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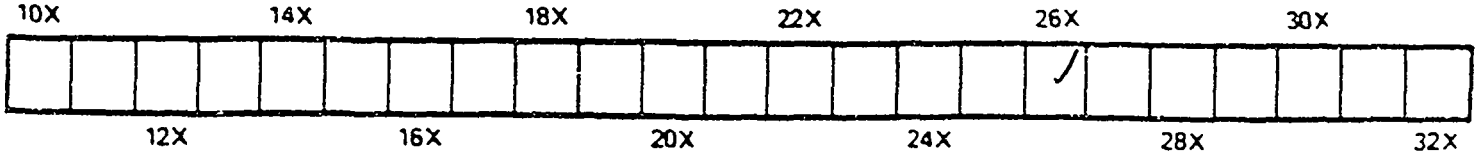

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W. D. ARDAGH, ESQ., AND ROBERT A. HARRISON, ESQ., B.C.L.,
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DIARY FOR JANUARY.

1 Thursday . Taxes to be computed from this day
4. SUNDAY . . *2nd Sunday after Christmas*
5. Monday . . County Court Term begins. Surr Court Term begins H. ir &
6. Tuesday . . . *Epiphany.* [Devisee Sittings com. Municipal Elections.
7. Wednesday... Election of School Trustees
8. Thursday. .. York and Peel Winter Assizes commence.
10 Saturday .... County Court and Surrogate Court Term ends.
11. SUNDAY .. 1*st Sunday after Epiphany.*
12 Monday ..... Election of Police Trustees in Police Villages. [Board of Audit.
15. Thursday... .. Treasurer or Chamberlain of Municipalities to make returns to
17. Saturday..... Articles, &c., to be left with Secretary of Law Society.
18. SUNDAY ..... 2*nd Sunday after Epiphany.* [hold 1st meeting
19. Monday ... ... Mem. of Mun. Coun (except Co's) and Tr. of Police Villages to
20 Tuesday ..... Heir and Devisee Sittings end. Last day for Notice Chan. Ex.
25. SUNDAY..... 3*rd Sunday after Epiphany.* [Toronto
27. Tuesday..... Members of County Council to hold 1st meeting.
31. Saturday..... Last day for Cities and Counties to make return to Governm't.
[Grammar School Trustees to retire.

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

JANUARY, 1863.

TO SUBSCRIBERS.

The attention of each Subscriber in arrear is directed to the wrapper of his copy of the Law Journal. There he will find a statement of the amount due us. The transmission of that amount will oblige us. The amount due us in the aggregate is very large. We must make an effort to collect it. Subscribers therefore will please take warning and govern themselves accordingly. Those long in arrear cannot expect much more indulgence. Those in arrear for a short time only have not much to fear. Those not in arrear had better transmit the $4 payment in advance for the current volume, and so save discount of $1 on their annual subscription.

NOTICE.

Subscribers will with this number receive the Law Journal Calendar for 1863. Index to Vol. 8 will be issued with our next number.

MARRIAGE WITH SISTER OF DECEASED WIFE.

The law of England is said to be founded on the laws of God. The law regulating marriage, which is a sacred as well as a civil contract, should be especially rested on the Divine law. The branch of it to which we are about to refer is supposed to be so.

Strange to say, the law which prohibits the marriage of a man with the sister of his deceased wife rests chiefly, if not wholly, on the legislation of Henry the Eighth, a monarch whose power was only equalled by his lust.

On 3rd June, 1509, he married Catharine of Aragon, the widow of his brother Arthur. She was his first wife. During 1528, he desired to marry Anne Boleyn, and, in order to be divorced from Catharine, professed scruples as to the legality of a marriage contracted with his brother's widow. He endeavored to get Catharine to consent to a divorce. This she steadily refused. Notwithstanding, the king cohabited with Anne Boleyn, and, in the early part of the year 1533, when she was pregnant, privately married her. She thereupon became his second wife. On 23rd May, 1533, a convocation of clergy declared his marriage with Catharine to have been contrary to God's law, and, in the following year, in order to confirm this declaration of the clergy and ratify his marriage with Anne Boleyn, the 25 Hen. 8, c. 22, was passed: it is the first English statute to which it is necessary for us to refer.

It was entitled "An Act concerning the successors," and recited that many inconveniences had fallen, as well within the realm as in others, by reason of marrying within degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the stepmother, the brother the sister, the father his son's daughter or his daughter's daughter, or the son to marry the daughter of the father procreate and born by his stepmother, or the son to marry his aunt being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or *the brother to marry his brother's wife*, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or *his wife's sister*, which marriages, albeit they be plainly prohibited and detested by the law of God, yet nevertheless at some times they have proceeded under colours of dispensations by man's power, which is but usurped, and of right ought not to be granted, admitted, nor allowed; for no man of what estate, degree, or condition soever he be, hath power to dispense with God's laws, as all the clergy of the realm in the convocation, and most part of all the famous universities of christendom and parliament do affirm and think.

It therefore enacted that no person or persons, subjects or residents of the realm, or in any of the king's dominions, of what estate, degree or dignity, soever they be, shall from henceforth marry within the said degrees afore rehearsed, what pretence soever shall be to the contrary thereof; and in case any person or persons, of what estate, dignity, degree or condition, soever they be, hath been *heretofore* married within this realm, or in any of the king's dominions, within any of the degrees above expressed, and by any the archbishops or ministers of the church of England, be separate from the bonds of such unlawful marriage, that then every such separation shall be good, lawful, firm and permanent, forever, and not by any power, authority or

means, to be revoked or undone hereafter; and that the children proceeding and procreate under such unlawful marriage shall not be lawful or legitimate, any foreign laws, licenses, dispensations, or other thing or things, to the contrary thereof notwithstanding.

The effect of this *expost facto* statute was not only to render void the marriage of the king with Catharine of Aragon, but as a consequence to bastardize her child, the Princess Mary.

In 1536, the king, desiring to marry Jane Seymour, affected to be jealous of Anne Boleyn, had her tried for high treason, condemned, and executed. She was executed on 19th May, 1535, and on the next morning the king was married to Jane Seymour. She thus became his third wife In order to legalize the marriage with Jane Seymour, and bastardize the Princess Elizabeth, the issue of his marriage with Anne Boleyn, the king, in the year following, procured the 28 Hen. 8, c. 7, to be passed. It is entitled "An Act for the establishment of the successors of the imperial crown of the realm." It repealed the former act 25 Hen. 8, c. 22. So much however of that act as respected marriages within the degrees therein prohibited was re-enacted, with slight modifications. It was also enacted, that if any man carnally know any woman, all persons in any degree of consanguinity or affinity of the parties so offending shall be adjudged to be within the said prohibition, in like manner as if the persons so carnally knowing one another had been married. The king, though married to Anne Boleyn, had been too intimate with her sister. This is here made the pretence for avoiding the marriage with that sister, and bastardizing her child Elizabeth. The remainder of the act contained a limitation of the crown to the issue of the Lady Jane Grey by the king, and in default to the heirs of the body of the king lawfully begotten, with a general power to the king to name his successors, either by letters patent or by his last will.

The crown was subsequently limited by the king in succession to his son Edward by Lady Jane Seymour, his daughter Mary by Catharine of Aragon, and his daughter Elizabeth by Anne Boleyn, and this limitation was afterwards confirmed by act of parliament.

In the same year that the last mentioned succession act (28 Hen. 8, c. 7) was passed, the 28 Hen. 8, c. 16, was also passed. It was entitled "An Act for dispensing with rules and licenses from the Pope." It enacted that all marriages had and solemnized before 3rd November, 1535, should be valid, whereof there was no divorce or separation had by the ecclesiastical laws of the realm, and which marriages were not prohibited by God's law, limited and declared in the act made in that present parliament for the establishment of the king's succession, should be good, and they were thereby confirmed. The previous act therefore as to the marriages prohibited "by God's law" was thereby confirmed.

Lady Jane Seymour, on 12th October, 1537, was brought to bed of Prince Edward. She died two days after her delivery, and was buried on the 15th day of October, 1537.

On 6th January, 1540, the king, by proxy, married Anne, sister of the Duke of Cleves, but, not liking her when she came to live with him, refused to have her as his wife. She, however, was in law his fourth wife. Shortly afterwards he fell in love with Catharine Howard, cousin germain of Anne Boleyn, and, in 1540, in order to destroy the effect of his pre-contract with Anne, sister of the Duke of Cleves, so as to enable him to marry Catharine Howard, caused the 32 Hen. 8, c. 38, to be passed. It enacted, in substance, that from 1st July then next (1540), all marriages solemnized in the face of the Church, consummate with bodily knowledge, between persons not prohibited by God's law to marry, should be valid, notwithstanding pre-contract; and that no reservation or prohibition, God's law except, should trouble or impeach any marriage without the Levitical degrees. This was the first act that recognized the Levitical degrees as being in any manner a part of the law of England.

On 8th August, 1540, the king, having removed the obstacles in the way of his marriage to Catharine Howard married her, and she thus became his fifth wife.

In 1542, Catharine Howard was accused of incontinence, and executed. The king in the year following married Catharine Parr, widow of Lord Latimer. She was his sixth wife, and continued his wife till the time of his death, on 28th January, 1547, in the 56th year of his age, and 38th year of his reign.

His son, Edward 5, succeeded, reigned seven years, and was succeeded by Mary. Her first act was to have a statute passed declaring the legality of her birth. It was entitled, "An Act declaring the queen's highness to have been born in a most just and lawful matrimony.' It for the second time repealed the whole of 25 Hen. 8, cap. 22, and so much of 28 Hen. 8, c. 7, as had a tendency to bastardize her or to pronounce the marriage between her father and Catharine illegal, which marriage was declared "to stand with God's law" and to be valid to all intents and purposes. So much of the act 25 Hen. 8, c. 7, as contained the prohibited degrees, was left untouched until the ensuing session, when, by 1 & 2 Phi & Mary, c. 18, s. 17, so much of the 28 Hen. 8, c. 7, as concerned the prohibition to marry within the degrees specified, together

with the whole of the 28 Hen. 8, c. 16, and 32 Hen. 8, c. 28, were repealed.

Elizabeth succeeded Mary. Her purpose was to undo what had been done by her sister, and in carrying her purpose into effect she in great part revived the marriage acts of her father. It was enacted by 1 Eliz. c. 1, s. 2, that the 1 & 2 Phil. & Mary, and all and every the branches, clauses and articles, therein contained (with a few exceptions) should be repealed and thenceforth utterly void and of no effect. The act then expressly revived most of the statutes repealed by 1 & 2 Phil. & Mary, omitting 28 Hen. 8, c. 7, but terminating with 28 Hen. 8, c. 16, which was expressly included. The section (10) reviving it concluded as follows: "and all and every branches, words and sentences, in the said several acts and statutes contained, are revived and shall stand and be in full force and strength *to all intents, constructions and purposes.*"

The 28 Hen. 8, c. 7, which contained "the prohibited degrees," was omitted because its effect was to bastardize Elizabeth; but the prohibited degrees were referred to in and confirmed by 28 Hen. 8, c. 16. It has therefore been held that "the prohibited degrees," though mentioned in the repealed act, are still within the intent, construction and purpose, of 28 Hen. 8, c. 16, and so revived, or rather that the 28 Hen. 8, c. 7, to the extent of the prohibited degrees, is revived. (*Harrison* v. *Burwell*, Vaughan, 325; *Hill* v. *Good*, Vaughan, 302.)

In 1563, "A Table of Kindred and Affinity, wherein whosoever are related are forbidden in Scripture and our laws to marry together," was published by the authority of the queen. It contained the prohibitions, prescribed by the statutes of Henry the Eighth.

In 1603, it was provided by the 99th Canon of the Church, that "no persons shall marry within the degrees prohibited by the laws of God and expressed in a table set forth by authority, A.D. 1563, and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall be by course of law separated, &c."

In 1835, the 5 & 6 Wm. 4, cap. 54, was passed. It recites, that marriages between persons within "the prohibited degrees" were voidable only by sentence of the Ecclesiastical Court, pronounced during the life time of both the parties thereto, and it was unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled for so long a period, and it was fitting that all marriages which might thereafter be celebrated by persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable. It therefore enacts, that all marriages before the passing of the act between persons within the prohibited degrees of affinity should not thereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit depending at the time of the passing of the act. It also enacts, that all marriages after the passing of the act celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever. It is expressly declared that the act shall not be construed to extend to Scotland. It is not declared on the face of the act whether or not it shall be taken to extend to the Colonies. It certainly does not bind all British subjects in all parts of the world. It does not, for example, affect the law of marriage in any conquered colony in which a different law at the time of its passing prevailed. Whatever effect it may have in any other colony remains to be decided (per Lords Campbell, Cranworth and Wensleydale, in *Brook* v. *Brook*, 4 L. T. N.S. 93).

The law of England therefore, be it right or wrong, now makes void the marriage of a man with the sister of his deceased wife (*Reyna* v. *Chadwick*, 11 Q. B. 205; *Coulson* v. *Allison*, 3 L. T. N.S. 763). That law of course extends only to subjects of her Majesty, whose domicile at the time of the marriage is within the portion of the dominions affected by the act to which we have referred (*Fenton* v. *Livingstone*, 5 Jur. N.S. 1183; *Brooke* v. *Brooke*, 30 L. T. Rep. 184; 31 L. T. Rep. 91; 4 L. T. N.S. 93). It applies as much to a naturalized as to a British born subject (*Mette* v. *Mette*, 28 L. J. Prob. 117.) The disability of either party to the marriage invalidates the marriage *in toto* (*Ib.*)

We do not at present propose to discuss the question whether or not the marriage of a man to the sister of his deceased wife is in truth opposed to divine law, or whether the law which prohibits such a marriage is in fact a reasonable or proper law. On a future occasion perhaps we shall do so. So long, however, as the law remains unaltered, it ought, like other laws, to be observed. Its history is certainly not much in its favor, but the fact that it is unrepealed, and, if any thing, strengthened by modern legislation, is sufficient to require obedience on the part of all concerned.

There have been many eulogies on trial by jury; but this spoken of by Sir James Mackintosh in his defence of Jean Peltier, charged with a libel on Buonaparte, First Consul, is probably unsurpassed in beauty:—"He now comes before you, perfectly satisfied that an English jury is the most refreshing prospect that the eye of accused innocence ever met in a human tribunal."—*Legal Notes and Anecdotes.*

JUDGMENTS.

QUEEN'S BENCH.

Present: McLEAN, C. J.; HAGARTY, J.

December 15, 1862.

Ash v. *Somers.* — Trespass. Judgment for plaintiff on special case.

In re Clerk of Peace of York and Peel and Clerk of the Recorder's Court in and for the City of Toronto.—Rule *nisi* for *mandamus* discharged. Clerk of the City Council held to be Clerk of the Peace in and for the City of Toronto for jury purposes.

Lynch v. *Wilson et al.*—No judgment on second plea. Court divided in opinion. Judgment for defendants on third plea.

Corporation of London and Corporation of Middlesex.—Postea to plaintiffs.

Reid v. *Trayner.*—Judgment for plaintiff on demurrer.

Ex parte Roblin and United Counties of Frontenac, Lennox and Addington.—Rule discharged.

VanBrocklin v. *Town of Brantford.*—Rule discharged without costs.

Adams v. *Nelson.*—Nonsuit to be entered.

Sexton and Port Whitby Road Co.—Rule discharged.

Strange v. *Dillon.*—Appeal dismissed.

Bell v. *Oliver.*—Appeal dismissed.

McCollum v. *McKinnon.*—Rule absolute.

Crooks v. *Bowes.*—Judgment for plaintiff on demurrer.

Ex parte School Trustees of Escott.—Rule absolute for *mandamus*.

Moore v. *Gurney.*—Rule discharged.

Mills v. *Wigle.*—Rule absolute for new trial on payment of costs.

In re Knowles.—Order for sale. Proceeds to be paid into court.

Ward v. *Fenton.*—Rule absolute for new trial upon payment of costs, unless plaintiff elect to reduce verdict.

Pearman v. *Hyland.*—Rule absolute for new trial on payment of costs.

Present: McLEAN, C. J.; HAGARTY, J.

December 20, 1862.

Woodruff v. *Corporation of Peterborough.*—Judgment for defendants. Postea to them. *Leave to* appeal.

Commercial Bank v. *G. W. R. Co.*—Action to recover $1,500,000 Plea, never indebted. Rule *nisi* discharged.

Muma v. *Niagara District Mutual Fire Insurance Company.*—Rule *nisi* to set aside nonsuit discharged.

Goodwin v. *Ottawa and Prescott Railway Co.*—Rule absolute to enter nonsuit.

Bergin v. *O'Neill.*—Postea to defendant.

Shaver v. *Linton.*—Rule absolute for new trial without costs.

Regina v. *Jerrett.*—Rule *nisi* granted.

Mann v. *Chamberlain.*—Rule *nisi* refused.

Colgan v. *Heyden.*—Rule *nisi* granted.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

December 15, 1862.

Hooker v. *Gamble et al.*—Rule absolute without costs.

Cameron v. *Boulton.*—Rule discharged.

Carruthers v. *Reynolds.*—Rule absolute to enter nonsuit. (Leave was reserved to move to enter a verdict for defendant in this cause, but upon the suggestion of counsel for plaintiff, the court, considering it had power to award the rule, ordered a nonsuit to be entered.)

Fisher v. *Jamieson* —Postea to demandant. *C. S. Paterson* applies for leave to appeal. Granted.

Hodgins v. *Hodgins.*—The court desire to have the case re-argued.

Wright v. *Ashton.*—Appeal allowed. Rule to be made absolute to enter nonsuit.

Cook v. *Christie et al.*—Rule discharged.

Roberts v. *King* —Appeal dismissed with costs.

Niblock v. *McGregor.*—Plea held bad, and rule *nisi* for new trial refused.

Lynes v. *Sifton.*—Appeal dismissed with costs.

Edwards v. *Kerr.*—Appeal dismissed with costs.

Macaulay v. *Ashton.*—Appeal allowed. Rule absolute for new trial. Costs to abide the event.

Hamilton et al v. *Holcomb* —Rule absolute to enter verdict for plaintiffs.

Young v. *Laidlaw.*—Rule discharged.

Armstrong v. *Bowes.*—Notice of action not sufficient. Plaintiff recommended to enter *stet processus*, else new trial.

Merrill v. *Ellis.*—Rule absolute. Verdict entered for defendant on 2nd and 3rd issues set aside on payment of costs by plaintiff, and repleader granted.

Smart v. *McBeth.*—Judgment for plaintiff on demurrer. New trial not necessary.

Westbrooke v. *Callaghan.*—Judgment for plaintiff on demurrer.

Clark v. *McKellar.*—Rule discharged.

McLellan q. t. v. *Brown.* —Rule discharged.

McLellan q. t. v. *McIntyre.*—Rule disharged.

Anderson v. *Romney.*—Rule absolute for new trial, unless plaintiff consent to the entry of *stet processus.*

Titus v. *Durkee.*—Rule *nisi* granted.

Building Society v. *McCurrey* —Rule absolute to enter verdict for plaintiffs.

Town of Clifton v. *Hubbard.*—Rule disharged.

Gaviller v. *Beaton.*—Rule absolute to set aside verdict for plaintiff and to enter verdict for defendant.

Smart v. *Henry.*—Rule absolute to enter a nonsuit.

Grimshaw v. *White.*—Plaintiff's proceeding irregular. Rule absolute.

Gartshore v. *Williams.*—Rule refused.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

December 20, 1862.

School Trustees of Elgin v. *Township of Elgin.* — Rule discharged with costs.

Moodie v. *Dougall.*—Action against defendant for damage sustained by sheriff, by defendant directing sheriff to seize goods.

Declaration held good. 2nd plea held bad.

Replication to 4th plea held bad. No connection shewn between the wrong doer and plaintiff, and plaintiff not shewn to be damnified. Judgment on the whole record for defendant,

Carveth v. *Fortune.*—Rule discharged. This was a rule *nisi* for nonsuit. The rule was discharged and award to stand.

Gibb v. *Davidson.*—Appeal allowed setting aside nonsuit, and new trial ordered. Costs to abide the event.

McFarlane v. *Buchannan.*—Action for use and occupation. Rule absolute to reduce verdict to seven pounds and four shillings.

Haldan v. *Kerr.*—Interpleader issue. Defendants, execution creditors of three persons, who, as executors carried on business together under power in will. The judgment was obtained against them in their individual capacity They then made an assignment for benefit of creditors of estate of testator, and also individual assignments to plaintiffs, for benefit of their individual creditors. *Held*, that goods passed to plaintiffs. Postea to plaintiff.

Bishop of Toronto v. *Cantwell.*—Action of ejectment. Verdict for defendant. Rule *nisi* for a new trial discharged.

Fraser v. *Hellman.*—Rule discharged.

PRACTICE COURT.

Present: MORRISON, J.

December 15, 1862.

Lyall v. *Forgie.*—Rule *nisi* discharged.

Gwynne v. *G. T. R. Co.*—Reference to master.

Charlesworth v. *Crooks.*—Rule discharged with costs.

In re VanNorman.—Rule absolute, with costs to be paid in ten days.

Titus v. *Cardie.*—Rule absolute.

Miller v. *Norman.*—Rule absolute to refer back award, upon payment of costs of this application. Costs of award to abide the event.

Forsyth v. *Greenwood.*—Rule absolute without costs.

Moffatt v. *White.*—Rule discharged upon payment of certain costs specified.

William v. *Belyea.* Rule absolute upon payment of nisi prius costs, but not costs of application.

Smart v. *Colfage.*—Rule absolute with costs—$14 witness fees to be deducted.

Coombs v. *Cuddey.*—Rule absolute without costs.

Bartlett v. *Benson.*—Rule absolute if costs not paid on or before first day of next term.

Macaulay v. *Ewing.*—Rule absolute without costs.

McKellar v. *Douglass.*—Rule absolute for procedendo, but without costs.

SELECTIONS.

LEGAL LONDON.

There is a legal district of London as unmistakably as there is a Jew's quarter in Frankfort; for the *Juden-gasse* of the German free town is hardly more distinct from the Zeil, than Chancery Lane and its environs from the City or West End of our metropolis.

And as there are several foreign colonies scattered throughout the British capitol—as Hatton Garden and its purlieus, swarming with glass-blowers and organ-grinders, is the metropolitan Italia; the neighbourhood of Leicester Square, with its congregation of beards and soft hats, the cockney Gallia Ulterior; and the parish of St. Giles, where the courts and cellars teem with hod-men and market-women, the London Hibernia; so there is a peculiar race of people gro ed around the courts of law and inns of court—Westminster and Lincoln's Inn being the two great legal provinces of London even as York and Canterbury are the two great ecclesiastical provinces of England.

A reference to the map will show that legal London is composed not only of lawyers' residences and chambers, but of inns of court and law courts—civil as well as criminal, "superior" as well as petty—and county courts, and police courts, and prisons; and that whilst the criminal, the county, and police courts, as well as the prisons, are dotted, at intervals, all over the metropolis, the superior law courts are focussed at Westminster and Guildhall; the inns of court being grouped round Chancery Lane, and the legal residences, or rather "chambers" (for lawyers, like merchants, now-a-days, live mostly away from their place of business) concentrated into a dense mass about the same classic spot, but thinning gradually off towards Guildhall and Westminster, as if they were the connecting links between the legal courts and the legal inns.

The inns of court are themselves sufficiently peculiar to give a strong distinctive mark to the locality in which they exist; for here are seen broad open squares like huge court-yards, paved and treeless, and flanked with grubby mansions—as big and cheerless—looking as barracks—every one of them being destitute of doors, and having a string of names painted in stripes upon the door-posts, that reminds one of the lists displayed at an estate-agent's office, and there is generally a chapel-like edifice called the "hall," that is devoted to feeding rather than praying, and where the lawyerlings "qualify" for the bar by eating so many dinners, and become at length—gastronomically—"learned in the law." Then how peculiar are the tidy legal gardens attached to the principal inns, with their close-shaven grass-plots looking as sleek and bright as so much green plush, and the clean-swept gravel walks thronged with children, and nurse-maids, and law-students. How odd, too, are the desolate-looking legal alleys or courts adjoining these inns, with nothing but a pump or a cane-bearing street-keeper to be seen in the midst of them, and occasionally at one corner, beside a crypt-like passage, a stray dark and dingy barber's shop, with its seedy display of powdered horsehair wigs of the same dirty-white hue as London snow. Who, moreover, has not noted the windows of the legal fruiterers and law stationers hereabouts, stuck over with small announcements of clerkships wanted, each penned in the well-known formidable straight-up-and-down three-and-fourpenny hand, and beginning with a "THIS-INDENTURE"-like flourish of German Text, "THE WRITER HEREOF," &c. Who, too, while threading his way through the monastic-like byways of such places, has not been startled to find himself suddenly light upon a small enclosure, comprising a tree or two, and a little circular pool, hardly bigger than a lawyer's inkstand, with a so-called fountain in the centre, squirting up the water in one long, thick thread, as if it were the nozzle of a fire-engine.

But such are the features only of the more important inns of court, as Lincoln's, and Gray's, and the Temple; but, in addition to these, there exists a large series of legal blind alleys, or yards, which are entitled "Inns of Chancery," and among which may be classed the lugubrious localities of Lyon's Inn and Barnard's ditto, and Clement's and Clifford's, and Sergeant's, and Staple, and the like. In some of these, one solitary, lanky-looking lamp-post is the only ornament in the centre of the back-yard like square, and the grass is seen struggling up between the interstices of the pavement, as if each paving-stone were trimmed with green *chenille.* In another you find the statue of a kneeling negro, holding a platter-like sun-dial over his head, and seeming, while doomed to tell the time, to be continually inquiring of the surrounding gentlemen in black, whether he is not "a man and a brother?" In another you observe crowds of lawyers' clerks, with their hands full of red-tape-tied papers, assembled outside the doors of new club-house-like buildings. Moreover, to nearly every one of these legal nooks and corners the entrance is through some archway or iron gate that has a high bar left standing in the middle, so as to obstruct the passage of any porter's load into the chancery sanctuary; and there is generally a little porter's lodge, not unlike a French *conciergerie,* adjoining the gate, about which loiter liveried street-keepers to the awe of little boys, who would otherwise be sure to dedicate the tranquil spots to the more innocent persuit of marbles or leap-frog.

The various classes of law courts too have, one and all, some picturesque characteristics about them. For example, is not the atmosphere of Westminster Hall essentially distinct from that of the Old Bailey? During term time the Hall at Westminster (which is not unlike an empty railway terminus, with the exception that the rib-like rafters are of carved oak rather than iron,) is thronged with suitors and witnesses waiting for their cases to be heard, and pacing the Hall pavement the while, in rows of three or four, and with barristers here and

there walking up and down in close communion with attorneys; and there are sprucely-dressed strangers from the country, either bobbing in and out of the various courts, or else standing still, with their necks bent back, and their mouths open as they stare at the wooden angels at the corners of the oaken timbers overhead.

The courts here are, as it were, a series of ante-chambers ranged along one side of the spacious Hall; and as you enter some of them, you have to bob your head beneath a heavy red cloth curtain. The judge, or judges, are seated on a long, soft-looking, crimson-covered bench, and costumed in wigs that fall on either side their face, like enormous spaniel's ears and with periwigged barristers piled up in rows before them, as if they were so many mediæval medical students attending the lectures at some antiquated hospital. Then there is the legal fruit-stall, in one of the neighboring passages, for the distribution of "apples, oranges, biscuits, ginger-beer"—and sandwiches—to the famished attendants at court; and the quiet old-fashioned hotels, for the accommodation of witnesses from the country, ranged along the opposite side of Palace Yard.

How different is all this from the central criminal court at the Old Bailey! There we find a large boiled-beef establishment, with red steaming rounds in the window, side by side with the temple of justice, and a mob of greasy, petty larceny-like friends of the "prisoner at the bar," and prim-looking policemen, gathered round the court doors and beside the gateway leading to the sheriff's entrance at the back, waiting the issue of that day's trials. Then within the court, upon the bench there are the aldermen, reading the daily papers, or writing letters, attired in their purple silk gowns trimmed with fur, and with heavy gold S collars about their neck; and the under-sheriffs in their court-suits, with their lace frills and ruffles—the latter encircling the hand like the cut paper round bouquets—with their black rapiers at their side, and all on the same seat with the full-wigged judges; and the barristers below crowded round a huge loo-table, that is littered with bags and briefs; and the jury packed in their box at one side of the little court—which, by the by, seems hardly bigger than a back parlor—with a long "day-reflector" suspended over their heads, and throwing an unnatural light upon their faces, whilst in the capacious square dock, facing the bench, stands the prisoner at the bar awaiting his doom, with the Governor of Newgate seated at one corner of the compartment, and a turnkey at the other.

This again is all very different from the shabby-genteel crowd, with its melange of "tip-staffs" and sham attornies, gathered about the insolvent court, and the neighboring public houses, in Portugal Street; that, too, utterly unlike the quaint, old-fashioned tribunals in Doctor's Commons; these, moreover, the very opposite to the petty county courts, that have little to distinguish them from private houses, except the crowd of excited debtors, and creditors, and pettifoggers grouped outside the doors; and those on the other hand, entirely distinct from the still more insignificant police courts, with their groups of policemen on the door-step, and where, at certain hours, may be seen the sombre-looking prison van, that is like a cross between a hearse and an omnibus, with the turnkey conductor seated in a kind of japan-leather basket beside the door at the end of the vehicle.

Farther, there are the several prisons scattered throughout the metropolis, and forming an essential part of the legal capital: the gloomy, yet handsome prison pile of Newgate, with its bunch of fetters over each doorway—the odd pologon-shaped and rampart like penitentiary, perched on the river bank by Vauxhall—the new prison at Pentonville, with its noble, portcullis-like gateway—the city prison at Holloway, half castle, half madhouse, with its tall central tower, reminding one of some ancient stronghold—besides the less picturesque and bare walled Coldbath Fields, and Tothill Fields, and Horsemonger Lane, and the House of Detention, and Whitecross Street, and the Queen's Bench—not forgetting the mastless hulks, with their grim-looking barred port holes.

These, however, constitute rather the legal institutions of London than the legal localities: and that there are certain districts that are chiefly occupied by lawyers, and which have a peculiarly lugubrious legal air about them, a half-hour's stroll along the purlieus of the inns of court is sufficient to convince us.

Of this legal London, Chancery Lane may be considered the capitol; and here, as we have before said, everything smacks of the law. The brokers deal only in legal furniture, the publishers only in Fearne on Remainders and Impey's Practice, and such like dry legal books—and the stationers in skins of parchment and forms of wills, and law-lists and almanacs, and other legal appliances. Then the dining rooms and "larders" so plentiful in this quarter, are adapted to the taste and pockets of lawyer's clerks: and there are fruiterers, and oyster-rooms, and "*café restaurants*," bakers, and "cocks," and "rainbows," for barristers and attorneys to lunch at; and "sponging-houses," barred like small lunatic asylums, and with an exercising yard at the back like a bird cage, and patent offices; and public-houses, frequented by bailiffs' followers and managing clerks; and quiet looking taverns, which serve occasionally as courts for commissions "*de lunatico*."

Now, the people inhabiting the legal localities of the metropolis are a distinct tribe, impressed with views of life and theories of human nature widely different from the more simple portion of humanity. With the legal gentry all is doubt and suspicion. No man is worthy of being trusted by word of mouth, and none fit to be believed but on his oath. Your true lawyer opines, with the arch-diplomatist Talleyrand, that speech was given to man not to express, but to conceal his thoughts; and we may add, it is the legal creed that the faculty of reason was conferred on us merely to enable human beings to "special plead," *i. e.*, to split logical hairs, and to demonstrate to dunderhead jurymen that black is white.

What beauty is to a Quaker, and philantrophy to a political economist, honor is to your gentlemen of the long robe—a moral will-o'-the-wisp, that is almost sure to mislead those who trust to it. The only safe social guide, cries the legal philosopher, is to consider every one a rogue till you find him honest, and to take the blackest view of all men's natures in your dealings with your friends and associates; believing that there is no bright side, as has been well said, even to the new moon, until experience shows that it is not entirely dark. In legal eyes, the idea of any one's word being as good as his bond is stark folly; and though, say the lawyers, our chief aim in life should be to get others to reduce their thoughts to writing towards *us*, yet we should abstain from pen, ink and paper as long as possible, so as to avoid "committing ourselves" towards *them*. Or if, in the frank communion of friendship, we are ever incautious enough to be betrayed into professions that might hereafter interfere with our pecuniary interests, we should never fail, before concluding our letter, to have sufficient worldly prudence to change the subscription of "Yours sincerely," into "Yours, *without prejudice*."

That lawyers see many examples in life to afford grounds for such social opinions, all must admit; but as well might surgeons believe, because generally dealing with sores and ulcers, that *none* are healthy; and physicians advise us to abstain from all close communion with our fellows, so as to avoid the chance of contagion, because *some* are diseased. Nor would it be fair to assert that *every* lawyer adopts so unchristian and Hobbesian a creed. There are many gentlemen on the rolls, at the bar, and on the bench, who lean rather to the chivalrous and trusting than the cynic and skeptical view of life; and many who, though naturally inclining towards the Brutus philosophy, and preferring stoical justice

to Christian generosity, are still sufficiently poetic to see a glimpse of "good in all things."

Moreover, it is our duty and pride to add, that if among the body of legal gentry there are to be found such enormities as "sharp practitioners" and "pettifoggers"—scoundrels who seek to render law a matter of *in*justice, and who use that which was intended to prevent injury and robbery as the means of plunder and oppression—who regard it as their interest to retard, rather than advance justice, and who love equity and its long delays simply on account of the iniquity of its costs—if there be such miscreants as these included among the legal profession, there are, on the other hand, the most noble judges of the land comprised among its members; and granting we should estimate the true dignity of a vocation by those who are at once the most honorable and honored types of it, we must candidly admit that there is no office that sheds so pure and brilliant a glory upon our nation, as that filled by the righteous and reproachless band of English gentlemen who occupy the judgment seats of this country.

For whilst in every other kingdom the judge is but little better than a quibbling and one sided advocate—a government hireling, trying his hardest to convict the prisoner—the British arbiter weighs,with an exquisitely even hand the conflicting testimony in favor of and against those who are arraigned at his tribunal, and with a gracious mercy casts into the trembling scale—in cases of indecision—the lingering doubt, so as to make the evidence on behalf of the accused outweigh that of his accusers. Nor can even the most skeptical believe that it is possible for governments or private individuals to tempt our judges to swerve from the strictest justice between man and man, by any bribe, however precious, or by any worldly honors, however dazzling. Indeed if there be one class in whose iron integrity every Englishman has the most steadfast faith—of whose Pilate-like righteousness he has the profoundest respect, and in the immaculateness of whose honor he feels a national pride—it is the class to whom the high privilege of dispensing justice among us has been intrusted, and who constitute at once the chiefs and the ornaments of the profession.—*Criminal Prisons of London.*

EXTRACTS FROM LORD BROUGHAM'S LETTER TO THE EARL OF RADNOR.

"Brougham, *October 15th*, 1862.

"But as to the last session in its legal and law-amending aspect, it really must be allowed to have done more than might have been expected, considering the degree in which all men's minds were absorbed by the cruel, unjust, and unnecessary civil war of the Americans, the distressed condition of Lancashire, the struggles of the Italian Kingdom, not to mention the distraction of our great international Exhibition. Some really useful amendments of the law were effected, of no great pretensions; for the less unassuming ones are far from being undeniable improvements."

* * * * * * *

"But the Act of by far the greatest pretension, for facilitating the transfer of real estate, is by many experienced persons expected to prove a failure. Certainly, such a bill should have been subjected to the fullest discussion, both of professional men. through whose instrumentality it must be worked, and of the community at large, for whose dealings it is intended. There could have been no harm whatever in a year's delay, for letting the plan be considered during the long vacation, and no use in hurrying such a measure through Parliament at the end of the session. The great Incorporated Law Society urged strong objections to it, alleging that it was permissive, and no one with a good title would take advantage of it, and holding that it would be inoperative except in creating offices with large salaries. I am very far from concurring in all the objections made, and still less in the sarcasm which has been ventilated, that the bill was hurried through in order to provide a set-off to the Bankruptcy Act, which has proved a total failure. This failure is fully admitted, and by all; but I consider the attempt to improve our conveyancing as conscientiously made, and heartily wish it may succeed, though I have stated now, as I did at the Social Science Congress, the objections to its hasty enactment, and my preference for the plan repeatedly presented in the shape of bills, extending to estates of every kind the procedure with customary property, by which, as Mr. Fawcett has explained from his large experience in customary courts, the cost of conveyance of the largest estate does not exceed a few shillings and the dispute of a title is almost unknown.

"But all the defects in late measures, and the great occasion for legislation upon other matters, as well as for arrangements in our judicial procedure requiring no new law, though imperatively required, lead to the absolute necessity of a department for performing the duties of Minister of Justice. Such a department would have prevented the omissions and bad provisions in the recent Acts, and would secure the proposal of measures required, beside the inestimable benefit of presiding over the preparation of all bills, with the consent of the Government and of individual members. We are indebted to Mr. Napier, the able and excellent ex-Chancellor of Ireland, for his persevering efforts on this subject in different sessions as long as he continued in Parliament. In 1853 and 1855 he met with little support; but in 1856 he obtained the consent of the Commons to a modified resolution. The year after his triumph was complete. He carried, all but unanimously, an address for the establishmer of a separate and responsible department of Public Justice, supported strongly by Lord Palmerston and Lord John Russell, who recommended the Queen to return an immediate answer that the "subject should receive that attentive consideration which its importance demands." I therefore naturally, before the end of the session, called for information as to what had been done in the five years since the "attentive consideration" had been promised; and a private communication from a leading member of the Government apprises me that nothing whatever has been concluded. It may, however, be hoped that this important step, so strongly recommended by the Commons and by the two chief Ministers, will at length be taken; and there is assuredly no lack of duties for the department. Nevertheless, even if the establishment of it should be delayed, some of these duties are so urgent that they must be discharged without such help."

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"You have lately seen a scandal in Scotland; the agitation over great part of the country on the subject of a conviction for murder. Petitions for pardon, numerously signed, are sent up, and a meeting was held at Glasgow, attended by thousands, to pass resolutions in favour of such an application nominally, but really against the learned judge and respectable jury who tried the indictment. The Home Secretary, in whose department the consideration of such a petition is, happens to be a lawyer; but this is a mere and a rare accident. His two predecessors were not; and I do not recollect an instance of a lawyer in practice holding that office. Ought not this and all such cases to be brought before the Department of Justice? But this case, and the scandal of the agitation upon it, in all probability never would have arisen had the attempt I so often made succeeded, to extend my Evidence Act to defendants in criminal cases, on their desiring to be examined, and of course subjected to the sifting of cross-examination. It is plain that the woman convicted would have desired to be examined, and her sifted testimony would either have led to an acquital or confirmed the verdict; in either case the public mind would have been satisfied. The only objection ever urged to this extension of the Evidence Act is, that any party declining to take the benefit of the law would be supposed to be guilty for that reason. But surely the judge

could explain to the jury how consistent such a refusal was with innocence, arising, as it oftentimes would from the party's want of confidence in his own presence of mind to stand a cross-examination. We must recollect, too, that the existing law allows the examination of defendants compulsorily and without any option in *quasi* criminal cases, as actions for assault of the worst character, or false imprisonment, or for libel. Lord Denman and Lord Campbell were so much struck with this inconsistency, that they inclined strongly to support my bill, if confined to cases of misdemeanour in which the opposite party was examined for the prosecution.

"The want of a Public Prosecutor has been often complained of, and in addition to all the instances of this defect given in my friend Mr. Phillimore's Committee, recent cases have put our inferiority to Scotland in this respect in a very remarkable light. A swindler, for example, having, beside obtaining money on false pretences, committed several forgeries, was not tried for the felony but only for the misdemeanour, which he confessed. His connections were in good circumstances, and it was urged for him that it was a first offence, and that he was only twenty-three years of age. No Public Prosecutor would have resorted to such a plea to excuse his breach of duty. Some years ago I recollect an anchorsmith of good property forging to a large amount, and he found means to pay the recognizances of the party bound over to prosecute, and so escaped.

"There are other things which we may very wisely borrow from Scotch procedure. Where the jurisprudence of two countries differs in fundamental principle there can be no mutual interchange. Thus the law regulating the title and conveyance of real estates in France, Scotland, and England, is so entirely different, that the one country cannot borrow from the other. But in procedure it is quite otherwise, and each might greatly profit by the imitation of the others. France, for example, in much that relates to criminal procedure might most advantageously borrow from us, as we might from their criminal appeal system. So Scotland has borrowed our trial by jury in civil cases with great advantage; and we have adopted, from the Scotch, the important principle of local jurisdiction, though as yet very imperfectly. The allowing trustees remuneration is another superiority of their procedure, and ought clearly to be adopted in England in all cases where the constitution of the trust does not expressly preclude it; but with the remuneration should be coupled more stringent obligations, such as the requiring yearly accounts. It is certain that the interests of parties under trust suffer much more constantly from the negligence and even inaction of trustees than from their dishonesty.

"I have mentioned the great subject of local judicature, and the vast improvement of our judicial system by the County Courts. It is with the most unqualified satisfaction that I observe their success. Last year there were nearly half a million of causes tried by those courts and only seventeen appeals; but the number of actions brought was nearly 900,000, for £2,220,000, so that half of them were settled without going to trial. It is difficult to over-estimate the benefits of such a system to the community, and especially to the working classes. That the jurisdiction of the courts ought to be considerably enlarged, seems evident. In Scotland the local judge has nearly unlimited jurisdiction; and one among other benefits derived from hence, is the facilities thus afforded for the choice of judges in the higher tribunals. It is well known how often a great advocate proves an indifferent judge. But if the option were given to parties to select the county court for trying their cause, a test of judicial capacity would manifestly be afforded by the comparative resort to the courts. All my attempts to extend the jurisdiction and to make the optional clause operative, failed. But my disappointment was far greater in the rejection of my proposal, often made, of introducing the process of Reconcilement, on which I have more than once addressed you. Can any one doubt the effect of both parties going before an experienced and impartial person, clothed with judicial dignity, and stating their several cases for his advice without the interposition of professional men? It must lead to the abandonment of most of the groundless claims and desperate defences, and the settlement of more than half the actions now brought. And such is the result of the plan wherever, as in Denmark, it has been fairly tried. The whole community, but most of all the humbler classes, have an immediate interest in this improvement, which will save them from being sacrificed to the profit, not of the more respectable branches, but the worst of the legal profession, the harpies who deform and defile it. As often as this has been propounded, it has been met by technical objections, but not one whit more strenuously than my original proposal of County Courts, or the great Evidence Act, the judges themselves joining in the opposition; and yet thirty years have sufficed to refute the one set of objectors, and a much shorter period to convince and convert the others; so that the learned judges have candidly confessed how great a help is afforded to the discovery of the truth by hearing the parties themselves as well as their counsel. Not one of the objections to Reconcilement is more strongly urged, or more plausible in itself, than those I had to encounter on County Courts and the Evidence of Parties.

"But now, my dear friend, we are dwelling upon the improvement of the law and the great benefits which the community derives from it. We have both of us, from the very beginning of the century, anxiously devoted ourselves to protect the rights of the people and promote their improvement, without the least regard to the combinations or the movements of party; and, Heaven be praised! we have had success enough to cheer us. Even at the present hour we are comforted by the spectacle of those who suffer the most severely, conducting themselves with exemplary patience, and perfect abstinence from all outbreaks, and even all discontents; so unlike the working classes of forty years ago under far less pressure. This is manifestly the result of their advance in knowledge, and better comprehension of the causes of the distress. But while our prospects at home are thus comfortable, abroad, in most quarters, the aspect of affairs is truly painful. Mischief is brewing in one part of Germany that may endanger its internal tranquility, and even shake the general peace; while priestly intrigue in France may have the same sad result, by the maltreatment of Italy. A gloom is thus cast over the prospect of the future in Europe; but in America the view of the present is as distressing as possible. Of the grievous civil war now raging for above twelve months, with the utter disregard of human life and of public credit, it is difficult to speak so as not to offend either, nay, perhaps both parties, of whom one seems bent upon an impossibility. But at least let us hope that the imputation is groundless which would represent the Northern States as prepared to inflict upon their adversaries, and upon humanity itself, the only aggravation whereof the deplorable contest is capable, by exciting an insurrection of the slaves. Such a calamity is more to be dreaded by the friends of that unhappy race than by those of their masters, for the chief sufferings would be theirs; and we might, on their behalf, have to address the more numerous and better armed body of the whites, and to exclaim,

> "Tuque prior, tu parce, genus qui ducis Olympo:
> Proice tela manu, sanguis meus!'

Nor let it be imagined that when the war shall happily cease, its evils will be at an end, either for the Americans themselves or for others. Armed men in hundreds and thousands will remain inured to slaughter, incapable of subordination, impatient of peace—their own government will be less secure than ever, and our colonies will have a bad neighbour."—*Law Magazine.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from Vol. 8, page 264.*)

The security covenant and bond to the Crown being perfected, both instruments are to be deposited with the proper officers. As to the covenant, sec. 26 provides that before any clerk or bailiff enters on the duties of his office, the covenant, with the Judge's certificate of approval, shall be filed with the Clerk of the Peace of the county in which the court is situate, who is to grant a certificate of the same.

For the filing and certificate, the Clerk of the Peace will be entitled to receive one dollar from the officer.

A copy of the covenant, certified by the Clerk of the Peace, is to be received in all courts as sufficient evidence of the due execution and contents thereof, without further proof (sec. 28).

With respect to the bond to the Crown, the practice is for the County Judge to send it, with his approval endorsed, to the Minister of Finance. It seems that the act respecting the security to be given by public officers (cap. 12 Con. Stat. Can.), so far as applicable to subordinate officers, extends to Clerks and Bailiffs in the Division Courts, and therefore the provision of the section is given. It enacts that—

Every person appointed to any civil office or employment or commission in any public department within the Province, or to any such office or employment of public trust under the Crown,—or wherein he shall be concerned in the collection, receipt, disbursement, or expenditure of any public money,—and who, by reason thereof, is required to give security, with surety or sureties or otherwise,—shall within one month after notice of such appointment, if he is then within the Province, or within three months if he is then absent from the Province (unless he sooner arrives in the said Province, and then within one month after such arrival) give and enter into a bond or bonds or other security or securities, in such sum and with such sufficient surety or sureties as may be approved of by the Governor, or by the principal officer or person in the office or department to which he is appointed, for the due performance of the trust reposed in him, and for his duly accounting for all public moneys entrusted to him or placed under his control.

Every person who by reason of his appointment to any civil office or employment or commission, as aforesaid, or who by reason of being concerned in the collection, receipt, disbursement or expenditure of any public moneys, gives or enters into any bond or other security for the due performance of the trust reposed in him—or for the duly accounting for of public moneys entrusted to him—shall cause every such bond or security to be registered at full length in the office of the Registrar of this Province, in manner hereinafter mentioned, and shall forthwith, after such registration, deposit the original bond or security at the office of the Minister of Finance.

And every such bond or security shall be recorded and deposited as aforesaid, within one month after being entered into or given, if the person on whose behalf it is entered into or given resides or is within this Province, and, if he is absent therefrom, then within three months after being entered into or given, unless such person arrives sooner within the Province, and then within one month after such arrival.

And by sec. 11 of the same act, every person required to give bond or security who fails to have it registered and deposited within the month, incurs a forfeiture of office.

The object of both these instruments, covenant and bond, is to afford adequate security to the public and the Crown for the full and faithful discharge of the officer's duty, and, that this security may be always maintained, provision is made for new sureties as occasion requires. If any surety in a covenant dies, becomes resident out of Upper Canada, or insolvent, the County Judge is required to notify the officer for whom such person became security of the fact, and he is required, within one month after being so notified, to give new security, and failing to do so incurs forfeiture of office (sec. 29). The insolvency of a surety, it is presumed, is not to be understood in the strict sense of being actually in the Insolvent Debtors' Court, but that any other tangible evidence of insolvency, as an assignment to creditors, a return of writs "no property," or the like, would evidence insolvency within the meaning of the section.

Section 30 enacts that the parties to a former covenant are not to be exonerated, by giving a new covenant, from their liability on account of any matter done or omitted before the renewal of the covenant.

By the act already referred to (cap. 12 Con. Stat. Can.) a more full provision is made in sec. 12, and regarding the purposes of the enactment there seems to be ground for holding that it would extend to the covenants as well as bonds required to be given by Clerks and Bailiffs. But any question on the point is practically obviated when the same persons enter into the covenant and bond as securities, as indeed is commonly the case. Sec. 12, no doubt, extends to the bonds; it enacts that—

Every such person as aforesaid who has given any bond or other security, with surety or sureties for the due execution of the trust reposed in him, or for duly accounting for public moneys coming to his hands,—shall give notice in writing to the Secretary of the Province, or to the principal officer or person of the department to which he belongs, of the death, bankruptcy, insolvency, or residence out of the Province, of any surety or person bound for or with him in any such security.

Such notice shall be given within one month after the fact comes to the knowledge of such person as aforesaid, if he then is or resides in this Province, or within three months if he be out of this Province (unless he sooner arrives in the Province, and then within one month after such arrival). And any person who neglects to give such notice within such period as aforesaid, shall forfeit to the use of her Majesty one fourth part of the sum for

which the surety so dead or bankrupt or insolvent or resident out of the Province, became security, to be recovered in any court of competent jurisdiction, by action of debt or information, at the suit of the Crown.

And the section further provides that, if new sureties are not put in, the officer is liable to forfeiture of his office.

The Judge is not limited by any of these enactments. He may, if the public interest require it, call on a Clerk or Bailiff to give a new security, and the Judge would seem to be justified in doing so where the increase of business in a court showed the existing securities to be insufficient in amount, or where he had reason to doubt the sufficiency of a surety, without being able to say that he was insolvent. Any officer declining to give new security when reasonably required to do so by the Judge, whether in terms of the statute or otherwise, might well be dismissed by the Judge at whose pleasure he holds office. And, moreover, an officer wilfully neglecting to communicate to the Judge any fact which would destroy or diminish the value of the security he is required by law to give and maintain, would be guilty of misbehaviour warranting his removal from office. No express provision appears to have been made for relieving the sureties in a security covenant from their responsibility for their principal, Clerk or Bailiff, but a new covenant entered into, approved and regularly filed, would doubtless operate to relieve them from further responsibility, from and after the time of such filing (see sec. 30).

Sec. 13 (same act) provides a mode of release. It is as follows:

When any person has become surety to the Crown for the due accounting for public moneys, or the proper performance of any public duty, such person, when no longer disposed to continue such responsibility, may give notice thereof to his principal, and also to the Secretary of the Province,—and all accruing responsibility on the part of such person as such surety shall cease, at the expiration of one month from the receipt of the last of such notices; and the principal shall within that period give the security of another surety, and register and deposit the bond of such new surety, or in default of so doing shall be liable to forfeit, and be deprived of the appointment, office, employment, or commission, in respect whereof such new security ought to have been given, in the manner and subject to the provisions hereinbefore set forth.

Thus it will be seen that very full provision has been made for securing the Crown and the public against damage or loss by the default, breach of duty, or misconduct of officers, by providing not only that ample security shall be given on the appointment of the officer, but also that the same shall be maintained and continued as a valuable and sufficient security; rendering it incumbent on the Clerk or Bailiff to notify the Judge without delay of any thing that would impair the value of the existing security, and on the Judge to cause new sureties to be given when any such fact is brought to his notice.

CORRESPONDENCE.

Division Court Law—Neglect of County Judge to require Security from Bailiff—Action.

TO THE EDITORS OF THE LAW JOURNAL.

Newcastle, December 14, 1862.

GENTLEMEN,—As you are at all times willing to give information on matters relating to division courts, your opinion on the following point is desired.

A B is appointed a division court bailiff, goes into his duties and acts as such for upwards of a year. During this time a writ of execution is put into his hands. The writ has never been returned. The defendant in the writ produces A B's receipt in full payment. The plaintiff in the case wants his money. He finds that A B is worthless, and also finds that *no sureties were taken from A B for the due performance of his office pursuant to the statute.* Query—to whom is the plaintiff to look for his money or redress?

I am, yours truly,

"MANVERS."

[A division court bailiff is in express terms prohibited from entering upon the duties of his office before the covenant of himself and sureties required by law, as a security to suitors, approved in the manner directed by the Division Court Act, is filed in the office of the clerk of the peace: (Con. Stat., U. C., cap. 19, sec. 26.) It is for the county judge to direct and approve of the security: (*Ib.*, sec. 25.) With him also rests not only the power to appoint, but the power to remove the bailiff: (*Ib.*, sec. 23.) It is the duty of the judge to see that proper security is given before the bailiff enters on the duty of his office. The neglect of this duty gives to the party injured by it a right of action against the county judge. (See *Parks* v. *Davis*, 10 U. C. C. P. 229.)]—EDS. L. J.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

SLOAN v. CREASOR, ATKINSON, AND MCKERNAN.

Division court bailiff—Misconduct—Action against his sureties—Prior judgment against the bailiff.

The plaintiff sued C, a division court bailiff, and his sureties, on their covenant that the bailiff would not misconduct himself in office, alleging a judgment recovered by himself against C., for selling his goods under execution contrary to the orders of the plaintiff in the suit, and a *fi. fa.* on such judgment returned *nulla bona* as to part, and claiming to recover the balance.

Held, (affirming the judgment of the county court,) that the declaration was bad, for the plaintiff having recovered judgment against C for the tort, could not afterwards sue upon the covenant for the same cause of action.

Appeal from the county court of the county of Simcoe.

The declaration alleged that the defendants by their covenant, on the 1st day of January, 1858, covenanted and promised in the sums of money therein mentioned, that the defendant John Creasor as bailiff of the first division court of the county of Simcoe, should duly pay over to such person or persons entitled to the same all such moneys as he should receive by virtue of his said office of bailiff, and should and would well and faithfully perform the duties imposed upon him as such bailiff by law, and should not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; and the plaintiff averred that after the making of the said covenant, and whilst the said defendants John Atkinson and Daniel Kernan were so sureties for the said John Creasor as such bailiff, one John Ardagh recovered a judgment in the said first division court for the county of Simcoe against the plaintiff for a certain amount therein mentioned; and then it proceeded to set forth the issuing of a warrant of execution for the amount so recovered, together with the costs of suit, and

the delivery of such writ to the defendant John Creasor, as bailiff of the said court, for the purpose of levying the amount endorsed on such execution to be levied from the goods of the said plaintiff: that after the delivery of the writ to the said John Creasor the said John Ardagh countermanded the execution of the same, or the levying on the plaintiff's goods under the said writ, on the plaintiff paying to the said John Creasor all his costs by reason of the said writ being in his hands as such bailiff: that the plaintiff tendered to the said John Creasor all costs due on the said writ, but that Creasor refused to accept the same, and refused to stay proceedings on the said writ, and afterwards, while the said order of the said John Ardagh was in full force to stay the proceedings on the said *fi fa.*, the said defendant John Creasor wrongfully, illegally, and contrary to his duty in that behalf, did, under pretence of the said warrant of execution, seize, take, and carry away certain goods and chattels of the plaintiff, to wit, a large quantity of wheat in sheaf, a large quantity of peas in the straw, and one hundred and fifty bushels of potatoes, and did afterwards wrongfully sell the same, the said order to stay proceedings and countermand not having been in any wise revoked cancelled, or annulled.

The declaration then averred that for such seizing and taking of the plaintiff's goods, and the wrongful conversion of the same, the plaintiff commenced an action of trespass in the county court against the said John Creasor, and that by the consent of the parties in the said action, their counsel and attorneys, and by an order of the said court, the said action and all matters in difference therein were referred to the award and arbitrament of John Strathy, Esquire, and that within the time appointed for making an award the said John Strathy did make an award in favour of the plaintiff for $78.25, for his damages by reason of such wrongful taking and conversion, and that the costs of the said action, reference, and award, were duly taxed to the said plaintiff at the sum of $97 38. The declaration then set forth a judgment obtained on the said award for the damages and costs, and that an execution issued thereon, and was delivered to the sheriff of the county of Simcoe, endorsed to levy the sum of £43 18s. 1d., being the amount ordered to be paid on the said award and costs, and the sum of £8 15s., being the costs taxed and ordered to be paid by the rule to enforce the payment of the said award, and the costs attending the proceedings for the said rule and the judgment entered thereon; and that the said sheriff afterwards returned the said writ of *fieri facias* with an endorsement that he had made thereon the sum of $37.80, and that the defendant John Creasor had no other goods or chattels within his bailiwick whereof he could cause to be made the residue of the said money. The declaration then concluded by alleging, "and so the plaintiff saith that the said defendant John Creasor did not well and faithfully do and perform the duties imposed upon him as such bailiff by law, and did misconduct himself in the said office of bailiff to the damage of the plaintiff, being a party in a legal proceeding, contrary to the said covenant, whereby the plaintiff hath sustained the said damagas; and the plaintiff claims fifty pounds."

The defendants demurred to this declaration, alleging, among other grounds of demurrer, that the plaintiff having recovered judgment against Creasor for the wrong, was precluded from suing on the covenant; and judgment having been given for the demurrer in the court below, the plaintiff appealed.

McCarthy, for the appellant, cited *McArthur* v *Cool*, 19 U.C. Q. B. 476; *Thompson* v. *McLean*, 17 U. C. Q. B. 495; *Sanderson* v. *Hamilton*, 1 U C Q B 460; *McIntosh* v *Jarvis*, 8 U C Q B 533; *Nelson* v. *Baby*, 14 U C Q B. 235, 238; *Miller* v *Tunis*, 10 U C C P 423; *Baker* v. *St. Quintin*, 12 M. & W. 411; *Hunt* v. *Hooper*, Ib. 664; *Drake* v. *Mitchell*, 3 East 257; *Bell* v. *Banks*, 3 M. & G 258.

Osler, contra, cited Stephen on Pleading, 288; 1 Saund. 276; Bac Abr. "Statute" L; *Hay* v *Bush*, 2 Scott N. R 86; *Peppercorn* v. *Hoffman*, 9 M. & W. 618, 628; *King* v. *Hoare*, 13 M. & W. 494; *Joule* v. *Taylor*, 7 Ex. 61.

McLEAN, C J.—The plaintiff appears to have brought this action, not for the purpose of recovering again such damages as a jury may give him for the tort of the bailiff against him and his sureties, but rather for the purpose of recovering the balance due upon the execution in the suit against the bailiff alone. If that were not the case it is difficult to imagine why the plaintiff set out on the record any thing connected with the suit against the bailiff, and the reference of that suit to arbitration, and the issuing an execution and levying a specific amount of the moneys endorsed to be levied on that execution. Had it been intended to act independently of the judgment recovered against Creasor, and to proceed *de novo* for the same cause of action against Creasor and his sureties, there could have been no necessity to set forth any thing but the cause of action alleged in the county court suit—that is, the seizing and selling the plaintiff's goods after he had been directed not to do so by Ardagh—and then the allegation that in doing so he had misconducted himself and caused damage to the plaintiff, a party in the suit or legal proceeding at the suit of Ardagh, contrary to the terms of the said covenant, whereby an action had accrued to the plaintiff to recover from the said defendants the amount of the said damages, the matter would have been sufficiently plain; but if that was all that was intended the declaration certainly sets out a good deal of irrelevant matter, and the statement at the close "whereby the plaintiff has sustained *the said damages*" might have been confined to a specific amount arising from the tort of the bailiff.

On the argument, however, the plaintiff argued that notwithstanding the recovery against Creasor and the levying of a portion of the damages awarded against him, he had a right to bring a second action for the same cause, and recover damages a second time for precisely the same tort. It is quite plain that there is no covenant set out a breach of which would render the sureties or their principal liable to the plaintiff for payment of any damages recovered against the bailiff individually, for a tort committed in the discharge of his duty. Then taking the conclusion of the declaration to apply to the act of trespass, for which the plaintiff shews that he has already recovered, and that the intention is to endeavor again to recover against Creasor and his sureties, it becomes necessary to look at some of the grounds of demurrer urged by the defendants against the declaration.

The sixth objection is, that "the plaintiff having sued for the wrong in the county court elected his remedy, and cannot now sue Creasor, or he would be made twice liable for the same cause, contrary to the maxim, "*nemo debet bis vexari pro eadem causâ*," &., and the matter has become "*rem judicatam*;" and the seventh is, "that the plaintiff having referred his grievance against Creasor to arbitration, thereby discharged the sureties from liability, and as to Creasor the wrong has become a debt, and a matter adjudicated upon."

Either of these objections, I think, must be fatal to the plaintiff's recovery. The action is against the defendants jointly, and on a covenant said to have been made by them under their respective seals in the sums of money therein mentioned, and it is alleged that they covenanted and promised that the defendant John Creasor as bailiff of the first division court, should duly pay over to such person or persons entitled to the same all such moneys as he should receive by virtue of the said office of bailiff, and should not misconduct himself, &c.

The covenant being sued upon as a joint one, any matter which will discharge one of the defendants will equally discharge all, for there can be no recovery against two of the defendants, who are bound only with a third person jointly to do a particular act. In the case of *King and another* v. *Hoare*, (13 M. & W. 493,) and the numerous cases cited by Mr. Baron Parke in the judgment given by him in that case, the principle is clearly established, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party, and that in cases of joint contracts or joint torts there can be no distinction made when there is but one cause of action in each case. The party injured may sue all the tort-feasors or all the contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other, but for the purpose of the decision in that case they are upon the same footing: whether the action is brought against one or two, it is for the same cause of action. It is also said in the same case by the learned baron, that if there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the

suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result.

In the case of *Buckland* v. *Johnson*, (15 C. B. 145,) the same principle is also recognised, and at page 166 *Maule*, J., says: "Having his election to sue in trover for the value of the goods at the time of the sale, or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy, and he has obtained a verdict and judgment. He has therefore got what the law considers equivalent to payment namely, a judgment for the full value of the goods. * * * When the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury, * * * and having once recovered in respect to the same goods the plaintiff cannot again recover the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment his remedy was altogether gone: his claim was satisfied as against all the world. He was in fact in the position of a person whose goods had never been converted at all."

In the case of *McArthur* v. *Cool et al*, in our own court, (19 U. C. Q. B 476,) it was held that the plaintiff had at one time a cause of action for the money sought to be recovered against Cool, a division court bailiff, and the other defendants his sureties, but that having elected to proceed in an action of trespass against Cool, the plaintiff could not afterwards sue on the covenant for money had and received by the bailiff for the same cattle for the taking of which the verdict in trespass had been recovered. That decision is binding until reversed by the judgment of a court of appeal, and upon the authority of that case, as well as the others cited, I think this appeal against the judgment of the learned judge of the county court on the several causes of demurrer must be discharged with costs.

HAGARTY, J.—The declaration in this case is framed apparently in conformity with that in *McArthur* v. *Cool*, (19 U. C. Q. B. 476.) There the covenant was stated jointly, not jointly and severally, and the statute not referred to. On objection taken the court say it can be supported as a joint covenant, although the sums for which each is respectively bound are different.

The statute is not here referred to, and the covenant is stated as joint, not joint and several. This creates a difficulty in my mind.

The three defendants, Creasor, Atkinson, and McKernan, covenant jointly that Creasor shall not do any act to the damage of the plaintiff. The declaration alleges an act so done, and a judgment in tort recovered against Creasor alone therefor, and part payment on such recovery. After that can this action be maintained against the three defendants on a joint contract?

The case of *King* v. *Hoare*, (13 M. & W. 504,) and *Buckland* v. *Johnson*, (15 C. B. 145,) seem strongly against the plaintiff's right.

Assuming the alleged wrong done here to be within the covenant, the plaintiff, when Creasor injured him, had two remedies,—one against him alone for the tort, the other against him and the other defendants on the joint contract that he should not commit any such tort.

Let us now see Parke, B.'s words: "If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment recovered in a court of record, the judgment is a bar to the original action, because it is thereby reduced to a certainty, and the object of the suit attained as far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "*transit in rem judicatam*," the cause of action is changed into matter of record, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two. * * * Popham, C. J., states the true ground. He says: "If one hath judgment to recover against one, and damages are certain," (that is, converted into certainty by the judgment,) "although" he be not satisfied, yet he shall not have a new action for the trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two is, because there every one of these is chargeable and liable to the entire debt; and therefore a recovery against one is no bar against the other until satisfaction." And it is quite clear" (continues Parke B.,) "that the Chief Justice was referring to the case of a joint and *several* obligation. * * * We do not think that the case of a joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case." The judgment is lengthy, and thus concludes: "These considerations leads us, quite satisfactorily to our own minds, to the conclusion, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the *same debt or tort* against another party."

To succeed in this action the plaintiff must I think maintain that where a man covenants not to do an act in itself the subject of trespass, and having done the act he is sued and judgment recovered against him expressly for the trespass, he can again be sued on his covenant, the same act of trespass being laid as the breach. This I consider cannot be permitted by the law. If, therefore, here the defence as to Creasor is a good bar, it is difficult to see how it must not equally be so as to his co-defendants.

Considering that the plaintiff fails on this ground I have not considered several other points suggested.

BURNS, J., concurred.

Appeal dismissed.

IN THE MATTER OF RIDSDALE AND BRUSH, CLERK OF THE CORPORATION OF THE TOWN OF AMHERSTBURGH.

Roman Catholic separate schools—Claim of exemption by protestants as subscribers to—Misconduct of clerk—Mandamus.

A rate having been imposed for the purpose of building a new school house in the town of Amherstburgh, certain persons who were not catholics, but protestants, signed a notice to the clerk, he himself being one of them, that as subscribers to the Roman Catholic separate school they claimed to be exempted from all rates for common schools for the year 1861; and the clerk, thereupon in making up the collector's roll, omited this rate opposite to their names.

Held, that the clerk who had been notified before making up the roll that it would be illegal to exempt these persons, had done wrong, and might be punished under C. S. U. C., ch. 55. secs. 171, 173, but that the court could not in the following year interfere by mandamus to compel him to correct the roll.

[Trinity Term, 1862.]

In Hilary Term last *Robert A. Harrison* obtained a rule calling upon the clerk to shew cause why a writ of mandamus should not issue, commanding him either in the collector's roll of the town to set opposite the lots or parcels of land as therein described of Thomas F. Park and eleven others named, the amount for which each of them was chargeable for school rates during the year 1861 erroneously omitted therefrom, or to certify the error to the collector of the municipallity, or to the treasurer of the county, upon the ground that the persons were liable to taxation for common school purposes in the town.

This rule was obtained on affidavits, stating the following circumstances to be true in fact: that the appellant was a ratepayer of the town, as were also the twelve persons mentioned: that the common schools were managed under a board of school trusetes, and that they were also a separate school, a Roman Catholic school, managed by a separate board of Trustees: and the corporation of the town, at the request of the board of school trustees, passed a by-law to raise for common school purposes the sum of £450 for the year 1861, which sum was intended to be expended in the building of a new school house. The supporters of the Roman Catholic school had, on the 1st of February, 1861, given by the hands of one of the trustees thereof a notice to the clerk of the municipallity, in the following words:

"We, the undersigned, subscribers of the Roman Catholic separate school, town of Amherstburgh, claim to be exempted from all rates relating to common schools and common school libraries for the year 1861."

This notice was signed by all those who had formerly supported the separate school, and in addition thereto, for the year 1861, by the twelve persons mentioned. The clerk of the municipality was one of the twelve persons. It was said that none of these twelve persons were catholics, but, on the contrary, were protestants, and that the object in their subscribing the notice was to claim exemption from paying, and to avoid being assessed for any part of the money with which to build the school house.

The persons named it was said owned a great deal of property in the town, and were on the assessment roll assessed for the ordinary town taxes in other respects, but that the town clerk, Thomas H Brush, in making up the roll for the collector, had omitted to carry out opposite to their names any rate whatever in respect of the sum so directed by the by-law, upon the ground that those persons were to be considered as exempted from the rate by reason of their being supporters of the separate school.

It was sworn that in the early part of the year, and before the roll was made up, it was intended to exempt these persons from payment of the rate, and Brush, as the town clerk, was notified that it would be illegal to exempt these persons, for they were not Roman Catholics The roll however, was delivered to the collector having no rate in respect of common schools to be paid by these persons set opposite their names or property. On the 3rd of February, 1862, a written notice was served upon Brush, requesting him to set opposite to the names of the persons mentioned in the roll the amount for which each person was chargeable for school rate for the year 1861, or to certify the same to the clerk of the municipality, or to certify the same to the county treasurer.

During last term *Prince* shewed cause, and filed affidavits in reply. In none of the affidavids was it denied that any of the persons mentioned were not Roman Catholics. Two of these persons said they had been supporters of the separate school before the year 1861, and had sent children to the separate school. The clerk stated that he had sent his children to the separate school before 1861, but he had never claimed exemption till 1861.

The collector's roll was delivered to the collector on the 21st of November, 1861, and he refused to allow any alterations while in his hands.

Consol. Stats. U. C., ch. 55, secs. 89, 101; ch. 64, sec. 27, sub-sec. 12; ch. 65, sec. 18 *et sequ.*, secs. 29, 31 were referred to in the argument.

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

This case is a most curious one in many respects, and exhibits the ingenuity of the human mind to devise ways and means for evading payment of what the legislature thought was perfectly plainly expressed. We mean in cases where people think their pockets are touched upon by those having such power as school trustees and others in a similar position,

We take it to be perfectly plain, from reading the Common School Act, chapter 64 of the Consol. Stats. of U. C., chapter 65, providing for separate schools, and chapter 55, the Assessment Act, that the legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separists as availed themselves of the provisions in their favour.

The persons mentioned as having signed the notice before stated have not in that notice, which Mr. Brush seems to have very strangely acted upon, told us that they were or are Roman Catholics. All they have said is that they claim to be exempted from all rates relating to common schools, because they are subscribers to the Roman Catholic school That is not the class of persons the legislature was providing for The provision was and is for those who not only supported the separate school, but for such persons as were in a position to claim the exemption from paying to the common schools by reason of their being Roman Catholics. The two things must combine, and in the present case it would be impossible to bring into operation the provisions of the 31st section of the act, chapter 65, with regard to the penalty for making a false statement in the notice, for though it may be quite true the persons are supporters of the separate school, a thing perfectly legal if they choose to do so, yet they have not said they are supporters because they are Roman Catholics

The 29th section of the Act has not been complied with by those who were claiming the exemption from paying the school rate.

But suppose the notice given might be considered as sufficient to exempt the persons signing it from payment, we must see how Mr. Brush has acted upon it. He seems to have thought that he, as the clerk of municipality, had a right to omit on the collector's roll carrying out the rate to his own name and the others who signed that notice. This is a clear violation of his duty as prescribed by the 89th and 90th sections of the Assessment Act, chapter 55 of the Consol. Stats. U. C. When the town council passed the by-law authorising the levying of such sum as the school trustees required, it was the duty of the clerk to calculate the rate that each person should pay according to the assessed value of his property, and set the sum down in the collector's roll. Whether the individuals named in the collector's roll would be exempt from payment of any sum or rate mentioned in the roll depended upon something else, which the clerk in the discharge of his duty, as far as making out the roll according to law, had nothing to do with.

The 29th section of chapter 64 does not exempt those who are Roman Catholics supporting a separate school from having taxes imposed upon them; it only exempts them from the payment of all rates imposed for the year for the support of the common schools, provided they give the notice mentioned in the section. To enable those who are thus by law exempt from payment of the rate imposed the 30th section provides for the clerk of the municipality giving a certificate to the person giving such notice of the effect of it, and the date of such notice, so that when the collector called for the rate the person holding the certificate could shew that he was not liable to pay, but was exempt from paying the rate. When the legislature intended the names of any persons supporting separate schools should be omitted from the collector's roll, they have said so, as in the provisions for separate schools for protestants and coloured persons.—See sections 11, 13, and 14 of chapter 65.

It appears that the roll was delivered to the collector on the 21st of November, 1861, and the collector states that he collected a great portion of the rates before the 14th of December, and that the council extended the time for making his return to the 14th of March, 1862, and by that time he had collected all the rate except from some indigent persons. Whether the roll yet remains in the collectors hands does not appear. Mr. Brush's duty as clerk of the municipality ended when he completed the roll and placed it in the hands of the collector for the collection of the rates. We can no where find that it is laid down, either in the Assessment Act, or the Municipal Act, that it is the duty of the clerk to certify either to the collector or to the treasurer any errors which may have been made. There are provisions with respect to errors and mistakes made, and that the lands stated shall not be exempt from the taxes by reason of the error and mistake, but we can no where find it stated to be a duty upon the clerk of any municipality to certify to any other person or authority when such error or mistakes exists or has been made.

We can see very plainly that in this case Mr. Brush has not discharged his duty as he should have done, but then we cannot see our way clearly to rectify that now, under the circumstances of this case, by the writ of mandamus as sought for. The effect of granting the writ would be to invest the collector, if he still remain in office, with an additional duty and liability, in the event of the roll being now made right, as it should have been when first delivered to him, and in case of the collector being out of office, or the roll returned, to create some confusion in the treasurer's accounts or mode of dealing with the matters provided for in the statute.

The 171st and 173rd sections of the Assessment Act provide for punishing the clerk of a municipality who refuses to do his duty, or who commits malversation in the discharge of it, by indictment. The insinuation thrown out in this case against Mr. Brush are of the latter description. So far as the complaint affects him personally the remedy provided for by statute should be pursued. Adopting such a course or omitting to do so would not in either case prevent the remedy by mandamus in order to correct the error in the discharge of the duty of the clerk, if the duty be plain and clear. There is no difficulty in pronouncing that the clerk in this instance did not discharge his duty according to law, but the difficulty consists in saying that we can by mandamus at this stage of the proceedings order him to do any thing which will have the effect of remedying the defective execution of his duty.

After giving the matter much thought and consideration, we have arrived at the conclusion that we must discharge the rule for the mandamus.

Rule discharged, without costs.

ECCLES ET AL., EXECUTORS OF HUGH ECCLES, v. PATERSON AND HOLE.

Ejectment—Proof of Title.

In ejectment against two defendants the plaintiffs proved a mortgage in fee made by one while he was in possession as owner, and duly assigned to them, and that the other defendant came in after, without shewing how.
Held, sufficient, *primâ facie*, to entitle the plaintiffs to a verdict against both.
(T. T., 26 V., 1862.)

EJECTMENT.—The plaintiffs proved a mortgage in fee from defendant Paterson, duly assigned to their testator.

At the trial, at Toronto, before Morrison, J., one James Paterson, the son of the defendant, swore that he knew the lot; that his father (the defendant) was in possession as owner when the mortgage was made. The defendant Hole, he said, went into possession after, he did not know how; his father was not in possession at the time of the trial.

It was objected that there was no evidence to entitle the plaintiffs to recover possession. This the learned judge overruled, holding that a *primâ facie* case had been made out, and there was a verdict for the plaintiffs.

Robert A. Harrison moved for a new trial as regarded Hole, for misdirection, citing *Doe Wilkes* v. *Babcock*, (1 U. C. C. P. 392,) and *Doe Crew* v. *Clarke*, Rob. & Har. Dig. "Title" 14.

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

The latter case is not, we think, applicable. There may be some expressions in the former case that give colour to the application, but on the plaintiffs' own evidence there the title was clearly shewn to be in the Crown, and defendant could not be assumed to be a wrong-doer. In fact the plaintiff shewed that he himself had not title as against defendant.

We have always understood it to be the rule, and a most wise and salutary rule it is, to hold such evidence as was given in this case to be sufficient *primâ facie*, and that in the absence of any contradictory proof from defendant, to direct a jury in favour of the plaintiff.

A man in full possession, claiming to be owner, makes a deed in fee to one through whom the plaintiffs claim. After this time another gets into possession in some unexplained manner, and to a process in ejectment the mortgagor and this person appear and defend.

We think the latter may be described in the words of Bramwell, B., in *Davison* v. *Gent* (1 H. & N. 748):—"The defendant" (there were two) "is in this dilemma: either his entry was altogether tortious, or he came in under the tenant, and is therefore estopped from denying the plaintiff's title."

We also refer to *Doe Hughes* v. *Dycball* (M. & M. 346); *Hogg* v. *Norris* (2 Fos. & Finl. 246); *Bikker* v. *Beeston* (1 Fos. & Finl. 685); *Homes* v. *Pearce* (Ib. 283).

As Sir W. Erle remarks in one of these cases, if defendant Hole had any title he could easily have offered proof of it. We think there should be no rule.

Rule refused.

COMMON PLEAS.

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

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN IN A CAUSE OF MEDCALFE v. WIDDIFIELD.

County Court—Jurisdiction of—Penalty—Con. Stat., Can. ch. 6, sec. 81.

Held, that the County Courts has jurisdiction in an action for the penalty imposed by the 81st section of Con. Stat. of Can., ch. 6, for selling spirituous or fermented liquors on polling days.
[T. T., 26 Vic.]

D. B. Read, Q. C., obtained a rule *nisi* for a writ of prohibition to the County Court of the County of Elgin, and to the judge thereof, prohibiting any further proceedings being taken in the said cause either to enter judgment or to issue execution, or any other proceeding in the cause, on the ground that on the face of the proceedings it appears and is shewn by the affidavits and papers filed that the said County Court had no jurisdiction over the said cause, or the cause of action on which a verdict has been recovered therein, or to entertain the same, and to shew cause why the plaintiff should not pay the costs of this application.

The writ issued from the County Court on the 8th of August, 1861, and the declaration was filed on the 22nd day of the same month. It claimed two penalties of $100 each from defendant, in separate counts, for neglecting to close and keep closed his tavern, by Consol. Stat. of Canada, ch. 6, and for selling spirituous and fermented liquors to divers persons in his tavern contrary to the provisions of that act.

The pleas were, 1st, *nil debet*. 2nd, that at the time when, &c., the liquor sold or given was by way of refreshment to travellers lodging at defendant's tavern, but not otherwise 3rd, to so much of the declaration as alleges the not closing and keeping closed the tavern, that there was not at the time of passing the said act, or before the passing thereof, any law requiring taverns or hotels to be closed on Sunday during divine service.

Issue was taken on the 1st and 2nd pleas, and there was a demurrer to the second and third pleas, and defendant gave notice of exceptions to the declaration.

It was sworn that the issue was tried on the 11th of March, 1862, and a verdict rendered for the plaintiff for $100 on the second count. That plaintiff had served a copy of his bill of osts on defendant's attorney with notice of taxation. That judgment had not been entered.

Crombie shewed caused. He referred to the Consol. Stats. Canada, ch. 6, sec. 81, and the Interpretation Act., ch. 5, sec. 6, sub-sec. 17, and cited *O'Reily qui tam* v. *Allan*, 11 U. C. Q. B. 526; *Apothecaries' Company* v. *Burt*, 5 Exch. 363; *In re Birck*, 15 C. B. 743; *Ricardo* v. *Board of Health*, 2 H. & N. 257; *In re Chivers* v. *Savage*, 5 E. & B. 697.

Read, Q. C., contra, cited *Roberts* v. *Humby*, 3 M. & W. 120; *In re Hunt* v. *North Staffordshire R. W. Co.*, 2 H. & N. 451; *Marsden* v. *Wardle*, 3 E. & B. 695; *Jones* v. *Owen*, 5 D. & L. 669; *Darby* v. *Cosens*, 1 T. R. 552; *Leman* v. *Goulty*, 3 T. R 4.

DRAPER, C. J.—The action in the County Court is founded on the 81st section of the Consol. Stat. Canada, ch. 6—"Every hotel, tavern and shop, in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service, and no spirituous or fermented liquors or drinks shall be sold or given during the said period under a penalty of $100 against the keeper thereof, if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors or drinks as aforesaid." And in sec. 87 of the same act, "All penalties imposed by this act shall be recoverable with full costs of suit by any person who will sue for the same by action of debt, or information in any of her Majesty's courts in this province, having *competent jurisdiction*, and in default of payment within the period to be fixed by such court, such offender shall be imprisoned in the common gaol of the place until he has paid the amount which he has been so condemned to pay and the costs."

The case of *In re Apothecaries' Co.* v. *Burt*, 5 Exch. 363, is, as regards the language of the statute, nearer the present case than *O'Reily qui tam* v. *Allan*, though it may be difficult to draw any solid distinction between the language of our act 4 & 5 Vic., ch. 12, and the English act 55 Geo. III., ch. 194, sec. 26. The court refused a writ of prohibition in that case, which was applied for because it was contended that the action was brought in such a form as to assert a claim for four penalties of £20 each, whereas the County Court, under the English act, 9 & 10 Vic., ch. 95, only had jurisdiction in "all pleas of personal actions where the debt or damage claimed is not more than £20, whether on balance of account or otherwise." Neither at the bar nor by the court does it appear to have been doubted that the County Court had jurisdiction, provided the debt claimed was not more than £20.

I think that if the case in the Exchequer conflicts with *O'Reily qui tam* v. *Allan*, we should rather be guided by the former. In the statute under our consideration the jurisdiction is given to any court of competent jurisdiction. And looking at the Consolidated

Stat. Can., ch. 5, sec. 6, sub-sec. 17, jurisdiction over suits for pecuniary penalties is given (when no other mode is prescribed) to "any court having jurisdiction to the amount of the penalty in cases of simple contract." We may, I think, call in aid the language of the Interpretation Act, and construe the act under consideration as conferring jurisdiction on any court, whether of record or no, which has jurisdiction to the extent of the penalty imposed. We are not obliged to dissent from *O'Reily qui tam* v. *Allan*, because of the different words of the two acts.

I think, therefore, this rule should be discharged.

Per Cur.—Rule discharged.

MORRIS v. CAMERON.

Warranty—Breach of—Damage—Jurisdiction of Division Court.

Held, that an action arising on breach of a warranty of a horse when the damages recovered were over £40 and under £100, was within the jurisdiction of the Division Court, and that costs according to the tariff of that court only were taxable thereto.

[T. T., 26 Vic.]

Declaration stated that in an action of the County Court of York and Peel, in which plaintiff was plaintiff and one J. B. defendant, plaintiff recovered a verdict for £12 10s., and was about to enter final judgment; and that in consideration that plaintiff would forbear to enter final judgment, defendant by an agreement in writing promised plaintiff to pay him the amount of the verdict and his full costs according to the tariff of the County Court. That such full costs amounted to £20.

Breach, non-payment.

Averment, that the action was not of the proper competency of the Division Court.

Plea as to £20, being the cost of the said action, that in that action the plaintiff declared as and for a breach of contract against J. B., as follows: "For that the defendant by warranting a horse to be eight years old, sound, free from vice, quiet to ride or drive in single or double harness, sold the said horse to plaintiff; yet the said horse was not then sound, free from vice, and quiet to ride or drive in single or double harness." That the defendant J. B. traversed the warranty and breach in that declaration. That the plaintiff's proof of the warranty was the following memorandum in writing: "Received of James Henry Morris the sum of £30 for a bay mare, warranted eight years old, sound, free from vice, and quiet to ride or drive in single or double harness." That because the mare did not answer the description, the plaintiff re-sold her for £17 10s., and recovered the verdict of £12 10s. as the difference between the £17 10s. and the £30 paid to J. B. That the plaintiff claimed by special endorsement on his writ in that action £23, and for the cause hereinbefore appearing the action was of the proper competency of the Division Court.

Demurrer, because the action appears on the face of it to have been of the proper competence of the County Court.

Eccles, Q.C., supported the demurrer.

M. C. Cameron contra.

DRAPER, C. J.—I think the 54th section of the Division Court Act has nothing to do with this case, for that points out the cases where the Division Courts have no jurisdiction at all. Here the jurisdiction as to the mere cause of the action is undeniable, provided the amount is not too large, and therefore the question arises, whether it comes within the first or second sub-sections of section 55. If the former, as a personal action where the debt or damages do not exceed $40, then the action is properly brought in the County Court. If the latter, as a claim and demand of debt, account or breach of contract, or covenant or money demand, where the amount or balance claimed does not exceed $100, then defendant is entitled to judgment.

But for the word "debt" in the first sub-section it might be argued that the words personal actions there used meant that class of action to which the old maxim *actio personalis moritur*, &c., applied. It is not easy to point out a personal action of debt to which the second sub-section would not apply.

The English County Court Act enacts that "All pleas of personal actions where the debt or damage is not more than £20 (afterwards extended to £50), whether on the balance of account or otherwise, may be holden in the County Court," and then follow certain exceptions. I take it there is no doubt an action for breach of warranty within the limited amount would lie in the County Court in England. The case of *Aris* v. *Orchard*, 30 L. J. Exch. 21; 3 L. T. N. S. 413, seems conclusive on this point.

In my opinion as to this point, the defendant is entitled to judgment.

Per cur.—Judgment for defendant.

GILLESPIE ET AL. v. CITY OF HAMILTON.

Assessments—Arrears of—Addition of 10 per cent. thereon—Computation of.

Held, that the 10 per cent. charged upon arrears of taxes due upon land is to be added to the whole amount due upon the lot, and not upon the amount of each year's taxes separately, thereby making it a compound computation of 10 per cent. each year.

[T. T., 26 Vic.]

This was an action brought by the plaintiffs against the defendants for the recovery of the sum of $10 25, money paid by the plaintiffs to the defendants under the circumstances set out below, and by consent of the parties, and by an order of Hagarty, J., dated the 28th of August, 1862, according to the Common Law Procedure Act, the following case was stated for the opinion of the court, without any pleadings:

SPECIAL CASE.

The plaintiffs were the owners of lots Nos. 12, 13 & 14, fronting on James street, and lots Nos. 12, 13 & 14, fronting on Hughson street, in block No 23, in St. Andrew's ward, in the city of Hamilton, the same being vacant lands.

On the 1st May, 1862, the chamberlain of the said city entered in his books against the said lands the arrears of taxes chargeable thereon at that date, at the sum of $855 25, made up as follows:

Taxes on lots 12, 13 & 14, James street, and 12, 13 & 14, Hughson street, 1859	$250 00	
1st May, 1860, addition 10 per cent	25 00	
		275 00
Arrears at 1st May, 1860	275 00	
Taxes of 1860	250 00	
	525 00	
1st May, 1861, addition 10 per cent	52 50	
		577 50
Arrears at 1st May, 1861	577 50	
Taxes of 1861	200 00	
	$777 50	
1st May, 1862, addition 10 per cent	77 75	
		855 25
Arrears at 1st May, 1862	$855 25	

The plaintiffs contended that the taxes chargeable against the said lands should have been computed as follows:

Taxes for 1859	$250 00	
1st May, 1860, addition 10 per cent	25 00	
		275 00
Arrears at 1st May, 1860	275 00	
Taxes for 1860	250 00	
10 per cent. on $500	50 00	
		575 00
Arrears at 1st May, 1861	575 00	
Taxes for 1861	200 00	
10 per cent. on $700	70 00	
		845 00
	$845 00	

The question for the opinion of the court was, whether the chamberlain was authorized in adding 10 per cent. to the several amounts in arrear on the 1st of May in each year, including the previous additions of 10 per cent., or simply on the actual amount of taxes then in arrear.

Freeman, Q. C., for plaintiffs, *Burton* for the defendants, reference was made to Consol. Stat. U. C. cap. 55, secs. 115, 121.

DRAPER, C. J.—By sec 168 of the Assessment Act, arrears of taxes due to cities on the lands of non-residents shall be funded, collected and managed in the same way as like arrears due to other municipalities, and the chamberlain and high bailiff shall for those purposes perform in the case of cities the like duties as are

hereinbefore in the case of other municipalities imposed on the treasurer and the sheriff.

Sec. 115 requires the treasurer of every county to keep books, in which he shall enter all the lands on which it appears from the clerk's return and the collector's rolls there are any taxes unpaid, and the amounts so due; and on the 1st of March in each year, he shall complete and balance his books by entering against every parcel of land *the arrears* (if any) *at the last settlement*, and *the taxes* of the preceding year which remain unpaid, and he shall ascertain and enter therein the total amount *of arrears* (if any) chargeable upon the lands at that date.

Sec. 121.—If at the balance to be made on the 1st of May in every year, it appears that there is any *arrear of tax* due upon any parcel of lane, the treasurer shall add to the *whole amount then due* 10 per cent. thereon.

It is upon these sections that the question is raised for our decsion upon facts which may be condensed into the statement following:

City taxes were due on lands in Hamilton, on the 1st of May, 1860, for the year 1859. The chamberlain charged the taxes against these lands, and added 10 per cent. to the charge. The sum of these two items formed the amount due on the 1st of May, 1860.

On the 1st May, 1861, the chamberlain again completed and balanced his books as regarded these lands by charging, 1st. the amount appearing due thereon, by the preceding account; 2nd, the taxes due for the year 1860; 3rd, 10 per cent. on these two amounts as forming the whole amount then due. The sum of these three items formed the amount due on the 1st May, 1861.

On the 1st May, 1862, the chamberlain charged the lands with the amount so due, adding the taxes for 1861, together with 10 per cent. on the sum of these two items.

The question is, if the 10 per cent. should be charged on the gross amount of arrears appearing due at each annual settlement, or only on the amount of taxes due for the several years: in other words, whether the amount on which the 10 per cent. is to be calculated on the 1st of May, 1862, is to include the preceding addition of 10 per cent. made on the 1st of May, 1860 and 1861, respectively.

I think the Legislature have used language very clearly indicated an intention that 10 per cent. should be added every year, calculated on the whole amount which is in arrear and due upon the lands at the time the charge is made. In the present case the lands were liable to satisfy a given sum on the 1st May, 1862, which sum included taxes for preceding years, and 10 per cent. added thereto at the preceding 1st of May. To that sum which constituted the whole amount due on the lands, the statute, as I read it, directs that 10 per cent should be added.

I am therefore of opinion judgment of *nolle prosequi* should be entered, according to the agreement of the parties.

Per cur.—Rule accordingly.

GRIFFIN v. JUDSON.

Promissory note—Dated and payable in Ogdensburg—Protest by a foreign notary—How far protest evidence—Interest—Currency of dollars and cents—Proof of value.

In an action on a promissory note, dated and made payable at Ogdensburg, in the State of New York;

Held, that the production of a protest of a notary of that State was no evidence of the facts therein stated, our statute, under which a protest is made *primâ facie* evidence of those facts, only applying to protests made by notaries of Upper and Lower Canada.

2nd That it was not necessary, in such an action, to prove the value of dollars and cents in the States, we having a corresponding currency, and no par value for the American currency being fixed by law.

3rd. That interest at the rate allowed by our law was chargeable upon such a note.

[T. T., 26 Vic.]

The defendant was sued as endorser of a note, dated at Ogdensburg, in the State of New York, and made payable at a bank there. The declaration contained the usual averments of presentment, dishonor, and notice to defendant. The defendant denied presentment and notice by his pleas.

To prove these two facts, the plaintiff, at the trial, put in the note and an instrument under the hand and seal of a notary, as follows:

"*Advance Office*, Ogdensburg, N.Y.

"United States of America, } S. S.
"State of New York. }

"On the twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-one, at the request of the Judson Bank, I, John D. Judson, notary public, duly admitted and sworn, dwelling in the village of Ogdensburg, county of St. Lawrence, and State of New York, did present the original note for $207 22 and interest, hereunto annexed, to the teller of the said bank, and of him did then and there demand payment thereof, which was refused.

"Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the maker and endorser of the said note, as against all others it doth or may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, and to be hereafter incurred, by reason of the non-payment of the said note.

"And I further certify and declare, that on the same day and year above mentioned, I served notice of the foregoing presentment, demand, refusal and non-payment of said note upon the endorsers, whose names are written below, by depositing said notices, partly written and partly printed, in the post-office in the village of Ogdensburg, and pre-paid the postage thereon, which notices were directed to the said endorsers, parties to the said note, at the places written opposite to their respective names.

"To P. S. Glassford, Ottawa City, C.W.
"To Edward Griffin, Ottawa City, C.W.

"In witness whereof, I have hereunto subscribed my name and affixed my seal of office, the day and date above mentioned.

(Signed) "J. D. JUDSON,
[L.S.] "*Notary Public.*"

The note itself was drawn for the amount of $207 22, with interest.

For the defence it was objected, 1st, that the document purporting to be a foreign protest, was not legal evidence of the notice of dishonor; 2nd, that the plaintiff should have proved the value of dollars and cents, which, in a note dated in the United States, must be taken to be a foreign currency; 3rd, that interest was not recoverable for want of proof of the rate of interest in the foreign country.

A rule nisi having been obtained in the court below was afterwards discharged.

C. S. Patterson, for the appellant, cited Con. Stat. U.C. cap. 42; Story's Conflict of Law, s. 272, A.; *Bonar* v. *Mitchell*, 5 Ex. 415. *R. A. Harrison*, contra, referred to *Ewing* v. *Cameron*, 6 O. S. 541; 7 Vic. cap. 4, sec. 2; 13 & 14 Vic. cap. 23, sec. 6; *Smith* v. *Hall*, 5 U. C. Q. B. 315; *Codd* v. *Lewis*, 8 U. C. Q. B. 242; Con. Stat. U. C. cap. 42, sec. 21.

DRAPER, C. J.—I felt some doubt on the first point, as to whether the Con. Stats. of Canada, cap. 57, sec. 6, was not confined to protests of notaries public in Upper and Lower Canada. On further consideration, I do not think the general language should have the same full effect given to it—"*All protests* of bills of exchange and promissory notes shall be received in all courts as *primâ facie* evidence of the allegations and facts therein contained"—as if it stood alone.

The 7th section enacts, that "any note, memorandum, or certificate, at any time made by one or more notaries public, either in Upper or in Lower Canada, in his own handwriting, or signed by him at the foot of or *embodied in any* protest, or in a regular register of official acts kept by him, shall be presumptive evidence in Upper Canada of the fact of any notice of non-acceptance or non-payment of any promissory note or bill of exchange having been sent or delivered at the time and in the manner stated in such notice, certificate or memorandum."

This immediately follows, and, as I think, qualifies and explains sec. 6. If that section were, by its own force, to make every protest evidence of every fact set out in it, then so much at least of section 7 as makes a note, memorandum or certificate, "embodied in any protest," evidence of the notice of non-acceptance or non-payment having been sent or delivered, as stated in such note, &c., would be superfluous

Unquestionably, but for our law, the statement by the notary, protesting a bill or note, that he had sent notice by post to the endorser or drawer, would not be proof of that fact. And if we had no such law, then I should think that section 6 would mean no more than that *all protests* shall be received as *primâ facie* evidence of these facts, which belong to the act of protesting.

A protest made abroad, of non-acceptance or non-payment of a foreign bill, proves itself, but the dishonour of an inland bill was not proved by such a protest. (Chitty on Bills, 224, 10th ed.)

I think the term "protest," in the sixth section, therefore, should be construed according to its ordinary meaning and acceptation among mercantile men; and that to make it evidence of notice of dishonor having been sent to drawer or endorser, it must be made by a notary public in Upper or Lower Canada, in his own writing, and signed by him, that is, it must be in conformity with the 7th section.

Now, on the face of this protest, it appears to have been made in the State of New York, and by a notary resident there, and therefore it is not *primâ facie* such a protect or instrument as the 7th section requires and makes presumptive evidence of notice.

On this ground, therefore, I am of opinion a new trial should be granted.

As to the second objection, I do not dissent from the conclusion of the learned judge of the county court.

On the third point, as at present advised, I think the plaintiff might have recovered interest at the rate allowed by our law.

Per cur.—Judgment accordingly.

In re Bright v. The City of Toronto.

Corporation—By-law—Tavern licenses—Committee—Bar-room closing of.

Held, that the appointment of a committee of the corporation for the purpose o granting or refusing tavern licenses is authorized by sub-sec. 1 of sec 246 of the Municipal Corporation Act

2ndly. That it is within the power and scope of the Corporation to compel, by by-law, the closing of bar-rooms within certain hours of the night, and a by-law compelling their being closed between 12 p.m. and 5 a.m. was not deemed to be beyond their power.

3rd. That it was not an excess of authority to compel the removal from over the door of such houses, not licensed to sell liquor, of a signboard or other notice of such license being granted them.

4th. A clause in a by-law which cancelled the license of a person convicted of a penalty for the infringement of a by-law, *held* to be beyond the authority of the corporation, and a clause rendering such infringement a cancellation was quashed with costs.

[T. T., 26 Vic.]

Hallinan obtained a rule *nisi* to quash sections numbered five, eleven, seventeen, nineteen and twenty of by-law No. 310, respecting the licensing and regulating hotels, taverns, and other places of public entertainment and places where spirituous liquors are sold, passed the 20th of February, 1860, on the ground of illegality in this, that the corporation therein try to exceed the powers given by law to them to pass by-laws for the purposes mentioned in the by-law, that they have no power to pass such sections or to delegate their powers to a committee.

The sections objected to were as follows:

Section 5. "The committee on licenses shall examine all applications for license or transfers of license, which the inspector may lay before them, and in their discretion grant or refuse the same, and if granted, approve of the names of sureties tendered by the applicant for such license or transfer, and the chairman, with two members of the committee, shall countersign the license or transfer to be issued.

Section 11. "The bar-room of every hotel or tavern, and of every other place licensed under this by-law, shall be closed on every Monday, Tuesday, Wednesday, Thursday and Friday night at twelve o'clock, and shall remain closed until five o'clock on the morning following each of the said days respectively; and every such place shall be closed on every Saturday night at eleven o'clock, and remain closed until five o'clock on the Monday morning thereafter.

"And whereas by statute 22 Vic. cap. 6, it is enacted," &c., (setting out the first section, which prohibited the sale of intoxicating liquors from seven on Saturday night until eight on Monday morning, but omitting the following words, "and during any further time on the said days, and any hours on other days, during which by any by-law of the municipality wherein such place or places may be situated, the same or the bar-room or bar-rooms thereof ought to be kept closed.") This section, commencing by words importing a recital, "and whereas," &c., contains nothing but a portion of the first section of the statute.

Section 17. "No person who has not a tavern license shall exhibit, or suffer or permit to be exhibited or continued over his or her door or otherwise, 'licensed to sell wines, beer, or other spirituous or fermented liquors,' or the words bar-room or tavern, or inn or saloon, or any other words or sign or signs, or sign-boards, indicating that the person keeps or that the person is authorized to keep such bar-room, tavern, inn or saloon, or any house or place of public entertainment.

Section 49. "In case any person who has taken out a license under this by-law is convicted of a breach of any of the provisions of the same, or of this by-law, such person, upon such conviction, in addition to the penalty imposed for the infraction thereof shall, in the discretion of the convicting magistrates, there being not less than three convicting magistrates concurring in such forfeiture, forfeit his or her license for the remainder of the current year; and the general inspector of licenses is required to notify the party in writing thereof.

Section 20. "Every person who has not a tavern license, who shall, after the passing of the by-law, exhibit any word or words, or sign or sign-boards, contrary to the seventeenth section of this by-law, shall be liable to a penalty of not more than fifty dollars, exclusive of costs, upon every conviction for any such offence."

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

Draper, C. J.—I think the 5th section is within the power given by the Municipal Corporation Act, sec. 246, sub-sec. 1, which enables the councils to pass by-laws for granting tavern licenses. I think the word "granting" does not impose the necessity of the council sitting with a majority of the whole number present, to consider or determine on granting or refusing a license to each applicant, and to pass a by-law or by-laws granting licenses to those whose application is acceded to. I think the mode of dealing with the applications, consid ring and granting, and refusing applications and issuing licenses, is intended by the language used. When the license is granted it is under such by-law the act of the corporation.

I also think the 11th section is good. It does not contravene the statute which it recites, but it adds to it provisions which may lawfully be done, as to the times and hours when the *houses* and bar-rooms must be kept closed. Its provisions may be administered in compliance with those of the statute.

I have had more difficulty as to the 17th section. No part of the Municipal Corporation Act was pointed out to us, which in direct terms or even by obvious inference, confers authority to make such a law. The nearest approach to it is in the 5th sub-sec. of sec. 282. The "suppressing of tippling houses" may, to some extent, be aided by this regulation. And I am the more disposed to uphold it, because no one can or ought to complain of injury arising from being prevented from exhibiting publicly a false notification, the principal object of which may well be deemed to be to induce persons in the streets to enter, and so to facilitate some illicit or immoral proceeding within.

The 20th section depends on the 17th, the one creating the offence, the other imposing the penalty. If the first can be supported, as I think it may, the latter is sanctioned by sub-sec. 6 of sec. 213, of the Municipal Corporation Act.

I think the 19th section must be quashed. I fail to distinguish this case from that of *Smith* v. *The City of Toronto*, 10 U. C. C. P. 225. The 5th section of this by-law is of the same character as the 254th section of the Municipal Corporation Act. The very next section of the statute imposes a penalty of not less than $20 with costs for a first offence against its provisions; for a second offence not less than $40 with costs; for a third, not less than $100 with costs; for a fourth, not less than three months' imprisonment with hard labour, but in no case forfeits the license for such offence, however frequently repeated. The 261th section of the statute authorizes a forfeiture of the license on a conviction of having a riotous or disorderly house, but it gives the power to the mayor, or police magistrate of a town or city, with one justice having jurisdiction therein, or to the reeve of a township or village, with one justice having jurisdiction therein. The Legisla-

ture have not seen fit to declare that the council of the corporation may grant the license, the principal part of the sum paid for which goes into their own treasury, and also impose forfeiture thereof as a penalty, for breaking any regulation to which they may subject the holders of such licenses; and I do not infer from anything the Legislature have declared, that such was their intention.

I am of opinion that so much of this rule as relates to quashing the 19th section of this by-law should be made absolute, and that the residue of the rule should be discharged, and that the costs be taxed to the applicant only as to the part of the rule on which he has succeeded. I should probably have thought this a fit case to withhold costs, as the applicant has asked for much on which he has failed; but this by-law was passed after the rule *nisi* in *Smith* v. *The City of Toronto* was granted, and the corporation did not oppose the rule. They must be taken to have had notice of the judgment on it, and yet they have permitted this 19th section to remain unrepealed.

Per cur.—Judgment accordingly.

CHANCERY.

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

McLENNAN v. HEWARD.

Administrator de bonis non—His right to call the estate of a predecessor to account—Rests—Agent—Commission.

The principle upon which an administrator should be charged with interest on funds belonging to the estate considered and acted on.

An administrator *de bonis non* having obtained a decree against the representatives of a deceased administrator for an account of his dealings with the estate. *Held* that he was entitled to charge the representatives with interest, &c., in the same manner, and to the same extent, as one of the next of kin might have done.

Where an administrator who had acted as agent for the intestate during his life-time, had, with the assent of the deceased, used moneys belonging to him, without any attempt at concealment as to his so using them, the court refused to take the account against the administrator with rests, and the master having allowed the estate of the administrator a commission of 5 per cent. on moneys passing through the hands of the administrator in his life-time, the court refused, on appeal, to disturb such allowance.

This was an administration suit, in which the usual reference had been directed at the hearing. The master having made his report thereunder, both parties appealed on the grounds stated in the judgment.

McLennan in person. *A. Crooks* contra.

VANKOUGHNET, C.—This is an appeal by both parties from the Master's report, by which it is found that on taking an account of the estate of the late Alexander Wood, deceased, there is a balance due by the personal representatives of the late administrator of the deceased amounting to £4083 10s. 7d. for principal and interest. The plaintiff sues as administrator, *de bonis non*, being the second in succession in that character. The following exceptions are taken to the Master's report by the defendant.

1st. That an administrator, *de bonis non*, cannot charge his predecessor in that office with breach of trust or dereliction of duty, or claim from his estate interest upon moneys retained by him, although such interest might be properly charged at the suit or instance of the next of kin of the intestate.

2nd. That at all events, in order to make such charge, a proper case should have been set out in the bill.

3rd. That the Master should not have charged interest at all, either upon the moneys of the intestate in his life time loaned to or received by the administrator for him, as there was no agreement or understanding between them that interest should be paid, and that no account of his dealings as agent, but only as administrator, is sought in this suit; or upon the moneys held by the administrator as such after the death of the intestate, or held by him between that time and the time of his appointment as such administrator, because there was not, during those periods, any person to whom the administrator could safely pay over the moneys, the right to them being in litigation in Scotland between rival claimants, and there being nothing to shew that the administrator was not at any moment ready to account and pay over the money. That he could not invest, as the period when he might be called on to pay was uncertain, depending upon the issue of the litigation; and that it does not appear that any of the parties interested ever called upon him to invest the moneys.

4th. That the defendants are not liable for interest, since the death of the administrator, without proof of sufficient assets to meet the claim.

5th. That the Master's mode of computing interest was erroneous in deducting the payments from the receipts in each year and calculating interest on the balance from the end of the year, and that he should have calculated interest upon the receipts and payments respectively and severally from their dates.

6th. That no case is made by the pleadings or otherwise for taking the account with rests, or charging at the most more than simple interest.

7th. That a reasonable commission should be allowed to the administrator's estate, and the Master has found that five per cent. on the gross receipts would, in his opinion, be a fair allowance therefor.

The cross appeal claims that the account should have been taken with rests, and that the master should not have made any report about allowance as commission.

The facts necessary to the determination of the question thus raised may be shortly stated as follows:—

Alexander Wood, the intestate, for many years a resident in this city, in the spring or summer of 1842, proceeded to Scotland, where he remained till his death, in the month of September, 1844. At the time of his departure from Canada, he owned a large real estate in the country, and had a deposit at his credit in the Bank of Upper Canada, in Toronto, amounting to about £1383. Prior to leaving, and about the 21st of May, 1842, the intestate prepared a memorandum of instructions addressed to two of his most intimate friends, Mr. Crookshank, the administrator, and Mr. Gamble, in which, after thanking them for their kindness in having undertaken to look after his property in his absence, (which, it seems, was not intended to be permanent,) he enters into details of various matters, and among them states:—"A considerable sum of money stands at my credit in the Bank of Upper Canada, which I was or am authorised to invest, and had intended to do so in government debentures, but there are none such in the bank at present: it has to be at command on short notice, or I could have got ample security for the use of it, as money seems much wanted at present, but it is necessary that I shall have it in my power to pay it out at any time when called for, though perhaps it may be permitted, or part of it may be permitted to lie for some time if well secured, and the interest regularly paid; but of this I am not certain. At my credit stands about £1300, and Mr. Webster has promised to pay Mr. Gamble the debt due by him as he can spare the money. Should I require the money timely notice will be given." Whether this last sentence refers to the deposit or to Webster's debt, or to both, is not very clear. Again, he says, "my dividends at the bank, if any are declared, will be due in July, and a special power of attorney being required for the purpose of discharging the bank, I have filled up one to Mr. Crookshank. These will enable you to satisfy any outlay called for on my account." Mr. Crookshank and the intestate appear to have continued on the most friendly terms to the last, and the utmost confidence seems to have been reposed by one in the other. Both were men of large properties, and appear to have been most intimate associates for years, and Mr Crookshank appears to have undertaken the duty of looking after his friend's affairs in his absence from pure friendship, and not from any expectation of reward, and so far as I can see he discharged that duty most faithfully and honourably. The personal property of the intestate is alone in question here. A great many letters from the intestate to Crookshank, and extracts of letters, (the originals not being forthcoming,) from the latter to the former, reaching down to within a month of his death, are put in. The first in date is one of the 6th September, 1842, written by the intestate, and in which, after alluding to a previous letter of the 20th of August, he says: "my deposit in that institution (meaning the Bank of Upper Canada) is too large to be lying idle, if it can be properly placed out at interest for a time, the proceeds will aid me, for I am not without the need of it, times are so hard here."

On the 17th of October the intestate writes: "I have just had the pleasure of your different respected letters of the 23rd and 26th ultimo. Mine, despatched only three days ago will, in a measure, have anticipated your wish. My deposit in the bank is idle there, and I wished of you to take the trouble of getting it invested so as to bring me something. Now, as you can employ it so as to serve you, I shall be quite pleased if you do so to the extent you require. It will be serving me quite as I wish." On the 26th of October the intestate, after stating the receipt on the 17th of the letters already referred to, says, "on the day yours got here, I immediately answered them in a few lines, to say that any thing of mine in the Bank of Upper Canada is completely at your service. The time was short, but I hope my previous letter would answer the purpose." On the 22nd of October, by the extract produced, Mr. Crookshank appears to have written to Mr. Wood on a variety of matters, and among them the bank deposit, and proposes to take all the intestate's funds for two or three years, and offers a mortgage in security. He had not then, of course, received the letter of the seventeenth of October, and the contents of the letters therein alluded to are not shewn, though they, or one of them, evidently contained a proposal to take the money. On the 24th of November, Crookshank appears again to have written that it would have been an accommodation to himself to have got the deposit, proposing several farms and lots by way of mortgage and security, and expressing a wish that the mortgage should not be registered, and stating that the deposit was £1385 2s. 11d.; that a dividend of £62 had been received, out of which some small payments had been made, and that Mr. Wood's cheque would be required to draw the money. On the 30th of November the intestate writes: "the particular matter interesting to yourself was, I presume, satisfactorily anticipated by my former letters. I think the power I left you (meaning the memorandum of instruction) would be sufficient to enable you to draw out of the bank. Then I suppose my dividend at last time was placed at my credit, with ten pounds from Captain Macaulay, would be £62; the dividend on insurance stock only a few shillings." On the 19th of December, 1842, Wood writes: "Mr. ————'s letter does propose to borrow my funds in the bank. I have written to him that I had requested of you to invest these funds three months since. I think the power of attorney will enable you to draw out by cheque my deposit. It would be rather hazardous to enclose one in a letter from this. If I should surprise you sooner than expectation it will be necessary for me to have some funds at my command, as times here are so bad. I see you state exactly the amount at my credit in the bank when I left; of course the dividends would, and I hope will be paid. Of course any demands made, you will be so good as to discharge, though I know of none except taxes and any little matter. Fenwick (a servant left in charge of his house) may need to keep things a little to rights. 'The Patriot' (newspaper) of course once a year." On the fifteenth of December, 1842, Wood writes: "I shall be glad to hear that the business with respect to money transactions has fully answered your wishes."

On the 26th of January, 1843, the intestate writes, "I would send you a cheque on the bank if I was not sure the cashier would have no hesitation in answering your own under the power of attorney I left, for it was intended to enable you to do so in case I required a remittance. I kept an exact copy of the power." And he enclosed him a letter to Mr. Ridout, cashier of the bank, instructing him to honour Mr. Crookshank's cheque for all or any part of the money standing at his credit.

On the 28th of March, 1843, the intestate writes, "My last covered a note to the cashier of the Bank of Upper Canada, though I am pleased you have done without it. I do not wish any deposit in my name in the Bank of Upper Canada; if you do not want it, get it invested in some other safe way, to be at my call when necessary." And he asks Crookshank to draw a small dividend from the assurance company. On the 24th of May, 1843, the intestate writes: "I shall be glad that you have received all my deposit, as I could not afford to leave it at such risks, though this is between ourselves. Would you advise to sell out?" alluding to his bank stock. On the 29th of April, 1844, the intestate writes a long and affectionate letter on various subjects, part of them business, and expresses his wish to be again in Toronto, but fears it cannot be realized in that year. On the 13th of August, in the same style and about many matters, is written the last letter from Wood to Crookshank. It contains this passage: "I also mention to Mr. G. that you will be remitting me money, and if any of my own remains in his hands to give it to you, that one remittance may serve. I shall hereafter inform you how much I want; so if he offers you any, take it." "He says, suffering it to remain, they will pay me interest for it." In the following month, as already stated, Mr. Wood died. Mr. Crookshank died in the year 1859.

Had these two old fond friends lived to come together again, doubtless they would have settled all matters between them without the intervention of any third party. They have gone, and the court is employed in adjusting the same matters, and those which have naturally grown out of them, between their respective representatives.

A general power of attorney, dated the 27th of December, 1844, from several persons named Barclay, and from some others, claiming to be next of kin and co-heirs of the intestate, was executed in favour of Mr. Crookshank. What pretence of right these parties made does not appear: they were probably the rival claimants to Mrs. Farrell, whose title to the intestate's real property seems to have been established at the close of the year 1850. About the same time an arrangement seems to have been come to among the relatives of the deceased as to the distribution of his personal estate, though not perfected till some time afterwards. About the 27th of December, 1845, the bill alleges, and it is not denied, Mr. Crookshank took out letters of administration to Wood's estate; upon whose request, unless under the first-mentioned power of attorney, does not appear. On the death of Mr. Crookshank, and about the 19th of February, 1860, the late Mr. Ewart, who for some years previously had been acting as agent for the heiress and next-of-kin, obtained administration *de bonis non*, at the instance of the next-of-kin of the intestate, and instituted the present suit, which, on his death, after decree made, was, on the 21st of December last, revived in the name of the present plaintiff as successor in the administration *de bonis non*. The master's report was made on the 9th of May, 1862. A general power of attorney to manage all the intestate's real and personal estate, to receive rents, get in and collect debts and moneys due him, &c., and dated the 25th of March, 1846, was executed by Mrs. Farrell, and sent to Mr. Crookshank. Another power of attorney from the same claimant, dated the 14th of March, 1850, and relating exclusively to the real estate, was also furnished.

As I have already stated, the rights of the several claimants to the intestate's real and personal estate do not appear to have been settled to the end of the year 1850; and the arrangement in regard to the personalty not completed probably till the beginning of the following year. On the 9th of November, 1850, a letter from Mr. John Falconer and Mr. James Edmund, representing, together apparently, those interested in the personal estate, is written to Mr. Crookshank in the following words:

"Aberdeen, 9th November, 1850.

"Dear Sir,—It is a long time since we last addressed you. We have satisfaction in now communicating, that all opposition has been withdrawn to the claims of our clients to the estate of Mr. Wood. In writing together, we write, as you are aware, with regard to the personal estate only; and as to that property, the forms are in progress, and will be shortly closed, for declaring the right to it of one of our clients. In that view it will be convenient to prepare, in other respects, for the transmission hither of the funds which are abroad. And it will advance us a step, if you will be so good as send us now an account of the matter, as it presently stands. Be so good also as inform us what form of discharge you will require, when accounting to us as the representatives of the relations on both sides of the deceased.

"We are, dear Sir, yours truly,

(Signed) "John Falconer.

(Signed) "James Edmund.

"The Hon. Geo. Crookshank, Toronto."

Up to this time, no account of the personal estate appears to have been asked for, no enquiry in respect of it made, no direction given. All parties seem to have rested satisfied with Mr. Crookshank's management and responsibility. About the beginning of

the year 1843, as well as I can ascertain, Mr. Crookshank, under the authority given him by the intestate, drew from the bank the deposit so often referred to, of £1,383. And the question of interest arises first as to it. Before, however, expressing an opinion thereon, it may be well to dispose of certain questions preliminary as well as technical and formal. I think there is nothing in the first objection that the administrator *de bonis non* cannot claim interest on such allowances as the court will make for breach of trust in his predecessor. He is appointed in succession to act for the court, which empowers him in getting in all that properly belongs to, or can be claimed for, the intestate's estate, and which the administrator has neglected to get in. Both the administrator and his successor merely act for the court—are both accountable to it; and the one and the other can be made accountable in this court, and can seek the aid of this court in the administration. If there be any objection to the claim of the administrator *de bonis non*, it must be this, that the administrator *de bonis non* cannot call the estate of the deceased administrator to account, but that this can only be done by the court, or under the authority of the court, which has appointed him. The objection cannot be that the administrator *de bonis non* does not represent the next of kin as fully as the original administrator, for his office, his duty, his authority, his mode of appointment from the same power, is precisely similar. But that objection has not been made; a decree for an account has been consented to; and were the point a debatable one, I am not now at liberty to consider it, but must treat the estate of the deceased administrator as accountable at the suit of the plaintiff. The second objection, and so much of the sixth as relates to the pleadings, are answered by the provisions of section 13 of general order 42, of the court, and by the decree itself. The fourth objection is displaced by the decree, which states that the defendants admit assets of the said Geo. Crookshank come to their hands sufficient to pay the plaintiff's claim; that claim being, of course, whatever the plaintiff can make himself out entitled to under the decree, according to the practice and law of the court. It thus differs from the case *Davenport* v. *Stafford*, 14 Beav. 319.

Then, as to this deposit of £1383, which, with the intestate's permission, Crookshank drew from the bank and used. It was I think, looking at the correspondence, the intention and understanding of both parties that Crookshank should pay interest for it, and yet the intestate never appears to have applied for or received any interest on this sum. It is doubtful whether it was his own money. His allusion to it in the memorandum of instructions would imply that it was not. He states that it must be kept on call or short notice. He refused to invest it on mortgage; and he lets Crookshank have it without mortgage, though the latter appears at one time to have offered him such security if he could get the money for two or three years. Still, he writes to have the money invested so as to bring him in something, though it is to be called in on short notice; and he seems rejoiced when Crookshank has taken the use of it, as he evidently considers it safe with him, and to produce something. Money held on call would not generally yield the same rate of interest as that borrowed for a fixed period, and yet I do not know what rate of interest other than six per cent. can be charged in the absence of any arrangement by Crookshank with the intestate for a lesser sum, and of any evidence shewing any other usual rate. I think he must be so charged during the intestate's life. The time at which this sum was received does not very clearly appear, nor whether in one sum or several sums. If the latter, a time should be ascertained from which interest should be charged, considering that the money was to be on call. I think that as six per centum is to be charged, it would be but fair to charge interest only from the time when the last of the sums was drawn out, if it was all taken within a short time. On the other sums received during the intestate's life-time, I think no interest should be during that period charged, for it is evident that the intestate intended Crookshank to hold these moneys for the discharge of any claims payable by him, and to be remitted to him at any moment he might require a remittance. Neither, of course, should any interest be allowed on payments made during the same period except where and on so much as they exceed the amount in hand to meet them.

This disposes of the subject of interest down to the intestate's death, and it is now to be considered how it is to be dealt with during the four subsequent periods. The 1st, from that death down to the time letters of administration were obtained by Crookshank. The 2nd, from that period down to the year 1851, when the rightful claimants were ascertained. The 3rd, from that time down to the institution of this suit. And the 4th, during the pendency of the suit until the final order for payment shall have been made. I have made this division of time because the learned counsel for the defendants contended that different rules might be applied to them respectively. On looking at the accounts, it does not appear that the administrator received any thing from the death of the intestate until after letters of administration were granted to him, but he retained during that period the deposit of £1383; and as I have already found that he was to pay interest for it, he must during this period be charged still with interest in the same way as if the debt was owing to the intestate's estate by a third party. And so, throughout the subsequent periods enumerated until the money was refunded. It is quite true as to it as well as to other moneys received and held by the administrator during the second of those periods that there was no one to whom he could have paid them over, and that it was uncertain when he might be called upon for them. An administrator in such a case is in an awkward position, but I have found no case which has decided that this is a sufficient excuse for his retaining moneys in his hands uninvested, or a good reason for not charging him with interest on the moneys of the estate which he has used. In England he has no difficulty in making investments, as he can purchase government securities in the market every day. Here there is greater difficulty, and the only course I think which can be properly taken is when a certain amount, such as one would think sufficient to offer as a loan, has accumulated in his hands to allow the administrator a reasonable time to seek a safe investment; and if he shall not have made one, then, after the lapse of that time, to charge him with interest unless he can shew that he has used all proper deligence to obtain an investment, and has failed, and that he has not himself used the money. If, while the parties entitled to the estate are unknown, the administrator makes investments of such a character as this court sanctions, those parties on establishing their title cannot complain that the money is so invested and is not in specie ready to their hand. Looking at the position, then, in which this estate stood, the discretion with which, during their pendency of the litigation, Mr. Crookshank appears to have been intrusted by the claimants, and the absence as already remarked of any desire by them that any of the moneys should be hung up in investments, and the expectation apparent in the letter of the 7th of November, 1850, that the funds were in a state to be transmitted so soon as all legal formalities for confirming the title of the next kin to them had been completed, I think the master exercised a fair judgment in charging the administrator with interest from the end only of the year in which the receipts had accumulated, after deducting the payments in that year, when such balance amounted to a sum sufficient for an ordinary investment, which could hardly be less than £100. When a balance equal to at least that sum was not in hand, it might well be carried on into the next year, and until in the receipts of that year, a sufficient accretion had been made to call for an investment. From the time when the parties entitled to the moneys were ascertained, and reasonable time had elapsed for arranging with them what was to be done with the estate belonging to them, and how it was to be transmitted or invested, the estate of the administrator must be charged with interest on all moneys then in his hands, or afterwards recovered and held by him without the assent of the parties entitled thereto, except for such reasonable time of course as would be necessary for their payment over, or transmission; and from the time of Mr. Ewart's authority to act for the next of kin, and to receive their property, being established and made known to the administrator, there could of course be no difficulty in paying over the moneys in hand, or as required from time to time. On the 4th of October, 1851, Mr. Crookshank transmitted to the agents in Scotland of the next kin, a bill of exchange for £2500 sterling, amounting to upwards of £3000 currency, and as it is not certain at what time in that year the rights of these parties were finally fixed, I cannot say that there was any unreasonable delay in transmitting those

moneys, chargeable, as they were, with interest. Mr. Crookshank may have thought and considered that this was all he owed.

He had now become an old man, and during the residue of his life was much enfeebled by age and growing infirmities, and for some time before his death was quite imbecile. It does not appear that he was engaged in business at any time, or that he was other than a gentleman of property living on the means which it afforded him. I have said already that Mr. Crookshank appeared to have discharged his voluntary duty to his friend, the intestate, most faithfully, and I see nothing in his dealings with the estate, after he assumed to be its administrator, from which I should infer that he intended to act otherwise, although he has rendered himself liable to charges, which from the relation in which he had stood to the intestate, and from a mistaken notion of his own obligations, he might probably have considered himself free. I have seen nothing to shew that Mr. Crookshank would himself have declined to account for the money which he borrowed from the estate with interest upon it. Indeed Mr. Ewart says that he never heard of that pretence till lately.

The defendants were not parties to the transaction, and were ignorant of it in its inception, and cannot be said to have improperly raised the question as guardians of their testator's estate. For the delays which have occurred of late years in the not rendering of proper accounts, and the paying over of any balance which on these adjustments might be found due, though legally he, Crookshank, cannot be considered morally responsible. His agents, from Mr. Ewart's evidence, are evidently to blame; and although it may be unfortunate for the estate that the evidence of McLean has not been procured, still I think the master would not have been justified in further delaying this report for it. The defendants have waited taking the risk of his return to the country instead of examining him abroad, and they must abide by it.

I have not failed to consider the objection that this is a bill for an account of Mr. Crookshank's transactions, as administrator, and not as agent of Wood in his life-time; but I think the latter are necessarily involved in the other, for it was his duty as administrator to call himself to account with himself as agent.

Mr Crooks insisted again at the close of the argument that the Master's mode of computing interest was wrong, and that interest should be calculated on payments and receipts from time to time; and Mr. McLennan, for the plaintiff, assented to it. If the defendants still wish for this mode, I will order it, though I have already stated I would not have subjected the estate, under the circumstances, to such a rigid rule. The claim for exemption from interest during the pendency of this suit cannot be maintained. An accounting party runs the risk of a report in his favour, or a balance being found against him; he ought to know the state of his own accounts, and what moneys he has in hand, and if he disputes his indebtedness he must be charged with interest on any balance found against him.

I think the cross appeal must be dismissed. This is not a case for compound interest; and any calculation of the master which would charge it should be disallowed. There has been here no wasting of the funds; no trading with them; no concealment of receipts; no making of profits with them; no delaying in accounting or paying over, which can be considered the fault of the administrator himself, though legally responsible for the neglect of his agents. I think also, it is a proper case for the allowance of a commission. In all the powers of attorney referred to, a reasonable compensation, or as the Scotch phrase used expresses it, "gratification" for the services of the administrator is guaranteed him, and I think under the 13th section of the General Order before referred to, the master was right in reporting upon it, though perhaps it will be more proper to allow the sum recommended on the hearing on further directions than now.

I have carefully considered all the cases cited on the argument, and I cannot but feel that there will be often difficulty, and sometimes great harshness in applying rigidly in this country, the rules usually adopted in England. I say usually, because they meet there with frequent relaxation, and, as they should, in no case more often than when there has been a total absence of *mala fides* in the administrator.

COMMON LAW CHAMBERS.

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

IN RE SLATER AND WELLS.

Con. Stat. Can., cap. 105, sec. 16—Form of conviction—Habeas Corpus—Liberty of the subject.

It is the duty of a judge hearing an application for discharge from custody on *habeas corpus*, where a person is restrained of liberty under a statute, to discharge the person, unless satisfied by unequivocal words in the statute that the imprisonment is warranted by the statute.

A conviction under Con. Stat. Can., cap. 105, for keeping a house of ill-fame, or being an inmate of such a house, adjudicating that the accused should pay a fine of $50 forthwith, and be imprisoned for three months, unless the fine be sooner paid, is not warranted by sec. 16 of the statute.

(Chambers, December 26, 1862.)

On 18th December last, upon the application of Eliza Slater and Catharine Wells, two prisoners in the common gaol of the county of Wentworth, Mr. Justice Morrison ordered the issue of a writ of *habeas corpus ad subjiciendum* out of the court of Common Pleas.

The writ was in the following form:—

[L. S.] VICTORIA, &c.

To the keeper of our common gaol in and for our county of Wentworth:

We command you, that you have before the Honorable William Henry Draper, C.B., Chief Justice of our Court of Common Pleas for Upper Canada, at Toronto, or other the presiding judge, in Judge's Chambers, at Osgoode Hall, in the said city of Toronto, immediately after the receipt of this our writ, the several bodies of Elizabeth Slater and Catharine Wells, being committed to, and detained in your custody as it is said, together with the day and cause and days and causes of their being severally taken and detained, by whatever names they may called therein, to undergo all and singular such matters and things as our said Chief Justice or other the judge sitting in Judge's Chambers as aforesaid shall then and there consider of and concerning them the said Eliza Slater and Catharine Wells, or either of them, in this behalf.

Witness, &c.

(Signed) L. HEYDEN.

Per Statutum tricesimo primo Caroli Secundi Regis.
JOS. C. MORRISON, J.

On 19th December last the writ was returned.

The return annexed to the writ was in the following form:—

I, George Jamieson, of the city of Hamilton, keeper of the common gaol of the county of Wentworth, to whom the herewith annexed writ has been directed, do hereby humbly certify, that in obedience to the said writ I have present the bodies of Eliza Slater and Catharine Wells therein named, together with the day of their commitment and cause of their detention in my custody, and that such day and cause will more fully appear by the warrants of commitment hereunto annexed, marked with the letter B, under and by virtue of which warrants the said Eliza Slater and Catharine Wells are and have been detained in my custody at hard labor.

(Signed) GEO. JAMIESON,
Keeper of said Gaol.

Annexed were two sets of warrants of commitment bearing date on the same day. The second set, though in no way referring to the first, were evidently substituted for the first—the first being defective in several respects.

The second or amended warrant, under which Eliza Slater was detained in custody, was in the following form:—

CITY OF HAMILTON, TO WIT: } To the Chief of Police, or any constable of the city of Hamilton, and to the keeper of the gaol of said city:

Whereas, Eliza Slater was, upon the complaint of George Graham, police constable of said city, duly convicted before me, G. H. Armstrong, Police Magistrace of the said city, for that she on the third day of December, 1862, in the said city, was guilty of keeping a house of ill-fame in said city, contrary to the provisions of chapter 105 of the Consolidated Statutes of Canada, and was by me adjudged to be committed for the said offence to the common gaol of the county of Wentworth, there to be kept for the space of three months, unless she pay the sum of fifty dollars fine.

These are therefore to command you, the said Chief of Police, or constable, to convey the said Eliza Slater to the said gaol, and her to deliver to the keeper thereof, together with this warrant.

And I do hereby command you, the said keeper, to receive the said Eliza Slater in your custody in the said gaol of the said city, and her there safely keep for the space of three months, unless aforesaid amount is sooner paid; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, at Hamilton, this third day of December, in the 26th year of the reign of our Sovereign Lady Queen Victoria, in the year of our Lord 1862.

(Signed) G. H. ARMSTRONG, P. M.

The second or amended warrant, under which Catharine Wells was detained in custody, was in the following form:—

CITY OF HAMILTON, TO WIT: } To the Chief of Police, or any constable of the city of Hamilton, and to the keeper of the gaol of the said city:

Whereas, Catharine Wells was, on the complaint of Robert Graham, police constable of said city, duly convicted before me, G. H. Armstrong, Police Magistrate of the said city, for that she on the third day of December, 1862, in the said city, was guilty of being an inmate of a house of ill-fame, in said city, contrary to the provisions of chapter 105 of the Consolidated Statutes of Canada, and was by me adjudged to be committed for the said offence to the common gaol of the county of Wentworth, there to be kept for the space of three months, unless she pay the sum of fifty dollars fine.

These are therefore to command you the said Chief of Police, or constable, to convey the said Catharine Wells to the said gaol, and her to deliver to the keeper thereof, together with this warrant.

And I do hereby command you, the said keeper, to receive the said Catharine Wells into your custody, in the said gaol of the said city, and her there safely keep for the space of three months, unless aforesaid amount is sooner paid, and for so doing this shall be your sufficient warrant.

Given under my hand and seal, at Hamilton, this third day of December, in the 26th year of the reign of our Sovereign Lady Queen Victoria, in the year of our Lord 1862.

(Signed) G. H. ARMSTRONG, P. M.

Robert A. Harrison having asked for and obtained leave to file the writ and return, moved to discharge the prisoners, upon the ground, among others, that an imprisonment for three months, unless the fine imposed were not sooner paid, was illegal, inasmuch as by the statute the proper mode of enforcing payment of such fines is by distress of the goods and chattels of the persons subject to the fine; and it was not shewn that any effort had been made so to collect the fine. He referred to Con. Stat. Can., cap. 105, sec. 16; *Rex* v. *Chantler*, 1 Ld. Rayd. 545; *Rex* v. *Whitlock*, 1 Str. 263.

T. H. Spencer shewed cause, contending that the warrants substantially complied with the statute, and argued that if defective in form they could not be held void because supported by good and valid convictions. He produced the convictions, and referred to sec. 29 of Con. Stat. Can. cap. 105.

The following is a copy of the conviction of Eliza Slater:

CITY OF HAMILTON, to wit. } Be it remembered, that on the third day of December, in the year of our Lord one thousand eight hundred and sixty-two, at the city of Hamilton aforesaid, Eliza Slater, being charged before me, the undersigned George H. Armstrong, Esquire, police magistrate of the said city, by Robert Graham, a police constable of the said city, is convicted before me in open court, for that she, the said Eliza Slater, at the time the said information was laid, had been keeping and then was keeping a house of ill-fame within the said city of Hamilton, and I adjudge her, the said Eliza Slater, for the said offence, to pay a fine of fifty dollars to me as such police magistrate forthwith, to be applied by me in accordance to the provisions of chap. number 105 of the Consolidated Statutes of Canada, and in default of such payment to be imprisoned in the common gaol of the county of Wentworth, situate within the city of Hamilton, for the period of three months or until such fine be paid, if the same shall be paid within said three months.

Given under my hand and seal the day and year first above mentioned, at Hamilton aforesaid.

(Signed) G. H. ARMSTRONG, P. M. [L.S.]

The following is a copy of the conviction of Catherine Wells:

CITY OF HAMILTON, to wit. } Be it remembered, that on the third day of December, in the year of our Lord one thousand eight hundred and sixty-two, at the city of Hamilton aforesaid, Catharine Wells, being charged before me, the undersigned George H. Armstrong, Esquire, police magistrate of the said city, setting in open court, by Robert Graham, police constable of the said city, with being an inmate of a house of ill-fame kept by one Eliza Slater, within the said city, and such charge being brought against her, the said Catharine Wells, she confessed before me in open court that she resided in said house of ill-fame and was an inmate thereof, and therein had carnal communication with men visiting said [illegible] of ill-fame. She is upon her own confession convicted before me, for that she, the said Catharine Wells, at the time the said information was laid, was an inmate of a house of ill-fame within the said city of Hamilton.

And I adjudge the said Catharine Wells, for the said offence, to pay a fine of fifty dollars to me as such police magistrate forthwith, to be applied by me in accordance to the provisions of chap. number 105 of the Consolidated Statutes of Canada, and in default of such payment to be imprisoned in the common gaol of the county of Wentworth, situate in the city of Hamilton, for the period of three months or until such fine be paid, if the same shall be paid within the said three months.

Given under my hand and seal the day and year first above mentioned, at Hamilton aforesaid.

(Signed) G. H. ARMSTRONG, P. M. [L.S.]

Mr. Harrison argued that the convictions so far from being good and valid were themselves void, on the same ground of objection that he urged against the warrants.

HAGARTY, J.—The second warrants of commitment produced by the gaoler in return to the *habeas corpus*, shew that each of the prisoners was convicted by the police magistrate and adjudged to be committed to gaol for three months, unless she pay $50 fine; and the gaoler is commanded to keep her "for the space of three months, unless the aforesaid amount is sooner paid." The convictions which are produced shew an adjudication that prisoners should respectively pay a fine of $50 to the police magistrate forthwith, and in default of such payment be imprisoned for three months, or until such fine be paid.

The case turns on the 16th section of cap. 105 Con. Stat. Can. The recorder (or police magistrate) is authorized to commit the offender to gaol, with or without hard labor, for any period not exceeding six months, or may condemn her to pay a fine of not exceeding, with the costs, $100, or to both fine and imprisonment not exceeding the said period and sum; and such fine may be levied by warrant of distress, &c.; or the party convicted "may be condemned (in addition to any other imprisonment in the same conviction) to be committed to the common gaol for a further period not exceeding six months, unless such fine be sooner paid."

We are told in sec. 26 that we must not refer to either of the acts in the same volume in relation to summary convictions, or as to indictable offences for guidance.

I feel no small difficulty in construing the 16th clause from the peculiar wording of the latter part of it.

In the cases before me no imprisonment is awarded as a substantive sentence or punishment. The fine is the only penalty if paid. But it was not paid, nor does it seem that any attempt was made to levy it by distress. The magistrate adopts the last alternative of the section, viz., imprisonment to enforce payment, or for non-payment. The words are that he may award the offender to be committed (in *addition* to any other imprisonment on the same conviction) to be committed for a *further* period, unless the fine be sooner paid. I think, according to ordinary grammatical construction, I might read the sentence without the parenthesis; and were it not for the use of the word "further" no difficulty might arise. But can this word be rejected? Did the legislature mean by a *further* period, especially after the words in the paren-

thesis, to give the power of commitment, except in a case where imprisonment had been awarded as a substantive punishment. Here lies the whole difficulty. I am not bound to reconcile doubtful terms, or shew a reason for any peculiarity of expression; but am bound to see if an imprisonment be warranted by clear, unequivocal words in the statute which confers a new power over personal liberty.

It may be the legislature considered that in ordinary cases a magistrate could readily ascertain if the parties could pay a fine, and when a fine only was awarded by him, could levy it by distress on the offender's chattels, and no imprisonment would be necessary; but that when the case was of that nature that the magistrate could readily see that imprisonment should be awarded substantially as a punishment besides a fine, that he should commit to gaol at once, and super add to the first imprisonment a further time, unless the fine were sooner paid. Magistrates attended by a staff of policemen can generally in cases like these readily ascertain if the parties can pay a fine, or have personal property to meet it, so that little practical difficulty need be apprehended. In the case of rich offenders a fine alone is often a slight punishment, and imprisonment has to be resorted to as a substantial punishment. Thus the clause in question can easily be applied. It is not difficult to imagine a case in which where a fine alone was awarded, and no distress attempted, but an immediate commitment till this fine be paid, that the person committed would be debarred of the means of raising the amount of the fine, in which case imprisonment, though only resorted to to enforce payment, would be turned into a substantial punishment.

I have felt much doubt about this case, but on the whole think I am bound, when personal liberty is concerned, to discharge the prisoners, unless I see unequivocal words used by the legislature warranting their imprisonment.

I direct the discharge of the prisoners.

Bleakley v. Easton.

Venue—Change on application of plaintiff—Terms.

In all transitory actions it is in the power of the court or a judge to change the venue, upon application either of plaintiff or defendant.
If plaintiff apply, he must show reasonable grounds for the application.
Where it was sworn that unless the venue were changed, plaintiff would be in danger of losing his debt, this was held to be a reasonable ground
Where the application is made by plaintiff, it will only be granted upon payment to defendant of the costs of the application.

(Chambers, Dec. 27, 1862.)

Durand obtained a summons, calling on the defendant to show cause why the venue in this cause should not be changed from the County of the City of Toronto to the County of York, one of the United Counties of York and Peel, upon grounds declared in affidavits filed.

He filed two affidavits. The principal affidavit was that of plaintiff, in which it was sworn that the action was brought to recover upwards of $3005; that the greater part of the sum was for money lent to the defendant for the purpose of getting the Toronto Street Railway into operation, and for other purposes specified; that defendant agreed to pay $4000 in September last, in settlement of accounts between the parties; that he (plaintiff) could have sued defendant at the last October assizes for the United Counties of York and Peel, but postponed payment upon the undertaking of defendant to pay interest at the rate of 2½ per ct. per month; that defendant was, on the 18th November last, then being in New York, served with a writ of summons, as a British subject resident in a foreign country, and had fifteen days to appear; that he (plaintiff) was anxious to have the cause tried as soon as possible, and believing the debt to be in danger had the venue in the County of the City of Toronto, the assizes for which county preceded the assizes for the United Counties of York and Peel, but, owing to the time the defendant had to appear, and the course of pleading adopted, and other things arising in the progress of the suit, the case, unless the venue be changed, could not be tried at the then approaching assizes for the County of the City of Toronto: that the defence set up by defendant was one purely for delay, and the cause was one which, owing to the existence of the Toronto Street Railway, could be more impartially tried by a country than by a city jury; that he (plaintiff) was credibly informed that defendant was making efforts to sell his interest in the Street Railway, and had removed considerable amounts of his personal property out of Canada, and, apart from his interest in the road, had not much property in Canada; that he (plaintiff) verily believed he was in danger of losing his debt if the venue were not tried at the Toronto winter assizes; and that the causes of action involved in the suit arose partly in the County of the City of Toronto, and partly in the County of York.

The remaining affidavit was that of Mr. Durand himself, in which the course of the proceedings in the cause was set out, and from which Mr. Durand concluded that he was thrown over the assizes for the County of the City of Toronto through the tricks of the defendant. Nothing turned upon this affidavit, and so no further reference is here made to it.

D. McMichael (with him *A. McNab*) showed cause. He filed an affidavit of Mr. McNab, in answer to the affidavit of Mr. Durand, which also set out the course of proceedings on the cause, and from which he (Mr. McNab) concluded that Mr. Durand was thrown over, not by reason of any act of the defendant or his attorney, but by reason of his own course of procedure. No affidavit was filed in answer to the affidavit of plaintiff, showing grounds for the belief that the debt was in danger. It was concluded on the part of the defendant that plaintiff having selected the County of the City of Toronto as his venue, should be held to that selection, and that the summons should be discharged. *Fife* v. *Bousfield*, 2 Dowl. N. S. 705, and Rule Pr. No. 19 (Har. C. L. P. A. 599), were cited for defendant.

R. A. Harrison (with him *Durand*) supported the summons, and argued, first, that the application was one of right (*Robertson* v. *Hayne*, 16 C. B. 560), and, secondly, even if one in the discretion of the court or judge, that reasonable grounds were shown for the exercise of that discretion, inasmuch as the trial, so far as defendant was concerned, could be as conveniently had at the assizes for the County of the City of Toronto, as at the assizes for the United Counties of York and Peel (24 Vic. cap. 53); and it was sworn (and not contradicted) that unless the cause were tried at the assizes for York and Peel, his debt would be in danger. (*Mercer* v. *Voght*, 4 U. C. L. J. 47; *McDonell* v. *The Provincial Insurance Company*, 5 U. C. L. J. 186.)

Hagarty, J., having taken time to consider his judgment on a subsequent day, said he considered the application governed by *Mercer* v. *Voght* (4 U. C. L. J. 47), and upon the authority of that case would make the summons absolute to amend the declaration by changing the venue from the County of the City of Toronto to the County of York, one of the United Counties of York and Peel, as asked, but only on payment of costs. He referred to *Comerford* v. *Daly*, 11 Ir. Com. Law Rep. 62.

Summons absolute, on payment of costs.

Robinson, Demandant, v. Blandshard et al, Tenants.

Dower—Infant tenants—Compelling plea—Practice.

Where, in an action of dower after declaration filed, and notice to plead served upon infant tenants, the latter neglect to plead, an order *nisi* may be made that unless the infants plead within a given time, the demandant may assign John Doe for their guardian, which order *nisi* afterwards, upon an affidavit of service and affidavit that no plea filed, will be made absolute.

(Jan. 7, 1863.)

This was an action of dower.

The declaration was in the ordinary form, and averred that the husband of demandant died seized of the land, and that since his death she was wrongfully deprived of her dower in the land, and therefore besides dower claimed damages.

Annexed to the declaration was the notice prescribed by Con. Stat. U.C. cap. 28, sec. 4, wherein the tenants were informed that unless they pleaded to the declaration within twenty days from the service thereof, judgment would be signed against them by default, and execution follow thereon according to law.

Copies of the declaration and notice were served on William Blanchard and Mary Jane Potter, wife of Thomas Potter, a defendant, on the 3rd and 8th December, respectively.

William Blanchard and Mary Jane Potter were both, at the time of service of declaration and notice, minors.

The time for pleading expired, and no plea was filed on behalf of either of the minors.

R. A. Harrison, on behalf of the demandant, having filed an affidavit showing the foregoing facts, made application for an order that unless the infant tenants should plead by guardian within three days after service of the order, demandant should be at liberty to assign John Doe for their guardian, enter judgment for default of a plea, and take all other necessary proceedings in the cause.

Mr. Harrison, in support of his application, cited 2 Chit. Arch. 9 Ed. 1170, and cases there noted.

McLEAN, C. J., on 31st December last, made the order as follows: "Upon reading the affidavits and paper filed, I do order that unless the above named infant tenants shall plead in this cause (by guardian) within three days after service hereof, the demandant may assign John Doe for guardian of the infant tenants, William Blanshard and Mary Jane Potter, and enter judgment thereon for default of a plea, and take all necessary proceedings in this cause in the ordinary way."

The order was served on 2nd January, 1863.

After the expiration of the three days limited by the order, *John Paterson*, upon an affidavit of the service of the order and of search for plea, and no plea filed, applied for an order absolute.

DRAPER, C. J., made the order absolute. It was in the following form: "Upon reading the order made in this cause on 31st December last, by the Honourable Archibald McLean, Chief Justice of Upper Canada, that unless, &c. (reciting order of McLean, C. J.), and upon reading the affidavit of service thereof, and an affidavit that no plea has been pleaded by said infant tenants, I do order that the above named demandant may assign John Doe for guardian of the infant tenants, William Blanshard and Mary Jane Potter, and enter judgment thereon for default of a plea, and take all necessary proceedings in the cause, in the ordinary way."

COBOURG FALL ASSIZES.

CHIEF JUSTICE DRAPER Presiding.

(*Reported by* THOMAS MOSS, Esq., M.A., *Barrister-at-Law.*)

HUTCHESON (Judgment Creditor) v. ALLEN (Garnishee) WILMOT ET AL (Judgment Debtors).

Held, the judgment debtor admissible as a witness on behalf of the plaintiff in an action under a garnishee order.

This was a garnishee action brought by the plaintiff, a judgment creditor, to recover the amount of a debt alleged to be due from the garnishee to the judgment debtors, under the usual order for the issue of a writ.

Wilmot, one of the judgment debtors was tendered as a witness on behalf of the plaintiffs.

Cameron, Q. C., acting for defendant (the garnishee) objected.

The learned JUDGE, considering the evidence admissible, overruled the objection.

The verdict was for the defendant.

ENGLISH REPORTS.

(*From the Law Times Reports.*)

RIDGWAY v. WEBBER AND ALGAR.

Costs—Taxation—Striking out co-defts.—C. L. P. A. 1852—15 *&* 16 *Vict. c.* 76, *s.* 37.

The same rule prevails on taxation of costs in actions of contract where the name of a co-deft. is struck out by the judge at the trial, as prevails in actions of tort where the verdict is in favour of one of two co-defts. and against the other; that is to say, the party exonerated from liability is entitled to a moiety of the costs. [Nov. 8 and 11.]

This was an action on a contract brought against the defendants as co-owners of a ship. The cause was tried before Blackburn, J., at Exeter spring assizes. At the close of the plaintiff's case the judge suggested that there was no evidence of authority in the defendant Algar to bind his co-partner. He allowed the name of the defendant Webber to be struck out, and the action then proceeded, and a verdict was given against Algar for £113. When the costs came to be taxed it was found that nothing appeared on the record as to the striking out of the name of Webber. Application was then made to a judge at chambers, and Blackburn, J., made an order under the C. L. P. A., 16 & 16 Vic. c. 76, s. 37, that the name of Webber be struck out of the record. The judge's order was in general terms, and did not specify the course as to costs. On taxation the master allowed the defendant Webber one-half of the costs.

Karslake now moved for a rule to show cause why the order of Blackburn, J., should not be amended, and why the master should not be directed to review his taxation. The question arises on what principle the costs should in this instance be taxed. The master having allowed Webber one-half of the costs of the defence, the plaintiff, who has succeeded against the other defendant, only gets one-half of his costs, the defendant Webber taking the other. The question is, whether that is, under the statute, the proper principle for the taxation. [WILLIAMS, J.—Both are liable, as between attorney and client, for the whole costs.] Yes. The effect at present is, that instead of getting the full costs from Algar, who defended the action, and against whom he succeeded, the plaintiff gets only half the costs from him.

ERLE, C. J.—If there is an established practice in such cases, we will not disturb it; if there is not, we will consider and settle the principle on which costs in similar cases should be taxed. We will inquire of the other courts.

ERLE, C. J., now delivered the judgment of the court.—This was a rule moved for by Mr. Karslake, to review taxation. On the suggestion of the judge, judgment was to be entered for one of the defendants, and the case was to proceed against the other of the defendants. One of the defendants being, therefore, exonerated from liability by the interference of the judge, under the C. L. P. A., the question was, what was the principle on which the costs of the defendant were to be taxed? The master proceeded on this principle. He considered what was the sum total of costs to be paid by the defendant, and divided the same. He considered the defendant who was exonerated from liability was entitled to a moiety of the costs which would have been due if both the defendants had succeeded. It was contended by Mr. Karslake that the costs of the plaintiff would be just the same, and the costs of the other defendant were not altered at all by this proceeding. We find there has been one understood and undisturbed rule of practice. In such a case as stated, the same principle was adopted as in an action of tort, where the verdict was in favour of one defendant and not the other. That is the principle upon which the masters have estimated the costs. They have treated it by analogy in actions of contract, where the case goes not against the first defendant; and, as at present advised, the court being informed by the master that this has not been disturbed, and the court not being aware of any better principle than that, they say, *primâ facie*, they will assume that the master is right. That may not be the case where the rule should not be carried out in utter strictness, and where the circumstances of the case require a variation. In the present case there are no circumstances brought forward that require variation, and the rule will be refused. Rule refused.

UNITED STATES REPORTS.

QUARTER SESSION CASES.

COMMONWEALTH v. LOWRY.

1. It is wrong for a party to commence a criminal prosecution against his adversary in a civil suit, for a supposed perjury committed in some collateral proceeding, during its pendency and before its termination.
2. When one is charged with a criminal offence, complaint should be made to a magistrate, who issues his warrant upon which the accused is arrested, and has a preliminary examination, and is bailed, or committed in default thereof or discharged.
3. This practice has been uniform since the organization of the Commonwealth, and what time and usage has thus matured should be regarded as a fundamental right.
4. The law is jealous for the reputation and protection of the citizen, and will not needlessly subject him to the severe ordeal of judicial investigation for an alleged offence, on the first imputation of it, when a more mild, less exposed and less expensive one will answer as well.

5. The sending of a bill to the Grand Jury without a preliminary complaint, arrest and examination, is in violation of law.

6. Cases of violations of the revenue laws, and of innovations upon the peace and good order of society, are exceptions to these rules

In the Court of Quarter Sessions of Erie County.

Indictment for Perjury.

The facts are fully stated in the opinion of the Court.

Davenport, Dist. Atty., and *Galbraith*, for Commonwealth.

Marvine, *Marshall*, *Sill* and *Douglass*, for defendant.

The opinion of the Court was delivered by

DERRICKSON, J.—The motion to quash the indictment in this case, is based upon several errors alleged to be apparent in the facts embraced in the following statement.

The defendant brought an action in Foreign Attachment against Fox & Van Hook of Washington City, in the Common Pleas of this county, and at the meeting of the court in May last a rule was taken on the plaintiff to show his cause of action, and why the suit itself should not be quashed. In obedience to this rule, the plaintiff made an affidavit in which he set up various matters arising out of dealings which had taken place between himself and the defendants, and in which he alleged he had been wronged to the amount of several thousand dollars, and claimed the right to receive the same in the light of consequential damages. The court being satisfied that the action was not founded in contract, made absolute the rule and the suit was dismissed. On the same day, or the one following, the defendants went before a magistrate of the city and made a formal complaint against the defendant of perjury, said to have been committed in this affidavit, upon which a warrant was issued and the defendant arrested; but after a hearing and examination of the charges before the magistrate, he was discharged on the grounds—as the transcript from the justice's docket states—that the averments in the affidavit were immaterial. Lowry then brought suit by ordinary process against the same parties for the same cause of action on which the foreign attachment was instituted, and that suit is still pending and undetermined in court. From an affidavit made on the hearing before us, it appears that Lowry was requested by citizens of Erie, in a public meeting, to proceed to Washington to aid in securing the appointment of a certain naval officer to a particular vessel, with which he complied. This was the week of the August Sessions, and on the day he left, or on the one following, Fox & VanHook went to another magistrate of the city and made a sworn complaint for perjury, similar to the one previously made against the defendant, on which a warrant was issued and placed in the hands of a constable, who returned it the same day—that the defendant could not be found. A certificate of this was made out and handed to the District Attorney, by whom a bill of indictment was prepared and sent to the grand jury, and was returned into court as true.

These are the material facts; and the complaint made in relation to them is, that the sending up of a bill of indictment without a previous opportunity being offered the defendant of an examination and hearing before the magistrate, and especially after he had been arrested and discharged on a former warrant and hearing was illegal and oppressive; also, that the charge itself was premature and unwarranted while the suit in which the affidavit was made as the cause of action was still pending in Court; and further, that the averments in the affidavit were immaterial and collateral to the real question before the Court in the application to quash the foreign attachment, and not sufficient to warrant a charge of perjury.

In determining the motion before us, we do not deem it essentially necessary to decide that the complaint for the alleged perjury was prematurely made, as this is one feature in the law which gives controlling influence in the disposition we must make of it. We take occasion, however, to say that as a general rule it is wrong for a party to commence a criminal prosecution against his adversary in a civil suit, for a supposed perjury committed in some collateral proceeding, during its pendency and before its final termination; and no Court will knowingly allow it to be done unless the course of justice would suffer to refuse it. A contrary practice would have a tendency to produce the most serious mischief, and induce many an honest but timid creditor to forego his rights, rather than have himself subjected to the imputation of crime, however groundless and corrupt the charge of it might be; and if countenanced, how many offenders would go unwhipped of justice by the commencement of a similar prosecution against the accuser in the previously instituted one, and this for the sole purpose of bringing about an amicable cessation of hostilities, or to operate on the fears of the adversary, and thus stifle prosecutions which, if carried on, would bring offenders to justice and merited punishment. Courts of justice should never give countenance to a practice like this, or it would be subversive of the ends of their creation—the protection of creditors and injured persons in their legal rights, and the punishment of evil doers. In general, it is time enough after the civil suit, or the criminal charge has passed the test of judicial trial, or been otherwise disposed of, to commence the investigation of offences which have originated during their progress. If it is attempted before this, it should not be without some apparent necessity for it, or the direction of the Court. This course will leave causes and criminal charges to be disposed of on their intrinsic merits, without being affected by the prejudices which might attach to them from prosecutions subsequently got up involving the purity of the prior moves, motives and actions.

The insufficiency of the averments in the defendant's affidavit as a ground of perjury, because not pertinent or material to the court's adjudication in quashing the suit of foreign attachment, however much we might be disposed to regard them in that light, (were the present the proper time for their consideration) would more properly be noticeable on a traverse of the indictment; and we therefore pass them by, and come to the point on which we dismiss the bill as improperly brought into court. The defendant had been once arrested and discharged by the magistrate because, in his opinion, the grounds of the accusation against him were insufficient to predicate legal guilt upon; and although this would by no means prevent a subsequent complaint for the same supposed or actual offence on which he might be arrested and held to bail, or committed for want of it, yet it should of itself, in the absence of any other cause for it, forbid the sending up of a bill of indictment unless he was a fugitive from justice, which it is not pretended the defendant was when this second complaint and warrant was made and issued against him. The supposed knowledge of the defendant's absence, or of his purpose to leave home for a brief period, when the last complaint was made, and the apparent haste in having the warrant returned and the bill sent to the grand jury, might possibly subject his accusers to a severe criticism for running in the matter at the time and in the manner they did, and as indicating motives more to gratify private ends and feeling than to promote public justice. The motives, however, if ever so impure, would not justify the court in quashing the indictment. With a jury they might have a very decided and controlling influence, but could not, or rather should not, if guilt was clearly established. All that we have to consider is, were the proceedings subsequent to the issuing of the second warrant legally right? In England the established course for centuries has been, when one is charged with a criminal offence, to have complaint thereof made before a magistrate, who issues his warrant, upon which the accused is brought before him for examination and hearing, and when this is through with he is then let go on bail or committed for want of it, or is discharged. If the latter, it is because the magistrate is satisfied of the absence of guilt, or it would be his duty to have the accused detained to answer the charge. Such has been the uniform practice in this commonwealth since its first organization as such; and what time and usage has thus matured should be regarded as a fundamental right, and not to be intruded upon except for palpable reasons.

Indeed the law is jealous for the reputation and protection of the citizen, and will not needlessly subject him to the severe ordeal of a judicial investigation for an alleged offence, on the first imputation of it, when a more mild, less exposed and expensive one will answer as well. If probable guilt is made apparent, the accused is made cognizant of it at the outset, and who his accuser is, and is thus enabled to prepare his defence in court. But of what use is this rule, and what protection can it afford to the citizen, if it may be disregarded at pleasure, or even under a semblance of conformity to it, while it is apparent that the design was to prevent a preliminary examination before the magistrate, the

informer gets before a grand jury, where, unknown to the accused, he secures the finding of a bill, and then for the first time has it in his power to have the defendant arrested? The discharge by the magistrate did not exonerate the defendant from a second arrest by the same or any other justice, but it would serve as an additional reason, if one was wanted, to protect him from liability to arrest on a bill of indictment found in court, without a previous hearing or an opportunity offered him to have one. Nor would it do for a court to be indifferent to the action of the magistrate in discharging the accused after a hearing was had of the complaint. It would be like ignoring a constitutionally appointed official, and in the very road to prevention of the most serious consequences. When it is made to appear that the ends of justice are best subserved by the sending of a bill to the grand jury without a preliminary complaint, arrest, &c., and the court is fully satisfied of this, directions to this effect may be given; but if it is done or attempted without such directions, it is not only without law but in violation of it, and must submit to its merited rebuke. The rule, however, is not without exception, particularly in those cases where the revenue laws or the general peace and order of society are innovated upon. Public necessity in such instances gives rein to a wholesome tolerance of these exceptions, because private prosecutors are not always and but seldom to be found to take the proper notice of them. In the present case there was nothing to bring it within the exceptions, but everything to show that the sending of the bill to the grand jury, and the action upon it it there received, were premature and illegal, and must therefore be quashed.

Indictment quashed.

GENERAL CORRESPONDENCE.

Municipal Law—Qualification—Township Councillor—Township Librarian.

To the Editors of the U. C. Law Journal.

Gentlemen,—I am, and have been, a member of the municipal council of this township for years. We take your excellent *Law Journal*, but from my distance from the post office and other causes, I see but too few of them, otherwise I might not have to trouble you for an answer to the following question.

On Monday two weeks I again intend to run for the office of councillor. I will be opposed by D. W., who has held the office of librarian for this ward. From the first of this year till yesterday two weeks past, the 29th ult., when he came to council and handed in his written resignation as librarian, preparatory to his running against me in this ward for the council. Can he legally run and if elected, will his election be good? A few words in answer to this in the *Law Journal* will ever be remembered with the most lively gratitude.

Yours, with profound respect,

William Skelton.

P. S.—At the time he resigned he named his own little daughter in his own house as his successor. His pay from the council as librarian is $5 per year.

W. S.

Township of Collingwood, Dec. 18, 1862.

[D. W. is in a position to run against you, provided his resignation of the office of librarian is a legal one; provided all accounts between him and the municipality be closed; and provided his property qualification be such as the law requires in the case of a township councillor.]—Eds. L. J.

MONTHLY REPERTORY.

CHANCERY.

V. C. K. Lee v. Page.

Partnership—Return of premium—Costs—Arbitration clause—Covenant not to sue.

Where there is a promise in partnership articles for a return of a part of the premium, and the parties dissolve by mutual consent and unconditionally, on bill filed subsequently, the Court will not order a return of any portion.

Misconduct, in the absence of an agreement to dissolve, is a ground for adverse dissolution and a return of the premium.

Where there is an unconditional dissolution by agreement, it is not competent by either party to enter into the question of previous conduct.

A mere delay in making out accounts not amounting to a refusal, does not make the party so delaying liable to the costs up to the hearing.

An agreement in partnership articles to submit disputes to arbitration is not an illegal withdrawal from the decision of the Court; but if a negative covenant not to sue is superadded upon such arbitration clause, such covenant is an illegal withdrawal.

V. C. K. Fleming v. Fleming.

Practice—Alteration of law since decree——Petition of rehearing.

Where, since the making of an order, the law has been altered on which the order was founded, the proper course is to present a petition of rehearing of the order to be heard with the cause.

V. C. S. Twynan v. Hudson.

Lien—Advance of part only of a sum agreed to be advanced.

M agreed to give H one-third of the profits of a contract, if H would assist him in performing it by advancing a certain sum. H failed to advance the stipulated amount, but gave bills, some only of which were satisfied by him.

Held, that H had a lien on the said profits for so much as he had actually paid.

M. R. Tildersley v. Clarkson.

Specific performance—Agreement for a lease—Newly erected house in town—Reasonable state of repair—Onerous covenant to maintain and repair.

A bill for the specific performance of an agreement to take a lease of a newly erected house in town was dismissed with costs, upon the ground that the plaintiff had not delivered up the house in a reasonable state of repair to the defendant, the incoming tenant, who was required by the terms of the agreement for the lease to enter into a covenant to maintain and deliver up the same in a proper state of repair.

In every case of such a description there is an implied contract on the part of the lessor to finish and deliver up the house to the incoming tenant in a complete tenantable state of repair, proper for a house of the character agreed to be demised.

V. C. K. Plowes v. Bossey.

Legitimacy—Access—Presumption of parentage—Lunacy.

Where a husband was confined in a lunatic asylum, the wife being resident 25 miles off, and there was a special interdiction on their being left alone together when she visited him; yet it appearing on the evidence that there was a possibility of sexual intercourse, a child which was born under these circumstances held legitimate.

The child of a married woman is presumed to be legitimate, and the evidence to repel such presumption must be clear and conclusive, the *onus probandi* being on the party alleging the illigitimacy. In considering an allegation of illigitimacy the court will look at

the balance of probability, even strong doubts not being sufficient to prove such illigitimacy.

Family likeness may be a special circumstance, but, ordinarily speaking, the least possible weight is given to it.

L. J. DOUGLASS v. CULVERWELL.

Mortgage—Conditional sale—Fraud or pressure—Undervalue.

Where a person in pecuniary difficulties executed a conveyance of land at an undervalue, under circumstances which tended to show a belief on his part that the transaction was intended to be a mortgage transaction and not an absolute sale—the same solicitor acting for both parties—the court set aside the instrument as an absolute sale.

M. R. BURRELL v. DELEVANTE.

Administration of assets—Suit by annuitant to have annuity secured—No arrears due—Costs.

In a suit to secure an annuity which was charged upon the whole of the testator's estate, but in such a manner that it was not incumbent on the testator to sell any part thereof to raise and pay the annuity, it appeared that, before suit, the representatives of the testator had made the plaintiff a beneficial offer to secure the annuity, which had been refused, also that the annuity had never been in arrear.

Held, that the plaintiff was entitled to a declaration that the annuity proved a charge on the estate; and that when any portion of such estate was sold, a sufficient portion was to be apportioned to secure the annuity, but that the plaintiff must pay the costs of the suit up to and including the hearing. Liberty to apply in case the annuity should fall in arrear.

V. C. K. DANIEL v. ANDERSON.

Injunction—Right of way—Common landlord.

Whatever right may be acquired or liability incurred by tenants *inter se*, that cannot confer such right, or liability on the common owner of both properties, inasmuch as a man cannot have a right or easement against himself; and, therefore, when the parties purchase of a common vendor, whatever rights or liabilities exist as between themselves, there are none with regard to him, and a purchaser can only purchase subject to the same rights and liabilities as his vendor has or is subject to.

V. C. W. WILDE v. WILDE.

Practice—Staying Proceedings—Costs.

A plaintiff who has obtained from the defendant all the objects of the suit pending the litigation, is entitled to move to stay all further proceedings, and to recover the costs of the suit from the defendant.

V. C. S. THE LEATHER CLOTH COMPANY v. BRESSEY.

Injunction — Lessee's covenant to insure — Exorbitant premium—Liability of sub-lessee—Unsupported allegation as to character—Costs.

A lessee covenanted to insure the demised premises in such office as his lessor should appoint. He sub-let the premises, and his sub-lessee covenanted to pay what he should pay for insurance. He insured the premises, at an exhorbitant premium, in an office not appointed by the lessors. The court granted an injunction to restrain him from proceeding with an action to recover the premium from the assignees of his sub-lessees.

The bill contained an allegation that the lessee was agent of the company in which he had insured the premises. This was proved to be incorrect, and the bill was amended by striking out the allegation. Plaintiffs were ordered to pay the costs consequent on the allegation.

V. C. K. FAULKNER v. LLEWELLIN.

Specific performance—Agreement for lease—Motion to pay rent into Court

F agrees with L to grant him a lease for 21 years of a certain house to be built, the term to be computed from the time when it shall be completed and fit for habitation. L takes possession before the house is furnished, and refusing to execute the lease or pay rent, F files a bill for specific performance and payment of the rent, and moves for the payment of a year's rent into court. Motion refused with costs.

V. C. W. RE THE PHŒNIX LIFE ASSURANCE SOCIETY, HOARE'S CASE.

Winding up—Contributory.

A, a shareholder in a joint stock company, gave notice to the directors of a trust deed, by which he had assigned his shares to B and C upon certain trusts.

B and C did not execute the deed of settlement, but their names were entered upon the share register as trustees, and from time to time they received in that capacity the dividends upon the shares, as trustees for the persons named in the deed of trust.

Held, that B and C were liable as contributories without qualification.

V. C. W. HOWITT v. HALL.

Copyright—Sale for limited period—Unsold stock.

Under a purchase by a publisher of the copyright of a work for four years, the expiration of the period does not determine his right to sell the remaining stock printed by him during the period.

V. C. W. DALTON v. HILL.

Will—Construction—Gift to grandchildren—Restrictive words enlarged by considering context and scope of will.

Gift by will to "all and every the child and children of the testator's daughter who should be living at the time of her decease" to be paid to and become vested in "such child or children" in the case of sons at twenty-one, and in the case of daughters at twenty-one or marriage; but if such times for payment should happen in the lifetime of the testator's daughter and her husband or the survivor, then after the decease of such survivor; but nevertheless the shares of "all and every such child or children" to be vested and transmissible on their attaining 21 or marriage, although such respective times should happen before the decease of the survivor of his said daughter and her husband.

Held, that a child who attained twenty-one and died in the lifetime of its mother took a vested interest.

COMMON LAW.

EX. MOSTYN v. COLES.

Negligence—Bailment—Damage—Evidence of—Verdict for—Nominal damages—New Trial.

In an action on a bailment for negligence, the evidence as to damage being slight or doubtful, a verdict for the Plaintiff for nominal damages will not be set aside as necessarily absurd, unreasonable, or inconsistent.

EX. C. AKINSON v. DENBY.

Illegal contract—Money paid under compulsion—Par delictum—Payment to induce creditor to enter into composition deed.

The plaintiff, being in insolvent circumstances, entered into a composition deed with his creditors. The defendant, one of his creditors refused to sign unless he were paid a sum of money. By a secret arrangement the plaintiff paid to the defendant £50 to induce him to sign the composition deed, which the defendant accordingly did.

Held, that the plaintiff was entitled to recover back the money in an action for money had and received.

EX. BOLCH v. SMITH.

Negligence—Right of Way—Nuisance.

The proprietor of a dangerous machine lawfully erecting it on and over which persons are allowed to pass is not liable for injury sustained by any one who, in so passing along near to it stumbles accidentally, and so falls against the machine in motion, it being visible and avoidable, although not so fenced as to prevent injury to any one striking against it.

REVIEW.

AN ENGLISH DICTIONARY OF ALL EXCEPT FAMILIAR WORDS, INCLUDING THE PRINCIPAL SCIENTIFIC AND TECHNICAL TERMS IN USE: compiled by JABEZ JENKINS. Published by J. B. Lippincott & Co., Philadelphia.

We seldom notice new books except written on some branch of the law or on kindred subjects, but an esteemed friend has called our attention to this work, which is a little gem in its way, and which the author has properly enough termed a "vest pocket lexicon." It is published at the small sum of 50 cents. It is "an English Dictionary of all *except familiar words*, including the principal scientific and technical terms" in use. By excluding all words the meaning of which is supposed to be known to every one who speaks the English language, the compiler has succeeded in producing a most diminutive volume, capable of being carried in the vest pocket, but still containing every word, technical, or scientific, or otherwise, which is in general use. In fact it omits only what everybody knows, and contains what everybody wants to know and cannot readily find.

THE UNITED STATES INSURANCE GAZETTE, New York. Notwithstanding the protracted war now being waged in the United States and consequent depression of business, the course of the United States *Insurance Gazette* appears to be steadily progressive. Its circulation is a wide one. It cannot be wider than we wish it. It abounds with information on the subject to which the Magazine relates (Insurance) of immense value.

THE LAW MAGAZINE AND LAW REVIEW for November, 1862 (London: Butterworth's, 7 Fleet-street), is received. The entertaining dissertation on the "Rights, Disabilities and Usages of the Ancient English Peasantry," is continued in this number. In addition there is in the number an article on the question of the hour—Prison Discipline. It is, however, more a historical resume of the question, than an argumentative dissertation either on one side or the other of it. The Extract from Lord Brougham's Letter to the Earl of Radnor is copied in this number of the *Law Journal*. It will be read with interest by the many admirers, both in the new and the old world, of the veteran law reformer. The remaining articles—such as "General Average," "Glasgow Murder," and "The Patent Law"—are all of interest, but we can do no more than mention them. We know of no periodical better deserving of the support of lawyers and legislators than the *Law Magazine and Law Review*. It is only £1 sterling per annum.

THE EDINBURGH REVIEW, for October (New York: Leonard Scott & Co.), is also received. Contents—"Solar Chemistry," "The Herculanean Papyri," "The Musselmans in Sicily," "The Supernatural," "The English in the Eastern Seas," "The Legend of St. Swithen," "Mrs. Oliphant's Life of Edward Irving," "The Mausoleum at Nalicarnassus," "Hops at home and abroad," "Prince Eugene of Savoy," "The American Revolution"—are of varied interest. The bare mention of the many and miscellaneous topics is sufficient for our purpose. That purpose is, to induce such men of education as have not already subscribed for the American reprints of the standard Reviews, to do so without delay. The annual subscription for any of the four Reviews is *only* $3. Blackwood and any one of the four Reviews may be had for $5; The four Reviews and Blackwood may be had for $10 per annum.

THE ECLECTIC MAGAZINE, for December (New York: W. H. Bidwell), is received. It is embellished with a fine portrait of the well known Bible commentator Albert Barnes, of Philadelphia. We observe that the present number closes the 57th volume of the *Eclectic;* and of them it is well said, they comprise an amount of literary treasure more choice, more varied and valuable, than can be found in any other series in the language. "Treatment of the Insane," in the present number, will be found a most useful paper at the present time. "The Theory of Cromwell's Life" will be read with interest, as having a tendency to throw additional light on the life and character of this remarkable man. We have not time to particularize the remaining articles, no less than eighteen in number.

The *Eclectic* is a magazine of some peculiarity. It is so named because it contains selections from the leading magazines of the world, such as the Edinburgh Review, the Quarterly, Blackwood, Fraser and the Dublin University Magazines. The price is moderate, considering the vast amount of reading matter that is furnished to subscribers. It is only necessary for the *Eclectic* to be known, to be appreciated.

APPOINTMENTS TO OFFICE, &c.

HEIR AND DEVISEE COMMISSIONERS.

The Hon. Sir JOHN BEVERLEY ROBINSON, Bart.; The Hon. ARCHIBALD McLEAN, The Hon PHILIP MICHAEL MATHEW SCOTT VANKOUGHNET; The Hon WILLIAM HENRY DRAPER, C.B.; The Hon JAMES CHRISTIE PALMER ESTEN; The Hon. ROBERT EASTON BURNS; The Hon JOHN GODFREY SPRAGGE, The Hon. WILLIAM BUELL RICHARDS; The Hon. JOHN HAWKINS HAGARTY, and The Hon JOSEPH CURRAN MORRISON, to be Commissioners under the provisions of chap. 80 of the Con Stat. of Upper Canada, intituled An Act respecting claims to lands in Upper Canada for which no patents have issued.—(Gazetted. December 20, 1862.)

COUNTY JUDGES.

ROBERT LYON, of the City of Ottawa, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Carleton —(Gazetted, Dec. 20, 1862.)

NOTARIES PUBLIC.

EDWARD HEATHCOTE, of Campbellford, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, December 6, 1862.)

FREDERICK PROUDFOOT, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, December 13, 1862.)

THOMAS HOLDEN, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Publi in Upper Canada —(Gazetted, December 13, 1862.)

CHARLES GAMON, of Collingwood, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, December 13, 1862.)

DEPUTY CLERKS OF THE CROWN.

PIERRE HECTOR MORIN, Deputy Clerk of the Crown and Pleas in and for the County of Essex, discharged from office —(Gazetted, December 6, 1862.)

CLERKS OF COUNTY COURTS

RODERICK McDONALD, of the Town of Cornwall, Esquire, to be Clerk of the County Court of the United Counties of Stormont, Dundas and Glengarry, in the room and stead of Robertson McDonell, Esquire, deceased —(Gazetted, December 6, 1862.)

CORONERS.

EDWARD McKENZIE, Esquire, M.D., to be an Associate Coroner for the United Counties of Lanark and Renfrew.—(Gazetted, December 6, 1862.)

GEORGE H CORBETT, Esquire, M.D., to be an Associate Coroner for the County of Simcoe —(Gazetted, December 6, 1862.)

JAMES G FREEL, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel.—(Gazetted, December 13, 1862.)

JAMES G FRELL, Esquire, M.D., to be an Associate Coroner for the County of Ontario —(Gazetted. December 13, 1862.)

TO CORRESPONDENTS.

"MANVERS"—Under "Division Courts."

"WILLIAM SEFTON"—Under "General Correspondence."