies therein the statute is imperative, and the court must be held there.

LAW OF EXEMPTION FROM SEIZURE.

The following communications, received from two attentive and well-informed correspondents—both clerks—speak for themselves.

We agree with one of our correspondents that, as respects the Division courts, the Legislature might very well have left the duty of certifying to the clerk who knows all about a suit from first to last. But we suppose that as the enactment is intended to apply to executions from *all* the courts, and as the clerks of the superior courts know next to nothing of the nature of the suits, the intervention of the judge was found desirable.

The judge merely acts upon the evidence of the fact, necessary to bring the case within the statute. This evidence may be his own actual judicial knowledge, from having tried the case, for instance—the original papers produced for his inspection—the certificate of the clerk—or the affidavit of the plaintiff.

In executions upon transcript of judgment, the judge of the Home county may certify upon his knowledge of facts, on the faith of which the judge of the foreign would certify upon the execution. But in these cases, the better mode seems to be an affidavit from the plaintiff or his agent. We continue to think that the certificate should be endorsed upon the execution, before it is placed in the bailiff's hands for execution.

To the Editors of the Law Journal.

GENTLEMEN,—In your October number you have noticed (page 262) "The Law of Exemption," and as you have asked to be informed what is the practice in other counties, under the act of last session, cap. 27, I write to explain the practice in this county. So soon as the act was officially known by the judge, he directed the clerks to endorse a certificate on the back of any execution, which was intended to be used under the provisions of the act, certifying that the debt was contracted before the 19th May, 1860; and upon the production of such an execution before him he would endorse the necessary certificate. In pursuance of this direction, I endorse *on every* execution I issue, on judgment for debt contracted before that date as follows:

"I certify, that the claim in this cause was upon a promissory note made by defendant, dated September 8th, 1858."

A. B. C., *Clerk.*

If anything shall arise by which the judge's certificate will be required, the bailiff can transmit the execution to the judge accompanied with his own or the application of the plaintiff, upon which the judge will act.

Yours truly, A CLERK.

To the Editors of the Law Journal.

GENTLEMEN,—In your last number I observe your very appropriate remarks respecting the Exemption Law as amended. You are perfectly correct in saying that it was a great injustice in making the act applicable to debts previously contracted. However, the Legislature of last session very wisely did away with the retrospective feature, which has enabled many plaintiffs in my court to collect judgments from debtors who were much more able to pay them than the unfortunate creditor was to lose.

I think it a useless feature in the amendment requiring the judge's certificate to the execution, as the clerk's certificate would have answered every purpose, and would have saved

much delay and trouble to the judge. The mode of getting the judge's certificate upon the executions in this county is, I think, as easy and correct a system as can be adopted, viz.; An execution creditor goes to the clerk and orders out the execution, and wants the judge's certificate endorsed thereon. The clerk turns to the suit, makes out the execution, and, if judgment were obtained since 19th May, 1860, and examines the original claim, which shows when the debt was contracted, takes the necessary postage from plaintiff, and transmits the execution by first mail to the judge, telling the judge that the debt for which the enclosed execution was issued was contracted before the 19th May, 1860. If the judgment was obtained before that time it is so stated in the body of the execution, and no certificate is required from the clerk, except that the judgment is not for tort, &c., which I think certainly the best evidence the judge can have necessary for his order, as the clerk cannot err as to the date of the contraction of the debt. Why not then allow the clerk's certificate upon the execution to answer every purpose, inasmuch as the judge has to be be guided by the clerk's certificate before he endorses the execution? My court is only 20 miles from the judge, with a a daily mail, and it takes till the third day after mailing the execution to the judge to get it back, with the judge's certificate ready for the bailiff; which delay often is to the predjudice of the execution creditor, as many persons have plenty of property one day, and two or three days afterwards have none.

It certainly cannot be argued that to simply allow the clerk's certificate upon the execution, would be placing too much power in their hands; if so, then it is equally wrong for a clerk to issue any process without an order from the judge. If a clerk would make a false statement upon the execution he would do so to the judge, which would not occur without some exposure. For instance: supposing a clerk misinform the judge, and procure his order, I ask, when the bailiff went to levy, if he (the debtor) would not know at once when the debt was contracted? and if he was imposed upon, would very soon go and see the judge to tell him that he had made a mistake in his certificate; and if correct, I fancy it would not be well for such clerk. And just the same would apply if clerks were empowered to make the certificate. If any clerk would certify upon an execution that a debt was contracted before the 19th May, 1860, and the bailiff sell under that execution, and it turns out that the debt was contracted since that date, I apprehend that the clerk and his sureties would be liable for damages, as on any other illegal process.

If any one will show me the use of imposing all this extra trouble upon the judge, then I will say it is a wise enactment.

The mode I have adopted on "transcripts and certificates" to other courts is, I require the plaintiff to make an affidavit that the "debt was, &c.," which I attach to the "transcript and certificate," requesting the clerk to whom I send it to forward said affidavit with his "execution on transcript" to the judge in his county, which I should think would be sufficient evidence for the judge to grant the certificate; which I think a much shorter process than for the clerk to mail it to the home judge for his certificate, who would have to remail it again to the foreign clerk, and for the foreign clerk to mail again to his judge, &c. Furthermore, a judge is not asked by the act to certify only *upon the execution*, and upon a transcript going to another county. I don't see how the judge of the county where the judgment was obtained could be called upon to make any certificate.

As you very kindly solicited remarks from correspondents on this subject, I have taken the liberty of sending you the foregoing for publication.

Yours, &c.,

CLERK 6TH DIV. COURT, Co. NORFOLK.

To the Editors of the Law Journal.

GENTLEMEN:—As your Journal is the only medium through which unfortunate country law practitioners can acquire any valuable information upon the practice of the Division Courts; and as you, hitherto, have always evinced a great readiness to devote time and space, for any thing pertaining to these Courts, I without any hesitation ask your opinion upon the *proper* practice in the following case:—

A has a claim against B for damages to the extent of $40, and also a claim against the same person for $100, for rent due on a lease. From his position he was obliged to sue on both claims. He brought his action for damages at one court, and at the following court sued for his rent. The Judge decided, that under the 59th clause, cap. 19, Con. Stat. U. C., the plaintiff (A) was barred from suing on his claim for rent, as he considered that the bringing of *two* actions was a dividing of the cause of action, within the meaning of this section, holding that the word "cause" *meant causes.*

Is it a dividing, where there are *two distinct causes of action?*

Yours, &c.,

Nov. 8th, 1861. ALPHA.

[The words "cause of action," as used in the section to which our correspondent refers, mean "cause of *one* action;" and no court, to our knowledge, has yet gone the length of saying that when two causes of action *may* be joined they *must* be joined. We refer to *Neale* v. *Ellis*, 1 D. & L. 163; *Brunskill* v. *Powell*, 19 & J. Ex. 362; *Grimsby* v. *Aykroyd*, 1 Ex. 407; *Wickham* v. *Lee*, 12 Q.B. 821; *Kempton* v. *Wiley*, 9 C. B. 719; *Bonsey* v. *Wordsworth*, 18 C. B. 525.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

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

IN THE MATTER OF THE JUDGE OF THE COUNTY COURT OF ELGIN.

Refusal of Judge to act—Application for mandamus—Interest of Judge and relationship to parties.

A garnishee summons having issued in a county court suit, one H. opposed it as assignee of the judgment debtor, and in answer to his claim an affidavit was filed from which it would appear that the judge was interested with H. in his claim. He then declined to act further in the matter, and after several subsequent meetings signed a memorandum, stating as an additional reason for refusing to proceed the fact that H. was his brother-in-law.

The court under these circumstances refused a mandamus to compel the judge to dispose of the case.

(Easter Term, 24 Vic., 1861.

In Hilary term last *Richards*, Q. C., obtained a rule *nisi* calling upon Mr. Hughes, as judge of the county court of the county of Elgin, to shew cause why a writ of mandamus should not issue commanding him to grant a summons as such judge to one John Allworth, in a suit in the said court wherein Allworth was plaintiff and one Wegg and others defendants, and one Patrick Burke was garnishee, and to proceed upon and dispose of the application according to the 289th and following sections of the Common Law Procedure Act.

During this term *John Wilson*, Q. C., shewed cause.

The facts of the case are fully stated in the judgments.

MCLEAN, J.—On this application affidavits have been filed with a view to inform the court of the precise state of the proceedings, and the cause of staying such proceedings in the county court of Elgin, and it is not difficult to perceive that much of the difficulty which has occurred has arisen from the terms on which the parties are with each other, and which it is much to be feared manifest themselves even in the ordinary proceedings of the court.

In this case an order was applied for to attach a debt due by one Patrick Burke to one Asa Howard, to answer on a judgment recovered by John Allworth against Asa Howard and two other parties. The usual attaching order was granted and served on Burke, the garnishee, and a summons calling on the garnishee to appear and shew cause why he should not pay over that debt, or so

much as was necessary to satisfy the judgment recovered by Allworth against Asa Howard and others. At the time appointed Burke, the garnishee, appeared before the judge of the county court in chambers, pursuant to the summons. He admitted that there was a debt of a certain amount to be paid by him to Asa Howard, but alleged that it was only payable by instalments, for payment of which the time had not arrived. At the said time Mr Edward Horton appeared before the judge, and claimed a right to be heard for the purpose of shewing that the debt could not be attached at the instance of Allworth, or any other execution creditor, on the ground that it had been assigned to him, Horton, by Howard, before the order to attach had been issued or served. The right of Mr. Horton to appear for such purpose was objected to by Mr. Abbott, attorney for Allworth, and by Mr. Stanton, who had several attaching orders for the purpose of attaching part of the same money in the hands of Burke.

The consideration of the application was postponed to give time to consider as to the objections urged to Mr. Horton having a right to be heard, and before the time appointed for proceeding with the hearing the objection was abandoned by Messrs. Abbott and Stanton; and then Mr. Horton produced an affidavit shewing that he had sold some lots of a property known as the Thompson farm to Howard; that Howard then agreed to hand him over the note of $500 which he held against Burke, of which Horton as his attorney was to collect $200 to pay himself for the lots, and the balance to be applied in some other suit in Horton's hands for collection: that relying on this arrangement made before Howard absconded, he, Horton, had procured conveyances to be made to one Thompson, to whom Howard was indebted, at the request of Howard, the purchaser of the lots, and that such arrrangement appeared in Howard's hand-writing entered in a book in his own possession, but found amongst his papers by his wife after he had absconded.

Mr. Abbott then, in reply to Mr. Horton's claim and affidavit, filed an affidavit of his own, stating that Asa Howard absconded from Canada some months previously: that a short time ago, and long after Howard absconded, Edward Horton, Esq., who claimed a portion of the money due by the garnishee, Burke, to Howard, and who has made an affidavit in the matter, told him, Abbott, that he did not hold any assignment of any portion of the moneys owing from the said Burke to the said Howard; that he, Abbott was informed and believed that the Thompson farm mentioned in the affidavit of the said Edward Horton, including the two town lots therein stated to have been sold by the said Edward Horton to the said Howard, was on the 21st day of March last the property of the said Edward Horton, Edward M. Farwood, William K. Kains, and David John Hughes, Esquire: that they were then, and had been for a long time, and still were the parties beneficially interested therein, and that he had good reason to believe that the name Horton & Co, in the memorandum referred to in the said affidavit of the said Edward Horton, meant the persons mentioned in the foregoing paragraph.

On that affidavit being read the judge objected to his name being made use of and mixed up in the matter, and asked Mr. Abbott whether he meant that he was interested in the application which Horton was making to prevent the order being made for paying over the money to Burke, and Mr. Abbot replied that he had made the affidavit to contradict the affidavit of Mr. Horton. Mr. Hughes then stated that if it was intended to be alleged that he was interested in the matter he could not proceed any further with it: that if he was interested he ought not to proceed with it, and if he was not that affidavit should be withdrawn; and he told Mr Abbott to enquire from his brother-in-law Mr. Kains: that he knew every thing about the purchase of the Thompson farm, and could give every information on the subject; and that he would adjourn the further hearing of the summons till he, Abbott, should have time to enquire on the subject of the Thompson farm, and ascertain as to the alleged interest of the parties therein.

The consideration of the application was further adjourned, and Mr. Abbott then offered another affidavit similar in all respects to the other, except that the name of Mr. Hughes was omitted, and the words "and another" inserted in its place. The judge was requested to proceed on that affidavit, but declined doing so, alleging that he could not proceed so long as the charge of interest remained directly or indirectly, and he handed back the papers which had been laid before him in support of or against the summons at the instance of Allworth. Subsequently an application was made to the judge to allow another barrister to dispose of the matter, but Mr. Ellis, who was then acting for Mr. Horton, would not consent to that course. Finding that they could not proceed to get an order for their clients to have the money in Burke's hands paid on the judgments recovered against Howard, Mr. Abbott and Mr. Stanton again applied to Mr. Hughes to proceed in adjudicating on the several summonses which were pending before him, and, as Mr. Hughes says, they did so in a menacing manner, stating that Mr. Hughes compliance *would save more troublesome proceedings*, while they allege that no threat of any kind was used by either of them, and that all that either of them did was to request Mr. Hughes to re-consider the proceedings.

Mr. Hughes than told the parties he could proceed no further under the circumstances, and he drew out or dictated a statement to the clerk of Mr. Abbott or Mr. Stanton referring to matters of a personal nature, and the unhappy difference existing between them; and then for the first time, as far as can be seen from the papers, objected to proceed on account of Mr. Edward Horton being connected with him by marriage, and Mr. Horton being personally interested in the result. In closing this paper Mr. Hughes makes a statement amounting to a species of irritating reply, which I think a sense of his own position ought to have prevented his making: "Having said this much I am now prepared to await the result of the troublesome proceedings with which the parties *yesterday thought proper to alarm me*, and which *I have no doubt, indeed I have too much reason to feel*, have *not been forborne or spared on my account*, or from any *apprehension that they might be troublesome* to me."

There are various other statements and accusations contained in the affidavit of the judge to compel whose action in a portion of his judicial duty a mandamus in this case has been applied for, and whatever may be the bitterness of feeling or the hostility existing towards him on the part of the practitioners making the application, there is too much reason to fear that there is not a better or more kindly disposition entertained towards them by him. But while I must regret the existence of such evident hostility between gentlemen whose professional duties must bring them very often together, and while I cannot but think that a proper and conciliatory spirit on either side would long since or might certainly long since have led to the removal of the obstacles which have caused a stay of proceedings undoubtedly injurious to the parties interested, it is necessary without further delay to decide whether on the affidavits before us a mandamus can properly be issued to compel the performance of those acts of duty which the parties desire to have performed by the judge of their county.

I am not surprised that upon the reading of Mr. Abbott's affidavit, stating who the parties were in whom the title of the Thompson farm was vested on a particular day, the judge should make the enquiry whether it was intended to impute to him an interest in the subject matter of Mr. Horton's claim to the money payable by Burke to Howard for certain lots of that farm sold by Horton to Howard, and afterwards conveyed by the proprietors to one Thompson to discharge a debt of Howard. The terms of that affidavit are such that it is difficult to imagine what other object could have been intended by it. The disavowal of that object, while Mr. Abbott declined to withdraw that portion of it, which, as it appears to me, was useless to his case, could scarcely remove the impression that such must have been its original intention, and while that continued to be the case, I cannot say that the judge acted improperly in forbearing to act in a matter in which a charge of personal interest might even seem to be fastened upon him. The title to the Thompson farm might be vested in him as one of four proprietors, and yet he might not be interested in the proceeds arising from the sale by the managing owner of two small lots worth only £50 together. If the parties were desirous to get the money they had in view for their clients on the attaching order they might surely have abandoned such an affidavit, but the pertinacity in adhering to it would seem to indicate an intention to compel the judge to abstain from adjudicating on the question on which their right to the money depended, or to compel him, if he did so adjudicate, to submit to the charge of acting in

his judicial capacity in a matter in which his personal interest was concerned.

Then as to the ground assigned at so very late a period, that a brother-in-law was personally interested in the result, and therefore Mr. Hughes could not further entertain the application pending before him, that must certainly be a sufficient reason for declining to act as a judge. Where any degree of relationship exists between a judge and a party personally interested in the litigation, the law and ordinary propriety will prevent the judge from acting judicially between the litigating parties, and had the reason been assigned in proper season, even those who desired to proceed with a view to have an order for the payment of money could not but have admitted its sufficiency, and would have proceeded by some other means to obtain their end.

As the matter now stands, I think it would be wrong to issue a mandamus to compel the judge on this occasion to proceed in a matter which a judge of one of the superior courts most certainly would not feel at liberty to entertain under the same circumstances. The parties may apply and remove their suits into one of the superior courts, and have the summons for the payment of the money by the garnishee to the persons claiming it on their executions decided by some judge not personally interested in the amount, and not connected with any one that is.

I think that the rule must be discharged with costs because long before the application for a mandamus was made the parties were aware that one of the reasons for declining to proceed was the near connexion of the judge with one of the parties interested in the questions to be decided on.

BURNS, J.—The purport of the affidavits upon which the rule was granted is as follows: on the 1st of September, 1860, an attaching order was made in the suit of *Allworth* v. *Wegg et al.*, attaching a debt said to be due by Patrick Burke to one of the defendants in the cause, and by summons to Burke he was called on to shew cause why he should not pay the debt, or a sufficient sum to pay Allworth's judgment. On the 9th of September, Burke appeared at the return of the summons, and admitted the debt. At the same time Mr. Edward Horton, an attorney, appeared before the judge on behalf of other parties who claimed a right to the debt so attached in preference to Allworth. The matter was adjourned. On the 17th of November the parties appeared again before the judge, and then Mr. Ellis, another attorney, appeared on behalf of Mr. Horton, and the Bank of the county of Elgin, Mr. Horton then claiming the amount due from Burke as assignee of the judgment debtor—the latter having absconded. The matter was again adjourned till the 24 of November, and then Mr. Abbott, the attorney for Allworth, produced an affidavit to answer Mr. Horton's affidavit, and among other things contained in it was a passage explaining how the judgment debtor became indebted to Mr. Horton; it being stated in Horton's affidavit, that the judgment debtor had bought two town lots on the Thompson farm, to pay for which the judgment debtor had assigned to him, Mr. Horton, the debt owing by Burke. Mr. Abbott stated in his affidavit he was informed and believed that the Thompson farm mentioned was on the 21st of March, 1860, the property of said Edward Horton, E. M. Yarwood, W. K. Kains, and Mr. Hughes (the judge). The judge, Mr. Hughes, declined to receive the affidavit on the ground of his name being mentioned in it, and the matter was then adjourned to the 4th of December. Mr. Abbott then proposed to put in and use another affidavit, which stated that the Thompson farm was the property of "Horton, Yarwood, Kains, and another," but the judge declined to receive that also, and dismissed the parties, and marked the summonses thus, "I decline to act further in this matter," and signed the same. Ineffectual attempts were made to induce Mr. Hughes to take up the consideration of the matter, and he finally made a memorandum with respect to it in these words;

"January 30th.—In the absence of the other parties, Mr. Stanton and Mr. Abbott applied this day for a re-consideration of my declining to act further in the matter of these summonses, *in order to save more troublesome proceedings*. I stated I would hear what they they had to say on the subject to-morrow, when the other parties are present.

"January 31, 1861.—Mr. Abbott and Mr. Warren appeared for the several plaintiffs, and Mr. Ellis for the Bank of the County of Elgin and Mr. Edward Horton. Mr. Abbott suggested that if I would appoint some other barrister to dispose of the cases they would be able to proceed, but as matters now stand the plaintiffs found it difficult, and were debarred of their remedy. I asked Mr. Ellis if he was willing that some other barrister should act in my stead, which he said he was unwilling to accede to, whereupon I read the following:

"I now definitely decline to interfere further in the consideration of these summonses, first, for the reasons already given by me when I last declined to do so, and because it has been suggested by the attorneys for these plaintiffs that I am personally interested; and for the following: because, secondly, I find Mr. Edward Horton, who is connected with me by marriage, and whose interest Mr. Stanton and Mr. Abbott have complained that I favor, is personally interested in the result: thirdly, and lastly, I place the case of *Foot* v. *Howard*, in which Mr. Stanton is the plaintiff's attorney, on the same footing as *Allworth* v. *Howard*, and *Lock* v. *Howard*, because Mr. Stanton placed the management of *Foot* v. *Howard* in the hands of Mr. Abbott, who placed them all on the same footing when he read the affidavit which suggested my interest in the matter, and Mr. Stanton being present sat by giving suggestions, prompting Mr. Abbott, and no doubt acting in consert in all he said and did; and it is too much for me to be expected to believe what is alleged now, that he did not so act in concert. He should have foreseen the effect of Mr. Abbott's course before he allowed himself to be committed to him.

"Having said this much, I am now prepared to await the result of the *troublesome proceedings* with which the parties yesterday thought proper to attempt to alarm me, and which I have no doubt indeed I have too much reason to feel, have not been foreborne or spared on my account, or from any apprehension that they might be '*troublesome*' to me.

"The attorneys acting for these plaintiffs voluntarily placed themselves in the present attitude towards myself, and however much it may be a subject of regret, I can only say it has been none of my seeking, and that if these plaintiffs suffer it is by the action of their own attorneys in making improper suggestions; for I cannot allow these gentlemen one day to say that I universally show partiality to another attorney, and allow myself on another day to be called upon to decide a case in which a relative by marriage is interested, and in the result of which they suggest I am myself personally interested, so as to open a door to further complaints in the event of an adverse decision, that I favoured that relation, or attorney, or my own interest. I conceive I have no right to be called upon to decide any case in which I am not free to act with all proper discretion, and to give a decision as law, justice and right may dictate, regardless of the feelings, opinions, to interest of any one, or in which my motives might be open to question, or my interfering obnoxious to censure.

"If I am wrong in these views the parties have their remedy, but feeling strongly as I do upon the impropriety of my acting otherwise, I must leave these matters as they stood when I before declined to act further in them."

On shewing cause several affidavits were filed.

The facts before stated are not denied or varied, but what took place at the different meetings is given more fully. Mr. Hughes states that it was not the use of his name in the affidavit which was produced at the meeting of the 24th of November that he objected to, nor did he object to Mr. Abbott using the other affidavit omitting his name. He says he asked Mr. Abbott what it was that was intended by the affidavits, and the reply was, that it was only intended to contradict Mr. Horton. The judge then said, "Do you intend to state that I am interested? If you do, I cannot go further in the matter;" or, "Do you think I am interested?" And to this it is stated Mr. Abbott would give no decided answer. The judge then further added, "If I am interested, as is suggested by the affidavit, then I have no right to decide this case; if I am not interested, the affidavit should be withdrawn; but with that affidavit before me, implying that I am interested, I will go no further. If you desire it I will enlarge the summons to give you an opportunity to inform yourself. Your brother-in-law, Mr. Kains, is acquainted with the whole business, and can give you every information." All this is confirmed by the affidavit of Mr. Parke, a solicitor, not having any thing to do with any of the

business connected with the suits mentioned, but who happened to be in attendance before the judge on the 24th of November, upon another matter. Mr. Parke adds in his affidavit, that the judge seemed to treat the matter as if the affidavit stated an interest in him, and when the question was put to Mr. Abbott, he neither admitted nor denied, nor did he explain what he meant by it; and Mr. Parke says he was under the impression at the time that if Mr. Abbott had disclaimed any desire to impute interest to the judge, or had withdrawn or explained the affidavit, the judge would have gone on with the matter; but it was enlarged that in the meantime Mr. Abbott might satisfy himself with regard to the judge's interest. What took place on the 4th of December, the judge says was this: when Mr. Abbott was proceeding to argue the matter, the judge stopped him until the question of the judge's interest was settled, and it was disclaimed that he had any interest; whereupon Mr. Abbott said he had not read his affidavit to shew that the judge had any interest, but to contradict Horton's affidavit, and as the judge did not like his name used he would make use of the other affidavit in which his name was omitted; and to this the judge remarked that it was only dealing with the shadow and not the substance; what was required was a disclaimer of imputing to the judge that he was interested in the matter he was called upon to adjudicate about. Mr. Abbott making no offer as the judge says, to retract the suggestion that he was interested, he declined to act further, and so endorsed the summons.

The point about the interest of the judge appears to be this from the affidavits: the judge and Mr. Horton, and the other two named gentlemen, joined together in the purchase of what is called the Thompson farm, for the purpose of laying it out into village lots and selling them. Mr. Horton had the management of selling the lots and accounting to the others for their different shares of the purchase money. He sold two of the lots on his own account to the judgment debtor, and there were also other accounts between them, and to settle up all the matters between them, and pay for the lots, as Horton contends, the judgment debtor assigned to him the debt due by Burke, the garnishee. The portion of the purchase money of the two lots which would be going to Kains, one of the proprietors, has been settled for with him by Horton, but he has not yet settled with the judge or Mr. Yarwood; and as Mr. Horton states, he will either owe each of them a share, or they will be entitled to take an equal portion of the land, and sell it for their own benefit. Evidently the question ultimately to be decided will be whether the assignment of the debt due from the garnishee to the judgment debtor was made, and whether done legally to vest the right in Horton of calling upon the garnishee to pay him. The judge and Mr. Horton are brothers-in-law.

There are many things in the affidavits on both sides which shew that the members of the profession at St. Thomas are not only not on good terms with each other, but are also at variance with the judge. Such feelings never conduce to the ends of justice, but on the contrary often thwart it, and the clients are made the victims in the way of unnecessary delays in the transaction of their business, and their pockets suffer by both unnecessary and very often unjust expenses, incurred in proceedings having no other end to serve than mere gratification either of pride, envy, or malice. I do not intend to say who are most to blame, or who are most in the wrong on this occasion, but it is evident, I think, if the feelings of the parties beyond the mere question in the case itself had not crept into it, there surely ought to have been no difficulty in the disposition of the matter upon the summons. The question was whether Burke should pay Allworth, the judgment creditor, or pay Horton. As we see it explained, whether Mr. Horton would have to pay the judge a proportion of the purchase money of the two lots, or whether the judge might sell some of the land and pay himself, was not of the slightest consequence. Why, therefore, Mr. Abbott should have inserted in his affidavit any account of the manner in which the title of the property was held it is difficult to perceive, unless his object was to annoy and unnecessarily mix up the judge's name in the matter. He could have obtained information upon the point, if he had thought it necessary that he should have the matter explained. The judge was quite right in putting the question to Mr. Abbott, and insisting upon an answer, as to whether he intended charging him with having an interest in the matter to be disposed of; but then, on the other hand, if the judge had been, perhaps, a little less punctilious, and at once have stated what now appears, and particularly if Mr. Horton had stated in his affidavit what the meaning of the memorandum of Horton & Co was, and had stated what appears in his affidavit now, that he sold the lots on his own account, we might have been spared the necessity of deciding an unnecessary dispute. Then again, had Mr. Ellis, who represented Mr. Horton and the bank, accepted the offer made by the other side of withdrawing the consideration of the matter from the judge, and left it to a barrister, the question might have been decided.

The question of the judge's interest being removed out of the way, as it is by the affidavit, a more serious one remains, and that is the relationship existing between the judge and Mr. Horton. The interest of Mr. Horton was not that of an attorney in his client's business, and to which the judge alludes in his memorandum of the 31st January that he has been accused of favouring by his partiality; but his interest was direct, which was to be determined, that is, whether he had or not a valid assignment of the debt due by Burke. The judge might well be excused from being called on to determine that question if he could avoid it.

The case of *Becquet v. Lempriere* (1 Knapp, P. C. C 376) throws a great deal of light upon the point. Among the questions brought up on appeal from the Royal Court of Jersey, one was whether one of the jurats who sat in the court below was incapacitated. He had been objected to on the ground that his first wife was aunt to the respondent Lempriere. It appeared that the wife had died without children many years before, and that the jurat had married two other wives afterwards, by whom he had had children. The court held him incapacitated according to the law of Jersey.

In the argument of that case, it was mentioned that Mr. Justice Lawrence on one occasion refused to try a case in which one of his relatives was concerned, though he was not incapacitated by law to try it.

The question, therefore, now is, whether we should issue a mandamus to compel Mr. Hughes to proceed in a matter in which his brother-in-law has a direct interest. The writ of mandamus is not a writ grantable of right, but is a prerogative writ, and the absence or want of a specific legal remedy gives the court jurisdiction to dispense it; and if there be a legal remedy, either at common law or by act of parliament, it will be refused.

Now, when we look at the constitution of the county court, we see that the crown may appoint two persons, one to be the judge of the county court, and the other to be the junior judge. Of course it is provided that both shall reside within the county, and shall not practise the profession. No doubt the Crown would not desire to incumber the fee fund with the appointment of an additional judge to a county where perhaps the fund will scarcely pay the salary of one judge, but I am not sure this court should be governed by such a consideration of the subject. It so happens that the county of Elgin has but one judge, but if another were appointed, all difficulty in the way of the parties proceeding would at once be removed.

Then again, the 8th section of the act, ch. 15, of the Consolidated Acts, U. C., provides for the appointment of a deputy judge for temporary purposes, allowing him to practise his profession in the meantime. The question upon this section is whether such an appointment must necessarily be confined to the case of death, illness, or unavoidable absence, or the absence on leave of the judge. It may be that it would be held to be so confined, and yet it may be urged that the provision should be construed liberally in favour of justice, and to enable the Crown to appoint so that justice may be done.

Whatever may be thought about either of these courses to be attempted, I feel clear there is another course open to the plaintiff in the suit in the court below, and that is to apply to the superior court for a writ of *certiorari* upon the facts, to remove the record and proceedings to the superior court, in order that justice may be done. Mr. Tidd in his treatise on Practice, (vol. 1, 9th ed., p 400,) says: "And in cases of absolute necessity, as where the inferior court refuses to award execution, the court above will grant a *certiorari* after judgment, for the sake of doing justice between the parties," and for this he quotes 1 Lil. P. R. 252, 253.

In *Arthur* v *The Commissioners of Sewers in Yorkshire*, (8 Mod. 331) the court uses this language: "It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior judicature."

With regard to Mr. Hughes' reason for not proceeding to adjudicate upon the summons by reason of his relationship to Mr. Horton, we can scarcely be expected to compel him by mandamus to do that which I have shewn a judge in England declined to do, and which has also occurred more than once in this province. Anciently a judge could not try a civil or criminal case in the county in which he was born or inhabited, so jealously guarded was the administration of justice, but that was remedied by statute.

Rule discharged.

VANEVERY ET AL. v. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Agreement—Construction—Liabilities for moneys received by purser, and for goods supplied to steamer.

Defendants entered into an agreement to advance money to the plaintiffs to enable them to procure a steamer which was to run in connection with defendants' railway, and guaranteed them against loss up to a specified sum. The earnings of the vessel were to be shared as provided for; and it was agreed that defendants should name and pay a person to act as purser, and keep an accurate account of the receipts and expenditure. He was to be subject to their authority, but to mess with the captain at the plaintiffs' expense.

Held, that the defendants were not liable to account to the plaintiffs for moneys received by him and not paid over.

The plaintiffs also claimed for goods supplied to another steamer, but it was shewn that this vessel was chartered to one W., who ran her on his own account, of which the plaintiffs had notice. *Held*, that they could not recover.

Assumpsit on the common counts. Pleas, never indebted, payment, and set-off.

At the trial, at Goderich, before Draper, C. J., after the plaintiffs had closed their case and the defendants had examined a witness, the plaintiffs agreed to take a non-suit, with leave to move the court to enter a verdict for them for the three first items of their account, No. 1, for $39.85c., No. 2, for $11.37c, and No. 3, for $28, amounting together to $79.22c.; and that the affidavits of J. K. Gooding and J. L. McCormick might be read by the court, in order to decide as a jury would decide on the evidence therein contained whether the plaintiffs were entitled to such verdict, and to add to that the further sum of $193.64c, if the evidence on the judge's notes would sustain such verdict, and the plaintiffs were in law entitled to recover; defendants to be at liberty to file the charter party of the steamer *Troy*.

J. Wilson, Q. C., obtained a rule calling on the defendants to shew cause why the nonsuit entered should not be set aside, and a verdict entered for the plaintiff for $79.22c., and $193.64c., or for either or both sums, or any part of either, pursuant to leave reserved at the trial, if the court should be of opinion that the plaintiffs were entitled to recover on the evidence, and on affidavits to be filed of one Gooding on the part of the plaintiffs, and an affidavit to be filed by the defendants if they should choose to do so.

E. B. Wood, for the defendants, shewed cause against the plaintiff's rule, and filed, pursuant to leave reserved, the charter party of the steamer *Troy*, which had been run in connection with the defendants' railway, for supplies for which steamer part of the plaintiff's cause of action against defendants was, the boat being owned by them.

During Easter Term, *J. Wilson, Q. C.*, supported the rule.

Though leave was reserved to the plaintiffs to file affidavits from Gooding and McCormick none were filed, and the plaintiffs' right to recover rested on the evidence received at the trial, which is fully stated in the judgments.

MCLEAN, J.—It appears that in the year 1859, the defendants being anxious to have a steamboat communication opened from Goderich to East Saginaw, in the state of Michigan, so that it might be in connection with their railway, and establish a route for the transport of goods and passengers from Buffalo to Saginaw, entered into an agreement with the plaintiffs to induce them to purchase a boat to be run by them on the proposed route, with certain stipulations as to the part to be performed by each for the mutual advantage of both parties. The defendants agreed to advance $5000 to the plaintiffs to enable them to procure a sufficient boat to be placed on the communication, and mutual stipulations were entered into as to the amount to be charged for freight and passengers, and for the payment by one to the other of a portion of the moneys received according to the services rendered by either. For the purpose of keeping an accurate account of the expenses of the boat, and of the moneys received on board of her, it was agreed that the defendants might name a person to act as purser on board, and to be entitled to mess on board with the captain; his wages, however, to be borne by the defendants. He was to be subject to the authority of the defendants, but to do the usual duties of a purser on board.

Under that agreement, bearing date 29th of June, 1859, the plaintiffs procured and placed upon the route the steamer *Kaloolah*, and one J. L. McCormick was placed on board as purser by the defendants, for the purpose of keeping the accounts of the boat and doing any other duty otherwise usually devolving on a person in that situation. The three first items in the plaintiffs' account, for which leave was reserved to the plaintiffs to move to have a verdict entered, were for moneys alleged to have been received by McCormick while he was purser on board of the boat and not paid over to the plaintiffs, and the only evidence of the receipt of such moneys consisted of receipts signed by McCormick.

The defendants objected that they were not liable for any moneys received by McCormick; that though they nominated him as purser, and paid his wages on board of the boat, he was only placed there as a person in whom they had confidence to keep the accounts and to discharge the general duties of purser for the plaintiffs, so that at proper periods there might be no difficulty in settling the accounts according to the stipulations of the agreement as to the running of the boat.

There was a further objection, that McCormick had nothing whatever to do as purser in receiving freights or other moneys elsewhere than on the boat, and that the moneys for which the receipts were given appeared to have been received from a Mr. Gooding, the agent of the steamer at Saginaw, for the purpose of being transmitted to the plaintiffs, except to the amount of $11.37 freight on goods sent by railway and steamer from Buffalo to Saginaw, of which amount $5.25 was freight on the railway.

The through manifest of railway and steamer charges, amounting to $11.37, receipted by McCormick on the 12th of October, 1859, was produced, and the witness, Jonathan Black, the plaintiffs' book-keeper, proved the signature of McCormick to the receipt, and also to a receipt on a similar manifest dated 5th of October, 1859, the freight on which amounted to $39.85. He produced the ledger kept by McCormick as purser on board of the boat. By that the two first items, $39.85, and $11.37, appeared to be entered as due to the *Kaloolah*, and in another entry McCormick charged the plaintiffs with $28 as paid to them on account of freight. The receipt the witness says purposes to represent the $28 to be money received from Gooding on account of produce shipped by the plaintiffs to Gooding on consignment. The two first items are charged to Cooding in the ledger as unpaid.

On cross-examination the witness Black stated that he was employed at the wharf at Goderich, and Gooding on the American side. If goods were consigned to Gooding he had to collect the freights: Gooding acted as agent for the steamer at Saginaw. The first item was for freight on goods consigned to Copland & Co., at Saginaw, the second item was for freight under similar circumstances, $11 37, but the witness never knew of McCormick collecting freights at Saginaw except in these two instances.

There was nothing to show any liability on the part of the defendants for moneys received by McCormick in his capacity of purser of the plaintiffs' boat. He was not there as the servant of the defendants exclusively, though they paid him and he was placed there at their instance. He was performing a duty for the plaintiffs in fact, and all that was required of him by the defendants was an accurate account of moneys received and expended by the boat, as the defendants had by their agreement covenanted to guarantee the plaintiffs against loss by their enterprise in running the boat. If it had been intended that the defendants were to be responsible for McCormick, there would no doubt have been some

stipulation to that effect in the agreement between the parties, but that such was not the case is manifest from the fact that on the 14th of February, 1860, a settlement of accounts between the plaintiffs and defendants took place at Brantford, in which nothing whatever was said of the items claimed on account of McCormick, and a balance was then struck by which the plaintiffs became indebted to defendants in the sum of $3,799.55. That sum, according to the evidence of defendants' secretary, Mr. McLean, was paid to him, and he gave a receipt for the amount. In the plaintiffs' account on which that settlement took place were two charges which were again brought forward in the particulars in this suit, $80, one-half of J. K. Gooding's salary as agent for the steamer *Kaloolah*, and $20, one-half of his travelling expenses, but these items were then deducted from the amount of the plaintiffs' accounts, and they paid the full balance remaining after such deduction. No further evidence has been given in reference to these items, and they must be taken to be abandoned.

The residue of the plaintiffs' account was for articles furnished to the steamer *Troy*, belonging to the plaintiffs, while running on the same route as the *Kaloolah* in connection with the defendants' railway. To that portion of the demand the defendants object, on the ground that the steamer *Troy* during the whole period was chartered to one Henry Whittaker, who ran her exclusively on his own account. It was proved that the *Troy* was registered in Buffalo in the name of Mr. William McLean, secretary to the company: that during July, 1859, that boat was run under charter by Captain Whittaker on his own account; and Mr. Pell, the general agent of the defendants, proved that on the morning the *Troy* arrived at Goderich he told the plaintiffs that she was run by Whittaker on his own account, and that the defendants were not at all responsible. This witness stated expressly that he had himself told the plaintif Rumball of that fact, and that the plaintiffs knew the conditions on which the boat was run, and that the account for goods furnished to her was, for the first time, sent into the defendants a month or six weeks before the trial; that a person of the name of Hirst was put on board of the *Troy* by the defendants, for express purpose of making it known that Whittaker, the captain, had no right to charge the defendants by his contract, and that it was in reference to the law of the United States especially that Hirst was charged with the duty, to avoid a lien attaching on the boat by Whittaker's contracts.

The charter party made to Harvey Whittaker, bearing date 23rd June, 1859, was not produced on the trial, but it has since been produced pursuant to leave reserved, and shews conclusively that Whittaker was to run the boat wholly on his own account, and bound to return her free from any charges on the expiration of his term. On the whole case as it now appears, I do not see that the plaintiffs have established any grounds for disturbing the nonsuit, and the rule must therefore be discharged with costs.

BURNS, J.—The charter party between R. S. Carter, the registered owner of the steamer *Troy*, and one Harvey Whittaker, shews that the steamer was leased to Whittaker for the year 1859, to run from Goderich to Green Bay in the state of Wisconsin, in the United States, and to run in connection with the Buffalo and Lake Huron Railway, charging a specific fare from Buffalo to the different ports on Green Bay, which was to be divided between the railway company and the boat in proportions mentioned in a schedule. The charter party provides that Whittaker will run the steamer at his own cost, expense, and charges, and furnish and supply her with all necessary outfittings requisite. It contains a provision that Whittaker will, in all cases, in his own individual name and on his own responsibility, and not in the name or on the credit of the boat, make all purchases. Various other stipulations are put in for the purpose of guarding against the effect of the laws of the United States with regard to lien on the vessel for supplies or necessaries furnished to her. In the present case the plaintiffs furnished provisions and wood in Goderich. The law of England is that the mere fact of one standing as the registered owner is not sufficient to shew that he is liable for the price of stores furnished to the vessel; but in this case it is not shewn that the defendants were the registered owners; at the utmost it was stated by parol evidence that another person was the registered owner in Cleveland, for the benefit of, or as a trustee for, the defendants. Besides this, however, it was proved at the trial that the plaintiffs were informed, before any part of the account they seek to recover was incurred, that the steamer had been leased to Whittaker, and that the railway company would not be answerable for supplies furnished to her. Under these circumstances there is no question the plaintiffs cannot recover against the defendants for any part of the charges made in respect to the steamer *Troy*.

The claim in respect of the *Kaloolah* arises in this way: the plaintiffs and the defendants on the 29th of June, 1859, entered into an agreement by which the plaintiffs were to buy or charter a steamer, and run her twice a week from Goderich to East Saginaw during the season of 1859, and the defendants were to guarantee the expenses of the boat to the extent of $100 per round trip. The boat was run in connection with the railway, and each party were to be entitled to receive and should receive from the charges for freight and passengers which should be carried by the said boat to Goderich, and thence eastward by the railway, or by the said railway to Goderich, and thence by the boat northward, according to rates in a schedule annexed. And it was provided that the settlement for the season should be in this manner: that the defendants should be debited with $200 per week during the season, and then that if the aggregate earnings during the whole season did not amount to the total sum thus guarranteed that the defendants should pay the deficiency.

Then comes the provision upon which the question turns with respect to the $78.22, which is this: "The company shall have power to place on board the said boat, during all the time aforesaid, a purser, who shall have the usual powers and shall discharge the usual duties of a purser on board vessels, and shall keep an account of the receipts and expenditure of the said boat, and be subject to the authority of the said company. The wages of the said purser shall be paid by the said company, but he shall, mess on board with the captain of the said boat, and at his table, at the cost of the said Vanevery and Rumball."

It was proved that the purser had received the $78.22 for freight, which it was said he had not accounted for to the plaintiffs, though he had accounted for every thing else. It was proved that on the 14th of January, 1860, the plaintiffs and defendants settled their accounts for the season of 1859, and the plaintiffs paid to the defendants the balance due them of $3,799.55, and then made no claim whatever for any sums received by the purser and not accounted for, and no claim was made until the bringing of this action. The question now is whose clerk or agent the purser was during the time he was on board in the character of purser. The plaintiffs contended that he was the clerk of the defendants? and that they should be answerable for the $78.22. On the other hand, the defendants contended they only reserved to themselves the power of appointment of the purser, and paid his salary, in order that they might have a guarantee that they were properly dealt by in the account of the receipts and earning of the steamer, and that he was under the authority of the capain, and subject to the plaintiffs keeping him or not, and accountable to the plaintiffs.

I certainly take the same view in that respect as seems to have struck the learned Chief Justice at the trial by his directing a nonsuit. The vessel belonged to the plaintiffs, and the freight would be the property of the owners for the time being. They alone could collect it or sue for it if necessary; the defendants could do neither; and although the defendants could under the power reserved to them appoint a receiver, and though the defendants were to pay him for so doing, yet his accountability would be to the true owners, who in this case were undoubtedly the plaintiffs. It is clear they must have so understood the purser's position, for he accounted for all with the exception of this sum to them, and they have settled with the defendants upon that basis. It is not, perhaps, unlikely, if we had the purser's statement, that it would turn out that even that sum was accounted for. The account which he was to keep was not only of the receipts but of the expenditure of the vessel, and it was not pretended that any other than the plaintiffs themselves to expend any thing, though undoubtedly the defendants were interested in knowing that a correct account of the expenditure was kept.

I think the plaintiffs' rule should be discharged.

The Chief Justice having been absent during the argument gave no judgment.

Rule discharged

IN THE MATTER OF CHARLES WIDDER AND THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Consol. Stats. C., ch 66, sec. 5—Construction of—Lands injuriously affected—Right to compensation.

One W. owned land upon the navigable river Maitland extending to high water mark The Buffalo and Lake Huron Railway Company constructed their road upon the river not touching his land, but connected with the banks above and below it, thus shutting him out from the river except across the railway

Held, that this land was not "injuriously affected," so as to entitle him to compensation under the Railway Act, sec. 5

Quære, whether the statute applies in any case where the land itself is not injured bodily, though the owner may sustain damage by its depreciation in value or otherwise.

Quære, also, whether the power given to this company by their special act, 19 Vic ch. 21, sec. 46, is controlled by secs. 136 and 138 of the Railway Act, notwithstanding the provisions in sec. 139.

C. Robinson obtained a rule *nisi* on the Buffalo and Lake Huron Railway Company to shew cause why a *mandamus* should not issue commanding them to serve a notice upon Charles Widder, Esquire, containing a description of the powers intended to be exercised by them with regard to his land described in the affidavit filed, a declaration of their readiness to pay some certain sum as compensation for damages likely to arise to the said land from the exercise of their powers, and the name of an arbitrator to be appointed on their behalf if such offer be not accepted; and to proceed to make compensation to the said Widder for the damage to the said land, injuriously affected by the exercise of the said powers in the affidavit set forth, and to determine the amount of such compensation in the manner provided by "The Railway Act"

It was admitted that the Railway Company had been required to appoint an arbitrator, and to have the damages ascertained, as the applicant desired, and that they refused, because they denied the right of the applicant to any such compensation as he was seeking to obtain.

Mr. Widder made an affidavit that he was the owner of certain lands which he specified, and which were near the mouth of the river Maitland, lying along the bank of that river, and bounded by the river on the north, and that the land was conveyed to him by the Canada Company in the year 1852: that the Buffalo and Lake Huron Railway had nearly completed a line of crib work upon the river, rising about four feet above the surface of the river, and extending along the whole front of his land, and connected with the bank of the river above and below his land, the effect of which was to shut out all access from his land to the river, except across the said crib work: that he was informed by the engineer of the company in charge of the works that they intended to lay down the track of their railway parallel to the line of crib work, between it and his land, and to fill up with earth the space between the crib work and his land: that the river Maitland is navigable from its mouth, where it enters into Lake Huron, up to and above his land: that before the erection of the said work he had laid out his land into lots, which he believed would have been valuable and saleable as water lots, having a frontage upon the river, but that such value, and all prospect of selling the lots, was wholly destroyed by the works of the company.

He shewed that in September, 1860, he notified the company that he intended to claim compensation, and requested them to state whether they were prepared to settle the same in the usual way, and that he received for answer that the railway works were being constructed on the company's property, and that they could not understand why any notice relating thereto should be given to him.

A sketch was appended to his affidavit shewing the situation of his land in relation to the river and to the railway.

E. B. Wood shewed cause

On the part of the railway company, it was shewn that by letters patent dated the 28th of July, 1835, the Crown deeded for 21 years to the Canada Company (with other property) the water lots in the river Maitland, extending from Lake Huron up the said river to a distance considerably beyond the land of Mr. Widder, with such conditions contained in it as shewed that the government treated the river in that part of it as navigable water, and provided for protecting the general privileges of the public in it.

And an affidavit was filed, made by the engineer of this railway company, and referring to a plan shewing the position of the railway track. This affidavit stated that the company, by deed of purchase from the Canada Company, dated the 14th of June, 1859, became the owners of the harbour at Goderich, and of the bed and soil of the river Maitland, and of the islands therein, below, and adjacent to, and along, and opposite to, and above Mr. Widder's lands: that Mr. Widder's deed limited his lands on the north by the high water mark of the river Maitland, expressly excluding him from all special right in the river and its waters: that the railway and work did not touch or encroach on the lands of Mr. Widder, but were entirely north of them: that the top of the bank on which his house stood was on an average 120 feet high, ascending from the river at an angle of 30 degrees, and was so rugged and steep that it could not be ascended except by persons on foot, and even so with difficulty.

E. B. Wood, for the Railway company, cited Angell on Watercourses, 10, 17, 51, 535; *Carroll* v. *The Great Western Railway Co.*, 14 U. C. Q B 614; *Wright* v. *Howard*, 1 Sim. St. 190: *Child* v. *Starr et al*, 4 Hill 369; *Gould* v. *The Hudson River R. R. Co*, 12 Barb 616, 622; Shelford on Railways 428; *Wilkes* v. *Gzowski et al.*, 13 U. C. Q. B. 312; *Small* v. *The Grand Trunk Railway Co*, 15 U. C. Q B. 283; *Wilkes* v. *The Hungerford Market Company*, 2 Bing. N C. 287; *Snure* v. *The Great Western Railway Co.*, 13 U. C. Q. B. 376; *Wismer* v. *The Great Western Railway Co*, 1b 383; *Day* v. *Gand Trunk Railway Co.*, 5 U. C. C. P. 420.

C. Robinson, contra, cited *East and West India Docks and Birmingham Junction R. W. Co.* v. *Gattke*, 3 McN. & G. 155; *Glover* v. *North Staffordshire R. W. Co.*, 20 L. J. Q. B. 376; *Regina* v. *Eastern Counties Railway Co.*, 2 Q. B. 347; *Bell.* v. *Hull and Selby Railway Co.*, 6 M. & W. 700; *Rose* v. *Groves et al*, 5 M. & G. 613; Addison on Torts 104; Woolrich on Waters 204.

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

The first question is whether it is clear that the proprietor Mr. Charles Widder, can claim compensation for the injury which he complains of.

The Buffalo and Lake Huron Railway Company is incorporated under the statute 19 Vic., ch. 21. By the 33rd section of that act they are placed under the operation of the Railway Clauses Consolidation Act, at that time 14 & 15 Vic., ch. 51, now ch. 66 of the consolidated Statutes of Canada; and by section 36 of 19 Vic., ch. 21, they had power given to them to construct the work which gives rise to this question; that is, to continue their railway "to any point on the river Maitland, or to the waters of Lake Huron, at or near the town of Goderich."

Whether such power is to be considered as controlled by the 136th and 138th sections of the Railway Act, ch. 66, Consol. Stats. C., notwithstanding what is provided by the 139 section, it may be material to consider, because if the company had not authority to construct their railway where they have constructed it they would be simply trespassing, and we should have no authority to deal with them or with this application as if they had proceeded under the powers of the Railway Act. We assume at present that they had legal power given to them to do what they have done.

Then by section five of the Railway Act, it is provided that "for the value of lands taken and for all damages to *lands injuriously affected by the construction of the railway in the exercise of the powers by this* or the special act, or any act incorporated therewith, vested in the company, compensation shall be made to the owners and occupiers of, and to all other persons interested in, any lands so taken or injuriously affected." And by the next section it is enacted that unless otherwise specially provided by that act or the special act, the amount of such compensation shall be ascertained and determined in the matter provided by that act, which is by arbitration.

"Damages *to lands* injuriously affected by the construction of the railway," &c., is the language of our statute. Does that include a claim like the present, where the *land* of the applicant *is not injuriously affected*, but where it is correct rather to say that the enjoyment of the land is rendered less valuable, or convenient, or agreeable, by something rightfully done outside of it? There is no damage here done to the land. The allegation is rather that the owner of this land sustains damage as owner by something rightfully done on adjoining land, which makes no change upon the land itself, on the surface or otherwise.

The language of the English statute on which the case of *The Queen* v. *The Eastern Counties Railway Co*, 2 Q. B. 347, 2 R. W. Cas. 736 was decided is very different. It provides (secs. 9 and 28 and several other clauses) for compensation to the owners of lands "for all damages *by them sustained*" in or by reason of the execution of the powers granted by the act.

It is material to consider the following parts of our Railway Act, namely, sections 4, 5, 6, sec. 7, sub-sec. 3. sec, 9, sub-secs. 3, 5, sec. 11 throughout, secs. 138-9.

We perceive nothing in them which seems to do away with the effect of that distinction between *lands* being *injuriously affected* by the railway, and persons sustaining damage from the construction of the railway.

The proprietor in this case has a right to go to the high-water mark of the river Maitland. The defendants' works are placed in the water of the river. The bed of the river for all that appears belongs to the Crown, and if any person by direction or authority of the Crown had for any purpose erected a wall along the bank of the river, or put up any work on the edge of the river and extending only towards and in the water, would each of the proprietors along the bank, and having no right in the soil beyond the edge of the water, have had a right to bring a civil action against the person who did it; or would he have a right to complain of any other injury than that as one of her Majesty's subjects he was excluded from access to the river from his land? And if he could for this common injury bring an action instead of relying upon his remedy by indictment, would his ground of complaint be that his lands were injuriously affected, or that he as owner of the land had suffered damage from the loss of a convenience or privilege of using the river which lay outside of his lands?

In *Day* v. *The Grand Trunk Railway Company*, (5 U. C. C.P. 420,) the Court of Common Pleas seem in principle to have decided this question against the claim of the proprietor to recompence.

So far as we have been able since the argument to investigate the very important principles involved in this application, we are not convinced that this applicant has a claim to compensation, but the question is a general one of much consequence to be clearly set at rest, and we have no objection to grant a rule for a mandamus *nisi*, as was done in the case of *The Queen* v. *The Eastern Counties Railway Co.*, 2 Q. B. 347, 2 R. W. Cas. 736; in order that the question may be decided in such a manner upon record as will allow of an appeal.

The applicant will consider whether it is worth his while to incur the expense of such a proceeding, while we do not at present incline to accede to his view of his rights, but the contrary.

COMMON PLEAS.

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

DANIEL HAIGHT v. EDWARD HOWARD.

Sale of Goods—Statute of Frauds—Principal and Agent.

1. A contract for the sale of goods void by the Statute of Frauds, is no contract in law, and it is immaterial whether a party who makes such a contract either does so in his own behalf or in behalf of another
2. Subsequent acts, such as a delivery and acceptance of part of the goods make the contract good
3. On, but not before the happening of these acts, either party who is contracting for a principal, must disclose the fact, or he himself held liable to fulfil the contract.
4. Therefore, where a person enters into a verbal contract for the purchase of goods, without at the time disclosing that he is acting for another, but before part delivery, or part payment, discloses his principal, he is not personally liable to the vender of the goods.

(Trinity Term, 1861.)

This was an appeal from the County Court of the United Counties of Frontenac, Lennox and Addington.

The declaration was on the common counts for money paid by defendant to plaintiff for goods bought and sold by plaintiff to defendant—goods sold and delivered by plaintiff to defendant—work done and materials provided by plaintiff for defendant at his request—money lent by plaintiff to defendant—money paid by plaintiff for defendant at his request—money received by defendant for use of plaintiff—interest upon, and forbearance at interest by plaintiff to defendant at defendant's request—of money owing from defendant to plaintiff—money found to be due from defendant to plaintiff on accounts stated between them.

The pleas were—1st. Never indebted. 2nd. Payment before action 3rd. That before action defendant satisfied and discharged plaintiff's claim by delivering to him goods. 4th. Set off.

The case was tried at the last March sittings of the county court.

The following witnesses were examined on behalf of the plaintiff:

William Butler—I was working with the plaintiff in September last, in a field; defendant came up to where we were; he said to plaintiff you have got some peas, do you want to sell them, or are you going to sell them; plaintiff said I want to sell the peas; defendant asked what was the price of them, and plaintiff said three shillings a bushel; defendant said I will take them; he asked how much peas he would have; plaintiff said about 300 bushels; plaintiff asked defendant if he was buying them for German; defendant said no; he said I want 300 bushels for my own pigs and horses; he said I have no order to buy peas for German not yet a while; plaintiff said he would bring him a load that night; defendant said his men were busy and he had no place then to put them in; defendant said so soon as I am ready you may bring them and your money will be ready so soon as I have room for the peas. After the peas had been delivered, I heard another conversation between plaintiff and defendant; plaintiff asked defendant if he wanted him to fulfil his contract for the 300 bushels of peas; defendant said no; defendant said no, I am not buying the peas for myself; this was after the peas was delivered; defendant said he had enough peas for 3s.

The conversation in the field took place in September; I heard nothing about barley; he said it was a pity to have all that straw wasted; I do not know German; I heard his name mentioned; I am sure Howard said he was buying for himself; plaintiff said he had rising on 300 bushels of peas; defendant said if plaintiff had 300 bushels he would give 3s. a bushel for them; he said he would give 3s. a bushel for 300 bushels if he had them; plaintiff drew all the peas over to Howard's; I think there were 300 bushels in the field; I think so by guess-work; defendant said he did not want any more peas; at this time he made mention of no name.

Elias Clapp—I reside in South Fredericksburgh; the defendant carries the mail and keeps a great number of horses; I had no conversation with him about 20th September last about peas; I asked him if he was buying peas, he said he was; I asked him if he purchased Daniel Haight's peas; he said that he bought Daniel Haight's peas, 300 bushels, at 3s. a bushel; defendant said he had some rye, and was going to sell it and feed the peas; he said he paid Haight $25; peas fell in price afterwards; in October they went down to 50 cents a bushel; I sold mine for 50 cents a bushel.

Peter D. Davis—I know defendant; he told me several times that he purchased peas from Haight, at 3s. a bushel; he said they were in the field cleaning them up when they were purchased; he said they were beautiful peas; he said if he bought them too high he would crack them and feed them for his cattle. In November I heard him say that he paid Haight $25 on the peas; he wanted plaintiff to sell the peas to somebody else to cover the 6d. on the bushel, peas in the meantime having fallen in price 6d. a bushel, defendant said he had used some of the peas for his pigs; they are stored in defendants store now. In the last conversation I had with defendant he said he bought the peas for German; he admitted he had the peas in his store and he would pay plaintiff $25 if he would take the peas, namely, the 250 bushels he delivered to defendant; I paid wharfage to Howard for peas that I sold to Mr. Sills.

Henry Lapoint—I drew some of the peas; I drew the second load; defendant told me that the plaintiff drew the first load; my load weighed 40 bushels and 46 pounds. In November defendant said I do not want them, but he took them after being angry some; plaintiff said he did not know anything about German; plaintiff said he thought he would have over 250 bushels; defendant said that is plenty, it is more than I ought to have at that price; defendant said to plaintiff that Sills was giving 50 cents a bushels and why not sell them to him for that amount, as with the $25 he already got it would be equal to 3s.; plaintiff said he sold them once and that was enough; Howard put a poor mouth on him and spoke about German; Haight said he would go over

to Alison's wharf and see Sills, that he would continue to draw the peas, and if Sills would come and take them on Thursday or Friday so that he would get his money, he said I will let Sills have them, but if not I will hold you to your bargain. It was at the request of Howard this was done. Defendant told me in September that he was out at Haight's and bought his peas, and that they were a fine lot; defendant said he bought them too dear, but if German would not take them he would feed them; he told me he used some of the first load; defendant said he did not want the peas there as Haight would be dunning him for the money; when I was drawing the peas he talked as though the peas had been purchased for German; he said he had done enough for German for nothing; German lives in Marysburgh, across from Howard, in Prince Edward's County.

Thomas Carnham—I was at Howard's in the middle of November, 1860, when the last load of peas was delivered; plaintiff came for the key of the storehouse; defendant looked round and said he would get his man at the storehouse; plaintiff said I have done drawing; defendant asked how many bushels there were; plaintiff said there was something about 250 bushels, something over 250 bushels, a bushel or two, it was a little over 250 bushels at any rate; defendant said that is pretty well.

The following witnesses were examined on behalf of the defendant:

George German—I live in Marysburgh; I rented a store in Fredericksburgh from the defendant in August last until the spring of 1861, for the storage of grain; I was purchasing grain; authorised the defendant to purchase for me; I authorised him to engage grain for me; about the 1st of September last I was at defendant's, *he took a sample of peas from his pocket; he said* he purchased 300 bushels of that sample for me from Haight, at 60 cents; it was between the 1st and 10th September; I said very well; I assumed the payment of the $25; I did not say to Carnahan that I was buying peas; I have not failed; I had trouble with the Company I was purchasing for.

William Lapoint—I live in Fredericksburgh; I was present at a conversation between plaintiff and defendant, at defendant's house, about the last of October or 1st of November; my brother delivered a load of peas; plaintiff came up; they began to talk about German; defendant said German had not furnished him with money to pay for the peas, that he had bought the peas for German; he would advise Haight to keep the $25, and sell the peas to whom he had a mind to, that the plaintiff would have no storage or wharfage to pay; defendant told him to take the key and put the peas in the storehouse, and sell them to whom he had a mind to; plaintiff did not say that he would or would not; something was said about Sills buying the peas at fifty cents at Oliphant's wharf; *defendant said nothing the one way or the other*; defendant said that he would not be responsible for any of the peas; plaintiff said that he did not know anything of German, he would look to the plaintiff for the price of the peas.

Donavan Sills—I was purchasing wheat at Alison's wharf about the 10th November, 1860, in Adolphustown; plaintiff came to me there; he told me he was in some difficulty about peas he delivered at Howard's, that there was some difficulty between Howard, Eccles and German, and that the plaintiff wanted to make a payment that week to one Thompson; he said he had a lot of peas, partly at home and partly at Howard's, and asked me if I would take them, and how much I would give for them; I told him I would take them if he thought I could get enough to make a cargo, then I said I thought I would take them; he told me afterwards he would not give me the peas as he intended to look to Howard for them, it made no difference, I got a cargo without them; I paid him nothing; he did not tell me he was selling them for Howard; I thought Haight intended to give me the peas; he told me that there was difficulty with German, and that he was afraid that he would not get his money.

William Gower—I was present when defendant told plaintiff that he had $25 of German's money, and that the plaintiff might have it; I did not see the money paid; I heard plaintiff ask defendant if German was over; plaintiff said that he wished defendant would go and see him, or send him his money, or words to that effect; I was at the police station-house since I arrived in Kingston.

William Jones—I was present at a conversation between plaintiff and defendant, at Howard's, about the peas, in the latter end of November last; defendant told plaintiff and his man to draw for German when the vessel arrived; I lived with Howard for three years.

The learned judge told the jury that the defendant was personally liable if he made the agreement for the purchase of the peas in his own name, without telling the plaintiff at the time of the sale that he was purchasing as an agent; that if the defendant entered into the agreement in his own name for the purchase of the peas, making himself personally responsible at the time he could not afterwards divest himself from the responsibility, by shewing that he was acting as agent for an undisclosed principal.

T. Parke, counsel for the defendant, took exception to the charge, contending that the judge should have told the jury that the defendant was not personally liable if his principal was disclosed or known to the plaintiff, and credit given to him before the acceptance or receipt of any part of the peas or part payment thereof.

Verdict for the plaintiff for $129 80.

During last April term of the county court, *Parke* obtained a rule *nisi* to set the verdict aside, on the ground of misdirection, as above stated.

The rule was argued during the same term. *Parke*, for the the rule; *J. A. Henderson, contra.*

MACKENZIE, J. Co. C., delivered judgment. — In Story's able and intelligent work on Agency, at page 269, (a work which is received in the English courts, as well as in the American courts, as authority) I find it laid down as law that, "A person contracting as agent will be personally responsible where, at the time of making the contract, does not disclose the fact of his agency, but he treats with the other party as being himself the principal; for in such a case it follows irresistably that credit is given to him on account of the contract. Thus a factor or broker or other agent buying goods in his own name for his principal, will be responsible to the seller thereof, in every case where is agency is not disclosed; but we are not therefore to infer that the principal may not also, when he is afterwards discovered, be liable for the price of the same goods; for in many cases of the sort the principal and agent may both be severally liable upon the same contract."

In Chitty on Contracts, at page 226, it is said, "Upon the principle that the contract of an agent is the contract of the principal, an agent is not liable upon an agreement which he makes in his representative character, provided he do not personally contract or expressly pledge his own credit by concealing his principal or otherwise."

In Paley on Agency, 372, it is stated, "that in all cases where a factor delivers goods as his own, and conceals his principal, he is is to be taken to all intents as the principal. This notification of the principal must be at the time of the contract: it is not sufficient to discharge the agent to make it afterwards."

Lord Ellenborough, C. J., was of opinion, in *Morgan* v. *Corden*, that a defendant was liable — the principal not having been disclosed at the time of the contract; and no subsequent act being done to shew that the plaintiff waived his liability to the defendant.

In Broom's Com., page 545, I find it laid down as law that "Where an agent contracts for the purchase of goods as principal, he, by so doing, incurs a personal liability:" and at page 547, "If an agent makes an oral contract in his own name, the principal may sue as such or be sued upon it; for it is a general rule that whenever an express contract is made an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made."

In the case of *Jones* v *Littledale*, Lord Denham, in delivering the judgment of the court, lays down this as a general proposition of law, "That if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of contract, relieve himself from responsibility."

I would also refer to the cases of *Higgins* v. *Senior*, 8 M. & W. 834; *Greene* v. *Kopke*, 18 C. B. 549; *Reid* v. *McChesney*, 8 U. C. C. P. R. 50.

The case of *McGee* v. *Atkinson*, 2 M. & W. 440, is almost in point. In principle it differs in nothing from the present case. The present defendant made a contract, in his his own name, with the plaintiff for the purchase of peas as principal, and when asked if he was purchasing for German, answered, No; that he wanted 300 bushels of peas for his own pigs and horses The defendant became personally responsible to the plaintiff at the time he entered into the contract with him in his own name, and he cannot, according to the authorities I have cited, be allowed to relieve himself from that responsibility by subsequently shewing that he was acting as an agent.

By looking at the case of *Higgins* v. *Senior*, it will be seen that the point taken by the defendant upon the Statute of Frauds is not tenable. The delivery of the peas, which was made in pursuance of the verbal contract, refers back to the time of the contract, and makes it binding on the defendant.

There is no exception taken to the verdict upon the law and evidence; indeed none could be. And as the authorities establish, I think satisfactorily, that there was no misdirection of the law at the trial, the present rule must be discharged."

From this judgment the defendant appealed to the Court of Common Pleas, and contended that the rule should have been made absolute for a new trial, on the grounds that it appeared by the evidence that the original contract was verbal, and was not binding, being a contract for the sale of goods for the price of £10 sterling and upwards, and no part of the goods having, at the time of the contract, been accepted or received, or anything given in part payment, or to bind the bargain. And that before the goods, or any part thereof, were delivered, or any payment made, the defendant disclosed to the plaintiff (as the fact was) that the defendant was acting as the agent of German, and refused to be personally responsible; and any amount that was paid was paid and received as German's money and payment; and that the delivery that was made must be held to be a delivery to or for German; that there was no delivery to, or acceptance by, the defendant of the goods as a purchase for himself, or with any intention of making himself personally liable; that under the circumstances set forth in the evidence, it was a misdirection on the part of the learned judge of the county court to refuse to tell the jury that the defendant was not personally liable if his principal was disclosed or known to the plaintiff, and credit given to him, the principal, before his acceptance or receipt of any part of the peas, or part payment thereof.

S Richards, Q.C., for the appeal.

R. A Harrison, contra.

The following cases were cited during the argument:—*Jones* v *Littledale*, 6 A. & E. 486; *McGee* v. *Atkinson*, 2 M. & W. 440; *Higgins* v. *Senior*, 8 M. & W. 834; *Green* v. *Koppke*, 18 C. B. 549; *Reid* v. *McChesney*, 8 U. C. C. P. 50; *Lerouz* v. *Brown*, 12 C. B. 801; *Bradford* v. *Roulstin*, 8 Ir. Ch. R. 468; *Warner* v. *Wellington*, 3 Drewry, 523, 581; *Waters* v. *Towers*, 8 Ex. 401; *Taylor* v. *Wakefield*, 6 El. & B. 765; *Taylor* v. *Ashton*, 12 L. J., N. S., Ex. 863; *Black* v. *Jones*, 6 Ex 213; *Harler* v. *Carpenter*, 27 L. J. C. P. 1; *Clarke* v. *Arden*, 16 C. B. 227.

DRAPER, C. J —The contract being verbal only was not binding until the purchaser should accept part of the goods sold, or give something by way of earnest to bind the bargain, or make a partial payment on account thereof.

It must necessarily be held immaterial whether a party who makes a bargain, void in itself by the Statute of Frauds, either does so on his own behalf or on behalf of another. No action could be brought against either the actual bargainor or against any person whom he names as his principal in the transaction.

Subsequent events, such as are stated to have taken place in this case, viz.: a delivery and acceptance of part of the goods, and a partial payment of the price, make a good contract, though there was nothing in writing.

Till some such subsequent event does happen, there is no contract; on this happening, there is one; and then either party who is contracting for a principal must disclose the fact, or may may be held liable himself to fulfil it.

The terms used in the charge of the learned judge are not open to exception. "That if the defendant entered into the agreement in his own name for the purchase of the peas, making himself personally responsible at the time, he could not afterwards divest himself of that responsibility by shewing that he was acting as an agent for German, or by disclosing his name."

And if, with this direction, the jury had been told that by the words "entered into the agreement" they were to understand not the first verbal bargain alone, but the contract evidencing that verbal bargain and the subsequent part delivery and part payment, or both, if they were concurrent, and that the disclosure of the principal at the time a binding agreement was thus made and entered into, would prevent any liability attaching upon the defendant. I should have been fully prepared to support the direction.

But from the form of the objection taken at the trial by the defendant's counsel, and from a part of the learned judge's judgment on discharging the rule *nisi*, I gather he ruled that the bargain as at first made though void by the Statute of Frauds, yet was so far effective as to prevent the defendant from discharging himself by naming his principal, when the part delivery or the part payment took place.

The objection taken at the trial, and renewed in the rule *nisi*, was, that the judge should have told the jury that the defendant was not personally liable, as his principal was disclosed or made known to the plaintiff, and credit given to him before the acceptance or receipt of any part of the peas, or part payment of the price.

And in the judgment the learned judge observed, "By looking at the case of *Higgins* v. *Senior*, it will be seen that the point taken by the defendant upon the Statute of Frauds is not tenable."

The passage in the judgment in *Higgins* v. *Senior* alluded to is, I presume, the following: "There is no doubt that where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other parties, and acted as such, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals, and this whether the agreement be or be not required to be in writing by the Statute of Frauds."

I understand this passage in each case put, *i. e.*, whether required or not to be in writing, to refer to a valid and binding agreement. That whether it be one which is binding without writing, or one which, under the statute, must, in order to be binding, be in writing, makes no difference in the application of the rule just enunciated—that it is competent to shew that one or both of the contracting parties, &c., &c. If that be the true meaning of the passage, it does not sustain the conclusion of the learned judge, which I take to be that if a contract, not binding in its inception, be made between two parties, which is, by some subsequent act, made valid and binding, neither of the parties can shew that they were mere agents for others, unless the statements were made at the inception and not at the time of doing the act or acts, without which there would be no contract in law.

The truth is, that until the act is done there is no contract, and the declarations of either party which accompany the act of delivery, or of acceptance, or of payment, or of receipt, cannot be excluded, but must be treated as forming part of the complete and binding agreement.

I think, therefore, there should be a new trial; and assuming the evidence to be the same, the jury should be asked to say whether—the first bargain being verbal only—the defendant, at the time of a part delivery of the peas to, and acceptance thereof by him, or of the payment of the $25, whichever first happened, stated that he was only an agent, disclosing his principal, accepted for him or paid for him; and with that knowledge the plaintiff went on with the transaction on his part. If they find this to have been so, they should be directed to give a verdict for the defendant.

RICHARDS, J., and HAGARTY, J., concurred.

Per cur.—Appeal allowed without costs.

IN THE MATTER OF JOSEPH WALKER AND THE PROVISIONAL CORPORATION OF BRUCE.

County of Bruce—County Town—Mandamus to compel construction of County Buildings—Statutes 19 Vic. cap. 19—20 Vic. cap. 77—22 Vic. cap. 111.

In 1856, by statute 19 Vic. cap. 19, the reeves and deputy reeves of the several townships in the county of Bruce were constituted a Provisional Municipal Council for that county In 1857, by statute 20 Vic. cap. 77, it was declared

that the Governor-in-Council should have power to fix the county town for the county, and to issue a proclamation for that purpose. On 15th June of the same year, Walkerton was proclaimed county town of the county. The provisional council refused to vote the necessary supplies for the construction of the county buildings in Walkerton. In 1858, by statute 22 Vic. cap. 111, the proclamation appointing Walkerton county town of the county was rescinded, and the selection of the county town was again left to the Governor General-in-Council. By the same act it was provided that each place desiring to do should present its claims to the Governor-in-Council before 1st October, 1858, and that a choice should be made from among such places By the same act it was also provided that before any action should be taken by the Governor-in-Council the provisional council of the county should vote the necessary supplies for the county buildings, and pass a valid by-law for raising and applying the same. The provisional council thereupon passed a valid by-law for the purpose of raising the supplies; and the Governor-in-Council having again selected Walkerton for the county town, it was on 8th November, 1860, again proclaimed county town.

On an application, at the instance of a resident ratepayer of Walkerton, for a mandamus commanding the provisional council to proceed with the erection and construction of a court house and gaol at Walkerton, it was Held

1. That in such a case the court should be careful only to grant the writ on clear grounds established that, in some particular or particulars, the provisional council refused to discharge the duties imposed upon them by law, having been properly required so to do
2. That applicant in this case had failed to establish a sufficient demand and refusal.
3. That the court before granting a mandamus should have distinctly before it—what was demanded—how the demand was made—how answered.
4. *Semble*, if a specific demand were made on the provisional council to purchase or contract, if they could truly answer they had been unable to raise the money, that could not be treated as a refusal.
5. *Quære*, If an application of such a character as this, belonging, among other things, to the administration of public justice, should proceed from a private individual, merely in his capacity of resident ratepayer?
6. *Quære*, as to the propriety of proceeding by mandamus on such a state of facts as that *set forth*?

(Trinity Term, 1861.)

In Easter Term last, *Harrison, R. A.*, obtained a rule *nisi* calling upon the provisional council and provisional warden of the county of Bruce to shew cause why a writ of mandamus should not be issued, commanding them to proceed with the erection and construction of a court house and gaol for the said county, in the town of Walkerton, the county town of the said county; and commanding the provisional warden forthwith to issue the debentures authorized by the by-law passed in that behalf.

The rule was granted on reading

1st. The by-law No. 4 of the provisional municipal council, intituled "To authorise the Provisional Municipal Council of the County of Bruce to raise the sum of six thousand pounds currency, for the purpose of defraying the expenses of erecting a court house and gaol, in the said county of Bruce." This by-law authorized the raising of £6,000 by loan on debentures, which the provisional warden was authorized to cause to be made, in sums of not less than £25 each, to be issued under the common seal of the county, payable within 20 years from the time the by-law should come into operation, bearing interest at six per cent., and imposing a special rate of one-fifth of a penny in the pound to pay interest, and form a sinking fund to pay off the debentures.

2nd. The proclamation of His Excellency Sir W. F. Williams, then Administrator of the Government, dated 8th November, 1860, appointing Walkerton as the county town, in the county of Bruce.

3rd. An affidavit of the relator referring to and partly setting forth the statutes and public proceedings relative to this matter; and further stating that a committee of the provisional municipal council reported in favor of procuring a particular site on which to erect the court house and gaol, and that the provisional council adopted that report; that the provisional warden made searches and enquiries respecting the title to that land; that since then there have been two meetings of the provisional council, at each of which a motion was made to carry into effect the provisions of the statutes relative to this matter and the by-law aforesaid, but both motions were negatived by a majority; that deponent demanded of the members of the council to proceed; that the deponent believes that a majority of the council have resolved to set the provisions of the statute and by-law at defiance, in order, if possible, by delay and obstruction to have a different place appointed for the county town.

In Trinity Term, *S. Richards, Q C.*, shewed cause. He filed affidavits,

1st. Of George Gould, clerk of the provisional council, who stated that the only meetings of the council between 29th November, 1860, and 1st August, 1861, were held on 28th and 29th January and 17th May, 1861, and denied that the relator made any application or demand upon the council as a body, or through the warden or clerk, to proceed; stated that the municipal corporation are not owners of real estate in Walkerton, which is not an incorporated or police village, but is simply a part of the township of Brant, without legally defined boundaries; that the relator claims to be the owner of the land mentioned in the report of the committee of the provisional council, referred to in his affidavit. The deponent proved certain searches and certificates shewing that the lands of the relator were incumbered; that the only motion made at any of the said meetings of the council was as follows:—"That a committee of five be ballotted for, to report as to what they may consider the most advisable steps to be taken with a view of selecting and purchasing a site on which to erect the county buildings, in the village of Walkerton, in accordance with the proclamation," which was lost; and that this motion was not made on any application or demand made to the council by the relator, nor, as deponent understood, to any individual member of the council.

2nd. An affidavit, that on the twenty-seventh August, 1861, there were four writs of *fieri facias* in the hands of the sheriff of Huron and Bruce against the lands of the relator for damages and costs, in the whole amounting to £336 15s. 7d.

3rd and 4th. Two affidavits from members of the provisional council of Bruce denying that the provisional council appointed a committee to select a site for the county buildings, in the village of Walkerton; that a committee was appointed as set forth in the resolution above, and made a report, which was adopted about two in the morning of the 30th November, 1860, there being then only nine members of the provisional council present, two of whom voted against it, and that the whole number was sixteen, several of whom had retired at that late hour. They confirmed the clerk's statement that there has been no formal demand made by the relator on the council.

J. H. Cameron, Q.C., Eccles, Q.C., and *Harrison, R. A.*, supported the rule.

The cases cited were: *Regina* v. *Bishop of Chichester*, 6 Jur., N. S., 120; *Ibson* v. *The County of Peel*, 19 U. C. Q. B. 174; *Rex* v. *The Bishop of London*, 13 East 425; *Curtis* v. *The Kent Water Works Co.*, 7 B. & C. 314; *In re Township of Augusta and United Counties of Leeds and Grenville*, 12 U. C. Q. B. 522; *Rex* v. *The East India Co.*, 4 B. & Ad. 533; *In re School Trustees of Otonabee*, 17 U. C. Q B. 275; *Justices of District of Huron* v. *Huron District Council*, 5 U. C. Q B. 574; *In re Gibson and the United Counties of Huron and Bruce*, 20 U. C. Q. B. 111.

The statutes cited were: 19 Vic. cap. 19; 20 Vic. cap. 77; 22 Vic. cap. 111.

DRAPER, C. J.—There are many grave objections to making this rule absolute.

As to the demand. It has been contended that there has been such a refusal to act, on the part of the defendants, as to make a demand unnecessary. I am not prepared to adopt that conclusion, on the facts stated. If a deliberate determination to disobey the law and to refuse to discharge duties imposed by law, existed, it might and ought to have been much more clearly proved than is done by the relator's affidavit, which only expresses his belief, coupled with the rejection of a particular motion, twice, as he asserts, only once, as is asserted in the contrary affidavits.

In considering the question it may be well to trace its history briefly:

By the 19 Vic. cap. 19, a provisional council for the county of Bruce was erected, upon and from 1st January, 1857. This act was passed on the petition of the reeves of the townships constituting that county

By 20 Vic. cap. 77, the Governor-in-Council was to fix the site of the county town by proclamation.

The 22 Vic. cap. 111, reciting that by proclamation, dated 15th June, 1857, Walkerton was appointed to be the county town of Bruce; and that the provisional council of the county had petitioned for an act to enable the municipal electors of the county to select a county town; that six places might be submitted to the electors (naming the places), and that the place receiving the greatest number of votes might be the county town; that the inhabitants of the county petitioned that the proclamation appointing Walkerton might be avoided, but that the selection should be

left to the Governor-in-Council; that the provisional council had refused to pass a by-law to raise the necessary funds for the erection of the county buildings at Walkerton: then proceeds to enact that the proclamation shall be rescinded; that the selection shall be left to the Governor-in-Council; that each place desiring to do so shall present its claims, in writing, to the Governor-in-Council; that the provisional council shall, before the Governor-in-Council acts, vote the necessary supplies for the county buildings, and pass a valid by-law for raising the same.

The passing of the by-law is asserted and not denied, but it is objected to as illegal, for it does not make proper provision to raise the money. As to this we are informed that there has been a mistake in bringing before the court a by-law to impose a rate of one-fifth of a penny in the pound, whereas there has been a by-law passed to raise one-fourth of a penny in the pound.

Then came the proclamation of the 8th November, 1860, re-appointing Walkerton for the county town, with the subsequent proceedings detailed in the affidavits

It is abundantly obvious that there is great difficulty in the provisional council, and, I have no doubt, great disinclination to carry into effect the erection of the proper public buildings, and so practically to establish the county town at Walkerton.

In view of these difficulties, I think the court should be careful only to grant the writ prayed for on clear grounds established that, in some particular or particulars, they have refused to discharge the duties imposed on them by law, having been properly required so to do.

Now, the only act which they have actually refused to perform has been to pass the resolution set out in the clerk's affidavit. I certainly am not prepared to grant a mandamus to them to pass that resolution, for when they had obeyed that command the difficulty would remain untouched. Nor am I called upon to devise the mode in which proceedings should be taken.

The raising sufficient funds would appear to be a necessary step, before they can purchase a site or enter into a contract to build. I do not see that any demand has been made either upon the council or upon any officer having authority for this purpose; and though they may do all that they can to borrow, it is not a certain consequence that they will find anybody to lend. But while there are no funds available, I should deem it premature to order their expenditure; and if a specific demand had been made on them to purchase or contract, if they could truly answer that they had been unable to raise the money, I do not think that could be treated as a refusal.

In my view the court should have distinctly before them—what it is that has been demanded — how the demand has been made—and how it has been answered—before granting a mandamus; for I apprehend the command in the writ should be to do the act or acts refused; and, therefore, it is indispensable we should know what they are.

I have not been able to free my mind from doubts whether an application of such a character as this is, belonging, among other things, to the administration of public justice, should proceed from a private individual merely in his capacity of a resident ratepayer in Walkerton, and so interested in the location of the county town in that village.

Nor am I satisfied, apart from the want of evidence of direct refusal, which would put the matter on a different ground, that the delay which has taken place affords evidence that it is merely colorable. A long-continued delay — doing nothing — attempting nothing—and obstructing those desirous of acting, might well establish against the provisional council the charge of wilful neglect of a duty imposed, and would certainly deprive them of all answer, when they persisted in such refusal after specific demand.

At present, I think enough is not shewn to warrant our granting the writ.

HAGARTY, J.—In my opinion the facts laid before us on this application are wholly insufficient to warrant our interference.

Assuming that we have the right to interfere by mandamus in such a case, it appears to me that the demand alleged to have been made was defective. Loose conversations with individual members of a corporation, or opinions as to their apparent determination not to proceed in any particular matter, wholly fail to satisfy my mind.

But apart from all technical objections, I feel the gravest doubts as to the propriety of proceeding by mandamus on such a state of facts. I should always be unwilling to interfere with the proceedings of a deliberative body, holding their seats by a popular vote, removable every year, and naturally reflecting, with reasonable fairness, the opinions of the ratepayers of the county on a matter in which it is clear the desire of the Legislature was to satisfy those who almost alone were, and are, interested in the separation of the counties. Outside the county, its existence or non-existence as a separate judicial municipality is a matter of trifling importance. The same, may of course be said of the erection or non-erection of county buildings. The Governor General has, it is true, finally named a place for the county town, but I am hardly prepared to hold it to be a wise exercise of the powers of this court, to force the ratepayers, by legal process, to hasten the expenditure of a large sum of money on the county buildings. They now have full powers in their own hands so to do when they please. I cannot satisfy myself that the provisional council are so clearly refusing to perform a well-defined legal duty as to warrant a mandamus on the application of an individual ratepayer to force them to its performance.

RICHARDS, J., concurred.

Per cur—Rule discharged.

IN CHANCERY.

(Reported by THOMAS HODGINS, Esq., LL.B., Barrister-at-Law)

IN RE YAGGIE, INFANTS

Master's report—Filing—Proceedings under.

Such Masters reports as are from their nature final, do not require to be filed fourteen days before proceedings may be taken on them.

One John Otter purchased the lands of the Infants under the order in this cause, but on his application the Court relieved him from his purchase, on his accounting for two-thirds of the crops of the year, and on payment of the costs, and ordered payment of the amounts when found by the Master.

The report was dated 29th June, 1851, and signed 29th August, 1861, filed 30th August, and same day a *fi. fa.* costs was issued and placed in the Sheriff's hands.

On 4th September a *fi. fa.* for the amount of the sum found due by the Master for the crops, was issued.

Fitzgerald moved to set aside the two writs of *fi. fa.*, on the ground that the Master's report had not been confirmed—not having been filed fourteen days before the issue of the writs.

Roaf, contra, relied upon *Empringham* v. *Short* (7 Sim. 78), and contended that in such cases as the present the Master's report did not require confirmation.

SPRAGGE, V. C., considered himself bound to follow the case cited, and refused the motion with costs.

CITY BANK v. AMSDEN.

Amending bill—Judgment—Lands sold under fi. fa.

Where the state of facts made by an original bill does not exist when the defendant answers the plaintiff cannot amend so as to bring in other facts to keep the bill alive, but must file a new bill.

In this case a bill was filed on a judgment recovered by the plaintiff against the defendant, alleging that certain lands were owned by the defendant in the County of Haldimand. Previously to the filing of the bill, writs of *fi. fa.* lands had been placed in the Sheriff's hands, and before the answer was filed, all the lands of the defendant were sold under the plaintiff's writs. The defendants answered setting out these facts.

Walkem, for the plaintiff, now moved to amend by setting out other lands in other counties.

Roaf, contra, objected on the ground that the amendments proposed would, in fact, make a new bill.

ESTEN, V. C., refused the motion with costs.

CHAMBERS.

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

WARELY v. POAPST.

Entry of appearance without authority—Remedy of defendant.

Where a defendant has been served with process and an attorney, without authority, appears for him, the Court will not interfere to set aside the proceedings if the attorney is solvent, but will leave the defendant to his remedy by summary application against the attorney.

If the attorney be insolvent, the Court may relieve defendant on equitable terms, if he has a defence on the merits.

Where, however, it appears that the suit instituted against the defendant is brought by collusion between plaintiff and defendant in order to enable defendant to cheat his creditors, a judge will not interfere summarily to remove the appearance, and thus assist the parties in the perpetration of a fraud.

(Chambers, 18th September, 1861.)

This was a summons calling on the defendant, his attorney or agent, to attend before the presiding judge in Chambers on the third day after the day of service thereof, to shew cause why the the appearance entered by John Walker, Esq., as attorney for the defendant in this cause, should not be set aside; and why the plaintiff should not be at liberty to sign final judgment in the same manner as if no appearance had been entered therein for the said defendant; and why the said defendant's attorney should not pay the costs of this application, on the ground that said appearance was entered without authority from the said defendant, and on grounds disclosed in affidavits and papers filed.

This summons was issued on September 2nd, 1861, and served at Cornwall on John Walker, Esquire, on the 3rd September. On the 6th September it was enlarged in Chambers till the 11th, and on the 11th further enlarged till the 15th, when it was moved absolute.

Jackson, shewed cause.

In support of the application an affidavit of Mr. Bergen, plaintiff's attorney, was filed, in which it was stated that the writ of summons in this cause was issued on the 8th day of August, and that, "as it appeared by the affidavit attached," was served on the same day upon the above named defendant; that upon the same evening the above named defendant absconded for the United States, and is now living in parts unknown; that on calling at the office of the Deputy Clerk of the Crown in Cornwall, for the purpose of entering up judgment on the 13th August, it was found that an appearance had been entered for the defendant by John Walker, Esq., as his attorney, and that Mr. Walker is merely employed as a salaried attorney in the offiee of the Hon. John S. McDonald of the firm of McDonald & McLennan; that the deponent has every reason to believe that the said appearance was entered without the knowledge or consent of the defendant, or any person authorised in his behalf; that writs had been issued in the County Court, from the office of Messrs McDonald & McLennan on behalf of the creditors of the defendant, and had been served on the defendant before he absconded; and that deponent has reason to believe that the appearance in this cause was entered for the purpose of enabling the parties to the said suits to get judgment in advance of the plaintiff; and that if such judgments were obtained the plaintiff will lose his debt, as there is reason to believe there is not sufficient property to pay all his debts.

There was also an affidavit of Mr. Bergen filed, that he demanded from Mr. Walker an inspection of his warrant as attorney, and that Mr. Walker had promised to send it to him by a certain hour if he had taken a warrant, but that he had not sent any warrant.

In opposition to this application, there were several affidavits filed tending strongly to shew that this was a fraudulent suit, instituted for the express purpose of defeating the claims of *bona fide* creditors; that the suit was brought by collusion between the plaintiff and defendant; and that, in fact, there was no debt whatever due from the defendant to the plaintiff; and that if the plaintiff should recover, he was under engagement to forward the proceeds to the defendant for his benefit

An affidavit of Hiram W. Wood was filed, which stated that a conversation took place between him and the defendant, while the defendant was waiting for the steamer on the evening he absconded, in which the defendant stated that the plaintiff was then indebted to him, and that if he succeeded in that action which he had just brought against him, the defendant, the plaintiff would owe him about $3,000, and that plaintiff had promised to forward to him the proceeds, but he, the defendant, only had his word for it.

There was an affidavit also filed by defendant's father, in which he stated that he has known the plaintiff from his childhood, and that he was never engaged in any business which could enable him to get the defendant so largely in his debt as he states; that a few days after the defendant absconded, he saw in plaintiff's possession goods which had been in defendant's store, and which had come from Montreal addressed to the defendant, and on asking plaintiff how he became possessed of them, he replied that he had paid the cash for them to the defendant.

There were two other affidavits from persons of respectability in Cornwall, strongly corroborating the affidavits of Wood and Poapst as to the collusion and fraudulent character of this suit.

MCLEAN, J.—There is in the affidavit of plaintiff's attorney something not by any means free from suspicion. In the first paragraph he states that the summons was issued on the 8th day of August, and, as appears by the affidavit attached, was served upon the same day on the defendant, thus intimating that it was only by the affidavit attached that he knew when the summons was served; but in the very next paragraph he says, that upon the same evening the defendant absconded for the United States, and he adds, that he is now living in parts unknown to him, deponent. If he knew that the defendant absconded the same evening for the United States, he could not but know that the summons must have been served either the same evening or in the course of the day, so that it was quite unnecessary to refer to the affidavit attached as shewing the time of service.

Then, in the third paragraph, it appears that Mr. Bergen called on the 10th of August, at the office of the Deputy Clerk of the Crown for the purpose of entering judgment, but found that an appearance had been entered by Mr. Walker. If he went for the purpose of entering judgment, he should at least have shewn what was the cause of action—whether it was liquidated or upon an open account, or whether the summons was specially endorsed, or whether, in fact, the proceedings were such that he, in case of default, could sign judgment.

If the suit is really collusive, no doubt the plaintiff would have good reason to know that no appearance was intended to be entered, and that he might expect to sign judgment for want of appearance at the expiration of ten days.

But there is a further circumstance which is calculated to throw still stronger suspicion on plaintiff's proceeding. His attorney swears that he absconded on the evening of the 8th August, and on the 20th August he swore that he was then living in parts unknown to him. On that affidavit a summons to set aside the appearance was obtained in Chambers on the 2nd September, and then on the 6th of September, four days after, an affidavit in the handwriting of Mr. Bergen is sworn to by the defendant at Windsor in the County of Essex, before a commissioner there, in which affidavit the defendant swears that the appearance entered in this cause for him, the defendant, was entered without his knowledge or consent, and that no power was ever given by him to any one to enter an appearance for him in this cause.

It is sworn that in the other suits instituted before the defendant absconded, appearance had been entered, but the justice of the several demands is not denied, while in this case it is manifest there was no appearance intended to be entered; from which, and the circumstances stated in the several affidavits filed against this application, the only reasonable inference that can be drawn is, that the whole of the proceeding in this suit is fraudulent, and the result of a foul conspiracy, by means of a spurious suit, to get possession of the defendant's property to defraud his creditors. The application complained of interferes with the proceedings, and the defendant joins the plaintiff in endeavouring to remove the obstacle.

I cannot interfere to assist the parties in what appears to me by the affidavits to be fraudulent. If the plaintiff's claim is honest, he has only to prove it as in other cases; if otherwise, the plaintiff may be examined respecting it at the trial, and the whole matter referred to a jury.

The attorney who entered an appearance for the defendant, if he has done so without any authority, is responsible to anybody injuriously affected by it, and as there is no complaint of his insolvency, I must leave any such persons to their actions against him. His act may delay ultimate recovery, but cannot prevent it if the demand be actually due—it may frustrate a fraudulent attempt to cheat creditors.

The case of *Bayley et al.* v. *Buckland et al.*, 1 Ex. 1, is strongly in point in this case.

In that case it was decided that when a defendant has been served with process and an attorney, without authority, appears for him, the Court will not interfere to set aside the proceedings if the attorney is solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the Court will relieve the defendant on equitable terms, if he has a defence on the merits.

In a case like the present, the question of solvency is of less importance, because the entry of an appearance is more likely to save than to cause an unjust recovery against the party for whom such appearance has been entered.

Summons discharged.

McInnes v. Hardy.

Consol. Stat. U.C cap. 22, sec. 287; Consol. Stat. U.C. cap. 24, sec. 41—Examination of judgment debtor—Form of order—Mode of conducting examination—Refusal to answer, or unsatisfactory answers, how made to appear.

Semble.—The common form of order for the examination of a judgment debtor, blending the provisions of Consol. Stat. U C. cap. 22, sec. 287, and Consol. Stat. U. C. cap. 24, sec. 41, is not proper. These acts have very different objects in authorising the oral examination of a judgment debtor. The affidavit applicable to the one, by no means necessarily will be suitable to the other.

If a question or a series of questions be put, which the judgment debtor *refuses* to answer, there should be some statement to this effect in the certificate of the examiner, either general—that questions of such a purport were put, which the defendant refused to answer—or, better still, that some specific question or questions were put—setting them forth in substance—and that defendant would not answer them, or that defendant's answers to such and such questions were not *satisfactory*, or giving questions and answers, so that it might be determined whether they were satisfactory or not.

Refusing to answer, or answering questions unsatisfactorily, are matters which, if not certified by the examiner, must be made specially to appear, either in the report of the examiner, or in an affidavit setting forth questions which were put and were wholly unanswered, or that an answer given (stating it) was unsatisfactory.

Semble.—The former is the better course. The examiner should require answers to his questions, and the defendant's refusal to answer, or his unsatisfactory answer, should be entered in the report of the examination.

(Chambers, Nov. 5, 1861.)

On the 5th August last, Draper, C. J., made an order in the comman form for the examination of the defendant.

The defendant was examined; and on 14th September last, *Mr. Jackson* obtained a summons from McLean, J., calling on defendant to show cause why he should not be committed to the common gaol of the county of Brant, on the grounds: 1st, That he refused to disclose his property, and his transactions concerning the same; 2nd, that he did not make satisfactory answers respecting the same; 3rd, that he concealed or made away with his property, in order to defeat or defraud his creditors.

Mr. Jackson obtained the summons on reading the examination of defendant before the county judge of Brant, and upon reading an affidavit of Mr. Bruce, who examined defendant.

James Paterson showed cause, and filed the affidavit of defendant, and affidavits of two other persons.

Draper, C. J.—The former part of the order to examine defendant is framed under the Consolidated Statutes U. C. cap. 22, sec. 287; the latter under the Consolidated Statutes U.C. cap. 24, sec. 41. The order is in a form commonly in use.

It did not occur to me, when signing the order, that these acts have very different objects in authorizing the oral examination of a defendant, and that the affidavit applicable to the one by no means necessarily will be suitable to the other.

I think the course of blending the two acts into one has in the present case produced inconvenience, and may frequently do so. As at present advised, I shall not make a similar order.

The summons on defendant is to show cause why he should not be committed to the county gaol of the county of Brant, on the grounds: 1st, of his refusing to disclose his property, and his transactions concerning the same; 2nd, that he did not make satisfactory answers respecting the same; 3rd, that he has concealed or made away with his property, in order to defeat or defraud his creditors.

The affidavit of Mr. Bruce bears directly only on the second objection, and inferentially on the third, in this way, that because the account given as to what has become of his property is not satisfactory, and because he admits he had certain property at one time, and asserts that he has none now; therefore he has concealed or made away with it in order to defraud his creditors.

I do not think the following passage in Mr. Bruce's affidavit: "I particularly required the defendant just before the close of his "examination, to give any account of payments made or losses "suffered by him that would make up the deficiency between the "money paid and the losses sustained by him, and the amount of "his full purchases, but he could or would give no other or fuller "information than appears in his said examination" sufficient to establish a refusal to disclose his property and his transactions concerning the same.

If a question or a series of questions were put which the defendant refused to answer as the first objection suggests, there should be some statement to this effect in the certificate of the County Judge, either generally, that questions of such a purport were put which the defendant refused to answer, or better still, that some specific question or questions were put, setting them forth in substance, and that defendant would not answer them; or coming to the second objection that the defendant's answer to such and such questions were not satisfactory; or giving questions and answers so that it might be determined whether they were satisfactory or not.

Then as to the third objection, the evidence of concealment of or making away with his property must not only be given, but that such acts were done to defeat or defraud creditors—an inference however, that would in most cases follow. The fact that a man's balance sheet shews a deficit, would not *alone*, I apprehend, be sufficient for this purpose

The examination of the defendant which is returned, contains a vast number of statements made, I assume, in answer to questions, shewing sales and purchases of property, payments of various sums of money to numerous individuals, transactions of receiving and of transferring promissory notes, making promissory notes, making payments upon them—in short, four closely written pages of details, neither systematically arranged nor very clearly explained.

An expert accountant might possibly form a balance sheet out of these statements, or the materials might be found wholly insufficient. I do not pretend to undertake the task of eliciting the real facts from such confused statements. If the defendant had been distinctly required to furnish a statement in writing by a day appointed by the Judge, in which should be made to appear his actual property and receipts, his expenditure and losses, and the deficit, accompanied with explanations how the deficit arose, and had either refused or had neglected after reasonable time to do so, this might have supported one of the objections; or the statement itself when examined might have supported another. But in what is placed before me, placed as it is, I am not prepared to say the examination leads to either conclusion, and with the aid of Mr. Bruce's affidavit there is no satisfactory or certain ground on which to determine that the defendant should be committed as a fraudulent debtor.

I cannot find certainty, and I will not condemn upon suspicion.

The defendant in reply, has filed his own and two other affidavits. They assist in leading me to the conclusion that refusal to answer or answering questions unsatisfactorily, are matters which if not certified by the examiner must be made specially to appear, either in the report of the examiner or on an affidavit setting forth questions which were put and were wholly unanswered, or that an answer was given (stating it) which it is contended was unsatisfactory. I rather incline against the latter course, for it appears to me it would be better that the examiner should require his questions, and the defendant's refusal to answer, or his unsatisfactory answer, to be entered in the report of the examination. The examiner may call for such accounts and statements as I have above suggested; in short, for any account or statement which may be necessary to arrive at the truth; and the Judge or officer taking the examination might be asked to appoint a day for

the production of such statements, giving sufficient time in his judgment to produce them, and then a neglect to produce them might be deemed equivalent to a refusal.

On the whole I think this summons must be discharged without costs.

Summons discharged without costs.

PRACTICE COURT.

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

MAGDALENA KLEIN, ADMINISTRATRIX OF MICHAEL KLEIN, PLAINTIFF v. ANDREW KLEIN, DEFENDANT;

MAGDALENA KLEIN, PLAINTIFF v. ANDREW KLEIN, DEFENDANT.

Judgment on specially endorsed writ—Fraud—Right of subsequent judgment creditor to impeach—Feigned issue.

The court possesses the jurisdiction, upon the application of a subsequent judgment creditor, to inquire into the *bona fides* of a prior judgment, obtained on a specially endorsed writ against the same judgment debtor; and to direct the trial of a feigned issue, in order to inform the conscience of the court as to fraud or *bona fides*.

Form of such an issue, *Wilson* v. *Wilson*, 2 U. C. Prac. Rep. 374, upheld.

(Trinity Term, 1861.)

In these cases, rules were obtained last term by *Mr. Jackson*, calling on the plaintiff to show cause why the judgment in each case should not be set aside as fraudulent and void, as against John Brown and J. H. McKenzie, judgment creditors of defendant, or why an issue should not be ordered to try which of the judgments was founded upon a valid consideration or fraudulent.

The application was founded on on affidavit, in each case, of Wardell, the attorney for Brown and McKenzie, and also the affidavit of Mr. Howard.

An action was commenced by Brown and McKenzie against defendant, Andrew Klein, on 31st May, 1860, and judgment obtained last November, and *fi. fa.* issued. Appearance had been entered for defendant, and plea put in, but no defence was offered at trial. The action was on a bond for a large amount: verdict rendered for $7,821 06. After this suit commenced, the now plaintiff, Magdalena Klein, took out administration to the estate of her husband, Michael Klein, who died in 1848; and the present suits were thus commenced.

The first suit was, by writ specially endorsed, for wages due deceased Michael Klein, from 1834 to 1840, at $130 a year and interest thereon, $1,053; and for wages to Michael Klein and plaintiff, Magdalena Klein, from 1840 (when they were married) to the year 1847, at $230 per year and interest thereon, amounting to $1,545; and judgment was obtained thereon for default of appearance, and execution placed in the sheriff's hands the26th September, 1860, prior the execution of Brown and McKenzie.

The other suit was commenced on the same day in May, 1860, and, by writ specially endorsed, for $1,260, wages due Magdalena Klein herself, from 1847 (when her husband, Michael, died) to 1860; and judgment in like manner obtained by default, and execution issued in September, 1860, prior to the writ of Brown and McKenzie.

These were the facts sworn to. The attorney and his client filed affidavits almost verbally alike, swearing to a great number of things, of which they were informed and verily believed, tending (if correctly informed) to raise strong grounds for inferring that the two judgments moved against were collusively obtained on a pretended consideration to defeat the claims of Brown and McKenzie.

During Easter term, *Mr. Harrison* shewed cause, contending that Brown and McKenzie, as strangers to these judgments, could not be heard, referring to the case of *Wilson* v. *Wilson*, decided in this court by Burns, J., 2 U. C. Prac. R. 374; and *Armour* v. *Carruthers*, 2 U. C. Prac. R. 217, distinguishing the former case, and denied that the authorities there relied on supported the judgment; and further that there was no power to order an issue. He filed several affidavits. Magdalena Klein, the plaintiff, swore in each case in substance, that her late husband, on coming of age in 1834, assumed the charge of defendant's farm, in Waterloo; from thence till his death in 1847, with deponent's assistance, at defendant's (his father's) request, on promise that he should have the farm at defendant's death; that Michael and she chopped and cleared about 50 acres, and after her marriage in 1840 she always did a man's work on the farm, defendant using the produce himself; that after Michael's death defendant requested her to continue working the farm, which she did down to the commencement of these suits, on the understanding that she and her family should have possession of the farm at defendant's death; that her claim for wages was justly and fairly due for her services and that of her son; and that her claim in the administration suit was also just, and that both were reasonable.

Defendant is an old man of 75. He also filed affidavits denying collusion and fraud, and that he did not defend these actions because he knew their claims were just, &c., &c. Four or five affiavits were filed on same side, giving a kind of history of the doings of the Klein family since 1834, and expressing, in each instance, deponent's belief that the claims were just. They were all exactly similar—verbally alike. In all the statements appeared to have been drawn with blanks for the names of the several deponents and afterwards filled up. The verbal similarity of statement appeared on both sides.

Jackson, in reply, cited *Farr* v. *Alderly*, 1 U. C. Q. B. 337; *Keys* v. *Horwood*, 2 C. B. 905; *Sharp* v. *Thomas*, 6 Bing. 416; *DeMedina* v. *Grove*, 10 Q. B. 152; *Pemmett* v. *Lawrence*, 15 Q. B. 1004; *Imray* v. *Magnay*, 11 M. & W. 266; *Christopherson* v. *Burton*, 3 Ex. 159; *Ward* v. *McCormack*, 6 O. S. U. C. 215; *Harrod* v. *Benton*, 8 B. & C. 217; *Martin* v. *Martin*, 8 B. & Ad. 933.

HAGARTY, J.—I have carefully examined the judgment of Burns, J., in *Wilson* v. *Wilson*, and have come to the conclusion that the court does possess the jurisdiction contended for, both as to right to enquire into an alleged fraud on behalf of a stranger to the suit, and to the direction of a feigned issue to inform the conscience of the court.

The jurisdiction of the courts over judgments entered on warrants of attorney and cognovits seems clear and undisputed. The cases are not so clear as to judgments otherwise obtained. I presume that on a judgment, after a trial on the merits, no interference could take place. But the cases of specially endorsed writs are certainly within the mischief arising from warrants of attorney; and I can see no sound reason for distinguishing them on such an application as this. All I can find in our own courts on this point is the case of *Young* v. *Christie*, 7 Grant 317, where the Chancellor says, "The Legislature did not mean to prohibit the creditor from suing; so it is, I apprehend, equally clear they did not mean to prohibit the debtor from defending. But although the debtor might have the right to defend if so minded, there is nothing in the statute which compels him to adopt that course. There is nothing in the act to interfere with his power to defend or refrain from defending: a consequence, which must have been foreseen, is that the injustice complained of has been left, to a great extent, without a remedy. There cannot have been any intention of interfering with a judgment recovered in ordinary course of law, and such judgment is consequently not within the equity of the statutes, (viz., the 22 Vic. cap. 96,) making void a fraudulent preference of a creditor."

If the court refuse to interfere here, the only course open to the injured creditors would be, I presume, either by acting against sheriff for a false return, notifying him of the alleged fraud in the prior execution, as in the well-known case of *Imray* v. *Magnay*, 11 M. & W. 1. which seems (though slightly questioned by Lord Campbell, in *Remmet* v. *Lawrence*) 15 Q. B. 104, to have been adopted as law in *Christopherson* v. *Burton*, 3 Ex. 159. Lord Tenderden very naturally said, in *Harrod* v. *Benton*, 8 B. & C. 21, "It is hard upon the sheriff that the question should be tried at his expense."

In *Imray* v. *Magnay*, 11 M. & W. 275, Parke, B., says: "The creditor has no other way of avoiding the judgment than by forcing his execution for the debt, notwithstanding an execution upon it; or by application to the equitable jurisdiction of the court to set it aside, which, we apprehend, has arisen in comparatively modern times. Whatever right the creditor had at the time of the statute (13 Eliz. cap 5) he has now." The judgment is, by statute, void as against creditors, but by implication it is void against a sheriff who acts in right of a creditor.

I am willing to follow the judgment of Burns, J., as to both rights. I do not dissent from his conclusions.

The amount in dispute here is large; and the affidavits on either side are not at all of that precise or satisfactory nature that would enable the court to decide so grave a matter on materials so very loose.

I therefore direct that the parties do proceed to the trial of a feigned issue in each case (unless it be agreed that one shall decide both); that Brown and McKenzie be the plaintiffs, and Magdalena Klein be defendant: that the question to be tried shall be, whether the judgment obtained by her against Andrew Klein, in the one cause, and the judgment obtained by her as administratrix of Michael Klein against Andrew Klein, in the other cause, was founded upon a valid and *bona fide* consideration, or whether the same was fraudulent and void, as against Brown and McKenzie, creditors of said Andrew Klein: that such issue or issues be tried at the next assizes for the county of Waterloo: that the rules granted last term be enlarged till the determination of such issues: and that all questions of costs be reserved; the issue to be delivered within 20 days from 23rd September, 1861, and to be returned in eight days from delivery.

I also refer to *Bell* v *Todd*, 6 Jurist 59; *Bainbridge* v. *Wildman*, 1 Dowl., N. S., 774; *Cooke* v. *Edwards*, 2 Dowl. N. S 55; *McMartin* v. *Cline*, 7 Grant 550.

Per cur.—Rule absolute for an issue in the terms directed.

McDonald v. McDonald et al.

Setting aside award on compulsory reference—Sufficiency of materials—Practice.

On an application to set aside an award on the ground that the arbitrator was mistaken in point of law and fact, the court will not interfere unless the alleged mistake appear on the face of the award or is disclosed by some contemporaneous writing.

In this respect there is no difference between awards made on compulsory references under the Common Law Procedure Act and other awards.

(Practice Court, Trinity Term, 1861.)

In Easter Term last *Mr. McKelcan* obtained a rule calling on the defendants to shew cause the following term why the award made on the 30th April last, by A Logie, Esq., should not be set aside on the ground that the arbitrator had acted improperly in allowing to defendants credit for the amount of a note for £250, made by defendants McDonald and Ross in favor of plaintiff, dated 18th January, 1856.

In support of this motion were filed the rule of reference, award and an affidavit of plaintiff.

It appeared that all matters in difference in the cause were by order of Mr. Justice Richards on 17th October last referred to the award of A. Logie, Esq., Judge of the County Court for Wentworth.

Mr. Logie made his award in favour of plaintiff, directing defendants to pay plaintiff $103.84, the amount he found to be due from them to him.

The plaintiff filed an affidavit in which he swore that he duly proved his account, and the arbitrator gave defendants credit for the amount of the £250 note, of which a copy was produced; that the evidence shewed that the plaintiff received the proceeds of that note from a bill broker who discounted it, and that he applied the proceeds in the works carried on in partnership between him and defendants A. P. McDonald and Ross, for the Great Western Railway Company at Hamilton, under an agreement, of which a copy was produced; that by the terms of partnership they were bound to find funds but did not, and he, plaintiff, was obliged to raise money by getting notes discounted which they should have retired; that in Chancery suit is pending between him and his late copartners A. P. McDonald and Ross, concerning their business; that he endorsed many notes for them; that he should not be charged with any portion of said note; that his claim in this suit was for moneys expended for defendants in connexion with the works at the Chats Canal on the Ottawa and services connected therewith; that the note was not in any way connected with said works or the claim in this suit, and the books of the works on the Chats Canal and in which plaintiff's account is entered were produced to the arbitrator and contain no charge of any such sum; that evidence was given that he, plaintiff, had stated to a person after the note became due he wished A. P. McDonald and Ross would take up the note as it was standing against him, the plaintiff, and was detrimental to his credit; that he proved before the arbitrator the agreement, of which a copy was produced, signed by A. P. McDonald, Ross being then his partner, and plaintiff also a partner in the Great Western Railway works, of which he, plaintiff, had the superintendence.

This document was dated 30th January, 1856, (after the date of the note,) and stated that plaintiff had signed and endorsed several notes, cheques, &c. for him and for A. P. McDonald & Co., at different places, and agreeing to indemnify plaintiff from any payments, &c. on said notes, &c., except what had been used for the work in which he was interested at the Great Western Railway depot, as he received none of the value or products of the above in any other way.

J. B Read shewed cause, filing an affidavit of defendant McDonald positively swearing that if all just credits were allowed, defendants owed plaintiff nothing, and that plaintiff was in their debt; that plaintiff discounted the £250 note, received the proceeds, and (to deponent's certain knowledge,) used the money for his private purposes, and so informed deponent; that it was never entered in the Company's book nor credit given therefor, or account rendered of it, and it has been paid by deponent and defendant Ross; that his note was not made for partnership purposes but was endorsed by plaintiff for his special benefit, and was understood when given to be a private transaction unconnected with any work in progress or the letter of indemnity.

For defendant were cited *Burns* v. *Hillabee*, 1 H. & N. 729; *Fuller* v. *Fenwick*, 3 C. B. 705; *Hutchison* v. *Shepardton*, 13 Q. B. 955; *Lalta* v. *Walbridge*, 7 U. C. Law Journal.

For plaintiff it was urged that this being a compulsory reference the Court should enquire more readily into the merits than under the old system, citing *In re. Hall* v. *Hynes*, 2 M. & Gr. 847; *Kent* v. *Enstoff*, 3 East. 18; *Jones* v. *Corry*, 5 Bing N. C. 187; *Bernard* v. *Wainwright*, 7 Dowl. 299, S. C. 1 L. M. & P. 455; *Hodgkinson* v. *Ferine*, 3 C. B. N. S. 189.

Hagarty, J. Assuming the law to be as Mr. McKelcan urges in some of the earliest cases, it would still be impossible to set aside an award like this on such materials as the plaintiff has laid before the Court.

The plaintiff has merely his own affidavit as to the evidence adduced and his own version of the facts, and on this he is flatly contradicted by the defendant's affidavit. No evidence whatever is before me as to how the arbitrator, a Judge of the County Court, proceeded, or on what view of the law or facts he has based his decision.

There are certainly authorities to shew that when the award or some contemporaneous statement in writing of the arbitrator shews a clearly mistaken view of law, or a clear mistake in fact, or possibly where the arbitrator communicated to the Court or the parties for their use, a statement of his conclusions or admission of his error, the Court may have interfered.

The case in East. where the award or a paper taken as part of it in a collision case stated that both ships were equally to blame and in the wrong, but nevertheless awarded large damages against one of them may illustrate this practice.

But the law seems clearly stated in a late case by a very high authority, the late Baron Watson. In *Hodge* v. *Burgess*, 3 H. & N. 298, "This is a motion to set aside the certificate of an arbi-"trator on the ground that he was mistaken in point of law and "fact. The law as regards awards not under this Act is clear, "where an arbitrator professes to decide according to law but "does not do so. If this mistake appears on the face of the "award or is disclosed by some contemporaneous writing, the "Court will set aside the award. So also with respect to a mis-"take in fact. To that extent the law has gone but no further. "That being the general law, the only question is whether there "is any difference with respect to awards under the compulsory "clauses of the C. L. P. Act." The Act provides, "the proceed-"ings upon any such arbitration shall be subject to the same rules "and enactments as to the power of the Court for enforcing or "setting aside the award as upon a reference by consent under a "rule of Court of Judges' order," therefore he continues, "the Le-"gislature has not left the matter in doubt, but has clearly ex-"pressed its intention that these compulsory references should be "governed by the rules of law applicable to ordinary references." Martin and Channel, B. B. concurred.

The same view seems to have been taken in a case in the preceding year, (1857) *Hodgkinson* v. *Fernie*, 3 C. B., N. S. 189, where the whole law as to setting aside awards is discussed.

Now this case before me is wholly wanting in materials to bring it within the influence of any of the cases cited. There is no statement of the arbitrator or admission as to his proceedings, or of his views of either law or fact. I am naturally struck on reading the papers, with the apparent difficulty of understanding how in a claim against A P. McDonald, Schram and Ross, the defendants, were entitled to set off the money received by plaintiff on a note to which Schram seems to have been a stranger, and which A. P. McDonald swears was retired by him (McDonald) and Ross, and apparently not with money in which Schram had been interested.

But I strongly suspect both from the language of the affidavits filed, the form of the motion, and the argument addressed to me, that the contest before the arbitrator was chiefly, if not wholly, as to the proceeds of this note being applied by plaintiff to the partnership business in Hamilton in which he was interested, or whether he appropriated the proceeds to his own use, and thus was chargeable therewith, and that very possibly the right of Schram to have the benefit of this set off may not have been denied, or at all events attention called thereto. On the other hand it may have been fully in question and there may have been strong reasons undisclosed in this motion for allowing it as a set off.

The utter obscurity of this point is a strong illustration of the danger of setting aside an award on such meagre materials as have been laid before me.

I think I should be far outstepping all decided cases and introducing new practice if I acceded to this motion.

It is shewn that a suit is pending in Chancery to settle the partnership accounts between plaintiff, A. P. McDonald and Ross. If so there can be little danger of plaintiff having to pay the note in question more than once. The fact of his application of the proceeds seems to have been fairly in issue, and I see no reason to question its having been fairly decided.

Per Cur.—Rule discharged with costs.

DIVISION COURT CASE.

(In the First Division Court of the United Counties of York and Peel, before GEORGE DUGGAN, Esq., Recorder for the City of Toronto.)

BROWN ET AL. v. MUCKLE.

Carriers—Wharfingers—Contract—Negligence—Cross action, when necessary.

It is an established rule of English law, that negligence or breach of duty cannot be set up as a defence in actions for the recovery of freight, where the defendant has derived a partial benefit under the contract, but defendant obliged to bring a cross-action for damages in respect of such negligence or breach of duty.

Such rule must be taken to prevail in division courts, notwithstanding the provision of the Division Courts Act enabling the judge to decide according to equity and good conscience.

A different rule prevails in several States of the neighboring republic, and is highly convenient as calculated to prevent multiplicity of suits.

The defendant caused to be delivered to the master of Captain Perry's steamer the "Bowmanville," at Quebec, where the steamer was then lying, property of her's, a cask of china and crockeryware, value at least of £10; also a quantity of household furniture, value not shown; which he there received, to be carried for the defendant to Toronto, at a charge of $30, as shown by an informal bill of lading produced at the trial by Captain Perry; although by another bill of lading, produced by plaintiffs, not signed by or on behalf of the captain, carriers, or others interested, $35 was charged as the freight. The sum of $35 was advanced by plaintiffs, as wharfingers at Toronto, to Captain Perry, on a supposed receipt of the goods for which it was incurred.

The plaintiffs held the goods, subject to this and two other charges, viz., $5 for wharfage and storage, and $2 50 for harbor dues.

The defendant, on application at Toronto to plaintiffs for her property, was refused delivery, unless all the above charges were first paid.

Subsequently plaintiffs delivered the goods, upon the undertaking of a friend of defendant that plaintiffs' claim should be paid.

The defendant, on receiving her furniture, found a portion of it damaged and broken, to the extent of $20.

Plaintiffs delivered to defendant a cask, as for that containing her china and crockery, but it was found to contain moccasins, and not to be defendant's cask, and was returned to plaintiffs, who disclaimed all knowledge of defendant's cask, and all liability in respect of it, and denied that it came into their hands.

The defendant refused to pay the above charges, unless her missing property (exceeding in value the amount of freight) was first restored, and her losses for injury to furniture allowed her on account.

Plaintiffs thereupon brought this suit, to recover for freight $35, wharfage $5, and harbor dues $2 50, in all $42 50, besides interest.

Defendant paid into court $7 50, covering plaintiffs' claim for wharfage and harbor dues; and urged that this being a court not of strict law, but of equity and good conscience, the plaintiffs, who voluntarily advanced their money to Perry, cannot be held to be in a better position to claim for the freight, which is the only claim now in dispute, than Perry himself would be had the advance not been made, and were he the plaintiff instead of Brown & Co.; that it would be unjust to permit plaintiffs to recover anything for freight on the contract for the safe carriage and delivery of the defendant's property, whilst the defendant, under this identical contract, has a legal and just claim against Perry exceeding that for which this action is now brought, the payment into court being the full amount of the plaintiffs' charges on the goods distinct from the charge which they voluntarily took the risk of by assuming the carrier's place in relation to them, in so far, at all events, as the freight of them was concerned. The defendant was willing to forego all excess of claim beyond sufficient to meet the charge for freight.

Defendant urged also that the voluntary advance for this freight made by plaintiffs to Perry, cannot give them a right of action against the defendant, but that admitting plaintiffs right to sue defendant, still defendant is entitled to set up her loss and damage growing out of the contract with Perry, against the claim for freight growing out of the contract and payable only in respect of the goods in question.

DUGGAN, R.—I have examined the various cases cited on both sides, and such others as I could find bearing upon this case, disposed if upon authority or precedent in law or equity I could do so to give effect in this action to defendant's just claims under the contract out of which arises the demand for freight, and avoid the necessity of another suit.

By the agreement between the plaintiffs and defendant for the delivery of the goods, and the defendant's acceptance of a portion thereof, I think she is liable to plaintiffs in this action to the extent to which she would have been liable to the carrier, Perry, for freight, had the latter made the delivery in question to the defendant direct, without the intervention of any other party. I find, however, that Perry omitted to carry defendant's cask, and earned no freight in respect thereof.

I consider it an established and inflexible rule of law, that negligence, or breach of duty or of contract, cannot be set up as a defence in actions for the recovery of freight of goods, or for the recovery of an attorneys bill of costs, where the defendant has derived a partial benefit by carriage and delivery of the goods, or had derived a partial benefit from the services charged in the bill of costs, but in these cases the defendant is invariably obliged to resort to an action for redress.

I find this distinctly stated by Bacon Park, in the case of *Mondell* v. *Steel*, 8. M. & W. 858, in which I was referred by the defendant on the doctrine of set off, and reduction of plaintiffs' demand, by setting up his laches in relation to the subject, or the contract out of which his action arises.

The law is so expressed, without doubt or qualification, in modern standard text books. I refer to the recent edition of Abbot, on shipping, and the able and learned work of Mr. Machlaclan, on the same subject, just issued from the English press.

I am unable to find that courts of equity have acted on a different rule where relief has been there sought in cases like the present. The rights and liabilities of the parties in such cases,

with the mode of enforcing them, do not seem to be in any respect doubtful.

It is true that in several States of the neighboring republic a different rule prevails, as shewn in the cases cited by the defendant, of *Batteremore* v. *Pierce*, 3 Hill. 171, and *Stone* v. *Yarwood et al*, 14 Illinois, 423, which rule appears just to all parties, and highly convenient, as calculated to avoid circuity of action and multiplication of suits, by enabling the defendant in a case like the present, to set up the loss and injury to his property for which the carriers would be liable in full discharge of their claim, for freight, if it amounted to so much, or if otherwise, then to the extent of the amount thereof in reduction of such claim.

Our laws appearing to me to be plain on the subject, and what is also important, the defendant having ample means of redress by action against the carrier, whom it is not suggested is in insolvent circumstances, or without the jurisdiction of our courts; I decide against the defendant's setting up in this action her claim for loss or damages under the contract referred to, and that she is liable for the full freight of the goods actually carried, amounting to $25, which sum the defendant is ordered to pay within fifteen days, with costs, excepting witnesses fees.

Judgment accordingly.

COUNTY COURT CASES.

(Before His Honor KENNETH MACKENZIE, Judge of the County Court of the United Counties of Frontenac, Lennox and Addington.)

MAGE v. RUTTAN.

When land is assessed against an occupant, the collector of taxes cannot proceed to collect the taxes, as in the case of "Lands of non-residents," by distress and sale of goods under sec 97 of the Upper Canada Assessment Act.

The term "Lands of non-residents" means unoccupied land not assessed against the owner or occupant.

Trespass for seizing and taking a colt of the plaintiff's at the Village of Sydenham, in the Township of Lougborough, of the value of one hundred dollars.

The defendant pleaded that before the time in the declaration mentioned, to wit in the year 1861, certain land and premises in the township of Lougborough liable to taxation were assessed in the said township, and at the time the assessment was made were not occupied by the owner but by one Edward Upham, and the owner did not reside, nor had he a legal domicile or place of business in the said township of Lougborough, nor had he signified personally, or by writing, to the assessor that he owned the said land, or desired to be assessed therefor, and that the same was assessed in the name of the said occupant, Edward Upham; and that the clerk of the council of the said township made out a collector's roll, under the authority of a by-law of the council in that behalf passed, and delivered the same certified under his hand to the defendant as collector of taxes for the said township, before the 1st day of October, 1861, and the taxes unpaid and charged under the said by-law on the said land and premises against the said Edward Upham, and set down on the said roll, amounted to 73 dollars and 76 cents, and the defendant upon receiving the said collector's roll proceeded to collect the taxes therein mentioned, and called at least once on the said Edward Upham, and demanded payment of the said taxes, and that the said Edward Upham neglected to pay and did not pay the said taxes for more than 14 days after such demand, and after the expiration of one month from the date of the delivery of the roll to the defendant, and after 14 days from the time of the said demand and while the defendant was duly authorised as collector as aforesaid, the defendant found the goods and chattels of the plaintiff in the declaration mentioned on the said land, and the plaintiff was then the owner and occupant of the same land, and thereupon the defendant, as collector as aforesaid, made distress of the said goods and chattels, and levied the said taxes by the sale thereof as he lawfully might, which is the supposed trespass in the declaration alleged.

The plaintiff demurred to this plea, assigning as causes of demurrer: 1st, that the defendant after demand from Upham, the occupant, proceeded to recover the taxes as in the case of lands of non-residents, without making the demand required by law in the case of lands of non-residents: 2nd, that the plea shows that at the time of the assessment the owner of the land was not resident, *and that the land was assessed in the name of the occupant*, Upham, and not as lands of a non-resident: 3rd, that the plea does not show that the goods and chattels were the property of Edward Upham, or in his possession; 4th, that the plea does not show that the land was assessed against the owner at the time of the assessment, or against the plaintiff, nor does it allege that the plaintiff was the owner at the time of the assessment.

J. A. Henderson for the plaintiff; *G. L. Mowat*, contra.

Fraser v. *Page*, 18 U. C. Q. B. 330, and the 23, 24, 92, 93, 94, 95, 96, 97, 122, sections of Consol. Stat. U.C., cap. 55, were cited upon the argument.

MACKENZIE, Co. J.—It does appear a little singular that the attention of the Court was not directed to the sixth section of the Assessment Act upon the argument, as the sufficiency or insufficiency of the plea must be got at in a measure through that section. At all events the sixth section serves as a key to the solution of the legal question raised upon the demurrer, and should not be lost sight of.

The defendant states in his plea, that the land in question at the time of the assessment thereof was occupied by one Edward Upham, and was assessed in the name of and against Edward Upham, as occupant thereof, while at the same time an unnamed non-resident was its owner; and that at the time of the seizure of the colt, the plaintiff was the owner and occupant of the same land.

From this state of facts the defendant has assumed in his plea that he had a right, as collector of Taxes, to treat the land as "The land of a non-resident," and to proceed to collect the taxes under the 97th section instead of under the 96th section of the Assessment Act.

Had the defendant at the time of seizure any right to treat this land as "the land of a non-resident" under the Assessment Act? If not the plea must fail.

I think that any person who will read the sixth section of the Assessment Act, in connection with the other sections which were cited during the argument must feel satisfied that the defendants plea must fall to the ground.

The sixth section explains the meaning of the term "Lands of non residents" under the Act in the following explicit words: "Unoccupied land owned by a person not resident, and not having a legal domicile or place of business in the township, village, town or city where the same is situate, or whose residence or domicile or place of busines therein cannot, upon diligent enquiry by the assessor be found, and who has not signified to the assessor personally or in writing, that he owns such land, and desires to be assessed therefor, shall be denominated 'Lands of non-residents.'"

Unoccupied lands only can be treated by the assessors and collectors as the "Lands of non-residents." Land occupied by the owner shall be assessed in his own name. If the owner be not resident or be unknown, and has not requested to be assessed therefor, then if the land is occupied, it shall be assessed in the name of, and against the occupant; but if the land be not occupied then and only then, it shall be assessed as "the land of a non-resident."

Land may be assessed against the owner and occupant when the owner is known; when that is the case, the assessor must on the roll add the word "owner" to the name of the owner, and the word "occupant" to the name of the occupant whom the taxes may be recovered from either or from any future owner or occupant, saving his recourse against any other person.

The assessor must write opposite the name of any non-resident freeholder who requires his name to be entered upon the roll, the word "non-resident" and the address of such freeholder. The 31st section of the Assessment Act, even without the unambiguous interpretation given in the 6th section of the term "lands of non-residents," points out, in my opinion, that the Legislature intended to mean "unoccupied lands" by that term.

By the 31st section it is enacted that as regards "the lands of non-residents" who have not required their names to be entered on the roll, the assessors shall proceed as follows: they shall insert such land in the roll separated from the other assessments, and shall head the same as "Non-resident Land Assessments," and to carry out the same idea uniformly throughout the Act, it is

enacted by the 92nd section that the clerk of every municipality shall make out a roll in which he shall enter "the lands of non-residents" together with the value of every lot, and enter opposite to each lot all rates or taxes with which the same is chargeable, and transmit the roll so made out to the treasurer of the county in which his municipality is situate, or to the city chamberlain; and subsequent clauses contain directions to the county treasurer and chamberlain in respect of the "lands of non-residents."

In the case of *Teeples* v. *Carson* decided in this Court in the year 1855, the Court in giving judgment said, "The collector derives his authority to collect the taxes mentioned in the collection roll, and his power to levy taxes in arrear, by distress and sale of the goods and chattels of parties in default from the roll itself. The roll must be looked upon in the nature of a warrant or writ delivered to the collector.

The same doctrine has been recognized by the Court of Queen's Bench in *Fraser* v. *Page*, 18 U. C. Q. B., 330.

The land would require to appear on the defendants' collection roll as "the land of a non-resident" before the collector could proceed to collect taxes on it, as on "lands of non-residents" The fact, as stated in the plea, appears to be the other way. It appears that the land was assessed in the name of and against Edward Upham. This of itself, under the statute, divested the land of the character of "the land of a non-resident." It being assessed in the name of the occupant Upham, made it for the purposes of the Assessment Act the land of a resident, Upham being in fact and in the eye of the law residing upon it. Consequently he should have proceeded to collect the taxes according to his roll, namely, against Upham, as directed by the 94th and 96th sections.

It will be seen by the 24th section of the Act that when land is assessed against the owner and occupant, the taxes may be recovered from either or from any future owner or occupant. In the present case, the name of the owner at the time of the assessment, whoever he was, does not appear at all, nor does the name of the plaintiff appear on the roll. I am at a loss to conceive by what right the defendant, a mere collector of taxes, has invested this land with a character inconsistent with what appears on his roll in this respect. It formed no part of the defendant's duty to invest the land with attributes of a more general form than what appears on the roll, as he appears by his own plea to have done. It was the duty of the assessors to return the land in its proper character, and of the municipality to see it was so returned. It was no affair of the defendant, as collector, whether the land was returned right or wrong. His duty was to collect the taxes according to his collection roll. The roll was his warrant. He had no right to travel out of it to establish by means *dehors* the roll, that the land was the land of a non-resident. It was no affair of his whether the owner's name was properly or improperly omitted from the roll. As the name of the plaintiff does not appear on the roll as the owner or occupant of the land, he stands, for the purposes of collecting the taxes, in the same relation to it, so far as the collector is concerned, as a stranger.

It is not averred in the plea that the colt was in the possession of Upham, the occupant at the time of its seizure; nor does the defendant profess to have acted upon the 24th section of the Act, and he could not, as the name of the owner was not on the roll.

The defendant seems to me, by his proceeding and his line of argument, to have confused two distinct and separate terms used in the Act, namely, the term "lands of non-resident," and the term "non-resident freeholders," into one idea, and hence his error in seizing the plaintiff's property. The term "lands of non-resident," I have already explained, according to the 6th section of the Act, as unoccupied lands, not assessed against the owner or occupant, and whose taxes or rates are charged on the roll against the land itself, and not against any owner or occupant whatever; whereas the term "non-resident freeholder" means a non-residents owner whose name is on the roll as the owner of unoccupied lands, or non-resident owners whose names are inserted on the roll together with the name of the occupant of occupied lands, under the 24th section of the Act.

The collector must transmit to such non-resident freeholders, by post, a statement and demand of the taxes charged against them on the roll, before he can proceed to enforce payment.

It will be observed that the wording of the 97th section of the Assessment Act, as published in the Consolidated Statutes of Upper Canada, and the wording of the 42nd section of 16 Victoria, from which it is taken, differ materially. By the latter, the collector was authorized to make distress of any goods which he might find upon "the lands of non-residents," on which the taxes inserted on the roll against the land were unpaid, one month after the date of the delivery of the roll to him. The enacting words of the former, namely, the 97th section, were:—"In case of the lands of non-residents, the collector, after one month from the date of the delivery of the roll to him, and after fourteen days from the time of such demand, may make a distress of any goods which he may find upon the land." The former clause gave a clear right to the collector to make a distress of any goods he might find upon the "lands of non-residents," that is to say, upon lands not assessed against any person.

It is possible that the peculiar wording of the 97th section renders it inoperative, and that the powers conferred by other clauses of the Act upon county treasurers and sheriffs, in respect of lands of non-residents, must be exercised to enforce the payment of taxes standing against the same. It is not necessary, however, to decide that point now; whatever view may be taken of it, the defendant has acted illegally. He had no right to treat this land as "the land of a non-resident" unoccupied, as his roll showed that it was occupied and assessed against Edward Upham, the occupant. He could not treat the plaintiff, or any other person, as a non-resident owner, because his name does not arpear on the roll as such; and if his name had been on the roll as a non-resident owner, the defendant could not proceed to seize property for the non-payment of the taxes until he sent by post the statement and demand of taxes mentioned in the 95th section of the Act. I think that judgment should be for the plaintiff on the demurrer.

Per Cur.—Judgment for the plaintiff on the demurrer.

WALKER v. O'REILLY ET AL.

Promissory Note—Indorsement—Guarantee.

The words "I guarantee the payment of the within," written upon the back of a promissory note, over the signature of the payee, treated as an endorsement of the note and not as a guarantee or collateral engagement for its payment.

Action on two promissory notes made by the defendant, O'Reilly, payable to the defendant, John A. Shibley, or bearer.

It was averred in the declaration, "That the defendant, John A. Shibley, endorsed the same notes to the plaintiff, Abraham Walker," and that the notes were duly presented for payment, and were dishonored.

The defendant, O'Reilly, allowed judgment against him by default. The defendant, Shibley, pleaded:—

1. That he did not endorse the notes.

2. "That the said notes, respectively, were made payable to the said John A. Shibley, or bearer, and that the said notes were and are transferable by delivery, and were so delivered by the said John A. Shibley to the plaintiff, and that the said John A. Shibley wrote on the back of the said notes, respectively, the words, 'I guarantee the payment of the within,' and signed his name at the end of the said notes, respectively; not for the purpose of completing the transfer of the said respective notes, but for guaranteeing the payment of the said notes."

The plaintiff took issue on both pleas.

The cause was tried at the last September sittings of the Court, before Judge Mackenzie, when the plaintiff put in evidence two promissory notes, made by the defendant, O'Reilly, payable to "John A. Shibley, or bearer," with the following endorsement on the back of each of the notes:—"I guarantee the payment of the within." Signed "J. A. Shibley."

It was admitted that the endorsements, respectively, were in the hand writing of the defendant, Shibley.

By consent, a verdict was entered for the plaintiff for 172 dollars and 52 cents, with leave reserved to the defendant, John A. Shibley, to move to enter a non-suit, on the ground that the writings on the back of the notes were not endorsements, and that the defendant, Shibley, was not liable to pay the notes on the present pleadings.

J. A. Henderson, in October Term last, obtained a rule nisi to set the verdict aside and to enter a non-suit, pursuant to leave reserved, and on the grounds taken at the trial.

A. S. Kirkpatrick shewed cause.

J. A Henderson supported the rule.

MACKENZIE, Co. J.—This Court had to consider the effect of an endorsement similar to these now under consideration, in the case of *Shibley* v. *Lee* and others, decided in the year 1858.

The defendant in that case pleaded that he did not endorse the note only. The present defendant has gone further, and pleads that he signed his name on the back of the note, at the end of the words "I guarantee the payment of the within," not for the purpose of completing the transfer of the notes, but for the guaranteeing the payment of the said notes. The plaintiff denies the truth of this statement of the defendant.

The defendant has offered no other evidence, but the notes and the writing on the back of them, in support of his plea.

In the case of *Shibley* v. *Lee* the Court stated, "Does the writing on the back of the note constitute a collateral agreement of a guarantor or a primary undertaking of an endorser? An endorser becomes a party to the note itself. A guarantor becomes a party to an agreement *dehors* the note. Every endorser guarantees the payment of the note or bill he endorses, and makes himself liable to be sued on such note or bill accordingly, but a guarantor is only liable to be sued on his contract of guarantee. A guarantor is generally a person who comes in to guarantee the engagement of the parties to the note for some consideration appearing in the agreement, keeping himself unconnected with the note, while the endorser becomes a party to the note as much as the maker, liable to be sued on it to the same extent, after default by the maker, as the maker himself. When the Court will find a person's name written across the back of a note in the usual way in which endorsements are made, accompanied with a writing of a dubious signification, it will incline to treat the matter as an endorsement, and not as a collateral guarantee. A collateral agreement for the payment of a note by the fourth section of the statute of frauds, will not only require to be in writing, but the consideration requires to be set out in writing, and the fact that no consideration appears in the writings, now under view, is in the opinion of the Court an additional reason for treating it as an immediate indorsement and not as a collateral gurantee."

Such was the interpretation which this Court gave to a similar writing on the back of a promissory note, three years ago.

I have made diligent search in the Upper Canada, as well as in the English Reports, for a case similar to the present one but have found none. And none has been cited upon the argument.

In the absence of better authority, I feel that I am bound by the doctrine laid down in the case of *Shibley* v. *Lee*, decided here.

I cannot accede to the proposition that the second plea entitles the defendant, Shibley, to a different interpretation on the present endorsement, from that given to a similar endorsement in the case of *Shibley* v. *Lee et al.* He has offered no evidence to show that writing was placed in the present notes for the purpose alleged by him in his second plea, and probably he could not do so in law or in fact. The second plea substantially amounts to a plea, that the defendant Shibley, did not endorse the notes as alleged in the declaration. The new facts which he professes to give in his second plea are nothing more or less than his interpretation of the writing endorsed on the back of the notes. The plaintiff by taking issue denies the interpretation, and the parties are thrown back to the place where they would be placed by the first plea. If the interpretation which this Court gave to the writing in *Shibley* v. *Lee et al.* was correct, the same interpretation must be given to a similar writing in the present case, notwithstanding the interpretative allegations contained in the second plea.

I have found a digest of some American cases in the American edition of Chitty on Bills 250, where the United States Courts seemed to have viewed the matter as this Court has. In *Hough* v. *Gray*, 19 Wendell Reports 202, and *Watson* v. *McLaren* 19 Wendell Reports 557, it would appear that the Courts held that a guarantee written upon a negotiable note, may be treated as an endorsement.

The digest of the last mentioned American case are given in Chitty in the following words: "Where an absolute guaranty is endorsed upon a note payable to bearer, at the time of the making thereof, and the note and guarantee are transferred by the payee, the assignee may maintain an action in his own name against the guarantor. But such guarantee is not negotiable, unless it be upon the note, in which case it may be treated as an endorsement, without a necessity of demand and notice."

Although the decisions of the Courts of the United States are not precedents for us, still their adjudications are received in Canada and England with great respect. In the present case the defendant Shibley was the payee mentioned in the notes. And in the absence of anything to the contrary it must be presumed that the note and endorsement were transferred to the plaintiff Walker, at the same time by the payee Shibley.

I think, as now advised, that the words, "I guarantee the payment of the within" upon the back of a negotiable promissory note over the signature of the endorser, may be treated as an endorsement, and that the writing itself is *prima facie* evidence that it was so intended and written at the time of the transfer.

I think the rule should be discharged.

Rule discharged.

In the County Court of the County of Elgin, before His Honour JUDGE HUGHES.

HILLIS v. TEMPLETON, MCBETH AND BLACKWOOD.

Held, that a person taking a negotiable security for a valuable consideration without notice of the equities between the original parties, is not bound by them. *Held*, also, that a pre-existing debt is a sufficient consideration for value.

In this case the defendant Blackwood bought lands of defendant McBeth, in the village of Tyrconnell, which Blackwood surveyed into village lots. The plaintiff became a purchaser of some lots, at an auction; and, in compliance with the terms of the sale, defendant Blackwood gave plaintiff a bond, conditioned to convey the lots so purchased by plaintiff free from incumbrances, &c., when all the instalments should be paid. Plaintiff had paid part of the purchase money at the day of sale, and given his promissory notes for subsequent yearly instalments. Defendant Blackwood had not paid defendant McBeth all the purchase money for this land, but had secured the amount unpaid by mortgage upon the same premises. At this time there were no judgments existing against defendant Blackwood, but what had been since discharged. Defendant Blackwood also owed defendant McBeth for an independent debt of £225, money lent, secured by mortgage upon a property at Port Stanley, consisting of a water lot and warehouse. Defendant Blackwood subsequently wished to remove his warehouse to Tyrconnell, and erect it anew upon unincumbered property there. McBeth assented, upon condition that defendant Blackwood should assign notes he had procured from the purchasers of village lots at Tyrconnell, to the extent of £1,017 3s. 6d. The amount due upon the Port Stanley premises—i. e., for the borrowed money—was made a first charge upon the notes, and it was arranged that the mortgage upon the Port Stanley premises was to be first paid out of the proceeds of the notes, and the balance was to go in discharge of the Tyrconnell mortgage. When the notes were assigned to McBeth, Blackwood took a receipt for them, setting forth the foregoing terms, and distinctly specifying that the arrangement was not to be held or construed as suspending McBeth's remedy upon either mortgage.

After some of the notes fell due, they were placed in the Division Court for collection, in the name of the defendant Templeton. Plaintiff was sued, amongst others; but he filed a complaint in this Court, and obtained an injunction restraining the further proceeding in the Division Court, on the allegation that Templeton was only the trustee or agent of McBeth—i. e., a nominal plaintiff—whilst McBeth was the beneficial plaintiff; and asking to have the recovery on the notes restrained until a title could be made; and alleging that McBeth had given no consideration to Blackwood for the notes; that Blackwood obtained them without value, inasmuch as he had only an equity of redemption in the property sold to plaintiff, which was heavily incumbered by judgments obtained against Blackwood; and that plaintiff had received no consideration or value for making the notes. The injunction was unopposed; judgment went *pro confesso* against both Templeton and Blackwood. Defendant McBeth put in an answer, denying

the allegations in plaintiff's complaint, and set forth that the notes were transferred to him by Blackwood for a good and valid consideration.

Plaintiff afterwards obtained an order for an issue, to be tried by a jury, first, as to whether there was a consideration passing at the time of the transfer of the notes by Blackwood to McBeth or not; second, as to whether the notes were taken as collateral security, or as payment for an existing debt; third, whether or not McBeth had notice of the consideration for which they were given by the plaintiff to Blackwood. At the trial the defendant McBeth was sworn as a witness, at the instance of the plaintiff, and proved the transaction as hereinbefore stated, but said he did not know what precise property plaintiff's notes were given in payment for. The judge charged the jury, first, that it was not necessary for the defendant to show a *new* consideration, in order to establish and maintain his right to recover on the notes, but that the important question was, was there any valuable consideration passing or passed for the transfer of the notes, and it was enough if a consideration then existed; second, that the existence of a debt from Blackwood to McBeth was a sufficient consideration, and that the plaintiff had proved the existence of it by the evidence of McBeth, and that it mattered not whether the notes were taken as collateral security or as payment of an existing debt; third, that the agreement put in by the plaintiff showed a sufficient consideration passing at the time of the transfer of the notes from Blackwood to McBeth; fourth, that the jury themselves must decide whether or not McBeth had, at the time he took the notes or before, given any valuable consideration, further than notice of the consideration for which they were given by the plaintiff to Blackwood, and told the jury there was no evidence at all that he could see that McBeth knew what exact land the plaintiff bought from Blackwood that these notes were given in payment of—whether it was covered by McBeth's mortgage or not, or whether Blackwood had bought it from Col. Talbot or others. *Abbott*, for plaintiff, objected to the judge's charge, because he urged that the mere pre-existence of McBeth's mortgages would not be a consideration within the meaning of the issue. The jury rendered a verdict for the defendant on the issues.

Afterwards, *Abbott*, for plaintiff, moved a rule absolute for a new trial, on the objection taken at the trial, and because the verdict was rendered contrary to evidence.

Ellis, contra, showed cause on behalf of McBeth.

HUGHES, Co. J.—The question involved in this matter is simply whether a mortgage creditor can take promissory notes as a collateral security some time after the mortgage is due, and whether the existence of mortgage security is a good consideration for the transfer of such notes. I never heard it doubted before that a previous debt due to the holder of a negotiable instrument is a good consideration, nor that a previous debt of any kind due by a mortgagor to a mortgagee may not be a sufficient consideration for the transfer of a negotiable bill or note from the mortgagor to the mortgagee. That was done by the defendant Blackwood to the defendant McBeth in the present instance. The plaintiff who complains of it, shows that the notes were given as collateral security, but that the defendant McBeth guarded against the suspending of his remedy on the mortgage until the maturity of the bills, as the circumstances might have otherwise been held to raise an implied agreement so to suspend the remedy. It is true that *Thompson* v. *Brunskill*, 7 Grant, 542, goes to shew that the defendant Blackwood might be restrained from recovering on the notes until he shewed a good or perfect title to the plaintiff, but I do not see that that case affects the question between the plaintiff and the defendant. McBeth is no doubt an endorsee for value, and not the mere agent or trustee, or colorable endorsee of the defendant, Blackwood. If he had been the trustee or agent of Blackwood, and merely collecting the notes upon a colorable transfer, I think the plaintiff would be entitled to restrain the collection of the notes under the authority last named. The plaintiff, at the trial, by his own witness, and by the documen the produced, shewed a *transfer and endorsement* of the notes to McBeth, on the understanding that out of the proceeds he was to pay himself first the mortgage on the land and warehouse at Port Stanly, and secondly, the residue was to be applied on the Tyrconnell mortgage, the notes to be considered collateral security for both claims, so that the title of McBeth in the notes is made out to my mind most clearly. I think the case comes within the principle that is laid down in *Bosanquet* v. *Dudman*, 1, Starkie 1.

At the trial I told the jury as to the first issue it was not necessary establish a *new* consideration, that the question was, was there any valuable consideration passing or passed, for the transfer of the notes, and it was enough if a consideration then existed, that the existence of a debt from Blackwood to McBeth was a sufficient consideration, and that the plaintiff had himself proved the existence of it; that it mattered not whether the notes were taken as collateral security or as part of an existing debt; that the agreement put in and proved by plaintiff's counsel shewed a sufficient consideration for the transfer of the notes to McBeth. I told the jury as to the second issue, they must decide whether or not McBeth had at the time he took them, or before giving any valuable consideration for them, notice of the consideration for which they were given by plaintiff to Blackwood, and that there was no evidence at all that I had seen of his (McBeth's) knowing what exact land these notes were given for, whether it was that part of the land sold to the defendant (Blackwood) by McBeth, or by Colonel Talbot, or others. I can see nothing in the authorities which I have read, to satisfy me I was wrong in so directing the jury. The case of *De la Chaumette* v. *The Bank of England*, was most relied upon in argument. That was an action of trover to test the right of property in a bank note which had been stolen. The plaintiff who presented it for payment at the Bank of England, brought the suit, because the bank kept it without payment and without returning it He merely shewed it had been transmitted to him by his agents at Paris, who owed him a balance, and was part of a remittance, and that his title to the note was the title of his agents, and their title was not proven; that they were mutually agents for each other as money changers and brokers, and responsible to each other for the bills transmitted for collection, and bears but little analogy with a case wherein the title to the note is undisputable, acquired *bona fide* and by honest means. The case cited by Mr. Abbott, *Gooderham* v. *Hutcheson*, 5 U.C C., P. 241, is an authority decidedly against his client, and in favor of McBeth. The late lamented C. J. of that court, at page 259, says, "Having considered the cases bearing upon the subject, I think the weight of argument is in favor of a pre-existing debt being a sufficient consideration for value;" and in the next paragraph he says, "under the evidence I do not feel warranted in holding that the plaintiffs did not give value for the note in question if obtained *bona fide*, even although exclusively on account of the pre-existing debts;" and again, about the middle of page 260, he says, "As relates to pre-existing debts, no doubt they would constitute ample consideration to support an action upon a promissory note made by the debtor to secure the creditor." It was not pretended that there was any mere colorable transfer or secret trust; and as there was no evidence of any *scienter* in McBeth that the notes were taken by Blackwood in payment of land, of which he either had not a title, or the title of which was encumbered; and as is shewn, they were taken *bona fide* as a collateral security for an existing valid debt; and McBeth's affidavit in answer to the plaintiffs' rule, makes out a good consideration, and is not contradicted, I think it would be unnecessarily prolonging litigation to grant a new trial; indeed, I never could see the slightest reason for bringing this suit at all, for all the questions that have been raised here might have been brought up in the Division Court, which is a court of equity and good conscience, and could as easily have been dealt with in that tribunal as by the proceeding in this court, or as could the suits of *De la Chaumette* v. *The Bank of England*, and *Gooderham* v. *Hutcheson*, in superior courts of common law. The defendant, McBeth, having received the notes before they were due, shews that his doing so was not subject to any equities that subsisted respecting the notes as between the plaintiff and the defendant Blackwood. I decide therefore that the rule shall be discharged. I think also, that as the issues go to the very root of the action, the injunction should be dissolved and the plaintiffs' bill, in so far as the defendant McBeth is concerned, dismissed with costs.

Rule accordingly.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Osgoode Club.

Sirs,—Can you tell me why it is that there is not a better attendance of the law students of Toronto at the weekly meetings of the Osgoode Club than there appears to be? It cannot be that there are no law students in Toronto, for the many offices of the city are full of them. Then why do they not attend weekly meetings designed for self-improvement, and a proper training, in that profession by which they hope to earn their livelihoods? Perhaps you will be good enough to administer a rebuke to the many who neglect so proper a mode of preparing themselves for the profession.

Your obedient servant,

Toronto, Nov. 1, 1861. One who Works.

[The attendance of law students at the meetings of the Osgoode Club is not, we believe, all that can be desired. The cause is a neglect on the part of those who are most interested in the success of the club. In a city like Toronto there are not only many law students but nightly many objects of amusement. These objects, we presume, on the night that the club meets are, to some students, more attractive than the meetings of the club. Men are not born lawyers, nor are they born advocates. The talents for the one and the other if not really acquired by study, are much improved by practice. Young men aspiring to the profession of the law, who, for the transient and unprofitable amusements of city life, neglect to devote one night in the week during the winter months to self-culture at the meetings of the Osgoode Club, certainly act most unwisely. They throw away opportunities of self-improvement that never can be recalled. They are blind to their own interests. They act like fools, and learn the nature and extent of their folly when it is perhaps too late to attempt to retrace their steps. Students in country places, with few facilities, often make better lawyers than city students with every facility that can be fairly and reasonably desired. One reason is, that in the country there is less to distract, less allurements to frivolity and dissipation, than in the city.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. Harcourt v. White. *May* 23.

Waste—Tenant for life—Timber improperly cut by a prior tenant for life—Stale demand—Devise for payment of debts.

An expectant tenant for life in remainder, who sees a tenant for life in possession, improperly cut timber, and takes no step to prevent it during his life, cannot in a suit instituted nearly twenty years after the death of such prior tenant for life, charge his estate with the burden of making good the value of the timber so improperly cut by him.

Upon the principle of preventing the assertion of stale demands, the lapse of time alone will form a bar in equity to such a suit, although the statute of limitations has no application.

The creation of a trust for the payment of debts does not create a debt where none existed before, or remove from a creditor the consequence arising from his negligence or acquiescence express or implied.

C. J. Griffiths v. Cowper.

Practice—Defendant out of jurisdiction—Substituted service.

The defendant to a suit in which a decree has been made was British Consul at Pernabuco.

Held, that service of the decree on the defendant's solicitor, who resided in London, and who corresponded with him, was good service on the defendant.

V. C. K. Stone v. Parker. *July* 24.

Will, construction of—Effects—Conditions of residence—Exoneration

A gift of household furniture, plate, linen, china, glass, books, fixtures, and other effects of a like nature, does not include cows, horses, carriages and farming stock.

A devise of a house and estate with the furniture and effects to trustees upon trust, to permit the testator's wife to occupy, use and enjoy the same for life, if she should so long continue his widow, and from and after her decease or second marriage, or in case she should refuse to occupy the house, upon trust to sell, is a condition which applies to the house only, and to willful non-residence, the occupation being that of an ordinary tenant for life.

V. C. K. Wright v. Vernon. *Aug.* 2.

Partition—Contract with a stranger—Jurisdiction—Direction to Commissioners.

Where one of the tenants in common under a partition directed by the court, has dealt with a stranger, and he asks a direction to the Commissioners to make a particular allotment in respect of such dealing, the court has no jurisdiction to grant such an application.

Where tenants in common under a partition, have had dealings *inter se*, the court will interfere by giving directions to the Commissioners as to such dealings.

V. C. K. Grimsby v. Webster. *Aug.* 6.

D. having a lien on a fund, by express agreement with the parties entitled to it, they by their acts depart from that contract, and D. is obliged to get a stop order, and appears to ask for those costs and claim his lien.

Held, that he was entitled to the costs of the stop order, and of his appearance.

Parties having a claim upon a fund in court, are not entitled, as a general rule, and under all circumstances, to the costs of getting a stop order.

V. C. K. Mullins v. Smith *July* 24.

Will—Construction—Residuary gift—Goods and chattles—Specific and demonstrative legacies distinguished—Annuity.

A testator may make a residuary gift at the commencement of his will, if there be no other gift of that nature, and the words "goods and chattels" in such a clause may pass general personalty; but where there is a subsequent and clearly residuary clause, "goods and chattels" must be taken in the ordinary sense.

Where there is a gift to one for life, with a direction not to sell the interest so given for a specific time, if the tenant for life dies within the time, the term expires by the death.

A legacy of stock out of stock is specific, but money out of stock is not, but demonstrative.

A specific legacy is not liable to abate—a demonstrative legacy is. A specific legacy is liable to redemption—a demonstrative is not. A specific legacy carries with it the dividend from the death of the testator—a demonstrative legacy does not.

A general legacy may be given to a specific legatee, although expressed to be "in addition to" the specific legacy—an annuity is comprised in the word "legacy."

V. C. S. DAWSON v. NEWSOME. *June* 11.

Practice—Petition—Order enforcing compromise—Jurisdiction.

The plaintiff and defendant in this suit entered into an agreement to compromise the same, with liberty to the plaintiff to make the agreement a rule of court in default of payment by the defendant of a sum to be ascertained on taking an account. The court on petition of plaintiff ordered that the agreement should be made a rule of court, and that the defendant should pay the amount due with costs.

V. C. S. THOMAS v. GRIFFITH.

Administration—Suit by creditor after the assets had been distributed under administration decree.

T. brought in his claim, under an administration decree, against the assets of G., a deceased person, for the balance of a complicated account. The chief clerk disallowed part of the demand. After the assets had been distributed, T. had to advance money on behalf of G.

Held, that T. was entitled to file a bill against G.'s legatees, and to have an account of what was due to him both on the original demand and for the subsequent advances. *Held* also, that the executors of G. were not necessary parties.

V.C.W. COLEMAN v. THE WEST HARTPOOL RAILWAY CO. *Aug.* 1.

Injunction—Contempt—Publication of proceedings by parties to a suit—Costs.

Pending litigation the court will restrain the publication by any of the parties to the suit of *exparte*, garbled accounts calculated to prejudice the case of their opponents of any of the proceedings in court, or before the examiner.

The circumstance that such publication is by way of defence, and in answer to similar publications by the other side, although it may excuse the party sought to be restrained, from the costs of the motion for that purpose, will not prevent the court from granting the injunction.

V. C. S. NOTLIDGE v. PRINCE. July 26.

Undue influence—Spiritual dominion—Gift of stock set aside.

L. N. joined an institution over which P. exercised control, having acquired influence by maintaining that the purposes of God were revealed to him. The institution was conducted with considerable luxury, and many of the members made over their property to P., but continued to share the advantages of the institution. L. N. was forcibly taken therefrom by her relatives, and placed in a lunatic asylum. At P.'s instance, the commissioners of lunacy instituted an inquiry, which resulted in her liberation; and immediately afterwards she made over all her property to P. By a written document, subsequently executed, she declared that by the gift of her property she had testified that all he possessed belonged to God, not to her.

Held, that the gift was made under undue influence, and must be set aside.

COMMON LAW.

C. P. YATES v. CASH. May 30.

Bill of Exchange—Payee.

That is not a valid bill of exchange, in which the payee is merely described as "the treasurer for the time being" of an institution.

REVIEWS.

THE WESTMINSTER REVIEW. New York: Leonard, Scott & Co.—The number for the quarter ending October, 1861, is received. The contents are: Mr. Goldwin Smith, on the study of History Biography, Past and Present; A Visit to the Mormons; Count Cavour; The Apocalypse; The Rival American Confederacies; Trades' Unions; Contemporary Literature. The first is a very severe criticism of a work entitled, The Study of History, being two lectures delivered by Goldwin Smith, M.A., Regius Professor of Modern History in the University of Oxford. While giving the author credit for ability the writer of the review charges him with want of candour. The writer of the review contends that the facts of human society are capable of *scientific* treatment. The Oxford professor is of a different opinion. The result is the criticism to which we have adverted. It is a well written paper, containing much argument and much originality of thought.

BLACKWOOD for October. New York: Leonard, Scott & Co., is also received. The contents are: Democracy teaching by example; Meditations on Dyspepsia; Chronicles of Carlingford; The Book Hunters Club; Social Science; What seems to be happening just now with the Pope; Among the Locks; Captain Clutterbuck's Campaign. The article on Democracy is, as one would imagine, a paper by no means in praise of the system of government hitherto prevailing in the United States of America, judged by its present results. The article on Social Science, suggested by the recent meeting of the National Association for the promotion of social science in Dublin, is an amusing and well written paper.

THE ECLECTIC for November is also received. We intuitively turn to the first page for the portrait of some illustrious person. In the number now before us we find a really beautiful and well executed portrait of "Frederick the Great," whose name is suggestive of deeds of valour and true greatness. The letter-press of the number is varied and interesting as usual, viz.: Revolutions of English History; Edwin of Deira; Equatorial Africa; Mad Dogs; The Constable of the Tower; Literature and Philosophy of the early Christian Ascetics; History of England, from the Fall of Wolsey to the Death of Elizabeth; Duelling in Modern times; Gone, gone gone! Volcanoes; Madame de Krudener, Military Panics; Greatness; Frederick the Great; History of the Pope's Train; Blown through a Tube.

GODEY for November is also received. This magazine is attractive and useful as usual. Its attractions and usefulness are on the increase as the current volume draws near its close. The number for November contains the well known engraving "The New Boy." It is admirably executed. No less than eight distinct figures, perfect in detail, are made to appear on it. The fashion plate is double, and contains no less than seven figures, said to be five more than any other magazine. The reading matter is such as to instruct every lady in the land who may choose to devote some attention to the reading of its pages. The magazine is so well conducted as to please all without offending any. Every page reflects judgment, experience, and a strong desire to please and instruct. The subscription is only $3 per annum.

APPOINTMENTS TO OFFICE, &C.

NOTARIES PUBLIC.

WILLIAM IRVINE STANTON, of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted October 12, 1861.)

HENRY McPHERSON, of Owen Sound, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted October 12, 1861.)

ALEXANDER MILLAR, of Berlin, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.—(Gazetted October 12, 1861.)

ARTHUR R. BOSWELL, of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.—(Gazetted October 12, 1861.)

TO CORRESPONDENTS.

"A CLERK"—"CLERK OF DIVISION COURT, Co. NORFOLK"—"ALPHA"—Under "Division Courts."

"ONE WHO WORKS"—Under "General Correspondence."