Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☑ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☑ Quality of print varies/ Qualité inégale de l'impression
- ☑ Continuous pagination/ Pagination continue
- ☐ Includes index(es)/ Comprend un (des) index

  Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☐ Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
							✓				

DIARY FOR SEPTEMBER.

1. Friday. Paper Day Queen's Bench. New Trial Day C. P.
2. Sat .... Paper Day Com. Pleas. New Trial Day Queen's B.
3. SUN ... 12*th Sunday after Trinity.* [Court sits.
4. Mon ... Paper Day Q. B. New Trial Day, Com. Pleas, Rec.
5. Tues... Paper Day Com. Pleas. New Trial Day Queen's B.
6. Wed.... Paper Day Queen's B. New Trial Day Com. Pl.
7. Thurs. Paper Day Common Pleas.
8. Friday .New Trial Day Queen's Bench.
9. Sat .... Trinity Term ends.
10. SUN ... 13*th Sunday after Trinity.*
12. Tues... Quarter Sessions & Co. Court sittings in each Co. Last day for services for York and Peel.
17. SUN... 14*th Sunday after Trinity.*
21. Thurs. *St. Matthew.*
22. Friday. Declare for York and Peel.
24. SUN ... 15*th Sunday after Trinity.*
29. Friday. *St Michael.* Michaelmas Day.
30. Sat .... Last day for notice of trial for York and Peel.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

SEPTEMBER, 1865.

AN ADMIRALTY COURT.

And why not an Admiralty Court or a Vice-Admiralty Court in Upper Canada, as well as in any other country upon the border of a sea! For are not our lakes, as we modestly call them, in point of fact, great inland *seas*—not salt water, certainly, but none the worse for that as far as all practical purposes which water as a carrying medium can be put to. The commerce of our lakes is probably much greater than was that of the British seas when admiralty courts were first heard of in England. And if the mercantile marine required a court for its own exclusive use and necessities then and there, why not also now and here.

Again, these lakes are, in fact, what are termed "high seas." They are the common highway for the use of two nations—nations pre-eminent as the greatest maritime powers of the world. It is true that there are at present but two nations upon the borders of these seas, but just as important points of international law may arise between two as between twenty, and the events of the last few years tend to show how quickly a third or even a fourth power may start into existence and become interested in the questions of international and maritime law that have arisen and will yet and more frequently arise between us and our neighbours.

The use and operation of admiralty law, as we understand it, are twofold. In the first place in determining matters of difference arising upon our "high seas" between subjects of different nations (principally at present between the United States of America and Upper Canada as an integral part of the British empire), upon the generally well-understood principles of admiralty law, as founded upon the customs and practice which are received and prevail between nations in general for the mutual benefit and protection of their subjects, with a due regard to the rights and liberties of all, and upon treaties which two or more nations enter into to determine some particular question or dispute, or to provide for some reciprocal rights or immunities. In the second place they have a municipal jurisdiction to decide maritime questions as between the people of the country in which the courts are established.

As regards the former, statute law would avail nothing, as one country cannot make a statute which can bind another. Nothing but "international" law could be resorted to in such cases; but as to the latter it is of course competent for a nation to make any regulations for its own governance which may be considered expedient.

Admiralty law is as well understood where there is any court to administer it as any other law. If such a court were organized here, there would, we apprehend, be no practical difficulties that a little care and research could not surmount; being new to us it might not work very smoothly at first, but that is the case with all kinds of new machinery. It is not *law* we want provided, but a *court* to administer the law already made to our hands. The position in this respect seems very similar to that of equity in this country before the Court of Chancery was established; the principles of equity were acknowledged and understood, but there was no machinery to put those principles into practice.

Admiralty courts are two-fold, the Prize Court and the Instance Court—the former for trying what is or is not lawful prize, and for adjudicating upon all matters of prize, whether civil or criminal; prize being understood to

mean every acquisition made *jure belli*, of a maritime character. With this we have nothing, at all events at present, to do. What we want is something that will be practically useful in correcting and remedying many anomalies, abuses and defects that injuriously affect our mercantile marine.

We want something that will put our shipowners and mariners on a par ith those of our enterprising and "go-ahead neighbours. They long ago saw the advantage of tribunals for protecting their own interests in this respect, and made provision accordingly. The consequence of their having stringent laws and we none at all is most injurious to us, and many are the stories that have been told of the oppression practised upon Canadian masters and owners by unscrupulous officials on the other side. This may have been partly owing to their ignorance of admiralty law, but even this is an argument for our having such law administered on this side of the water. They have it now all their own way, and whilst they can in case of debts contracted for a Canadian vessel, or of collision, salvage, &c., where a Canadian vessel is concerned, tow her into an American port, and keep her there till the demands of the claimants or injured parties, or the salvors, are satisfied, or until bonds are given for the payment of all claims that may be established against her, a Canadian master has no help for it, and has not even the satisfaction of knowing that the same justice can be meted out to American ships. This bonding, moreover, is often a troublesome business in a foreign port, miles away perhaps from the owner, who may not even under the most favourable circumstances have sufficient means or credit to furnish the security that will be accepted, and the effect of this often is that the most exorbitant and outrageous demands have to be paid. A few parallel cases under similar laws on our side would have a wonderful effect in setting matters right; no man is so likely to be bullied as one that is incapable of taking his own part.

The benefits, however, would not end here. Those that would accrue in disputes or claims as between ourselves in matters nautical would be very great. Let us take a few cases for example. Courts of common law proceed *in personam*, Admiralty Courts *in rem*. The former can decide questions of contract express or implied, but the latter can do more, they can apportion a loss on equitable principles, proceeding more after the manner of the Court of Chancery. Suppose a case of collision. One, or it may be both the vessels are "libelled," and the executive officer takes possession until bonds are given. The proceedings in such case being very similar to the execution of a writ of replevin by a sheriff. The court hears the evi- ..d, what is more, understands it. It then apportions the loss and orders such and such repairs to be made, or that such a sum shall be paid in lieu thereof.

Salvage, again, is a difficult subject for Courts of Common Law to deal with. Canadians are not wanting in daring or heroism, when the occasion for their exercise arises, but would it not be a great inducement to any man to know that his attempts to save a vessel in jeopardy would be likely to meet not only with a careful investigation, but a liberal reward, commensurate with the risk and toil of his self-imposed task, and the skill with which he may carry it out, instead of having to bring an action upon a doubtful contract or no contract at all, to be tried before a judge unversed in nautical matters, and a jury probably quite incapable of appreciating his services. Besides, perhaps, by the time he gets a verdict the owner of the vessel may be insolvent, and the vessel perhaps at the bottom of the lake.

So again with sailors wages. Seamen are proverbially improvident, and would generally sooner dance a hornpipe on the main truck in a gale of wind than go to a lawyer to enter a suit against the owner or master. Every facility should be given them to recover the amount of their hardly-earned wages. They can understand and appreciate stopping the vessel till their wages are paid. This is to them the orthodox nautical way of solving the difficulty, and they are right enough in thinking so.

There should also be some means of enforcing a contract for necessary repairs done to a vessel, so as to afford due protection to all parties. And these and other contracts purely marine, such, for instance, as agreements as to sailors wages, can only be satisfactorily determined by an Admiralty Court.

The difficulty of obtaining any satisfactory verdict from an ordinary jury has been alluded to. We venture to say, that in nearly every case which involves purely nautical questions, the jury know just about as much of the case

when they have given their verdict as they did when it was first opened, perhaps a little less. How can they possibly in the course of a few hours appreciate all the nice little manœuvres and manipulations that constitute "seamanship." They may know what wearing a coat is but "wearing" a ship is to them a ridiculous absurdity; they probably understand but too well what "paying out" is in a financial sense, but "paying out" a hawser would be to them an unfathomable mystery; why, to them, the 'helm" should, in case of emergency be sometimes "put up" and sometimes "jammed down," or "hard-a-weather" or "hard-a-port," or why it should be called "hard up," would rather bother them. A "dolphin striker" would suggest thoughts of spermaceti candles; and "flying kites" anything probably sooner than the advisability of getting the cat to scratch the mast. In Upper Canada, we are fortunate in having one judge capable of arriving at a sound decision from purely technical evidence, but that does not help the jury, unless they have sense enough to find a verdict according to the directions from the bench, if any are given. And as to the counsel, they generally appear to be in the same hopeless maze as the jury.

The constitution of an Admiralty Court would obviate all these difficulties. The judge, who of course must be a lawyer, and if conversant with nautical matters so much the better, at all events he would soon pick up a good general idea of them, would be assisted by the advice of a certain number of "assessors," as they are called in England, or men thoroughly acquainted with the sea and ships, generally old sea captains. The executive officer or marshall would be as it were the sheriff of the court. A clerk or registrar would also be required, but these, with the exception of occasional deputy marshalls or bailiffs, (custom house officers in distant ports might be commissioned to act for the marshall,) would be all.

Very little difficulty would be found in organizing such a court, and a consideration of the subject leads us decidedly to the conclusion that it must be a distinct court, complete in itself. No patching or tinkering, or, after the manner of legislators of the present day, giving "jurisdiction in the premises" to such and such a court or such and such a judge, will be sufficient. No sane man will say that our judges have not enough to do. Let us divide the labour, giving to each their own particular department, and the slight extra cost will more than be repaid by the benefits that will accrue from the protection that will be afforded to our shipping interests.

There is an Admiralty Court in Lower Canada, presided over by a very able judge. Its jurisdiction is said to extend as far west as Three Rivers, but no farther. There is no tide west of that place. But the existence of tide has, we fancy, as little to do with the necessity for an Admiralty Court as the existence of salt. The boundary strikes us as not only arbitrary, but absurd and illogical.

An Admiralty Court, or a Vice-Admiralty Court, or some tribunal with similar powers, let it be called what it may, we in Upper Canada must have sooner or later. The sooner, we think, the better. Let those that make our laws take the hint.

LAW SOCIETY.

TRINITY TERM, 1865.

CALLS TO THE BAR.

The following gentlemen passed the necessary examinations, and were called to the Bar this Term:

Messrs. A. T. Drummond, B.A., LL.B., London; C. F. Fraser, Brockville; George Holmested, Napanee; John Dougan, St. Catharines (all of whom passed on their written examinations, which were so satisfactory that they were not called on in the oral examinations). Richard Grahame, Toronto; C. A. Price, Kingston; D. B. McLellan, M.A., Cornwall; F. J. Joseph, LL.B., Toronto; G. M. Macdonall, B.A., Fergus; A. H. Thibodo, Kingston; D. S. Gooding, Goderich; J. A. Kains, St. Thomas; P. W. Darbey, London; Arthur Boswell, Toronto; J. M. Bruce, Hamilton; W. H. McClive, B.A., LL.B., St. Catharines; John Burnham, Peterboro'; J. H. Gilbert, Toronto.

ATTORNEYS ADMITTED.

The following is a list of the gentlemen to whom certificates of fitness were issued this term:

J. C. Dent, Toronto; Richard Grahame, Toronto; J. H. Gilbert, Toronto; J. Dougan, Toronto; F. McKenzie, Toronto; Joseph

Jakes, Toronto; Francis Cleary, Toronto; G. M. Macdonell, B.A., Fergus; Henry Smith, Cobourg; —— Slee, Barrie; A. H. Thibodo, Kingston; J. A. Kains, St. Thomas; —— Maclellan, Belleville; E. H. Tiffany, Toronto; F. J. Joseph, Toronto; F. W. Darbey, London; W. H. McClive, B.A., St. Catharines; J. G. Milne, Ancaster; Geo. Redmond, Brockville; John Burnham, Peterboro'; Arthur H. Sydere, London; J. S. Hallowell, St. Thomas; J. W. Ward, Toronto; B. S. Gilbert, Belleville; —— Bradley, Ottawa; —— Dunning; —— Thompson; R. S. Baird, Oneida; —— Kilvert; —— Lister, Sarnia; D. Stewart, Belleville.

The case of Mr. Maclellan, of Belleville, is deserving of especial notice, for though both deaf and dumb he passed we are informed a most creditable examination.

Hon. George Sherwood, of Brockville, has been appointed Judge of the County of Hastings, in the room of the late Mr. Smart.

SCHOLARSHIP EXAMINATIONS.

The following resolution, passed by the Benchers of the Law Society, in Convocation, on the 14th February last, will be interesting probably to several of our aspiring young friends, and answers the question of a "Student-at-law" in another place. The rule reads as follows:—

"That all students who have been, or who shall hereafter be admitted upon the books of the Society in Easter or Trinity Terms in each year may present themselves for examination for scholarships as follows, that is to say: For the scholarship for first year students, in the Michaelmas Term of their second year. For the scholarship for second year students, in the Michaelmas Term of their third year; and for the scholarships for third and fourth year students, one or both, in the Michaelmas Term of their fourth year, provided always, that nothing herein contained shall authorize or permit any student to present himself a second time for examination for the same scholarship."

Mr. O'Brien's book of practical and explanatory notes on the Division Courts Acts, Rules, &c., is completed, and is in the hands of the printer for publication. It comprises all the acts and portions of acts in any way affecting procedure in Division Courts, or the duties of Division Court officers; together with the Rules of practice and Forms, now we believe out of print, together with other forms of practical value; the whole being supplemented with numerous notes, which will doubtless be of great aid in elucidating and eventually helping to settle the practice of these now important courts.

We see in a telegraphic despatch from across the boundary line that a store was "*burglarized*" a short time ago. We are sorry that any thing so dreadful should have happened to any of our inventive cousins. Truly the American language is "fearfully and wonderfully made." Just fancy the horror of an English judge reading an indictment charging a prisoner with having "feloniously *burglarized* and entered, &c. If it were *robberiously burglarized*, the expression would be complete and without a parallel.

The efforts of the Lower Canada section of the House of Assembly, to carry us back to the "dark ages" of commerce, are admirable for their persistency, if for nothing else. The oft repeated endeavour to limit the rate of interest upon money by Legislative enactment has again been made. Experience, argument, and public opinion, seem equally to fail in convincing a prejudiced and retrogressive party. They are even impervious to ridicule. We cannot but think that the common sense of the House will again prevail.

SELECTIONS.

THE ORIGIN OF MAGNA CHARTA.

(*Continued from page* 205.)

When we turn our attention to the provisions of this famous charter, we ought not to allow ourselves to form an inadequate estimate of what we have a right to expect from the men of that day. A large proportion of the people of England were little or no better than slaves. Villanage was the condition of her laboring classes. There was a feudal aristocracy throughout the kingdom, but the grand council of the State included only the bishops and the barons, while there was nothing like a representation of the commons in Parliament. And, in the absence of everything like an educated class of men, and without trade and commerce, and in the very infancy of the arts, there were few interests for which provision could be made beyond the feudal rights, duties, and burdens connected with the holding and

culture of the land, the privileges and immunities of the church, the personal security of the freemen, and the tardily-recognized claims to anything like consideration of a class of tenants who were gradually rising above a state of villanage or serfdom.

The charter contains thirty-eight chapters or sections, some of which are exceedingly brief. They do not follow any orderly arrangement in subjects, and the terms in which they are expressed are mostly so technical, and much of them so nearly obsolete, that it is impossible now to understand them, unless read in the light of surrounding circumstances, and with the knowledge of the meaning of the phrases and forms of expression in which they are couched. It would occupy too much space, as well as be too severe a tax upon your patience, to attempt to analyze these chapters. In fact, the course of events, and the change in the laws and customs of the kingdom, have rendered most of them of little interest beyond being matters of history.

The first section, as a peace-offering to the church, guarantees the whole of her rights and liberties, and declares them to be inviolable; and to all freemen of the realm the liberties which it then proceeds to enumerate. And this, it is said, is done "unto the honor of Almighty God, and for the salvation of the souls of our progenitors and successors, kings of England, to the advancement of holy church and amendment of our realm." I should have said that the charter was written in Latin, though law proceedings had been in the Norman-French language from the time of William the Conqueror, and continued to be till Edward III., when they were required to be recorded in Latin. And this continued to be done for about four hundred years, till the time of the Commonwealth, when the English was substituted as the law language of the kingdom.

The onerous burdens imposed by the feudal law upon the land-holders of the kingdom form a prominent subject in several of the chapters of the charter; and guards and protections against abuse were interposed between them and the king, to whom, as lord paramount, they were due.

In the first place, all proper feuds were those which were held by a vassal on condition that he performed certain military services, which was called knight-service, and was finally abolished, with all feudal tenures, in the time of Charles II. Many if not most of the principal baronial manors, were held directly from the crown, or, in technical terms, *in capite*. Among these feudal services, or rather fruits of feudal tenure, were *Relief*, *Wardship*, and *Marriage*. Reliefs were sums of money which an heir had to pay to the lord for the privilege of coming into the enjoyment of his ancestor's feud. At common law this was a fixed sum, but by the grasping disposition of the late kings this had become extremely burdensome and oppressive.

Wardship was still a more oppressive burden. By it, if an ancestor who was the king's tenant died leaving a minor heir, the crown took possession of his lands, farmed them out, making the most it could out of them, leaving the minor at his majority an estate stripped and wasted, and all he had received in return had been his own personal support.

Marriage was a still more odious fruit of feudal tenure. By it, if the vassal left a female heir under a certain age, the lord had a right to sell her in marriage for the best price he could get. In one case the Earl of Warwick received the sum of £10,000 for his consent to the marriage of his infant ward. If the infant refused to carry out the lord's bargain of her person and estate, she forfeited to him the amount he could have realized from it; and if she married without his consent, she forfeited double the value of such marriage.

The barons, being vassals of the crown, and owning military service for their lands, were immediately interested to mitigate these burdens and oppressive exactions; and several of the chapters of the great charter were aimed at these abuses. They struck at one of the principal sources of the income of the crown; and it is not, therefore surprising that the king should have reluctantly yielded to the required reform.

Another class of evils under which the freemen as well as the feudal landlords had been suffering, was connected with the administration of justice. The King's Bench was theoretically held by the king, and accompanied him wherever he went. Its writs and proceedings were returnable "ubicunque fuerimus in Anglia." At the head of this court there had been an officer called the Chief Justiciar, —generally imported from Normandy,—having the notions of a man educated in that feudal and now foreign country, clothed with great power, and exercising it with unrelenting severity. Not only was a suitor in this court obliged to follow the king wherever he might choose to go, and thereby be subjected to enormous expense, but when his cause came to be tried he found, practically, a foreign tribunal, in which justice was openly sold; and he could feel no assurance of obtaining his right, however clear. There were, also, courts held by inferior officers, in which matters of the gravest moment, even cases of a capital nature, were tried by men wholly incompetent by education or character to secure a fair or satisfactory result. In connection with this was a most important circumstance which, at that period of the law, might seriously affect the party arraigned upon a criminal charge. By a concession to the sanctity of the church, and from a regard to the sacredness of the office of priest, the courts of common law yielded their jurisdiction over clerical offenders to the trial and censure of the bishops and higher officers of the church. In determining who should be admitted to this exemption from punishment under the criminal law of

the realm, inasmuch as what little learning there was had been monopolized by those in holy orders, the test applied if any claimed the privilege or "benefit of clergy," as it was called, was to place in his hand a book, and require him to read. If he succeeded, he escaped punishment for most of the many offences known to the law, and several of them capital The mode of doing this is thus described by an old author:

"The bishop must send to every jail-delivery a proper commissary. If the prisoner asks his clergy, the judge commonly giveth him a psalter, and turneth to what place he will. The prisoner then readeth as well as he can (God knows often very slenderly.) Then he asketh the commissary, *legit sit clericus?* The commissary must then answer, *legit* or *non legit.*"

Now, as the bishop would not attend an inferior court, if a man were held for trial, even for his life, in one of the courts held by the sheriffs or coroners, or other inferior officers, he had no chance to get the benefit of clergy; and this, of course, operated most unequally upon the persons charged with offences in the kingdom.

Other evils had grown up, and defects had developed themselves in the administration of justice, which the barons sought to obviate and correct by means of the charter. Thus the court of common pleas, in which most of the actions between subjects were heard, was thereby made stationary, and practically fixed at Westminster. Questions of title to lands were to be tried in the county where the land lay, and sheriffs and other inferior officers were prohibited from holding courts for the trial of considerable crimes. Nor could a man's land be taken for his debt due the crown, so long as he had goods which might be seized.

It will be recollected that in the discussions preliminary to our Revolution, constant reference was made to the Magna Charta as a standard of the civil rights of the colonists; and that one of the great causes of complaint was the power asserted by the crown of compelling a citizen of one of these colonies to answer for acts done here before the courts of England, so remote from the vicinage of the transaction.

One or two things in the charter may be referred to as illustrative of the intercourse and society in England at that time. It guards towns and freemen from being distrained to make bridges or banks "but such as of old time"; as they had been heavily taxed during the previous reigns under the pretence of maintaining fortresses, bridges, and the like public works.

No man had a right by the charter to claim exclusive control of a river merely because he owned the land upon its banks; and fishing-weirs then existing in the Thames, Medway, and other rivers in the kingdom, and which effectually interrupted their navigation, were, by the charter, to be removed. The significancy of these provisions was in the fact that these streams were the principal means of transporting commodities to and from market; and these weirs, among other things, prevented floats, or, as we should say, rafts, of wood from coming down these streams to supply the towns on their banks with fuel before the days of coal-mines. And yet it was nearly two hundred years after this before the weirs in the Thames between London Bridge and Staines, near Windsor, were wholly removed.

There is one clause in favor of extending protection to foreign merchants coming to England, securing to them safe ingress and egress, and passage through the kingdom. And another provision favorable to trade was requiring all measures of quantity and weight to be uniform.

An important, and, under the circumstances, a remarkable provision in the charter was aimed at the grasping spirit of monopoly and aggrandizement of the church. In an age of violence and the lawless abuse of power, the passions of men often led them to a course of life for which they felt it necessary to make some expiation in order to make their peace with the church, and win an entrance into heaven at last. No readier way offered itself than, like a man's giving up his vices after his power of indulgence has been lost, to leave to the church the fruits of a life of rapine and injustice. And in this way the monasteries and other church establishments were engrossing all the lands in the kingdom. As these church lands escaped many if not most of the feudal burdens which fell so heavily upon the other lands in the kingdom, the barons insisted upon an express clause in the great charter prohibiting all persons from giving their lands to religious houses. This is the origin of the laws still in force in England against *mortmain*, as it is called, or the falling of lands into the *dead hands* of ecclesiastical corporations.

If, now, we ask what provisions were made in this charter for the liberties, safety, or protection of the people, we shall find their number few, but at the same time most interesting and important in their bearing. Some of these are rather by indirection than any explicit declaration of what they intend to secure. Widows were relieved from the payment of feudal dues, like other tenants, in coming into possession of their dower lands, and were, moreover, permitted to occupy the mansion-houses of their husbands for the period of forty days, called a widow's "*quarantine*," after the death of their husbands,—a principal which has been substantially retained ever since, wherever the common law of England prevails.

There is a single clause only relating directly to that oppressed and down-trodden class then so numerous in England, called villeins. It is connected with a clause limiting the extent to which a freeman might be amerced, and is in these words:—"And any other's

villein than ours shall be likewise amerced, saving his *wainage*, if he shall fall in our mercy." It is the protection of his *wainage*, derived from the Saxon *wagna*, or *wain*, that is significant here, as it was by means of that that villeins were able to do the service of carrying out manure and other like work upon the lord's land, the doing of which was the feeble tenure by which he held his land. It was, in other words, protecting him from being stripped of the means of earning a livelihood; and it is upon this principle that to this day the tools of a mechanic are free from attachment, and the tools of trade and beasts of the plough, necessary for cultivating the land, are exempt from distress in enforcing the payment of taxes. It was in the case of the villein a boon, small in amount but of inestimable value to him, as it secured to him the means of subsistence. But even this favor, small as it was, was witheld from the tenants of the crown lands.

In process of time, however, villanage disappeared in England, by a sort of outgrowing of it by the people, so that the general provisions of the charter in favor of the subjects of the crown, came to embrace, in theory at least, the entire people of the realm.

One provision in the charter had several of the properties of a process of Habeas Corpus; by it any one imprisoned upon a capital charge might have it inquired into whether the charge was made from hate and malice, or upon good and sufficient ground, and this process was to be issued without charge to the party applying for it.

But the great and significant clause of the Charter, upon which its claim to the admiration and veneration of every successive age rests, is the 29th chapter or section; it is so broad in its terms, and extensive in its application that it may be justly regarded as embodying the great principles of civil liberty, as well as of personal rights and protection, under a wise and just administration of law, which have their foundation in the English common law. I follow the words of Lord Coke in the very awkard and inelegant translation of this clause. "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land." The original closes with these noble and often quoted words: "Nulli *vendemus*, nulli *negabimus* aut *differemus* justitiam vel rectum."

We here have in epitome the elements of the free British Constitution, which was more fully developed and declared after that long struggle with the Tudors and the Stuarts, in the Habeas Corpus Act of Charles II., and the Bill of Rights of William and Mary, one of the crowning acts of the Revolution of 1688. We have, in fact, in this clause of the charter the germinal principle of a process of Habeas Corpus, which is, after all, but the declaration of an original principle of the English common law; and we have, moreover, what I apprehend is the first public authoritative recognition of the right of trial by jury.

It is singular how little is known of the first introduction of trial by jury into the proceedings of the English courts. Barrington, a writer upon the early English statutes, quotes what he regards as very high authority, showing that it was unknown to the Saxons, and he favors the idea that it was introduced into England about the time of Henry II.—(*Bar. Stat.* 21, 22.)

Be that as it may, from that day trial by jury has been deemed one of the great safeguards of English liberties, and one of the last to be surrendered. So long as a man's life, property and liberty cannot be taken from him, in the words of this charter, "nisi per legale judicium parsium suorum vel per lege terræ," he may feel that he is under the guardianship and protection of the whole body politic, and in the vigilance of the law has the surest safeguard which human invention has ever devised.

In the closing language of the chapter which I have cited above, we have, in view of the history and condition of the times, one of the noblest declarations in the history of jurisprudence. Made at a time when justice was openly hastened or delayed for money, or withheld in obedience to the dictates of royal power, and which state of things continued to a greater or less degree down to the English revolution, it did but anticipate, by centuries, that advance of the nation and the race, to which they have attained in the progress of civilization and refinement. The words "nulli vendemus, nulli negabimus aut differemus justitiam vel rectum," were adopted by our own Supreme Court as the motto of the seal of that court; and the fidelity with which they have regarded it, in the exercise of their high functions, while impressing it, legibly, upon the processes which they issued, can hardly fail to make one conscious, as he reflects upon a fact so suggestive, of the undying force and dignity of that noble declaration, when a thought, thus elicited by the hardy and unlettered vassals of a weak and contemptible monarch, of then more than half barbarous England, should stand out, as it were in relief, in the proceedings of a court of common law jurisdiction of the highest dignity, administering justice to a million and a half of intelligent freemen, speaking the language of England, in a land of whose local existence even the wisest men of that day had never dreamed, it is but another illustration of the undying nature of noble thought, when clothed in a language of fitting and becoming dignity.

The circumstances under which Magna Charta was granted are in many respects widely variant from any under which we can conceive that Americans can be called upon to

act; but the lesson taught by an examination into the origin and character of this remarkable instrument, can never be too carefully learned, too well remembered, or too faithfully carried out, when it is desired to secure the protection of a numerous, but individually less powerfull class, against the tyranny of active, influential, and unscrupulous superiors. —*Law Reporter.*

QUALITIES OF JUDICIAL EXCELLENCE.

Certainly no country can furnish more illustrious examples of judicial excellence than Great Britain. The modern names of Lord St. Leonards, Lord Campbell and Sir Alexander Cockburn have nearly rivaled, in profound knowledge of English law, and grave and impressive discussion of topics presented, those of Lord Eldon and Holt, or the accomplished Mansfield, of a former generation. The qualities which make an excellent judge in Great Britian are not much different, we suppose, from those which make our American judges so generally acceptable to the Bar and to the public. Some reflections in a late issue of the London *Times*, upon reviewing Mr. Foss's History of the Series of Judicial Personages who have adorned the English Bench, are interesting for their novelty, and instructive for the soundness of the sentiments expressed.

In every generation the Judges of England have had some members of patrician birth, but by far the more numerous have risen from the middle classes, and not a few from a humbler station. We think our readers will thank us for quoting a few passages, tending to show the qualities which seem to distinguish English Judges of eminence, and mark their path to illustrious places in the history of jurisprudence.

Professional eminence—success at the Bar of some description—has been the ground for judicial promotion in an overwhelming majority of instances. A few men have been elevated to the Bench by favor, corruption, intrigue, or caprice; and some judicial appointments have been made to recompense somewhat questionable merit. These cases, however are quite exceptions; and, speaking generally, the judicial office has been fairly and honorably won by a long career of forensic distinction. It is evident that the absence of exclusiveness in the ranks of those who are to become our Judges and the principle which has regulated their selection are strong proofs of the dignity and importance which Englishmen during many generations have attributed to the administration of justice, and of the jealous care they have taken to secure that it shall be pure and efficient.

Nearly all of the most illustrious of the series were men who, with knowledge of law, combined literary and scientific accomplishments, and were versed in many branches of learning; Chief Justice Hale was no mean historian; Chief Justice Vaughan was an eminent civilian; the splendid and fruitful intellect of Somers pursued many intellectual objects; Lord Mansfield was an exquisite scholar and a writer of the very highest merit; and it is not necessary to remind the reader of Lord Brougham's many and remarkable attainments. On the other hand, the few persons who have become really distinguished Judges with mere professional and technical acquirements have invariably shown, in different ways, the consequences of their inferior education. Though a great master of English law, Lord Macclesfield was so coarse and illiterate that, in the words of one of his cotemporaries, he "remained to the last a vulgar attorney."

The judicial genius of Lord Hardwicke would have been more brilliant had it received some lustre from the glory of letters, and his influence in the House of Lords, and especially in the society of the world, was impaired by his plebeian manner. It has been alleged that Lord Eldon's practice of never reading anything but law had much to do with his verbose style and the slovenly uncouthness of his judgments, and indeed, it would be difficult to suppose that, had he possessed his brother's scholarship, he would have been so completely deficient in all that relates to expression and method. The same distinction will be found to run more or less throughout the entire series; the men of high education and culture have usually shown a marked superiority over those of mere professional attainments. This is a truth that should be remembered by those who are about to enter the race of the Bar; while it is yet time they should take care to lay in a store of various learning, and to discipline themselves by intellectual training, before their engrossing professional work shall confine them within its narrow limits.

Again, this judicial list gives us much information as to the kind of qualities which have usually raised their possessors to the Bench, and suggests thereby some valuable inferences. Looking over the series of names generally, we shall find that practical acuteness and energy have been in the vast majority of instances the passports to judicial promotion and that the thoughtful and philosophical intellect has been usually distanced in the race, unless, indeed, it has been associated with the other conditions requried for distinction. The most of our Judges have been men completely versed in the business of the courts, with a thorough knowledge of case law within a limited range of subjects, and wonderfully dexterous in points of practice; or they have been eminent advocates at the Bar, or otherwise skilled in conducting causes. But they have shown for the most part little aptitude for jurisprudence, for international law, or even for English law as a system; or, finding these studies in low esteem, they have devoted themselves to those parts of

their calling which secured them the highest advantages, and were the most congenial to their nature.—*N. Y. Transcript.*

LAW v. EQUITY.

Stewart v. *The Great Western Railway Co. and Saunders*, 13 W. R. 886.

The development of a legal system appears to be attended with symptoms similar to those which accompany the progress of political development. The archaic type of government is patriarchal, such as we find it in the earliest portion of the Old Testament, and the government of all unsettled tribes is still largely imbued with this character. Every extant record, however, of the rise, progress, and fall of nations, testifies that, when a tribe first quits its romantic life, and becomes a nation, the elements of power become concentrated either in a military aristocracy or a successful general: if the former, the policy assumes a feudal, if the latter, a despotic type. And according to the predominance of one or other of these forms, which are found in conflict with one another in the early life of every nation, is the course thenceforth taken by that nation's history.

Feudalism is the essence of decentralization, despotism is the perfection of centralization, and as power ever tends to beget favour, it follows, of necessary consequence, that to whichever of these forces chances or skill shall give the predominance, that one will gradually but surely, unless stopped by force from without, assume indisputable, and at length undisputed, sway; ending in the one case, in disintegration, in the other, in rigid fixity of rule.

Take the history of ancient Rome as an instance. Whatever may be the truth underlying those mythic records of early kings which our unsuspecting boyhood once devoured without suspicion, this much at least may be assumed, that the original government of the villages, &c., which afterwards coalesced to form the city of Rome, was of the pure patriarchal type; the original senate consisted literally of the "fathers of families," and the original sovereigns were obviously but military leaders of the tribes.

This patriarchal element continued till a late period in the *Comitia Curiata*, which were at first the preponderating power of the state, but which gradually gave way under the centralizing influences to which the peculiar position of the state during the republic lent abnormal strength.

The vast mass of citizens who, not being enrolled in the old guilds, had no part in the *Comitia Curiata*, but who, by the gradual accretion of wealth and numbers came in time to wield the principal power of the state as members of the *Comitia Centuriata*, for a time averted this course; but when, after the success of the Licinian reforms, the whole mass of citizens were admitted to equal civic privileges, the position of the city as the mistress of a large conquered and subject territory led naturally to a policy somewhat like that of Athens; a policy of great freedom for the citizens *inter se*, the most centralized despotism as between the city and her dependant states.

How this centralization grew, by the increase of power in the tribes, into military despotism, we need not here discuss, that seems to be the only condition of political rest; the organization towards which, while it affords no hope of change in itself, all others seem more or less rapidly to gravitate. It is as it were the centre of force of the political universe, round which all systems of government revolve in spiral orbits, which must, after a greater or less number of revolutions, according to circumstances, lead at last to absorbtion in the centre.

May the day be long delayed.

The progress of law as a system closely resembles this. Some ultimate truths or rules are accepted at first, and are sufficient for the simple transactions of a semi-civilized tribe, and enforced by the spontaneous action of the executive government. These may be considered as the patriarchal laws. These general rules, however, are soon found to be inadequate, even for all the cases which they were designed to meet, much more for the ever-varying circumstances of civilized life, and thereupon discretionary, equitable, or Prætorian courts are originated, in which the judge interferes, in accordance, indeed, or presumed accordance, with the principles of the common law, to "mitigate the rigour," of its rules. This is the first great step towards centralization. Henceforward the supreme tribunal of the country, that which practically controls all the others, be it presided over by Prætor, Pro-Consul, Maire de Palais, or Lord High Chancellor, becomes a central power, forcing into harmony with its dictates all the independent actions of the old common law authorities. But this tribunal, at first, *ipsâ naturâ rei*, an arbitrary "court of conscience," gradually becomes systematized. "That which has been shall be," and accordingly precedents, consistently followed, become the law of the court, and it gradually comes to be supposed co-extensive with all possible important questions, and the discretionary extension of the action of the court thereupon ceases. Precedents, however, being merely concrete rules, must, in order to be made thoroughly available, be endued with an abstract or general form. This is done at first by the action of the judges themselves, who, by comparing and classifying the cases cited before them, deduce therefrom certain abstract rules or "principles," which they declare to have been the guiding rule in the class of precedents adverted to, and then the precedents themselves come to be neglected, and the rule thus enunciated is accepted as an equitable "maxim."

But by and bye a fresh central power steps in, which, in every civilized state, is sure to absorb all authority into itself—the Legislature. Whether the legislative power be representative, or feudal, or despotic, or a combination of all three, or of any two of them, it is equally certain that it will, as the nation passes towards complete organization, become more and more rapidly the only active power in the commonwealth, so that the courts, ceasing to mould old rules, or make new ones, become, in time, machines for registering statutory decrees. When this stage is arrived at, the nation has reached legislative despotism; the legal planet has plunged into its centre of force, and a fixity of state—may it not prove to be the blackness of darkness—thenceforth remains for it. Then, and not till then, may judges be heard to refuse to do justice because an Act of Parliament is too strong for them; then, and not till then, to implore legislative assistance to help them out of difficulties arising from anomalies in the law.

With all its drawbacks, however, this state has one great advantage. It is pre-eminently the age of simplification. The Legislature may, and ordinarily does in such case, interfere unnecessarily and perniciously with the action of the settled law, and many "novels," not always beneficial, may be expected as the result; but the same authority which issues the "novels," delights in "pandects," and an age of codes and digests naturally succeeds the era of legal fictions and Prætorian edicts.

Thus the legal system, like the body politic, becomes in its old age, as in its youth, subject to arbitrary rules, admitting neither of variation nor evasion.

(*To be continued.*)

PLEADING A CONTRACT.

In an action founded upon a contract, such contract should be stated truly, with all its conditions (*Adam* v. *Mayor* of N. Y., 4 Duer, 295) and qualifications (*Metzner* v. *Bolton*, 9 Exch. 518; *Brown* v. *Knill*, 2 Brod. & B. 395) though unintentional defects of statements are not attended with such serious consequences as was formerly the case.

An express contract may be set forth in its precise words (*Fairbanks* v. *Bloomfield*, 2 Duer, 353; *Moore* v. *Plymouth*, 3 Barn. & Ald. 69; *Newborough* v. *Schroder*, 7 C. B. 397) or according to its substantial effect (*Clarke* v. *Morrell*, 1 Man. & Gr., 841.) It is not necessary, now, to state a contract strictly according to its legal effect, nor indeed is it allowable to plead the legal effect of an agreement, if it is not consistent with the literal truth (*Gasper* v. *Adams*, 28 Barb., 441.)

Where a contract contains several distinct covenants, it is unnecessary to state more than the one upon which the action is brought, and such as qualify it (*Williams* v. *Healey*, 3 Denio, 363; *Sanford* v. *Halsey*; 2 Denio, 253, 255; *Scott* v. *Lieber*, 2 Wend. 479; *Henry* v. *Cleland*, 14 Johns. 400; see *Hood* v. *Inman*, 4 Johns. Ch. 437; *Handford* v. *Palmer*, 2 Brod. & B. 359.)

If a contract has been modified, it must be pleaded as modified (*Baldwin* v. *Munn*, 2 Wend. 399; *Langworthy* v. *Smith*, id. 587; *Freeman* v. *Adams*, 9 Johns. 115; *Phelps* v. *Rose*, 8 id. 392); and, if a new agreement is substituted, that must be pleaded (see *Spencer* v. *Halstead*, 1 Denio, 606) and that alone (*Chesbrough* v. *New York and Erie Railroad Company*, sp. t., 26 Barb. 9; 13 How. 557.) A mere extension of time for performance is not, however, a modification essential to be pleaded, if constituting no part of the cause of action (*Crane* v. *Maynard*, 12 Wend. 408.)

In an action upon a contract implied by law, the facts from which the law implies such a contract must be alleged (*Prentice* v. *Ayke*, 6 Duer, 220) though the implied contract itself need not and should not be expressly pleaded (*Farron* v. *Sherwood*, 17 N. Y. 227; *Jordan & Sken P. R. Co.* v. *Morley*, 23 id. 552.)

Except in the cases hereafter noted, every complaint upon a contract, whether implied or express, oral or written, must aver the existence of a consideration for the contract (*Dolcher* v. *Fry*, 37 Barb. 152; *Spear* v. *Downing*, 12 Abb. 437; 22 How. 30; 34 Barb. 522; *Bailey* v *Freeman*, 4 Johns. 280; *Burnet* v. *Bisco*, id. 235; to same effect *Seaman* v. *Seaman*, 12 Wend. 381; *Parker* v. *Crane*, 6 id. 647; and see *Prindle* v. *Caruthers*, 15 N. Y. 430.) And the consideration, as pleaded, must be sufficient to sustain the contract (*Ross* v. *Sadgheer*, 21 Wend. 166.)

Where the nature of the contract alleged is such as to raise a presumption of a consideration, none need be averred. Thus, no consideration need be stated in pleading a contract under seal (*Bush* v. *Stevens*, 24 Wend. 256) or a negotiable bill or note (*Tibbetts* v. *Bissel*, 21 Barb. 650; see *Bank of Troy* v. *Topping*, 9 Wend. 277; *Goshen Turnpike Co.* v. *Hurtin*, 9 Johns. 217; *Halch* v. *Trayes*, 11 Ad. & El. 708; *Combs* v. *Ingram*, 4 Dowl. & Ryl. 214.)

The consideration should of course be stated with substantial truth, but the strict rules of the Common Law, which required the whole consideration to be stated, and to be proved as laid, without regard to the importance of the omission or variance, are not applicable under the Code.

If the action is brought upon a written contract, signed by the defendant, containing an acknowledgment of consideration, and a copy thereof is set out in the complaint, that is a sufficient averment of consideration (*Prindle* v. *Caruthers*, 15 N. Y. 425.)

An executed consideration—that is, one which had been rendered before the promise sued upon was made—must be alleged to have been rendered at the defendant's request (*Spear* v. *Downing*, 35 Barb. 522; 12 Abb.

437; 22 How. 30; *Parker* v. *Crane*, 6 Wend. 647; *Chaffee* v. *Thomas*, 7 Cow. 358; *Comstock* v. *Smith*, 7 Johns. 87; *Livingston* v. *Rogers*, 1 Cai. 583) unless it is made apparent that such consideration was not given nor accepted as a mere gratuity, in which case the averment of request may be omitted (note to *Fisher* v. *Pyne*, 1 Man. & Gr. 266; see *Victors* v. *Davis*, 12 Mees. & W. 760; *Doty* v. *Wilson*, 14 Johns. 378; *Hicks* v. *Burhans*, 10 id. 243.) Thus, in an action for goods "sold" (*Acome* v. *American Mineral Co.*, sp. t., 11 How. 24) or money "lent" (*Victors* v. *Davis*, 12 Mees. & W. 760) it is not necessary to allege that the sale or loan was made at the defendant's request. And a subsequent adoption or ratification of an act done in the expectation of reimbursement is equivalent to a previous request (*Doty* v. *Wilson*, 14 Johns. 378.)

When the only consideration alleged for a promise on the part of the defendant is a promise by the plaintiff, it must appear that they were made simultaneously (*Livingston* v. *Rogers*, 1 Cai. 583; see *Keep* v. *Goodrich*, 12 Johns. 397.)—*N. Y. Transcript.*

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Ball v. Sprung.

Appeal from county court—Verdict entered on motion, without leave reserved—Practice.

A rule *nisi* to enter a verdict for the plaintiff, or for a new trial, was made absolute in the county court in the first alternative, although defendant had not assented to any leave being reserved to move. On appeal, this court directed the rule absolute to be discharged, leaving it to the court below to dispose of the application for new trial, the other alternative of the rule *nisi*.

[Q. B., E. T., 1865.]

Appeal from the County Court of Huron and Bruce.

This was an action for converting goods, and on the common counts.

At the trial in court below the jury found a verdict for defendant, but they were requested to assess the damages sustained by the plaintiff in case he should be entitled to succeed, and they settled this amount at £ .

Leave was reserved to the plaintiff to move to enter a verdict in his favor for this sum, the defendant not assenting to the reservation, although the learned judge was at the time under the impression that it was not objected to; and a rule *nisi* obtained in pursuance of such leave, or for a new trial, was made absolute to enter the verdict accordingly.

The defendant thereupon appealed.

O'Connor, for the appellant.

S. Richards, Q. C., contra.

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

The amending act, 27 Vic., ch. 14, sec. 2, seems to extend to the question brought before us, as the rule on which the judge has given his decision was upon leave reserved to move to enter a verdict for the plaintiff. Otherwise there would apparently be no appeal, under Consol. Stats. U. C., ch. 15, sec. 67.

There could be no doubt that the learned judge had no authority to reserve any such leave to the plaintiff without consent of the defendant, which consent, it now appears, was not given. The rule absolute to enter a verdict for the plaintiff, in lieu of that given for the defendant by the jury, cannot be upheld, and we must order and direct that such rule absolute be discharged, without costs, however, under the circumstances.

The rule *nisi*, however, contained two alternatives; one to enter a verdict for the plaintiff the other for a new trial. This latter alternative has not been decided upon, nor indeed could it, for the former part being granted rendered it impossible to grant the latter. As in our judgment the decision given must be annulled, the question presented by the latter alternative necessarily arises, or the verdict for the defendant must stand. No decision has been given upon this in the court below, and the reversal of the decision given has not proceeded upon the merits, which we declined to hear, as there was a clear want of authority. We cannot therefore decide on appeal when the court below has not decided anything as to the question of new trial, and we must leave the case to the jurisdiction of the County Court judge, subject to the decision above given, in order that the latter alternative of the rule may be disposed of by him.

Appeal allowed.

Taylor v. Rose et al.

Nonsuit—Right to move against—Practice.

Action upon a promissory note. Plea fraud and want of consideration. At the end of the charge, in which the judge had expressed an opinion that there was some evidence to support the plea, the plaintiff's counsel desired him to charge in a particular way, and upon his declining to do so took a nonsuit. *Held*, (affirming the judgment of the County Court,) that having thus elected to be nonsuited, the plaintiff could not move against it.

[Q. B., E. T., 1865.]

Appeal from the County Court of the County of Wellington.

The action was brought by the plaintiff as indorsee of a promissory note made by the defendants.

The declaration contained only one count on the note, to which there was only one plea—that the defendants were induced to sign the note through fraud, &c., on the part of the payee, and without consideration, and that the plaintiff received the note with knowledge of the premises, and without consideration.

At the trial the defendants called witnesses to support their plea. The case closed without any objection; but at the end of the learned judge's charge to the jury, in which he had expressed his opinion that there was evidence to go to them in proof of the defendant's plea, the plaintiff's counsel desired the learned judge to charge in a particular way, and upon his declining to do so took a nonsuit.

In the following term the plaintiff obtained a rule *nisi* to set aside the nonsuit and for a new trial. The first ground stated in the rule was, that the plaintiff consented to be nonsuited out

of deference to the opinion of the judge. The other ground referred to the want of proof to support the defendants' plea.

Upon the argument of the rule it was objected that the plaintiff having voluntarily elected to take the nonsuit, he was not in a position to have it set aside. The learned judge sustained the objection, and upon that ground refused to set aside the nonsuit, and discharged the rule *nisi*. Against that decision this appeal was brought.

Robert A. Harrison, for the appellant.

S. Richards, Q. C., contra, cited *Stuart* v. *Bullen*, 1 U. C. Q. B. 451; *McGrath* v. *Cox*, 3 U. C. Q. B. 332; *Vacher* v. *Cocks*, 1 B. & Ad. 145; *Simpson* v. *Clayton*, 2 Bing. N. C. 467; *Wood* v. *Bowden*, 23 U. C. Q. B. 466.

Morrison, J.—Upon the trial of the cause no motion was made for a nonsuit, nor did the learned judge suggest or direct a nonsuit or a verdict for defendants. The rule *nisi* was not moved for on the ground of misdirection, or the reception of improper evidence, or the rejection of evidence.

The case of *Simpson* v. *Clayton*, 2 Bing. N. C. 470, is very like this case. There *Park*, *J.*, in charging the jury, intimated a strong opinion on the evidence unfavorable to the plaintiff, and the plaintiff's counsel interposing without effect to obtain a direction in his favour, elected to be nonsuited. The nonsuit was moved against, and it was contended that it was a case of respectful acquiescence in the opinion of the judge, and not a case of election. *Tindal*, C. J., in discharging the rule says "The general rule is, that when in the progress of a trial the counsel for the plaintiff withdraws the question of fact from the consideration of the jury, and submits to a nonsuit, he cannot afterwards move to set aside a result of the cause which has been occasioned by his own act. * * One exception is, that if the learned judge who presides expresses a strong opinion that there should be a nonsuit, or gives a jury a wrong direction, and the counsel for the plaintiff yields for the time in deference to the judge, the Court will afterwards deal out to the plaintiff the same measure of justice as if the cause had gone on to an uninterrupted conclusion. That was the case of *Alexander* v. *Baker*, 2 Cr. & J. 133. "So far is that from being the case here, upon either of the particulars to which I have referred, that the learned judge never directed a nonsuit, but was proceeding in his summing up when the counsel for the plaintiff, after one interruption, desired to be nonsuited rather than allow the case to go to the jury. That course therefore was the voluntary election of the plaintiff's counsel. I have heard of no wrong direction, nor of any evidence having been improperly rejected, but only that the learned judge from time to time expressed an opinion on the evidence, as he was bound to do."

I also refer to *Austin* v. *Evans*, 2 M. & G. 430. *Wilkinson* v. *Whalley*, 5 M. & G. 590, and to *Mugrath* v. *Cox*, 3 U. C. Q. B. 332, where Sir *James Macauley* reviews all the cases. In *Wilkinson* v. *Whalley* it was conceded that where a plaintiff elected to be nonsuited in consequence of misdirection as to the weight and effect of the evidence, he could not move to set aside the nonsuit; but it was submitted that a plaintiff might do so where the misdirection was as to the law. And *Cresswell*, J., in his judgment said, "I wish to add one word as to setting aside nonsuits. The doctrine has perhaps been carried a little too far. I do not accede to the rule, in its broad terms, that whenever a judge misdirects the jury upon a point of law, and the plaintiff thereupon *elects* to be nonsuited, he can afterwards move to set aside the nonsuit"—See also Baron Wood's judgment in *Ward* v. *Mason*, 9 Price, 291.

Upon the strength of these authorities, I am of opinion that the judgment of the court below upon this point was correct, and that the appeal should not be allowed.

Upon the other points raised in the court below, and referred to in the argument, it is unnecessary to express any opinion. The question arising upon the construction and effect of the 29 Vic., ch. 45, is one of great importance, and by no means free from doubt. I am authorised to say that my brother Hagarty, who heard the argument, concurs in this judgment.

Draper, C. J., concurred.

Appeal dismissed with costs.

Gamble v. The Great Western Railway Company.

Railway—Liability for loss of luggage.

Plaintiff, travelling on a first-class passenger ticket on defendant's railway, from Chatham to Toronto, had a travelling bag, which he took with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge to any of defendants' servants. At the London station, where the train stopped for refreshments, he left it on his seat in the car, in order to retain the place, and on his return from the refreshment room it was gone

Held, that defendants were liable for the loss.

Morrison, J., dissented, on the ground that, under the system of checking luggage adopted in this country, defendants' liability should be confined to articles checked.

Per Draper, C. J.—That system should be considered as an additional precaution adopted by the defendants for their own security, not as affecting their liability.

[Q. B., E. T., 1865.]

This was a case stated for the opinion of the court, under the C. L. P. A., as follows:—

The defendants are common carriers, for the carriage of passengers, luggage and goods.

In the month of October last the plaintiff was a passenger on the railway of the defendants, having purchased at their station, in the town of Chatham, a first-class passenger ticket, which entitled him and his luggage to be carried from Chatham to Toronto, but the defendants not thereby assuming a higher responsibility in respect of such luggage than attaches to carriers of passengers having luggage with them—meaning to distinguish such responsibility, if it exists in law, from the responsibility of common carriers for goods.

The plaintiff had with him, amongst other luggage, an enamelled travelling bag, containing the usual articles of a dressing-case, wearing apparel, and other effects of the plaintiff, of the value of twenty pounds.

All these articles of luggage were taken by the plaintiff into the passenger car in which he took a seat for the journey he was about to make. He did not offer the travelling bag to the porters of the defendants to be checked. No servant of

the defendants presented himself to take charge of the same, nor was any notice given that defendants required the same to be checked.

At the London station of the defendants the train stopped for a short time to enable passengers to obtain refreshments, and the plaintiff, as is usual with passengers, in order to retain their seats, placed the travelling bag in the seat where he had been sitting, and went out to the refreshment room. Upon the plaintiff returning shortly afterwards to his seat in the car, the travelling bag, but no other portion of the plaintiff's luggage, was missing, and has not since been found although the plaintiff forthwith reported the loss to the conductor of the train, and also to the station master at the London station

The question for the opinion of the court is whether, under the facts above stated, the defendants are liable for the loss of the travelling bag.

If the court be of opinion that the defendants are liable, then judgment to be entered for the plaintiff for twenty pounds and costs of suit.

But if the court shall be of opinion that the defendants are not liable, then judgment of nonsuit to be entered against the plaintiff, with costs of suit.

G. D'Arcy Boulton for the plaintiff, cited *Richards* v. *The London, Brighton, and South Coast Railway Co.*, 7 C. B 839; *Butcher* v *The London and South Western Railway Company*, 16 C. B 13; *The Great Northern Railway Company* v. *Shepherd*, 8 Ex. 30; *Shaw* v. *The Grand Trunk Railway Company*, 7 U.C C.P 493. (Hagarty, J., referred to *Stewart* v. *London and North Western Railway Co*, 10 L. T. Rep. N S 302.)

Irving, Q. C, contra, cited Powell on Carriers, 2d Edn 42, 56; Chitty and Temple on Carriers, 285. 289; *Towers* v. *The Utica and Schenectady R. W Co.*, 7 Hill 47; *Great Western R. W.* v. *Goodman*, 12 C. B. 313.

Draper, C. J., read the following judgment, prepared by Hagarty, J.—The case states that defendants are common carriers of passengers, luggage and goods, and plaintiff purchased a ticket which entitled him to be carried with his luggage from Chatham to Toronto, but the defendants (as the case states) did not thereby assume a higher responsibility in respect of such luggage than attaches to carriers of passengers having luggage with them—meaning to distinguish such responsibility, if it exist in law, from the responsibility of common carriers of goods.

The plaintiff had with him a travelling bag, containing ordinary articles for a traveller's personal use, and placed it on the seat beside him, not offering it to be checked, nor being asked to have it checked as baggage, nor any notice that it should be checked being given to him. He left the carriage for a few minutes at a refreshment station, and on his return to his seat the bag was missing, and has not since been found.

The case is stated without pleadings, and no question is raised as to their being any thing unusual or against the defendants' rules or practice in the plaintiff or any other passenger placing an article like a travelling bag beside him in the carriage. He was entitled under the contract of carriage to be carried from Chatham to Toronto by defendants, *with his luggage*, of which the bag was a part.

It is not easy to understand how, on such a state of facts, the defendants, as carriers, are not responsible for the safe carriage of this passenger's luggage There is no suggestion of any personal neglect or violation of any known rule or course of dealing on the plaintiff's part. He was received by defendants in their train in the ordinary way. His bag is placed near him, as far as we are told, not in any improper or unusual place. During the transit he leaves the train, with other passengers, for refreshments, in a manner permitted or at least not objected to by defendants, and on returning to his seat his bag is missing. We cannot see how defendants can escape liability.

In *Richards* v *The London, Brighton, and South Coast Railway Co.*, 7 C. B. 839, the plaintiff came to the train in a cab, and the driver, without any communicaiton with defendants' servants, placed her dressing-case under her seat in the carriage; her other luggage was taken and weigned by the defendants' porters. On arrival the porters carried her luggage, consisting of many articles, from the carriage to a coach, telling her servant that they would see to her things. On reaching her residence it was, for the first time, discovered that the dressing-case was lost. The defendants insisted that this article had never come into their custody The jury found that they had received it to be carried.

The court held the defendants liable Wilde, C. J., (a judge peculiarily well versed in all such common law questions) adds "The fact of the dressing-case being placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion, makes no difference." Creswell, J., says, "There was abundant evidence to shew that the dressing-case in question came into defendants' custody under such circumstances as to make them responsible for its safe conveyance and delivery." Williams, J., says, "It was in their custody as common carriers at the time of the loss."

Much of the contention of defendants was that the transit was at an end before the loss, and that, as the dressing-case was lost between the train and the hackney coach to which the plaintiff's luggage was carried, they were not responsible.

In *Stewart* v. *The London and North Western Railway Co*, 10 L T. Rep. N. S. 302, this last case is spoken of by Bramwell, B, who says, 'I was counsel in that case, and certainly thought it a hard one upon the company; but, assuming that case to be law, it is not this case." It was contended that defendants, as to passenger's baggage, had all the responsibilities of common carriers of goods, and Story's opinion to that effect is cited—Story on Bailments' sec. 499. Pollock, C. B, says, "By the case of *Richards* v. *The London and Brighton Railway*, I am not convinced to the contrary; and notwithstanding the eminence of Story as an authority, and his learning and ability, I do not think the luggage of passengers by railway is to be treated as goods which are usually and ordinarily sent as 'goods'"

It must be noted that this latter case was one in which it was proved that the plaintiff took a ticket at a reduced rate by an excursion train,

one term of the contract being that his luggage was at his own risk.

In *Shepherd* v. *Great Northern Railway Company*, 8 Ex. 30, the plaintiff put a carpet bag beside him under the seat, containing a large quantity of merchandise. The court held that defendants were bound to carry the plaintiff and his luggage, and that he could not recover for the loss of merchandise. For a few things in the bag, shewn to be "luggage," he was allowed to recover. "The defendants," (says Parke, B.,) "only agreed for the stipulated fare to carry passengers and every thing which constituted personal luggage."

In *Butcher* v. *The London and South Western Railway Co*, 16 C. B. 13, the plaintiff took his carpet bag into the carriage and placed it on the seat by him. Besides wearing appearel it containing £400. On arrival he alighted with it in his hand. A servant of defendants took it from him, and guided him to a cab inside defendants' station, and placed the bag on the foot-board. Plaintiff returned to the train for his wife. When he came back the cab and bag had disappeared. Defendants contended that they had never received the bag to be carried, besides contesting their liability for its loss at the terminus. The court held defendants liable. Cresswell, J., says, "There was *primâ facie* evidence of the delivery of the bag to the company to be carried." The whole contest was as to the loss at the terminus.

In *Cahill* v. *The London and North Western Railway Co.*, 4 L. T. Rep., N. S. 246, the defendants were held not responsible for the loss of merchandise delivered to them by a passenger as his personal luggage Erle, C. J., says, "The contract by a passenger taking a ticket to be carried with his luggage, is a contract creating a duty in the railway company to carry safely that which he passes to them as personal luggage, but not that which is in reality not personal luggage, not ordinary luggage, but merchandise. Wilies, J., says, "The fair conclusion is—and that appears to have been the view laid down by Story, J.; I believe also entertained by Lord Wensleydale; it appears to me to be rather a conclusion of fact than of law; that a ticket so taken gives the passenger a right to have himself and his ordinary personal luggage carried for the payment which he makes."

The Belfast &c. Railway Co. v. *Keys*, 4 L. T. Rep., N. S 841, in the House of Lords, turned on the same difficulty. The plaintiff, as Lord Westbury says, "intended to carry as personal baggage that which he was bound in ordinary fairness to have stated and paid for as merchandise." The company admitted that under his ticket he and his personal luggage was to be carried by them. Lord Wensleydale says "The original contract certainly was that the plaintiff was not to pay anything for his luggage, but he was bound to pay for merchandise," &c., &c *Shaw* v *The Grand Trunk Railway Co.*, 7 U.C.C.P. 493, turns on the same distinction between luggage and merchandise, and follows the *Great Northern Railway* v. *Shepherd*, already referred to, and emphatically recognises the liability to take care of passengers' luggage, quoting with approval Angell on Carriers, sec. 115:—"An aggreement to carry ordinary baggage may well be implied from the ordinary course of business," &c.

The case before us is free from any of the difficulties presented in some of those cited. I entertain no doubt of liability for the loss of the plaintiff's personal luggage, under the circumstances stated in the case. If defendants ordinarily permit passengers to take articles of luggage into the carriage with them, making no objection, and not requiring them to surrender it into their servants' special charge, it is not easy to see why they should not be responsible.

Draper, C. J.—The judgment which I have just read was prepared by my brother Hagarty under the impression that it would express the unanimous opinion of the court. I concur in the conclusion at which he has arrived, but my brother Morrison, I believe, dissents, for reasons which he will give and I desire, therefore, to add a few words.

The law of common carriers, either by railway or otherwise, I take to be the same here as in England, and therefore, if it be determined there in any particular case that a contract is implied, the same contract will arise here, unless some special condition has been introduced by the company for their own protection. In this case there is a reference to the system of checking, which prevails here with regard to luggage carried on railways, but not in England. I have considered whether the existence of this practice should make any difference, and my conclusion is that it must be regarded as introduced by the company for their own benefit, not for that of passengers. If the law be the same in both countries, and makes the company liable for passengers' luggage, as I take it to do, then I do not see how the responsibility can be altered by any difference in the system which they may choose to adopt for the care and management of it. In England the luggage is often carried on the tops of the various cars, and in no way identified with its owner but by marking upon it the destination. Here there is usually a baggage-car on which the company require all baggage to be placed which is not carried by hand; and in addition to that there is a system of checks, one check being attached to the luggage, and another, with a corresponding number upon it, given to the owner, which must be produced on claiming the property. These, I think, are to be considered only as additional precautions taken by the company, beyond what is customary in England, in order to prevent the luggage from being given up to the wrong person. They would be liable for a loss, in case no such means had been taken, and if, notwithstanding, a loss occurs, I do not think their liability is changed, in the absence of express notice on their part that they will be responsible only for articles checked.

This being so, I think the case cited by my brother Hagarty, from 7 C. B 839, is conclusive, and it is as strong a case in its circumstances as could well be conceived. There it did not appear that any of the company's servants had the least notice of any such thing as was lost being on the train, and the loss was not observed until the plaintiff had entered a hack, another mode of conveyance, and driven two or three miles from the station. The company were held liable; and though Baron Bramwell, in *Stewart* v. *London and N. W. Railway*, remarked that it was a hard

case upon the defendants, I am not aware that the decisions has ever been impunged.

Morrison, J.—I regret that I am unable to concur in the judgments just given. The system of checking luggage, and the appropriation of a particular car for it, the construction of the passenger carriages and the passing to and fro of passengers i them at their pleasure, so entirely differs from the system and customs prevailing in England, that I cannot avoid keeping those differences in view in applying the law and principles laid down in the English cases. Here the passenger frequently takes into the carriage with him portions of his luggage, for his personal use and convenience during the journey, retaining it entirely under his own control, and removing it from time to time from one car or seat to another. As to the system of checking, which is a custom practised upon all our railways. I think it is but a fair construction to put upon it, to consider it as a notice to passengers that all articles of luggage which they do not desire or prefer to keep under their own personal care and at their own risk must be checked or handed to the Company's officers.

In all the cases relied on by the plaintiff, it is important to note that the losses complained of were in some degree caused by the neglect or misconduct, or through the interference of the Company's servants, they having either taken charge of or dealt with the missing articles in one way or another; and although the principles laid down in those cases are apparently broad enough to create liability without such interference, yet the material parts of those decisions rest to a great extent upon the conduct of the Company's officers or servants; and from what was said by Wilde, C. J., in *Richards* v. *London and South Coast Railway Company*, 7 C. B. 859, the question of liability depends upon the particular circumstances, for when referring to the circumstances under which the plaintiff's dressing case was put into the carriage, he says: "No doubt this might have been done under such circumstances as would discharge the carriers, or, more properly speaking, under such circumstances as never to cast upon them the responsibility of carriers. But that would depend upon the evidence."

Now it appears to me upon the facts and circumstances here admitted, and the conclusion to be deduced from them, that the defendants were discharged from responsibility as to the plaintiff's bag I cannot arrive at any other conclusion than that the bag was under the personal care and charge of the plaintiff, and virtually withdrawn by him from the care and control of the defendants, a view which is supported by the act of the plaintiff at London, using the bag for the purpose of retaining his place in the carriage, by placing it on the seat when going out for refreshments. I am therefore of opinion that a nonsuit should be entered.

Judgment for plaintiff, Morrison, J. dissenting (a).

(a) At the conclusion of this judgment *Boulton*, for the plaintiff mentioned that in practice the Railway Companies decline to check smaller articles like the bag in question, for fear of injury to them in the baggage-car: and that these defendants had in fact refused to check this bag when asked to do so by the plaintiff on a previous occasion.

COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

Dunn v. Dunn.

Right of official assignee to attach judgment on ground of irregularity—Necessity for prompt application—Amendment of trifling irregularity without costs—Defence on the merits—Attaching judgment on ground of fraud.

Where final judgment in default of an appearance to a specially indorsed writ was entered on 23rd January, and execution issued on 30th of same month, and a writ of attachment under the Bankruptcy Act issued on 3rd February, an application on 28th March, at the instance of the official assignee, to set aside the judgment as irregular for a defect in the affidavit of service, was held to be too late.

Where an irregularity was of a trifling character, such as the omission to fill in the date of the entry of judgment, an amendment was allowed without costs.

Leave to the official assignee to defend on the merits, which if granted would have had the effect of destroying plaintiff's priority as against the attaching creditors, was refused, and the official assignee left to his remedy if any, in term, as against the judgment on the ground of fraud.

[Chambers, April 10, 1865.]

Defendant's official assignee, on 28th March last, obtained a summons calling on the plaintiff to shew cause why the judgment entered in this cause on the twenty-third day of January last should not be set aside, and the writ of execution issued thereon, and all proceedings had on them, or either of them, for irregularity, on the ground that the affidavit of service of the writ of summons did not sufficiently state the date on which the said writ of summons was served; and also that the date of entering of the said judgment was not stated in the said judgment; and on grounds disclosed in affidavits filed; and also to shew cause why the said judgment should not be set aside for the benefit of William Thomas Mason, the official assignee of the defendant; or the said William Thomas Mason, as such official assignee, be let in to defend the action on the ground that defendant had and there was a good defence to the action upon the merits and upon the grounds disclosed in affidavits and papers filed. And why any monies made by the sheriff under the writ of execution should not be paid over to the official assignee, on grounds disclosed in affidavits and papers filed.

The writ of summons was issued on 11th January; the affidavit of service was sworn on the same day, and deponent swore that he endorsed on the writ on 11th January, within three days after the service, the day of the week and month of such service. The endorsement was, "Served on Monday the 11th day of January, 1865." The affidavit omitted to state the day of service. Final judgment was entered on the 23rd January, and execution on the 30th January.

The writ of attachment was issued against defendant on 3rd February, before the goods were sold.

T. H. Ince for plaintiff.

O'Connor for official assignee.

The following cases were cited during the argument: *Warrington* v. *Leake*, 22 L. J. Ex. 263; *Gould* v. *Whitehead*, 8 Scott, 341; *Cash* v. *Wells*, 1 B. & Ad. 375.

Richards, C. J.—I think the application to set aside the summons too late (even if the affidavit under any circumstances were defective, of which I have strong doubts, supposing the

rights of the official assignees have accrued from 3rd February.

As to the entry of judgment wanting the date, I suppose it is irregular, and th . the official asssignee has an interest in having the proper date of the judgment placed on it. But as the amendment is of such a trifling character the plaintiff may amend without costs.

As to letting in the official assignee in the name of the defendant to defend on the writs, if the judgment be set aside then the plaintiff will I apprehend lose his priority for the attachment issued before the sale of the goods; and as they are bound by plaintiff's execution, he would in the event of his judgment being sustained, have a right to the proceeds of the sale of the goods.

I do not see my way clear, in the present state of the case, to open the matter and let the official assignee in to defend, as he seeks to do, and, as at present advised, must discharge that portion of the summons. If he can attack the judgment as fraudulent, on making out a clear case, the court in term may set it aside, or if they have doubts may order an issue to inform their conscience before setting it aside, which as a judge in Chambers I cannot do.

Looking at the final result of the application, the plaintiff if he desire it may have an order to amend the roll by inserting the proper day of entering the judgment in it in the regular way; otherwise the defendant may amend the roll and tax the costs of such amendment against the plaintiff.

If the plaintiff elects to amend the rolls he will get the order without costs, and no costs will be allowed to either party.

On the order going to emend the roll to plaintiff, the residue of the application will be discharged, as I have said, without costs to either party.

This decision is without prejudice to the official assignee to set aside the judgment as fraudulent, if advised to do so in term.

Order accordingly.

In re Bright.

Canadian Foreign Enlistment Act, 28 Vic., cap. 2, sec. 1—Sufficiency of warrant of commitment—Statement of offence—Adjudication—Costs.

Held 1. That a commitment under Stat. 28 Vic., cap. 2, sec 1, stating the offence as follows, "for that he on &c. at &c., did attempt to procure A. B to serve in a warlike or military operation in the service of the Government of the United States of America," omitting the words "*as an officer, soldier, sailor, &c.*" was bad.

Held 2. That a judgment for too little is as bad as a judgment for too much, and so a condemnation to pay $100 and costs, when the statute creating the offence imposes a penalty of $200 and costs, is bad.

Held 3. That a commitment, on a judgment for a penalty and costs, not stating in the body of the commitment or a recital in it, the amount of costs, is bad.

Quære, is the jurisdiction of the officers named in 28 Vic., cap. 2, a general or local one?

[Chambers, April 21, 1865.]

This case came before the presiding judge in Chambers, on a return to a writ of *habeas corpus* The prisoner's presence having been dispensed with at his own request.

The return showed that the prisoner was in custody on four warrants. The first was dated the 28th day of March, 1865, "at Chatham in the county of Kent," and recited that the prisoner was on that day charged before T. M., Esq., "Police Magistrate and one of the Justices of the Peace in and for the said county of Kent," for that he on the 22nd March last, at Chatham, did attempt to procure Thomas Livingood to serve in a warlike or military operation in the service of the Government of the United States of America, for which offence he was on the 28th March convicted "before me the said Police Magistrate, and condemned to pay a penalty of $100, and in default of payment forthwith to be committed to the Common Gaol of the county, until paid," and "that the prisoner has not paid, &c.," and directed him to be taken and conveyed to the gaol—there to be kept until he should pay the said penalty together with the costs of this "comment," or be thence delivered by due course of law.

The second was dated 30th March, 1865, at Chatham in the county of Kent aforesaid. The magistrate was described as in the first warrant, and the offence was set out in terms precisely similar, except that the name John F. Russell is introduced in place of Thomas Livingood. The adjudication was that the prisoner pay a penalty of $100 and costs forthwith, and be imprisoned at hard labor in the Common Gaol for a period of six months, and in default of payment of the penalty and costs, forthwith for such further time as the same remain unpaid—and the committal was at hard labor for a period of six months and for such further time as the said penalty and costs remain unpaid, also the charges of the commitment and conveyance to gaol.

The third was dated the 28th March, 1865, and was like the first, correcting the word "comment" by substituting "commitment," but it ordered the prisoner to be kept "until said fine and costs together with costs of commitment and conveying the said James Bright to the said Common Gaol"—not finishing the sentence but at once proceeding with "Given under my hand &c." In the margin of this warrant is the following memorandum or entry:

Fine	$100 00
Information and warrant	0 50
Hearing case	0 50
Return of conviction	1 00
Arrest and attendance by constable	2 00
1 Witness	0 50
Commitment	0 25
Conveying to gaol	1 00
	$105 75

The fourth was dated 30th March, 1865, and was like the second, but contained a marginal entry or memorandum like that on the third warrant.

James Paterson, for the crown.

John B. Read, for the prisoner.

Draper, C J —The statute 28 Vic., ch. 2, sec. 1, enacts that if any person whatever in this Province shall hire, retain, engage or procure, or shall attempt or endeavour to hire, engage or procure any natural born subject of Her Majesty, person or persons whatever, to enlist or to enter or engage to enlist or to serve or to be employed in any warlike or military operation in the service of or for or under or in aid of any foreign power,

state, potentate, colony, province or part of any province or people, or of any person or persons exercising or assuming to exercise the power of government in or over any foreign country, colony, province or part of a province or people, either as an officer, soldier, sailor or marine, or in any other military or warlike capacity—or the other definition of offence not bearing on this case) such offender may be prosecuted either in the manner provided in the 59 Geo. 3, ch. 69, (the Foreign Enlistment Act) or in a summary way before (among others) any judge of either of the Superior Courts of Common Law for Upper Canada, or any judge of a County Court, Recorder, Judge of the Sessions of the Peace or Police Magistrate, or before any two justices of the Peace for the district or county where the offence shall have been committed, and if convicted on the oath of one or more credible witness or witnesses, may be condemned to pay a penalty of $200 with costs, and may be committed to the common Gaol of the district county or city, for a period not exceeding six months at hard labor, and if such penalty and costs be not forthwith paid, then for such further time as the same may remain unpaid; and such penalty shall belong one half to the prosecutor and one half to Her Majesty, for the public uses of the Province.

It is objected,

1. That it does not appear for what place the convicting magistrate is Police Magistrate. Each warrant has in the margin these words, "Province of Canada, county of Kent to wit," and is dated "at Chatham in the county of Kent," but there is a township of Chatham as well as a town of Chatham in that county, and *non constat*, the magistrate was a Police Magistrate for the town nor that he was exercising jurisdiction within the town.

2. That the offence is not sufficiently described according to the statute which prohibits the hiring, retaining, &c., any person to enlist or to serve in any warlike or military operation, for any foreign power, &c., "*as an officer, soldier, sailor or marine, or in any other military or warlike capacity.*" The latter words are not set out as part of the prisoner's offence.

3. The penalty is not discretionary in amount. The statute fixes it at $200, peremptorily. The adjudication is for a fine or penalty of only $100.

4. The amount of costs is not stated in the body of the commitment, nor in the recital of the conviction.

I incline to hold that each of these objections is fatal.

But as to the first it may be said that a general and not a local jurisdiction, is given by the letter of the statute to the judges of the County Courts, Recorders, judges of the Sessions of the Peace and Police Magistrates, and that it is only where two Justices of the Peace are acting that they must be justices of the county where the offence is committed. For the purposes of this case it is not necessary to determine this point.

The second objection is clearly fatal—for the offence is not simply hiring, &c., any person to enlist or serve in any warlike or military operation for a foreign power, but hiring, &c, such person to enlist, &c., as an officer, soldier, &c. The statutory definition is only half followed, and the prisoner is convicted of part and not the whole of what the statute declares to be punishable.

The third objection is clearly fatal, "A judgment for too little is as bad as a judgment for too much," *R.* v. *Salomons*, 1 T. R. 249. See also *Whitehead* v *Reg.* in error 7 Q B 582, where a sentence of seven years transportation was passed on a conviction for an offence punishable by statute by transportation for not more than 15 nor less than 10 years.

The fourth objection is supported by Lord Mansfield's judgment in *Rex* v. *Hall*, Cowp 60.

In my opinion the prisoner is entitled to his discharge.

Order accordingly.

In re Andrew Smith.

Canadian Foreign Enlistment Act, 28 *Vic. cap.* 2—*Sufficiency of warrant—Powers of police magistrates.*

Held, 1st, That a warrant of commitment on a conviction had before a police magistrate for the town of Chatham, in Upper Canada, under the recent statute 28 Vic. cap. 2, averring that on a day named, "at the town of Chatham, in said county, he the said Andrew Smith did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided;" and then proceeding: "And whereas the said Andrew Smith was duly convicted of the said offence before me the said police magistrate, and condemned," &c., sufficiently showed jurisdiction.

Held, 2nd, That the direction to take prisoner "to the common gaol at Chatham," the warrant being addressed "To the constables, &c., in the county of Kent and to the keeper of the common gaol at Chatham, in the said county," was sufficient.

Held, 3rd, That the warrant as above set out sufficiently contained an adjudication as to the offence, though by way of recital.

Held, 4th, That the words "to enlist to serve" do not show a double offence, so as to make a warrant of commitment bad on that ground.

Held, 5th, That the offence created by the statute was sufficiently described in the warrant as above set out.

Held, 6th, That the warrant was not bad as to duration or nature of imprisonment.

Held, 7th, That the amount of costs was sufficiently fixed on the warrant of commitment.

Held, 8th, That there is power to commit for non-payment of costs.

Held, 9th, That the statute does not require both imprisonment and money penalty to be awarded, but that there may be both or either.

[Chambers, May 13, 1865.]

This was an application for the discharge of the prisoner from close custody, under writ of *habeas corpus*.

The prisoner, as appeared by return to the writ, was confined in Chatham gaol, on two charges under the Foreign Enlistment Act.

Prior to the receipt of the writ, the gaoler had received two additional warrants by the committing magistrate, the first two being open to grave objections. All the warrants were returned.

The convictions were had before Mr. McCrae, police magistrate for the town of Chatham, under the late Canadian act 28 Vic. cap. 2.

Each warrant averred that on a day named, "at the town of Chatham, in the said county, he the said Andrew Smith did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided," &c.; and then proceeded: "And whereas the said Andrew Smith was duly convicted of the said offence before me the said police magistrate, and condemned," &c.

James Paterson for the crown.
J. B Read for the prisoner.

Hagarty, J.—Mr. Read objects, first, that it was not shown that the police magistrate was acting within his jurisdiction. The warrant shows that the charge was made at the town of Chatham before Mr. McCrae, police magistrate for said town, and that the attempt to enlist was made at Chatham; and it professes to be given under the magistrate's hand and seal at Chatham. It cannot possibly intend that the magistrate acted in any way except in his jurisdiction, in the presence of these objections.

Secondly, that the directions to take prisoner "to the common gaol at Chatham" is insufficient.

The warrant is addressed "To the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," and I think a direction to the said constables to convey him "to the common gaol at Chatham aforesaid," is quite sufficient.

Thirdly, that the conviction is only recited, and the warrant does not contain a direct adjudication in itself.

I think the warrant sufficiently clear from objection on that ground. The conviction itself, if produced, would be worded differently, and would express directly and not by way of recital the adjudication of the magistrate: (See *In re Allison*, 18 Jur. 1055.)

Fourthly, That "enlist to serve," shows a double offence, when "enlisting," or "serving" is sufficient.

I see nothing in this objection.

Fifthly, That the offence is not sufficiently described.

The statute declares that "if any person, &c., shall hire, &c., or attempt, &c., to hire, &c., any person or persons, &c., to enlist or to enter or engage to enlist, or to serve or to be employed in any warlike or military operations in the service of, &c, any foreign prince, state, &c, either as an officer, soldier, sailor or marine, or in any other military or warlike capacity." The words in the warrant are, "to enlist to serve *as a soldier* in the army of the United States of America, contrary to the statute," &c., omitting the words "in any warlike or military operation." On the best opinion I can form on this point, I think the warrant is good against this objection. I think the words "to enlist to serve as a soldier in the army of the United States of America," comes within the act. The word "army" does not occur in the act, but it seems to me that it is impossible to serve as a soldier in the army without serving as a soldier in some warlike or military operation. It is made an offence to serve as a soldier in any warlike or military operation, or in any other military or warlike capacity. I think to serve as a soldier in the army comes within the words of the statute. Mr. Read urged that the statute pointed to serving in actual hostile operations. I do not think it is so limited, but that it covers attempts to procure soldiers here for the army of a foreign state, at peace as well as at war. I think serving as a soldier in the army must come under either alternative, as a warlike or a military operation.

Sixthly, That the commitment for the further time beyond the six months, is not to be at hard labour, as the six months are declared to be.

I think the act does not require this. After speaking of six months at hard labour, it continues, "and if such penalty and costs be not forthwith paid, then for such further time as the same may remain unpaid," without adding "at hard labour" for such further time.

Seventhly, That adjudication is in addition to the $4 50 for costs; for all costs and charges of commitment, and conveying him the said Andrew Smith to the said common gaol, amounting to the further sum of $1.

This, I think, sufficiently fixes the amount in a warrant of commitment. As to the power to commit for such costs, the statute creating the offence merely says "may be condemned to pay a penalty of $200 with costs." I find provisions in our law for ordering payment in summary convictions, as in section 62, chapter 203. Consolidated Statutes of Canada, where, after ineffectual attempt to levy penalty and costs by distress, the committing justice may direct imprisonment, unless the sum adjudged to be paid and all costs of distress, "and also the costs and charges of the commitment, and conveying the defendant to prison, if such justice think fit so to order, the amount thereof being ascertained and stated in such commitment." I cannot therefore say that under a statute inflicting a penalty "with costs," the costs of conveying defendant to prison may not lawfully be added. In one of the cases there is no imprisonment awarded, only the penalty and costs, and imprisonment if they be not paid. Mr. Read urges that the statute requires both the imprisonment and money penalty to be awarded, and "that may be condemned to pay," and "may be committed to gaol," mean "must be condemned" and "must be committed." As I read the statute I think it was intended to allow both fine and imprisonment, or either, and that it was not compulsory to award both. I think it a harsh intendment, that in an act so worded it is compulsory to award imprisonment. As to the words "such further time," I do not think that they necessarily show that there must be a previous award of imprisonment as a substantial punishment.

I have examined the case of *In re Slater and Wells*, decided under Con. Stat. C., cap. 105, sec. 16, reported in 9 U. C. L. J. 21.

I am not wholly free from hesitation on this warrant, but on the whole I think it is sufficient, and that I am not bound to read such a document with the extreme severity of construction insisted on by the applicants.

I direct the prisoner to be remanded.

If dissatisfied with my view, he is not without a remedy by application elsewhere.*

* Prisoner subsequently obtained from Practice Court, returnable in full Court of Queen's Bench, a rule *nisi* on the Attorney-General to show cause why a writ of *habeas corpus* should not be issued, with a view to the révision of the above decision of Mr. Justice Hagarty; but the court, holding that the judge in Practice Court had no jurisdiction to grant the rule *nisi*, declined to express an opinion on the several points decided by Mr. Justice Hagarty.—Eds. L. J.

IN RE JOHN CARMICHAEL.

Habeas Corpus Act, 31 *Car.* 2, *cap.* 2—*Second arrest for same offence, after discharge under writ of habeas corpus from first arrest—When such can be said to be the case—Effect thereof when prisoner entitled to the writ.*

Held, That where a prisoner is under a writ of *habeas corpus* discharged from close custody on the ground that the warrant of commitment charges no offence, he is not, under s. 6 of the Habeas Corpus Act. 31 Car. 2, cap. 2. entitled to his discharge as against a subsequent warrant correctly stating the offence upon the alleged ground that the second is for "the same offence" as the first arrest.

Semble. That a prisoner is not entitled to a writ of *habeas corpus* under the statute of Charles unless there be "a request made in writing by some or any one on his behalf, attested by two witnesses who were present at the delivery of the same.

[Chambers, June 3, 1865.]

This also was an application by a prisoner for discharge under a writ of *habeas corpus*.

The prisoner was brought up before Mr. Justice John Wilson, at Chambers, on the 1st June, 1865, by the keeper of the common gaol of the United Counties of Lanark and Renfrew, upon a writ of *habeas corpus* issued on the 16th day of May last.

By the return to the writ it appeared,

1. That the prisoner had been committed to the gaol on the 21st day of April, 1865, upon the warrant of S. G. Lynn and Duncan McDonell, two of Her Majesty's Justices of the Peace in and for the said United Counties, dated the 19th day of April, 1865, charging "that he the said John Carmichael did on or about the night of the 21st day of June last past, at the village of Osceola, in the counties aforesaid, maliciously and wilfully kill and murder one David Fitzgerald"

2. That on the 23rd day of May, 1865, another warrant by the same Justices of the Peace of the same date was delivered to the said gaoler, charging that the prisoner at the same time and place "did feloniously, wilfully, and of malice aforethought, kill and murder one David Fitzgerald."

On reading the writ and the return, *James Paterson*, for the prisoner, filed

1. A warrant under the hand and seal of John D. Clendenneer, a coroner for the said United Counties, dated the 24th day of June, 1864, in these words:

"United Counties of Lanark & Renfrew. To wit:" "To Thomas Culberton, constable, and all other constables in and for the United Counties of Lanark and Renfrew, and also to the keeper of Her Majesty's jail at Perth, in the County of Lanark.

"Whereas by an inquisition taken before me, one of Her Majesty's coroners for the said counties, the day and year hereunder mentioned, on view of the body of David Fitzgerald, lying dead in the township of Bromley, county of Renfrew, John Carmichael stands charged with having caused the death by violence of the said David Fitzgerald.

"These are therefore, by virtue of my office, in Her Majesty's name to charge and command you forthwith safely to convey the body of the said John Carmichael to Her Majesty's jail at Perth, and safely to deliver the same to the keeper of the said jail. And these are likewise by virtue of my said office, in Her Majesty's name to will and require you the said keeper to receive the body of the said John Carmichael into your custody, and him safely to keep in the said jail until he shall thence be delivered by due course of law. And for so doing this shall be your sufficient warrant.

"Given under my hand and seal this twenty-fourth day of June, one thousand eight hundred and sixty four.

(Signed) "JOHN D. CLENDENNEER,
"Coroner U. C. Lanark and Renfrew."
[L. S.]

2. An order of the Honorable Mr. Justice Morrison, discharging the prisoner from custody under this warrant, in these words:

"Upon reading the writ of *habeas corpus* issued from this honourable court on 8th day of August last, directed to the keeper of the common gaol of the United Counties of Lanark and Renfrew, commanding him to have the body of John Carmichael detained in the said jail, as it was and is said, together with the day and cause of his being taken and detained, before the presiding judge in Chambers at Osgoode Hall, Toronto, immediately after the receipt of the said writ, upon reading the return of the said jailer to said writ annexed, both said writ and return being filed, upon reading the remand of the Chief Justice of Upper Canada, and the enlargement of the return of the said writ, and upon hearing counsel as well for the said John Carmichael as for the Queen, I order that the said John Carmichael be, and he is hereby discharged out of the custody of the said jailer or keeper of the common jail in and for the said United Counties of Lanark and Renfrew.

(Signed) "JOS. C. MORRISON, J.
"Toronto, September 1, 1864.

"To the keeper of the common jail in and for the United Counties of Lanark and Renfrew."

3. An affidavit of the prisoner, sworn to 5th May, 1865, setting out that he was then in close custody in the common jail of the United Counties of Lanark and Renfrew, charged with the killing and murder of David Fitzgerald; that on 22nd June last past he was arrested for the killing and murder of said David Fitzgerald, and committed to jail by virtue of a warrant issued by John D. Clendenneer, coroner of the said United Counties; that on the 3rd September last past he was brought up before the presiding judge in Chambers under a writ of *habeas corpus*, and discharged from custody by order of Mr. Justice Morrison*; that on the 8th April last he was again arrested for the same identical offence, viz., the killing and murder of the said David Fitzgerald, and brought before five justices of the peace for the said United Counties and committed by two of said justices, S. G. Lynn and Duncan McDonell, Esquires, to the said common gaol, contrary to 6th sec. Habeas Corpus Act, 31st Chas. II., chap. 2.

Mr. Paterson cited no authority, but contended that under the provisions of this section the prisoner could not again be committed for the same offence.

Robert A. Harrison, for the Crown, contended that the coroner's warrant charged no offence, and therefore it could not be said the subsequent warrants were for "the same offence," within the meaning of the statute. He also contended

* See *In re Carmichael*, 10 U. C. L. J. 235.—EDS. L. J.

that as between the two subsequent warrants, if the first of the two were defective, the prisoner must still be detained for the second. He cited *In re Smith*, 3 H. & N., 227; *In re Asher Warner*, 1 U. C. L. J., N. S., 16.

John Wilson, J.—I think the prisoner was not entitled to this writ under the statute 31 Chas. II, for there was no "request made in writing by him or any one on his behalf attested and subscribed by two witnesses who were present at the delivery of the same" (sec. 3).

But, by the warrant of the coroner, the prisoner was not charged with any criminal offence. The alleged charge was "with having caused the death by violence of the said David Fitzgerald." His death might have been caused by violence where the homicide was *per infortuniam* or *se defendendo*, or in any other manner not of felony.

The prisoner is now for the first time committed for murder, and is therefore not within the provisions of the 6th section, according to the construction of it urged by the counsel for the prisoner.

If, however, by any defect in a warrant, the prisoner had been once discharged under a writ of *habeas corpus*, I should not, in the absence of authority, have discharged him, if the second warrant of commitment "were for treason or felony plainly and specially expressed in it." See *Ex parte Milburn*, 9 Peters, 710

It is scarcely necessary to allude to the fact of there being two warrants here subsequent to that of the coroner. The first, in fact, charges the prisoner with murder in apt words. But even if the first of the two warrants were defective, the defect is cured by last one. *In re Smith*, 3 H. & N. 227, before cited.

I remand the prisoner.

Order accordingly.*

ELECTION CASE.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-law.*)

Reg. ex rel. Chambers v. Allison.

Con. Stat. U. C., cap. 54, *ss* 75, 97, *sub-s.* 9—*Con. Stat. U. C., cap.* 55, *s.* 60, *sub-s.* 2, *and s.* 61—*Qualification of municipal electors—Sufficiency of rating — Conclusiveness of roll —New point – Costs.*

The franchise right not to be lost to any one who really is entitled to vote, if it can be sustained in a reasonable view of the requirements of the statute.

The rating of electors under s. 75 of the statute is sufficient if in the surnames of the electors, although the Christian names be erroneous.

Thus "Wilson Wilson" was held to be a sufficient rating to entitle "William Wilson" to vote, he having sworn that he was the person intended, and it appearing that he was otherwise qualified.

So "Simond Faulkner" was held to be a sufficient rating to entitle "Alexander Faulkner" to vote, he having taken the same oath, and being otherwise duly qualified.

"Thomas Sanderson" was held to be *idem sonans* with "Thomas Anderson," so as to entitle a person bearing the latter name to vote under the former as a sufficient rating.

And *held*, that the assessment roll, as to the qualification of municipal electors, is conclusive.

[Common Law Chambers, March 9, 1865.]

The relator, in his statement, complains that Samuel Allison hath not been duly elected, and hath unjustly usurped the office of councillor for Ward No. 2 in the Township of Caledon, under the pretence of an election held on Monday and Tuesday the 2nd and 3rd days of January, 1865, in the Township of Caledon, and that he the said Philip Chambers was duly elected thereto, and ought to have been returned at said election, on the ground that the said Philip Chambers had the majority of duly qualified votes polled for him, the said Philip Chambers, at the said election, and that several votes given for the said Samuel Allison were not the votes of duly qualified electors, and ought not to have been received.

The relator made oath that he was a candidate for the office of councillor for Ward No 2, at the last election held for that office on Monday and Tuesday the 2nd and 3rd days of January, 1865; that his opponent for the said office was Samuel Allison, of Caledon, doctor of medicine; that H. Pettigrew, of Caledon, was returning officer at said election; that of the 138 persons who voted or assumed to vote at the said election, 68 voted for his opponent, and 66 for himself, and that his opponent was thereupon declared duly elected by the said returning officer, and accordingly accepted the said office; that of the votes given for his deponent, some of which he believed to be bad, were objected to at the time when tendered, and others deponent since discovered to be, as he believed, bad; that Jacob Nickson numbered on the said poll book as 17, and was not, as deponent was informed and verily did believe, either a freeholder or householder in said Caledon at the time of the said election, but a resident of the adjoining Township of Albion, and was objected to on deponent's behalf at the time of the said election, when his vote was tendered thereat; that Thos. "Sanderson," No. 20 on the poll book, was not named on the said last revised assessment roll, and his vote when tendered at the election was objected to on deponent's behalf; that Wm. Wilson, No. 21 on said poll book, was not named on the said last revised assessment roll, and his vote when tendered at the said election was objected to on deponent's behalf; that Frederick Nixon, No. 30 on said poll book, was not as deponent was informed and verily believed, either a freeholder or householder in said Township of Caledon at the time of the said election, but a young man living with his father in the adjoining Township of Albion, and was objected to on deponent's behalf at the time his vote was tendered at the said election, although the returning officer, according to the copy of the said book, did not appear to have made a note of the said objection on the face of the poll book; that Neall McBride, No. 52 on the said poll book, to whom objection was made on deponent's behalf at the time of the election, when his vote was presented thereat, was not as deponent was informed and verily believed, either a freeholder or householder in said Township of Caledon at the time of the said election, but a young man living with his father, James McBride, when at home, and at other times working out as a hired man; that Hugh Malloy, No. 66 on the said poll book, was not, as deponent was informed and verily believed, either a freeholder or householder in said township at the time of the said election, as deponent since discovered and had good reason to believe, but a resident without the municipality, in the village of Brampton; that Edward Ward and

* An application was subsequently made to the full court for a writ of habeas corpus, but the court, agreeing with the views above expressed, refused it.—Eds. L. J.

William Ward, No. 72 and 95 in the said poll book, to whom objection was made, on deponent's behalf, at the time of the said election, when their votes were tendered thereat, were not, nor was either of them, as deponent was informed and verily believed, freeholders and householders in said township at the time of the said election, but young men living with their father, Edward Ward, on property belonging to their father, Edward Ward; that Alex. Falkner, No. 96 on said poll book, to whom objection was made on deponent's behalf at the time of the said election, when his vote was tendered thereat, was not at the time of the said election named on the last revised assessment roll for the said Township of Caledon; that Thos. Sparrow, No. 130 on the said poll book, to whom objection was made on deponent's behalf at the said election, when his vote was tendered thereat, was not as deponent was informed and verily believed, either a freeholder or householder in said township, but a resident of the adjoining Township of Chinguacousy; that each of the persons above named to whom objections were made as above mentioned voted for his opponent; that said objections were made at deponent's instance and on his behalf by Thomas Manton, who acted for him at the said election.

An affidavit of Thomas Manton in corroboration of the foregoing was also filed on the part of the relator.

Robert A. Harrison, for the relator, referred to Con. Stat. U. C., cap. 54, s. 75, s. 97, sub-s. 9; Con. Stat. U. C., cap. 55, s. 60, sub-s. 2, and s. 61, and in the first placed argued that the assessment roll was conclusive. In this view he concluded that three persons, Thomas Anderson, Wilson Williams, and Alexander Faulkner, who voted for defendant, were not on the roll—the names Thomas Sanderson, Wilson Wilson, and Simond Faulkner, intended to represent them, not being a sufficient rating to entitle them to vote. But should the roll not be conclusive, he argued that ten other persons, whose names are given in the relator's affidavit, though properly rated, were shewn not to be in truth qualified, and so in either view he contended the relator was entitled to the suit.

D. McMichael, for defendant, admitting that the roll was conclusive, argued that Thomas Anderson was sufficiently rated as "Thomas Sanderson," William Wilson as "Wilson Wilson," and Alexander Faulkner as "Simond Faulkner." Section 75 of the Municipal Institutions Act as to the rating of electors, not like s. 70 as to the rating of candidates requiring a rating in their own names. He filed affidavits made by Thomas Anderson, William Wilson, and Alexander Faulkner, in which they swore they were qualified electors, and intended by the rating "Thomas Sanderson," "Wilson Wilson," and "Simond Faulkner." But should the rule not be conclusive, he objected to several persons who voted for relator, and who, though regularly rated, were not really qualified.

John Wilson, J.—The Con. Stat. U. C., cap. 55, s. 19, directs that the assessor shall prepare an assessment roll, in which after diligent enquiry he shall set down, according to the best information to be had, the name and surname in full, if the same can be ascertained, of all taxable parties resident in the municipality who have taxable property therein.

Sec. 60, sub-s. 1, enables any person complaining of an error or omission in regard to himself, as having been wrongfully inserted on or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, to give notice in writing to the clerk of the municipality that he considers himself aggrieved for any or all of the causes aforesaid.

The Court of Revision, after hearing upon oath the complaint, shall determine the matter, and confirm or amend the roll accordingly, s. 60, sub-s. 12.

The roll, as finally passed by the Court and certified by the clerk, as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as the same may be further amended on appeal to the judge of the County Court, s. 61.

Then the Con. Stat. U. C., cap. 54, sec. 97, sub-s. 2, requires the clerk of the municipality to deliver to the returning officer who is to preside at the election for the same or every ward thereof, a correct copy of so much of the last revised assessment roll as contains the names of all male freeholders or householders rated upon the roll in respect of real property, with the assessed value of the real property for which every such person is so rated.

By the 75th section the electors shall be those who among other things were rated on the last revised assessment rolls for real property in the municipality.

Persons to be elected as members of a council are those who have freehold or leasehold property rated in their own names on the last assessment roll of such municipality, s. 70.

Sec. 97, sub-s. 9, declares that the only oaths to be required of any person claiming to vote, and appearing by the last revised assessment roll to have the necessary property qualification are, among others, that he is the person named in the last revised assessment roll.

Philip Chambers, the relator, and Samuel Allison, the defendant, were candidates at the last election for the office of councillor for Ward No. 2 in the Township of Caledon.

The list of votes furnished to the returning officer contained three names which gave rise to this contention—Thomas Anderson, Wilson Wilson, and Simond Faulkner, each in respect to qualification entitled to vote.

There were in fact no persons thus named resident in the ward; but Thomas *Sanderson* came and said he was named as Thomas *Anderson* in the list, and the returning officer allowed him to vote for Samuel Allison, and recorded his vote in his proper name, he having taken the oath at the election as directed in the statute. He now swears that he was the person rated as "Thomas Anderson." The relator's counsel argues that the two names when written are in no way alike, but I think they when pronounced are *idem sonans*, and are not distinguishable unless a pause is made between the name and surname *William* Wilson came also and said he was named in the list as *Wilson* Wilson, and the returning officer allowed him to vote for Samuel Allison, and

recorded his vote in the proper name, he too having taken the prescribed oath at the election. He now swears that he was the person named and described in the assessment roll as "Wilson Wilson." *Alexander* Faulkner came in the same way and said he was the person named on the roll as *Simond* Faulkner, made the same statements, took the same oath, was allowed to vote for Samuel Allison, and had his vote recorded in his own name. He now swears he was the person intended under the name of Simond Faulkner.

It is not denied that these men were qualified to vote, but it is contended they are not on the last assessment roll or voters' list, as required by the statute, and that the returning officer ought not to have taken their votes. The defendant Allison had at the close of the poll 68 votes including these three, and Chambers, the relator, had 66 votes. Allison was declared elected, and took his seat as councillor. But if these three votes are struck off, Allison, for whom they voted, will have but 65 votes, while the votes for Chambers will be 66, who will thus be entitled to take his seat as councillor instead of Allison, who in this view has usurped the office.

I think the franchise ought not to be lost to any one really entitled to vote if his right to it can be sustained in a reasonable view of the requirements of the statute.

It was clearly intended that persons resident within the municipality, and properly qualified, should have the right to vote for municipal officers; but it is equally clear that it was intended that no one should vote whose name and qualification were omitted from the roll, for in these respects the Court of Review has express power to correct the roll, and impliedly, I suppose, has the right to correct an error in the name of any one who requests it.

The assessor is directed upon diligent inquiry to set down according to the best information the name and surname in full, if the same can be ascertained, and only those who have been rated on the last revised assessment roll are entitled to vote. There is a distinction in the words of the 70th section respecting those who are candidates for office and of the 75th section regarding who are voters only. In the former section those only who are rated "in their own names" on the last assessment roll can be candidates, but in the latter one those may vote who are rated on the last revised assessment roll.

Now were these men rated on the last assessment roll and returned in the list furnished to the returning officer? They swear they were; but this does not answer the question. Let us see what is to be done in rating them. The assessor is to make diligent enquiry. He asked we may assume of the first voter, What is your name? He answered, Thomas Sanderson; but if the whole name is pronounced without pause or peculiar emphasis it sounds as much like Thomas Anderson as Thomas Sanderson. It was written, I infer, Thomas Anderson, and the peculiarity of it is that if it had been repeated by the writer it afforded no means of correction. Questions of *idem sonans* have usually arisen in the spelling of names, but this is an instance of it in pronouncing them, and the duty of the officers was to set down the name on inquiry, and the duty of the person to be assessed to answer it if so asked *viva voce*, and he could not tell except by inspection whether it was right or wrong. When written they have no resemblance, but quite otherwise when spoken.

As to Wilson Wilson instead of William Wilson, or, as it should be written in the list, Wilson Williams, the suggestion is offered which is at least plausible, that as the surname is usually written first, the assessor having written the name first forgot for the moment that he had done so, and wrote it again as if he had written the surname first. The name is right beyond question.

As to Faulkner it is not suggested how "Simond" was written for "Alexander," but suppose in both cases that no surname had been written, and the surname only appeared on the roll, would either of them have been the less rated because his christian name did not appear? and would either be in reasonable fairness less entitled to his franchise, when it was not even doubted that he was the man, and had the qualification which gave it to him?

It has been argued that because the 61st section of cap. 55 declares that "the roll as finally passed by the Court (of Review), and certified by the clerk as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll. Every person should examine it after it after it has been put up for inspection, to see that it is right in every respect. This would no doubt be prudent, for its omission may deprive a man of his franchise who neglects it; but I may safely say that if men trust, as most men do trust, that a public officer does his duty, I cannot lay down a rule so strict as to require suspicious vigilance regarding the acts of such officers. I know, we are so constituted that even when we intend to be very careful, and suppose we are acting scrupulously so, we fall into mistakes caused, perhaps, by the over anxiety to avoid it.

I think, under all the circumstances, the first voter was rated by a name *idem sonans*, and the last two by their names, although the surnames were wrong. I think it would be carrying the rule to an extreme at variance to one's sense of right to hold that because a man's surname was not right in every respect he should be deprived of his right to vote, when his neighbours as well as himself knew he was in right of his qualification entitled to vote.

The case, however, is presented in another point of view, namely, that the returning officer had no right to put any name on his poll book which was not on his list, and that he did put on his poll book the names of three voters whose names were not on the last list furnished by the clerk to him.

This is more plausible than sound, for it is the same proposition as the one first discussed, "That if the voters' names on the list do not correspond with the names as given when they come to vote, they have not been rated at all, and have no right to vote.

If the returning officer in the honest discharge of his duty had rejected these votes, he could not have been fairly charged with misconduct or indiscretion; nor can he be so charged in doing what he did.

He no doubt conscientiously felt that they were the voters who had the franchise, and he very probably knew they lived on the land in right of which they claimed to vote, and I approve of his conduct, for if he had adopted the first alternative he might have been denying a positive right, while by adopting the latter he left the right to be questioned before the proper tribunal.

For what he did he may have known that he had a precedent in the practice of our own courts analogous to his own procedure. In jury lists the jurors are designated by the numbers of their lots, but the names and surnames are frequently found wrong. They come when called, and say their names are not right, and on its being ascertained they are the persons intended, the names are corrected, and they are then taken to be the jurors retained.

Some of my learned brethren have decided that we shall not go behind the assessment roll and constitute ourselves a Court of Review. I concur with them, and in this matter I am not infringing upon their decision. I hold only that in this case these men are upon this list so as to entitle him to vote although not correctly named thereon.

My order is in favor of the defendant, but as the points are new, without costs.

Order accordingly.

ENGLISH REPORTS.

Parkinson v. Hanbury.

Costs—Taxation—Fees to counsel—Discretion of master.

It is within the discretion of the taxing master to allow or disallow the amount of fees paid to counsel, and the court will not review his taxation where his certificate is objected to only in respect of such allowances.

[Chancery, June 9, 1865.]

In this suit an appeal by the plaintiff, Miss Parkinson, was recently dismissed with costs by the Lords Justices (11 L. T. Rep. N. S. 755.) The bills were carried in before taxing master Skirrow, who allowed to defendants the fees paid to their counsel upon the appeal, namely, twenty guineas and two guineas for consultation to the leading counsel, and twelve guineas and one guinea for consultation to the junior, which fees were the same in amount as had been paid to them upon the original hearing of the cause.

Miss Parkinson in person now moved, in pursuance of notice given by her, that the master might be directed to review his certificate so far as the allowance of these fees was concerned, and contended that, considering the nature of the case and the amount of necessary matter laid before counsel, the fess were unduly large.

The certificate was not objected to in any other particular.

Kay, for the defendants, contended that the allowance was within the master's discretion, and produced Skirrow's certificate, in which he relied upon the general rule, that it was usual to allow upon an appeal the same fees as had been paid at the original hearing, and stated moreover that, in the present instance, he considered the fees to be moderate.

Lord Justice Knight Bruce said that it might perhaps be desirable that their Lordships should have the opportunity of seeing the briefs which had been delivered before they decided the question, but he would defer to the opinion of his learned brother, and leave the matter entirely to him.

Lord Justice Turner said that he thought clearly that this motion should be refused. If the court was to be called upon to consider and adjudicate upon the amount of fees paid to counsel on their briefs, and whether those fees were to be ten guineas, or fifteen, or twenty, the vexation and injury to the suitors would be infinite, and innumerable questions would be raised. These matters had always been left to the discretion of the taxing master, and it was most proper that they should be still left to him. Here the question had been considered by him—the fees had been allowed, and the motion must be refused with costs.—*Law Times Reports.*

UNITED STATES REPORTS.

COURT OF COMMON PLEAS—NEW YORK.

Rittenhouse et al. v. The Independent Line of Telegraph.

Liability of telegraph companies.

A telegraph company is not excused from liability for an erroneous transmission of a message, by the fact that its meaning was unintelligible to them, so long as the words were plain.

Where an order is sent by telegraph for the purchase of one article, and by a blunder of the operator, the dispatch is made to read as an order for another, the company must make good any difference between the price paid for the article actually ordered, if purchased as soon as the error was discovered, and the price at which it could have been bought when the dispatch was received. But they are not liable for a loss upon a resale of the article bought under the direction of the erroneous dispatch, unless they have had fair notice of such resale.

By the Court: Brady, J.—The dispatch written by the plaintiffs was an order to their brokers here to sell their Michigan Southern stock, and to buy five hundred shares of Hudson River Railroad stock. The language employed, however indefinite to others, was intelligible to the brokers. The dispatch written was not sent, and the effect of the error was to make it an order to sell the shares of Southern and to buy five hundred more. As to this, the erroneous dispatch is neither uncertain nor indefinite. No other interpretation can be fairly given to it. The evidence established the fact that the use of words "five Hudson," by an understanding between the plaintiffs and their brokers, meant five hundred shares of the Hudson River Railroad stock, and also that the erroneous dispatch was understood to be an order to purchase five hundred shares of the Michigan Southern, and which, as before suggested, was the only conclusion to be drawn from the language employed. These views dispose of the exceptions to the sufficiency of the evidence to warrant the findings of fact upon which the judgment is based. The plaintiffs, on learning that an error had been committed, again directed the purchase of the Hudson River Railroad stock, and were entitled to the advantages of such purchase at the rates prevailing on the day of the date of the dispatch, without reference to the session of the Board when the dispatch was received. The omission

to buy at the Board on that day arose from the defendants' misconduct in sending the dispatch, and it became the duty of the broker, under his instructions, to make the purchase at once. The defendants, having placed it beyond the power of the plaintiff's brokers to make the purchase in the particular manner indicated, cannot avail themselves of the fact that the purchase was not made in that mode. They cannot take advantage of their own wrong, particularly when it nowhere appears that they were injured by the circumstance. The prices paid were the lowest at which the stock could be obtained, and the defendants had the benefit of that fact. The purchase was voluntary, it is true, but it was an act which the plaintiffs had the right to perform, growing out of their relations with the defendants, established by the contract on the part of the latter to transmit the dispatch faithfully. These views are responsive to the exceptions taken to the legal conclusions arrived at upon the trial, and leaves but one to be considered The plaintiffs' claim for a difference of $475 on the sale of the five hundred shares of Michigan Southern was disallowed upon the ground that the stock was in legal effect purchased on defendants' account and could not be sold without some notice to them. I think this ruling was a proper one, the relations of the parties being considered. If the plaintiffs intended to disavow the purchase, the defendants should have been notified thereof, and in that way enabled to keep the stock or not, as they might deem most advisable. By exercising the act of ownership in the sale made, they have adopted the purchase, and the sale must therefore be regarded as on their account. But if this view be incorrect, there can be no doubt that the defendants were entitled to notice of the mistake made by them before any sale of the stock, purchased in pursuance of their erroneous dispatch, was made. For these reasons, the judgment must be affirmed.—*N. Y. Transcript.*

SUPREME COURT OF PENNSYLVANIA.

Moyer v. Moyer.

Slander—Evidence of general bad character in mitigation of damages.

In an action to recover damages for slander in saying that plaintiff had committed perjury, evidence of the plaintiff's general character for truth and veracity is admissible in mitigation of damages.

Error to Common Pleas of Elk County.

The opinion of the Court was delivered by Read, J.

Mr. Pitt Taylor, in the 4th edition of his Treatise on the Law of Evidence, in speaking of evidence in mitigation of damages, in Slander and Libel, says, "Whether in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages, is a point which has been much controverted;" and after stating the arguments on both sides, he says, "such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favor of the admissibility of the evidence, even though the defendant has pleaded truth as a justification, and has failed in establishing his plea." "It seems, however, that here, as in other cases, where witnesses to character are admitted, evidence must be confined to the particular trait which is attacked in the alleged libel, and as to this, it can only furnish proof of general *reputation*, and must by no means condescend to particular acts of bad conduct." Vol. 1, pages 354, 355, 356.

In *Teese* v. *Huntingdon*, 23 Howard, 2, it was clearly established as the general rule in the United States, that in impeaching a witness the inquiry should be as to his reputation for truth and veracity. In *Chess* v. *Chess*, 1 Penn. Rep. 32, this is undoubtedly the rule—and in *Gilchrist* v *McKee*, 4 Watts. 380, where it was held that the character of a female witness for veracity could not be impeached by evidence of her general character for chastity, Chief Justice Gibson said, "But if an inquiry into reputation for a particular vice be inadmissible, it is not easy to comprehend how an inquiry into reputation for a variety of vices may be less so. Granting that universal immorality includes want of veracity, yet a man may be generally vicious, without being universally so. He may be intemperate, incontinent, profane, and addicted to many other vices that ruin the reputation, and yet retain a scrupulous regard for truth. Countless instances of such partial exemption from depravity are in the knowledge of every one. It is, after all, character for veracity alone with which the jury have to do, and why not let it come to them in the first instance without admixture of ingredients that may alter its quality and corrupt its influence. If character for veracity be the legitimate point of inquiry, and if to this complexion it must come at last, it follows that it is the only one, and that an inquiry into anything else is illegitimate."

It seems therefore from these authorities that in an action for slander in saying that the plaintiff had committed perjury, the defendant would be permitted to prove in mitigation of damages, the plaintiff's general bad character for truth and veracity. So where the charge is of dishonesty, or immorality, or want of chastity, the evidence in each case would be of a general bad reputation for either of those vices. With regard to want of veracity, or lying, it may be a confirmed habit in persons of otherwise excellent character, as we all of us know, of notable examples of men of integrity who are known to be habitual liars. When, therefore, the alleged slander is an accusation of perjury, it seems inevitable that the defence might be a bad general reputation for veracity, whilst the general reputation for integrity and honesty might be good.

We are however met by two cases in our own State, the first, of *Long* v. *Brougher*, 5 Watts, 439, really decides nothing bearing upon this question, and the second, *Steinman* v. *McWilliams*, 6 Barr, 170, is an opinion of Judge Coulter's, founded mainly on the pleadings, and also upon authorities in two other States, those in New York made under peculiar circumstances, and under a mistaken view of the English rule,

and those in Massachusetts have been so modified by subsequent decisions as to greatly weaken, if not destroy their applicability.

These cases, if applicable, are, however, substantially overruled by *Conro* v. *Conro*, 21 Legal Intelligencer. 124, where the slander was of want of chastity in gross terms, and was met by evidence in mitigation of damages, of a bad general reputation in that particular. This decision is undoubtedly applicable to the present case, which was an action of slander for a charge of perjury, and the evidence rejected was a bad general reputation for truth and veracity. Upon authority therefore, and clearly upon principle, the evidence should have been admitted.

Judgment reversed, and *venire de novo* awarded.

SUPERIOR COURT.

Before Robertson, C. J., Garvin and McCunn, J.J.

Wilkins v. Earle et al.

Liability of innkeepers for money lost from safe.

The rules of law governing the liability of an innkeeper for the safety of a guest's baggage, are the same as those which regulate the liability of common carriers as to a passenger's baggage.

An innkeeper is liable to a guest for the loss of a sum of money brought into the inn only for an amount sufficient for his travelling expenses, in the absence of proof of a special contract.

A notice posted in defendant's hotel required a package deposited in defendant's custody for safe keeping to be "properly labelled," and the clerk informed plaintiff that he must describe the property before a redelivery. The plaintiff, on delivering a package for deposit in defendant's safe, informed the clerk that it was "money," and wrote his name upon the envelope.

Held, that this did not amount to a special contract for the safe keeping of the deposit, and the plaintiff was guilty of negligence in not describing the value of the package more particularly.

A notice, to be sufficient to relieve the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value.

[General Term, June 28.]

In this case, the Chief Justice delivered the following opinion:

By the Court: Robertson, C. J.—The liability of keepers of inns for property, which travellers who are guests therein bring with them, is as old as the existence of inns in England (Hollingshed's Chronicle, cited in Edw. on Bailment, App. 620). The whole doctrine in relation thereto is summarily stated in the recital of an ancient original writ, entered in the Register of Writs (f. 105) among writs of trespass (on the case), and set out at length in Fitzherbert's *Natura Brevium* (94 a. b.). Such writ forms the groundwork of the early decision in *Coyle's* case (8 Rep. 32), in which the general principles embraced in such doctrine are evolved from such writ; all of which have some bearing on this case, and are in substance as follows:

1. The place of loss is required to be an inn (*communa hospitium*), which is defined to be "a house where the traveller is furnished with everything he has occasion for on the way" (*Thompson* v. *Lay*, 3 B. & A. 283), the keeper of it not being bound to furnish anything else (*Fell* v. *Knight*, 8 M. & W. 276); such as a place of sale for goods (*Burgess* v. *Clement*, 4 M & S. 306), or to receive any one but travellers (*Rex* v. *Luellin*, 12 Mod. 445), or anything but what is usually brought with or carried by them (*Broadwood* v. *Granava*, 10 Ex 417; S. C. 24 Law J. [Ex.], 1). Although he is liable to an action for not receiving them (Com. Dig. Action on the case; *Rex* v. *Jones*, 7 C. & P. 213; Bacon's Abr. Inns Court, C. 3; *Thompson* v. *Lay*, 3 B. & A. 283), as well apparently as indictment (Year Book, 5 Edw. IV., Easter T., fol. 10, by Hogdon, J; 1 C. & K. 404; Edw. on Bailm. 408), he cannot make any terms or conditions with his guests (6 T. R. 17, per Ld. Kenyon; *Cole* v. *Goodwin*, 19 Wend. 269, per Cowen, J). A house becomes an inn by the mere custom of receiving persons transiently as guests, without a definite agreement as to time (*Wintermonte* v. *Clarke*, 5 Sandf. 242; *Taylor* v. *Monnot*, 4 Duer, 116). But a mere restaurant or place of eating is not one (*Carpenter* v. *Taylor*, 1 Hilt. 193).

2. The guest must be a traveller (1 Roll. Abr. 394; 2 Brome, 254; *Rex* v. *Luellin*, 12 Mod. 445; *Ingolsbee* v. *Wood*, 36 Barb. 452; Bacon's Abr. Inns, C. 5; *Parkhurst* v. *Foster*, Salk. 388); the time of his stopping is, however, immaterial, whether it be of some duration or for mere refreshment (*Barnell* v. *Mellor*, 5 T. R. 273; *Carpenter* v. *Taylor*, 1 Hilt. 193; *McDonald* v. *Egerton*, 5 Barb. 56).

3. The loss or injury for which the innkeeper is liable is that of or to goods and chattels (*bona et catalla*) placed within the inclosure and shelter of the inn and its appurtenances (*infra hospitium*), as laid down in the Year Books (11 Hen. IV. 45 a. b.; 22 Hen. VI. 21 b.; 42 Eliz. 3, 11 a. b.; 42 Ap. pl. 1). Although animals put out to pasture at the guest's request are not so (1 Roll. Abr. 34; 4 Len. 6; 2 Browne, 255; *Hawley* v. *Smith*, 25 Wend. 262); yet vehicles left in the street by the innkeeper's servant (*Jones* v. *Tyler*, Ad. & El. 522), or a waggon-load of goods in like manner placed in an unenclosed shed (*Piper* v. *Manny*, 24 Wend. 282), or a sleigh-load of grain in an outhouse, where such articles were usually stored (*Clute* v. *Wiggins*, 14 J. R. 175), and goods placed in a "commercial" room (*Richmond* v. *Smith*, 8 B. & C. 9), were held to be so.

4. The person by whom the articles were taken, or the mode of loss, is immaterial (Year Book, 22 Hen. VI. 38, pl. 8; Roll. Abr. Tit. Hostler, 7; *Clute* v. *Wiggins*, *ubi sup.*; *Giles* v. *Libby*, 36 Barb. 70; 2 Kent's Com. 593; Story's Com. 306, secs. 470, 479; Bell's Com. 402–3, 4th ed., 496, 5th ed.; Edwards on Bailm., 400, 403, 407; Jones on Bailm. 94), unless such person were the servant or companion of the guest (Cro. Eliz. 285; *Burgess* v. *Clements*, *ubi sup.*; *Fowler* v. *Dorlan*, 24 Barb. 384), or the negligence of the guest contributed to the loss (10 Eliz., Dyer, 266; *Burgess* v. *Clements*, *ut ante*; *Farnsworth* v. *Parkwood*, 1 Stark. 249).

5. For clothing, ornaments of the person, including a reasonable amount of jewellery generally worn by travellers, which embraces a gold watch and chain, gold pen and pencil-case (*Giles* v. *Libby*, *ubi. sup.*), and for sufficient money to pay the travelling and other reasonable daily expenses of the guest, the innkeeper is held liable (*Taylor* v. *Monnot* and *Giles* v. *Libby*, *ubi sup.*; *Van Wyck* v. *Howard*, 12 How. Pr. 197; *Stanton* v. *Leland*, 4 E. D. Smith, 88).

(*To be continued.*)

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Presuming upon the kindness which you have ever extended to the student as well as the practitioner in your exposition of doubtful points, I have taken the liberty of placing my trouble before you, which is as follows:

I was admitted a member of the Law Society as a student-at-law in Trinity Term, 1865, and am consequently, in accordance with a late resolution passed by the Benchers of Osgoode Hall, eligible to compete for the first year's scholarship at the examination in November next. Now what I desire to know is this—am I eligible for the second year's scholarship, to be competed for in November, 1866?

Although I have propounded this question to several of the legal profession here, I have as yet been unable to obtain any definite information on the point, and your answer in the next number of the *Law Journal* would, I am certain, be of interest to others similarly situated, as well as to a

Student-at-law.

[See page 228.—Eds. L. J.]

Belleville, 16th August, 1865.

To the Editors of the Law Journal.

Gentlemen, — Will you allow me to call your attention to what seems to me to be a serious practical defect in the Registration Act? Section 18 provides that deeds, &c., are to be registered through memorials thereof. Section 20 provides for the execution of such memorial. Section 23, *et seq.*, provides modes of proof for registration; section 27 for cases in which the witnesses have died, or are out of the Province. No provision is made for the death of the parties to the deed. So long as any one of them is alive, he can re-execute the deed by acknowledging his hand and seal before the requisite witnesses, and have a memorial executed; so that section 27 is of but little practical value.

The Legislature evidently intended to give a much wider reach to the section than it has, and provide for the case of the death of the parties as well as of the witnesses, the latter part of the section evidently pointing to the registering of the instrument, on its production, with the certificate signed by the chairman, &c.; but by the operation of section 18, a memorial must be produced, and by section 20 that memorial must be executed by one or more of, &c.

Yours truly,

Geo. D. Dickson.

[We think our correspondent has somewhat misconceived the effect of the sections referred to. Section 20 provides for the registration of a deed after the death of the grantee, provided there is a witness to the execution of the deed who can attest its execution; for it expressly authorises the heir, executor or administrator, &c., of the grantee to execute a memorial. It is thought by some that the word "heirs," would include purchasers; but, however that may be, the act now before Parliament to amend the Registry laws, makes this provision much more general, and will thereby, if the bill becomes law, save any question as to this. If, however, the witnesses are dead, or the witnesses and grantee are both dead, proceedings should be taken under section 27. It will be remarked that this section says nothing about a memorial, but provides that upon the necessary certificate being obtained, "the registrar, &c., shall *record such deed*, &c., *and certificate*, and shall certify the same." We do not think it an unreasonable construction to put upon the section to say that in such cases a memorial is not required. The case seems to be an exception to the general rule that a memorial is necessary, and an act must be so read that every clause it may, if possible, have due operation. We cannot say what the *general* practice is, but in the registry offices for York and some other counties, it is usual to record the deed and certificate, and no memorial is required by the registrar. —Eds. L. J.]

Concurrent writs—Antedating — Cancellation of stamps.

To the Editors of the Law Journal.

Gentlemen,—In issuing a *concurrent* writ of summons on a day after issuing the original writ, should the Clerk not only antedate the writ, but also cancel the stamp as of the day on which the original writ was issued? Or should he simply antedate the writ and cancel the stamp as of the day he issues the writ?

By answering the above queries, you will much oblige your obedient servant,

Cornwall, Aug. 16, 1865. Lex.

[The C. L. P. Act provides that the concurrent writ will be antedated, or rather bear the same date as the original writ. But there is no statute providing that the stamp shall be cancelled as of the day on which the original writ issued; and in the absence of such, it would, in our opinion, be improper, if not illegal, to do so in regard to the stamp.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. —— May 6.

Cowell v. The Amman Aberdare Colliery Company.

County Court—Costs—Reference by consent before trial—Meaning of "recover" in 13 & 14 Vict. c 61, s. 11.

An action having been commenced, and issue joined between the parties thereto, who were within the jurisdiction of the same county court, was by consent referred, before trial, to the decision of an arbitrator, "the costs of the cause to abide the event of the award." The arbitrator found for the plaintiff, with twenty shillings damages, and the master allowed him his costs, the award being in his favour.

Held, that the plaintiff was not entitled to his costs, having "recovered" a sum less than £20, within the meaning of 13 & 14 Vict. c. 61, s. 11, and being therefore deprived of costs by that section. (13 W. R. 715.)

Ex. May 1.

Union Bank of Manchester v. Beech.

Principal and surety—Release of principal.

The defendant executed a guarantee under seal to secure a floating balance due from T. to the plaintiffs, and the deed contained a proviso that no forbearance to, or composition with, the principal, should discharge the defendant, but that the plaintiffs might deal with the principal at their discretion. Afterwards T. entered into a deed of arrangement, which the plaintiffs executed. The deed contained an assignment for the benefit of creditors, and a release of the debtor, without any reservation of rights against sureties.

Held, that the latter deed did not discharge the defendant from his liability as surety. (13 W. R. 922.)

H. of L. June 13.

Blades v. Higgs.

Game—Property in animals feræ naturæ.

If a trespasser starts game in the land of A., and hunts it and kills it there, the property in such game vests absolutely in A., and not in the trespasser. (13 W. R. 927.)

Q. B. June 17.

Lochlin v. Richardson.

Practice—Venue

The marginal statement of venue is, under Gen. Reg. T. T., 1853, r. 5, incorporated with the declaration, and therefore in a local action it amounts to an averment that the cause of action arose in the county named, and, if this fact be contradicted by the evidence, gives ground for a nonsuit. (13 W. R. 940.)

C. P. June 10.

Hurst v. Great Western Railway Company.

Railway—Conveyance of passengers—Liability for punctuality of trains—Evidence of contract of duty—Time table—Ticket.

The Great Western Railway Company's line extends from C. to G., and from G. to N. the line belongs to other companies. By arrangements with those companies the Great Western Railway Company issue tickets from C. to N. The plaintiff took a ticket from C. to N., and he and another person stated in evidence that they knew that the train ought to start from C. at 4 34, and arrive at G. at 7.39, in which case the plaintiff would have gone by the 8 17 train from G. to N. The plaintiff was told by the station-master when he took his ticket that he would go through to N. by the train about to start, and he was also told afterwards by a porter that the train should start 4.34. The train, owing to a break-down, was late at C., and in consequence the plaintiff missed the 8 17 train from G.; and he could not proceed from thence to N. till the 8.17 train next day, and incurred various expenses and losses, for which he brought this action. The ticket was put in evidence on the part of the plaintiff, but the defendants' train bill was not. No evidence was given on the part of the defendants.

Held, that the plaintiff could not recover, as there was no evidence of any breach of contract or duty on the part of the defendants. (13 W.R. 950.)

CHANCERY.

H. of L. —— May 12.

Leather Cloth Co. v. American Leather Cloth Co.

Trade mark—Infringement—False representations—Colourable imitation—Property in trade mark.

The Court of Chancery will not protect a person in the use of a trade mark which contains false or misleading representations concerning the character of the goods to which it is applied.

Accordingly, where the purchasers of a manufacturing business, and of the right to use a trade mark, adopted and continued the use of such trade mark, which contained the name of the firm from whom they purchased, and statements and representations which had ceased to be true as regarded the article they manufactured.

Held, that they were not entitled to relief against an infringement of such trade mark.

Observations as to the meaning of the expression "property" in a trade mark, and as to what amounts to a colourable imitation of a trade mark. (13 W. R. 873.)

L. J. June 15.

Munro v. The Wivenhoe and Brightlingsea Railway Company.

Interlocutory injunction — Comparative injury — Specific performance—Railway company—Contractor—Withholding of certificates—Practice—Evidence.

The court will not, by an interlocutory injunction, restrain an act, the validity of which, as between the parties to the suit, is matter of doubt, and for which, if wrongful, the plaintiff can obtain adequate compensation in damages at the hearing of the cause; while the injunction, if granted, would inflict serious injury on the party sought to be restrained.

The court, on motion for an injunction, will act as well according to the comparative injury which may arise from granting or withholding the injunction, as according to the justice of the case as appearing on the evidence.

The court will not intertere by injunction between the parties to a contract, specific performance of which cannot be decreed.

Per Turner, L. J.—On motion for an injunction, it is open to counsel to use any affidavit filed before he addresses the court. (13 W.R. 880.)

V. C. K. June 15.

Talbot v. Marshfield.

Practice—Production of documents—Trustees' dealings.

Where trustees deal with a trust fund, all the *cestuis que trust ent* have a right to see the documents relating to such dealings, unless there is a special reason why they should not.

If trustees take the opinion of counsel to guide them in the trust, simply, the *cestuis que trustent* have a right to see those opinions, but not cases and opinions taken after adverse proceedings and relating to such litigation. (13 W.R 885.)

L. J. June 29.

Galloway v. City of London.

Practice—Stay of proceedings pending appeal—Jurisdiction—Dismissal of bill.

Where a bill is dismissed, the jurisdiction of the court over the cause is gone, and no order can be made to bind the parties pending an appeal to the House of Lords.

Where a plaintiff, whose bill is about to be dismissed, intends to appeal to the House of Lords, he should ask that the decree dismissing the bill should be so framed as to keep alive the jurisdiction of the court pending the appeal.

Oddie v. *Woodford*, 3 My. & Cr. 625, followed; *Price* v. *Salusbury*, 11 W. R. 1014, overruled. (13 W. R. 933.)

AUTUMN ASSIZES, 1865.

EASTERN CIRCUIT.

The Hon. Mr. Justice Hagarty.

Ottawa	Tuesday	3rd October.
L'Orignal	Monday	9th October.
Cornwall	Thursday	12th October.
Brockville	Wednesday	18th October.
Perth	Monday	23rd October.
Kingston	Tuesday	7th November.

MIDLAND CIRCUIT.

The Hon. The Chief Justice of Upper Canad

Whitby	Monday	2nd October
Cobourg	Thursday	5th October.
Peterborough	Monday	16th October.
Lindsay	Friday	20th October.
Napanee	Wednesday	25th October.
Picton	Monday	30th October.
Belleville	Friday	3rd Novemb

HOME CIRCUIT.

The Hon. Mr. Justice Morrison.

Milton	Monday	2nd October
Welland	Thursday	5th October
Niagara	Monday	9th October
Barrie	Monday	16th October.
Owen Sound	Tuesday	24th October
Hamilton	Monday	6th Novem

OXFORD CIRCUIT.

The Hon. Mr. Justice John Wilson.

Simcoe	Tuesday	3rd October
Cayuga	Monday	9th October
Brantford	Thurday	12th October
Guelph	Tuesday	17th October
Berlin	Tuesday	24th October
Stratford	Friday	27th October
Woodstock	Tuesday	31st October

WESTERN CIRCUIT.

The Hon. The Chief Justice of the Common Pl

Goderich	Tuesday	10th October
Sarnia	Monday	16th October
St. Thomas	Thursday	19th October
London	Tuesday	24th October
Chatham	Tuesday	7th Novemt
Sandwich	Tuesday	14th Novem

YORK AND PEEL AND CITY OF TORONTO.

The Hon Mr. Justice Wilson.

York and Peel	Monday	9th October.
City of Toronto	Monday	6th Novemt

APPOINTMENTS TO OFFICE

NOTARIES PUBLIC.

JAMES KEITH GORDON, of Whitby, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gaz. August 12, 1865.)

COLUMBUS H. GREEN, of Toronto, Esquire, Barrister at Law, to be a Notary Public in Upper Canada. (Gaz. August 12, 1865.

CORNELIUS VALLEAU PRICE, of Kingston, Esq. Attorney at Law, to be a Notary Public in Upper Can (Gazetted August 12, 1865.)

DANIEL McCARTHY DEFOE, of Toronto, Esquire torney-at-Law, to be a Notary Public in Upper Can (Gazetted August 12, 1865.)

TO CORRESPONDENTS.

"Student-at-Law"—"Geo. D. Dickson"—"Lex"—"General Correspondence."

"A Ratepayer" too late for this number.

We have received a communication apparently post "Mitchell" and signed "an old subscriber." If she surely be aware of our rule that we cannot notice comm cations not verified by the name of the writer. In any however, we do not think the subject matter of the let such general interest as to warrant us in answering it.