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DIVISION COURTS.

OFFICERS AND SUITORS.

OFFICERS.

We have learned, through one of the County Court Judges, that a circular letter has been issued from the Inspector-General's Department, requiring Officers to renew their securities to Government; that new and improved forms of bonds are supplied; and that each bond is accompanied with an affidavit of justification.

This is as it should be. The public must be effectually protected, and securities of this nature ought on every account to be uniform and in the most approved form.

We have no doubt that officers of the Courts will promptly respond to this call, and that the Judges will cordially co-operate with the Department in bringing this branch of the public service into the state desired.

By the way, very few persons have an adequate notion of the heavy securities Clerks and Bailiffs are required to enter into. Each officer gives a double security; first, a *covenant*, which is available to parties injured by the officer's default or misconduct; secondly, a bond to the Crown for the payment over of fees collected, and for the due performance of the duties of the office.

These securities vary in amount, according to the business done in each locality. Few, we should say, are under £400; many are for very large sums. We know one officer, having a business not much beyond the average, who has given obligations amounting in the whole to over £3000, and probably the general average of securities would be about £1000 (that is, assuming each officer to have given in sufficient security), which would make for Upper Canada about three hundred and seventy-two thousand pounds, as the aggregate amount of securities given by Division Courts' officers,—an enormous sum, but we believe by no means exaggerated in amount.

This induces two considerations: first, the necessity for intelligent, strict, and careful administration in the Inspector-General's Department, as respects these securities, and the importance of active supervision by the County Judges; and, secondly, the importance of the class of public officers (Clerks and Bailiffs) from whom such heavy securities are necessary. Those who think officers sufficiently remunerated by their present fees, we dare say, are not at all aware of the heavy securities demanded of them, and properly so, by reason of the important and responsible duties required of them.

THE NEW RECEIVER OF FEES—A WORD IN SEASON TO OFFICERS.

After the first day of January next, the Crown Attorney in each County takes the place of the County Treasurer; and thereafter the Clerks of Division Courts will make their quarterly returns, and submit their accounts to that officer.

We consider this change a decided improvement. County Treasurers do not hold their offices under Government, but are appointed by and amenable to the Municipalities. Moreover, we are not aware that they have been required to give security to the Government; whereas the County Crown Attorney *is* an officer appointed by and *directly responsible to* Government, and *is required* by the statute to give security to the Crown.

We have not heard of any defaulting Treasurer, unless the late Treasurer of Middlesex may prove to be one; but we have heard that several of these officers have been remiss in making their returns, as well as in the discharge of duties assigned to them in connection with the fee fund.

For this there was no adequate remedy. The Government had no effectual control over a Treasurer. With the County Attorney it will be otherwise. In those counties in which Clerks have been remiss from the negligence of the Treasurer in not furnishing forms or otherwise, a great change may be expected, and we recommend *every* Clerk to "put his house in order." New brooms are said to sweep clean, and the new officers (lawyers, by the way) will look for a rigidly exact and punctual discharge of duty from Clerks.

Clerks who have been in the habit of giving indiscriminate credit for fees will be obliged to abandon the system, for they may depend upon it no excuse will be received for the nonpayment of the fees on the accounting days. The action of the Legislature in respect to other receivers of Court fees—making the appointment void and vacating the office, if fees are not paid over within twenty days after each quarter day—will probably be taken as a guiding principle in respect to Division Court officers.

We have felt it necessary to warn officers generally, as any carelessness or want of punctuality may be attended with serious consequences to them; but we believe that the great body of Division Courts' officers perform their duties with all punctuality and care.

ANSWERS TO QUERIES.

"T. L." 1.—Desires to know what charges he should make in cases of Interpleader Summons. Such cases, he remarks, are not like ordinary suits where the amount of the account entered for suit guides.

2. He also desires to ascertain our opinion "as to mileage, there being two distinct parties to serve—the claimant and the judgment creditor.—Is the bailiff entitled to mileage on service of each, as he would be in the case of two separate suits?"

1. If we mistake not, the question has been answered some time since in this journal; but at all events we now answer it, as some of our new subscribers (the

querist amongst the number) may not have the back volumes.

In interpleader cases, *the value of the goods in dispute* regulates the grade in which the fees are to be charged. The bailiff should state the value in his application for the summons. If he do not, it will be settled at the hearing. In the meantime, the Clerk would appear to be warranted in claiming the highest fees, subject to be reduced at the hearing.

We may remark that in this opinion we are supported by the author of "The Bailiff's Manual," who has, at our request, kindly set down his views on the point.

2. The interpleader is in effect a suit between the claimant and the judgment creditor. By rule 53, "the claimant shall be deemed the plaintiff, the judgment creditor the defendant;" and if both claimant and defendant reside at the same place, and are served on the same day, we are of opinion that but single mileage should be allowed in taxation.

"A CLERK WHO DOES *his* DUTY," complains of gross inattention on the part of a certain Clerk in another county, "in the transmission of summonses sent to him for service, which frequently arrive long after the court day at which they are returnable is passed;" and also that he "cannot get any return from the same Clerk upon transcripts of judgments sent to him to be levied; and (that) he will not even answer the letters sent to him, asking him what is done." Our correspondent desires us to publish the name of the alleged "delinquent," and to administer to him "the castigation such conduct deserves."

We object to do this. The parties interested can bring an action against the officer and his sureties, and recover damages on proving the facts alleged: or if the bringing an action would be attended with serious inconvenience to the parties, they should forward a statement of the officer's conduct to the County Judge, accompanied with an affidavit showing the state of things. Upon this the Judge would at once act, and if the officer were in default compel him to make restitution, or remove him from office. It is no doubt "very important that Clerks should act faithfully, and so as to secure public confidence," but, unless in gross cases, we cannot undertake to "castigate," except the ordinary remedies which are open to suitors have been tried without effect.

Is a Clerk of Division Court entitled to charge 1s. for filing and swearing to affidavit on confessions. Also can a clerk charge 3d. receiving fee on a summons that has not been served when the Bailiff fails to effect a service. You will confer a favour by answering the above question in your most valuable paper. T. M.

The usual and better practice is for the Judge to take *viva voce* proof of execution of confessions, and this is commonly done at the opening of each Court. Should the Judge, however, require the affidavit to be in writing, the clerk will be entitled to 6d. only. The charge for entering bailiff's returns, is allowable in every case, whether service be made or not.

SUITORS.

Commitment on Judgment Summons.

It has been suggested to us by a County Judge, that some "notes of cases tending to explain the scope and meaning of the grounds on which a defendant may be committed—such as *breach of trust*, &c.—would be exceedingly useful to suitors as well as officers in the Division Courts. * * * It would be just in place, after the matter in your last number. I do not mean," says our correspondent, "a regular treatise, but short cases, or notes of them, without reference to the order in which the grounds of commitment are inserted in the 92nd clause."

Willing at all times to receive suggestions from well-informed quarters, we act now on the hint, which we thankfully acknowledge.

Breach of Trust.—A case decided some years ago at Northampton County Court, England, under an enactment similar to our own, will serve to throw light on what is and is not a breach of trust, within the meaning of the 92nd section of the Division Courts Act.

Lake v. Shipp.—It appeared that plaintiff and defendant were in the habit of buying cattle together, and that on a particular occasion defendant obtained from plaintiff £—, on the pretence that he had bought cattle to that amount, would sell next day, and give plaintiff his share of the profits. A day or two afterwards defendant told plaintiff he lost the money at cards, but promised to pay plaintiff back the amount. An application was made to commit the defendant, on the ground that he was entrusted with the money for a specific purpose, and that his playing at cards with it was a breach of trust.

"His Honor Judge Wing held that it was necessary plaintiff should give strict proof that the *credit was obtained* on false pretences, or by fraud or breach of trust."

The plaintiff contended that it was unreasonable to suppose that the words "*obtaining credit*" applied to the breach of trust; for in every case where there was a breach of trust, credit must have been obtained previously, for the trust must have been created prior to the breach being committed.

"His Honor stated that it was clear the section was very ill drawn, and probably it might have been intended to have borne a different signification; but he was bound by the plain grammatical construction of the words; and it was clear that the words 'by means of fraud or breach of trust,' must be read in connection with the words 'has obtained credit.' Unless, therefore, plaintiff could show that at the time defendant obtained the money he made use of false pretences, or that he obtained it by fraud or breach of trust, no subsequent misappropriation or breach of trust would bring him within the meaning

of the section. As he looked on this in a certain degree as a criminal proceeding, he felt bound by the strict words, and also to require strict legal proof."

(Cases to be continued.)

MANUAL, ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—By V——.)

[CONTINUED FROM PAGE 179.]

Claims by Third Parties to Goods seized.

As this little work is intended exclusively for the assistance of Bailiffs, it is proposed to notice the Interpleader clause in the Division Courts Act only so far as it affects the discharge of their duties.

As before mentioned, the bailiff making a seizure is often met by a claim to all or to a portion of the goods seized. This claim is advanced by some third party, who alleges that he has bought them from, or lent, or hired them to the defendant. The bailiff need not take the responsibility of yielding to this claim, nor yet of acting as if it were invalid; and it would be very unwise of him to do so if there appear to be any reasonable foundation for the claim made, for there is a provision in the statute for his protection on this very point. The 7th section of the Division Courts Extension Act provides "that if any claim shall be made to or in respect to any goods or chattels, property or security, taken in execution, or attached," or in respect to the "proceeds or value thereof by the landlord for rent, or by any third person, "the bailiff may apply to the Clerk, and sue out what is called an interpleader summons from the Division Court, to call the claimant and the judgment creditor before the court, and thereupon the Judge will investigate such claim, and adjudicate thereupon."

It will not be proper for the bailiff to sue out an interpleader summons *as a matter of course*, whenever an adverse claim is made to the goods seized. Before doing so he should enquire into the grounds of the claim, and satisfy himself that the claimant has at least some color of right to the goods; for should it afterwards appear that the claim was palpably groundless, and that the bailiff, by reasonable enquiry, might have satisfied himself of the fact, the Judge would probably order *him* to pay the costs of the proceeding.

It does not appear absolutely necessary that a claim should be in writing (unless by landlord for rent), but it is far safer, and honest parties, who desire to act in good faith, will not omit to set it down in writing. Indeed the omission to do so may affect their after right to the costs, even where the claim is made good. Whether the claim be verbal or in writing, the bailiff should notice it, and proceed to make proper enquiries. Having satisfied himself that it is necessary to sue out an interpleader summons for his own protection, the bailiff should ascertain the name and residence of the claimant, and the particular articles he lays claim to. The bailiff will be naturally desirous to have the claim properly sifted, and should therefore give early intimation thereof to the judgment creditor. The latter will of course be served with an interpleader summons in due time, but still the bailiff would do well to inform the party who sets him in motion of the obstruction, so as to enable him to make timely enquiries. It is not unusual for bailiffs to accept an indemnity from claimants for the delivery to them of the goods seized. It may possibly be convenient to do so in some cases, but the proceeding by interpleader is the better course, and the safer one for the officer.

APPEALS TO PRIVY COUNCIL.

ORDER IN COUNCIL.

At the Court of Buckingham Palace, the 13th June, 1853.

Present:

The Queen's Most Excellent Majesty.
His Royal Highness, Prince Albert

Lord President.	Earl of Aberdeen.
Lord Steward.	Earl of Clarendon.
Duke of Newcastle.	Viscount Palmerston.
Duke of Wellington.	Mr. Herbert.
Lord Chamberlain.	Sir James Graham, Bart.

WHEREAS there was this day read at the Board a Report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th of May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the Committee, with a view to greater economy, dispatch, and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their Lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in Appeals, and recommending that certain Rules and Regulations therein set forth should henceforth be observed, obeyed, and carried into execution, provided Her Majesty is pleased to approve the same:

Her Majesty having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the Rules and Regulations set forth therein, in the words following, videlicet:—

I. That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an Appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree, or order appealed from, shall be entitled to recover the costs of the appeal from the Respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct.

II. That the Registar or other proper Officer having the custody of records in any Court, or special jurisdiction, from which an appeal is brought to Her Majesty in Council, be directed to send by post, with all possible despatch, one certified copy of the transcript record in such cause to the Registar of Her Majesty's Privy Council, Whitehall; and all such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from; and that such transcript be accompanied by a correct and complete index of all the papers, documents and exhibits in the cause, and that the Registrar of the Court appealed from, or other proper Officer of such Court, be directed to omit from

such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that especial care be taken not to allow any document to be set forth more than once in such transcript; and that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registar or other Officer preparing the same.

III. That when the record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registar or other proper Officer of the Court from which the appeal is brought shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal if any, of the Court appealed from, to these copies, with the sanction of the Court.

And that in all cases in which the parties in appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio, and transmitted at their expense, to the Registar of the Privy Council, two of which printed copies shall be certified as above by the Officers of the Court appealed from; and in this case no further expense for copying or printing the record will be incurred or allowed in England.

IV. That on the arrival of a written transcript of appeal at the Privy Council Office, Whitehall, the Appellant, or the agent of the Appellant prosecuting the same, shall be at liberty to call on the Registar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case, and likewise all such parts thereof as the Respondent or his agents may require, to be printed by Her Majesty's Printer, or by any other printer on the same terms, the Appellant or his agent engaging to pay the cost of preparing a copy for the printer, at a rate not exceeding one shilling per brief sheet, and likewise the cost of printing such record or Appendix, and that one hundred copies of the same to be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fees for Solicitors' copies of the transcript, or for drawing the Joint Appendix, be henceforth allowed, the Solicitors on both sides being allowed to have access to the original papers at the Council Office, and to extract or cause to be extracted and copied such parts thereof as are necessary for the preparation of the petition of appeal, at the stationers' charge, not exceeding one shilling per brief sheet.

V. That a certain time be fixed within which it shall be the duty of the Appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof, in all matters brought by appeal from Her Majesty's Colonies and plantations east of the Cape of Good Hope, or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad; and that in default of the Appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registar of the Privy Council, at their Lordship's next sitting.

VI. That whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties, with the sanction of the Registar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same: Provided that nothing herein contained shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplifications of the matter in dispute, the Registar of the Privy council may call the agents of the parties before him, and having heard them, and examined the transcript, may report to the Committee as to the nature of the proceedings.

And Her Majesty is further pleased to order, and it is hereby ordered, that the foregoing Rules and Regulations be punctually observed, obeyed, and carried into execution, in all Appeals or Petitions, and complaints in the nature of Appeals brought to Her Majesty, or to Her heirs and successors, in Council, from Her Majesty's Colonies and Plantations abroad, and from the Channel Islands or the Isle of Man, and from the territories of the East India Company, whether the same be from Courts of Justice or from Special Jurisdictions, other than Appeals from Her Majesty's Courts of Vice-Admiralty, to which the said Rules are not to be applied.

Whereof the Judges and Officers of Her Majesty's Courts of Justice abroad, and the Judges and the Officers of the Superior Courts of the East India Company, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

WM. L. BATHURST.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

QUEEN'S BENCH.

(Reported by C. ROBINSON, Esq., *Barrister-at-Law.*

IN THE MATTER OF THE INQUEST UPON THE BODY OF WILLIAM MILLER, DECEASED, BY SILAS W. COOK, ONE OF THE CORONERS, FOR THE COUNTY OF BRANT.

Coroner's inquest—Irrelevant verdict—Amendment—13 & 14 *Vic., ch.* 56.

At an inquest held upon the body of a boy who had committed suicide the verdict, after finding the cause of death, stated that from evidence submitted the jury judged that the boy's master, a medical man, had not done justice to him according to his agreement made with the boy's father in Scotland, in regard to his clothing and the labour he had to perform.

Held, that the latter part of the verdict was relevant and within the province of the jury; and although the evidence seemed to preponderate the other way, the court could not on that account alter the finding. [15 U. C. Q. B. 244.]

Burns obtained a rule on the coroner, to shew cause why the inquisition should not be quashed or amended, on the ground that the latter part of the verdict of the jury on the said inquest, after finding the cause of the death, is irrelevant, extrajudicial, surplusage, and unfounded, and was inserted with a malicious motive to injure Robert Christie, Esquire, named in the said verdict, and it calculated to bring him into disrepute; and that the same be struck out of the said verdict; and why a *venire facias* should no issue to bring the said coroner into court, in order to have the said inquisition and verdict quashed or amended as aforesaid.

The inquest was held on the 2nd of April, 1857, and had been returned into this court upon a certiorari.

The verdict of the jury was that "William Miller, now lying dead in the house of Robert Christie, Esq., M. D., came to his death by administering with his own hands strychnine during the afternoon of Tuesday, the 31st day of March, but we judge from the evidence submitted, that he, Christie, had not done justice to the lad, according to his agreement made with the boy's father in Edinburgh, Scotland, in regard to his clothing and the labour he had to perform."

The inquest had been filed with the clerk of the peace, to whom as well as to the coroner the writ of certiorari was directed.

The boy, as appeared from the evidence, returned with the inquest, was about fourteen years of age. Dr. Christie came out from Scotland to Canada in 1853, and by agreement with the boy's father brought him out with him as an apprentice, to do such work as might be required of a servant until he should be twenty-one years of age. He was to treat him well, and to give him instruction in medicine and surgery, and to qualify him for practising if the boy discovered ability to learn. After being some time with Dr. Christie's father on a farm near Paris, in Upper Canada, he went to live with Dr. Christie, and had been with him between two and three years, when, on the 31st of March, in the afternoon, he went up into a hay-loft, and while lying there cried out in great agony that he was dying. Mrs. Christie on being told this by a

servant went out to him, and was told by the boy that he had taken strychnine.

He used to attend in the shop occasionally, and was acquainted with medicines. It was clearly proved that his death was occasioned by taking a large dose of strychnine. Many witnesses were examined.

There was evidence that he had complained of insufficient food and clothing, and of being over-worked, and had expressed himself as if he was weary of life and wished to die; also that he had spoken of running away.

On the other hand, many witnesses gave a different account of the manner in which the boy was treated.

M. C. Cameron showed cause.

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

There was enough perhaps in the evidence to warrant the finding of the jury, if it had been uncontradicted; and it is impossible for us to come to the conclusion that the jury was not honestly under the impression produced by the testimony, the appearance of the body, and the fact of self-destruction not accounted for by any want of sound understanding in the boy, that he had been driven to the fatal act by a want of reasonable and kind treatment on the part of his master, though the evidence is very strong the other way, and seems to preponderate in favour of the opposite conclusion. It cannot be said that the enquiry into the cause of the boy taking poison was irrelevant: it was evidently the duty of the jury; it bore upon the question whether it was accidentally done and by mistake, or in consequence of insanity. Such inquiry into the inducements which led to the act are constantly made at inquests; and though the jury seem to have come to the conclusion upon light evidence, we cannot on that account alter their finding.

The statute 13 & 14 Vic. ch. 56, has evidently a very different object in view from that which is sought to be accomplished by this application.

Rule discharged.

REGINA EX REL. HALL V. GREY ET AL.

Where the returning officer used the original collector's roll instead of a copy, as directed by the act, having first announced that he intended to do so, and no one having objected.

Held, that the election was valid. [15 U. C. Q. B. 257.]

Morris obtained a rule on defendants to shew cause why the judgment of the judge of the County Court for the County of Grey should not be reversed, and why the election of the defendants should not be set aside, and the relator, Hall, be declared duly elected, on the ground that the returning officer did not procure a correct copy of the collector's roll for the township (Melancthon) as required by the statute 16 Vic., ch. 181, and on grounds disclosed in the relator's statement and the affidavits filed.

The other grounds in the statement were, that the returning officer would not allow this relator's name to be inserted in the poll book as a candidate, or receive votes for him, although he was proposed and seconded at the election, and was duly qualified; that the defendants, *or some of them*, were not duly qualified in point of property, which the returning officer held to be immaterial, treating the election as one coming under the statutory provision applying to cases where there are not more than two persons in the township for each seat having the property qualification required by law, whereas in fact there were more than the requisite number of persons in the township possessing the necessary qualification.

J. B. Read showed cause, and cited Regina ex rel. Ritson v. Perry, 1 P. R. 237; Regina ex rel. Carroll v. Beckwith, Ib. 278; *Morris*, contra.

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

Upon the first objection, the opinion of the learned judge of the County Court is supported by the case cited, of The Queen ex rel. Ritson v. Perry et al. (1 P. R. 237), and this is so far a case more favourable for the defendants, that it is shewn and not denied that the returning officer had here the original roll; that is, the assessor's roll as revised, and of which the collector's roll ought to be a copy, and we may assume was. Then it is shewn also that he publicly announced that he intended to proceed with the election, using this original roll, and that no one objected. In all such cases, however, the returning officer ought to proceed as the act points out, if it were only for the sake of excluding objections such as have been made here, which, though they may not be treated as fatal, yet put the parties elected, and sometimes the returning officer himself, to a great deal of trouble and expense, which by simply conforming to the statute would be avoided.

The other objections, we think, were not intended to be pressed; we mean were not intended to be revived here.

They were rightly determined, it seems, by the judge of the County Court, according to the evidence.

Rule discharged.

REGINA V. BOULTON.

Lane—Dedication—Highway.

Where a person has sold lots according to a plan on which a lane is laid out in their rear, he cannot afterwards shut up such lane: and the fact that he had previously conveyed portions of the land comprised in the lane, would only effect so much as he had thus precluded himself from giving up to the public, and would not entitle him to close up the whole. [15 U. C. Q. B. 272.]

INDICTMENT for nuisance, in obstructing a common public highway, being a lane on the north side of King Street, and running parallel with it, connecting York St. with Simcoe St., in Toronto.

At the trial, at Toronto, before *Robinson*, C. J., the jury found a verdict of guilty, and the learned Chief Justice reserved for the opinion of the court the question whether the evidence supported the conviction. Sentence was not passed.

The facts were as follow:—The defendant owned a block of land on the north side of King street, extending from York street to Simcoe street, and many years ago he laid out a lot fronting on King street, and running 100 feet. This lot he sold to one Nicholson, who long ago built a wooden stable upon it, which he placed on the extreme northern limit of this lot.

Afterwards the defendant laid out the north part of his block into building lots, and left a lane of about twenty feet (there was no accurate account of its width) which was to extend some distance between York street and Simcoe street, and was to separate the range of lots fronting upon King street from a range of lots north of that, which the defendant intended should front upon a street to the north called Boulton street.

This plan of survey gave to the range of lots fronting upon King street a less depth by some feet than had been given to Nicholson's lot, and as the defendant had conveyed that lot, and Nicholson had placed his stable as far back as he could, the lane could not be laid open in that part of the same width as it was and now is east and west of it.

The plan was certified and filed in the County Registry Office, in 1852:

It was sworn by Mr. Crooks the prosecutor, that he became the purchaser of Nicholson's lot in February, 1854: that north of the stable, and between it and the range of lots abutting on the lane, there was a space wide enough for a lumber-waggon to pass, with some room to spare: that he had used it for the purpose, and the space had always been left open in rear of the stable or shed, until the defendant shut it up by running out a board fence from each end of the stable to the northern edge of the land: that there were many persons living on the lots east and west of that point, on each side of the lane, which opens into a street at each end; that about eighteen months ago defendant closed it at this point; that some one living near the place pulled down the fence which the defendant had put up, and it was renewed and pulled down again, and the defendant replaced it; and the prosecutor, Mr. Crooks, again pulled it down in presence of two policemen, and afterwards preferred the indictment for nuisance, in order to have the right of way determined.

Mr. Crooks swore that before he purchased he referred to the registered plan, in order to ascertain whether he would have a passage-way behind his property, and that it was at that time open, though it seemed that when the plan was filed it was fenced across from the stable at each end, or at least it had been fenced and *some* of the boards were still up.

Charles McClellan, the city inspector, swore, that in 1856 he made a report of a nuisance (rubbish or water) allowed to lie in that lane, and partly in the space between the stable and the north side of the lane: that an investigation took place before the police magistrate, upon a complaint preferred by the witness against the present defendant as proprietor of the ground: that the defendant

attended, and insisted that he was not bound to remove the nuisance, for that it was in a public highway, and it was the business of the public to see that the road was kept in repair.

This witness swore that the space north of the shed was about eight feet wide, and that it had been long used as a thoroughfare before it was fenced across, about May, 1856.

Mr. Gurnett, the police magistrate, produced the information which the city inspector spoke of, and stated that Mr. Boulton appeared and defended himself: that he contended the lane was a public highway, and that he was not bound to put it in order. He referred to the statute which provides that streets and lanes laid out by private proprietors in towns shall be looked upon as public highways. That he, Mr. Gurnett, thought the defendant was right in what he contended for, and dismissed the complaint against him. The city authorities in consequence put the lane in proper order.

On the part of the defendant, John O'Brien was called as a witness. He swore that he was a tenant of the defendant, living on the lane behind Nicholson's (now Crooks') lot; that he had known the lane for six years; that when Mr. Crooks bought it it was stoppted up that when the witness first saw it it was fenced from each end of the shed to the north side of the lane; that the witness' lot, which was on the north side of the lane, was 84 feet deep; that is, running southerly towards the lane for that distance; and that, giving him his eighty four feet, there would be only two feet left between him and the shed. In other words, if he had his complement there could only be a passage at that point two feet wide.

He said that the lane was closed up at that point till Mr. Crooks became the owner of the Nicholson lot: that is, part of the board fence was up, though there might have been some boards off, but Mr. Crooks insisted on its being laid open.

The parties put in a written admission of certain facts; it was explained that the real ground of the dispute was, that the defendant desired that Mr. Crooks should move his stable back, so as to leave to the lane its full width, in which case he would not object to that part remaining open, which he now insisted he had to close; and till Mr. Crooks consented to that, the defendant objected to giving up the ground in question for a road, unles he wree paid for it.

Mr. Crooks, on his part, contended that by his plan filed Mr. Boulton had dedicated the lane to the public, and that if there were a few boards across the street when he filed his map, it would not the less be a dedication, as shewn in the plan, and that he was bound to leave as much of the lane open as was in his power, and to leave that part open which his plan exhibits as open space whether it be much or little.

R. A. Harrison, for the Crown, cited 9 Vic., ch. 34, sec. 33; 12 Vic., ch. 35, sec. 43; 13 & 14 Vic., ch. 15; Poole v. Huskinson, 11 M. & W. 827; Belford v. Haynes, 7 U. C. Q. B. 464; Regina v. Spence, 11 U. C. Q. B. 31.

The defendant in person, contra.

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

Independently of the statutory provisions of this province respecting streets laid out in blocks of land in towns and villages owned by private proprietors, we are of opinion that the defendant in this case having made and registered a plan, and sold according to it, which plan exhibits a lane or passage in rear between those lots fronting on King street and those fronting on Boulton street, he would, upon well-known principles, be precluded from resuming exclusive possession of the land, and excluding the public from the use of such lane. What the defendant had laid down on his plan as a lane was apparently of sufficient width to be used by horses and carts, as well as by foot passengers; but if limited to foot passengers, it would still be a great accomodation. It is alleged by the defendant that whatever the plan may seem to hold out, he cannot in fact concede to the public a lane of more than three or four feet in width, for that by his grants made to vendees before he filed his plan, he had entitled them to come so far south from Bulton street as not not to leave more than that inconsiderable space between the rear of their lots and the rear of the lots which front on King street. To make that argument apply, it would be necessary at least to shew those alleged grants on Boulton street, that we might see the terms of the descriptions contained in them; and to prove also at what time they were made, so that it might be seen whether they were before or after that had taken place which is relied on as a dedication. No evidence for this purpose was given, but if it had been, it could only have material in regard to so much of the land as it would appear the defendant had precluded himself from dedicating as a highway. He could not be entitled to close up the whole lane because he had led those who purchased from him to expect that they would have a wider lane than there was room for; and so, also, as to what is shewn respecting the particular part of the lane marked in the plan: we mean the part opposite to Nicholson's lot. The plan does exhibit the stable, which is in the rear limit of that lot, as jutting out into the lane, so as to obstruct more than half its width. The defendant, it does seem, cannot remedy that, and by the plan the public can see what the fact is in that respect. But though it be true that the defendant could not give the advantage of a lane as wide there as it may be on either side of the stable, yet the public are not the less entitled to have so much of the lane left open as Nicholson's lot does not occupy.

We think the evidence supported the conviction, for that the defendant is bound to leave the passage open so far as he legally can; and if it be only two feet wide, it might still be a desirable convenience as a passage way for foot passengers.

Conviction affirmed.

BRENNAN v. WHITLEY.

Covenant—Action by assignee—Evidence—Amendment.

Plaintiff declared that defendant, by his deed, covenanted not to commit waste, not stating with whom the covenant was made, or who were the parties to the deed:

Held, that the plaintiff could not shew that was suing an assignee of the reversion, but must prove a covenant with himself; and an amendment was refused at *nisi prius*. [15 U. C. Q. B. 277.]

The plaintiff sued in covenant, setting forth that defendant, by his certain deed in writing, bearing date the 23rd June, 1851, did, amongst other things, covenant that he should not nor would at any time during the term granted by said deed, commit, or permit, or suffer to be done, any wilful or voluntary waste or spoil in or upon the said premises, or any part thereof; and then the declaration charged the defendant with having cut and carried off timber, contrary to his covenant.

It was not stated expressly in the declaration who were the parties to the deed, nor that the defendant by the deed covenanted with the plaintiffs; but there was no intimation whatever of the plaintiff suing as assignee of the reversion, nor any explanation given why he should sue upon it unless he was the covenatee.

The defendant pleaded *non est factum*. The lease produced upon the trial, which took place at Toronto, before *Robinson*, C. J., was made by George Brennan to the defendant, and it was shewn that he had by deed conveyed his reversion in the land to the plaintiff, John Brennan.

It appeared to the learned Chief Justice that he could not admit evidence of an interest in the plaintiff which was not stated in the declaration; that from the record he could only understand that the plaintiff was suing as upon a covenant entered into with himself, for otherwise he could have no more connexion with the cause of action, for any thing that was stated, than any stranger. He held that the issue put the plaintiff to prove a demise made by himself. The plaintiff then moved to be allowed to remodel his declaration, so as to make it an action by him as an assignee, upon a covenant running with the land.

The learned Chief Justice declined to allow the amendment, and the plaintiff was nonsuited.

Blevins obtained a rule *nisi* to set aside the nonsuit as contrary to law and evidence, or for a new trial, on the ground that the amendment ought to have been allowed.

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

We are of opinion that the nonsuit was proper, and that the court has no discretion to review the decision at *nisi prius* refusing the amendment; but we allow a new trial on payment of costs, with liberty to amend the declaration on paying the costs occasioned by the amendment.

Wanless v. Matheson and Blair.

Malicious arrest—Evidence of reasonable and probable cause.

Held, that under the evidence stated below, the plaintiff clearly failed to shew want of reasonable and probable cause, and that a nonsuit should be entered. [15 U. C. Q. B. 278.]

Action for malicious arrest, tried at London before *Richards*, J., *Plea*, by each defendant, "not guilty." Verdict for plaintiff for £50.

McMichael obtained a rule *nisi* for a nonsuit on leave reserved, or for a new trial on the law and evidence, and for reception of improper evidence.

Fitzgerald shewed cause, and cited Torrance v. Jarvis, 12 U. C. Q. B. 120.

The facts of the case fully appear in the judgment.

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

We are of opinion that upon the leave reserved at the trial, a nonsuit should be entered. It was proved very clearly that the plaintiff was overwhelmed with debts, which he was unable to pay: that there were mortgages and judgments recorded against him: that he had assigned his personal property; and that the executions which were out against him were returned "no goods." He had broken faith with the defendants in the arrangements which he had made with them; he had deceived them with promises which he had not performed, and by making statements in regard to his circumstances which were found to be incorrect.

There were rumours very generally prevalent that he had absconded, and others that he was immediately about to abscond, which rumours, undeniably prevailing, the defendant was told by his legal adviser well warranted an arrest.

It would be, we think, a great reproach to the administration of justice, if when the law of the land expressly allows a debtor to be arrested, a creditor acting upon such grounds as these defendants did, should be treated as having acted without reasonable ground and maliciously.

If persons acting on such grounds are not safe from vindictive damages, there ought certainly to be no power given by law to arrest for debt, for what the law intends to be an advantage to the creditor would be nothing but a snare.

It would amount to this: that the creditor must wait till his debtor has not only completed his arrangements for a flight, but till he has actually fled from his house, and is making his way with all speed to a foreign country, and must take his chance of overtaking him on his way.

The plaintiff in this case owed the defendants £800 or £1000 for a steam engine which he had purchased from them. He had stripped himself of all means of paying the debt; had trifled with and decived them; and the general report and impression was, that he had actually absconded, though the defendants, having informed themselves more correctly as to his movemennts, found that if they lost no time they might yet possibly be able to stop him and obtain satisfaction or security.

We are of opinion that the rule should be made absolute.

Rule absolute.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law.*)

Young et al. v. Buchanan.

Declaration—Action on the case.

A declaration charging defendant with wilfully and fraudulently taking away and secreting the goods of one F., against which goods the plaintiff had put an execution in the hands of the sheriff, so that the sheriff could not discover the same or levy, &c., averring knowledge of the facts in the defendant is good on demurrer. [6 U. C. C. P. 218.]

Case.—The declaration stated, by way of inducement, that the plaintiffs had recovered a judgment in the Queen's Bench against one James L. Freeman, in assumpsit, for £2003 11s. 8d., and on the 14th of May, 1855, sued out a *Fi. Fa.* to the Sheriff of Halton, returnable on the first of Easter Term, 1855, endorsed to levy £925, with interest, &c., £3 11s. 8d. costs, &c., &c., which writ so endorsed was delivered to the sheriff. That at the time of the delivery, and before the return of the writ, there were goods of Freeman's of which the sheriff might have made the moneys so endorsed. Yet defendant well knowing, and intending to injure plaintiffs, and to prevent the recovery of the said moneys out of the said goods, after the delivery of the writ to the sheriff, and before he could reasonably execute the same by seizure, "falsely, wilfully, fraudulently and deceitfully took, carried away and secreted the said goods and chattels," so that the sheriff could not discover the same, or levy, &c. By reason whereof the plaintiffs have lost the means of recovering the moneys endorsed on the writ.

Plea.—That before the delivery of the said writ to the sheriff, the said Freeman was indebted to the defendant in a large sum of money, and in good faith sold and delivered the said goods and chattels to defendant, for the purpose of securing the payment to defendant of the said debt. That at the time of such sale and delivery defendant had no notice of the writ being in the sheriff's hands, and so defendant, before any delivery of the writ to the sheriff, took and retained possession of the said goods, and removed and carried away the same, as he lawfully might.

Demurrer to the plea,

Exceptions to the declaration.—That it does not shew that defendant, in taking the goods was acting in collusion with Freeman; that defendant may have been—for all that is averred—acting as the servant of Freeman, and by his authority; that it is not averred defendant knew of the delivery of the writ to the sheriff; that defendant appears to have been a mere trespasser in taking the goods, and if so plaintiffs, as creditors of Freeman, could have no right of action against him.

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

The plea was given up by the defendant's counsel, I have not, therefore, considered it.

The statute 5 Wm. IV., ch. 3. sec. 8, enacts that "any person who shall assign, remove, conceal or dispose of any of his property with intent to defraud his creditors, and *any person who shall receive such property with such intent* shall, upon conviction, be deemed guilty of a misdemeanor.

The declaration in this case does not expressly charge a "*receiving*" of the goods of Freeman with intent to defraud Freeman's creditors. The terms "*falsely*" and "*deceitfully*," are not very applicable or definite when used in reference to taking, carrying away, and secreting goods; the terms "*wrongfully*" or "*unlawfully*," would have been more pertinent. "Wilfully" conveys no stronger meaning in this case than the averment of acting with the knowledge of the introductory matters; and "fraudulently," which is the only really appropriate word, is not, *per se*, sufficient to import a reception with intent to defraud the creditors of Freeman. The declaration cannot, therefore, in my opinion, be sustained on the statute.

But, on the best consideration I can give the case, I am of opinion that the declaration discloses a good cause of action at common law. It charges a wrongful act, namely, the wilfully and fraudulently taking away and secreting the goods of one Freeman, against which the plaintiffs had placed a writ of *Fi. Fa.* in the hands of the sheriff. It asserts the defendant's knowledge that the plaintiff's execution against Freeman's goods was in the sheriff's hands, and that the defendant did the act complained of fradulently to defraud the execution; and it states that the plaintiff has sustained damage thereby.

It cannot be denied that the law gives a remedy to every person who sustains damage by the wrongful act of another, against the party who does the wrong. This is the general rule. In applying this principle the courts have decided that case will lie for the rescue of a debtor on a *Ca. Sa.*—Wheatly v. Stone (Hob. 160), Lynne v. Conyngham (Hetly's Rep. 95,) Congham's case (Hut. 98.) So also if the debtor has been arrested on mesne process, Kent v. Elves (Cro. Jac. 241,) in the Exch. Chamber. So if the defendant by a false summons, as that a prisoner in custody for debt is the servant of a privileged person, or an officer of the court procures a *Supersedeas* for him, (21 Edwd. III., 23; 11 H. 6, 8; 21 Edwd. IV. 22.) It seems also that case will lie for the rescue of a distress taken for rent, (3 Bulst. 121) and in Hetly's Reports 145, (same as in Littleton's Reports 296), it is said no *rescuous* can be had on a *Fi. Fa.*,—the rescuous referring to the person—but the party shall have an action in the case.

In all these instances the person of the defendant has been arrested, or the goods have been taken by the sheriff, so that the

plaintiff, but for the wrong, would have had the actual benefit of the execution of the debtor's goods. In the present case no execution, it is alleged, could be done by the sheriff owing to the defendants act. It does not appear to me that this difference will deprive the plaintiff of his remedy. The injury is in effect the same whether the sheriff is prevented from levying, or the goods are taken from the sheriff after he has levied. In either case the plaintiff is hindered from obtaining satisfaction—Seaman v. Graham (Cro. El. 908), reported as Semayn's case (5 Co. 91), and referred to in one of the other cases I have cited, as Seaman's case contains nothing against the maintaining this action, but leads in my opinion, decidedly the other way. There the sheriff [illegible] writ against the goods of A., which were in the house of B., and went to the house of B. to seize, and that B. shut the door and would not admit him, whereby the sheriff could not seize, by which the plaintiff lost the benefit of the writ. Though judgment was given against the plaintiff, yet the court held, that after denial upon request made the sheriff might have broken open the door, and that it should have been certainly and directly alleged that the defendant had notice of the process, and of the coming of the sheriff to execute it,—as without such notice the shutting of the door of his own house was lawful—which shews, I think, clearly, that the action would have been sustained if there had been a sufficient averment that the defendant, being fully apprized of the process and the object of the sheriff to execute it, had prevented him from discharging his duty, it would have been sustained.

In an old work—Shepherd on the action on the case for Deeds—it is laid down (p. 4), "When cattle are on my ground damage feasant, and a stranger drives them out and prevents me of my distress," case lies; and again, (p. 160), "If an officer be coming to arrest a man, or attach his goods at my suit, and another carries away the goods or the person, so that the officer cannot do his work," case lies.

I think both reason and authority are in the plaintiff's favour and that the declaration discloses a sufficient cause of action.

The plea was given up by the defendant's counsel on the argument.

Judgment should be given for the plaintiff on demurrer.

Per cur—Judgment for plaintiff.

GRIFFITHS v. MUNICIPALITY OF GRANTHAM.

Notice—School section.

Before any alteration can be made in the limits of a school section, notice must be given to the parties interested in the proposed alteration, before the passing of the by-law authorising the same. [6 U. C. C. P. 274.]

In Easter term last *W. Eccles* obtained a rule *nisi* to quash a by-law passed the 14th May, 1856, intitled, "An act for the more equitable arrangement of the school sections in the Township of Grantham," or such part of it as relates to No. 4, because the parties affected thereby were not duly notified of the intention to pass such by-law or make any alterations, and because no request was made by the freeholders or householders to make such alterations nor was any meeting held for that purpose. The affidavits filed shewed that the boundaries of school section No. 4 had been altered by this by-law; and they negatived any motion to the parties affected, any request by the freeholders or householders to make the alteration, and the holding of any public meeting for that purpose.

No cause was shewn. The rule was served on the 5th of June last, and enlarged to Trinity term, when it was moved absolute, and reference made to Ness v. Municipality of Saltfleet, in which the necessity of notice being given to parties to be affected by any alteration of the boundaries of a school section, before any step is taken towards such alteration is distinctly recognised.

In the case referred to, though it was my misfortune to differ in opinion from the majority of the court as to the necessity of a request from the freeholders or householders of a school section, and of a public meeting for that purpose as a precedent to the township council making the alteration, the court was unanimous as to the necessity of notice. The statute, as was then remarked, makes no provision for the form of the notice, nor for the mode in which it is to be given, nor by whom; but still it requires notice, the affidavits negative any notice and none is asserted on the part of the municipality.

The promptitude of this application relieves us from any difficulty resulting from possible inconvenience to arise from the by-law being quashed, if that could have any influence.

In my opinion the rule should be made absolute, with costs.

Rule absolute.

CHAMBERS.

(*Reported for the Law Journal, by* C. E. ENGLISH, Esq.)

WILSON ET AL. v. BULL & BULL.

Interpleader—Appearance of Claimant.

In interpleader applications, if the affidavits forwarded by claimant be lost, he will be allowed an opportunity to file others; or, if the nature of his claim appear on the affidavits filed by the execution creditor, then the usual issue may be directed.

The particulars of this case sufficiently appear in the judgment.

ROBINSON, C. J.—This was an interpleader summons, granted by Mr. Justice *Burns*, on the 25th of July, 1857, upon application of the sheriff; one Alex. Grant having claimed the goods seized.

The defendants had made a mortgage of land, with a grist mill upon it, to Grant. Some of the mill-stones, and parts of the machinery of the grist mill, had been taken out, with a view to the machinery being altered and improved, and replaced; and while it stood so severed from the building, and unconnected with other parts of the machinery, the sheriff's officer came with this *fi. fa.* and seized the things which had been so separated from the building and from the other parts of the machinery.

Grant served notice of his claim, contending that the things seized were fixtures, part of the real estate, and were vested in him as mortgagee, under the deed given by the defendants.

On the return of the summons, the execution creditor appeared by counsel, and filed affidavits for the purpose of showing that the things seized had been severed from the freehold and were liable to be taken under the execution as chattels.

The claimant Grant did not file any affidavits in support of his claim; but he appears by counsel, who says that he has been written to by the claimant to *appear* for him, and that the claimant did transmit affidavits which cannot now be found.

Under these circumstances, I cannot treat the claimant as not appearing to support his claim, but must, if I thought it necessary, give him time to file other affidavits. Upon the affidavits, however, which are filed on behalf of the execution creditor, the facts fully appear,—or at least sufficiently to let us see that the question is one of law, *i. e.*, whether the machinery as it stood is to be considered as part of the realty which passed under the mortgage to the claimant Grant, or whether it had lost that character by reason of its being severed, and the effect of such severance.

Order for an issue in the common form.

RICHMOND ET AL. v. PROCTOR AND PROCTOR.

Cognovit—Attorney—Judgment.

A confession of judgment may be executed by the attorney of the party giving it. A Judge in Chambers will not set aside a final judgment regularly signed. Great delay on the part of a defendant may preclude his right to have judgment against him set aside.

(6th August, 1857.)

A summons was granted by *McLean*, J., on the plaintiffs, to show cause why the judgment entered against Alexander Proctor, one of the defendants, and all subsequent proceedings had thereon, should not be set aside, on the ground that the cognovit on which it was entered was executed by Mr. *Shanly* as attorney for the said Alexander Proctor without his authority; and also because the affidavit of execution of the cognovit was not properly written, the name of one of the plaintiffs being omitted. The cognovit was taken on the 29th of May, 1856, for £200 damages, besides costs. No stay of judgment. True debt £100 12s. 6d., with interest from date of cognovit, with authority to take out execution if the same be not paid by the 1st of July, 1856, with costs. It was signed in the name of both defendants by *J. Shanly*, jun., as their attorney.

The affidavit of execution was sworn on the 29th of May, 1856. It had not the name of one of the plaintiffs (James Richmond) in the intitling of the cause, but it was endorsed on the cognovit itself, which was properly intitled, and was executed in the name of the two defendants.

The defendant Alexander Proctor swore that in May 1856, he was served with process in this suit, which was upon a promissory note made by the defendant John Proctor, and endorsed by the defendant Alexander Proctor, his brother: that soon after such summons, he was informed by John that he had taken up the note by paying part and giving a note for the balance; that he entered no appearance as he supposed he had thus been relieved from all liability on the note, that he gave no authority to Mr. *Shanly*, or any one, to appear for him; that he has had nothing since served upon him in the cause, and heard nothing further of it till the 7th of July, 1857, when his goods were seized upon a *fi. fa.* issued in this cause; that judgment was entered on the 30th of May, 1856, on a cognovit given by Mr. *Shanly*, but without any authority from him; that he first heard of this on the 11th of July, 1857. He swore that he did not to the best of his knowledge and belief owe the plaintiffs any sum whatever on account of their claim in this action. On the other hand, Mr. *Shanly's* affidavit was filed, in which he swore that John Proctor came to him and employed him to defend this suit, which he did for both parties; that from his instructions he believed that they were partners in business; that he instructed deponent to obtain as good terms as he could for them, and to settle the cause in a manner as little expensive as possible; that he accordingly offered the plaintiff's attorney a cognovit, which he accepted, saying that if £50 should be paid by the 1st of July, 1856, execution should be delayed till the 1st of August; and that on the 14th of June, 1856, he was paid his costs by John Proctor.

An affidavit was filed by Daniel, stating that John Proctor had absconded; that Alexander was a bankrupt, and had assigned his property to some of his creditors; and that he had no defence to this action on the merits.

Personal service of the summons on Alexander Proctor on the 23rd of May, 1856, was proved; and it was further shown that the action was on a note for £99 10s. 6d., made by John and endorsed by Alexander Proctor; that Mr. *Shanly* appeared for both defendants; and that the amount now due on the judgment was £42 18s. 6d., and £6 9s. 8d. costs.

It was sworn that the attorney Mr. *Shanly* was in solvent circumstances.

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

I decline to interfere summarily upon this application. The defendant here was served with process. He swears he endorsed the note, and he gave himself no trouble about it, trusting to his brother's statement that he had settled it.

He does not allege want of notice of nonpayment, or any other defence whatever, from which he could have been shut out by the confession, and it is plain that the proceedings have not been hastened by the confession. There is abundant reason to infer that this defendant left it to his brother to defend or arrange as he best could; otherwise, being personally served with the summons, he would not have allowed thirteen months and more to elapse without paying any attention to the suit. His brother having absconded, the plaintiff has no means of showing by him what the facts were in regard to his authority to give instructions on behalf of both. I should not at any rate have set aside this final judgment, and I am not asked to stay proceedings.

I discharge the summons, without costs.

In Re. Jones (Attorney) ex parte Ketchum.

Costs between Attorney and Client—Order to Tax—Revision of Taxation.

An order to tax costs between Attorney and Client must be made in the Court in which part of the business is done, and must be for professional services.

Bills of costs settled more than one year cannot be referred to taxation.

A Revision of Taxation will not be ordered when the grounds of the original taxation have for any reason failed or become or been found invalid.

(7th August, 1857.)

On 6th April, 1857, Robinson, C. J., granted an order on Mr. Jones to render within a week to Ketchum his bills of cost with dates for fees and disbursements in his professional business for and on account of Ketchum and to refer the same to the Master to be taxed, and that Jones should pay the costs of the application.

On the 15th of May the Master taxed the bills at £57 6s. 6d., due to Jones for services, some of which were not of a professional character.

On 22nd June, 1857, Mr. Justice McLean, on the application of Mr. Ketchum's Counsel, ordered a review of the taxation upon view of affidavits filed by both parties, and in the event of the costs allowed in a suit of *Ketchum* v. *Duffy*, being struck out by the Master, then that Ketchum should pay all costs occasioned by his taxation of this Bill—all other costs to be under sec. 20 of 16 Vic., ch. 175, or the Master to report specially to the Judge in Chambers thereon who should be at liberty to make any order in reference to such costs.*

On 27th July, 1857, the Master made a special report to the effect that the costs occasioned by the taxation of the Bill in the case of *Ketchum* v. *Duffy*, and taxed to Mr. Jones under the last mentioned order, (of 22 June), amounted to £2 9s. 2d. That on considering the affidavits laid before him, according to Mr. Justice McLean's order, he found that the case of *Ketchum* v. *Duffy* had been settled more than a year before the application for taxation, and that as to all the other items charged in Mr. Jones' Bill which had been taxed by the Master, he found that with the exception of one or two cases where instructions to the Attorney, and a few other small items might have been taxed to Mr. Jones, as being strictly for professional services, but which bearing a very small relation to the charges for the remaining services performed, Mr. Jones waived his right to tax; the other costs pertained only either to services not of a strictly professional character, or not performed in either the Queen's Bench or Common Pleas, and consequently ought to be omitted from taxation. There remained therefore, the Master adds, no costs for him to tax, excepting the costs of taxation of the Bill in *Ketchum* v. *Duffy*, and he reported as above to the Judge in Chambers with a view to its bearing on the question of the other costs in this matter.

On 1st August, 1857, on this report being made Ketchum's Counsel applied for and Mr. Justice Richards granted a summons on Mr. Jones, the Attorney, to shew cause why his Bills of costs should not be referred back to the Master on the same affidavits and papers which were before him on the previous revision, and to tax all taxable items in the said Bills.—also to tax all costs of taxation in this matter, except in the case of *Ketchum* v. *Duffy*, under sec. 20 of 16 Vic., ch. 175, against the party chargeable under that section.

Robinson, C. J. It now turns out, and is admitted, that the costs of Mr. Jones in *Ketchum* v. *Duffy* had been paid more than a year before Ketchum moved to have the Bills taxed that were served on him under the order of 6th April, 1857. If that had been known when the first order to refer for taxation was made, and also what now appears, that except in that suit in which the Bill could no longer be referred to be taxed; there was no business done by Mr. Jones in either of the superior courts, no order for taxation would have been made under the 20 sec. of 16 Vic., ch. 175, such as was made. Then whose fault was it that it was not known? Jones delivered that as one of his bills under the order having first, as he swears, asked McIntyre whether he wished to leave that bill also, and was told that he did wish it.

He swears that he told McIntyre that it had been settled, but did not say how long ago, and he now admits, or states that he had received £17 for costs in that suit more than a year before the application to tax his bills, but whether that was in full of the costs in that suit or an account of what they might be, he does not state positively.

Now, on what appeared to me, when the order of 6th April was made, and on what appeared to the Master on 15th May when he made the taxation—that bill for business done in the Queen's Bench was yet open to taxation.

That appearing therefore gave jurisdiction to the proper officer of the Queen's Bench to enter upon the taxation of all the bills for professional business, that is, for business done by Jones for Ketchum in the character of an Attorney, and so the Master went on and taxed the whole at £57 4s. 4d., which included £30 0s. 6d. for the bills in Duffy's case.

In Jones' general bill of charges delivered in 1856, he had included no charge for costs in Duffy's case, but had made his other items amount in all to £33 17s. 10d.

Now, upon the revision made under Mr. Justice McLeans order of 22nd June, the Master reports that he is satisfied the costs in

* See p. 167 of Vol. III. of this Journal.

Duffy's case had been settled more than a year before the application to refer. So under the terms of Mr. Justice McLEAN's order the costs occasioned by the taxation of that bill are to be struck out and have been.

Then as to any order it may be proper for me to make, on the return of Mr. Justice RICHARD's summons of the 1st August, 1857, to shew cause why the bills delivered should not be referred back to the Master on the same affidavits and papers that he has already had before him, with directions to tax all taxable items in the said bills, and also to tax all costs of taxation in this matter, except in the case of *Ketchum* v. *Duffy* under section 20 of 16 Vic., ch. 175, against the party chargeable under said section; it seems to me that as it is now clear that *Ketchum* v. *Duffy* was no longer open to taxation, and there was no business charged for in any of the bills delivered which was done in the Queen's Bench, except in that bill—the foundation of reference to the Master for taxation fails, because the power given in the Act is to refer the bills to be taxed "by *the proper officer of any of the Courts in which any of the business charged for may have been done.*" We cannot therefore continue to exercise a jurisdiction after it is plain that we have none.

I therefore discharge this summons of Mr. Justice RICHARDS.

As to any costs of taxation in respect to what has occurred, I do not feel that I can make any order respecting them as desired by the summons, that is, any order under the Stat. 16 Vic., because the whole foundation of taxation under that Statute fails. And I make no order respecting costs of this application, because both parties have been in fault in allowing the proceedings to go on so far, it being within the knowledge of both, when the bills in Duffy's case were settled, and consequently that no taxation ought to take place as a proceeding under the Statute 16 Vic., ch. 175.

I merely discharge the summons.

Note.—The effect of the Statute, 16 Vic., ch 175, s. 20, seems to be that if any of the bills delivered contains charges for business done in either of the Courts then a Judge has jurisdiction to refer all taxable items to the proper officer of the Court. (*Smith* v. *Dimes*, 4 Ex. 32, and see Grey on costs.)

To give jurisdiction therefore under the Act there must be some charges open still to taxation for business done in one of the Courts. If there be that foundation then all charges *are taxable* before the officer referred to for services rendered in a professional character—though not in any cause, such as advice, inquiry, &c.

It seems a defect in our Statute that where there is no charge for business done in Court there can be no reference under the 20th clause of charges for professional services. In the English Statute, 7 & 8 Vic., there is provision in such case for taxation by order of the Lord Chancellor or Master of the Rolls, see 7 & 8 Vic., ch. 93. sec. 37.—Our 20th clause is copied almost from that clause, omitting the provision to which reference is here made.

SCHOFIELD AND ANOTHER v. BULL AND CAVILLIER.

Interlocutory judgment — Insolvency — Final order of discharge — Proceeding by Audita Querela.

An interlocutory judgment will not be set aside to enable a defendant to plead matters arising subsequent thereto. A Judge in Chambers will not in general entertain or enter into a question as to the validity of an order of discharge for insolvency in the nature of a bankrupt's certificate, under 19, 20 Vic. cap. 93, but will rather let the point be determined by way of *audita querela*.

(Sept. 9, 1857.)

This action was commenced on the 9th of August, 1856, by writ of summons, and declaration was filed on the 30th of October, and judgment by default signed on the 20th of January, 1857; and an order or rule of court was made on the 21st of February, 1857, referring it to the Judge of the County Court of Hastings, to compute principal and interest on the promissory note on which the action was brought.

In the meantime, on the 10th of February, 1857, the defendant Cavillier presented his petition to the Judge of the County Court, Hastings, under the provisions of the statute 19, 20 Vic. cap. 93, for relief; and on the 24th of March last he obtained a final order. On the 12th of June the plaintiffs proceeded to obtain an appointment from the Judge of the County Court to compute principal and interest on the promissory note.

The defendant Cavillier appeared to oppose such computation, on the ground that he was discharged from the debt, as the demand had been included in the schedule to his petition. The Judge enlarged the time, to enable the defendant to apply for relief. Accordingly the defendant Cavillier, on the 20th of June, obtained a Judge's summons, calling on the plaintiff to show cause why all further proceedings should not be finally stayed, or why the defendant should not be at liberty to set aside the interlocutory judgment, and have leave to plead the final order so obtained by him on the 24th of March last. The summons was enlarged from time to time, and the proceedings were in the meantime stayed. The plaintiffs opposed the application, and contended that if the application could or should be entertained upon motion, they desired to show that the final order was fraudulently obtained.

BURNS, J.,

With respect to certain grounds for attacking the final order, the Judge of the County Court is the proper tribunal to apply to, to rescind the order. The 26th section of 8 Vic. cap. 48, empowers the Judge of the County Court, on the application of any creditor, official, or other assignee, under certain circumstances, to rescind the final order; but the power is excepted in cases arising under the 5th section of the Act, that is, as to traders within the meaning of 7 Vic. cap. 10, who had failed before the passing of that Act, and who may have obtained a final order. The statute 19, 20 Vic. cap. 93, was passed to embrace a class of persons similar to those mentioned in the 5th section of the former Act; for the 2nd section enacts that in addition to the effect mentioned in the 4th section of 8 Vic. cap. 48, the final order shall have the effect of the bankrupt's certificate under the 59th section of 7 Vic. cap. 10, and this is the same as contained in the 5th section of 8 Vic. cap. 48. Whether such will be sufficient to exclude the power of the Judges of the County Courts to enquire whether the final orders which may have been granted under the 19th and 20th Vic. cap. 93, can be rescinded, is an important question, and much too serious to be determined upon a mere motion, when there can be no appeal to the Court of Error.

Besides this difficulty, there are other considerations which should prevent the present application being entertained upon a motion. The judgment by default was obtained some time before the final order, therefore the final order could not be pleaded in bar of the action. It cannot now be pleaded *puis darrein continuance*, as appears from the case of Shaw v. Shaw, 6 O. S. 458, and the court will not set aside the judgment by default to enable the defendant to set up by way of plea a matter arising after the judgment was obtained. The action is against two defendants, and there is nothing shown which should prevent the plaintiffs from having their judgment against the defendant Bull. All that the defendant Cavillier can have is, that the final order shall operate so as to discharge the debt as against him or any property he may acquire, and not that it should operate to discharge the debt so far as to prevent the plaintiffs from having the judgment completed and perfected which they had begun to perfect long before the order was obtained by the one defendant.

All these considerations appear to me to render it more proper that the defendant should adopt the proceeding by *audita querela*, which will spread the matter upon record, and thus the parties can have the opinion of the Court of last resort, if they think proper.

The summons is therefore discharged, without costs.

RACEY v. CARMAN.

Affidavit to hold to Bail—Irregularity—Waiver.

An Affidavit to hold to Bail on a Promissory Note or like instrument must shew that the note is overdue, either directly stating the fact or by giving the date of the note and the time it has to run.

If Defendant put in Bail after application made to set aside an arrest for irregularity, it will be considered a waiver of the application and an abandonment of the application.

[18th August, 1857.]

This was an application to set aside the affidavit to hold to Bail in which the defendant had been arrested and all subsequent proceedings with costs on the ground that it was not stated in said affidavit when the promissory note therein mentioned was made, or became due, and on the ground that it did not appear whether the note had fallen due or not, or to set aside that part of the affidavit which related to the said note on the above grounds.

The affidavit was in the following words,—"That George Cameron is justly and truly indebted to one Henry Racey in the sum of fifty-five pounds seventeen shillings and five pence of lawful money of Canada for principal money and interest due to the said Henry Racey as Indorsee of a Promissory note made by the said George Carmon, whereby he promised to pay James J. Spence or order the sum of fifty pounds, with interest three months after

the date thereof, and by the said James J. Spence endorsed to the said Henry Racey also the sum of four pounds and five pence of lawful money aforesaid, for money paid by the said Henry Racey to and for the use of the said George Carman and at his request, and that the said sum of fifty-five pounds seventeen shillings and five pence is still due and unpaid. And I, this deponent, further make oath and say that I have good reason to believe, &c."

Jackson for plaintiff urged that as it was stated in the affidavit, 1st, that defendant "*is justly and truly indebted* to plaintiff in the sum of, &c." 2nd, that the said sum of, &c., "is still *due and unpaid*," the affidavit sufficiently shewed that the note must have been overdue, as neither of these statements could have been made in truth if such were not the case. He also put in an affidavit shewing that defendant had put in special bail since this application and therefore had waived the irregularity, even if the affidavit be insufficient.

ROBINSON, C. J., decided that the affidavit was insufficient in not stating distinctly either that the note was overdue, or the date of note, and the time it had to run, which would have shewn whether it had arrived at maturity or not. But he considered the putting in of Special Bail after the application was made a waiver of the irregularity the same as if it had been put in before the application was made, and therefore discharged the summons.

Summons Discharged.

CROWE ET AL v. MCGUIRE.

Ejectment—Security for Costs—Appearance

In Actions of Ejectment security for Costs cannot be obtained before appearance is entered, as in other actions: and the entering an appearance does not put the cause at issue, so as to prevent the defendant applying for security for costs.

(26th of September, 1857.)

Action of Ejectment.—*McFarlane* for defendant, made the usual application for security for costs, on the ground that plaintiffs reside out of the jurisdiction.

Carroll for plaintiff, objected that defendant had not entered appearance, and that this application could not be made before appearance entered.

McFarlane replied, that by sec. 232 C. L. P. Act, 1856, an appearance in ejectment has the same effect as a plea in other actions, and that an issue may be made up thereon, and on the notice of title served therewith without any further proceedings. And that he purposely had not entered an appearance before making this application, because he feared that under this section it would be considered a joinder in issue, and he would thereby be precluded altogether from obtaining security for costs.

DRAPER, C. J., C. P.—In my opinion, the defendant should appear before he can obtain security for costs, as well in ejectment as in other actions. The 273 sec. of the C. L. P. Act, requires the defendant to appear before he could obtain security for costs under very analogous circumstances. The objection as to the effect of the appearance would be the same under that section, as in the present case.

Summons discharged with leave to apply again, after appearance entered.

COMMERCIAL BANK OF CANADA v. LOVIS.

Consolidation of Actions—Costs.

A party must not bring two or more actions at the same time against another, on claims which might be included in one action; and if he do so, he may be compelled to consolidate them with costs.

(1st of October, 1857.)

This was an application to consolidate two actions brought by the above named plaintiff, against the above named defendant, as endorsee of five promissory notes,—The one action being on one note, the other on four notes—on the ground that the actions were commenced at the same time and were for claims which might be included in one and the same action.

The plaintiff replied that the actions were originally brought against one Kerr along with Lovis,—the one action being against both as endorsers, the others against Kerr as maker and Lovis as endorsee of the note; that Kerr absconded before service of the writ, and plaintiff then proceeded against Lovis alone.

Morphy for defendant, shewed that the plaintiffs' attorney had been requested to consolidate these actions previous to the making of this application, and had been notified that this application would be be made in case of his default.

DRAPER, C. J. C. P., granted an order to consolidate the actions with costs, to be paid by the plaintiff to the defendant.

CHAMBERS v. CHAMBERS,

Practice—Venue—Certiorari.

Where cases have been brought up from the Division Court of an outer county, into one of the Superior Courts at Toronto, by writ of Certiorari, the papers should be filed in the office of the Clerk of the Crown at Toronto: but the venue need not be laid in the County of York.

(2 October, 1857.)

This was an application to set aside the service of the declaration in this cause, on the ground that it had not been filed in the office of the Clerk of the Crown, at Toronto.

The affidavit filed, shewed that the action had been originally brought in one of the Division Courts of the United Counties of Frontenac, Lennox, and Addington, and was removed by certiorari, into the Court of Queen's Bench at Toronto. That the defendant after the return of the writ of certiorari, had filed his appearance in the office of the Clerk of the Crown at Toronto, where the writ and papers had been filed.

The plaintiff, by his agent, opposed the application, on the ground that the declaration had been filed in the office of the deputy Clerk of the Crown, in the Counties of Frontenac, Lennox, and Addington, where the action was originally brought; and that the venue was laid in the County of Frontenac.

DRAPER, C. J. C. P.—Considering that the first proceeding in the cause, in the Court of Queen's Bench, was the writ of certiorari, which having issued from, and been returnable to the Crown office at Toronto, made it requisite to file all the subsequent papers the regranted the order, but without costs, it being a case of the first impression. His Lordship, however, was of opinion that the venue need not be laid in the County of York, but that it might be laid in the county, where the action was originally brought.

RICHARSON v. DANIELS ET AL.

Venue—Change thereof—Amendment—Practice

Venue may be changed by plaintiff, if laid by mistake in the wrong county. In this case the proper order is to *amend the declaration* by changing the venue. Such amendment may be made after plea pleaded.

(2 October, 1857.)

The writ of summons in this case, was issued from the office of the Clerk of the Process at Toronto, where the other papers in the suit were filed, viz., appearance, declaration and pleas; but the venue in the declaration was laid in the County of Ontario.

The plaintiff's attorney applied to change the venue to the County of York, stating in his affidavit, that it was laid in Ontario by mistake.

DRAPER, C. J. C. P.—I think the affidavit of the plaintiff's attorney, that the venue was laid in the county of Ontario by mistake, affords a sufficient ground (no prejudice being suggested which will arise to the defendant) for allowing the declaration to be amended by changing the venue, which I take to be the proper form of the order: such amendment cannot affect the nature of the defence pleaded, and if the defendant would be put to any disadvantage he should have opposed the application on that ground. An amendment may be permitted after plea pleaded, and I see nothing in the character of this amendment to prevent a similar permission. As it is for plaintiff's benefit, he must pay any costs caused to the defendant.

Order granted.

TO CORRESPONDENTS.

E. S.—The question you ask is one of general law, and such as is hardly within the scope of this Journal to answer, but we may say that so far as your statement of the case enables us to judge, we think that B made himself liable to pay the debt to C at once, if by a trade or a credit sale he went beyond the terms under which he accepted the assignment.

T. L.—Your queries are answered under title "Division Courts."

T. M.—Your queries are answered under title "Division Courts."

A CLERK WHO DOES HIS DUTY.—Your queries answered under title "Division Courts."

CORONER.—It is not your duty to bind over for appearance at the assizes, persons who appeared at the inquest to exculpate the accused.

A. B.—We think a Coroner should now as much as ever, declare the forfeitures of deodands. The English Act, 9 & 10 Vic. cap. 62, is not in force in Upper Canada.

T. E., Cobourg.—Your timely and excellent communication too late for this Number, it will appear in our next.

J. J., Jr., Middlesex.—Your letter too late for this Number, will receive attention in our next.

A. A. B., Guelph.—Too late for this Number, will be attended to in our next.

E. F.—Your question will be answered in our next Number.

TO READERS AND CORRESPONDENTS.

No notice taken of any communication unless accompanied with the true name and address of the writer—not necessarily for publication, but as a guarantee of good faith.

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FINANCIAL MATTERS.

Parties in arrears for the LAW JOURNAL will particularly oblige the Proprietors by remitting the amounts due to them immediately. The aggregate of the sums now outstanding and unpaid is very large, and while the prompt payment of a small debt cannot be of any moment to the individual, delay at this time very seriously affects the Proprietors of the Journal. We expect, therefore, that our friends will pay *prompt* attention to this notice.

THE LAW JOURNAL.

NOVEMBER, 1857.

THE PRINCIPLES OF BANKING.—LIABILITY OF SHAREHOLDERS.

The Banking interest is one of the most formidable and most important in this Province. It is one concerning which the ideas of the public are equally vague and unsatisfactory. In times of monetary depression, the pinch of "hard times" brightens inquiry, and causes men to pry into the secrets of the "money changers" in a manner bordering on impertinence. Whether pleasant or unpleasant to the gentlemen who sit enclosed within green baize doors, the inquisitive under such circumstances must be satisfied.

In Canada, we believe that without exception the banks are conducted on the joint-stock principle. In a country where wealth is scattered—seldom consolidated—seldom at the command of individuals, the principle of joint-stock coöperation, as applied to banking, is not only allowable but indispensable. But when the joint-stock principle has tacked to it the further principle of limited liability, it behoves the State to see that the people are well protected.

The standard of currency is gold or silver bullion. The Legislature may, however, confer upon individuals or companies the right to issue paper in substitution of metallic currency. But the public is not obliged to accept paper for bullion, or, having accepted it, is not bound to retain it one moment longer than it is considered safe to do so. True, we occasionally hear it mooted that the Legislature can authorize the suspension of specie payments. As a proposition of what *might* be done, this is unquestionably true; but as a proposition of what *ought* to be done, is subject to the gravest suspicions. In 1837 it was done under circumstances of the greatest necessity. To warrant it at any time, the necessity must not only be great, but the good to be gained certain and effectual. The system of *ex post facto* legislation is in few cases sound; but as applied to the rights of the public in relation to banking institutions, it savors strongly of dishonesty. To return to the ordinary issue of paper currency. The power to do so can only be beneficially exercised so long as the parties issuing it possess the confidence of the public. Now, as public opinion is extremely ticklish, it is absolutely requisite that the parties issuing paper currency should be at all times prepared against the worst contingency. Loss of public confidence is the worst contingency that can happen to any banker. So long as he enjoys this confidence, he may rest securely and continue delighted at the roaming tendencies of his "promises to pay." The moment confidence is shaken, the picture changes. Not one by one—but in whole cohorts the promises return and specie is demanded.

It is the duty of the Legislature to anticipate these catastrophes, and, anticipating them, to see that when specie is demanded specie is forthcoming. If, however, a condition were imposed that no banker should issue bills or notes for an amount greater than the actual bullion in his vault, few would be found willing or able to assume the responsibility. This being the case, it is usual for our Legislature, when constituting joint-stock banking companies, to provide that they shall issue notes for "the aggregate amount of the paid up capital stock and the gold and silver bullion, and debentures or other securities, reckoned at par, issued or guaranteed by the Government under the authority of the Legislature of this Province, on

hand." This stipulation, in these very words, is to be found in every Canadian bank charter to which we have made reference. It is also stipulated in every such charter, that "the total amount of the debts which the said bank shall at any time owe, whether by bond, bill, note or otherwise, shall not exceed three times the aggregate amount of its capital stock paid in, and the deposits made in the bank in specie and Government securities for money." A violation of either of these stipulations is invariably made to work a forfeiture of the charter in which the stipulation is contained. In the management of a concern which may have liabilities outstanding at least three times greater than available assets, extraordinary caution is required. The profits of banking, though generally remunerative, are not made without considerable risk. A "panic" is the spectre which haunts the banker. When it becomes a reality, the chances are greatly in favor of his downfall and utter prostration.

Again: if bankers were merely bound to have specie to a certain amount in their vaults, and no means were provided for testing compliance with the requirement, the grossest and most unpardonable frauds might be the consequence. This test is applied by the enactment that every chartered banking company shall, once each month, exhibit and publish a statement of its assets and liabilities. Under the head "assets" must be given coin and bullion, landed or other property, Government securities, promissory notes or bills of other banks, notes and bills discounted, other debts due not included under the foregoing heads. Under the head "liabilities" there must be given the capital authorized, the capital paid up, notes in circulation, bills of exchange in circulation, balance due other banks, cash deposits. The secret of success lies in working all these different heads of liabilities and assets so that the former shall not exceed the latter. Subsidiary to this, a still further object is, to keep on hand an amount of bullion equal to any possible immediate demand. Auxiliary to this is the necessity there exists of exercising caution in not investing much money in doubtful or unavailable securities. In every charter which has come under our notice, is to be found a provision that "a suspension by the said corporation, either at the chief place or seat of business or at any of their branches or offices of discount and deposit at other places in this Province, of payment on demand in specie of the notes or bills of the said corporation payable on demand, shall, if the time of suspension extend to sixty days consecutively or at intervals within any twelve consecutive months, operate as and be a forfeiture of this act of incorporation, and all and every the privileges hereby granted."

Watching the operation on each side of the scale as the equipoise alters, there are two classes of individuals—the stockholders and the public. Our present intention is to deal with the stockholders only. If all things fail—if bullion be exhausted—if securities be unavailable or worthless—if debts be irrecoverable—if real estate be valueless—the stockholders are liable to be pounced upon by an excited and suspecting populace. In every joint-stock banking company's act there is a provision commencing in these words: "In the event of the property and assets of the said bank becoming insufficient to liquidate the liabilities and engagements or debts thereof, the shareholders of its stock, in their private or natural capacities, shall be liable or responsible for the deficiency, but to no greater amount than," &c. (here the responsibility is made to vary). Few persons who subscribe for stock in banking institutions, ever stop to inquire the extent of their liability. Fewer still, we are glad to say, are ever called upon to make good their liability. The soundness of the banking business of Canada is a cause of much self-congratulation. But the brightest day may be overcast, and the soundest banking institution may come to the wall. The material, animal, and moral world are perpetually changing. In view of the mutability of all mundane affairs, a word of good advice ought not to be slighted.

Stockholders are all subject to responsibility, either more or less. Were there no limitation of liability, each stockholder would be liable to the debts of the whole concern of which he is a stockholder. Were this the case, we can easily fancy there would be no stockholders. The public is interested in having the liability of stockholders as great as possible; the stockholders are interested in having it as little as possible. Between the two parties whose interests thus conflict, the Legislature intervenes, and makes a solemn contract, which, when made, approved and sanctioned, becomes the law of the land. No bank stockholder is made liable, when acting within the powers of the charter or act of incorporation, for the

whole debts of the institution chartered. Each stockholder is made liable either to double the amount of his *subscribed* stock, or to double the amount of his *paid up* stock. Under one or other of these engagements does every person enter who becomes a stockholder in a joint-stock bank. Why there should be such a distinction, we are at a loss to divine. That such a distinction *does* exist, the following table manifestly shows:

CANADIAN CHARTERED BANKS.

NAME.	ACT OF INCORPORATION.	CAPITAL.	AMOUNT PER SHARE.	LIABILITY OF SHAREHOLDERS.
Class I.				
St. Francis Bank	18 Vic. c. 201	£ 100,000	£25 0 0	Double the amount of their capital stock.—Sec. 33.
Molson's Bank	18 Vic. c. 202	250,000	12 10 0	Double the amount of their capital stock.—Sec. 28.
Zimmerman Bank	18 Vic. c. 203	250,000	12 10 0	Double the amount of their capital stock.—Sec. 27.
Niagara District Bank	18 Vic. c. 204	250,000	25 0 0	Double the amount of their capital stock.—Sec. 34.
Class II.				
Commercial Bank of Canada	19 & 20 Vic. c. 120	1,000,000	25 0 0	Double the am't of their respective shares.—Sec. 38.
Bank of Upper Canada	19 & 20 Vic. c. 121	1,000,000	12 10 0	Double the am't of their respective shares.—Sec. 36.
Union Bank of Canada	19 & 20 Vic. c. 122	1,000,000	20 0 0	Double the am't of their respective shares.—Sec. 25.
Ontario Bank	20 Vic. c. 159	250,000	10 0 0	Double the am't of their respective shares.—Sec. 36.
The Bank of Toronto	20 Vic. c. 160	500,000	25 0 0	Double the am't of their respective shares.—Sec. 37.
International Bank of Canada	20 Vic. c. 162	250,000	25 0 0	Double the am't of their respective shares.—Sec. 30.
Bank of Brantford	20 Vic. c. 164	250,000	25 0 0	Double the am't of their respective shares.—Sec. 30.
Class III.				
Gore Bank	5 Wm. IV. c. 46 amended by 12 Vic. c. 169	80,000	10 0 0	Twice the am't of their subscribed shares.—Sec. 37.
Class IV.				
Eastern Townships Bank	18 Vic. c. 206	250,000	12 10 0	Double the amount of paid up capital.—Sec. 28.
The Bank of Montreal	19 & 20 Vic. c. 76	1,500,000	50 0 0	Double the amount of paid up capital.—Sec. 27.
City Bank, Montreal	4 & 5 Vic. c. 97 amended by 18 Vic. c. 41	300,000	20 0 0	Double the amount of paid up capital.—Sec. 17.

It strikes us as surpassing strange that while Canadian charters are in almost every other point uniform, they differ in that point which of all others is the one upon which they ought to agree—responsibility of shareholders. For the sake of convenience, we have in the above table divided the banks into four classes. The liability of shareholders of the banks mentioned in the first, second, and third classes, we conceive to be identical. Whether shareholders are made liable for "double the amount of their capital stock," "double the amount of their respective shares," or "twice the amount of their subscribed shares," it matters not: under a slight variation of language, one and the same meaning is conveyed. But when we come to the shareholders of banks mentioned in the fourth class, there is not only a variation of language but a variation of meaning. There is a wide distinction between making shareholders responsible for "double the *amount of their capital stock*," (as in class No. 1,) and "double the amount of *paid up* capital," (as in class No. 3.) Of course, as to banks in which all the capital is paid up, the effect is substantially the same in either case. But how few banks are there in which the whole capital stock, both old and new, is paid up! As to the three banks mentioned in class No. 4, if the capital be not fully paid up, the shareholders are allowed to speculate upon the whole of their capital shares, and receive dividends upon the whole of their stock, when paid up capital only is made the basis of liability! This, abstractedly considered, is manifestly improper; but when these banks are compared with the others less favored, there is a positive and glaring wrong made to appear. We ask the attention of the Legislature to the circumstance. A distinction such as that which we have thus laid bare, can have only one effect, and that is, the effect of giving to the shareholders of two or three particular banks an unfair advantage over all other banks. The respective charters of the *Banque du Peuple* (7 Vic. cap. 66), and the Quebec Bank (2 Vic. cap. 24), are thoroughly unique. We cannot class them under either of the foregoing heads, and therefore content ourselves with a simple reference to them.

Bank charters are becoming as numerous as the sands of the sea. They are granted with too much laxity; they are passed with too little consideration. Surely they are not matters of so little moment that attention bestowed upon them would be time wasted! There must be more surveillance, or else the time will come when designing men will be authorized by act of

Parliament to swindle her Majesty's subjects, whom her Majesty's Government is sworn to govern and protect. Our opinion is, that all bills, before passing a third reading, ought to be subjected to the ordeal of close criticism by men competent in point of ability and of information. With respect to bank bills, the desirableness of such an examination is beyond all cavil. To convince those in doubt, we have only to draw attention to the facts mentioned in this article. We trust they will carry home conviction to the hesitating, and spur to action those of more decided views.

THE LAW OF DOWER.

It is difficult to conceive anything more unsatisfactory, than the present state of the Law of Dower in Upper Canada. Dower is commonly understood to be a provision for the support of a widow, out of the lands of her deceased husband. The Law treatises tell us that it is a portion which a widow hath of the lands of her husband, at his decease, for the sustenance of herself, and the education of her children. These are high and worthy objects. But does the law enable a widow to have the fruition of the support, so humanely vouchsafed? Take the case of every day occurrence. A farmer dies, leaving a valuable lot of land under cultivation. His wife survives, and becomes his widow. His son inherits it, subject to the dower of the widow. She claims it. He offers no resistance. On the contrary, he pleads that he is and always has been ready to assign the dower. Why, then, does not the widow accept what she apparently claims? Simply because though apparently claiming one thing, she, in truth, seeks another. She claims dower. What is that? The third part of her husband's land for life. Of what use is the third part of one hundred acres without a house upon it, to a widow without means? Sell it—she cannot. Till it—she cannot. Eat it—she cannot. Truly the widow asks for bread; but the law gives unto her a stone. What then does the widow want? She wants "sustenance" or that which will purchase sustenance for her—in other words she wants money. The law does not provide that she shall recover money. It provides that she shall recover an estate in land, which is not convertible into money! So far the law practically fails to give that which it professes to give—the required relief.

Turn we now to the tenant of the land,—the owner *de facto*. He is harrassed, tortured, vexed, if not victimized. He in all probability to purchase peace, pays the widow an exorbitant money demand. Here, however is the difficulty. The real object of the widow is to recover a sum of money. The law does not in any manner, assist in the computation of it. Suppose the tenant in possession, declines to pay the widow's demand; suppose he says to her, "do your best, recover what the law allows you"—what ensues? The widow goes into possession of a piece of land, upon which to live, she must either beg, borrow, or steal. The honest yeoman is, by this dog-in-the-manger operation, probably deprived of a very useful piece of arable land. To the widow it is of no earthly use. To the tenant it is of considerable value. In this respect, the law vexes the one, and does no good to the other! This is supposing the land to be arable. Now, suppose it to be wild, and uncultivated. No widow, however tenacious of life, could hope to exist upon a third of the parcel. She therefore holds off. The tenant sets her at defiance, and says, take "your thirds." She cannot. The land in the meantime, is incumbered with her claim; the title is clouded, because of her outstanding interest; the saleable quality of the land is depreciated. Here, too, the law is practically inoperative. It does no good—it does much mischief.

Having supposed the cases of arable, and wild lands respectively, we have had under consideration, nine-tenths of the dower cases, which arise in the course of litigation. However suited such a law may be for England, and other old and long settled communities, it is, we believe, wholly unsuited for a country such as Canada. But even in England, the law no longer exists. Since our adoption of it it has to all intents and purposes, been killed off in the land of its birth. We preserve it in its integrity, as a memorial of thoughtless and thriftless legislation, if not of positive and melancholy incapacity. Sales of real estates are clogged, and nobody is benefited thereby. The sturdy and stalwart sons of the plough are oppressed, and nobody is profited thereby. A law exists, which exists too often for mischief—seldom for good. If it be necessary for the support of widows and their offspring, that they should have a lien upon their husbands' estates, let it be made an available lien. Do away with the mummery of actions to recover posses-

sion, when the very claimants, of all things, dread to receive possession. Let the land be appraised, at the time of the husband's death, or, if afterwards appraised, let it be appraised as it was when he died. Compute the annual value of the third part of the land. Let that be paid to the widow for life; or, if the owner be able to commute, let him take the proportion which the annual charge bears to the probable duration of the widow's life, and pay to her the principal money thus represented. In this there would be some common sense. In the law as it stands, there is none. Either dower should be done away with altogether, or else be made a real and positive good.

INVESTIGATIONS INTO TITLE.

We think it our duty to call the attention of the profession generally to a case tried at the Fall Assizes for the County of Simcoe before Mr. Justice Hagarty.

As questions of law arising out of the suit have yet to be argued and decided by the Court, we refrain at present from offering any opinion thereon, and confine ourselves to a mere statement of the facts, in order that those whom it may concern may be made aware at the earliest moment, of the extent of their responsibility in the opinion of jurors, if not also in the eye of the law, and govern themselves accordingly.

The suit to which we have reference was brought by one John Ross against John Strathy, as an attorney, for negligence and want of due care and knowledge in making search into the title to five acres of land, which plaintiff was at the time of the alleged retainer about purchasing from one Perry, and which he afterwards did purchase on the faith, as it was averred, of the representations as to title made by defendant.

It appeared that, in 1852, the Sheriff of the County of Simcoe sold three acres of land belonging to said Perry for taxes. In 1854 (before the three years then allowed for redemption had expired) Perry agreed to sell to plaintiff five acres, including the three above mentioned, for £25 an acre, and plaintiff "employed and retained defendant to look after the matter and get him a good title." Defendant made search in the Registry office, and found that the title as there shown was clear, and the purchase was accordingly completed. In 1857, one William Graham, the purchaser at the Sheriff's sale took out his deed, and recorded it, thereby becoming the absolute owner of the land.

The Plaintiff having re-sold the five acres, a search was made, and the sale for taxes became, for the first time, known to the plaintiff, who brought his action against defendant, to recover the damages sustained by him consequent upon the loss of the three acres. In defence, both the negligence and retainer were denied—and questions as to what would constitute the former, and be sufficient proof of the latter, were reserved—and the only one left to the Jury was that of damages. A verdict was given in favor of the plaintiff for £90.

Whatever be the result of this suit—whether the verdict be sustained or not, it conveys a lesson by which the profession should profit. The responsibility which persons assume when they take upon themselves the duty of advising a purchaser as to whether or not the title of a vendor is perfect and free from incumbrances does not appear to be sufficiently comprehended. It would seem to us to be advisable in all cases to have a perfect understanding, evidenced by writing, of the exact nature and extent of the services required to be performed by the party retained. A strict attention to this precaution may save the loss of thousands of pounds.

We believe that seaches in the office of the Register and Sheriff are all that it is customary to make; and at the trial several legal gentlemen who were examined gave evidence to that effect.

The learned Judge also said he was free to confess that in a long practice he had never made a search in the Treasurer's Office—and that he had no hesitation in mentioning this to the Jury as the sole question was that of damages.

We may have occasion to refer to the matter again but as a further precaution we would now remind our professional readers of the existence of the Statute, whereby lands are to be bound by the registration in the Office of the Clerk of the Court of Queen's Bench at Toronto, of *any instrument* creating a debt to the Crown: (14 & 15 Vic. cap. 9.)

TOWNSEND *alias* McHENRY.

Never in the annals of criminal jurisprudence, was there a case more extraordinary than that of this prisoner. A murder is committed in the County of

Haldimand, by a man called "Bill Townsend," who is well known to many of the residents of the county. The murderer escapes. A reward is offered for his apprehension. For three years nothing is heard of him. At the expiration of that time, a person is apprehended as being the veritable "Bill" He denys it stoutly. He is brought to his trial. Witnesses, four score and five, are produced *pro* and *con*. About two score swear positively to the identity of the accused. About two score swear as positively, that he is not the man. Some go so far as to swear, that he does not in least the resemble the notorious culprit. Others laugh at the very idea, and cannot be reconciled by any species of ocular demonstration.—The jury very naturally are unable, upon such testimony, to arrive at any conclusion. They agree to disagree, and are accordingly discharged. Subsequently, the accused is conveyed to a different County to be tried for another and a different murder, committed shortly after the first, by a person supposed to be one and the same person, viz.,—Townsend. Being unprepared for taial, the trial is, at the request of the prisoner, postponed. Before the Court arises two witnesses breathless, and care worn, arrive from the land of Ophir, California, and are prepared to swear a clear *alibi*. Depositions from the same locality and to the same effect are also produced to the government. The trial having been postponed, the evidence is not received, and the prisoner is remanded to gaol for a future assize. The mystery which shrouds this case defies comprehension. If the man now in custody as being William Townsend, be not William Townsend, he is a sorely injured individual. *Nous verrons.*

U. C. REPORTS.

We have to renew our thanks to Mr. Robinson the able Reporter of the Queen's Bench for a continuance of his obliging and disinterested attention. We are sorry that we are not, on this occasion, in a position to say so much of Mr. Grant, the Reporter of the Court of Chancery. Of the Reporter of the Common Pleas, the less said in this respect the better. Owing to the assiduity and industry of Mr. English in reporting Chamber cases, there is no lack of material in his branch of the Reports. We may take occasion in a future number to express more at length our opinion of the manner in which the Reporters of the several Courts discharge their duties to the Profession.

A SOUND PRINCIPLE IN RAILWAY TRAVELLING.

In every matter connected with the place and mode of conveyance in the train, the arrangements as to luggage—the particular place in which the passenger is to sit—in short, in all matters of local management, the passenger must look to the officer in charge for directions—(per Mr. Justice Hagarty, in Childs v. G. W. Railway Company).

HARRISON'S C. L. P. ACTS.

We learn that Mr. Harrison's work on the Common Law Procedure, and County Courts' Procedure Acts of 1856, is at length finished. The Index is now in the hands of the printers. The Acts of 1857 will also be bound up in the same volume, but without notes, as it was found that to annotate them would make the volume much too bulky. The Index, however, will embrace all the Acts of 1856 and 1857, and will be, we are informed, very complete. It has been prepared by W. C. Keele, Esq., under the direction of Mr. Harrison, expressly for his work. The cost of the whole work will only be $6 and not $7 as lately announced. The reduction is made in consideration of the Acts of 1857 not being annotated.

Among five licentiates in law, who came forward recently to take the usual oath required for a member of the French bar, one wore a moustache not of any great size, but still quite apparent. The first President, Delange, observing it said, "The licentiate wearing the moustache cannot be admitted to take the oath." The young man on hearing this, immediately withdrew. So says the English *Law Times*.

Our attention has been called to the case of Griffiths *v.* the Municipality of Grantham given elsewhere. The reader is, by the Report itself, left to guess by whom the Judgment was delivered. The allusion, however, to "Ness *vs.* Municipality of Saltfleet," gives the desired information, and shows it to have been the Hon. Chief Justice Draper.

It may possibly be that the omission was by the Printer, but as Reports should be perfect in themselves, the defect referred to is to be regretted.

In the case of Young *et al v.* Buchanan, which appears in a previous page, a most important principle is recognized. One that cannot be too widely proclaimed, viz., that the wilful and fraudulent taking away and secreting the goods of a defendant, against whom there is a *fi fa* in the Sheriff's hands by a party who had knowledge of plaintiffs' execution, and who did the act complained of fraudulently to defraud such execution—is actionable *at Common Law*—the plaintiff having sutained damage by such wrongful act.

The law, as laid down in this case, is of general application. We see no difficulty in the way of a suitor in the Division Court, bringing his Action therein for such wrongful act. So far as we are informed, the 5th Wm. 4, ch. 3, sec. 8, has been all but a dead letter, but we are satisfied that the development of the law in this case, will have the beneficial effect of restraining a practice, we are sorry to add, common in the country of assisting fraudulent debtors to conceal or make away with their property, to the great inquiry of their honest creditors.

Not having seen the Order in Council of 1853 regulating appeals from the Privy Council in any Upper Canadian publication, we to-day, insert it in our columns. We may mention that it is taken from Vol. VII. of Moore's Privy Council cases.

The Index to Vol. II. of this Journal is now in type, and will be immediately published. Ere long we hope to be able to make a similar announcement as regards the Index to the current volume.

MONTHLY REPERTORY.

COMMON LAW.

C. P. GILES *v.* SPENCER. *April* 29, *June* 25.

Landlord and tenant—Distress, postponement of, by agreement.

A provision in an agreement whereby premises are let to a tenant, that no distress shall be made for rent until the person letting has produced the receipt of the Superior landlord for the rent which has previously become due to him, is a legal provision, and binding on the person letting; and an action lies against him, if he distrain without complying with such provision.

C. P. LODER *v.* KEKULE. *February* 9, *July* 4.

Damages—Delivery of inferior article.

In an action brought to recover damages for the delivering an article inferior in quality to that which was sold, the true measure of damages if the difference between the value of the article of the quality contracted for at the time of delivery, and the value of the article then actually delivered. This is, however, on the assumption that the article delivered could immediately be re-sold in the market. But where the defendant by his conduct delays the sale during which time the market is falling and the plaintiff re-sells the article as soon as he reasonably can, and it is properly sold, the proper measure of damages is the difference between the value in the market of the article of the quality contracted for at the time of the delivery, and the amount made by the re-sale of the article actually delivered.

C. P. JONES (*Administrator, &c.,*) *v.* THE PROVINCIAL LIFE ASSURANCE COMPANY.

Life insurance—Circumstances tending to shorten life, knowledge of, and knowledge of tendency of.

A declaration signed by a person about to insure his life, (and which declaration it is agreed shall be the basis of the contract of insurance,) that he is not aware of any disorder or circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous refers not merely to the knowledge of the assured of the disorder or circumstance, but also to his knowledge that it tended to shorten his life, or to render an assurance on his life more than usually hazardous.

Q. B. MELBOURNE *v.* COTTRELL.

Mortgage—Abortive treaty for—Liability for costs.

Where a treaty for a loan on mortgage goes off, the lender not being satisfied with the title, and there being no stipulation as to title or as to costs on the event of the treaty going off, the proposed lender cannot recover the costs incidental to the investigation of the title.

Q. B. HOBSON *v.* THE OBSERVER LIFE ASSURNACE SOCIETY. *June* 23, *July* 4.

Life Insurance—Statement of Interest in Policy—14 Geo. III. cap. 48, sec. 2.

In a policy of life assurance, the name of the party interested in the life must be inserted, as being the party interested; and a declaration cannot be suppported which states the interest to be in a different person from the person alleged in the policy.

CHANCERY.

V. C. S. NELSON *v.* BOOTH. *June* 24, 25.

Mortgagor and Mortgagee—Separate Estate—Change—Solicitor and Client—Purchase by Solicitor.

The plaintiff, a married woman, was entitled at the date of her marriage to a separate estate for life in hereditaments, which were subject a mortgage for £400. Her husband paid off this mortgage and took possession of the title deeds. He afterwards without the privity of his wife, agreed with B., to whom a debt of £330 was owing for costs which had been incurred by him as their Solicitor in a suit which had been commenced by the wife previously to her marriage, that he would assign to him the hereditaments above mentioned by way of security, for such claim. The husband afterwards became bankrupt and died. B. subsequently purchased from the original mortgagee for £40, a claim of £175 which the latter would have been entitled to add to his claim of £400.

Held, that the husband was entitled to charge the estate of his wife to an extent equal to the amount which had been paid by him; and that the agreement above mentioned, and also the purchase of the £175 were valid and binding on the estate so far as they operated, merely as securities for the amount actually paid by B. A solicitor is not debarred by his position from obtaining from a client a security for a *bona fide* debt.

M. R. WILLIAMS *v.* ST. GEORGE'S HARBOUR RAILWAY COMPANY. *June* 23, 24.

Public Company—Agreements by Promoters.

Agreements entered into by the promoters of a Company before the Act of incorporation, do not bind the Company without subsequent adoption.