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☑ Additional comments / Commentaires supplémentaires: Continuous pagination.

DIARY FOR FEBRUARY.

1. Friday Clergymen to make yearly return of marriages to County Registrar.
2. Satur. *Purification of B. V. M.*
3. SUN... *4th Sunday after Epiphany.*
4. Mon. .. Hilary Term commences.
6. Wed. .. Meeting of Grammar School Boards.
8. Friday Paper Day Q. B. New Trial Day C. P.
9. Satur. Paper Day Q. B. New Trial Day Q. B.
10. SUN... *5th Sunday after Epiphany.*
11. Mon. .. Paper Day Q. B. New Trial Day C. P.
12. Tues... Paper Day C. P. New Term Day Q. B.
13. Wed. .. Paper Day Q. B. New Term Day C. P. Last day for service for County Court.
14. Thur... *St. Valentine's Day.* Paper Day Common Pleas.
15. Friday New Term Day Queen's Bench, Last day for County Treasurers to furnish to Clerks of Municipalities in Counties list of lands liable to be sold for taxes.
16. Satur. Hilary Term ends.
17. SUN... *Septuagesima.*
23. Satur. Declare for County Court.
24. SUN... *Sexagesima.*
27. Wed. .. Appeals from Chancery Chambers.
28. Thurs.. Sub-Treasurer of School Moneys to report to County Auditors.

NOTICE.

Subscribers in arrears are requested to make immediate payment of the sums due by them. The time for payment so as to secure the advantages of the lower rates is extended to the 1st April next, up to which time all payments for the current year will be received as cash payments.

THE

Upper Canada Law Journal.

FEBRUARY, 1867.

WRITS AGAINST LANDS AND GOODS.

Some time ago, referring to the cases of *Ontario Bank* v. *Kirby*, 16 U. C. C. P., 135, and *Ontario Bank* v. *Muirhead*, 24 U. C. Q. B. 563, we remarked upon the unsatisfactory state of the law with regard to writs of execution against goods and lands, and expressed a hope that a bill on the subject introduced into Parliament in the previous session by Mr. M. C. Cameron would become law. Another provision, however, found favor in the eyes of the Legislature, and was passed, and now forms cap. 42 of 29 Vict.—"An Act to amend the Common Law Procedure Act of Upper Canada"—the 5th and 6th sections of which are intended to remedy some of the inconveniences which previously existed, or at all events definitely to settle the law as to the concurrent issue to several counties of different writs of execution.

As the law stood before this Act it was sufficient to procure a return of *nulla bona* from the sheriff of the county in which the venue was laid, (*Oswald* v. *Rykert*, 22 U. C. Q. B. 305;) and as many writs of execution against lands to as many sheriffs could then be issued as the creditor might think proper.

The *bonâ fides* of this return was secured by section 26 of cap. 28, 27 & 28 Vict.—"An Act to make further provision for the office of sheriff in Upper Canada," which enacts that if any sheriff shall wilfully make any false return upon any writ, unless by consent of both parties, he shall be liable to forfeit his office. The lands of the debtor were thus protected from sacrifice before the creditor had made some attempt to realize his debt from the fund which has always been declared by the Legislature primarily liable to pay it. The Act of last session above referred to enacts (sec. 5) that no execution shall issue against lands to the sheriff of any county until after the return of an execution against goods in the same suit by the same sheriff, and (sec. 7) that no sheriff shall make any return of *nulla bona*, either in whole or in part, to any execution against goods until the whole of the goods of the execution debtor in his county shall have been exhausted, and that then such return shall be made only in the order of priority in which the writs have come to his hands. In these enactments the interests of the debtor appear to be kept in view, and those of the creditor ignored. The effect of sec. 5 is in many cases needlessly to delay the creditor by compelling him to ground a *fi. fa.* lands on a *fi. fa.* goods, although his debtor may not reside in the county, and may not have chattel property there to the value of a dollar, or the cost of the writ. As, however, the sheriff must exhaust the goods, and upon penalty of forfeiture of his office may not wilfully make a false return, except by a consent not likely to be obtained, ample time is afforded to the debtor during the investigation, for the disposal of the lands which it is the creditor's object to reach, and in such a case he may either lose the benefit of them altogether, should the sale be *bonâ fide*, or is driven to the risk, expense and delay of a Chancery suit for equitable execution. But it is the latter part of sec. 6 which it may with force be argued is specially unreasonable. The sheriff's return is only to be made in the order of priority in which the writs have come to his hands. Take the frequent case of several

writs of *fi. fa.* against the goods of the same debtor, the first of which absorbs all, without satisfying the judgment in full; the creditors on the other writs must wait until the first has been returned before they can compel the sheriff to make that return to their own which will entitle them to proceed against lands, and when they have obtained it they find their fortunate competitor still first in a race which no diligence on their part will enable them to win.

Or again, take the case of an interpleader issue between the first creditor and a claimant of the goods. A subsequent creditor, who declines an issue, either not feeling it safe to contest the claim, or because convinced that the property will not more than satisfy the first writ, is obliged to wait until the issue is disposed of, and the first writ returned, and after all this delay is still postponed, as to his remedy against lands, to the first execution creditor.

Other practical inconveniences suggest themselves as likely to arise from the present state of the law, among which may be mentioned the difficulty of ruling a sheriff to return a writ when there are several against the same party in his hands. How is he to be compelled to do this "in order of priority," if for any reason some or one of the prior creditors do not desire their writs to be returned, or simply remain passive? Whether this question can be solved judicially or not, we are aware that some officers govern themselves at present by the strict letter of the law.

Apart from any question of the insolvent laws, it seems unjust to give one creditor priority throughout the series of writs which he may find it necessary to issue (a priority which the grossest laches can hardly deprive him of), because the delays which must occur will often, as we have said before, give the debtor time and opportunity to dispose of his real property, before it can be bound by a *fi. fa.* lands.

We think Mr. Cameron's bill was a step in the right direction. If goods and chattels, lands and tenements, are included in the same writ, the chances are lessened of the debtor defeating his creditors by making away with his property. The lands could not be sold until the goods were exhausted, yet they are bound by the writ, and available, so far as they extend, for all the execution creditors.

The last sentence suggests an objection which might be made in favor of the debtor, similar to that urged against certificates of judgment, in that they operated to tie up and encumber the sale of the very land, by means of which a debtor might often be enabled to pay his debts. But in answer to this it is to be said that the writ of a certificate of judgment could only be enforced by a suit in Chancery, while the remedy on a *fi. fa.*, already in the sheriff's hands, is inexpensive and speedy.

The subject is one of great practical difficulty, and every course suggested seems open to some objections. Mr. Cameron's proposal seems to us, however, to be the least objectionable, and though not perhaps quite so favorable to the "poor debtor," is more just to the "poor creditor," who has, after all, some slight claim to justice, not to say sympathy, at the hands of the public.

LAW SOCIETY—HILARY TERM—1867.

It is gratifying to the profession and especially to those most concerned to observe the marked improvement that was evidenced during this term in the proficiency of students presenting themselves for examination both for call and admission as attorneys. The papers of the gentlemen who went up were so good as to call forth from the Treasurer the expression of the unanimous opinion of the Benchers that these examinations were the best that had ever taken place before the Law Society, upon similar occasions, since examinations were required. This is very probably owing in a great measure to the system of lectures that was introduced some five years ago. It is at least a coincidence that the majority of those who went up this term are the first of those who had an opportunity of availing themselves of these lectures.

CALLS TO THE BAR.

The following gentlemen were, during the present term, called to the bar of Upper Canada:—Messrs. F. T. Jones and J. G. Smith, Toronto; G. P. Land, Hamilton; James H. Fraser, London; James Watt, Oil-springs;—Merrill, Picton;—Mudie, Kingston; G. L. McCaul, Toronto; W. H. Walker, Ottawa; C. Seager, Sarnia; F. C. Draper, Toronto; Wm. Lynn Smart, Toronto, and

H. Wetenhall, Hamilton—of these the first seven obtained such a number of marks that they were passed without any oral examination. Messrs. McCaul, Walker, Draper and Seager were only a very few marks behind them.

ATTORNEYS ADMITTED.

The following gentlemen passed the required examination for admission as attorneys:—Messrs. Adam Lillie, Guelph; J. H. Bleasdell, Trenton; W. H. Moore, Peterboro'; B. Gilleland, St. Catharines; J. G. Smith, Toronto; N. Sparks, Ottawa; D. H. Preston, Toronto; J. Munro Gibson, Hamilton; F. C. Draper, Toronto; James H. Fraser, London; W. Mosgrove, Ottawa; Messrs. H. R. Parke, Toronto; G. L. McCaul, Toronto; Edward O'Connor, Guelph; E. A. Bates, Smith's Falls; Wm. Lowe, Picton; and George W. Ostrom, Belleville.

Messrs. Lillie, Bleasdell and Moore were especially complimented by the Treasurer upon their excellent examination, and they, as well as Messrs. Gilleland, Smith, Sparks, Preston, Gibson, Draper, Fraser, and Mosgrove, were not required to undergo any oral examination.

The courts will hold sittings in banco, for the giving of judgments in cases previously argued, and for the disposal of such other business as the courts in their discretion shall see fit, upon the following days:—

Queen's Bench,	March	4th, at	10 A.M.
Common Pleas,	"	"	2 P.M.
Queen's Bench,	"	9th,	2 "
Common Pleas,	"	"	10 A.M.

CHANCERY SPRING SITTINGS, 1867.

The following table shews the latest date at which proceedings can be taken in order to get causes down for examination of witnesses and hearing at the respective sittings. It will be seen that the last day for setting down a cause, at any of the places, for examination and hearing, and for giving notice thereof, is, in general, put on the same day of the week on which the sittings begin at that place, thus, at Toronto, causes are to be set down and notices served, at latest, on Monday, March 4th, the sittings commencing on Monday, March 18th. This is in accordance with a late decision of his Lordship the Chancellor that a cause so set down, has been regularly "entered" and a notice so served has been regularly served "at least fourteen days before the commencement of the examination term."

We are indebted for this table to the industry of Mr. Charles Moss, Student-at-law.

Place at which venue is laid.	Last day for service of bill.	Last day for filing replication, setting cause down, and giving notice of examination and hearing.	Date of Sittings.
Toronto	Saturday, Feb'y 2nd	Monday, March 4th	Monday, March 18th
Stratford	Monday, " 18th	Tuesday, " 19th	Tuesday, April 2nd
Goderich	Wednesday, " 20th	Thursday, " 21st	Thursday, " 4th
Sarnia	Monday, " 25th	Tuesday, " 26th	Tuesday, " 9th
Sandwich	Wednesday, " 27th	Thursday, " 28th	Thursday, " 11th
Chatham	Friday, March 1st	Saturday, " 30th	Saturday, " 13th
London	Tuesday, " 5th	Wednesday, April 3rd	Wednesday, " 17th
Simcoe	Monday, " 11th	Tuesday, " 9th	Tuesday, " 23rd
Belleville	Tuesday, " 12th	Wednesday, " 10th	Wednesday, " 24th
Woodstock	Wednesday, " 13th	Thursday, " 11th	Thursday, " 25th
Kingston	Thursday, " 14th	Friday, " 12th	Friday, " 26th
Brockville	Tuesday, " 19th	Wednesday, " 17th	Wednesday, May 1st
Cornwall	Wednesday, " 20th	Thursday, " 18th	Friday, " 3rd
Guelph	Tuesday, " 26th	Wednesday, " 24th	Wednesday, " 8th
Ottawa	Friday, " 29th	Saturday, " 27th	Saturday, " 11th
Brantford	Monday, April 1st	Tuesday, " 30th	Tuesday, " 14th
Peterborough	Wednesday, " 3rd	Thursday, May 2nd	Thursday, " 16th
Hamilton	Wednesday, " 3rd	Thursday, " 2nd	Thursday, " 16th
Lindsay	Monday, " 8th	Tuesday, " 7th	Tuesday, " 21st
St. Catharines	Wednesday, " 10th	Thursday, " 9th	Thursday, " 23rd
Barrie	Saturday, " 13th	Monday, " 13th	Monday, " 27th
Owen Sound	Thursday, " 18th	Friday, " 17th	Friday, " 31st
Whitby	Saturday, " 20th	Monday, " 20th	Monday, June 3rd
Cobourg	Wednesday, " 24th	Thursday, " 23rd	Friday, " 7th

We are requested to state that a number of copies of the reports now being issued under the new arrangement, over and above those required for practising attorneys, have been struck off for the benefit of judges and others whose names are not on the list furnished to the publishers by the secretary of the Law Society. These, so far as they go, can be had for two dollars a volume. This reduction in the price, an especial boon to students, will be as well received by those we speak of, as the late arrangements have been by the profession at large. Those desirous of obtaining the reports on the above terms should subscribe as soon as possible, as the number of copies left after the practising attorneys are supplied is somewhat limited.

In accordance with our promise, we commence in this number a digest of the English Law Reports. The period which will be embraced in the first digest, the first part of which is now given, is from January to July of 1866. The cases included in this period will be completed in two numbers more, perhaps less—when the next half year, or the next three months, as may be found most convenient, will be taken up and completed in the same way; when the cases are all worked up, the digest will be continued in each monthly number, with the cases in the Reports as they are from time to time received from England.

SELECTIONS.

OF THE ORIGIN, EARLY HISTORY, AND GENERAL PRINCIPLES OF THE COMMON LAW.

1. There is much conflict, by writers on the question in reference to the origin of the common law. Hallam, for instance, says, that the English lawyers, prone to magnify the antiquity like the other merits of their system, are apt to carry up the date of the common law, till, like the pedigree of an illustrious family, it loses itself in the obscurity of ancient time: Hallam's Middle Ages, vol. 1, p. 120. By his own showing, though, it seems that the comparison which he has himself instituted is peculiarly appropriate, and that the origin of the common law, very much like the pedigree of *some* "illustrious families," is lost in the obscurity of antiquity. His own admissions are, that some of the features of the common law may be distinguished in Saxon times, and that our limited knowledge prevents us from assigning many of its peculiarities to any terminate period.

2. Hume considers that the body of la framed by Alfred, as a guide to the magistra in the administration of justice, though n lost, served long as the basis of English ju prudence, and he adds that "this body of la is generally deemed the origin of what is nominated the common law:" Hume's H of Eng., vol. 1. p. 105. And Hallam adm —notwithstanding he places the origin of t common law at a much later period—that t treatise denominated the laws of Henry I. (a which are merely a *compilation*) bears ma of a Saxon character.

3. Neither Sir Edward Coke, Sir Matth Hale, nor any of the other old common-l writers, contend that the common law was r very greatly changed after the accession of t Norman dynasty to the English throne. S 4 Bla. Com., ch. 33. It is of the *origin* of t common law that Sir Matthew Hale says "It is as undiscoverable as that of the Nil And, although the talented historian of t middle ages may be right in considering t establishment of a legal system as not bei complete until about the end of Henry III reign, when the unwritten usages of the co mon law, as well as the forms and precede of the courts, were digested into the gr work of Bracton, yet, this in nowise milita against the idea of the old writers, that t *origin* of those unwritten usages, and of th forms and precedents, is lost in the obliv of much earlier periods.

4. The pecuniary compensation for crim —referred to and dwelt strongly on by Hall —which existed in the Saxon periods, was n it is true, known in after ages, but, even the time of Alfred,* there existed a law the punishment of wilful murder by death Hume's Hist., p. 223), and this seems to ha continued in force until the time of Willi the Conqueror, who took away all capi punishment, substituting therefor vario kinds of mutilations: Reeve's Hist. of E Law, vol. 1, p. 193.

5. Mr. Reeves, in his History of Engl Law, in treating upon the early criminal l of England, says—"All injuries inflicted persons or property, were, under the ea criminal law of the Anglo-Saxons, *commu* by a payment of money; the idea of a *co pensation* for a money recompense going far as to extend even to the taking of the of a man; and radiating upward and dow ward on a scale proportioned to the grea or less value and elevation of the life and nity of the person killed." These fines, cases of homicide and in thefts of vari kinds, were *in lieu of the punishment of de* which also was redeemable by a great vari of inflictions of other corporal punishmen For the commission of certain infamous

* "The good King Alfred's zeal against murder first ca it to be capitally punished:" Consd. on Cr. Law (A. D. 1 p. 353.

nces, there was also punishment, or trial, by deal, of persons who had previously been nder accusations for violations of the law: id., pp. 14, 15.

6. In the reign of Henry I., murder was ain made a capital offence, as it had been rior to the change in that respect made by 'illiam the Conqueror. Glanville, who wrote bout A. D. 1181, says,—"If, on the trial y ordeal, a person is convicted of a *capital ffence*, then the judgment is of life and mem-ers, which are at the king's mercy, as in other leas concerning felony:" Glanville, b. 14, ch. , p. 347.*

7. One of the earliest collections of laws was ade by Edward the Confessor, which com-rised the whole law of the kingdom, contain-g not only the unwritten customs, but the ws and customs made by the several kings. his volume was lost, and thus much relating the early Anglo-Saxon customs, or common w, perished. From the remains of Saxon gislation, it is inferred, that the lost volume, ke the Saxon laws that are in existence, was rincipally taken up with an enumeration of rimes and their punishment: 1 Reeves's Hist.

6. The laws adopted by William the Con-ueror, says Sir Matthew Hale, consisted prin-ipally of those of Edward the Confessor: 'ist. of Com. Law, p. 5.

8. Most of the early statutes which have ome down to us were passed in affirmance of ie common law, or declaratory of it. Thus, ie statute declaring that a servant killing his aster; a wife killing her husband; an eccle-iastical person killing his prelate or superior, whom he owed faith or obedience, was guilty f petit treason; was, says Lord Coke, but eclaratory of the common law as it had pre-iously existed: 3d Inst. 20. The statute 25 dw. 3 is also, for the most part, declaratory f the common law, and therefore the word eclaration (*declarisement*) is used in it. And here the violation of the queen regnant is ade treason, the Mirror (cap. i, § 5) and ritton (cap. 23, fo. 43) show that the common w is to the same effect. So, also, as to the olation of the king's eldest daughter unmar-ed; levying war within the realm without ie king's authority; and other offences against ie Statute of Treasons, are shown by Bracton, he Mirror, Britton, Fleta and Glanville, to ve been treason at common law. And Coke ys (3d Inst. 16), for counterfeiting the unishment was only as in petit treason, ecause the statute is but a declaration of the mmon law, and for counterfeiting the punish-ent at common law was only as for petit eason: Fleta, l. 1, c. 22. So the clause pro-ding for the forfeiture of the escheats to the ng is in affirmance of the common law: *In De Brittain's Case*, 20 Ed. 1, n. 2. The tute of 1 Edw. 6 is a plain declaration and resolution of the common law, as is also the statute of 1 Edw 3: 3 Inst. 65. On this point, Hale, in his History of the Common Law, p. 49, says,—"Now, as to matters criminal, whether criminal or not, they are determinable by the common law, and not otherwise; and in affirmance of that law are the statutes of Magna Charta, cap. 29; 5 Edw. 3, c. 9; 25 Edw. 3, c. 4; 29 Edw. 3, c. 3; 27 Edw. 3, c. 17; 38 Edw. 3, c. 9, and 40 Edw. 3, c. 3; the effect of which is that no man shall be put out of his lands or tenements, or be imprisoned upon any suggestion, unless it be by indictment or presentment of lawful men, or by process at common law." And by the statute of 1 Hen. 4, in affirmance of this, it is enacted (cap. 14) that no appeals be sued in Parliament at any time to come. This extends to all accusations by particular persons, and that not only of treason or felony, but of other crimes and misdemeanors. Many of the statutes of Hen. 3, and Edw. 1 and 2 were made but in affirmance of the common law, and the rest of them are so ancient, that they are, as it were, incorporated, with the judicial resolutions, decisions, and expositions connected with them, into the common law, and become a part of it: Hale's Com. Law 9. And Mr Reeves says—"These statutes which were made before the time of memory, and have not since been repealed, nor altered by contrary usage, or subsequent Acts of Parliament, are considered as a part of the *leges non scriptæ*, being, as it were, incorporated into and become a part of our common law:" 1 Reeves's Hist. of Eng. Law 215. And, notwithstanding copies of these may be found, their provisions obtain at this day, not as Acts of Parliament, but by immemorial usage and custom, of which kind is, no doubt, a great part of our common law: Hale's Com. Law 3. "And, doubtless," adds Lord Hale, "many of those things that now obtain as common law, had their original by Act of Parliament, or constitutions, made in writing by the king, lords, and commons." For in many of the acts that are yet extant, numbers of those laws are to be found enacted, which now obtain merely as common law, or the general custom of the realm: Ibid. Blackstone says, that it is agreed by all our historians that the great charter of King John was, for the most part, compiled from the ancient customs of the realm, or the laws of King Edward the Confessor; by which they usually mean the old common law, which was established under our Saxon princes, before the rigors of feudal tenure and other hardships were imported from the continent by the kings of the Norman line: Blk. Law Tracts, pref. 12.

9. By statute 1 & 2 Ph. & Ma. it was enacted, that "all trials hereafter to be had, awarded, or made for any treason, shall be had and and used only *according to the due order and course of the common law.*" By the statute of 33 H. 8, c. 23, the right of peremptory challenge was taken away in cases of high treason. It was resolved by *Sir Walter Ra-*

* By the laws of King Athelstan a thief who was upwards twelve years old, and stole more than the value of twelve nce, was punished with death; Constdu. on Cr. Law, p.

leigh's Case, cited Co. 3 Inst. 27 n, by all the judges, that the statute of 1 & 2 Mary abrogated the statute of 33 H. 8, for the end of challenge is to have an indifferent trial, and all Acts of Parliament made before the Act of 1 & 2 Ph. & Ma., for trial of high treason, petit treason, or misprision of treason, contrary to the due course of the common law, with challenges incident in those cases, are restored: Ibid., p. 27. The statute of 33 H. 8, c. 23, was thus decided to be in derogation of the common law. It was provided by this same act, that if a man attainted of treason, became mad, notwithstanding this, he should be executed; "which cruel and inhuman law" (says Coke) "lived not long, but was repealed, for in that point, also, it was against the common law, because, by intendment of law, the execution of the offender is for example; but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others:" Ibid., p. 6.

10. Again, the statutes of 1 Edw. 6 and 5 Edw. 6 provide, that, for treason, petit treason, &c., &c., there shall be two sufficient and lawful witnesses, &c.; the latter statute using the words "two lawful accusers," in reference to which it was adjudged in *Lord Lumley's Case*, Dyer's R., 1 Hil. 14 El., that, as there were no other "accusers" known to the common law, but lawful accusers or witnesses, they must be such as the common law requires, namely, lawful witnesses. And, by the ancient common law, one accuser or witness was not sufficient to convict any person of high treason, for, in that case, "it shall be tried before the constable and marshal by combat, as by many records appeareth. But the constable and marshal shall have no jurisdiction to hold plea of anything which may be determined or discussed by the common law:" Co. 3 Inst. 26. That two witnesses were required at common law appears also by the Mirror, ca. 3, *ord. deat.*, and by Bracton, l. 5, fol. 354; and "accusers" and "witnesses," in the above acts, were held to be synonymous.

11. Britton says, if felons come in judgment to answer, &c., they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer but at their free will: cap. 5, fo. 14. And, again, he says, "and of prisoners we will that none shall be put in irons but those which shall be taken for felony, or trespass in parks or vivaries, or which be found in arrearages upon account, and we defend that otherwise they shall not be punished nor tormented:" Britton, c. 11, fo. 17. And the Mirror—"It is an abuse that prisoners be charged with irons, or put to any pain, before they be attainted:" cap. 5, § 1. And Sir Edward Coke says—"It appeareth, that where the law requireth that a prisoner should be kept in *salva* and *arcta custodia*, yet that that must be without pain or torment to the prisoner:" Co. 3 Inst. 35. The Duke of Exeter having brought in the rack or brake, which is allowed in many cases by the civil law, Sir John Fortesque, Chief Justice of England, wrote his book in commendation of the laws of England, showing that all torments and tortures of parties accused were directly against the common law of England, and also showed the inconvenience thereof, by fearful example: Fortescue, ca. 22, fo. 24. A question, in reference to this matter, having been put to the judges, they unanimously declared that the rack was unknown to the laws of England: 4 Bla. Com. 326.

12. "By the common law, to avoid all extortions and grievances of the subject, no sheriff, coroner, gaoler, or other of the king's ministers, ought to take any reward for doing of his office, but only of the king, and this appeareth by our books, and is so declared and enacted by Act of Parliament of 3 Edw. 1. And a penalty is added to the prohibition of the common law by that act. But after that this rule of the common law was altered, and that the sheriff, coroner, gaoler, and other the king's ministers, might in some case take of the subject, it is not credible what extortions and oppressions have thereupon ensued." So dangerous a thing is it, adds Coke, to shake or alter any of the fundamental rules of the common law; which, in truth, are the main pillars and supporters of the fabric of the commonwealth: 2 Co. Inst. 73.

13. St. Germain, in his "Doctor and Student," c. 7. fo. 23 (said to have been written in 1518), says—"By the old custom of the realm, no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the law of the land. And this custom is confirmed by Magna Charta, cap. 26." Coke, in his 2 Inst. c. 29, p 45, explains the phrase "by the law of the land," here used, to mean "by the common law, statute law, or custom of England, which have been declared and interpreted by authority of Parliament, by our books, and by precedents." He also renders it "by due process of the common law;" 2 Inst. 50; and, thus, "No man (shall) be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, according to the old law of the land:" Ibid.

14. As regards these styles or appellations of the common law, Sir Matthew Hale furnishes an enumeration of them, and the reasons on which they are founded. Of that, above referred to, from St. Germain and Lord Coke, he says—"'Tis called sometimes by way of eminence, *Lex Terræ*, as in the statute of Magna Charta, cap. 29:" Hale's Hist. of Com. Law 29; adding, that there the common law is principally intended by those words *aut per legem terræ*, as appears by the exposition thereof in several subsequent statutes, and particularly in the statute 28 Edw. 3, c. 3, which is but an exposition and declaration of Magna Charta.

15. "Sometimes 'tis called *Lex Angliæ*, as in the Statute of Merton; sometimes it is called *Lex et Consuetudo Regni*, as in all commissions of oyer and terminer, and in the statute *de quo warranto*, &c., but, most commonly, it is called 'The Common Law,' or The Common Law of England, as in the statute of *Articuli super chartas*, cap. 15; in the statute Edw. 5, c. 5, and in infinite more records and statutes:" Ibid. 53. It was called by William the Conqueror, in his confirmation of it, *Lex Communis* and *Lex Patriæ*. It is also called *Lex Non Scripta* (the unwritten law), to distinguish it from the *Lex Scripta*, or statute law: 1 Blk. Com. 63; 1 Steph. Com. 10, 45. This last-named designation, however, is not to be considered strictly accurate, for, as has been seen, much of the common law has been repeatedly collected and promulgated by royal authority, and the whole of it is to be found in the various treatises on the common law, and in the reports of the decisions of the courts from very early ages down to the present time. The term is also understood in a wider sense, as distinguishing the great body of law, whether statutory or otherwise, administered in common-law courts, as distinguished from the system of equity administered in courts of chancery. It has various other appellations, but in American jurisprudence the common law is chiefly used in the two last-named senses: per Story, J., in *Lessee of Levy* v. *McCartee*, 6 Peters 102, 110; 1 Kent Com. 471. As equity has no criminal jurisdiction, the term is only sensible, in connection with the subject of this treatise, in the sense of being distinguished from the statute law; although, as will be hereafter more fully seen (see post, Part III., §§ 1–5), the term, in this sense, has even less force here than in England, as the common law of this country consists not only of the common law of England, but of such English statutes, also passed before the emigration of our ancestors, as were in amendment of the common law, and as were applicable to the circumstances of the country. And even some English statutes that have been passed since the settlement of this country, have been adopted, and are in force, to a greater or less extent, in different states, as part of the American common law.

16. The common law, as the *Lex Non Scripta*, consists, then, in England, of those laws which are not comprised under the title of Acts of Parliament, but which are, for the most part, extant in records of pleas, proceedings, and judgments; in books of reports and judicial decisions; in treatises of learned men's arguments and opinions, preserved from ancient times and still extant in writing. But the authoritative and original institutions are not set down in writing in that manner, or with that authority, that Acts of Parliament are, but they are grown into use, and have acquired their binding power, and the force of laws, by a long and immemorial usage, and by the strength of custom and reception in the kingdom. A part of the common law, in this acceptation, is that by which proceedings and determinations in the ordinary courts of justice are directed and guided, and by which the processes, proceedings, judgments, and executions, of the ordinary courts of justice; the limits, bounds, and extents of courts, and their jurisdictions,—the several kinds of temporal offences and punishments at common law, and the manner of the application of the several kinds of punishments, with other particulars, extending as far as the many exigencies, in the distribution of ordinary justice, may require: See Hale's Hist. of Com. Law, p. 23 *et seq.*

17. Mr. Reeves also defines the common law in this sense. He says that the common law is the custom of the realm, on which courts of justice exercise their judgment, declaring, by their interpretation, what is, and what is not, that common law. Many of the statutes that have been enacted prior to the *Magna Charta* of 9 Hen. 3, have been blended with the custom of the realm, and have gone to make up the English common law, which common law or custom of the realm, consists of those rules and maxims concerning the persons and property of men, that have obtained by the tacit assent and usage of the people of England; being of the same force with acts of the legislature. The consent and approbation of the people, with respect to the common law, being signified by their immemorial use and practice of it: 1 Reeve's Hist. of Eng. Law 1.

18. The nature of the common law is to be accommodated to the condition, exigencies, and conveniences of the people, for, or by whom they are appointed, as those exigencies and conveniences insensibly grow upon the people. Thus, though it may be said of the common law of England, that it was otherwise in the time of Henry II., when Glanville wrote, or in the time of Henry III., when Bracton wrote, than it is now administered, yet it is not possible to assign the time when the change began; nor have we all the Acts of Parliament, or judicial resolutions, which might have induced or occasioned such alterations. The true constituents of the common law are the common usage or custom and practice of the kingdom in matters lying in usage or custom. The custom is not simply an unwritten one, as has been seen, nor orally derived down from one age to another, but it is a custom that is derived down in writing and transmitted from age to age, especially since the beginning of the reign of Edward I.; a monarch, whose wisdom in connection with the English laws, has aptly caused him to be designated the the English Justinian. Secondly: The judicial decisions of courts of justice, consonant to one another in the series and successions of times. And, thirdly: The authority of Parliament manifested in introducing such laws. Much of that which is used and taken as common law is undoubtedly derived from old Acts of Parliament, the record of which, in its origi-

nal state, is not now to be found. These were acts "before time of memory," and are taken as part of the common law and immemorial customs of the kingdom; though, in their first original, they were Acts of Parliament. The decisions of courts of justice are rather to be received as authorities or evidence of what the law is, than laws in themselves, and they have great weight as precedents in all subsequent cases that arise, based, as they are, upon the common reason of the thing. See Hale's Hist. of Com. Law 57-69.

19. As the common law has been the accumulation of various ages, so different nations, as the Britons, the Romans, the Saxons, the Danes, and the Normans, have all brought their contributions to enrich its stores. Not only so, but other systems of jurisprudence have furnished their quota to increase the value of "the gathered wisdom of a thousand years."

20. The civil and canon laws, says a writer before quoted (Mr. Reeve's Hist. of Eng. Law, vol. 2, p. 37), besides exciting an emulation in the professors of the common law to cultivate their own municipal customs, afforded, from their treasures, ample means of doing it. The use made of those laws was much nobler than borrowing their language. To enlarge the plan and scope of the municipal customs; to settle them upon principle; to give consistency, uniformity, and elegance to the whole;—these were the objects the lawyers of those days had in view; and, to further them, they refused not to make a free use of those refined systems. Many of the maxims of the civil law were transplanted into ours; its rules were referred to as part of our customs; and arguments, grounded upon the principles of that system of jurisprudence, were attended to as a sort of authority.

21. The application the professors of the common law made, whether of the canon or civil law, in treating subjects of discussion in the law of England, is visible from the account given by Bracton, whose treatise contains much that is taken from those systems of law. See Coxe's translation of Gütterbock's Bracton, Phila. 1866.

22. Sir Walter Scott, in his Life of Napoleon, in describing the advantages to be derived from the existence of such a system as the common law of England, says—"Each principle of English law has been the subject of illustration for many ages, by the most learned and wise judges, acting upon pleadings conducted by the most acute and ingenious men of each successive age. This current of legal judgments has been flowing for centuries, deciding, as they occurred, every question of doubt which could arise upon the application of general principles to particular circumstances; and each individual case, so decided, fills up some point which was previously disputable; and, becoming a rule for similar questions, tends, to that extent, to diminish the debateable ground of doubt and argument, with which the law must be surrounded like an unknown territory, when it is first partially discovered:" Scott's Life of Napoleon, p. 56.

23. But as comprehensive as the common law is in England, it is much more comprehensive in this country. In ancient times (1 H. 7, fo. 6) adultery and fornication were punishable by fine and imprisonment in the courts of common law. But now, these offences, in England, are cognisable in the ecclesiastical courts: Co. 3 Inst. 205. Or, at least, were so until the comparatively recent constitution of the court for "Divorce and Matrimonial Causes:" 20 & 21 Vict. c. 85.* In this country such offences have frequently been held indictable at common law, as will be seen hereafter. See post, Part III., §§ 19, 20.

24. Malicious mischief, too, has received a far more extensive interpretation here than it has received in England: see post, Part III., § 25 *et seq.* There, says Wharton, in his Treatise on American Criminal Law, § 2002, each object of investment, as it arose into notice, became the subject of legislative protection; and as far back as the reports go, there has been scarcely a single article of property which was likely to prove the subject of mischievous injury, which was not sheltered from such assaults by severe penalties. Thus, for instance, a series of statutes, upwards of twelve in number, beginning with the 37 Hen. 8, c 6, and ending with "The Black Act," were provided for the single purpose of preventing wanton mischief to cattle and other beasts of certain kinds. Upwards of eighteen hundred sections, it is estimated, of acts, running from Henry 8 to Geo. 3, repealed or otherwise, were enacted for the especial purpose of providing against malicious mischief. In this country, in numerous cases where there were no such statutes, malicious mischief has been made the subject of adjudication at common law.

25. The comprehensiveness of the common law, however, is illustrated in England, by a series of cases which show that there is no public wrong, unprovided for by special statute, which is not the subject of a criminal action. Thus it has been held indictable wantonly and injuriously to carry a child infected with small-pox, along the public streets (*The King* v. *Vantandillo*, 4 M. & Sel. 73; *King* v. *Burnett*, Ibid. 272); to refuse to provide necessities for an infant of tender years, whether child, apprentice, or servant (*Regina* v. *Smith*, 8 C. & P. 153; *Regina* v. *Marriott*, Ibid. 425); to show a monster for money (*Herring* v. *Walround*, 2 Ch. Cas. 110); to put combustible materials on board a ship without giving notice of the contents (*Williams* v. *The East India Co.*, 4 East 192); and to overwork children in a factory (Twiss's Life of Lord Eldon 36).

26. Mr. Wharton, in referring to the deficiences for the protection of the family and social relations, by the most polished nations of antiquity, says—Even in the most refined classi-

* And this act perhaps, only takes away the jurisdiction of the ecclesiastical courts in strictly matrimonial causes.

cal eras, no violation of social or domestic duty was held punishable, unless it fell within the very few overt acts which were prohibited by statute. Now, observe how different from this it is with the common law of England and America. With us it is held indictable for any one to refuse succour to another to whom he is bound by social or domestic ties: *e. g.*, parent to child, child to parent, husband to wife, master to servant; or, even, when, by peculiar circumstances, the duty of protection is created from one to the other,—stranger to stranger. Few criminal cases are now more frequent than those in which the law steps in and enforces these very duties. The man who refuses to supply his apprentice with suitable food; the husband who neglects the proper nurture of his wife; the stranger who lets a helpless infant starve at his gate, have each, when injuries have ensued, been held penally liable. Now, on what principle do these cases rest? Certainly, not on statute, because there is no statute on the subject. They are sustained on that broad principle of common law that, when a duty is violated, a penalty will be imposed. But what is there to declare this duty? The only method of solving this difficulty is by resort to the great substratum of Christian ethics, on which the common law, as declared judicially by the English courts, from whence we took it, is founded: Whart. Cr. Law, § 2544.

27. The common law is also defined to be the experience of the past, and the wisdom of the present age, applied to the exigencies of the particular case. See *Cottrill* v. *Myrick*, 3 Fairf. 222. In this sense it includes not only the decisions of the courts, but the opinions of experts on the particular branches to which their attention has been devoted. Thus, the evidence of persons acquainted with navigation is admissible upon the facts as developed in cases of collision, or loss from alleged unseaworthiness; of persons conversant with handwriting, as to whether a paper was forged; of seal engravers, as to the genuineness of an impression; of artists, as to whether a painting is an original or a copy; of postmasters, as to the genuineness of a postmark; of scientific engineers, as to the effect of an embankment on a harbor; of practical surveyors, as to whether certain marks were intended as boundaries or terriers; and of naturalists, as to whether the habits of certain fish were such as to enable them to overcome certain obstructions in a river. And so, nothing is more common than to examine a surgeon as to whether death resulted from natural causes, or from certain artificial agencies which may be the subject of inquiry. On this principle the opinion of medical men as to whether particular symptoms, supposing them to exist, constitute insanity, is part of the law of the case: Whart. Cr. Law, § 47.

28. As a further illustration of the use that is made of the common law, the following is selected:—Murder, defined at common law, is where a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm, any reasonable creature *in rerum natura*, under the king's peace, with malice forethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c., die of the wound, or hurt, &c., within a year and a day after the same: Bracton, l. 3, fo. 20 *et seq.*; Britton, fo. 5, 18; Fleta, l. 1, c. 23 and 30.

29. Every word of any importance in the above definition, has been made the subject of judicial decisions in various ages, and the meaning and force of each of them, with the various consequences arising directly out of, or collateral to them, have been, by those adjudications, absolutely fixed and determined. These, and similar adjudications relating to crimes, comprise some of the most important features of the common law. Thus, in the definition selected, as to what is sound memory; what the age of discretion; what unlawfully killing; what a reasonable creature *in rerum natura*; what under the king's peace; and what express and implied malice, have all been judiciously declared. So have the various questions connected with killing within any county of the realm; how the year and a day are to be accounted; who are principals and who accessories: whether the offence is murder, or manslaughter, or justifiable homicide, and numerous other incidental questions that have been brought practically before the courts during the thousand years that the principles of the common law have been in force in the nation from which we derived it.

30. As much space as could be spared has now been devoted to a consideration of the origin, early history, and general principles of the common law. Further consideration will be given to these last, in detail, in subsequent parts of this article. The following brief extracts are given from a learned defender of the principles of the common law, in contending for their retention in this country, and are deemed appropriate in this connection.

31. "Common law," says the learned pamphleteer, "is but another name for common sense, tested and systematically arranged by long experience. What governs the manners of men towards each other? It is the common law of social intercourse. What constitutes the habits and customs of a country, but a common law, gradually growing with civilization, and always accommodating itself to the situation of the people? Nor is the common law of jurisprudence less pliable. It is one of its excellencies that it is capable of change, of modification, of adapting itself to new situations and varying times, without losing its original character, its vital principles, its most useful institutions:" 5 Law Tracts 21, 22. And again, by the common law "every crime is now defined with mathematical certainty; and all its various modifications, shapes and circumstances, defences and palliations, distinctly provided for, either by general rules

and principles, or by particular decisions. So of the modes of trial, the competency, credibility, and examination of witnesses. Everything is so constructed as to shield innocence from corrupt persecution, and to bring the guilty to punishment; at least as far as human means can effect it:" Ibid. 58.—*American Law Register.*

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Massachusetts Hospital v The Provincial Insurance Company.

Covenant to pay in N Y.—Depreciation of Currency.

Defendants in Toronto covenanted to pay $516 in New York on the 20th August, 1858, which they failed to do and when sued here in 1865 they claimed to pay in American Currency at par, though in the meantime it had become very much depreciated. *Held*, however, that the plaintiffs were entitled to the equivalent of the $516 at New York on the day of payment, with interest.

[Q. B. T. T. 30 Vic., 1866.]

Declaration on a covenant, dated 21st June, 1858, to pay $515 89, sixty days after date, at the Bank of the Republic, New York. Breach, non-payment.

Plea, that on the day when said money was payable defendants provided funds, and had the same to meet this claim at the Bank of the Republic, but said deed was not then there, nor was it presented there on the day it became due, nor were the plaintiffs there to receive it, nor was any claim made on defendants till the 10th of November, 1865; that the money is payable in New York in American currency, and defendants are and have been always ready to pay in lawful United States currency, and before action tendered the same to the plaintiffs in such lawful currency, which the plaintiffs would not accept, and on the day of tender the amount in United States currency was worth $212 38 in Canada currency, and which last sum is paid into court. Issue.

At the trial, at Toronto, before *Draper*, C. J., a statement of facts was put in by consent, as follows:—

The covenant being, as alleged, in form a promissory note under seal of the defendants, payable at the Bank of the Republic, New York, was presented for payment on the 20th of June, but the defendants treated it as a promissory note, and allowing three days' grace, went to the place of payment and tendered the full amount, but neither the covenant nor any one authorised to receive payment was there. This was three days after it was due. Shortly after, defendants wrote to plaintiffs, asking them to present the covenant to their named New York agents for payment. Soon after the funds held by their agents for payment were returned to defendants in Toronto.

Some weeks after, this deed of covenant was presented at the New York agents by plaintiffs for payment, but it was not paid, and on the same day the plaintiffs also demanded payment at the Bank of the Republic, but without success.

Some years afterwards, in November, 1863, some correspondence took place between defendants and a person claiming to be the assignee of this claim. In October, 1864, the assignees wrote to defendants demanding payment, but no answer was sent. In November following, it was placed in a Toronto solicitor's hands for collection. On the 10th of the same month, defendants' attorney tendered to the plaintiffs' attorney $518 in United States currency, reckoned at par, which was declined.

It was further admitted that the covenant was made in Toronto, where defendants then and now are domiciled, and that on the day it became due it was not presented at the Bank of Republic, nor had defendants any funds there to pay it.

On these facts the learned Chief Justice ruled that the plaintiffs were entitled to recover the full amount claimed, viz., $757, including interest, and for this the plaintiffs had a verdict.

In Easter Term, *Burns*, for defendants, obtained a rule to set aside or to reduce the verdict, the damages being excessive, or why at least it should not be reduced by the amount paid into court.

During this term, *S. Richards*, Q. C., shewed cause, citing *Judson* v *Griffin*, 13 U. C. C. P. 350; *White* v *Baker*, U. C. 15 C. P. 293.

Burns supported the rule, and cited *Jones* v. *Arthur*, 8 Dowl. 442; Stor. Confl. L. secs. 313 b. 318; *Jones* v. *Arthur*, 4 Jur. 859; *Cooch* v. *Malthy*, 23 L. J. Q. B. 305.

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

We do not see any thing in this case to take it out of the operation of the ordinary rule, that the plaintiffs should recover such damages as will put them in the same situation as if the contract had been duly performed. The defendants were bound to have paid the plaintiffs on the 20th of August, 1858; no valid excuse for their not having done so has been offered. At all events, as they did not attend to pay the money at the place named on the proper day, it was their duty to find the plaintiffs and pay them. We therefore think that the plaintiffs are entitled on the face of the contract to an amount equivalent to the value of the sum at the place of payment on the 20th of August, 1858, besides interest from that date. We understand the parties to admit that at that time the dollar in New York and in Toronto was of the same value.

Assuming, as we do, that the delay in payment was the fault of the defendants, we cannot understand why the plaintiffs are now to lose one-third of their claim because their own currency has become depreciated in value. The defendants, on the other hand, have only to pay what they originally contracted to pay, viz., the same amount (apart from interest) which on the 20th of August, 1858, would have satisfied their covenant. The point seems expressly decided by our Court of Common Pleas in *White* v *Baker*, 15 C. P. 293. The damages should be reckoned with reference to the time fixed for payment.

As to reducing the verdict by the amount paid into court, this is a mere formal matter, as it is conceded that defendants are of course entitled to credit for that sum. The plaintiffs have taken

issue on defendants' plea, thereby denying the fact of the payment into Court. As, however, the defendants have raised other questions by the rule, we think the proper course is to direct the verdict to be reduced by the amount paid into court, neither party to have the costs of the motion or arguing in Term.

Rule accordingly.

ELECTION CASE.

(Reported by Henry O'Brien, *Esq., Barrister-at-Law and Reporter in Chambers.)*

Reg. ex rel Tinning v. Edgar.

Municipal election—Qualification for alderman in cities—29 & 30 Vic caps. 51, 52—*Seating unsuccessful candidate—Notice of disqualification to electors.*

On an application to unseat one E., sitting as an alderman for a city and to seat another candidate in his place, it appeared that E. was only rated on the last revised assessment roll as a householder to the extent of $160. It was, however contended, that no qualification at all was necessary but even if so it was sufficient that the qualification should be that of a councilman under the former act. It was disputed whether due notice had been given to the electors of his alleged want of qualification before and during the time of the election, and nothing was said in the affidavits as to any such notification, or any protest at the time of the *nomination*. On the day of election, just before the polling commenced, a notice warning the electors against voting for E., signed by an elector, was handed to the Returning Officer, and read by him aloud in the hearing of those present Printed copies of this notice were posted up in various places The relator obtained the highest number of votes next to the three candidates who at the close of the poll were declared elected, and his qualification was not denied.

Held 1. That it was necessary that candidates for the office of alderman should, at the time of the last election for cities, have been qualified as was necessary for them under the former act.

2. That a qualification as councilman under the old law was insufficient That therefore E. was not qualified for election as an alderman

3. That the notice of disqualification should have been given at the time of the nomination of candidates, as under sec. 110, sub sec. 6, of the new act, no candidates could be voted for who had not been proposed and seconded at the nomination.

4. That an exception taken to the qualification should be of such a plain character that the electors can easily form an opinion as to its correctness.

That for these reasons the relator could not be seated in the place of E.

(Common Law Chambers, Feb. 5, 1867.]

This was an application to unseat James D. Edgar, one of the Aldermen elect for St George's Ward in the City of Toronto, and to seat the relator, Richard Tinning, the unsuccessful candidate next on the poll, in his place.

The facts of the case as they appeared from the affidavits filed on both sides appeared to be, that Mr Edgar was on rated on the last revised assessment roll as a householder to the extent of $160 rental. That since the assessment was made he had become the owner of real estate in the City of Toronto of the value of about $2,000. It was denied, on the part of Mr. Edgar, that due notice had been given to the electors of his alleged want of qualification before and during the time of the election, and nothing was said in the affidavits as to any such notification, or any protest at the time of the nomination. On the day of election, just before the polling commenced, a written protest or notice against the election or return of Mr Edgar, warning the electors against voting for him, and signed by an elector, was handed to the Returning Officer, and read by him aloud in the hearing of those present. Printed copies of this notice were posted up in various conspicuous places throughout the ward, but were in many instances defaced and concealed by other persons. The relator obtained the highest number of votes next to the three candidates who at the close of the poll were declared elected, and his qualification was not denied

Lauder, for the relator, obtained a *fiat* directing a writ of summons, in the nature of a *quo warranto*, to issue, directed to and calling upon James D. Edgar, of the City of Toronto, &c, Esquire, *to shew* cause by what authority he exercised or enjoyed the office of Alderman for the Ward of St George of said City, and why Richard Tinning, of the said City of Toronto, wharfinger, should not be declared duly elected and admitted to the said office of Alderman for the said Ward, and in the room of the said James D Edgar.

He filed several affidavits and the statement of the relator, who alleged.

1. That the said election was not conducted according to law, in this, that although the returning officer for the said ward, and the electors of the said ward, were duly notified before any votes were taken on the day of the said election that the said James D Edgar had not the necessary property qualification to qualify him for the said office, yet votes were by electors given and were taken and received by said returning officer for the said James D. Edgar for the said office of alderman.

2. That the election of the said James D. Edgar was illegal on the ground, that he, the said James D. Edgar, had not at the time of said election, either in his own right or in the right of his wife, as proprietor or tenant, a legal or equitable freehold or leasehold rated in his own name on the last revised assessment roll for the said City of Toronto, to the extent or value sufficient to qualify him for the said office, according to the true intent and meaning of the acts in force in the Province respecting the municipal institutions of Upper Canada

3. That the said Richard Tinning should be declared duly elected to the said office of alderman for the said ward, inasmuch as he received next the said James D Edgar the highest number of votes at the said election, and, being duly qualified, should be declared one of the duly elected aldermen for the said ward.

4. That the said James D Edgar, not being possessed of the necessary property qualification, and due notice having been given of the same to the electors, the votes polled for the said James D. Edgar should be treated as thrown away and of no effect, and the candidate (namely the said Richard Tinning) having the next highest number of votes at said election, and being otherwise duly qualified, should be declared to be the duly elected candidate for one of the offices of alderman for the said ward of the said city, and in the room and instead of the said James D. Edgar.

5. That he, the said Richard Tinning, should be declared one of the duly elected alderman for the said ward, and the said James D. Edgar removed from said office, inasmuch as he, the said Tinning, objected to the election of the said

Edgar to the said office as above stated, and notified the said Edgar, &c.

On the return of the summons

Robt. A. Harrison (*Moss* with him), shewed cause.

Any person not disqualified under 29 & 30 Vic. c. 51, and who can take the declaration required in that act (except the clause as to property qualification) is eligible up to 1st of Sept., 1867, for the reason, that cap. 51 clearly repeals the old property qualifications, and cap. 52 simply postpones the new qualification for some months, making no provision at all for property qualification in the meantime.

If caps 51 & 52 must be read together, then all inconsistent portions of former acts are repealed By these enactments the whole constitution of the council is changed. Aldermen and councilmen are both swept away, and in their place are new members of council differently chosen, different in numbers and different in powers and term of office. They are extremely different from both aldermen and councilmen under the old act. Therefore the old office of alderman is repealed, and as a consequence, any clauses or enactments in former acts, solely relating to that office, such as property qualification, are repealed.

At first sight the fact of present members of council being called "Aldermen," leads one to think that the old office still exists, while that of councilman is abolished. But the term alderman is now simply the designation of "Members of Council," while before it was a rank in the council, and denoted a grade.

If then there is to be any qualification it can only be what was sufficient under the old law for member of council. The law could not imply, in the absence of the new qualification, any higher property qualification than would entitle a man to a seat at the council at the time when the candidates for the year were nominated. Then a councilman was a member of council, with a seat at the council, and exactly the same powers in the council as the old alderman.

It is unreasonable to say that before the new property qualification is in force we should be obliged to adopt the qualification of one half of the members of the old council, and ignore the qualification that was sufficient for the other half. When the qualification is only implied, and for the purpose of complying with the intent and spirit of the law, it is reasonable that we may look for it outside of the assessment roll, provided the property belonged to the candidate at the time of the election.

Mr. Edgar is qualified as councilman upon the roll, and besides that property he included in his declaration other freehold property not upon the roll in his name but owned by him at the time of the election, and sufficient to make up more than the qualification for the former office of alderman.

The courts always lean towards not depriving electors of the result of the exercise of their franchise. And in this case, if the relator succeeds, the court would also be depriving the candidate of an office for which he was qualified before the new law, viz.: a seat at the council; while the qualification prescribed by the new law is not yet in force.

The case is clear, that the notice given by the relator and others, as to the alleged want of qualification of Mr. Edgar, was insufficient to entitle the relator to be seated in his stead.

Lauder contra.

The old law relating to qualification of candidates for office was unrepealed, and consequently Mr. Edgar, being only rated to the extent of $160 leasehold, was disqualified, the necessary qualification being $320 leasehold for alderman. The new Municipal Act expressly superseded the operation of the qualification clauses until next September. The amended Municipal Act 29 & 30 Vic. cap. 52, was to be read as part of the Municipal Act 29 & 30 Vic. cap. 51, and is in fact incorporated with it, and sec. 428, the only clause which in any way could be said to repeal the old law only repeals those portions of the old act inconsistent with the new act.

The notices given at the opening of the poll and otherwise were sufficient to entitle the relator to claim the seat without a new election, and the alleged disqualification was one which every elector could ascertain the truth of by a reference to the assessment rolls of the city.

The following cases were cited by counsel. *Reg. ex rel. Metcalfe* v. *Smart*, 10 U.C Q B 89; *Reg. ex rel. Richmond* v. *Tegart*, 7 U. C L J 128; *Essex Election Case*, 9 U. C. L. J. 247; *Reg. ex rel. Dexter* v. *Gowan*, 1 U.C. Prac. Rep 104.

Adam Wilson, J., delivered the judgment of the court.

The chief allegation against Mr. Edgar is contained in the second branch of the statement filed by the relator with his motion.

"That the said James D Edgar had not at the time of said election, either in his own right or in the right of his wife, as proprietor or tenant, a legal or equitable freehold or leasehold rated in his own name on the last revised assessment roll for the said City of Toronto, to the extent or value sufficient to qualify him for the said office" [of alderman for the Ward of St. George, in the City of Toronto] "according to the true intent and meaning of the acts in force in this Province respecting the Municipal Institutions of Upper Canada."

It is certified by the clerk of the municipality, "that the qualification of James D Edgar in the assessment roll of the city for the year 1866 is as follows: in the Ward of St. George for the sum of $160 rental, and that he is not assessed in any other ward of the city."

This statement is not denied by Mr. Edgar.

It was in effect argued on his behalf:

1. That no property qualification was necessary for an alderman at the last election, and

2 If one were required, that any qualification which was before then sufficient to enable a person to be elected a member of the council, as a councilman, was sufficient at the last election to enable him to be elected as an alderman.

The reason, it was contended, why no property qualification was required of the candidate or member at the last election is, that it was said the former municipal law was, by chapter 51 of the acts of last session, wholly repealed, and as the enactments of the new law as to the property qualification are not to take effect until the month of September, 1867, and no provision in this respect

has been made for the interim, there was and is in such interval, including the whole period of the election, an absence or suspension of law relating to this particular subject.

If this view of the law be the correct one, the alderman elected cannot be unseated; and whether it is or is not the correct view, depends entirely upon the construction of the language of the statutes which have been referred to.

The Municipal Act, ch 54, of the Consolidated Statutes for Upper Canada, declared that the property qualification for aldermen should be freehold property of the value of $160 per annum, or leasehold property of the value of $320.

The Municipal Act of 1866, chap 51, made the qualification for aldermen,—freehold property of the value of $4,000, or leasehold property of the value of $8,000.

The 427th section of the act is as follows:—"This act shall take effect on the first day of January next [1867], save and except so much thereof as relates to the nominating of candidates for municipal offices, and the passing of by-laws for dividing a municipality or any ward thereof into electoral divisions and appointing returning officers therefor, which shall come into effect on the first day of November next, and also so much thereof as relates to the qualification of electors and candidates [see chap. 52], shall not take effect till the first day of September, 1867.

The 428th section is: "All acts or parts of acts inconsistent with the provisions of this act relating to the municipal institutions of Upper Canada, are hereby repealed"

This act, cap. 51, and the act amending it, cap 52, were passed on the 15th of August, 1866, but the repealing clause, 428, had no operation at that time upon the pre-existing law, because the new act expressly declared that it should not come into operation at all excepting in the manner and at the times therein specially mentioned in the 427th section.

Therefore, until the 1st of November, 1866, no part of the new act was in force, but all remained as before the passing of it, and was carried on under the preceding municipal act, cap. 54, as if the new act had never been passed; but upon that day all that related "to the nominating of candidates for municipal offices, and the passing of by-laws for dividing a municipality or any ward thereof into electoral divisions, and appointing returning officers therefor," came then into effect; and all that was at that time inconsistent with these provisions, but nothing more, was thereby repealed.

Then until the 1st of January, 1867, none of the other provisions of the new act but those which took effect on the 1st day of November, 1866, were in force, but everything with the exception just mentioned remained as before, to be and was carried on under the provisions of the former municipal act; but upon the 1st day of January, 1867, all the rest of the new act, "save and except so much thereof as related to the qualification of electors and candidates," took effect, and as a consequence all acts or parts of acts inconsistent with the provisions which came then into operation were thereby repealed.

And until the 1st day of September, 1867, none of the provisions relating to the qualification of electors and candidates under the new act are to be in force; and as before stated, with respect to the other matters which came into operation from time to time, all the enactments of the former law which related to such qualification, must and do remain as before the new law, to be carried on under the old law, as if the new act had not been passed.

But when the first day of September does arrive, then that part of the new act which relates to the qualification of electors and candidates shall also take effect; and all acts or parts of acts which may be inconsistent with these new provisions will be thereby repealed.

There are at the present time no provisions whatever of the old act relating to the qualification of electors and candidates in any manner "inconsistent with the new act," because these new provisions are not yet in force, and may happen never to be in force; and it is only such acts or parts of acts which are inconsistent with the new act which are declared to be thereby repealed.

I am therefore of opinion, that it was necessary that candidates for the office of alderman should at the time of the last election for the City of Toronto be qualified in the like manner as it was necessary they should have been qualified in order to have been eligible under the former act, cap. 54, of the Consolidated Statutes for Upper Canada.

I think this is the proper construction to be placed upon the Statute, and it is well that it is so; for it would have been a very unfortunate condition of the law if I had been obliged to pronounce a different decision.

The result would have been, that all property qualification would have been suspended, that is, abolished until the first day of September next,—both of the electors and the elected,—and that the council now representing the whole property of the city might be men possessing not one shilling's worth in value of that property which they have the power to tax and to charge with further burdens, which would not and could not affect themselves.

In my opinion, then, Mr. Edgar was not qualified for election as an alderman under the old law, although he would have been qualified to have been elected a councillor if the office of councilman had not been abolished; but there was after the first day of January no such member of the city council as a councilman; the new council, it was provided, should thereafter "consist of three aldermen for every ward, one of whom should be mayor, to be elected in accordance with the provisions of the 105th section.

It was, however, argued, that although Mr. Edgar was not qualified for alderman, yet so long as he was qualified for election to the council by the old law, it was of no consequence whether that qualification was according to the rate which was required for an alderman or for that which was required for a councillor. I cannot adopt this view. There were certain well known functionaries called aldermen, and certain others called councilmen. The one office was quite different from the other in many respects. The aldermen have been continued, the councilmen have been discontinued; and the mere fact that three aldermen are now to be

elected for each ward in place of the two aldermen and the two councilmen who formerly represented it, does not alter the status of the alderman as to his property qualification, his magisterial duties, or otherwise.

The policy of the new law was to raise the qualifications both of electors and candidates very considerably, but the argument addressed to me on this point was to lessen the qualification of the aldermen for the present year. I think that on the election of aldermen, an alderman's qualification is that which must be required whether the number of aldermen for a ward be greater or fewer than formerly was necessary.

The remaining question is, whether, as Mr. Edgar was not qualified to be elected, the judgment should be merely for his removal, or whether Richard Tinning, the relator, should not be declared to have been duly elected to the office, and be admitted thereto in the place of Mr. Edgar.

The papers filed on this application showed that Mr. Tinning was qualified to be elected so far as property is concerned, and that there were only four candidates, the poll at the close shewing the number of votes for the candidates to be as follows:

For Vickers	203	For Edgar.....	173
" Smith	185	" Tinning	160

So that if Edgar, who was third upon the poll-book, be removed, Tinning, who stands next to him, will be entitled to rank as third in law, if he can shew that the votes which were given to Mr. Edgar were given by the voters with a knowledge of his want of qualification; in which case such votes will be considered as if they had not been given at all.

It is alleged by the relator that the voters for Mr. Edgar did vote with such knowledge, but this fact is denied. I had given a good deal of attention to the questions relating to the sufficiency of the notice, and the sufficiency of its communication to the electors, and I had made some observations upon both points, but for the reasons below stated, it is not necessary to say what my opinion was I might perhaps have come to the conclusion that the notice was sufficiently explicit in stating the nature of the objection to the candidate's eligibility, and also that sufficient notice had been given to the electors of the fact of disqualification I need not however say more on either point, because I think I ought not to seat the relator for the following reasons, but more especially for the one first stated; these reasons are:

1. That no notice of disqualification was given at the time of the nomination of candidates, and by s. 101 of the new act, sub-sec 6, it would seem to be the law that no other person could have been put forward or voted for or elected, unless he had been a candidate who had been proposed and seconded at the nomination.

It has always been considered an important matter in election law, to afford the electors an opportunity of voting for some other person in the room of the person objected to, in case they should be satisfied of the ineligibility of their present candidate, and this the electors of St. George's Ward could not have done, because the candidate was not objected to until a time when it was too late to select another person in his stead.

2. The exception taken was not of that plain character, in consequence of the new legislation, that the electors could easily have formed an opinion upon its validity or invalidity.

I do not know that I should have placed so much reliance upon the last ground as some of the cases say it is entitled to; for a candidate protesting against the want of qualification of another can do no more than state the fact, and then leave the electors to act upon the notice so given to them as they please at their peril. I am well satisfied, however, on the first ground, to be able to arrive at a conclusion by which I am not obliged to seat a minority candidate, who as a general rule, should never be the representative of any electoral body.

Upon a consideration of the whole case, I adjudge the election of James D. Edgar, as one of the aldermen for St George's Ward, in the City of Toronto, to be invalid; and I direct that a writ shall forthwith be issued, according to the statute, to remove the said James D. Edgar from such office; and I further direct, according to the statute, that a writ shall issue for the purpose of a new election being held for the election of an alderman for St George's Ward aforesaid, in the room of the said James D. Edgar, who has been removed as aforesaid.

And I direct that Mr. Edgar do pay the costs of these proceedings, so far as they relate to the invalidity of his election, for the want of a property qualification.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law and Reporter in Chambers.*)

In Re Reeve, An Overholding Tenant.

Mortgagor and mortgagee—C. S. U. C., cap. 27, sec. 63.

A mortgagee from whom the mortgagor has accepted a lease of the mortgaged premises will not be permitted on the expiration of the term to proceed against the mortgagor as an overholding tenant under the above Act.

[Chambers, Jan. 22, 1867.]

After default had been made in payment of a mortgage, the mortgagor accepted from the mortgagee, a lease of part of the mortgaged premises for a year. No rent was paid, and upon the expiration of the term the tenant refusing to go out of possession, the landlord applied for a writ of inquisition under sec. 63 of the Act respecting ejectment.

Osler, for the landlord.

Richards, C. J.—I have consulted with some of my brother judges and we are of opinion that the present is not a case in which we should grant the summary remedy given by the above section It cannot be said that the tenant holds over without right, or colour of right. She is mortgagor in possession, the landlords have their remedy by ejectment or foreclosure, and the tenant has the right to stay proceedings in either case by paying the amount really due on the mortgage with costs. I do not think I should deprive her of this right by enabling her landlord to proceed against her as an overholding tenant.

Brega v. Hodgson.

Conditional order to defendant to put off trial on payment of costs—Option of defendant—Costs of the day

The defendant obtained a judge's order in these words:—"I do order that the trial of this cause be put off to the next Spring Assizes for York and that the record now entered for trial be withdrawn, and that said trial be so put off on payment of costs"

The costs were taxed, but the defendant refused to pay them. The record was not withdrawn The plaintiff then applied to compel the defendant to pay these costs, and to rescind the order and pay the costs of the day &c.—*Held*, that the record was not withdrawn and is a remanet, the order must be treated as a conditional order, and that the defendant could not be compelled to pay the costs; but the part of the summons applying for a rescission of *the order was made absolute.*

[Chambers, Feb. 5, 1867.]

On the 16th January last, a judge's order was made on the application of the defendant, which concluded in the following words:—"I do order that the trial of this cause be put off to the next Spring Assizes for York, and that the record now entered for trial be withdrawn, and that said trial be so put off on payment of costs."

It was stated on affidavit, that on the 18th of January the costs under the order were taxed by the Master at $37 18.

That the above order was served on the plaintiff's attorney, and that after such service no further proceedings were taken to take the case down to trial, and one of the plaintiff's witnesses was paid his fees and allowed to return home, and the defendant's attorney, though requested to pay the costs, refused to pay the same.

It was stated on the other side, that the taxation had not been closed or enlarged, and no allocatur had been given, and that the appointment to tax had lapsed.

The plaintiff subsequently obtained a summons, calling on the defendant to shew cause why he should not forthwith pay to the plaintiff, or his attorney, the sum of $37 18. the costs taxed under the order before mentioned or why the order should not be rescinded and why the defendant should not pay the costs of the day, the costs of opposing the said order, and of all proceedings thereon, and also the costs of this application

Lawder showed cause, and contended that the defendant was not liable to pay the costs referred to in the order, because they were to be paid not absolutely but conditionally, on the withdrawal of the record and the putting off of the trial; and the defendant had not taken the benefit of the option which he had, and therefore the record was not yet withdrawn nor was the trial put off, everything still remained as it was, and the cause could be tried at the said assizes, if there was sufficient time for the purpose, or it would remain on the list of causes as a remanet for a future assize, and the defendant could not be called on to pay the costs demanded, because they had not been taxed, for there was no taxation until the allocatur was made: *McKenzie* v *Stewart*, 10 U. C. Q. B. 634; *Walker* v *Toy*, 16 M. & W. 60; *Gibbs* v *Plight*, 13 C. B. 803; *Pugh* v *Kerr*, 5 M. & W. 164; 6 M. & W. 17; 8 Dowl. 218; *Horton* v. *The Western Improvement Commissioners*, 21 L. J. Exch. 325; 7 Exch. 911.

John Patterson supported the motion

The order is not conditional in its terms, and since its making both parties have acted upon it; the plaintiff, by sending his witness away, and both plaintiff and defendant by attending on the appointment to tax, and conducting the taxation, all but the payment of the fees, by affixing the necessary stamps, which is all that prevents the allocatur being signed: *Gore District Mutual Fire Insurance Company* v. *Webster*, 10 U. C. L. J. 190.

Adam Wilson, J.—There is the further case of *Lewis* v *Barker*, 14 U. C. C. P. 336, on the subject In *Horton* v. *The Western Improvement Company*, *ante*, the words "on payment of costs" were held not to be necessarily conditional, but that they might be construed as words of agreement, according to the fair construction of the order.

In that case the plaintiff, by reason of the order which was made, actually changed the venue, which was part of the order; in this case the plaintiff has not yet withdrawn the record, and therefore it still remains on the list: if it had been withdrawn, I should have been content to have followed the decision last referred to, for it seems the most reasonable and the most consonant with the general practice and understanding of the profession to treat the words "on payment of costs" as equivalent to a direction or agreement that the costs shall be paid; this may not be the most correct language to express that idea, but it is the general understanding of the profession that it does express it, in the words of Parke, B, before quoted, "according to the fair construction of the order;" that construction being aided, like all other agreements or writings, by the surrounding circumstances.

But as the record was not withdrawn, and as the record is a remanet, for it was not reached by the judge in its proper place on the list during that assize, and as the plaintiff can yet, if he proceed, recover all the costs in question, I think it better to follow the other cases which were cited, and to treat this as a conditional order only under the circumstances of this case.

I must therefore discharge the summons, excepting as to that part which applies to the rescission of the judges' order, and as to that part of it that the order be made discharging it.

CHANCERY CHAMBERS.

(Reported by Mr. Charles Moss, *Student-at-Law.)*

Lee v. Bell.

Money in Court—Stop-order—Imperial Acts 1 & 2 Vic., Cap. 110, & 3 & 4 Vic. Cap. 82

A judgment creditor at law cannot obtain a stop-order against moneys in this Court to the credit of his judgment debtor preventing them from being paid out to him; the Imperial Act 1 & 2 Vic. C. 110, under which, as amended by the Imperial Act 3 & 4 Vic. C. 82, such an order can be obtained in England, not being in force in this province.

[Chambers, Jan. 17, 1867.]

Mr. Smith a judgment creditor at law of the defendants. W. H., and C. T. Bell, presented a petition under the circumstances, and for the purposes set forth in the judgment

G. Murray, in support of the petition cited *Wellesley* v. *Mornington*, 11 W. R. 17; *Re Blunt's Trust*, 10 W. R. 379; Imperial Act 1 & 2 Vic. cap. 110 secs. 14 & 15; *Robinson* v. *Wood*,

5 Beav 388; *Watts* v. *Jefferey*s, 3 McN. & G. 372; Morgan's Chancery Acts & Orders, foot note page 489, (3rd Ed. 1862); *Leistel* v *Kings' College*, 11 Beav 254, Con. Stat U C. Cap. 12, sec 26 sub-sec 10.

T Moss, contra, contended that this Court could not make the order by virtue, either of its inherent or statutory jurisdiction. No statute conferring rights similar to those conferred on judgment creditors by the Imperial Act 1 & 2 Vic C 110. has been passed in Upper Canada, and that statute itself is not in force here.

The Judge's Secretary —In this suit a decree was made in May, 1865, which ordered the payment into Court of certain moneys The defendants, W. H and C. T. Bell, are entitled to a share of these moneys when paid in. A B. Smith who has recovered a judgment at law against these defendants, and who has in the sheriff's hands, a writ of execution founded on that judgment now presents a petition praying that an order may be made declaring his judgment a first charge, and lien upon the interest of the defendants in their late father's estate under his will and upon such part of the estate or proceeds thereof, as are now, or hereafter may be paid into Court, and preventing the payment out of Court to these defendants of any part of moneys now in Court, or hereafter paid in until his debt and costs be fully paid and that the petitioner may have notice of any future proceedings in the cause and be entitled to attend the same In other words he seeks to obtain what is commonly called a stop-order. On the part of the defendants it is contended that the Court has no jurisdiction to grant such an order on the application of a judgment creditor. This contention is I think correct.

At common law the right of a judgment creditor was to take the body of the debtor in execution, or to issue a writ under which the sheriff could seize and sell his goods and chattels, and in due course he was entitled in England to a writ of *elegit*, or in this province to a writ under which his lands might be sold. By the Imperial Act 1 & 2 Vic. C. 110, arrest on mesne process was abolished, and the creditor being thus deprived of a remedy he had long enjoyed, the rights of judgment creditors were extended—judgments were made a charge on lands, and by section 14 it is provided that if any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts, &c, shall have any Government stock funds or annuities or any stock or shares of, or in any public company in England, (whether incorporated or not), standing in his name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favor by the judgment debtor.

Doubts having been entertained as to whether this section extended to money in the hands of the Accountant General of the Court of Chancery, the 3 & 4 Vic. cap 82 was passed declaring moneys in the hands of the Accountant General subject to the charging order provided by 1 & 2 Vic cap. 110, sec 14.

Under the general words of the Chancery Act Con. Stats. U. C cap 12, sec 26, as interpreted by this Court *In re Lash*, these acts may be in force here so far as they affect the Court of Chancery, but if they are, they give judgment creditors rights without the means of enforcing them. A stop-order is never granted in England on the application of a judgment creditor except in aid of a charging order obtained at law: *Hulker* v. *Day*, 10 Sim 41; *Watts* v. *Jefferey*s, 3 M. & G. 372; and see *Warburton* v *Hill*, *Stant* v *Wickens*, Kay, 470; and it is granted there because by force of the staute the judgment creditor who has obtained the charging order stands in the same position as if he had an assignment of the sum.

The charging order can be issued by a common law judge only, and not by a judge of the Court of Chancery: *Miles* v. *Presland*, 2 Beav 300; and as these statutes, even if in force as to the Court of Chancery, are certainly not in force as to the Courts of Common Law, it follows that no judgment creditor can here obtain the charging order necessary to be obtained before a stop-order can be granted, there being no Act in force here which gives the Courts of Common Law power to issue such an order.

All the cases cited, except *Robinson* v. *Wood*, where stop-orders have issued on the application of judgment creditors, are cases where the charging order at law had first been obtained. In *Robinson* v. *Wood*, the application was not for a stop-order, but money having been directed to be paid out to the judgment debtor, and cheques for the purpose actually drawn, the Court was asked to stay the issuing of these cheques to the debtor, and for an order that they might be handed to the sheriff of Middlesex. The first part of the motion was granted, and the issuing of the cheques stayed, but the other part of it was left for further argument

Taking the view I do, the petition of Mr Smith must be dismissed with costs.

Vanwinkle v. Chaplin.

Next friend of married woman—Person of no means, and residence not known—Security for costs—Co-plaintiff—Misdescription in notice of motion.

Where, upon a bill filed by a married woman by her next friend, it appears that after due enquiries the next friend is not known in the locality of which he is described to be a resident and not in possession of any property there an order will be made for security for costs

Upon an application for security for costs under such circumstances. *Held*, following *Rann* v. *Lawless*, Cham Reports 333 that the fact of a co plaintiff, resident within the jurisdiction being on the record would not prevent the order being granted.

The next friend was termed a plaintiff in the notice of motion. *Held*, that the misdescription was not such as to mislead, and that therefore the motion ought not to fail upon that ground

[Chambers, Jan. 31, 1851.]

C. Jones, applied for an order for security for costs on the ground that the next friend of the plaintiff (a married woman) was not resident where he was described to be in the bill, and was not possessed of any property.

The plaintiffs resisted the application contending that as there was another plaintiff on the record who was resident within the jurisdiction, no order could be granted, and that at any rate the plaintiff had not made such a case as entitled him to the order.

The Judges' Secretary.—I think the defendant entitled to security for costs, and to have the proceedings stayed until the security is given. The next friend is described as of the Township of Chinguacousy in the County of Peel, Yeoman. The defendant has made enquiry in that neighborhood of persons who are acquainted with the residents in that Townsihp, and who are likely to know the next friend if he really resides there and is a man of substance; but no one knows him I think the enquiries made by the defendant, and the result of these enquiries justify the present application. On the part of the plaintiff an affidavit is filed from which it would appear that the plaintiff's solicitors have never seen the next friend and know nothing about him except that they believe his post-office address to be Brampton, and that a letter addressed to him at Brampton will reach him. I think the affidavits filed by the plaintiffs should have been explicit as to the actual residence of the next friend, and as to his being a man of substance.

In *Oldale* v. *Witcher*, 5 Jur. N. S. 84, *V. C. Kindersley* said, if a plaintiff cannot be found when he ought to be forthcoming and is wanted, he must give security for costs. As to the other objection that there is on the record a co-plaintiff who is responsible for costs, without expressing any opinion, I feel bound by *Rann* v. *Lawless*, Cham. Reports 333, where the chancellor considered that the presence of a co-plaintiff made no difference.

The other objection that the notice of motion asks that "the plaintiff, J. A. P. as next friend" may give security, is not sufficient to entitle the plaintiffs to have the present motion dismissed They cannot have been in any way misled by the wording of the notice. The usual order must go.

Purkiss v. Morrison.

Application for stop order—Garnishing order at law—Charging order.

Upon an application by a judgment creditor for a stop order under circumstances somewhat similar to those in *Lee* v. *Bell*, reported *supra—Held*, that the fact that the judgment creditor had obtained a garnishing order from the Common Law Court in which the judgment had been obtained, did not entitle him to a stop order in this Court.

[Chambers, Feb. 2, 1867]

This was an application for a stop order against money in court to the credit of the judgment debtor of the applicant. The applicant had obtained an order from the Court of Common Law in which his judgment was entered, garnishing all debts due or accruing due to the judgment debtor.

Downey, in support of the application.

McGregor, contra.

The Judges' Secretary.—The only difference between this case and *Lee* v. *Bell* is, that the judgment creditor has obtained an order garnishing debts due to the judgment debtor. This, however, places him in no better position as to the present application, the charging order necessary to be obtained, before a stop order can be granted, and the order garnishing debts being two entirely distinct things.

The motion must be refused with costs.

ENGLISH REPORTS.

Feltham v. England

Master and servant—Negligence of fellow-servant—Foreman—Superior authority.

The rule that a servant cannot recover for injuries sustained through the negligence of a fellow-servant in their common employment, unless the latter be shown to be a person unfit for his employment, is not altered by the fact that the servant to whom negligence is imputed was a servant of superior authority, whose lawful direction the plaintiff was bound to obey.

This was a case tried at Middlesex before the Lord Chief Justice, in which a verdict was returned for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

A rule having been obtained, *D. Seymour*, Q. C., and *Daly* showed cause, and *Hanse* appeared in support of the rule.

The facts of the case and the arguments are set out fully in the judgment.

The Court,* having taken time to consider, the following judgment was delivered on the 24th November:—This case stood over on the suggestion that another case was pending for argument before us, which involved the same points. The case referred to on the hearing a few days ago was found not to involve any question applicable to the present. We therefore give our judgment upon the facts which appeared on the trial of this case.

The defendant was a maker of locomotive engines, employing a great number of men. In the course of the work a travelling crane was used to hoist the engines, and convey them to tenders for their carriages. The crane moved on a tramway resting on beams of timber, and supported by piers of brickwork. The piers had been recently partly repaired and partly rebuilt, and the brickwork was fresh. It appeared that at the time of the accident the piers first gave way, and then the beams broke from the strain thus cast upon them. The accident occurred on the first occasion of using the crane, and it was the first time that the plaintiff had been employed upon it. There was no evidence that there was any defect in the crane, or negligence in the mode in which it was used, or that the engine was of unreasonable or improper weight. There was no evidence of any personal privity or interference by the defendant; but his forman or manager was present and gave the directions to hoist the engine.

The traveller was worked by six men, three at one end and three at the other. As the crane moved along it oscillated, and the foreman thinking that the men were not working it properly directed them to stop, which they did for a minute or so. He then ordered them to move on again, which they did; just before that he had ordered the plaintiff to get on the engine and clean it. The plaintiff did so, and was on it

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* Cockburn, C. J., Mellor, and Shee, J J.

whilst in motion for the purpose, and whilst so engaged some mortar fell, the pier gave way, and the engine fell, and the plaintiff's arm was broken. Upon objection by the defendant's counsel, that there was no case to go to the jury, to fix the defendant with liability, either personally or for the act of his manager or forman, the Lord Chief Justice reserved the question for the Court and the case went to the jury, who found for the plaintiff, with two hundred pounds damages On the argument before us it was contended that the defendant was liable on two grounds. Firstly it was urged that the foreman or manager was an *alter ego* of the master, and not a fellow servant of the plaintiff, and that he was guilty of negligence in not ascertaining the sufficiency of the piers before he ordered the plaintiff to get upon the engine to clean it as it travelled along. Secondly, it was urged that there was evidence to fix the defendant personally with negligence, in permitting the engine to be removed by means of the piers when he might, and ought to have known, that the piers were not sufficient for the purpose. We are of opinion that the plaintiff is not entitled to succeed on either ground. We think that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow servant of the plaintiff, although he was a servant having greater authority. As was said by Willes, J., in *Gallagher* v *Piper*, 12 W R 988, 33 L J. C P 33 9 "a foreman is a servant, as much as the other servants, whose work he superintends" There was nothing in the present case to show that he was an incompetent or improper person to be employed as foreman or manager. We are unable to distinguish the case on this point from that of *Wigmore* v. *Jay*, 19 L J. Ex 300. 5 Ex. 354; *Gallagher* v. *Piper* and *Skip* v *The Eastern Counties Railway Company*, 23 L J. Ex. 223. We think that this case ranges itself with a great number of cases by which it must be considered as conclusively settled, that one fellow servant cannot recover for injuries sustained in their common employment by th negligence of a fellow servant, unless such fellow servant is shown to be either an unfit or improper person to have been employed for the purpose: *Morgan* v *The Vale of Neath Railway Company*, 12 W R 1032, 33 L. J. Q B. 250, in error. 14 W R 144, 35 L J. Q B 23 And this rule is not altered by the fact that the servant to whom the negligence was imputed was a servant of superior authority, whose lawful direction the plaintiff was bound to obey It is difficult in the present case to discover any evidence that the forman was guilty of any negligence; but it is not necessary to determine that, inasmuch as the conclusion at which we have arrived renders it unnecessary to do so.

With regard to the second ground relied upon on the part of the plaintiff, we can find no evidence of personal negligence to fix the master. There was nothing to show that he had employed unskilful or incompetent persons to build the piers, or that he did know, or ought to have known, that they were insufficient for the use to which they were to be employed. He was a maker of engines, and therefore in th it sense an engineer, but not in the sense that he possessed special knowledge as to the strength or sufficiency of brickwork We cannot, in the absence of such evidence, say there was any case fit to be submitted to the jury as to this ground of liability, and we therefore think that the rule to enter a nonsuit ought to be absolute.

Rule absolute.

UNITED STATES REPORTS.

COURT OF APPEALS OF KENTUCKY.

Commonwealth v. Reed

The commonwealth may maintain a civil action for its own use for damages against a sheriff for breach of his official bond by negligence in arresting a party charged with crime, or by wilfully taking insufficient surety from such party for his appearance.

This was an action against a sheriff and his sureties for an alleged breach of his official bond, in negligently failing to arrest Stephen Patterson, on four bench warrants issued on four several indictments for unlawful gaming, and also in wilfully taking insufficient security for Pinkney Patterson, whom he had arrested under indictments for permitting unlawful gaming in his house—the petition alleging the escape of Stephen and the insolvency of Pinkney Patterson.

Per Curiam—The Circuit Court having sustained a demurrer to the petition—which is good if such an action be maintainable—the only question for revision by this court is, whether the commonwealth has a right, for its own use, to recover in a civil suit, against the sheriff and his sureties, damages for a breach of their covenant.

Although there may be no precedent of any judicial recognition of such a remedy, yet we can perceive no reason why it should be available, and it seems to us that principle sanctions it, and that it is sustained by both the common and statutory law of Kentucky.

The sheriff's official bond is required for assuring his fidelity as well to the commonwealth as to every individual who may lose by his infidelity. His delinquencies, as charged in this case, might subject the commonwealth to some insecurity, and to loss of revenue which she might have derived from the execution of the process Why, then, should not she, as well as a citizen, have a right of action for damages to himself from a breach of the bond given to her for securing her interests as well as those of citizens?

The fact that the sheriff may be liable to a fine is no sufficient answer This is only punitive; the civil action is remunerative He may be insolvent, and his sureties would not be responsible for the fine And the actual damage to the commonwealth may greatly exceed the amount of the fine.

Nor is the indeterminateness of the damages and the difficulty of ascertaining their precise amount by any certain or fixed standard, a sufficient answer.

The same difficulty occurs in many other classes of actions undoubtedly maintainable. Nominal damages might always be recovered, and generally the amount of the prescribed fine would afford a definite criterion for assessing the

civil damages In this case no court can assume that had Stephen Patterson been arrested he would ever have been tried, or, if tried, convicted, or, if convicted, that the fines would ever have been collected by the commonwealth. But still, for every wrong there is a remedy; therefore, the imputed breach of the bond must be actionable upon common-law principles, and the damages must be assessed by the best tests the facts of the case may afford.

Confirmatory and, as we think, also declaratory of the common-law—the sixth section of article 8, chapter 83, of Stanton's Rev. Stat., p. 259, provides that "clerks of courts, sheriffs, and other public officers, and their sureties, and the heirs, distributees, devisees, and personal representatives of each, may be proceeded against by suit or motion, jointly or severally, for their liabilities or defalcations by the commonwealth in her own right.

The application of this enactment cannot be restricted by the context of the article in which it is found and which is too contracted for its useful or consistent operation. But it is, in its range, coextensive with the chapter on revenue, and applies to every case affecting the revenue of the commonwealth, as this case certainly may affect it by possible diminution. One of the principal objects seems to have been to hold the sureties to liability. On these grounds we are of the opinion that the action, as brought, is maintainable, and that, consequently, the Circuit Court erred in sustaining the demurrer to the petition.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

The importance and novelty of the foregoing decision seem to bring it fully within the range of our publication. We cannot say, that we should have been inclined, *à priori*, to have adopted the same view of the law, and still we are far from feeling any decided repugnance to the decision It seems to us, that the statute of the state referred to in the opinion may be regarded as favoring the view taken by the court It is true the court also intimates that the view is sustained by principle, as well as by the common and statutory law of Kentucky

We feel very confident that the common law of England countenances no such remedy in favor of the government, in cases of a criminal or penal nature, where the default complained of is in not detaining the accused party, when arrested, and where the proceeding is, in form, criminal. The only remedy which could there be resorted to in cases of that character would be by attachment for a contempt of the court before whom the process is made returnable The English authorities are digested in 15 Petersdorff's Ab. 615 It seems that at common law the remedy by attachment was the only one allowed. Remedies by action in favor of private parties seem to be exclusively of statutory origin in England But some of the later English statutes have given an action against the party by a common informer suing *qui tam*: 4 Geo 3, c 13, s 4; *Sturmy* v. *Smith*, 11 East 25. And there seems to be no question the sheriff is amenable for the act of his officers, though the offence be indictable: *Woodgate* v. *Knatchbull*, 2 T. R. 148

And we see no objection in point of principle or precedent, to allowing an action in favor of the state upon all actions which sound in damages merely, and where the object is to recover a pecuniary mulct or penalty Thus, in actions to enforce recognisances in criminal cases, or in penal actions, there would be no such uncertainty as would be likely to embarrass the courts or juries It has been often held that the liability of a sheriff is in the nature of a tort, and that assumpsit will not lie: *Wallbridge* v. *Griswold*, 1 D Chip. (Vt.) 162. So also of a collector of taxes: *Charlestown* v. *Stacy*, 10 Vt R 562. But beyond this it seems to us the sheriff is so much a part of the government, being the head of the police force of the county and of the *posse comitatus*, that there would be an incongruity in quickening his pulses in favor of duty by an action on the case for any tortious act or neglect. The remedy of public opinion and in extreme cases, where there is reason to presume bad faith and criminal connivance, by attachment and imprisonment, in the discretion of the court, or by fine, would seem more natural and effective, in the majority of cases.

But we are not insensible to the fact that all punishment, as well as reward, is fast coming to be measured by its direct effect upon mutual interests and pecuniary advantage or loss It is humiliating to reflect that it is so, so much as the stubborn facts compel us to recognise. And when that high sense of honor, that made the sheriffs of England to be reckoned among the nobility, as *vice comes*, on the deputy of the earl, when that fails to render such important officers insensible to all considerations except the strict law of duty it may become necessary to extend pecuniary penalties so as to embrace all the duties of the sheriff —(*American Law Register.*)

I F R.

Quotations at the Bar —Not long since Mr. Bacon, Q C., whilst commenting upon the scientific evidence in a light and air case, where witnesses had attempted to prove the exact number of degrees of light which would be obstructed, made use of the following happy quotation from Hudribras' description of the philosopher who,—

> "By means of geometric scale,
> Could tell the size of quarts of ale."

The most recent, and perhaps the most remarkable apposite, was by Mr. Grove, Q C., in *Bovill* v. *Goodier*, when dealing with the evidence brought forward to prove anticipation of the patent. Arguing that no patent or discovery could be upheld on the principles put forward by the defendant he said Sir Isaac Newton's discovery of the laws of gravitation might with equal force be said to have been anticipated by Shakespere when, in "Troilus and Cressida," he makes Cressida say:—

> "But the strong base and binding of my love,
> Is as the very centre of the earth,
> Drawing all things to it."

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

COMMENCING JANUARY, 1866.

Accomplice.—*See* Witness, 3.

Accruer.

1. By a marriage settlement, funds were settled on the wife for life; remainder to the children equally, "to be a vested interest at their ages of 21," with a gift over to the husband in case all the children died under 21, and a reversion to the settler, if no child was born; but no clause of survivorship and accruer as to shares of children dying under 21. Of five children, four only attained 21; *Held*, that the whole fund vested in the four.—*Colley's Trusts*, Law Rep. 1 Eq. 496.

2. On a gift to testator's daughters, "the share or shares of such daughters to be for their separate use," followed by a contingent gift to survivors, the separate use attaches to accrued shares.—*Jarman's Trusts*, Law Rep. 1 Eq. 71.

Administration.

1. The executor being out of the jurisdiction, administration with the will annexed was granted to the guardian of infant legatees, limited to their interest.—*Goods of Hampson*, Law Rep. 1 P. & D. 1.

2. If, after an order on summons for the administration of a testator's estate, the sole executor and trustee has become bankrupt, a receiver ought to be appointed, though the assignees are not before the court.—*In re Johnson*, Law Rep. 1 Ch. 325.

3. If the estate of a deceased consists of his share in a business which he was carrying on in partnership at the time of his death, and which the surviving partner continues to carry on, an administrator *pendente lite* will not be appointed against the wishes of such partner, unless a strong case is made, that he is dealing improperly with the business.—*Howell* v. *Wilts*, Law Rep. 1 P. & D. 103.

4. The administrator being the only person beneficially interested in an intestate's estate, and there being no creditors, a bond was allowed to be given with sureties resident in Scotland —*Goods of Houston*, Law Rep. 1 P. & D. 85.

5. Justifying sureties will not be dispensed with, though a receiver of the estate has been appointed in chancery, if chancery may not continue to have the control of the estate, after administration granted. — *Jackson* v. *Jackson*, Law Rep. 1 P. & D. 12.

6. The court will not discharge original sureties to an administration bond, or allow other sureties to be substituted. — *Goods of Stock*, Law Rep 1 P. & D. 76.

See Conflict of Laws, 3; Equity Pleading, 1; Executor; Husband and Wife, 4.

Aiding to Escape.

The 28 & 26 Vic. c. 126, sec. 37, which forbids the conveyance into a prison with intent to aid an escape, of any mask, dress, or other disguise, or of any letter, or of any other article or thing, includes a crowbar. — *The Queen* v. *Payne*, Law Rep. 1 C. C. 27.

Alien.—*See* Copyright, 2.

Alimony.

In making an order as to settled property under 22 & 23 Vic. c. 61, sec. 5, the divorce court will consider the conduct of the parties, as well as their pecuniary position.—*Chetwynd* v. *Chetwynd*, Law Rep. 1 P. & D. 39.

Appeal.

Execution of a decree, that the plaintiff should be let into possession of real estate, the defendant being about to appeal, and the plaintiff declining to give security to refund the rents in case of a reversal of the decree, was stayed; the defendant giving security for past rents, the future rents to be paid into court, with liberty to the plaintiff to apply as to maintenance, and for costs of the appeal.—*Barrs* v. *Fawkes*, Law Rep. 1 Eq. 392.

See Equity Practice, 3, 7.

Apprentice.—*See* Master and Servant, 4.

Appropriation of Payments.—*See* Contract, 1.

Arbitration.

A master, to whom an action on a building contract has been referred, under the Common Law Procedure Act, may send a surveyor in whom he can confide, to view and report on the work done; but the parties may offer independent evidence.—*Gray* v. *Wilson*, Law Rep. 1 C. P. 59.

See Award.

Assault.—*See* Indictment.

Assignment.—*See* Pleading, 1.

Attorney.—*See* Solicitor.

Auctioneer.

See Principal and Agent, 2; Vendor and Purchaser, 3.

Award.

1. It is no objection to an award, that the arbitrator has not found each matter referred to him separately, unless from the submission

* See page 32 ante for explanation as to the above. We are largely indebted in the construction of this Digest to the valuable American Quarterly *The American Law Review*.

it is clear that the parties intended he should so find.—*Whitworth* v. *Hulse*, Law Rep. 1 Ex. 251.

2. To an action again a railway company on an award, whereby the arbitrator found that the plaintiff had been damaged by reason of his messuage being injuriously affected "by the erection of an embankment and by the narrowing of a road" by the company, to the amount of £80, the company pleaded that the messuage was not injuriously affected by the narrowing of the road; and that the sum awarded included money of uncertain amount, which was awarded as compensation for damage sustained by reason of the messuage being, as the arbitrator erroneously supposed, injuriously affected by the narrowing of the road, by reason whereof the award was void. *Held* on demurrer a good plea.—*Beckett* v. *Midland Railway Co.*, Law Rep. 1 C. P. 241.

See Specific Performance, 3.

Bankruptcy.

1. A colonist, who had taken the benefit of a colonial insolvent act, alleged that a judgment had been recovered against him in a colonial court, from which he had unsuccessfully appealed; that the assignee, now in England, had assets from which, if the judgment were reversed, a large surplus would return to him; that an appeal from the judgment would probably be successful, but that the assignee, colluding with the judgment creditor, refused to appeal; and prayed that the assignee might be decreed to prosecute the appeal, or that the plaintiff might be enabled to do so in the assignee's name. *Held*, that there was no sufficient averment, that the plaintiff had failed to obtain justice in the colonial courts.—*Smith* v. *Moffatt*, Law Rep. 1 Eq. 397.

2. A person having a vested reversionary interest in a trust-fund of personal property in England became insolvent in Australia; and, after the property fell into possession, but before it was paid over, the insolvent died. *Held*, that if his domicile was Australian, his assignees were entitled to the fund; but that, if it was English, the executor, who had proved in England, was entitled; and the assignees, to obtain it, must sue such executor.—*In re Blithman*, Law Rep. 2 Eq. 23.

3. An assignment by a trader of all his property as security for an advance of money, which he afterwards applies in payment of existing debts, is not an act of bankruptcy, unless fraudulent; and is not fraudulent unless the lender knew that the borrower's object was to defeat or delay his creditors.—*In re Colemere*, Law Rep. 1 Ch. 128.

4. A colonial insolvent act provided, that if a creditor held any security on any part of the insolvent estate, the amount of such security should be deducted from his debt. *Held*, that this provision did not change the English rule, that a creditor, holding a security on the separate estate of a partner, may prove the whole of his debt against the joint estate, without giving up his security.—*Rolfe* v. *Flower*, Law Rep. 1 P. C. 27.

5. It is no good equitable plea to an action, that the defendant has been adjudicated bankrupt, and that the plaintiff has proved his debt in bankruptcy.—*Spencer* v. *Demmett*, Law Rep. 1 C. P. 123.

6. The word "creditor," in the Bankruptcy Act, 1861, means any one who could prove against the debtor's estate.—*Wood* v. *De Mattos*, Law Rep. 1 Ex. 91.

7. A protection order, under 12 & 13 Vic. c. 106, sec. 112, is good only against creditors who were such at the time of the bankruptcy, and had a right to prove their debts under it.—*Phillips* v. *Bland*, Law Rep. 1 C. P. 204; *In re Poland*, Law Rep. 1 Ch. 356.

8. A protection from arrest, under 7 & 8 Vic. c. 70, sec. 6, does not protect the debtor's goods from seizure.—*Davis* v. *Percy*, Law Rep. 1 C. P. 256.

9. A bill accepted for the accommodation of another may constitute a debt contracted without any reasonable expectation of being able to pay the same, and therefore may be ground for refusal of a bankrupt's discharge.—*Ex parte Mee*. Law Rep. 1 Ch. 337.

10. The court cannot both imprison a bankrupt, and suspend his order of discharge, under 24 & 25 Vic. c. 134, sec. 159.—*In re Marks*, Law Rep. 1 Ch. 334.

11. On an appeal in bankruptcy, evidence not before the commissioner cannot be used without leave, except to show what took place before him.—*In re Lascelles*, Law Rep. 1 Ch. 127.

12. A petitioning creditor is personally liable under 12 & 13 Vic. c. 106, sec. 114, for the fees of the messenger in bankruptcy, down to the choice of assignees; and the trade-assignee is liable for those incurred subsequently, if he has personally interfered by directing the management of property in the messenger's possession.—*Stubbs* v. *Horn*, Law Rep. 1 C. P. 56.

13. If an order, made by a commissioner of bankruptcy at his own instance, is discharged on appeal, the costs of the appeal may be given to the appellant.—*In re Leighton*, Law Rep. 1 Ch. 331.

See Partnership, 2; Production of Documents, 5.

Bigamy.

On a trial for bigamy, of a man who had lived apart from his first wife, for the seven years preceding the second marriage, the prosecution must prove that during that time he was aware of her existence.—*The Queen* v. *Curgerwen*, Law Rep. 1 C. C. 1.

Bill of Lading.

1. A bill of lading on goods, making them deliverable "to order or assigns," was indorsed by the consignor in blank, and deposited with a banker as security for an advance; and, on repayment of the advance, was re-indorsed and delivered back to the assignor. *Held*, that the consignor could sue the ship-owners for a breach, whether occurring before or after the re-indorsement of the bill of lading.—*Short* v. *Simpson*, Law Rep. 1 C. P. 248.

2. If a bill of lading provides that, as soon as the ship is ready to unload the whole or any part of the goods (sixty-five pipes of lemon juice), the consignee is bound to be ready to receive the same from the ship; and, in default, the master may enter the goods, and land or lighter them at the consignee's risk and expense; the contract is divisible, and, if, after part of the goods have been landed by the ship-owner, but not before, the consignee offers to receive the remainder, the ship-owner is bound to deliver them to him, unless he has been prejudiced in the delivery of the remainder by the consignee not being ready to receive the whole.—*Wilson* v. *London, Italian and Adriatic Steam Navigation Co.*, Law Rep. 1 C. P. 61.

See Stoppage in Transitu.

Bill of Sale.

In an affidavit annexed to a bill of sale, a description of the grantor's residence and occupation, to the "best of the belief" of the deponent, is sufficient—*Roe* v. *Bradshaw*, Law Rep. 1 Ex. 106.

Bills and Notes.

1. "On demand, I promise to pay to the trustees of W. Chapel, or their treasurer for the time being, £100," is a good promissory note, as the trustees alone are to be taken as payees, and the treasurer, as their agent, only to receive payment.—*Holmes* v. *Jacques*, Law Rep. 1 Q. B. 376.

2. If a bill of exchange is indorsed, payable "in need" at a bank, the bank are agents of the indorsers for payment only, and not agents for notice of dishonor generally.—*Leeds Banking Company*, Law Rep. 1 Eq. 1.

3. The rule allowing a day for each step in presentation and notice, applies only as between the parties to a bill, and not as between the agent of the holder and the holder, who resides at a distance.—*Leeds Banking Company*, Law Rep. 1 Eq. 1.

4. Presentation of a bill for payment to an indorser is not *per se* notice of dishonor by the acceptor.—*Leeds Banking Company*, Law Rep. 1 Eq. 1.

5. Notice of dishonor, good according to French law, on a bill indorsed in England, payable in France, is good against the indorser, either because the law of the place where the contract is to be executed governs, or because, in general, notice, good according to the law of the place where the note is payable, is such as can reasonably be required, and therefore to be deemed a good notice according to the law of England.—*Hirschfeld* v. *Smith*, Law Rep. 1 C. P. 340.

6. A bill of exchange, indorsed in blank to E. S., was by him indorsed in blank, and delivered to H., who changed the blank indorsements to E. S., so that it read thus: "Pay to the order of E. S., at the rate of 25 fr. 75 c. per £1, value received, the sum of 6,437 fr. 50 c. *ut retro*;" and wrote the same words on the face of the bill, purporting to make them part of the acceptor's contract. *Held*, such a material alteration as to avoid the bill in the plaintiff's hands.—*Hirsdfeld* v. *Smith*, Law Rep. 1 C. P. 340.

See Mortgage, 1; Principal and Agent, 1, 2; Variance.

Blockade.

It is not a municipal offence, by the law of nations, for a neutral to trade with a blockaded port.—*The Helen*, Law Rep. 1 Adm. & Ecc. 1.

Bottomry Bond.

Fraud practised by an owner on a mortgagee of a vessel, which might render the voyage illegal, does not invalidate a bottomry bond to a *bonâ fide* lender.—*The Mary Ann*, Law Rep. 1 Adm. & Ecc 13.

Breach of Promise.—*See* Damages, 1.

Carrier.

1. A by-law of the defendants provided, that no passenger should enter a carriage without obtaining a ticket, which would be furnished on payment of the fare, and was to be shown and delivered up on demand. The plaintiff took tickets for himself and servants by a particular train, which was afterwards cut in two, the plaintiff being in the first train with all the tickets. The defendants refused to carry the

servants in the second train, they being unable to show tickets. *Held*, that the defendants, having contracted with the plaintiff, and delivered to him the tickets, could not justify their refusal under the by-law.—*Jennings* v. *Great N. Railway Co.*, Law Rep. 1 Q. B. 7.

2. A by-law of a railway company, that no person shall enter a carriage without having paid his fare, and obtained a ticket, which he is to show and deliver upon demand; and that any one, not so showing or producing his ticket, shall pay the fare from the place whence the train originally started, or forfeit not exceeding forty shillings, does not apply to a passenger who has not paid for and obtained a ticket, if he has no intention to defraud the company; and, if it did apply, it would be void under 8 Vic. c. 20, §§ 103, 109.—*Dearden* v. *Townsend*, Law Rep. 1 Q. B. 10.

3. The defendants, a railway company, carried on the business of common carriers off their line. They charged an equal rate for carriage on their line between their termini. They also collected at one terminus, carried on their line, and delivered at a place distinct from, and at some distance beyond, their other terminus; and for this they charged an equal through rate. *Held*, that the carriage beyond the second terminus was not auxiliary to their business as railway carriers, and that the plaintiffs could not deduct the cost of this carriage, and of collection at the first terminus, from the through rate, and have their goods carried between the termini for the difference.—*Baxendale* v. *London & S. W. Railway Co.*, Law Rep. 1 Ex. 137.

4. If a railway company is forbidden by statute to charge different rates to different persons, and is in the habit of charging on any consignment of goods made to one person, though consisting of distinct parcels, a tonnage weight on the aggregate weight of the whole, the fact that, of goods so consigned to one person, and distinctly addressed to him, some articles had also written conspicuously upon them the names of the persons to whom the consignee intended to deliver them, does not entitle the railway to charge separately for those on which such names were different.—*Baxendale* v. *London & S. W. Railway Co.*, Law Rep. 1 Ex. 137.

5. The plaintiff having obtained a verdict against the defendants for the amount charged to and paid by him for the carriage of goods more than was charged to others, but the defendants continuing to make the same charges, and receive the same sums as before, the plaintiff brought a new writ, to recover for money paid during a later period; and applied, under the Common Law Procedure Act, §§ 79, 82, for an injunction to restrain the defendants from charging him otherwise than equally with others. *Held*, that the court would not exercise their statutory power to grant an injunction.—*Sutton* v. *S. E. Railway Co.*, Law Rep. 1 Ex. 32.

6. If A. has arranged orally with a railway company to carry cattle for him to E. on their line, and thence, by a connecting line to K.; and has, at the same time, signed, without noticing its contents, a consignment note by which the cattle are directed to be taken to E., parol evidence is admissible to show an agreement to carry on to K., as it only supplements the contract.—*Malpas* v. *London & S. W. Railway Co.*, Law Rep. 1 C. P. 336.

7. The plaintiff sent goods from M., by the defendants' railway, to his traveller at C., the delivery of which, was, by the defendant's negligence, delayed till the traveller left C., and the profits which would have been derived from a sale at C. were lost. *Held*, that such profits could not be recovered as damages.—*Great W. Railway Co.* v. *Redmayne*, Law Rep. 1 C. P. 329.

8. If a carrier parts with goods to a consignee, after notice of stoppage *in transitu*, damages can be recovered in equity under Sir H. Cairns's Act.—*Schotsmans* v. *Lancashire & Yorkshire Railway Co.*, Law Rep. 1 Eq. 349.

9. An entire contract, to carry partly by land and partly by sea, is divisible; and, as to the land journey, the carrier is within the protection of 11 Geo. IV., & 1 Wm. IV. c. 68.—*Le Conteur* v. *London & S. W. Railway Co.*, Law Rep. 1 Q. B. 54.

Cases Overruled and Doubted.

Goods of Alexander, 29 L J. (P M & A.) 93. *Goods of Hallyburton*, Law Rep. 1 P. & D. 90. *Marc* v. *Underhill*, 4 B. & S. 566. *Wood* v. *De Mattos*, Law Rep. 1 Ex. 91. *Willis* v. *Pluskett*, 4 Beav. 208. *Sanders's Trusts*, Law Rep. 1 Eq. 675. *Wythe* v. *Henniker*, 2 My. & K. 635. *Lord Lilford* v. *Keck*, Law Rep. 1 Eq. 347.

Cattle.

Driving a van with horses, in which calves are being conveyed to market, is not within a statute which forbids any drover, or other person, from "conducting or driving" any cattle through the streets on Sunday.—*Triggs* v. *Lester*, Law Rep. 1 Q. B. 259.

Champerty.

A. having executed a conveyance of real estate to B., which was liable to be set aside on equitable grounds, afterwards made a voluntary settlement of the same on himself for life, re-

mainder to his children as he should appoint; and, in default of appointment, to all his children who should attain twenty-one or marry, in equal shares. *Held*, that the voluntary settlement was not void on the ground of champerty; that A.'s infant children could maintain a bill, making A. and the trustees of the settlement defendants, to set aside the conveyance to B.—*Dickinson* v. *Burrell*, Law Rep. 1 Eq. 337.

Children, Custody of.—*See* Infant, 2.

Codicil.—*See* Will.

Common Carrier.—*See* Carrier.

Company.

1. If a company is formed for working a patented machine, it is not *ultra vires* to purchase the patent.—*Liefchild's Case*, Law Rep. 1 Eq. 231.

2. The promoters of a railway company contracted with a land-owner, a peer of Parliament, to pay him £20,000 personally for his countenance and support in obtaining their act, such sum to be independent of the ordinary payment for land and other usual compensation. After the passing of the act, and formation of the company, the directors ratified the contract. A separate agreement stipulated for the quantity of land to be taken and the amount paid. *Held*, that the original contract and the ratification by the directors were *ultra vires* of the company, and could not be enforced against them.—*Earl of Shrewsbury* v. *N. Staffordshire Railway Co.*, Law Rep. 1 Eq. 593.

3. The deed of settlement of a bank declared that no one should be a transferrer of a share, unless approved by the directors. *Held*, that the directors must use this power reasonably, and would be controlled in equity.—*Robinson* v. *Chartered Bank*, Law Rep. 1 Eq. 32.

4. The power of making contracts in writing, signed by their agents, conferred by 19 & 20 Vic. c. 47, § 41, on companies registered thereunder, is a "right or privilege acquired under" that act, and so is not affected by its repeal by the 25 & 26 Vic. c. 89, which saves such rights or privileges.—*Prince* v. *Prince*, Law Rep. 1 Eq. 490.

See Principal and Agent, 4.

Confidential Relation.

1. It is a principle of equity, that one standing in a confidential relation toward others cannot hold substantial benefits which they may have conferred on him, unless they had competent and independent advice in conferring them; and, in cases to which this principle applies, the age and capacity of the party conferring the benefit are of little importance.—*Rhodes* v. *Bate*, Law Rep. 1 Ch. 252.

2. A confidential relation once established will be presumed to continue, in the absence of evidence to the contrary.—*Rhodes* v. *Bate*, Law Rep. 1 Ch. 252.

3. A., a nephew of a former trustee of B., being sent by his uncle to advise B., who was twenty-three years old and of extravagant habits, on the settlement of his debts, and to advance him money for that purpose, offered to give him £7,000 for his estate, under which there were coal mines. Pending the negotiations, in which a separate solicitor was employed for B., A. obtained from C., a mining engineer, a valuation of the minerals under the estate at £10,000, which he did not communicate to B.; nor did he suggest to B. to consult a mineral surveyor. B. accepted A.'s offer, and died before conveyance. *Held*, in a bill by B.'s administrator that A.'s purchase could not be sustained.—*Tate* v. *Williamson*, Law Rep. 1 Eq 528.

Conflict of Laws.

1. An English testator devised and bequeathed real and personal estate to A., for life, with remainder, as to the personalty to her children; and, as to the realty, to her first and other sons, lawfully begotten. A., having married in 1830 in England, obtained in Scotland a decree of divorce *a vinculo* on the ground of her husband's adultery; he having been induced with her connivance to go to Scotland, to bring herself within the jurisdiction of the Scotch courts. A. afterwards married in Scotland, and had two daughters and a son, all born in Scotland during her first husband's lifetime. *Held*, on petition, that these children were not entitled to either real or personal property under the will.—*Wilson's Trusts*, Law Rep 1 Eq. 247.

2. By a settlement in the Scotch form on the marriage of his daughter with a Scotchman, A., an Englishman, covenanted to pay £4,000 for the benefit of his daughter, her husband, and their younger children. The £4,000 was not paid; but, by will made after the daughter's death, A. gave £16,000 between the younger children. *Held*, that the English doctrine of presumption against double portions was applicable, and that the will operated as a satisfaction of the settlement.—*Campbell* v. *Campbell*, Law Rep. 1 Eq. 383.

3. A testator, domiciled in England, and having real and personal estate both in England and Holland, gave by will to trustees all his property here and abroad. A decree was made in England for the administration of the estate. Afterwards, a child of the testator commenced proceedings in Holland for the administration

of both the real and personal estate there. *Held*, that the prosecution of these proceedings would be restrained, it not appearing that they could be carried on against the real estate alone.—*Hope* v. *Carnegie*, Law Rep. 1 Ch. 320.

See Bills and Notes, 5; Marriage, 1.

Consideration.

See Deed, 1; Release; Tenant for Life and Remainder Man, 3.

Contempt.—*See* Nuisance, 3.

Contract.

1. A. proposed to B. & C., home agents of A.'s foreign consignees, that they should make advances to him against the consignments, and that "the proceeds of sales above the advances" should go in payment of an old debt of B. & C. against A. B. & C. agreed to this by a letter, which,—after saying that there were two ways of making advances, one for A. to draw on B. & C., and take and negotiate their acceptances; the other, for B. & C. to advance cash to A., and draw on him for the amounts, A. to accept, and B. & C. to negotiate—concluded, "and we shall retire that acceptance from proceeds of the sales." A. directed his consignees to remit to B. & C.; and B. & C. drew on A., negotiated his acceptances, and remitted the proceeds to him. Afterwards, B. & C. directed the consignees to remit, not to themselves, but to C. & D., bankers (C. being a partner in both firms,) as a security for advances by C. & D. to B. & C. B. & C. became bankrupt. *Held*, that C. & D. had notice of the arrangement between A. & B. & C.; and the remittances in the hands of C. & D. were appropriated in equity, first to the payment of A.'s acceptances, and then to the discharge of the old debt.—*Steele* v. *Stuart*, Law Rep. 2 Eq. 84.

2. One who would otherwise be entitled to set aside a contract for fraud, cannot do so, if, after discovering the fraud, he has acted in a manner inconsistent with the repudiation of the contract.—*Ex parte Briggs*, Law Rep. 1 Eq. 483.

3. A contract between the W. Railway Company and other parties provided, that any difference should be referred to T., "if and so long as he should continue the company's principal engineer." The W. Company afterwards became amalgamated with the N. B. Company, under a statute which provided that all contracts should be proceeded with; the N. B. Company being in all respects in such matters substituted for the W. Company. *Held*, that T., who continued engineer of the W. portion of the railway, but was not principal engineer of the amalgamated railway company, was still the proper referee.—*In re Wansbeck Railway Co.*, Law Rep. 1 C P. 269.

4. One who makes a contract for sale or hire, with the knowledge that the other party intends to apply the subject-matter of the contract to an immoral purpose, cannot recover on the contract: it is not necessary that he should expect to be paid out of the proceeds of the immoral act.—*Pearce* v. *Brooks*, Law Rep. 1 Ex. 213.

5. On a bill by a bankrupt, who had compounded for eight shillings in the pound, and whose bankruptcy had been annulled, a secret bargain by him to pay one creditor in full, in consideration of his becoming surety for payment of the composition, was set aside with costs.—*Wood* v. *Barker*, Law Rep. 1 Eq. 139.

See Bill of Lading, 2; Carrier 6, 9; Covenant; Frauds, Statute of; Lease, 2; Specific Performance; Tenant for Life and Remainderman, 3.

Conviction.

The certificate of a previous conviction is sufficient, by virtue of 8 & 9 Vict. c. 113, § 1, if signed by an officer who purports to have custody of the records, though he is therein described as deputy clerk of the peace of a borough. And the certificate need not aver, that the quarter sessions at which the conviction took place were held by the recorder.—*The Queen* v. *Parsons*, Law Rep. 1 C. C. 24.

Copyright.

1. The compiler of a directory, containing information derived from sources common to all, cannot spare himself the labor and expense of original inquiry by adopting the information contained in previous works on the same subject. He must work out the information independently for himself, and can only legitimately use the previous works for the purpose of verification.—*Kelly* v. *Morris*, Law Rep. 1 Eq. 697.

2. An alien may acquire a copyright, under 5 & 6 Vict. c. 45, in his book published in England while he is residing temporarily in a British colony, although not entitled to a copyright by the laws of that colony's legislature.—*Low* v. *Routledge*, Law Rep. 1 Ch. 42.

3. The plaintiff registered under the copyright of Designs Act a piece of cloth having woven on it a chain-work ground, with shaded and bordered six pointed stars arranged in a quincunx. *Held*, that this was sufficient registration of the entire pattern, as the "design;" but that the whole combination only, and not single parts, though new, were protected.—*McCrea* v. *Holdsworth*, Law Rep. 1 Q. B. 264.

Corporation.—*See* Company.

Digest of English Reports.

Costs.

1. Under a private act providing that commissioners for settling claims might certify costs, and that, in case of difference, costs should be taxed by a master of a superior court of law, according to the rules, and on payment of the fees observed and paid in actions at law, held that the masters taxed as *personæ designatæ*, not as officers of the court, and the court cannot review their taxation.—*In re Sheffield Waterworks Act*, Law Rep. Ex. 154.

2. The legal representative of a plaintiff in error (the plaintiff below), coming in after the commencement of proceedings in error, is not under the Common Law Procedure Act, 1852, on affirmance of the judgment, liable for the defendant's costs below.—*Parker* v. *Tootal*, Law Rep. 1 Ex. 41, 115.

See Appeal, 1; Equity Practice, 7; Executor, 3; Legatee, 2, 3; Production of Documents, 7; Railway, 7: Vendor and Purchaser, 7.

Covenant.

1. A covenant against building, entered into by a purchaser of land with the vendor (the owner of adjoining lands), his heirs and assigns, for the benefit of said adjoining lands, runs with the land, and may be enforced by a subsequent purchaser of part of such adjoining lands who would sustain substantial injury by its breach, though he has acquiesced in breaches which did not cause substantial injury, and though all persons entitled to the benefit of the covenant do not join in the suit.—*Western* v. *Macdermot*, Law Rep. 1 Eq. 499.

2. Defendant A. was the purchaser of premises, part of an estate formerly belonging to the plaintiffs, of which all the purchasers of such parts as were sold had covenanted not to use the premises so purchased as a beer-shop. A. on the 11th of February, without the plaintiffs' consent, but without their interference, opened a beer-shop on the back of his premises, which he leased in June to the co-defendant B., who with his consent, but without that of the plaintiffs, carried on the same business. On the 8th of July, the plaintiffs notified B. to desist. A purchaser of another house on the same estate had also, without consent, but without interference from the plaintiffs, opened a beer-shop at the back of his premises. *Held*, that there had not been such acquiescence and waiver by the plaintiffs as to preclude them from enforcing the covenant.—*Mitchell* v. *Steward*, Law Rep. 1 Eq. 541.

See Lease, 4, 5; Parties, 2.

Criminal Law.

See Aiding to Escape; Bigamy; Conviction; Disorderly House; Embezzlement; False Pretences; Indictment; Jury, 1; Malicious Mischief; Master and Servant, 3; Rape; Receiving Stolen Goods; Threatening to Accuse; Witness, 3.

Damages.

1. In an action for breach of promise, if the plaintiff has been seduced by the defendant, it is no misdirection to tell the jury, that, in estimating damages, they may consider the altered social position of the plaintiff in relation to her home and family through the defendants' conduct.—*Berry* v. *Da Costa*, Law Rep. 1 C. P. 331.

2. A child of seven years, by his next friend, brought an action, and recovered damages for injuries from the defendant's horse. Nine days after the trial, the child died, and judgment was signed by the next friend. *Held*, that though the damages were presumably given on the supposition that the child would live, yet the court would not grant a new trial; and that the child's death between verdict and signing judgment was no ground for staying the proceedings.—17 Car. II. c. 8, § 1; and 15 & 16 Vict. c. 76, *Kramer* v. *Waymark*, Law Rep. 1 Ex. 241.

See Carrier, 7, 8; Patent, 2; Trade Mark, 2.

Declaration of Title.

On a bill praying a declaration that a legal estate did not pass by a deed, the court refused to declare the legal right; but decreed that "the court, being of opinion that the estate did not pass, dismiss the bill."—*Jenner* v. *Jenner*, Law Rep. 1 Eq. 361.

Dedication. *See* Highway.

Deed.

1. Though a nominal consideration is expressed in a deed, the real consideration, if not inconsistent with the deed, may be proved *aliunde*. — *Leifchild's Case*, Law Rep. 1 Eq. 231.

2. An old man granted real estate, including his dwelling-house, by deed, to trustees for a charity, subject to a lease made by him shortly before to his sister at a pepper-corn rent for twenty years, determinable on the death of himself and of his sister, with whom he continued to reside on the premises, and who was acting in concert with him. *Held*, that the grant was void under the statute of mortmain, as not conveying *bonâ fide* all the grantor's interest.—*Wickham* v. *Marquis of Bath*, Law Rep. 1 Eq. 17.

3. A marriage settlement recited, that, by virtue of certain specified instruments, certain specified hereditaments, "and all other the freehold hereditaments in the county of Y., thereinafter expressed to be appointed and released," were limited as the settlor should appoint; and that it was agreed that the several hereditaments and estates in the county of Y., "thereinafter mentioned and intended to be thereby conveyed," should be assured to the uses thereinafter mentioned. The deed then contained an appointment and conveyance of the specified hereditaments mentioned in the recital and of all other the freehold hereditaments, if any, in the county of Y., of or to which the grantor was seized or entitled for an estate of inheritance." *Held*, that fee simple estate in Y., of which the settlor was seized, but which was not comprised in the specified instrument, and was not recited or mentioned in the conveyance, did not pass.—*Jenner* v. *Jenner*, Law Rep. 1 Eq. 361.

4. A conveyance contained a reservation to the grantor of "all mines or seams of coal, and other mines, metals, or minerals," within and under the land granted. *Held*, that "minerals" included freestone, but that the grantor could get it only by underground mining, and not in an open quarry.—*Bell* v. *Wilson*, Law Rep. 1 Ch. 303.

5. A deed attested by one witness, though executed in the presence of two persons who are parties to and execute the deed, is not executed in the presence of two or more witnesses within the meaning of the statute of mortmain. —*Wickham* v. *Marquis of Bath*, Law Rep. 1 Eq. 17.

Devise,—*See* Will.

Directors.

See Company.

Discovery.—*See* Production of Documents.

Disorderly House.

The master and mistress of a house resorted to for prostitution are guilty of keeping a disdisorderly house, though no disorderly conduct is perceptible from the exterior.—*The Queen* v. *Rice*, Law Rep. 1 C. C. 21.

Domicil.

One having no permanent place of abode "dwells" within the meaning of 9 and 10 Vict. c. 95, § 128, giving jurisdiction to the superior courts, at the place at which he may be temporarily residing.—*Alexander* v. *Jones*, Law Rep. 1 Ex. 133.

See Bankruptcy, 2; Will, 3.

Ejectment—*See* Will, 7.

Embezzlement.

One who by the inhabitants of a parish in vestry has been nominated and elected, and who afterwards by the warrant of two justices is appointed assistant overseer, and performs the duties of an overseer, is well described in an indictment for embezzlement as the servant of the inhabitants of the parish.—*The Queen* v. *Carpenter*, Law Rep. 1 C. C. 29.

Equity Pleading.

1. A bill filed by one of the next of kin against the administrator for administration of the estate, and also seeking, as against other defendants, to set aside a deed whereby the plaintiff had assigned a part of his interest in the estate for their benefit, is multifarious.—*Bouck* v. *Bouck*, Law Rep. 2 Eq. 19.

2. Demurrer will lie to a bill called a cross-bill, if it is not really so.—*Moss* v. *Anglo-Egyptian Navigation Co.*, Law Rep. 1 Ch. 108.

3. The rule, that a decree must be enrolled before it can be pleaded to in bar of a second bill for the same matter, is not applicable to a case where the bill is filed to impeach a decree on the ground of fraud.—*Pearse* v. *Dobinson*, Law Rep. 1 Eq. 241.

See Executor de son tort, 1; Interrogatories, 4; Parties; Res adjudicata.

Equity Practice.

1. The clerk of records and writs may refuse to file an amended bill without reprint, if the amendments are numerous and complicated, though not exceeding two folios in any one place.—*John* v. *Lloyd*, Law Rep. 1 Ch. 64.

2. Leave to file a supplemental answer, to correct a mistake in the original answer, must be applied for by motion in court, and not by summons in chambers; and will not be granted, unless the court has materials so that it can judge for itself as to the existence of the alleged mistake.—*Charton* v. *Treven*, Law Rep. 1 Eq. 238.

3. An order to sue *in forma pauperis*, obtained at any stage of the suit, is good through all later stages, including appeal.—*Drennan* v. *Andrew*, Law Rep. 1 Ch. 300.

4. Under a general order, which provides that no depositions taken in any other court shall be read unless by order, an order, of course, may be made to read proceedings in bankruptcy, including depositions.—*Lake* v. *Peisley*, Law Rep. 1 Eq. 173.

5. On an appeal from an order overruling a demurrer, and from the whole of the decree made at the hearing, the plaintiff is entitled to begin.—*Blackett* v. *Bates*, Law Rep. 1 Ch. 117.

(*To be Continued.*)

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Your opinion is asked for on the 8th and 9th sections of chapter 55 of the 29 & 30 Vic., "An act to impose a tax on dogs, and to provide for the better protection of sheep."

1st. If the owner of a flock of sheep comes to his barn yard or field on any morning, and finds a number of his sheep killed or injured, sees no dogs, and, after diligent search and inquiry, has been unable to discover the owner or keeper of the dog or dogs, if any, has the magistrate's jurisdiction a right to award damages to the owner of said sheep, on suspicion that his, the owner's sheep, were killed by dog or dogs.

Is the owner, who must be interested, a competent witness to swear into his own pocket from ten to one hundred dollars, and also to be his own valuator, to put whatever value he, the owner, placed on his own sheep; or must his damage or loss be sustained by disinterested evidence.

An answer to the above will set at rest a good deal of dissatisfaction which prevails at present in this township.

I may just add from information and claims to the municipal council, that there has been more damage done to sheep since the above act has been in force than there has been in years previous.

Yours,

An Old Subscriber.

Toronto Tp., Feb. 12, 1867.

APPOINTMENTS TO OFFICE.

COUNTY JUDGES.

JOHN BOYD, of Osgoode Hall, Esquire, Barrister-at-Law, formerly Junior Judge of the County Court of the United Counties of York and Peel, to be Junior Judge of the County Court in and for the County of York. (Gazetted January 5, 1867.)

NOTARIES PUBLIC.

JOSEPH BAWDEN, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted 19th January, 1867.)

EDWARD ALLEN, of Mono Centre, Esquire, to be a Notary Public in Upper Canada. (Gazetted 19th January, 1867.)

CORONERS.

JOHN BINGHAM, of Orono, Esquire, M.D., to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted 19th January, 1867.)

GEO. LLOYD MACKELCAN, of Stoney Creek, Esquire, M.D., to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted 19th January, 1867.)

WILLIAM McGILL, of Oshawa, Esquire, M.D., to be an Associate Coroner for the County of Ontario. (Gazetted 19th January, 1867.)

SPRING CIRCUITS, 1867.

Eastern Circuit.

The Hon. Mr. Justice A. Wilson.

Kingston	Monday	Mar. 18.
Brockville	Tuesday	April 2.
Perth	Tuesday	April 9.
Cornwall	Tuesday	April 23.
Ottawa	Wednesday	May 1.
L'Orignal	Thursday	May 9.
Pembroke	Tuesday	May 14.

Midland Circuit.

The Hon. Mr. Justice J. Wilson.

Whitby	Monday	Mar. 18.
Belleville	Monday	Mar. 25.
Napanee	Tuesday	April 2.
Cobourg	Tuesday	April 9.
Peterborough	Tuesday	April 16.
Lindsay	Monday	April 22.
Picton	Wednesday	May 1.

Niagara Circuit.

The Hon. Mr. Justice Hagarty.

Hamilton	Monday	Mar. 18.
St. Catharines	Monday	April 1.
Barrie	Monday	April 8.
Welland	Monday	April 15.
Milton	Tuesday	April 30.
Owen Sound	Monday	May 13.

Oxford Circuit.

The Hon. Mr. Justice Morrison.

Guelph	Monday	Mar. 18.
Berlin	Monday	Mar. 25.
Brantford	Monday	April 1.
Cayuga	Monday	April 8
Stratford	Monday	April 15.
Woodstock	Monday	April 22.
Simcoe	Monday	April 29.

Western Circuit.

The Hon. The Chief Justice of Upper Canada.

Walkerton	Tuesday	Mar. 19.
Goderich	Thursday	Mar. 21.
St. Thomas	Thursday	Mar. 28.
London	Wednesday	April 3.
Chatham	Tuesday	April 30.
Sandwich	Tuesday	May 7.
Sarnia	Monday	May 13.

Home Circuit.

The Hon. the Chief Justice of the Common Pleas.

Brampton	Monday	Mar. 18.
City of Toronto	Monday	Mar. 25.
County of York	Monday	April 8.