THE

Local Courts' & Municipal Gazette.

VOLUME I.

FROM JANUARY TO DECEMBER, 1865.

EDITED BY

W. D. ARDAGH, ESQ., ROBT. A. HARRISON, ESQ., B.C.L., & HENRY O'BRIEN, ESQ.,

BARRISTERS-AT-LAW.

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OF THE

CASES REPORTED IN THIS VOLUME.

DIARY FOR JANUARY.

1. SUN... *Circumcision.* Taxes computed from this day.
2. Mon... Heir and devisee Sitt. com. County Court and Surrogate Ct. Term begins. Munic. Elections.
3. Thur... York and Peel Winter Assizes commence.
6. Frid.... *Epiphany.*
7. Sat.... County Court and Surrogate Court Term ends.
8. SUN... *1st Sunday after Epiphany.*
9. Mon... Election of Police Trustees in Police Villages.
11. Wed.... Election of School Trustees.
14. Sat. ... Tr. & Cha. of Muns. to make ret. to Br. of Audit.
15. SUN... *2nd Sunday after Epiphany.*
16. Mon... Members of M. C. (except Co's) and Tr. of P. V. to hold first meeting.
17. Tues... Heir and Devisee Sittings end.
21. Sat. ... Articles, &c, to be left with Secretary of Law. S.
22. SUN... *3rd Sunday after Epiphany.*
24. Tues... Members of County Council to hold 1st meeting.
25. Wed... *Conversion of St. Paul.*
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31. Tues... Last day for Cities and Counties to make returns to Government. Gram. School Trust. to retire.

The Local Courts'
AND
MUNICIPAL GAZETTE.

JANUARY, 1865.

TO OUR READERS.

Ten years ago the first number of the *Upper Canada Law Journal, and Municipal and Local Courts' Gazette* was published. With this number will commence the eleventh year of a publication for which even our best friends anticipated but a short life.

The result has assured us that the undertaking was based on a proper foundation. Commenced with many interests in view, and embracing subjects of value and interest to various classes, the conductors from the first hoped to make the *Law Journal* "generally useful, as well to the profession as to county officers, officers of division courts, magistrates, coroners, and municipal functionaries;" indeed it was only by such a combination that a sufficient support could have been obtained to meet the expenses of a law periodical.

At first a very large measure of support came from county and division court officers; latterly this somewhat changed, and now professional men and county and division court officers stand nearly on a par as to numbers in the subscription list. We have continued to enlarge and improve upon the original design, but with little return beyond the current expenses and abundant and flattering testimony to the value of the publication.

It has been represented to us that if the subscription were reduced one-third, the circulation would at once be doubled; but, according to the present arrangements, this would not be possible without a positive loss. We have also been made aware that clerks and bailiffs of division courts, and suitors in the remote divisions, and also magistrates and municipal officers, object to pay four dollars a-year for a publication in which so much matter for the lawyers appears, the same being of little value to them; and, on the other hand, professional men say that they are made to pay for matter devoted to the information of division court and other officers magistrates, &c., and which they care little or nothing about. And some again contrast the price of the *Law Journal* with the newspapers; but such a comparison is most unfair as the subscription lists of the leading journals are forty or fifty times larger than ours—and this must always be the case. With a publication confined to a particular subject, and limited to a few classes, the circulation *must* be limited. After the first thousand, the expense of printing is little beyond the cost of the paper, and herein lies the ability of journals with a large circulation to sell at a low rate.

In order to meet the views and wishes of all our supporters the conductors have decided on publishing separately *The Upper Canada Law Journal* and *The Local Courts' and Municipal Gazette* at greatly reduced prices: the former to contain the matter intended more particularly for the profession, the latter to include subjects of special importance to county and division court officers and suitors, magistrates, municipal officers, &c. In this we follow a similar plan acted on in respect to the English *Law Times* and *County Courts' Chronicle*, both which periodicals are published at the same office, a portion of the matter appearing in both.

Under the new arrangement, it is not proposed to curtail the amount of matter usually given to the profession in the *Law Journal*, whilst the matter for the other classes of our readers will be increased. The cash subscription to the *Law Journal* will be reduced to $3 yearly, and the cash subscription to the *Local Courts' Gazette* will be $2; and as a portion of the matter suited to both publications may be transferred from the former to the latter, to persons taking both publications the charge will be $4 yearly. If not paid within one month, the charge will be —for the *Law Journal*, $4; for the *Local Courts' & Municipal Gazette*, $3; for both, $5.

Both publications will be sent to our present subscribers, unless, immediately after receiving the first number of each, they express a desire to subscribe for the *Law Journal* or the *Local Courts' Gazette* only, in whch case such persons are requested to return the other publication to the publishers.

Our early friends must see in this new arrangement proof of our appreciation of the support received, and a desire on the part of the conductors to bring their publications within the reach of all.

The judges of the county courts, county officials and division court officers, could with a very little effort double the number of our subscribers for the *Local Courts' Gazette*, and the *Law Journal* will now be at so low a price that not only every practitioner, but every law student should give us their support. Unless great additions be made to the subscription list, we shall sustain a loss in publishing, and the business of this year must determine whether or not it will pay to continue both publications.

Very complete arrangements have been made to carry out satisfactorily the new arrangements, and the Editors have pleasure in stating that Henry O'Brien, Esquire, one of the editors of Harrison and O'Brien's Digest, and at present engaged in a work on the Division Courts, and who has for some time past been assisting, is now joined with the present Editors.

The circular letter copied above, which was sent to most of our friends, will sufficiently explain the appearance of this the first number of the *Local Courts' and Municipal Gazette* for Upper Canada as a separate publication. Published for ten years in connection with and under the shadow as it were of the *Law Journal*, the *Local Courts' and Municipal Gazette* now appeals for support mainly to those at whose instance it was first originated, and whose interests it is now more than ever in a position specially to serve.

The class of persons for whom this publication is more particularly designed are numerous enough to give exclusive support to an organ of their own. Not to speak of magistrates and county and municipal officers, there are about 500 officers connected with the Division Courts, each and all of whom may well be expected to subscribe and to interest themselves for the publication. What we have done in the past will be a sufficient guarantee that, with more available space, the information and assistance of Magistrates, Division Court, Municipal and School officers, and of business men, will be fully and faithfully attended to.

The present plan of the *Local Courts' Gazette* is specially framed to suit these classes, and to present to them in brief form and plain language whatever information we may be able to gather with special reference to their powers, duties and employments; and the arrangement of the present number will serve to illustrate the design We direct particular attention to the title in another column—"Magistrates, Municipal and Common School Law," and "Simple Contracts and Affairs of Every Day Life."

Under the new arrangements, the cases having special reference to County and Division Courts will as a general rule be published in the *Local Courts' Gazette* at length, and noticed editorially. No standing heading therefore will be found for notes of cases relating to them, as they will appear amongst the reports on the later pages. Attention will however be directed to such notes of cases under the heads referred to, as may appear to have a bearing on the business of the Division Courts or the duties of officers connected with them.

Our readers must be aware that to make the *Local Courts' Gazette* a separate publication on its present plan involves great additional labor and expense, yet we put the cash price at $2, hoping that a large subscription list will afford a suitable return, and we expect that all who approve of it will exert themselves to procure subscribers.

It was found necessary in the *Law Journal and Local Courts' Gazette* to publish matter suited to the various classes that supported the joint publication. Now that they are severed, and each contain its own special matter, it remains to be seen whether the classes to whom its journal is specially devoted are able to support an organ of their own. However we are hopeful on this head, for well-informed friends assure us of success, and Magistrates, Division Court, Municipal and School officers, and country merchants form a very large and influential part of our community.

The *Local Courts' Gazette* will be issued during the first week of each month. This and the next number will be necessarily somewhat delayed by the alterations that have been made.

INTERPLEADERS IN DIVISION COURTS.

Interpleader issues have been, and seem likely to continue to be, sources of perplexity to practitioners and trouble to suitors; but at the same time, proceedings of this sort are doubtless of great practical benefit to such persons as are unfortunate enough either to be execution creditors, execution debtors, or claimants. This perplexity is perhaps partly owing to a very general false impression as to the precise legal nature of interpleader proceedings. Speaking on this subject a learned judge says, "In effect, the feigned issue (between the claimant and the execution creditor) and judgment thereon is no more than an interlocutory proceeding in another suit, in the nature of an interlocutory judgment, wherein the court are subsequently to act in disposing of the rights of parties." Another judge says, "It is like an interlocutory proceeding *in another action.* * * It is not strictly a suit in the eye of the law." (See *Salter* v. *McLeod*, 10 U. C. L. J. 299.) These remarks should be borne in mind in considering the subject.

Our readers will find in another column the report of a case on this subject (*Munsie* v. *McKinley et al*) of considerable importance to those connected with Division Courts.

The first point there decided is that a judge of a Division Court may, notwithstanding the provision in the statute depriving those Courts of jurisdiction where the right or title to lands comes in question, try an interpleader issue as to goods, even though the enquiry may involve the question of title to land.

The other part of the case, to which we desire at present particularly to draw attention, is with reference to the intervention of a jury in interpleader cases.

A jury had been summoned at the instance of the plaintiff, which was objected to by the defendant, on the ground that there was no provision in the act for juries on the trial of such issues. The judge overruled the objection, and the defendant then brought up the question before the Court of Common Pleas.

Section 119 of the Division Court Act permits either party to have a jury in actions of tort when the amount sought to be recovered exceeds ten dollars, and in all other actions when such amount exceeds twenty dollars. The next section points out the course to be adopted by the parties requiring a jury. Section 175 says that the judge shall adjudicate upon the claim, and make such order, &c., as to him seems fit. The wording of these sections seems to preclude the idea that a jury can be had in interpleader issues as in ordinary cases, on the application of either party. Such is the opinion we have before expressed, and agreeable to this was the decision in the case before us.

In giving judgment on this point, the learned judge said—"In regard to the question as to whether the judge alone is to adjudicate upon the claim in interpleader, or may summon a jury, or whether either party may require a jury, we think the directions of the statute are plain: 'The *County Judge* having jurisdiction in such Division Court *shall adjudicate* upon the claim.'"

It has been considered, however, by several of the most able of our county judges, that they could, under section 132, order a jury to be empannelled, to *assist* them as it were in coming to a conclusion upon "any fact controverted in the cause" before them; and this course has often been taken, and with much advantage, for there is no class of cases in which the assistance of a jury would occasionally be more welcome to a judge than in interpleader issues.

We must not, however, hastily conclude from this decision that section 132 (which does not appear to have been referred to by counsel or by the Court) is inoperative in cases of this nature, but we desire to draw the attention of our readers to the decision, and we may have occasion to refer to it again.

SUNDAY TRAVELLERS.

The subject of the sale of intoxicating liquors to travellers on Sundays, and who are *bona fide* travellers, has lately come up for discussion both here and in England.

Section 254 of our Municipal Act prohibits the sale or disposal of intoxicating liquors to any person whomsoever, from or after the hour of seven o'clock on Saturday night till eight o'clock on the morning of the following Monday, and during any further time on the said days and any hours on any other days during which by any municipal by-law all places for the sale of intoxicating liquors, or the bar-room thereof, ought to be kept closed, *save and except to travellers lodging at*, or ordinary boarders lodging at, such places; except for

medicinal purposes, &c. The words of the corresponding English acts are various, viz.: "except as refreshment for travellers;" "except as refreshment to a *bona fide* traveller or a lodger therein;" and, in the last act, "except to a traveller or lodger therein." But it is apprehended that these expressions are all substantially the same.

It may here be remarked that, in our act, the words "*lodging at*" are used in addition to the word "travellers," and it might perhaps be argued that these words imply something more than the simple word "travellers," and that their introduction was intentional, and that they must be interpreted to mean travellers having a temporary habitation or hired room or resting place for the night. But without expressing any opinion on this point, or as to how these words may be affected by the context, "or ordinary boarder lodging at such place," we will now proceed to notice the decisions alluded to.

In the first place, section 282 of the Municipal Institutions Act empowers municipal councils to make by-laws for the preservation of public morals, and particularly alludes, amongst other things, to enforcing the due observance of the Sabbath and the suppression of tippling houses, &c. This power, however, is subject to the provisions of section 254, already referred to, and, as might have been expected, a by-law forbidding the sale of intoxicating liquors *to any one* was adjudged to be bad (*In re Ross* v. *Mun. of York and Peel*, noted in another column.)

The most recent case in England on the question as to who are "travellers" is *Taylor*, appellant v. *Humphries*, respondent, 13 W. R. 136. The facts were these:—The appellant kept a public-house at a village about two miles from Birmingham. One Sunday morning, a police constable, on passing the house, found the door closed, but not fastened. He entered and saw some thirty men and women, in different rooms—some had ale and bread and cheese before them, and some of the men were smoking. The bar-maid said that they were all strangers, and on being asked if they were "travellers," the appellant said they were. The appellant was summoned before the local magistrates, under the act, when it was proved by two of the customers on the occasion that they resided in Birmingham, and that they had walked through lanes and fields seven or eight miles before reaching this public-house, where they had ale and bread and cheese, and that they did not leave home with the intention of stopping at the house, and that before being served they were asked if they were travellers, and they said they were. The magistrates convicted the appellant, but an appeal from this conviction was sustained; Erle, C. J., in giving judgment, saying that "the word 'traveller' ought to be considered to include all those who fare abroad, either from a desire to enjoy country sights and sounds, or from any other motive, either of business or pleasure; but that it should not include a person coming abroad merely because he desired to go to a public-house to obtain drink; and that any supply of refreshment needed by reason of such faring abroad ought to be construed to be refreshment to a traveller; and that the burthen of proving that there had been a breach of the prohibition in the statute is cast on the informer, and that if the publican believed, and had reason to believe, when he supplied drink, that he was supplying refreshment to to a traveller, he ought not to be convicted. The circumstances under which the guest was admitted and supplied, would be matter for consideration in deciding whether the publican had reason to believe, and did believe, that he was a traveller within the description, either when he admitted him, or when he afterwards supplied him, such as whether he was a stranger or neighbour; whether he delayed longer or took more than was consistent with the need of refreshment. The distance also would be relevant, but no rule can be laid down for a definite distance, as that which may be short for the vigorous may be long for the weakly."

It has also lately been decided in England, under the same act, that a person who has taken a ticket and is about to start in a railway train is a "traveller" within the act: (*Fisher* v. *Howard*, 13 W. R. 145.)

From these and similar decisions, it is clear it makes no material difference under the act whether the person supplied is a traveller on business or on pleasure. Some such rule, moreover, as that laid down in the case from which we quote is absolutely necessary for the protection of tavern-keepers. All they can do is to ask their customers the question whether they are travellers; the latter need not submit to a cross examination; and a tavern-keeper refusing to entertain travellers, does so at his peril.

In a country like this there are few large cities, and none to be compared in size or density to cities in the old country, and a few minutes walk would bring a person into the fields from any of them, and a few minutes more bring him back again; and though this may not in the slightest degree affect the principles of the decisions referred to, it would nevertheless be well in any case in which the facts were at all similar to those in *Taylor* v. *Humphries*, for those concerned to keep in view the different positions of the countries, as one of the "circumstances under which a guest is admitted and supplied."

A WORD TO MAGISTRATES.

The case of *Connors* v. *Darling* (reported in Volume X. of the *U. C. Law Journal*, page 291), ought to serve as a warning to magistrates. There was no imputation of bad faith or improper motive to the defendant, who was a magistrate, but the plaintiff nevertheless suffered by reason of an illegal imprisonment on his warrant, and it is probable the defendant will not get out of the difficulty under three hundred dollars for damages and costs.

Our readers will remember the facts of the case: the defendant was charged with larceny and brought up on a warrant before the magistrate. He did not offer bail or ask for an examination, and the magistrate, under a mistaken notion of duty, at once made out a warrant of commitment for trial, instead of bringing the accuser and accused face to face and taking the evidence of witnesses in the manner pointed out by the statute regulating the duties of magistrates out of session: (Con. Stat. Can., cap. 30.)

It was urged for the magistrate that he had some jurisdiction, and was consequently within the protection given by the act for the protection of magistrates (Con. Stat. U. C., cap. 126), and the judge of the County Court in which the action was brought felt naturally embarrassed in this very peculiar case, and in a very carefully considered judgment, at last, and with much hesitation, decided in favor of the magistrate; but the Court above, whilst willing to see every reasonable protection given to magistrates, thought that the law would be in a singularly unsatisfactory state if there could be no redress for such an injury committed in clear violation of the precise words of the statute, although without any improper motive in the person committing the injury.

Magistrates have by some means got the notion that the statute just mentioned enables them to do anything with impunity, if only they act with honest intentions. Never was there a greater or more dangerous mistake. The statute, no doubt, like charity, covers a multitude of sins, and really leaves many grievous wrongs committed by magistrates in the exercise of their great powers wholly without redress. But when a magistrate has no jurisdiction, or acts as in the case of *Connors* v. *Darling*, he must abide the consequence, for, as suggested by the learned judge (Hagarty, J.) who delivered the judgment of the Court of Queen's Bench, injuries to liberty and property committed from mere ignorance may be as damaging in their results as if committed from vindictive or malicious motives.

This case, will, we hope, make magistrates careful on their own account, when acting *under any statute*, to have the law before them, and to follow its directions closely; and above all to remember that the law strives anxiously to guard against illegal imprisonment, except on a clearly defined charge made out by witnesses brought face to face with the accused, and that juries may properly give liberal damages for an illegal imprisonment.

COUNTY ATTORNEYS AND DIVISION COURT CLERKS.

We are informed from several quarters that the County Attorneys in Upper Canada have come to an understanding to make no allowance whatever to Division Court clerks purchasing stamps in quantities. We hope that this is not the case, for we think it would be exceedingly unfair, and we fail to see upon what ground it can be defended. By Con. Stat. U. C., cap. 20, County Attornies were allowed four per cent. on fee fund moneys passing through their hands. For this they had to see that all Division Court clerks duly accounted, and to report them if default made; to examine a number of accounts each quarter; to render accounts to the Minister of Finance, with such particulars as he might require; to pay the salaries and disbursements authorised; to report on any deficiency and obtain the Governor's warrant to make it good. Now they have simply to send their

orders for stamps, and to hand them over as required and paid for, to clerks. The work to be done now certainly seems to us not one half what it was before, and yet there is one per cent. increase in their allowance. "But," say the County Attorneys, "we have to lie out of the money paid for stamps some time, and the per centage is little enough." Well, so have clerks of courts, and for a much longer time, for they must have on hand a stock of stamps sufficient to keep the business of the courts going on, and generally have to wait for the cost of stamps till judgment in a case is obtained. Now if we are rightly informed, County Attorneys are allowed a standing credit with the Government of from $300 to $500, but they will not give clerks credit nor allow them any percentage on the purchase of stamps in quantities. It will be wise for County Attorneys to reconsider their decision, if indeed it be correct that they have determined to act as stated, for the clerks are a large and influential body of men, and their clamor for justice will not be lightly esteemed. There is a certain story about a goose that laid golden eggs, and—*verbum sap.* However, we would be much pleased to see a proper understanding on the point between these officers, and at present do not desire to say anything more. County Attorneys are certainly not, we know, properly paid for their services generally; but in this particular matter justice calls for a fair allowance to Division Court clerks, who are the worst paid officials in the country.

SELECTIONS.

A MAGISTERIAL FOOTPAD.

A Continental paper relates the following curious incident: — One night last week, M. M ——, a magistrate, when returning home through a dark and narrow street, came into violent contact with a passenger, who instantly made off with all speed. The judge immediately felt for his watch, and finding that it was not in his pocket, ran after the supposed robber and demanded its restitution. The man hesitated a moment, but at last handed him a watch. On arriving at home M. M——was astonished to see his own watch on a table. The next morning he went to the police office, related his adventure, and gave up the watch which he had so strangely obtained on the previous evening. The officer on duty then informed the magistrate that a person had just called to complain that he had been robbed of his watch in the street mentioned, and the fact was at once ascertained that both the magistrate and the complainant had mistaken each other for robbers.—*Law Times.*

ODDS AND ENDS.—OLD LAW REPORTS.

Usley's case records an interesting fact in the history of—turkeys. Thus it runs:

"Trespass. Plaintiff declares that the defendant did break his close, and eat his grass, &c., *cum averiis suis, scilicet*, oxen, sheep, hogs, *avibus*, that is to say, turkeys.' And the Judge in this case did not hold that turkeys are not comprised within the general word *averia*, which is an old law word, and these fowls came but lately into England. And upon this it was directed to cover the damages, for otherwise, if the damages shall be jointly given, and it be ill for this, because of the turkeys, for the reason above said, it will overthrow all the verdict."—*Clayton's Reports.*

THE LAW & PRACTICE OF THE DIVISION COURTS.

(*Continued from page* 318, *Vol.* X., *U. C. L. J.**)

The requirements of the rule of practice in the Superior Courts as to the plea of "General issue by Statute," are not in terms incorporated with the procedure of the Division Courts, though section sixty-nine of the act ought to be adopted and applied in all such cases. The defendant in a Division Court, desiring to avail himself of a defence under a statute, must give a notice in writing six days before the trial (sec. 93,) and the general form (No. 9,) of "Notice of defence under Statute," evidently contemplates a description of the particular statute under which the defence is offered.

The principles of practice in the Superior Courts, applicable to actions in the Division Courts, would therefore demand that in pleading the general issue, or not guilty by statute, the year of the reign in which the act of parliament was passed, as well as the chapter and section of the act upon which the defendant relies, should be embodied in the notice or stated in the margin before the defendant could be allowed to avail himself of the privilege of giving *any* special matter in evidence in actions for *things done* under the Division Courts Act.

The words in section 194 are very general; the defendant "may give *any* special matter in evidence," under the plea of "not guilty by statute." When properly pleaded therefore, it lets in, not only defences peculiar to the

* By an error of the press on this page "126, sec. 13," is put for "126, sec. 11."

statute under which it is pleaded, but also those which are available at common law. (*Ross* v. *Clifton*, 11 A. & E. 631; *Williams* v. *Jones*, 11 A. & E. 645; *Eagleton* v. *Gutteridge*, 11 M. & W. 465.)

Large powers to adjourn the hearing, to permit either party in a Division Court suit to serve any notice necessary to enable him to enter more fully on his defence, are given by section 86, and there may be cases when it would be proper to enable a defendant, who had omitted to do so, to give notice of (or plead) the general issue under section 194, but in such case, and as one of the terms, the judge ought to require the defendant to state specifically the special matter or matters he purposes giving in evidence.

The privilege of giving any special matter in evidence, under the general issue, has been strongly impugned as a violation of the first principles of justice, and the expediency of granting it, to paid officers at least, admits of much question. When, therefore, a matter comes as an appeal to the judge's discretion, he ought to take care that the plaintiff has full knowledge of the particular defence that is to be set up against his claim, when it comes on to be tried.

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

[Under this head will be placed notes giving in substance new decisions relating to the law as it affects Justices of the Peace, Coroners, County, Town and Township Municipalities, School Trustees, Municipal Officers and Constables, with occasional reference to established cases of general importance, and which may be called leading cases on the branch of the law to which they refer.]

VAGRANT ACT—GAMING.—The English act on this subject designates as a rogue and vagabond a person "who plays or bets in any street, road or highway, or other open or public place, at or with any table or instrument of gaming at any game or pretended game of chance." The current coin of the realm was held not to be "an instrument of gaming" within the statute, and therefore that "pitch and toss" was not gaming: (*Watson* v. *Martin*, 11 L. T. Rep. N.S. 372.)

DEMANDING MONEY BY THREATS.—A policeman, late at night, met prosecutor, who had just parted from a prostitute, and told him that he must go with him to jail, for he was under a penalty of £1 for talking to a prostitute in the street; but if he would give him 5s. he might go about his business. The prosecutor gave him 4s. 6d., but whilst he was searching for the other 6d, the inspector came. It was held to be no answer to the charge, that all the money had not been obtained. The offence was a larceny; and also that it was a menace within the meaning of the act: (*Reg.* v. *Robertson*, 11 L. T. Rep. N.S. 387.)

SALE OF INTOXICATING LIQUORS — BY-LAW.—A by-law prohibiting the sale of intoxicating liquors on Sunday to all persons, without excepting travellers and boarders, is invalid. But a by-law prohibiting the sale of intoxicating liquors to idiots and insane persons is good: (*In re Ross* v. *Mun. of York and Peel*, 14 U. C. C. P. 171.)

MUNICIPAL LAW—CONTRACT—"ORDINARY EXPENDITURE."—The plaintiff entered into a contract under seal with a city corporation to construct a main drain and macadamise a street. Having done the work he sued for it. There was no by-law authorising the contract. *Held*, that this was not a matter of "ordinary expenditure," and that the plaintiff could not recover; and also that the fact of the plaintiff being allowed to go on without any intimation that no by-law was passed could make no difference: (*Cross* v. *Corporation of Ottawa*, 23 U. C. Q. B. 288.)

COMMON SCHOOLS—MANDAMUS TO LEVY RATE—ESTIMATE.—The school trustees of a town passed a resolution to apply to the corporation "for an appropriation of $3000 for the erection of school premises at, &c." This resolution was laid before the corporation, and a by-law was passed accordingly. This by-law was subsequently repealed on being found to be defective. This resolution of the trustees was not considered by the court a sufficient *estimate;* that preparing an estimate meant something more than resolving to make a application for a large sum of money for erecting school premises; and that there should be something to shew that proper enquiries and calculations had been made, and that the sum asked for was necessary and sufficient for the purpose required. But it was held that the objections to the estimate were cured by the corporation having passed a by-law in pursuance of it. As the by-law was invalid, and the estimate insufficient, the court would not grant a mandamus to enforce either

the one or the other: (*In re School Trustees and Corporation of Sandwich*, 24 U. C. Q. B. 639.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

[The notes of cases under this division will relate chiefly to mercantile law, contracts of the ordinary kind in the general business of the country, and to questions of a general character (whether arising upon a contract, or upon a wrong committed), which are constantly presenting themselves in the contact of every day life. This head will be found interesting and valuable to all, but especially to business men.]

ACCIDENT — COMPENSATION FOR. — A custom house officer was in the docks in discharge of his duty, when, in passing a warehouse, a bag of sugar which was being lowered fell and injured him, but there was no evidence to show how the accident happened. It was held by the Court that the accident was in itself sufficient *primâ facie* evidence of negligence to throw on the defendant the burden of proof that it did not arise from negligence: (*Scott* v. *London Dock Company*, 11 L. T. Rep. N.S. 383.)

WARRANTY OF A HORSE.—A. sold a horse to B. Before the sale, A. had pointed out to B. a splint on the horse. Afterwards, he gave a written warranty that the horse was sound. The horse subsequently fell lame from the splint. The Court held that A. was liable on his warranty, notwithstanding his communication to B. before the sale: (*Smith* v. *O'Bryan*, 11 L. T. Rep. N.S. 346.)

CONTRACT—WARRANTY.—B. having inspected at E.'s warehouse some soap frames, not put together, subsequently ordered them by a letter, thus, "Sir,—Please send to the above address the six new iron frames which were seen yesterday, on the following conditions, viz, they are to be warranted new frames, with all nuts and bolts complete, and to be delivered, &c." They were sent with this invoice, "Received six new iron soap frames, with nuts and bolts complete and perfect." When put together they were found to leak, and to be useless for the purpose of making soap. In an action on the alleged warranty, it was held, that the frames were to be fit and proper for the purpose of soap making, and that the facts proved a warranty to that effect: (*Mallam* v. *Radleff*, 11 L. T. Rep. N.S. 381. C.P.)

INFANT—NECESSARIES.—The plaintiff, a tailor, sued defendant, a young man under age, for a bill, including hunting coat and cap, racing jacket and breeches, &c., supplied to him. The question left to the jury was whether the articles were necessaries, and they found for the plaintiff. A new trial was applied for, and on the argument it was contended on behalf of the plaintiff that as defendant was wealthy and had been sent to a farmer to learn agriculture, hunting was a natural and legitimate recreation for him, and that the equipments for hunting were similar to *pads* now used in playing cricket, an amusement allowed by every body as proper for young men. The Court, however, did not see it in that light, and said that unless plaintiff would consent to reduce his verdict by the price of the articles, a new trial would be granted: (*Foster* v. *Gammon*, 9 S. J. 102.)

STEAMBOAT OWNERS — PASSENGER.—A steamboat owner who departs from the ordinary and proper method of landing passengers, is responsible for the increased danger of the method he adopts: (*Cameron* v. *Milloy*, 14 U. C. C. P. 340.)

UPPER CANADA REPORTS.

COMMON PLEAS.

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

MUNSIE v. MCKINLEY ET AL.

Division court—Jurisdiction—Interpleader—Title to land—Jury—Prohibition.

The judge of a division court may, notwithstanding Con Stats. U. C. ch. 19, sec. 54, subsec. 4, entertain an *interpleader* application to try the question of property in goods, even though the enquiry may involve the title to land. The judge himself must decide such application without the aid of a jury.

[C. P., M. T., 1864.]

In Trinity Term last, *O'Connor* had obtained a rule, calling upon the plaintiff and John Boyd, Esquire, junior judge of the county court of the united counties of York and Peel, to shew cause why a writ of prohibition should not issue to prohibit the said John Boyd, or other person authorized to hold the Sixth Division Court of the said united counties, from proceeding to try and determine, or from further proceeding in a certain interpleader summons issued out of the last mentioned court, whereby one Francis McKinley and the said William Munsie were called before the said division court, in order that the claim of the said Francis McKinley to certain property seized by one of the bailiffs of the said division court, under process issued by the said William Munsie, out of the said division court, against the goods of William McKinley and Sidney McKinley, might be adjudicated upon, upon the ground that the title to corporeal hereditaments came in question, and the said court had no jurisdiction; and why the sum of £20 18s. 2d., which the said Francis McKinley

had paid into the said division court should not be refunded to him.

The affidavits shewed that the property in dispute was the crops growing on the east half of lot number three, in the tenth concession of the township of King, which one Pottage, the bailiff, had seized in the month of June last, as the property of William McKinley and Sidney McKinley; that William McKinley had conveyed the said land to Francis McKinley for a good and valuable consideration; and that the crops belonged to the said Francis McKinley, who had been in the continuous possession of the land from the date of the conveyance; that after the seizure Francis McKinley gave notice of his claim to the bailiff, who, thereupon, caused an interpleader summons to issue, calling upon Francis McKinley to appear, and prove and sustain his right to the said property; that on the first day of July last he did appear before the said John Boyd, Esquire, the said judge, and, by Mr. O'Brien, who acted for him, objected to the jurisdiction of the court, on the ground that the title to land came in question; that a jury which had been summoned at the instance of William Munsie was also objected to, on the ground that there was no provision of law for juries on such issues; that Mr. Boyd overruled these objections, and the case went to the jury, who found for Munsie; that afterwards a new trial was granted, on condition that the debt and costs should be paid into court, which was done.

During the present term, *Bull*, for Munsie and Boyd, shewed cause. He filed affidavits denying that the jurisdiction had been questioned, and cited, *Denton* v. *Marshall*, 7 L. T. N. S. 689; *Walsh* v. *Ionides*, 22 L. J. Q. B. 137; *The Queen* v. *Doty*, 13 U. C. Q. B 398; *Richards* v. *Maidenhead Local Board of Health*, 27 L. J. Mag. Ca. 73; *Joseph* v. *Henry*, 19 L. J. Q B. 369.

O'Connor supported the rule, and contended that in order to sustain his claim, Munsie attacked the conveyance to Francis McKinley, so as to show that the title to the land on which the crops were growing was still in William McKinley, and thus brought the title to the land in question; and that instead of deciding himself on the interpleader matter, the judge had summoned and sworn a jury, for which he had no authority. He cited *Marsden* v. *Wardle*, 3 Ell. & Bl. 695; *Thompson* v. *Ingham*, 14 Q B. 710; *Kerken* v. *Kerken*, 3 E. & B. 399; Con. Stats. U. C. ch. 19, sec. 54, subsec 4, sec. 55, subsec 2, secs. 61, 175.

Hector Cameron (*amicus curiæ*), cited *Trainor* v. *Holcomb*, 7 U. C. Q B. 548.

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

The 4th subsection of section 54 of the "Act respecting the Division Courts" provides, that these courts shall not have jurisdiction in actions in which the right or title to any corporeal or incorporeal hereditaments comes in question. But the 175th section provides, that "in case a claim be made to or in respect of any goods or chattels, property or security, taken in execution, or attached under the process of any division court, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process issued, then, subject to the provisions of the 'Act respecting Absconding Debtors,' the clerk of the court, upon application of the officer charged with the execution of such process, may, whether before or after the action has been brought against such officer, issue a summons calling before the court out of which such process issued, or before the court holden for the division in which the seizure under such process was made, as well the party who issued such process, as the party making such claim; and the county judge, having jurisdiction in such division court, shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceeding, as to him seems fit; and such order shall be enforced in like manner as an order made in any suit brought in such division court, and shall be final and conclusive between the parties."

In this clause is embodied this important provision, "that thereupon" (that is, upon the bringing of the party who issued the execution and the party claiming the goods before the court), "any action which has been brought in any of Her Majesty's superior courts of record, or in any local or inferior court, in respect of such claim, shall be stayed; and the court in which such action may be brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels or property or security were so taken in execution, or upon attachment, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issuing of such summons out of the division court."

By the statute the jurisdiction is limited, first, in all personal actions where the debt or damages claimed do not exceed forty dollars, and, secondly, to all claims and demands of debt, account, or breach of contract, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars.

If an action were brought in a division court to try the right or title to any corporeal or incorporeal hereditaments, or if a personal action, or an action for debt, account or breach of contract, or covenant or money demand, had been brought clearly beyond its jurisdiction, and attempted to be maintained, prohibition would have been granted. But in an interpleader matter, which is collateral to the action, is the jurisdiction limited? A quantity of goods, a single chattel, a piano or a horse, in value much exceeding one hundred dollars, may be the subject of dispute. Is there any doubt of the jurisdiction of the division court judges to try whose they are, in an interpleader matter? But the jurisdiction is limited in regard to value to forty dollars in matters of tort, which a seizure of the goods of B. for the goods of A. must necessarily be. The question of whose the land is, may arise on a claim of a landlord for rent from the bailiff, but the statute gives express jurisdiction; or it may arise, as in the case before us, on the question of whose the crops are; but it is a collateral question, arising in a matter collateral to the action. Does it therefore, follow that the court has no jurisdiction? There is no express limitation of jurisdiction in the act in reference to interpleader matters; and we may gather the intention of the Legislature that none was intended from the fact, that to enable a bailiff to make one hundred dollars and the costs of the suit, goods to a much greater value must necessarily be seized. To enable the judge

to adjudicate upon claims for rent, might involve the question of title, for two might claim for rent adversely to each other. The clause quoted, which stays proceedings in any court for the alleged wrong in seizing, implies the right in the judge to adjudicate upon rights to property and securities exceeding in value one hundred dollars, and contains no provision to prevent the judge from proceeding in case the inquiry involves the title to lands.

We, therefore, think the judge may, in interpleader, try whose the crops are, although the inquiry may bring the title to the land in question.

In regard to the question as to whether the judge alone is to adjudicate upon the claim in interpleader, or may summon a jury, or whether either party may summon a jury, we think the directions of the statute are plain: "The *county judge* having jurisdiction in such division court *shall adjudicate* upon the claim."

A new trial has been granted by the Division Court judge. We cannot presume he will act contrary to the express directions of the statute, and throw off the responsibility cast upoh himself. But can we grant a prohibition on the statement that he has once improperly sworn a jury, and on the suggestion that he may do so again? We think not; and no doubt the opinion of the court in this respect will prevent the irregularity in future. The rule will be discharged.

Rule discharged without costs.

RECORDER'S COURT.

(Before the Recorder of the City of Toronto)

In the matter of Bennet G. Burley.

Ashburton treaty—Fugitive felons—British subjects—Belligerent rights—Robbery.

Held, 1. That the Ashburton Treaty as to the extradition of fugitive felons, and our acts passed to give effect to it, extend to British subjects committing the offences named in the treaty, in the territory of the United States, and becoming fugitives to Canada.

Held, 2. That it is in the discretion of the magistrate investigating into a charge under the treaty against a person accused of one of the crimes mentioned in the treaty, to receive evidence for the defence.

Held, 3. That under the circumstances of the case as shewn, as well on the part of the prosecution as the defence, that the accused, who took the property of a noncombatant citizen by violence from his person, was guilty of robbery and liable to be surrendered under the treaty.

(Toronto, January 20, 1865.)

The prisoner, Bennet G. Burley, was charged with a robbery from the person of Walter O. Ashley, of a $20 treasury note of the United States, in use in the said States as current lawful money thereof.

The robbery was charged to have been committed in the State of Ohio, one of the United States of America, on the nineteenth day of September, 1864.

The charge was preferred, before the Recorder of Toronto, against the prisoner, under the laws in force in this province respecting the treaty between her Majesty and the United States for the apprehension and extradition, amongst others, of persons charged with the commission of the crime of robbery within the jurisdiction of the said United States.

From the evidence for the prosecution, it appeared that at the time of the committing of the acts complained of, viz., the 19th September, 1864, and for some time previous, civil war existed between the Confederate States of America and the United States of America. Johnson's Island is in Sandusky Bay, two miles from the city of Sandusky, in the State of Ohio, one of the United States of America, and is a military post of the government of the United States, having a military prison, reported and understood to contain between two and three thousand Confederate prisoners of war, and having the United States war vessel *Michigan* guarding the same. Ashley, the complainant, was a resident of the city of Detroit, in the State of Michigan, and a citizen of the United States, and owner jointly with other citizens of the United States of an American steamer called the *Philo Parsons*, an ordinary freight and passenger boat, running between the city of Detroit and the city of Sandusky, touching occasionally at the Canadian ports of Windsor, Sandwich and Amherstburg. Ashley was clerk on the boat. Whilst she was at her dock at Detroit, on the evening of the 18th September, the prisoner Burley had an interview with him on board, by which it was arranged that Burley should be a passenger in her next morning, for Sandusky, with three of his friends, who were to be taken on at Sandwich. The next day, being the 19th September, Burley came on as a passenger at Detroit, and his three friends at Sandwich. They had the address and manners of gentlemen. On the arrival of the boat at Amherstburg, about twenty men roughly dressed came on board and took passage for Sandusky, paying their fare. The only baggage brought on board here was an old trunk, which, as afterwards appeared, contained revolvers and axes. At about four o'clock, and after the boat had touched at Kelly's Island, in the State of Ohio, and had proceeded southerly about two miles towards Sandusky, having ab ut eighty passengers on board, thirty of whom were ladies, the prisoner Burley appeared on deck, armed with a revolver, at the head of about twenty-five persons, who then armed themselves each with two large revolvers, and some with axes, from the old trunk, and took forcible possession of the boat and made prisoners of all on board. Burley threatened the life of Ashley if he refused to submit. A person called Bell, who took a leading part with the prisoner, came up to Mr. Nichol, the mate of the boat, enquired if he had charge, and said to him that as a Confederate officer he seized the boat and made him prisoner. It was declared among the party that the object in seizing the boat was to enable them to capture the *Michigan*, and to release their friends, the prisoners at Johnson's Island. The prisoner caused to be thrown overboard a portion of the pig-iron freight lying on the main deck, of which there were thirty tons, also a sulky. The iron might have interfered with the movements on that deck. The passengers had been assured that they should not be injured. Ashley had told some of the ladies that rebels had captured the boat. Subsequently this armed party arrived with the boat at Middlebass Island, in the State of Ohio, and there, under the command of the prisoner, captured the *Island Queen*, an American steamer, making her fast to the *Philo Parso* and making prisoners of all on board, including some twenty five unarmed United States soldiers, and had them all brought prisoners on board the

Philo Parsons. Here a promise of secrecy for twenty four hours, as to what had occurred, was exacted from the ladies, and an oath to that effect from the male passengers—all of whom were then liberated and put ashore. They were not prevented from taking their baggage, and it did not appear that, beyond their imprisonment, any one of them had been molested or his effects interfered with. Here the prisoner and Bell went to Ashley, in the cabin of the *Philo Parsons*, and holding their revolvers in their hands, demanded his money. In peril of his life he took from his pocket a roll of bills, amongst which was the $20 bill in question, and which bills the prisoner and Bell took. They then also, in like manner, took about $10 more found in the drawer, consisting partly of silver. All of this money was the property of Ashley and his co-partners, owners with him of the *Philo Parsons*. Ashley was then, about nine o'clock at night, put ashore at Middlebass Island. The *Philo Parsons*, with the *Island Queen* fastened alongside, at once steered for Sandusky. After proceeding for about half an hour they set the *Island Queen* adrift, it was said scuttled. They were then distant from Sandusky about fourteen miles, by the route they were pursuing. Nichols, the mate, who had been detained in the hold a prisoner for two or three hours after leaving the island, was then called up. He found that they had got the boat into a pond. Subsequently he was directed to steer for Detroit River. He observed a Confederate flag on board. The wind was high. It was said amongst the party that they intended taking the *Michigan*, if they could, but that they had not made much by their coming down. Some of Nichols' clothes had been taken by them. On returning up the Detroit River, one of the party said it was well for some of the vessels then near by that they were in Canadian water, as otherwise they would have boarded them. Some of them asked Nichols if a banker did not reside at Grosse Isle. He replied yes, that one Ives did. It was then said, if it had not been so late they would have gone and robbed him. The boat was next morning, at Sandwich, abandoned by the party, and some of its furniture, which had been removed on shore, was also found there.

At the close of the case for the prosecution, the prisoner asked an adjournment in order to procure testimony on his behalf, and denied on oath the fact of having committed the robbery. To this the prosecution objected, contending that, under the treaty and the acts passed to give it effect, the Recorder was not to try the case, but merely to inquire as to probable cause. The Recorder held that he was bound, under the statute, to receive evidence as to "the truth of the charge," and admitted the evidence.

On behalf of the prisoner, evidence was given of his being a British born subject of her Majesty. He had been at the city of Richmond, in the State of Virginia, one of the Confederate States of America, in May, 1863, also in February and March, 1864, then appearing in the uniform of a Confederate soldier, having a badge of military rank; also of the fact of a military prison existing at Johnson's Island, containing from two to three thousand Confederate prisoners of war, and of one of the prisoners therein in September being then aware of an anticipated movement upon the place for their relief. A document, under the official seal of the Department of State of the Confederate States of America, signed by Jefferson Davis and by Judah P. Benjamin, Secretary of State, dated at the city of Richmond, 24th December, 1864, was proved. This instrument recognizes the prisoner as an acting-master in the navy of the Confederate States of America, and alleges that to him, in September last, had been confided an enterprise for the taking of the steamer *Michigan* and the release of the prisoners at Johnson's Island, and that such enterprise had been authorised by the Confederate Government, and it closed in these words:—"And I do further make known to all whom it may concern, that in the orders and instructions given to the officers engaged in said expedition they were specially directed and enjoined to abstain from violating any of the laws and regulations of the Canadian or British authorities in relation to neutrality, and that the combination necessary to effect the purpose of said expedition must be made by Confederate soldiers, and such assistance as they might (you may) draw from the enemy's country." A document under the official seal of the Secretary of the Navy of the Confederate States, signed by the Secretary, S. R. Mallory, was proved. It certified a copy of an appointment of the prisoner, September 11th, 1864, to the office of an Acting-master in the Confederate navy.

This closed the evidence for the defence.

M. C. Cameron, Q. C., for the prisoner, claimed his discharge from custody, and contended that the Ashburton Treaty in no way applied to British subjects; but admitting that it did, argued that the prisoner had done no more than exercise a belligerent right, for which he had the authority of the Government of the Confederate States, and that whether the act was in the first instance authorized by that Government or subsequently adopted by it, the prisoner as a mere political refugee was not within the Treaty. He cited Wheaton's International Law, 6 Edn. 179; 1 Black. Com. 137; *Brown* v. *United States*, 8 Cranch. 133.

S Richards, Q. C., for the United States, contended that what the prisoner did was to commit robbery, and was not justifiable as an act of war, and could not be and was not in fact ratified by the Government of the Confederate States. He cited Wheaton, part 4, cap. 2, s. 4, 5, p. 591 to 596, last ed.; Halleck, p. 412, 427, 456, 457, 458; 3 Phillimore, p. 74; Vattel, cap. 8, p. 165, 358, 359; *Reg.* v. *Tivnan*, 10 L. T. N. S. 499.

Robert A. Harrison, for the Canadian Government, argued that Burley and those with him had violated the neutral territory of Canada, and could not therefore be allowed to say in the courts of that country that what he did were acts of legitimate warfare, that under any circumstances the property of non-combatants in time of war was protected; that the taking of such property by violence from the person was robbery, and that evidence if any, to excuse the act, could only be weighed before a jury in the tribunals of the foreign country. He cited *Two Brothers*, 3 C. Robinson. 164; *Lucas* v. *Bunce*, 4 Am. Reg. 98; *In re Anderson*, 11 U. C. C. P. 60; *Reg.* v. *Tivnan*, 10 L. T. N. S. 499; *In re Bennett*, 11 L. T. N. S. 488; *In re Kaine*, 14 Howard U. S. 103, 137; the case of the *Chesapeake* in Nova Scotia; the case of *McLeod*, 6 Webster's Works, 247, S. C. 25 Wendell, 483.

DUGGAN, *Recorder*.—On behalf of the prisoner it is urged—first, that being a British subject, he is not within the provisions of the Extradition Treaty; second, that before and at the time of the committing of the acts charged as the robbery, war existed between the United States of America and the said Confederate States; that such act was one which the prisoner, then engaged in a belligerent enterprise, had by the law of nations a right to commit.

With regard to the first point the language of the treaty, as recited in our Act 22 Vic., chap. 89, of the Consolidated Statutes of Canada, is as follows:—"That Her Majesty and the said United States should, upon mutual recognition by them or their ministers, officers or authorities, respectively made, deliver up to justice *all* persons who, being charged with the crime of murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek any asylum or be found within the territories of the other."

The terms employed are plain and most comprehensive, embracing all persons, without exception or qualification of any kind. What persons, in the words of the treaty, are to be given up? Expressly "all persons who being charged," &c. That the treaty includes, and was intended to include, without exception, all persons, irrespective of country or nation, I entertain no doubt, and therefore hold that the prisoner, on the ground of his being a British subject, is not exempt from its provisions.

Then, as to the existence of war, I consider the existence of war proved. This important *status* is by the Supreme Court of the United States of America, in the judgment given on March 19th, 1863, in the case of the *Hiawatha* and *Amy Warwick*, distinctly recognized to be that of the contending parties. And I do not say that, taking into account the whole proceedings of the prisoner, as shown in the evidence for the prosecution, it may not be justly presumed that he was engaged in the enterprise which he and others acting with him professed. But I do say that it appears clear to me, upon the evidence, that the prisoner's arrangements for the alleged enterprise, the collecting of men and arms, were clandestinely made in this country, and were partially acted upon within this country, by proceeding from it direct with these men and arms into the adjoining territory of the United States of America, and that therein, and by these means, acts of hostility and violence were waged upon its non-combatant inhabitants—this country being happily at peace and in amity with the United States of America and with its people. I consider the above acts a flagrant violation of the public law and a gross injustice done to our country.

Then as to the taking from Ashley of his money by violence, and the putting him into peril of his life, the avowed object of the alleged enterprise was the release of the prisoners at Johnson's Island. Johnson's Island is in the State of Ohio, and far away from the scene of war and warlike hostilities. The country around is the abode of non-combatant people, engaged in the ordinary peaceful avocations of every day life, and it was through this country and amongst these people that the alleged enterprise was attempted to be carried out. Would it be lawful for the belligerent enemies of the nation to which these people belong, simply on the ground of being such enemies, without any necessity for the acts by violence, and at the peril of the lives of these people, to despoil them of their effects and plunder them at will? It is said by writers on international law that by the modern usage of nations, which has now acquired the force of law, private property on land is exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and military contributions levied upon the inhabitants of the hostile territory. It is not pretended that the prisoner committed the act complained of under any of the circumstances suggested. Ashley, when deprived of his money by violence, and at the peril of his life, was to the knowledge of the prisoner such a non-combatant as I have described. If the prisoner on the occasion in question had an absolute right, without necessity of any kind, then to take Ashley's money at the peril of his life, would he not equally have had the right in like manner by violence to despoil of his money and effects every other non-combatant United States citizen whom he might happen to meet and choose to attack under colour of carrying out, or because of being engaged in, a belligerent enterprise? I do not find that such a right exists, or is sanctioned by the code of Christian and enlightened nations.

I have herein endeavoured to give all the facts and circumstances material on this proceeding, and I have now to state, in conclusion, that I find and determine that the evidence taken before me, according to the laws of this Province, on the charge of robbery here preferred against the prisoner, Bennett G. Burley, would justify the apprehension and committal for trial of the said Bennett G. Burley, according to the laws of this Province, for the said robbery, if the same had been committed in this Province.

Order for committal.

COUNTY COURTS.

(Before the County Court Judge, at Goderich.)

THOMAS V. GRACE.

Subscription for charitable purposes.

Liability where purposes partly carried into effect with knowledge of subscriber, though no consideration sufficiently stated in the heading of the subscription list.

[October Term, 1864.]

This was an action for the amount of a subscription for building a church and rectory in Goderich. The defendant signed a subscription list for the sum claimed. The heading of the list was in these words: "We, the undersigned, do hereby severally promise and agree to pay to F. W. Thomas, Esq., agent of the Bank of Montreal, in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal church and rectory in the town of Goderich."

The action was defended on the ground that the church and rectory had not been built, and that therefore defendant was not liable, he having subscribed for both purposes, and was not a consenting party to the money being disposed of for one of the purposes only.

It was proved by the evidence of the plaintiff's witnesses that it had been agreed at a general meeting of the subscribers to build the rectory first, and that the list was intended to form part of the fund intended for the building of the church and rectory, and that the rest of the money required was to be raised in other ways. The defendant was proved to have been present at this meeting. A number of the other subscribers had paid their subscripitons.

No evidence was given on behalf of defendant. A nonsuit was asked for, which however was not granted, but leave was reserved to move in term. It was left to the jury to say whether the promise was obtained in good faith, and whether the position of refusing to pay was or was not only afterwards assumed by the defendant, and that the promise was binding if there was a part performance of it, with the defendant's knowledge. And some other observations were made to the jury, which sufficiently appear in the judgment. A verdict was found for the plaintiff.

Cameron, in October term, obtained a rule nisi to enter a nonsuit pursuant to the leave reserved, on the following grounds:

1st. That the promise set out in the declaration is *nudum pactum*, and not enforceable at law.

2nd. That the consideration and contract set out in the declaration is not stated or proved in the evidence. The allegation in the declaration is, that in consideration that Watson and others would severally subscribe and promise the defendant to pay to the plaintiff one hundred dollars each, for the purpose of building an Episcopal church and rectory, the defendant promised to pay him one hundred dollars for that purpose, whereas, in fact, the promise (if any) proved by the plaintiff was a separate and distinct promise, by each of the persons named in the declaration to the plaintiff, to pay him the sum of one hundred dollars each, and not a promise by one of them to pay the plaintiff, as is alleged.

3rd. That there is no evidence of any kind that the plaintiff incurred any loss or damage, or subjected himself to any charge or obligation, at the instance of the defendant, with respect to the subject matter of the suit.

4th. That the written or printed contract produced by plaintiff on the trial does not sustain the declaration, and that no other evidence was or could be given to sustain such declaration. That in fact the oral evidence offered and given by plaintiff clearly established that there was no such consideration for defendant's alleged promise as that set out in the declaration.

5th. That plaintiff's evidence clearly proved that the building a church and rectory, was the consideration for which defendant, and others named in the said declaration, promised to pay the amount set opposite to their names, and that in fact no church was built nor even commenced, and that the building of such church was a condition precedent to the defendant's being called on to pay any sum.

6th. Or why there should not be a new trial without costs, or with costs to abide the event, on the grounds, that the verdict is contrary to law and evidence, and for misdirection.

Mr. Cameron cited *Morrow* v. *Butt*, 8 E. & B. 738; *Neill* v. *Ratcliffe*, 15 Ad. & Ell., N.S. 916; *Street* v. *Blay*, 2 B. & Ad. 456; *Baker* v. *Vanluven*, 14 U.C.C. P. 414; *Sinclair* v. *Bowles*, 9 B. & C. 92; *Reid* v. *Rann*, 10 B. & C. 438; *Elliott* v. *Hewitt*, 11 U. C. Q. B. 292; *Cutter* v. *Powell*, 6 T. R. 320; 2 Smith's L. C. 9.

McDermott shewed cause, citing *Elliott* v. *Hewitt*, 11 U. C. Q. B. 292; Taylor on Evidence, 1570; Chitty on Contracts, 47. He contended that the evidence was not wrongly received and that the contract was complete in its inception.

COOPER, Co. J.—The misdirection, as stated, was this. That the jury had been told, that if defendant's conduct was such as to lead them to believe that the defendant sanctioned the building of a rectory first, then they might find for the plaintiff; whereas this was not part of the issue, nor in any way in question.

I did charge to that effect, and am still of opinion that it was a proper way of putting the case to the jury.

Again, that the Judge told the jury that if the defendant's conduct was not such as to put the plaintiff on his guard, that if both buildings were not completed he would not pay; then they might find for the plaintiff.

Some observations of this kind were made in the course of the charge, and I still think they were fully warranted, if, as I shall have occasion to observe, the part performance of the intended consideration has any thing to do with the question of the defendant's responsibility.

It is further objected, that the jury should have been charged that "if defendant subscribed for building a church and rectory, and if the church was not built, nor commenced, nor any liabilities incurred on account of it, to find the issue on the second plea in favor of defendant."

I did charge somewhat to the effect which the learned counsel contends I should have done, and distinguished the issues, leaving the jury to take their own course, and expected a verdict on that issue for the defendant; but the issue does not go to the whole cause of action, and the verdict the other way would only affect th question of costs, and I do not feel at liberty to grant a new trial on that ground alone. The counsel on both sides do not appear inclined to consent to any alteration of the verdict, and, if my judgment is correct, it must stand or fall as it is, upon all the issues, and an alteration of the verdict on the one issue is not asked for by the rule.

Again, it is contended that the jury should have been told, that if defendant subscribed for the purpose of building a church and rectory, and if the plaintiff and others, without defendant's sanction, agreed to apply the first $2,400 subscribed towards building a rectory, then, if the church was not commenced, nor any liabilities incurred on account of it, to find the third plea for the defendant.

It was not at all necessary to charge the jury in that way, unless the law is such that the defendant is entitled to have the first part of his rule, for the entry of his nonsuit, made absolute.

The declaration states, that "in consideration that Jas. Watson, Thomas B. VanEvery, Charles Watt, and other persons, would severally subscribe and promise the defendant to pay to the plaintiff, &c., &c., &c., for the purpose of building an Episcopal church and rectory in the town of Goderich." The defendant promised to pay, and the declaration goes on to aver that all things necessary were done to entitle the plaintiff to re-

cover the amount subscribed. There was no demurrer to this declaration. It is not necessary to go further than this statement in the declaration to dispose of the question, whether the action is maintainable upon the two simple facts, namely, that the subscription list was signed, and part of the work done with the knowledge and without the objection of the defendant. He clearly notified the contractor that he would not be responsible as a member of the committee; but there is no evidence that he sought to escape from his obligation as a contributor, because the work was not begun as he thought best, or for any other reason.

Elliott v. *Hewitt* is cited to show that this contract set up is good and could be sued upon at once, irrespective of any other circumstances, and it is conceded that unless this is the case this action must fail. For this view both counsel relied upon the law laid down by the late Sir J. B. Robinson, namely, "that nothing is plainer and better settled than that where a sum is agreed to be paid * * * * * for certain work to be done, the party may insist upon having the work done before he pays." This view of the law was not disputed, and was admitted to be in perfect accordance with the case of *Cutter* v. *Powell*. But it is more difficult to say whether these cases do or do not apply. That the mere signature to the subscription list is a *nudum pactum* I have no doubt. Sitting in other courts, I have often decided so and see no reason to change my view, No consideration whatever is expressed, no time is named for payment, and the object of the intended payment is expressly a mere charity. It is simply a voluntary promise, to result in a voluntary payment, or a refusal, which may under some circumstances be a refusal to pay a debt of honor, and under other circumstances a refusal to pay a debt which conscience would not require one to pay. But as a matter of strict law, which is all that I administer here, it does not constitute a binding contract. Hence the well known practice of taking promissory notes at the same time as the subscription, and which, being soon passed off to a contractor, who is an "innocent purchaser," the amounts are recovered. Building committees often adopt this practice in order to avoid such difficulties as present themselves in the case before us. This case is not within *Elliott* v *Hewitt*, or any case cited under *Cutter* v. *Powell*. The defendant is no contractor under Mr. Thomas, or dealer with him, nor in any way connected with him in any such privity as to bring him within those cases. He does, however, promise to pay some money for certain purposes. To those purposes the other part of the fund, subscribed and paid by others, is devoted. This forms an ample consideration for the promise, if it was with his knowledge. This knowledge is proven by the fact that he warned the contractor that he was not one of the acting committee, but only a contributor. True, he does not seem to have been present at the little meetings which the witnesses dignify by the name of committees—which met at a private house where the vestry could not meet, and to which the contributors are not pretended to have been asked, and where many of them would have felt some diffidence about going, even had they been asked, and where the property of the vestry seems to have been subjected to the ordeal of amateur acts of parliament, to be submitted to the Legislature, I suppose, and which have never been seen by the very corporation that owns the property to be affected, nor by the subscribers, whose money has gone to the very proper purpose of erecting a rectory for the pastor of the oldest congregation in the counties. But there stands the name to the subscription list; there stands the rectory built with the knowledge of the defendant, out of the funds paid by the other contributors. The consideration is ample. The scheme did not break down. A great deal of the work has been done, and in law it does not rest with any one to say but that the rest will be, though some most important work may have to be done by the vestry, under the Temporalities Act, before any other funds can be acquired in the manner spoken of by one of the witnesses. If the scheme did not break down, but was proceeded with, so far that part of the fruits are reaped; then the one subscriber is as liable as the other, and the payments made by the witnesses, together with the work performed, afford the consideration I speak of. The argument as to the incomplete character of the contract, as appearing in the heading and signing only, would only apply if nothing more had been done. It is not sufficient to say that the proceedings of the committees, behind the back of the vestry, were utterly irregular and could be got rid of by a proceeding elsewhere. The disposal of church property by an act of parliament, never submitted to or dealt with by the vestry under the statute, may be a very puerile thing to attempt; but that does not prevent the cashier, as he appears to be, of this very list of contributors, from claiming to be reimbursed that which he would not have expended but for the promise of the contributors, of whom the defendant is one; and the contractor who gave his evidence does not state that he remains unpaid, and if he is, it is most likely that this plaintiff or the committee will pay him.

I think the verdict was right, except as to the issue referred to, and as to that I cannot interfere. The verdict was right on the merits, and the law is with the plaintiff upon all the facts.

Rule discharged.

CORRESPONDENCE.

Division Courts — Jurisdiction — Action for Rent.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Will you oblige a subscriber by answering the following question:—

Can an action for "rent," be entertained in the Division Court, or is it necessary to bring an action in the County Court, on account of rent being an incorporeal hereditament?—See sub-section 4, section 54, D. C. Act.

Yours, &c.,

"One in Doubt."

Kingston, Jan. 11, 1865.

[An action of assumpsit for use and occupation, or of debt for rent, can no doubt be

brought in a Division Court. The title to land does not necessarily come in question in such an action. Similar words are found in the English County Courts Act to those in sec. 54, sub-sec. 4 of our Act; and it has never been questioned that the Courts had cognizance of the action for rent in ordinary cases.]—Eds. L. C. G.

Statute labor—Apportionment.

To the Editors of the Local Courts' Gazette.

Sirs,—I am requested by our Township Council to ask your opinion on the following question:—Can the Municipal Council, in apportioning statute labour, place one individual on two divisions to work a portion of his labour on each, provided he is not called on to work more days than the law requires, each division passing his own property. An answer in your next issue will oblige,

Yours, truly,

Rowley Kilborn,
Clerk Tp. Clinton, Co. Lincoln.

[We think the Council have the power of so regulating the performance of the statute labour of the individual referred to.—Eds. L. C. G.]

REVIEWS.

The Insolvent Act of 1864, with Tariff, Notes, Forms, and a Full Index. By James D. Edgar, of Osgoode Hall, Barrister-at-Law. Toronto: Rollo & Adam, Law Publishers, King Street East, 1864.

This little volume must command an extensive circulation. The Act which it contains, and which it explains in annotated form, is as yet little understood, and many are interested in the speedy and correct understanding of it.

To attempt a comment upon an Act which has only been a short time in operation, in the absence of decisions to guide in its interpretation, is no doubt, as the compiler states, "a hazardous undertaking." But we have carefully examined his notes, and find that he has creditably acquitted himself. Some of his notes are of necessity speculative; but the greater part of them are practical.

The note to s. 2, as to persons entitled to make voluntary assignments, is well considered and carefully written; and, so far as we can judge, the conclusion at which the compiler arrives is undoubtedly correct. His note to s. 3, sub-sec. 2, as to the meaning of the word "trader," is one of the best on that subject that we have seen in any work of a similar kind to the one before us. We have not space to transcribe these notes, or we should be glad to do so for the information of our readers and as good examples of what they who become purchasers of this work may expect to receive. The two notes to which we have referred are, perhaps, the most elaborate in the work; but there are many others no less valuable for learning, and as repositaries of decisions early and late bearing upon the points suggested. We have been agreeably surprised to find to what a late period the compiler has brought down his cases. We observe reference to cases reported in current volumes of the *Law Times Reports* and *Jurist*; and at pages 35 and 81 we find noted the decisions of his honor Judge Logie in *Bagwell* v. *Thompson* and *Worthington* v. *Taylor*, as reported in 10 U. C. L. J. 304, 305.

This book, for the purposes of the Upper Canada lawyer, is more suitable than that of Mr. Abbott, which was reviewed by us in our last issue of the *Law Journal*. It would be well for all who can do so to become possessed of both; but those in Upper Canada who require one only cannot hesitate to prefer the work of Mr. Edgar. Those in Lower Canada who require one only will have as little hesitation in choosing Mr. Abbott's work. This might naturally be expected. The laws of Upper and Lower Canada, in regard to civil rights are so essentially different in their origin, that works in relation thereto, written in either section of the Province, must partake largely of the peculiarities in law of that section in which it is compiled. Hence in Mr. Abbott's work will be found many references to French law of as little service to the practical lawyer of Upper Canada as many of Mr. Edgar's references to English decisions will be to the practical lawyer of Lower Canada.

We are disappointed with the Tariff of Fees framed by the judges of the superior courts of Common Law and Chancery in Upper Canada, as compared with the Tariff framed by their brethren in Lower Canada, published in Mr. Abbott's work. Upon turning to Fees to Counsel in the Upper Canada Tariff, we read as follows:—

COUNSEL.

"Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case."

If there were only one judge in Insolvency the rule might not be very objectionable. But when we reflect that there are more than thirty, of different degrees of liberality, having different views as to amounts of fees that ought to be paid to counsel, we have little hope that there will be anything like uniformity. Perhaps there is no subject upon which even the judges of the superior courts so little agree as on the fees proper in amount for counsel, and certainly no subject more distasteful to them than applications for counsel fees. Whenever they can they throw upon the master the responsibility of settling the quantum of fees to be paid to counsel. We have known one judge *ex parte*

to allow and to order a counsel fee of $50 to counsel for defendants at a Chancery hearing postponed at instance of plaintiffs owing to absence of witnesses, where nothing was done beyond opposing the application. We know other judges who would as soon sign warrants for their own committal to close custody as make such an order under such circumstances. We do not undertake to say who is right and who is wrong. We simply advert to the fact to shew how differently men high in authority view remuneration to counsel. This being so, it is hopeless to effect a uniformity of practice in this matter among county judges, chosen from different sections of the country, and who have little communication with each other in matters appertaining to their office.

We have looked cursorily through the Tariff of Fees for solicitor or attorney as between party and party, and also as between attorney and client. It is in detail, and appears to be framed in a fair and liberal spirit. There are, however, many proceedings authorized in the Act to be done by attorneys and solicitors for which no remuneration is fixed by this Tariff. But it such cases it is declared that the charges are to be the same "as for like proceedings in the Tariff of the superior courts." The analogy afforded is a proper one, and if closely followed will meet the expectations of those who framed the Tariff, and of those for whose benefit it is intended. So fees to sheriff and witnesses are to be the same as in proceedings in the superior courts. The fees to clerks are apparently unobjectionable. So the fees directed to be paid to the "Fee Fund."

We understand that Mr. Edgar's work was for a long time delayed in order to enable him to present the Tariff of Fees to his readers. He could not have done without it. The Act without it was incomplete. Now, however, the volume contains all that is necessary to make it a useful, complete, and reliable manual of our insolvency law. Not the least valuable part of it is the thorough index at the end of the work. A book without an index is a casket, more or less valuable, without a key. Mr. Edgar has done good service by furnishing to his patrons an index which is not merely very full but most skilfully prepared. It is not every man who is capable of preparing a good index, We could name more than one standard legal work which is shamefully defective in respect to its index. The value of a good index to a work of practical utility cannot be over estimated, and we are glad to announce that Mr. Edgar has not been unmindful of this element of value in the book before us. The mechanical execution of the work is also all that can be desired, and reflects credit upon the enterprising publishers—Messrs. Rollo & Adam.

The work is, by permission, dedicated to the Honourable William Henry Draper, C. B., Chief Justice of Upper Canada, as a slight tribute to those varied talents that adorn his high position. No man in Upper Canada is so deserving of the honour. If the judges whose duty it will be to administer the provisions of the Act, while in the discharge of their duties endeavour to emulate the patient industry, dignity, affability and learning of the Chief Justice, much good will be accomplished throughout the several counties of Upper Canada.

INSOLVENTS.

Strobridge & Botham	Brantford.
Sidney Smith	Peterboro'.
Joseph James Inglis	Brantford.
Henry Wilkinson	Brantford.
Amos James Fisher	Peterboro'.
George P. Brewster	Montreal.
Hiram Sedgwick	Peterboro'.
John Struthers	Brantford.
Robert H. Gairdner	Bayfield.
George S. Pickell	Belleville.
John C. McNaughton	Tp. Whitby.
Remy & Co.	Montreal.
Samuel Irvin	Woodstock.
Hugh Miller	Toronto.
H. R. Macdonald	Hamilton.
Edgar & Melville	Hamilton.
Donovan Sills	Tp. Fredericksburgh.
Marshall P. Roblin	Napanee.
Owen S. Roblin	Newburgh.
T. McCrosson	Toronto
Robert J. Hamilton	Hamilton.
Milton Davis	Hamilton.

(To be continued.)

APPOINTMENTS TO OFFICE.

QUEEN'S COUNSEL.

NESBITT KIRCHOFFER, ALBERT PRINCE, JOHN ROAF, and EDWARD D. BLAKE, of Osgoode Hall, Esquires, Barristers-at-Law, to be Queen's Counsel in Upper Canada. (Gazetted, December 31, 1864.)

NOTARIES PUBLIC.

JULIUS P. BUCKE, of Ottawa, Esquire, Barrister-at-Law to be a Notary Public in Upper Canada. (Gazetted, Decem, ber 31, 1864.)

JOHN COOK, of Newmarket, Esquire, to be a Notary Public in Upper Canada. (Gazetted, December 31, 1864.)

WARREN TOTTEN, of Paris, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. Gazetted. Dec. 31, 1864.)

ISSUERS OF PASSPORTS.

JOSEPH WILSON, of Sault Ste. Marie, Esquire, and ALONZO B. DANA, of Brockville, Esquire, to issue Passports and Certificates to British Subjects, about to travel in foreign parts. (Gazetted, December 3, 1864.

DAVID BURN, of Cobourg, FREDERICK JNO. PRESTON, of Clifton, HUGH RICHARDSON, of Woodstock, JOHN TWIGG, of Picton, WILLIAM GRANT, of St. Catharines, CHAS. E. PEGLEY, of Chatham, JOHN ALEXANDER, of Barrie, H. K. SANDERS, of Port Hope, JOSEPH R. BROWN, of Dunnville, and SAMUEL S. MACDONNELL, of Windsor, Esquires, to issue Passports and Certificates to British Subjects about to travel in Foreign Parts. (Gazetted, December 31, 1864.)

TO CORRESPONDENTS.

"ONE IN DOUBT," under "Correspondence," page 14; "ROWLEY KILBORN, *Clerk Tp. Clinton, Co. Lincoln*," under "Correspondence," page 15.