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DIARY FOR MAY.

1. SUNDAY..... *Rogation. St. Philip and St. James.*
6. Thursday..... *Ascension.*
8. SUNDAY ..... *1st Sunday after Ascension.*
15. SUNDAY ..... *Whitsunday.*
15 Monday ..... EASTER TERM begins.
18. Wednesday .. Last day for service for County Court.
20. Friday. ..... Paper Day, Q. B.
21. Saturday ..... Paper Day. C. P.
22. SUNDAY ..... *Trinity Sunday.*
23. Monday..... Paper Day, Q. B.
24. Tuesday..... Queen's Birthday. Paper Day, C. P.
25. Wednesday... Paper Day, Q. B.
26. Thursday ..... Paper Day, C. P.
28. Saturday..... EASTER TERM ends.
29. SUNDAY ..... *1st Sunday after Trinity.*
31. Tuesday ..... Last day for Court of Revision finally to revise Assessment Rolls, and for County Court to revise Township Roll.

BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

MAY, 1864.

RIGHT OF SHERIFFS TO POUNDAGE.

The office of Sheriff was for a long time purely honorary, and Sheriffs were bound as the King's deputies to execute his writs, without making them the subject of any charge whatever.

The duties of the office, however, by degrees becoming more onerous, and the dignity of the position more expensive, Sheriffs' fees became the subject of legislative enactment; and under the statute of 29 Eliz. cap. 4, Sheriffs were first entitled to poundage.

The right to poundage did not exist at common law, but is purely a creature of statute. (*Yates* v. *Meehan*, 11 Ir. C. L. Rep., Appendix 1.)

The Statute of Elizabeth cannot be considered as being in force in this province, Sheriffs' fees and poundage being regulated entirely by our own statutes and tariffs. (*Morris* v. *Boulton*, 2 U. C. Cham. R. 60.)

The first statutory provision in this colony was 49 Geo. III. cap. 4, sec. 3. This referred only to poundage on executions against goods. It was followed by 2 Geo. IV. cap. 1, sec. 19, which enacted that it should be lawful in any execution against the person, lands, or goods of any debtor, for the Sheriff to levy the poundage fees and the expense of the execution, over and above the sum recovered by the judgment, &c.

Under the authority of sec. 45 of this act, the court made a tariff of fees (Hilary Term, 10 Vic.) which regulated the fees to be taken by the plaintiff. The words used in the tariff are "poundage on executions when the sums levied and made," &c.; thus explaining the meaning of the expression "poundage fees," as used in the statute.

Before proceeding further it will be necessary to ascertain the meaning of the words "levied and made," used in this tariff. All the learning upon this point, up to the time of the decision in *Morris* v. *Boulton*, 2 U. C. Cham. R. 60, will be found in the very careful judgment of the late Mr. Justice Burns in that case.

After dividing the subject into (1) writs of execution against persons and writs against goods, and (2) writs against lands, he decided with respect to the former that "there must be a *taking* to entitle the Sheriff to poundage; that if the money be paid before the taking, either to the plaintiff or the Sheriff, the right to poundage does not attach; that the meaning of the tariff in these cases is that the Sheriff's right to poundage begins with his taking the person or goods, and the words "and made" are to be interpreted in favor of the Sheriff, whether the money go through his hands or not, if it be forced as the consequence of his act."

We now propose to examine more in detail, the law as it stands with reference to the several kinds of executions, confining ourselves to cases decided in our own courts.

1st. As to executions against the person.

A question arose before the case of *Morris* v. *Boulton*, but under the same statutes and tariff, as to whether the taking a party into custody by a Sheriff on a *ca. sa.* was such a making of the money as to entitle him to poundage. We refer to *Corbett* v. *McKenzie*, 6 U.C. Q.B. 605. The court there held that "the debt was in a legal sense satisfied while the party was in custody, and the Sheriff's right to poundage was then complete, and could not be divested by any act of the law or the court, or by the death of the party, being all matters over which the Sheriff has no control." In this case the debtor had been discharged under the Insolvent Act of 10 & 11 Vic. cap. 15; and, referring to this, Robinson. C. J., remarked, "It may be said with truth by the execution creditor that he has not been satisfied, for the debtor has been discharged because he has satisfied the court that he was wholly unable to pay. And there is an apparent hardship if he has to pay poundage when he has received nothing. But the hardship would have been the same here as in England, where the party died in execution, or is rescued, or remained in custody without paying; and yet in all such cases I take the claim for poundage by the law of England to be clear." The English legislature has however thought fit, by 5 & 6

Vic. cap. 98, sec. 31, to deprive Sheriffs of poundage on writs against the person. But that act does not affect the law in this province.

2nd. As to executions against goods and chattels.

The next statute on this subject, after 2 Geo IV. cap. 1, sec. 19, was 7 Wm. IV. cap. 3, sec. 32, which applies to executions against lands and goods only. The section is as follows:

"And whereas in cases where writs of execution have been issued into several districts upon which writs property, real or personal, may have been seized or advertised, which property has afterwards not been sold on account of satisfaction having been otherwise obtained, or from some other cause, it has been doubted whether a claim to poundage may not be advanced by the Sheriff of each of such districts respectively, although no money has been actually levied by them under such writ: Be it therefore enacted, &c., That where, upon any writ of execution sued out against the estate, real or personal, of the defendant or defendants, no money shall be actually levied, no poundage shall be allowed to the Sheriff, but he shall be allowed his fees for the services which may be actually rendered by him; and it shall be in the power of the court from whence such execution shall have issued, or for any judge thereof in vacation, to allow a reasonable charge to the Sheriff for any service rendered in respect to such execution, for which no specific fee or allowance may be assigned in the table of costs."

9 Vic. cap. 56, sec. 2, repealed this section and re-enacted it in the same words, with this exception, however, that it inserted the word "such" before the word "writ;" the sentence reading "That where upon any such writ, &c.;" thus limiting the effect of the enactment, which might otherwise have had a more extended application, to cases where several writs have been issued to as many Sheriffs to compel payment of the same debt. This is at all events the view that was taken of the two acts in *Thomas* v. *Cotton*, 12 U. C. Q. B. 148, where it is stated that the effect of the latter is to "leave the claim of Sheriffs to poundage upon the footing on which it stood under the existing law, independently of the repealed clause of 7 Wm. IV.," that is to say, governed by the tariff established under the authority of 2 Geo. IV. cap. 1.

We have already seen (*Morris* v. *Boulton*) that under this tariff there must have been a taking to entitle the Sheriff to poundage; and if the money be paid before the taking or actual levy, this defeated the right to it; but if the money were forced by the act of the Sheriff, then, although it did not pass through his hands, his right to poundage was held to accrue. Thus *Thomas* v. *Cotton* was an action brought by a Sheriff to recover his fees and poundage from the defendant, an execution plaintiff. Under the *fi. fa.*, the Sheriff had seized goods sufficient to cover the claim, but afterwards withdrew from possession in obedience to a judge's order to that effect. The facts of the case showed that the defendant had obtained satisfaction of his judgment under the compulsion of the levy made under the writ. The court considered that, as the Sheriff was authorized to make the levy and had done so, and satisfaction had been obtained by means thereof, he was entitled to his poundage.

This brings us down to the time of the Common Law Procedure Act, 1856, under which our present tariff was framed. The words there used are, "Poundage on executions and on attachments in the nature of executions, where the sums made, &c."; leaving out the words "levied and," which were in the former tariff.

In *Walker* v. *Fairfield*, 8 U. C. C. P. 95, the Sheriff to whom the writ of execution was issued seized goods to an amount sufficient to satisfy the debt and costs, made an inventory and advertised the goods for sale. The sheriff held the goods for twenty-seven days, and had persons in charge. Before the time for sale the writ of *fa. fa.* was set aside, and the sheriff was ordered to withdraw from possession and re-deliver possession of the property seized by him. The master, on a reference to him of the sheriff's bill of charges, disallowed the poundage claimed, and some of the other items. On an application to the court for a revision of the taxation, Draper, C. J., C. P., after referring to the tariffs and to the judgment in the case of *Morris* v. *Boulton*, said, "Here the writ has been set aside for irregularity, but that is the plaintiff's fault. The sheriff has levied, done all prior to a sale, has incurred all responsibility; but unfortunately no money has been made, and though the case has a hard bearing on the officer, I do not see that we can help him without violating the express terms of the tariff, and allow the sheriff poundage."

Burns, J., in commenting on this case, said, "It does not decide that of necessity the word 'made' in the new tariff of fees is to be interpreted as meaning that the money must go through the sheriff's hands; for if that were so, it would always be in the power of the defendant, after his goods were levied upon, to avoid payment of the sheriff's poundage by paying over the money to the plaintiff." (*Brown* v. *Johnson*, 5 U. C. L. J. 17.) But in the case he referred to no money was made in any way, as the judgment was set aside. If the writ had had the effect of causing the defendant to pay the debt, even though no money had been made or received by the sheriff, the court would probably have decided in accordance with the view taken of the law in *Morris* v. *Boulton*. But however that may be, we must now turn to ss. 270, 271, of the Consolidated

Statutes for Upper Canada, cap. 22, and consider them in conjunction with the tariff, to discover the rights of sheriffs as they at present stand in relation to poundage.

Sec. 270 "Upon any execution against the person, lands or goods, the sheriff may, in addition to the sum recovered by the judgment, levy the poundage fees, expenses of the execution, and interest upon the amount so recovered from the time of entering the judgment."

Sec. 271. "In case a part only be levied on any execution against goods and chattels, the sheriff shall be entitled to poundage only on the amount so levied, whatever be the sum endorsed on the writ; and in case the real or personal estate of the defendant be seized or advertised on an execution, but not sold, by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only, for the services actually rendered; and the court out of which the writ issued, or any judge thereof in vacation, may allow him a reasonable charge for any services rendered in respect thereof, in case no special fee be assigned in any table of costs."

Section 271 purports to be taken from 9 Vic. cap. 56, sec. 2; but, as will be seen by comparing the two sections, the construction of the latter has been very materially altered. The effect of the earlier statute is confined in its operation to cases where concurrent writs of execution, so to speak, have been issued to different counties. This is not so, however, with the later statute, which applies to any writ of execution against lands or goods, including of course the case of concurrent writs. The words "the sum made," in the tariff, might well be interpreted to mean either the sum actually made under the writ, or the sum in effect made by the pressure of the writ; but the words of the act seem to require another state of facts before poundage could be collected. Of course if a debt is paid to the sheriff before a seizure, he is without doubt entitled to his poundage, the act not affecting such a case. But if it is necessary to proceed according to the exigency of the writ, there must, in the first place, be an actual *taking* of the goods, or an advertisement of the lands, to entitle the sheriff to poundage. If the money is subsequently paid to the sheriff, there can, we apprehend, be still no question as to his rights; but if, on the contrary, the money is not so paid, and the property is not sold by reason of satisfaction being obtained *otherwise* than by a sale (as for example by a settlement of the suit between the parties, or by payment of the amount to the plaintiff or his attorney, or by the payment of the debt out of another fund, or by the money being made on another writ to a different county), *or from some other cause* (as for example, the writ or judgment being set aside), *and no money be actually levied*—it would only seem reasonable to suppose that in such cases the Legislature did *not* intend that poundage should be receivable. The sheriff would, however, be entitled to his reasonable fees for the services rendered. On the other hand it may be argued in favour of sheriffs, that where they have taken possession of property, and become responsible for it, and liable perhaps to an action of trespass for the seizure, it would be unreasonable to hold that the payment of the debt by the defendant to the plaintiff, under pressure of the execution, should deprive the sheriff of his poundage. We are not aware of any reported decision on this section of the Consolidated Statutes; but Mr. Justice Morrison, sitting in the Practice Court, in a case of *Gwynne* v. *Grand Trunk Railway*, decided in Michaelmas Term, 1862, held a sheriff not entitled to poundage where the money had not passed through his hands.

3rd. As to execution against lands.

The law under this head is, in the main, identical with that under the preceding division. There is however this difference, that there can be no actual *taking* of lands as in the case of goods and chattels. We must therefore keep in view the remarks of Burns, J., in the case of *Morris* v. *Boulton*, where he says, "Upon writs of execution against lands, as there is no taking by the Sheriff, no act done by him which can vest any property in him, and nothing which he can do to deprive the defendant of the lands before sale, his right to poundage must begin with the sale"

We must remember also that the advertisement in the Official Gazette of lands for sale under a writ of execution, is to be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands, after the writ becomes returnable (Con. Stat. U.C. cap. 22, s. 268); or, in other words, that this advertisement practically amounts to the seizure of the land. (See *Doe dem. Tiffany* v. *Miller*, 5 U. C. Q. B. 426.)

With respect to poundage where several writs have been issued on the same judgment to different Sheriffs, it is admitted on all sides that only one Sheriff is under the act entitled to poundage. The decisions which we find in our own reports on this point are *Henry* v. *Commercial Bank*, 17 U. C. Q. B 104, and *Brown* v. *Johnson*, 5 U. C. L. J. 17. These cases were decided before the consolidation of the statutes, but we apprehend that the law, as far as this branch of the subject is concerned, has not been altered by the late act.

In *Henry* v. *Commercial Bank*, the plaintiff had recklessly and improperly issued three writs of execution on his judgment, to different Sheriffs, upon each of which the money was made. Two of the three Sheriffs were required to return to the defendants the amounts paid to them under the executions, which they did, retaining

thereout their poundage and fees. The court, on the application of the defendants, decided that under the circumstances these two Sheriffs had no legal claim to poundage, at all events against the defendants. But as the court considered that the conduct of the plaintiff's attorney had been oppressive and unreasonable in issuing three writs, when the money could have been made under any one of them, he was ordered to refund to the defendants the sums retained by the two Sheriffs, out of the moneys they had to return to the defendants.

In *Brown* v. *Johnson*, the plaintiff sued out a writ of *fi. fa.*, which on the 10th of June, 1858, he placed in the hands of the Sheriff of York and Peel. Sufficient goods were seized under this writ to satisfy the debt. In August following, a *fi. fa.* was issued on the same judgment to the Sheriff of Wellington, and upon this writ also, goods sufficient to satisfy it were taken in execution. In October, the plaintiff and defendant came to an arrangement, and the Sheriffs were ordered to withdraw. They did so, but exacted their poundage and fees. A summons was taken out by the defendant, calling upon the Sheriff of Wellington to refund the poundage exacted by him. It was contended that, under 9 Vic. cap. 56, sec. 2, neither Sheriff was entitled to poundage, because no money was actually levied. Burns, J., said, "The section is obscurely worded, and it seems difficult to construe it properly. I can scarcely imagine the legislature intended, when two Sheriffs were set in motion, that they should each be in a worse position than if only one writ of *fi fa.* was issued." The learned judge further thought that there was such a priority in point of time, that if either Sheriff was entitled to poundage it would in this case be the Sheriff of York and Peel. He was not called upon to give any opinion as to whether this Sheriff was so entitled, and simply decided the question, as to whether the Sheriff of Wellington was entitled to poundage, in the negative."

Poundage is recoverable from a defendant on a writ of extent (*Reg.* v. *Patton*, 6 U.C.Q.B. 307), Robinson, C. J., in his judgment, saying, "I do not see any reason why 33 H. VIII. cap. 39, sec. 54, should not be held in force here, and by that in all suits on obligations and specialties to the king costs shall be recovered by the king from defendant, as in ordinary cases between party and party."

NEW COUNTY JUDGE.

We observe that William George Draper, Esq., has been appointed County Judge of the united counties of Frontenac, Lennox and Addington. Mr. Draper is favourably known to the profession as the editor of The Rules of Court bearing his name, and more recently as the author of an admirable little Handy-book on the Law of Dower. He cannot, now that he has received a judicial appointment, have a better examplar than that of his father, the present Chief Justice of Upper Canada, whose legal attainments are the admiration of the Province.

SELECTIONS.

LEGAL PROCEDURE.*

Legal Procedure has at first sight little attraction for any but lawyers; but, correctly viewed, it ought, I think, to interest not only the legal profession, but all other persons who, by education and reflection, are concerned in, and capable of appreciating the right administration of the law, and I have chosen it as my subject, feeling convinced that as a social question bearing on the economy of the law, it is, when rightly considered, not only of the greatest practical importance, but has at the present time special claims to attention. I here particularly refer to two important public documents—the Lord Advocate's Bill for consolidating and amending the Procedure of the Court of Session, and the Report of the Royal Commissioners appointed to inquire into the practice of the Courts of Law and Equity in England and Ireland, and which was laid before Parliament towards the end of last Session. The fact that the different systems of procedure in the Courts of Justice in the United Kingdom are at present under the anxious consideration of the Crown and Government, may of itself be allowed to be a sufficient reason for taking cognizance of so grave a matter on this occasion.

But even if not suggested as it is at this time by the action of the great public and constitutional authorities referred to, the subject is intrinsically of too much importance to require any apology for its public—even its popular—discussion. For, if this is a matter which not so much concerns the principle or policy of the law, it is one which relates to that which is of not less consequence to a free country, namely, to that system of actual procedure and practice by which the business of the Courts is regulated and controlled; by which the law is practically brought home to the people in regard to their rights, liberties, and duties; by which their rights are vindicated, their wrongs redressed, their persons and property protected, and their conduct socially and individually determined. Such being the real character and object of legal procedure, its importance cannot be over-estimated. It is indeed that which gives real value to the laws, and no system of jurisprudence, however excellent, philosophic or true, can secure any practical advantage to those who owe it allegiance, unless it be assisted and applied by accurate forms of administration. It otherwise becomes a dead letter.

Of the two, indeed, I would rather have a bad system of laws well and justly administered, than the finest jurisprudence erroneously or even inefficiently practised. There was a time when the lawyers of England claimed the benefit of that sentiment, when taking a comparative view of the English and Scotch systems, admitting, as they at the same time did, that the jurisprudence of Scotland was more excellent than their own. "The law of England," they said, "is a bad system, but it is well and justly administered, the Scotch law is an admirable system, but it is badly administered." And in this saying there can be no doubt there was much truth. And there are other European countries where we might easily find illustrations of the vital character of procedure, and be made

* A paper read at Edinburgh, before the National Association for the Promotion of Social Science, by Robert Stuart, Esq., Barrister-at-Law.

to understand and feel, that whether the laws themselves be good or bad, their practical administration may either on the one hand be made the handmaid of liberty or the instrument of the despot. The finest, the most learned, the most scientific writers on jurisprudence, have been and are Frenchmen and Germans. I shall say nothing of their respective judicial practice. There was a time, too, when the Neapolitan school of law was the most enlightened of its age. Need I say anything of the Courts of Naples? In these countries, justice was a theory and not a fact, and the people were in so many words told that the laws were not so much intended for them as for the whim and caprice of the lawgiver.

Perhaps I should not be far wrong were I to suggest, that however unfavourable the law of England may contrast with other systems of jurisprudence, the comparative purity and independence of its administration, by which it has ever commended itself to the respect and confidence of the English people, may be attributed in a great measure to that rigid and unbending technicality by which its forensic regulations have been from time immemorial, and may be said still to be distinguished,—in other words, that if not the system of English special pleading, that, at least, the principle on which that pleading is founded has afforded to the suitors in the English courts of law the best security for justice, and that the ignorant unpopularity, as I must call it, of what no doubt may be regarded as the most subtle and crafty of the English lawyer's art was an unthinking and self-delusive outcry. For whatever may be said against technical pleading and practice when compared with that rough "substantial justice" which appears to be the stock in trade of too many of our modern law reformers, I say, whatever may be said against technical pleading and practice in other respects, it at least secures perfect impartiality to the forms of the Courts. It does this by compelling a constantly unvarying appeal, in the interests of all classes of suitors, to the same unvarying principle of justice, and it obliges all these suitors themselves, without regard to rank or any external consideration, to use, in presence of the judicial magistrate, precisely the same language.

Modern legislation, however, has shown that such technical procedure may be carried too far, and the Common Law Procedure Acts of recent times prove that excessive technicality may operate so as to defeat justice. That it was so formerly in English Common Law practice there can be no doubt, and the eloquent denunciation of the system by our noble and learned President, Lord Brougham, in his great speech on Law Reform, in the House of Commons, in 1828, is not yet forgotten. "Talk of scourging men with a rod of iron!" his lordship exclaimed,—"Why should he do so? The lash of parchment which is applied to all suitors in our Courts of Law, that flapper that keeps them awake by the sufferings it inflicts, that excellent and parental corrector of human errors, those engines of pleading, which, when they pretend to enlighten, seem only to keep the Court and the suitors in the dark." And the late Lord Campbell, when Attorney-General, stated in his evidence before a Scotch Law Commission, by way of justifying the opening statement that is made at trials in England, that "the record does not at all state what the real circumstances of the case are; and the evidence that is given would be quite unintelligible without an opening statement."

But, on the other hand, it cannot be doubted that the lawyers of Scotland, in their devotion to jurisprudence as a science, and their disregard of the claims of technical pleading, have gone to the other extreme.

It has, I confess, been a matter of surprise and regret to me, that what I must take leave to call the inartificial procedure of the Courts of Scotland should, with the example of English Courts, before them, have been so long persevered in; and for myself, I confess, I exceedingly rejoice that the necessity of a different and better system has at length been recognised by the Government, and I may say at once, that in my humble judgment, the Legislature will do a good service to Scotland by adopting, with such amendments and improvements as may be required, and passing into law, the Lord Advocate's Bill. It may be regarded as a fortunate circumstance that this bill will come before Parliament for consideration simultaneously with the report of the Royal Commissioners on the English and Irish Courts to which I have referred, and which Report is one of the most able, discriminating, and instructive statements that could be offered to our attention. Both these documents, the Lord Advocate's Bill and the Commissioner's Report, propose considerable changes in the practice of Scotch and Irish Courts, on the principle of assimilating the latter, as well as may be, to the practice of the Courts in England. And it is remarkable (as a perusal of the report has satisfied me) that while, as is well known, the judicial system in Ireland, by its recognition of the separate administration of law and equity, and in many other particulars, is very much the same as, if indeed it is not identical with, the English system of procedure, has many points of resemblance to the legal practice of Scotland, while it shows a corresponding departure from the English rules. So far, therefore, these documents attest the comparative superiority of the procedure of English Courts, and without inquiring whether such is justly attributed superiority, the practical boon to the people of the three kingdoms of assimilation in legal procedure, cannot be regarded as other than a great public convenience and benefit to the people of the United Kingdom, so great comparatively as to overweigh the local value of minor points of divergence. I sincerely trust that such assimilation may be permitted to go still farther, and that, ere long, we of the present day may live to see the same system of administration regulating all the Courts of the realm, and to know that the Queen's subjects realize in their political and social intercourse, and in all their public and private relations, the happiness of living not only under the same constitution and the same law, but even the same forms of law. Let me also throw out, although the suggestion is not so germane to my subject as my other topics, that for the purposes of this assimilation it is very desirable that the distinctions that are known to exist in what may be called the domestic institutions of the legal profession in the three countries, should cease, and that in fact there should be but one profession for the three countries, one class of law agents and solicitors, and one and the same bar, entitled to exercise their forensic office, whether in England, Ireland, or Scotland, as may best suit their interest or convenience. Sure am I of this, that, until these professional distinctions are entirely abolished, we can scarcely expect that complete assimilation of the law and its practice in the Queen's dominions which the common interest of all her subjects so plainly requires.

I am not aware of the nature of the discussion and criticism which the Lord Advocate's Bill has received here, but in regard to those who support it may not yet have conciliated, I beg you will kindly indulge me with a brief historical retrospect of the course of legal procedure in Scotland, and from which I hope you will see that this contemplated reform is not a mere English importation.

The most ancient court of justice here of which we have any authentic record was the curia parliamenti, but it does not appear to have been regularly established till 1424, when King James I. gave it a more settled character. Lord Stair speaks of the King in the following terms: "He was one of the most excellent and best experienced kings we ever had. He had most of his breeding among the English, by whom he had been taken while on his voyage to France, and detained prisoner eighteen years; and he was likewise for some time in France, being brought thither by Henry V., King of England, of design to interest the Scots in his favour, they having about that time fought in France with singular valour and success against the English. So that he had opportunity to learn and under-

stand the order of administration of justice in both these kingdoms. He did fix most of our forms by erecting of the chancery, and the brieves thereof, which were the fixed tenors of all the summonses before the ordinary courts, as they yet are in England, and without them no suit can be commenced in the Court of Common Pleas, which is the most proper judicature of the Common Law of England, which brieves they enlarge by declarations extending the same to the several special matters; and it behoved also to be so with us, till the erection of the College of Justice, wherein the clerks or writers to the signet were entrusted with the forms of summonses and diligencies." This curia parliamenti was followed by the Session, commonly known as the old Court of Session, which again in its turn was succeeded by the Daily Council. These three tribunals formed, of their respective periods, the Supreme Court of Scotland, and however much they may have been, as it is reasonable to suppose they were, improvements on each other, their procedure appears to have been substantially that described by Lord Stair, and which was in its leading features the same as prevailed in England, and which still regulates the procedure of the English Common Law Courts. But let it not therefore be supposed that such old Scottish practice recognised, as the English system now does, a distinction between the procedure at law and in equity. It did no such thing, nor was their anciently such distinction in England. That it was so there is shown in a very interesting and able manner by a paper which I had the pleasure of hearing read before the Juridical Society of London, by the present Lord Chancellor in 1855, when Solicitor-General. In this paper his Lordship expresses himself strongly against the separate system, and he observes: "The rules and maxims of the Common Law were so broad and comprehensive, that they admitted of being made the basis of an enlarged system of jurisprudence. A portion of the Statute of Westminster the Second (13 Edw. I.) was passed with a view of effecting this object, and of expanding the maxims of the Common Law, so as to render it applicable to the maxims of an advancing state of society. For this purpose, new writs were directed to be framed, as new occasions for remedial justice presented themselves. And if this had been fully acted on, the Law of England might have been matured into a uniform and comprehensive system. For it was justly observed by one of the judges in the reign of Henry VI., that if actions on the case had been allowed by courts of law as often as occasion required, the writ of subpœna would have been unnecessary, or, in other words, there would have been no distinction between courts of law and courts of equity, and the whole of the present jurisdiction of the Courts of Chancery would have been part of the ordinary jurisdiction of the courts of law." The Statute of Edward here referred to by the Lord Chancellor was passed in the year 1285; and it concludes in these terms:—"Moreover, concerning the statutes provided *where the law faileth, and for remedies*, lest suitors coming to the King's Court *should depart from thence without remedy*, they shall have *writs provided in their cases*." In fact, the Statute contemplated the very procedure described by Lord Stair. But unfortunately, as we all know, things took a different course, and equity was compelled to interfere where the ordinary tribunals of the country refused redress—the injury to the legal scholarship of the profession being not less than the wrong done to the people. Happily, it was otherwise in Scotland, and we have every reason to believe that the old Scottish procedure which I have described in the words of Lord Stair would have still regulated the practice of the law here, had it not been for the circumstances which led to the establishment of the present Court of Session on the model of the Parliament of Paris in 1532; and whose course of administration, distinguished as it is by much that is learned and philosophic, has been retarded—I had almost said disfigured—by a system of pleading and method of trial, the effect of which it has long been the unceasing effort of legislation to counteract. To have further persevered in such patchwork reform would, I venture to think, have been unwise; and that the Lord Advocate has done better by bringing in his bill, which instead of being liable to the reproach (as some might say) of being a mere assimilation or copy of the English practice, may be more correctly and justly described as an attempt to restore the old Scottish procedure of the fifteenth century, while substantially retaining in the practice of the Court of Session all that is valuable in the system which was originally obtained from, as I have already shown, not an English or Scottish, but a French source.

This will appear from a brief examination of the bill itself. It sets out with repealing no less than seventeen Acts of Parliament, from the 48 Geo. III., chap. 51, to the 22 & 23 Vict., c. 7, by which, more or less, the existing practice of the Court of session is regulated; and it makes, as its leading feature, two grand divisions of actions, namely, first those which may be tried by jury or otherwise, very much according to the plan that prevails at law in England, and which, I repeat, there is every reason for believing was the practice of Scotland anciently; and those which require a procedure corresponding to that which prevails in the English and Irish Courts of Equity. The bill, even in stating such a distinction, makes use of the English technical terms, and I was really, on first perusal of it, inclined to think that it might be read so as to favour the severance of Law from Equity, and at a time when it is the policy and tendency of all Law reform in England to put an end to the distinction—a policy and tendency remarkably illustrated by the speech of the Lord Chancellor to which I have referred. On a closer examination of the bill, however, such an impression has been removed from my mind, and, indeed, the fact that the same judges, and the same Courts, are to administer both forms of procedure, is a sufficient answer to the objection, if made. It may take some time before the judges may easily accommodate themselves to such a new state of things; and they may be troubled with the same difficulty which, I understand, has been experienced in America, in several States of which the distinction between Law and Equity has been abolished. This defect, as it may be called, has been candidly pointed out by an American lawyer, Mr. Theodore Sedgwick, known to the profession as the author of "The Measure of Damages." Alluding to the New York code of procedure Mr. Sedgwick, in a letter he addressed to an English friend, in 1859, and which has since been made public, observes: "I have little doubt that you will before a great while come to it" (he is speaking of the fusion of Law and Equity), "as we have. When you do, I think you will find, as we have, that the greatest practical difficulty in effecting the change is to draw the line between those cases which are triable by jury, and those which are not. This line was, for all, practical purposes, drawn with us, as it is with you, by the distinct organisation and procedure of Law and Equity tribunals; but when we created only one set of tribunals, abolished all distinction between Common Law and Equity pleadings, and melted down bills and declarations into a *complaint*, we found that we had some difficulty how to classify the cases which should go to a jury and those which should properly be tried by a judge; and this has greatly perplexed us." Perhaps it would not be easy to define more clearly than the bill does the two classes of actions; and it is only to be hoped that the Court would not be long embarrassed by the difficulty described by Mr. Sedgwick, and that it will gradually accommodate itself to the procedure. For a time, too, it may be anticipated that the working of the bill may be somewhat impeded by a preliminary discussion as to whether the facts of a case fall under one class of action or the other.

As to the first class of actions, the procedure is to be comparatively simple and summary. They are to be commenced by what is called a summons, which resembles, as nearly as may be, the English writ, but which also bears some correspondence to the ancient Scottish brieve, commanding the defendant or defendants within a certain number of days after

service to enter appearance. In England, the plaintiff, at the expiration of the time for entering appearance, is allowed to obtain judgment at once, or to sign judgment, as it is called, and thereon execution may issue, and he may do this without any other formality or proceeding in Court whatever, judgment and execution following by the simple operation of the law. The regulations, however, on this subject are somewhat different in the bill under consideration, and I am not sure if they are improvements. According to the bill, the pursuer or plaintiff will not be entitled to judgment by the mere issuing of the writ or summons, no matter how plain the case may be, or however indefensible, for, by s. 6, "unless payment shall previously have been made, the pursuer shall, eight days before the expiration of the inducim, lodge the summons with the clerk of the process or his assistant, for enrolment," and he is at the same time to lodge a condescendence of the facts, which, according to the bill, corresponds to the English declaration; and not till all this has been done is he to be entitled to judgment or decree, and even then not as a matter of course by operation of law as in England, but "it shall be lawful for the pursuer forthwith to enrol the cause in the Lord Ordinary's motion roll, and to move for and obtain decree against the defender." Now there really appears to me to be a great deal that is unnecessarily cumbrous and therefore expensive in such an arrangement. The issuing and service of the writ seem to answer no other purpose than to warn the defender of his liability, and to suggest to him the expediency of paying—an intimation, however, which could be as well made by a letter from the pursuer's solicitor or law agent. Possibly, however, the procedure required by the bill is intended to meet an objection that has frequently been made to separate the summons from the condescendence, namely, that without such condescendence, there would be no sufficient interruption of prescription. Now, I humbly venture to think that the condescendence is not required for any such purpose, but that the writ or summons, if sufficiently endorsed, so as to show a reasonable identification of the claim, would be perfectly good for interrupting the running of the prescriptive period (15 & 16 Vic. c. 11). It is so in England by express enactment, and I would suggest that if there is any serious doubt on the subject by the existing law of Scotland, it would be better to dispense with the condescendence, and to enact that the issuing of the writ or summons shall, in all cases, have the effect of interrupting the prescription. For any other purpose, I do not see that the condescendence is required at all, unless appearance be made by the defendant, and then it would be time enough to lodge or file the condescendence after such appearance has been made. Where, however, no such appearance is made, and where the pursuer's claim is of such a nature that it could not seriously be disputed, I do not see why he should not have judgment at once as in England, instead of being subjected to the tedious and expensive procedure proposed by the bill. And this opinion is in accordance with the recommendation contained in the Report on the English and Irish Courts to which I have alluded. It appears from that Report, and it is not a little remarkable that, notwithstanding, as I have said, a general similarity of pleading and practice to that which prevails in England, the Irish lawyers had, in their recent Common Law Procedure Acts, deliberately combined the writ and declaration or condescendence; for, in Ireland, the writ and plaint, as it is called, is considered fully to state the plaintiff's case without any further pleading on his part; and the next step is the defendant's plea, on which issue may be joined at once. This difference of practice, however, between the English and Irish Common Law Courts has been anxiously considered by the Royal Commissioners, who have unanimously reported in favour of complete assimilation, as far as practicable; and, in particular, the Commissioners give it as their opinion, "that the English system of written declaration should be adopted in Ireland instead of the summons and plaint;" and there really seems no reason why, with reference to the class of actions contemplated by this part of the Lord Advocate's bill, the system should be different in Scotland. I submit, with the greatest deference and respect, that the policy of the Government in regard to such legislation should, as far as possible, be the same in the three Kingdoms, because the true policy must be, to take advantage of every opportunity of assimilating the law of the United Kingdom. It therefore appears to me that, on this subject, the bill might be simplified and improved. There is also a little ambiguity in regard to some of its proposed enactments. Thus, I am not very sure how it deals with the important matter of the Signet. The form of the writ given in the Schedule bears to be given "under the Signet," but the writ itself may be signed by any law agent. It will be reasonable, therefore, to infer, that the exclusive privilege hitherto exercised by the members of the body of writers to the Signet is proposed to be abolished, and that the Signet or Seal itself is simply to be impressed at the office. It may be right that it should be so, and it certainly ought to be the inherent right of the Queen's subjects to possess themselves of Her Majesty's writ in the simplest and most direct manner, with as little official interposition as possible, and on the easiest and cheapest terms. Let me take the opportunity of these remarks further to propose that there should cease to be any distinction as to privileges between Edinburgh and country practitioners. There is no such distinction in England and Ireland, but all solicitors and attorneys are admitted by the Superior Courts both in London and Dublin; and they may thereafter practise in any part of the country they may think fit, whether in the capital or in the provinces. And I think that it ought to be the same in Scotland. Such a reconstitution would indeed be the necessary precursor of the larger reform I have hinted at, namely, that there should be but one of the same profession for the whole United Kingdom.

The provisions of the bill as to the conjoining of actions, special cases, and other matters of detail, seem well conceived, and ought, I think, to be approved; and the same may be said of the rules of pleading recognised by the bill, so far as such recognition goes. This, to my mind, is by far the most interesting part of the whole measure, and for the sake of it alone I should deeply lament any serious miscarriage of the bill in Parliament. It is, so far as I am aware, the first formal and technical adoption by Scotch legal authorities, of special pleading as a science, namely, the science of forensic allegation. It might even without extravagance be contended that nothing deserving the name of pleading has hitherto distinguished the records of the Court of Session, parties being left to their own language, and allowed to introduce into their averments, argumentative, even rhetorical, and other objectionable matter, utterly subversive of sound judicial method. The pleadings were, as Mr. Sergeant Stephen describes them in his admirable treatise, "pleadings *at large*." According to Sir James Scarlett (afterwards Lord Chief Baron) they were not pleadings at all, but popular pamphlets, which the parties wrote against each other, and the whole so loosely expressed, as to make it a matter of no little difficulty to discover by the most careful analysis and examination, what the material questions were on which the litigants were at issue. This evil, and a more vicious evil could scarcely impede the administration of justice, still fully exists, and some such measure as the bill on which I am remarking has become unavoidable. I lately perused a voluminous Scotch "record," and with feelings of utter amazement, that such a form of statement could be tolerated at the present day by any enlightened legal system. It was characterized by considerable ability in the way of argument and rhetorical inuendo, and one could scarcely read it with any attention without seeing what it was about; but I would defy any one who had not some other knowledge of the case to understand from it what was the material contention between the par-

tion. Now this may be pamphleteering, but it is not pleading, and that there should be found among the legal profession in Scotland any single individual who would be disinclined to put a stop to such mischievous procedure, is to me utterly incredible. The bill, however, although it takes the right ground on this vitally important subject, does not, in my humble judgment, go far enough; and, if I may be allowed the remark, there appears to me to be a certain degree of timidity and hesitation about these, its pleading clauses, which are *merely permissive*. A material averment should not only exclude matter of law, matter of evidence, or argumentative and explanatory matter, but it should be made *issuably*, that is to say, it should be expressed in an issuable form, so that it may be admitted or denied in its own terms; otherwise, it falls short of Sir Matthew Hale's great canon of pleading, that "a thing should be so pleaded that it may be tried." But this precision also requires at the hands of the defender a corresponding clearness; and I would venture to recommend that instead of being content with calling on him to deny, the form of denial should be prescribed in the bill, otherwise we may still have "denied with reference to," "denied as stated," and the other modes of expression allowed under the existing system, by which the issue is not only rendered obscure, but, so far as the pleadings are concerned, impossible. As a general rule, a defender should admit or traverse the case against him in his adversary's words.

In regard to these and other particulars on this subject, I think the bill might be considerably improved. It is, however, distinguished by some excellent regulations, and I would particularly notice two, as worthy of especial approbation; first, its extension of the principle of the English demurrer (the Scotch objection to the relevancy) to all the pleadings, instead of being confined as at present to the summons. The second point to which I have referred is a change as sound as it is radical, for, in principle, it really goes to uproot the whole existing system. I allude to the proposed abolition of what are called "pleas in law," a contrivance which I have heard condemned by many experienced lawyers—the late Professor George Joseph Bell among others, and which, for myself, I confess I have always regarded as a clumsy and inartificial expedient. Now, what are pleas in law? Neither more nor less than the interested opinions of the counsel for the parties as to what is the law, or, rather, what ought to be the law, to be applied to the case, and couched in certain terse legal propositions, which are inserted at the end of the pleading, and, beyond these pleas in law, parties are not allowed to maintain any contentious argument, for we are solemnly told, in books of practice, that these said pleas in law constitute the "sole ground of action and defence!" A plea in England or Ireland is a fact, or the allegation of a fact, but such a plea as we are considering is an abstract, and too often a very questionable, legal proposition. Does it not stand to reason that all such matter should be reserved, either for the trial or for the subsequent legal argument before the Court, nor should counsel be controlled or limited in the way pointed out? The argument should be free, and suitors should not be called in this way to anticipate the law for themselves, but are entitled to have it applied in all its amplitude, and without any reserve or restriction whatever. Most righteously, therefore, does this bill propose to abolish these pleas in law, and, for doing that alone, it is entitled to the warm support and commendation of the working profession—judges as well as practitioners. Generally, on this important matter of pleading, I think the bill affords promise of a good measure, and certainly is capable of being made a most valuable reform. It gives the true character to the pleading. Hitherto, what is known as the "record" has been understood to contain materials for the most discursive speculation, and even for the judgment of the Court, whereas the object and purpose of pleading is the discovery of the controversy of the matter in debate, with a view to the trial, whether that trial be of the fact or the law.

For those who may be troubled with the fear that, by the adoption of a more technical pleading in the Court of Session, unnecessary difficulties and embarrassments may be experienced in legal business, I would strongly recommend the report to which I have referred on the Courts of Law and Equity in England and Ireland, and, in particular, the careful study of the statement in the Appendix, p. 87, by Gerald Fitzgibbon, Esq., one of the Masters of the Court of Chancery in Ireland. This paper is one of the most able, lucid, and instructive legal documents I think I ever read.

There is one other remark on this subject of pleading which occurs to me, of importance, and it is that all the pleadings, from the condescendence to the issue, should be invariably and exclusively prepared by counsel, who, if they perform their duty in this respect, as I doubt not they will, ably and well, will strengthen the hands of the Court in administering the new practice, and, in particular, render the examination of the record by the Lord Ordinary, as provided by the bill, comparatively easy. It may be questioned, indeed, whether there should be such a revision of the pleadings by the judge It would, perhaps, be better to leave the whole responsibility to the counsel, who would be found to derive benefit from the intellectual and juridical discipline which would thus be imparted to the discharge of their duties.

I have now detained you so long with this part of the bill, that I fear to trouble you with the observations which had occurred to me on the other class of actions, and which are to be commenced by bill instead of by summons. The Scotch technical phraseology used on the subject cannot conceal, and, probably, is not intended to conceal, the fact that the changes proposed to be made by this part of the bill involve the adoption of a procedure as nearly as possible the same as that which prevails in the Court of Chancery in England, although it does not appear that merely equitable interests and considerations are intended to be dealt with by the regulation proposed. It is simply that the procedure of the Court of Chancery appears to have recommended itself as convenient for the class of actions I have mentioned; and, in one word, the old summons of declaratur will be simply turned into a bill or petition, with the *conclusions* stated in the prayer. Assuming always that it is expedient to make a distinction in the procedure between the two classes of actions, I cannot say that I have seen any thing in this part of the Government measure to object to; and undoubtedly, if there is to be such a change, no system of practice could be pointed out having stronger claims to attention than the existing procedure of the English Court of Chancery. That system no doubt has its defects, and I should hope that the bill of complaint to be prepared under this measure would be a better, clearer, and more satisfactory document than the bill in Chancery is often known to be. It may, however, be of the less consequence to prepare the bill in England with a greater regard to succinctness than usually characterizes it, seeing that its statements are afterwards turned into interrogatories, by which the defendant, in the way of defence to the suit, is required to answer upon oath. This is a proceeding which, whatever may be said for or against it in other respects, certainly has the effect of searching the conscience, and producing a complete and unreserved disclosure of the truth. There are no regulations exactly corresponding to this procedure in the bill before us; but the rules prescribed for the preparation of the defendant's answer appear to be well considered, and, *if rigidly enforced by the Court*, would undoubtedly lead to a great improvement on the present practice. I would suggest, however, that a power should be reserved to the Court to order, in its discretion, the parties, and not merely the defendant, to swear to the truth of their statements. I may here add, that as in the other points of assimilation referred to, the Lord

Advocate's bill is favoured by the Report of the English and Irish Commissioners before alluded to. It appears from that Report that not only the procedure at law, as already explained, but also the practice in Chancery, considerably differs from the same practice in England, but that, after having fully considered the whole matter, the Commissioners unanimously — Irish as well as English — recommend the adoption in Ireland of the English plan.

In conclusion, let me express the hope that, whatever form this Government bill may have assumed, when it becomes law, its provisions will, in letter and spirit, be strictly and rigidly worked out by the Judges, and that, ere long, their enlightened decisions may reduce its enactments into a system of procedure, which, in the words of the great English charter, will secure to the Scottish people the pure and speedy administration of right and justice.—*Law Magazine & Review.*

NEW TRIALS FOR EXCESSIVE DAMAGES.

Notwithstanding the abundance of treatises upon practice and legal subjects generally, there is yet no one work which contains a full collection of the decisions in New York and England, down to a recent period, upon the subject of new trials. The following synopsis of the cases in regard to the allowance of new trials on the ground of excessive damages, which we have prepared for our own convenience, may therefore be useful to some of our readers.

It is well known to be the constant practice of the Courts to set aside verdicts for excessive damages (*Harris* v. *Panama R.R.*, 5 Bosw., 312; *Finch* v. *Brown*, 13 Wend., 601; *Moandinger* v. *Mechanics' Fire Ins. Co.*, 2 Hall, 490; *Sherry* v. *Freeking*, 4 Duer, 452). In actions upon personal injuries, however, whether willful or negligent, the Courts are more cautious of interference than in other cases; and will not grant a new trial on this ground alone, unless the damages assessed are so clearly excessive as to indicate that the jury were swayed by improper motives, or acted under some mistake (*Clapp* v. *Hudson R.R.*, 19 Barb., 461; *Collins* v. *Albany &c. R.R.*, 12 id., 492); but where they are thus excessive a new trial will be granted.

In actions for willful injuries, this rule is more strictly enforced than in the other class of cases. Thus, in the suits for libel (*Fry* v. *Bennett*, sp. t., 9 Abb. Pr., 45, *Root* v. *King*, 7 Cow., 613; *Coleman* v. *Southwick*, 9 Johns. 45; *Southwick* v. *Stevens*, 10 id. 443), slander (*Ryckman* v. *Parkins*, 9 Wend., 470; *Ostrom* v. *Calkins*, 5 id., 263; *Douglas* v. *Tousey*, 2 id., 352; *Moody* v. *Baker*, 5 Cow., 351; *Cole* v. *Perry*, 8 id., 214; see *Potter* v. *Thompson*, 22 Barb., 87), malicious prosecution *Bump* v. *Betts*, 23 Wend., 85: *Marquiss* v. *Ormston*, 15 id., 368), or assault and battery (*Blumb* v. *Higgins* 3 Abb. Pr., 104; *M Connell* v. *Hampton*, 12 Johns. 234), the Court will not interfere with the damages, unless they are so excessive as clearly to indicate that the jury acted under the influence of passion, partiality, prejudice, mistake, or corruption.

It is said (and we think correctly) that there is no precedent for granting a new trial on the ground of excessive damages in an action for seduction (*Travis* v. *Barger*, 24 Barb., 614) or crim. con. (*Smith* v. *Masten*, 15 Wend., 270; *Duberley* v. *Gunning*, 4 T. R., 651); and verdicts for $3,000 (*Travis* v. *Barger*; *Smith* v. *Masten*) $10,000 (*Chambers* v. *Caufield* 6 East, 244), and even $25,000 (*Duberley* v. *Gunning*), the last under circumstances which rendered it a very unjust verdict, have been sustained.

Even where it was conceded that the plaintiff's daughter was not a virtuous girl, the Court refused to interfere with the damages, saying that it could not do so unless they were so excessive as to shock the sense of mankind (*Sargent* v. ——, 5 Cow., 106).

On the same principal, the Courts are reluctant to interfere with the damages in actions for enticing away a wife (*Scherpf* v. *Szadezky*, 4 E. D. Smith, 110, 1 Abb. Pr., 366), or for breach of promise of marriage.

Instead of granting a new trial absolutely, the Court may, and frequently does, order a new trial unless the plaintiff will remit a specified portion of the damages assessed (*Clapp* v. *Huds. R.R.*, 19 Barb., 461; *Collins* v. *Albany, &c., R.R.*, 12 id., 492; *Potter* v. *Thompson*, 22 id., 86; *Dublin* v. *Murray*, 3 Sandf. 19).—*N. Y. Transcript.*

DIVISION COURTS.

TO CORRESPONDENTS.

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

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

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 94.)

OF THE SPECIAL PROVISIONS FOR THE PROTECTION OF OFFICERS GENERALLY AND OTHERS.

For the protection of officers and others acting in good faith under the Division Courts Act, the 192, 193 and 194 sections make special provision and are of great value. They relate as well to the ordinary proceedings under the authority of the court, as to prosecutions before a magistrate allowed in certain cases under the statute. Subordinate to these, section 116 makes certain provisions as to costs in actions of a trifling character.

The first of these protective clauses (sec. 192) enacts that no levy or distress for any sum of money to be levied by virtue of this act, shall be deemed unlawful or the party making the same be deemed a trespasser on account of any defect or want of form in the information, summons, conviction, warrant, precept or other proceeding relating thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for the special damage. This section has the effect (*inter alia*) of making the warrants and precepts issued by the clerk a complete protection to those authorised to act under them, notwithstanding any irregularity in the previous proceedings; and defect or want of form, previous to the issue, will not affect the party executing the writ; but if injury is caused by the defect, the party aggrieved has his remedy against the author of the defect for his special damage.

An express provision in this clause prevents the application of trespass *ab initio*. The general rule on the subject may be stated thus—that one who has authority by law for doing an act, and does not pursue that authority, but abuses it, the abuse turns the act into trespass, and the party be-

comes a tresspasser *ab initio*, and this though his conduct may have been lawful in the first place: for the subsequent illegality is said to show that the party contemplated an illegality all along, and so the whole becomes a trespass. (1 Smith's L. C. 65; *Smith* v. *Eggington*, 7 A. & E. 167; *Reed* v. *Harrison*, 2 W. Blac. 1219). As to this difficult subject, the clause enacts in terms that a party distraining shall not be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but shall nevertheless be liable to make satisfaction for the special damage, so that acts originally justifiable remain unaffected by a subsequent abuse of authority.

The provisions contained in secs. 193 and 194 are similar to those in the first English County Courts Act, 9 & 10 Vic., ch. 95; and a variety of statutes, passed for the protection of persons who have public duties to perform, embody like enactments. The meaning of words and terms common to most of them have been fixed by frequent judicial interpretation.

Sec. 193 enacts that, "any action or prosecution against any person for any thing done in pursuance of this act shall be commenced within six months after the fact was committed, and shall be laid and tried in the county where the fact was committed, and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action." And sec. 194 provides that, "If tender of sufficient amends be made before action brought, or if the defendant after action brought, pays a sufficient sum of money into court, with costs, the plaintiff shall not recover, and in any such action the defendant may plead the general issue, and give any special matter in evidence under that plea."

In order to entitle a party to the protection of these sections, it is not necessary that the thing should be authorised by the act. A thing is done in pursuance of the statute when the person who does it is acting honestly and *bona fide*, either under powers which the statute gives or in discharge of the duty which it imposes, reasonably supposing that he has authority, though he may erroneously exceed the powers given by statute; but if he act *bona fide* in order to execute such powers or discharge such duties, he is to be considered as acting in pursuance of the statute and entitled to the protection conferred on persons whilst so acting.

In order to maintain an action or prosecution against any person for anything done in pursuance of the Division Courts Act, it is necessary, and these sections require:

1st. That a notice in writing of such action, and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

2nd. That the action shall be commenced within six months after the fact committed, and

3rd. That the action shall be laid and tried in the county where the fact was committed.

And for their further protection, such persons have certain privileges under the sections named, that is to say:

1st. The defendant may tender amends before action brought.

2nd. After action brought he may pay into court a sufficient sum to cover the damages, which he has neglected to tender in due time.

3rd. The defendant may plead the general issue and give any special matter in evidence under that plea.

UPPER CANADA REPORTS.

ERROR AND APPEAL.

[*Before the Hon.* Sir J. B. Robinson, Bart., Chief Justice of Upper Canada, the Hon. W. H. Draper, C.B., Chief Justice of the Common Pleas, the Hon. V. C. Esten, the Hon. Mr. Justice Burns, the Hon. V. C. Spragge, the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.

ON AN APPEAL FROM A JUDGMENT OF THE COURT OF QUEEN'S BENCH.

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

Mountjoy v. The Queen.

Grant from the Crown—Highway.

On the 8th of January, 1836, a surveyor, in compliance with instructions from the government agent, laid out a road or street on the northern limits of the town of London, two chains wide, a portion of which was then, and had for some time been, in the actual possession of the Episcopal Church, to which body a patent subsequently, on the 18th of January, 1836, was issued, granting to them all that parcel or tract of land, "on which the Episcopal Church now stands, and containing four acres and two tenths of an acre or thereabouts." Upon an indictment for a nuisance in stopping up the highway, *Held*, that this survey, although made after the grantees had gone into possession, must prevail against such possession.

[*Hagarty, J.*, dissenting.] [Error and Appeal, 1861.]

The appellant John Mountjoy was indicted for a nuisance for unlawfully and injuriously erecting a certain fence of the length of two hundred feet, and of the height of four feet, in a certain street in the city of London, called East North Street, being the Queen's common highway, whereby the same was and is straightened, narrowed and obstructed to the great damage of all Her Majesty's liege subjects, &c.

To this indictment the defendant pleaded "not guilty," and was tried before the Hon. Mr. Justice Richards in the month of March, 1860, when the jury returned a verdict of guilty. The effect of the evidence taken upon the trial is stated in the judgment.

A rule *nisi* for a new trial was subsequently obtained, which upon argument was discharged. His Lordship the Chief Justice in disposing of the case, saying: "The report of the case of the *Queen* v. *The Bishop of Huron* (8 U. C. C. P. 253) will explain the nature of the question presented by this case, which turns upon the same patent, and the same facts, though the evidence upon the two trials in some respects varies.

"The defendant in this case is an occupant of part of the land, which it is contended on the part of the prosecution is not included within the patent referred to in the case in the Common Pleas, and he has inclosed all the land up to the northern limit of East North Street, assuming that street to be 100 feet wide only, and not two chains, or 132 feet.

"The letters patent by which the Crown granted certain lands in and near the town of London, as an endowment for the Rectory of St. Paul's Church, in the said town, describes the land thus, of which the defendant is in possession of a part, 'all that parcel or tract of land, being part of the town plot of London, on which the Episcopal Church of England now stands, and containing four acres and two-tenths, or thereabouts.' It is dated the 18th of January, 1836.

"The question is, whether the description in the patent of the land granted by it did or did not cover the ground on which the defendant has his fence, which is complained of as being upon a public highway. The trial of the former indictment against another defendant, bringing up precisely the same question in effect, took place before myself; and though I reserved the case for the opinion of the Court of Common Pleas, I had formed, I confess, a strong opinion of my own, that upon the evidence given at the trial the land in question formed a part of the land granted by this patent, and was not within the allowance for a street or public highway.

"The Court of Common Pleas have decided otherwise, but not without a difference of opinion.

"We have read the evidence given upon this trial, and see nothing in it to warrant us in holding that if a conviction was proper in the former case, the same verdict was not also proper upon the evidence that was given in the case now before us. Whether the evidence given upon the trial of this latter case does not better support a verdict in support of the prosecution than the evidence that was given on the former case, it is not necessary to determine, for we think our right course will be to defer to the judgment given in the Court of Common Pleas, rather than to decide in opposition so it; and in this case there can be no difficulty in the defendant obtaining the judgment of the Court of Appeal. We give judgment, therefore, discharging the rule *nisi* for a new trial, and we do so entirely on the authority of the judgment given in the Court of Common Pleas, and in the hope that the judgment may be reviewed on appeal, for the case is one of consequence, upon which I may say that there is among the judges a considerable difference of opinion, and the judgment of the higher court could not be obtained by our taking any other course than affirming the conviction."

From this decision the defendant appealed, assigning as a reason:

That upon the proper construction of the patent, taken in connexion with the evidence given, it should be held to embrace the land upon which the fence complained of in the indictment was erected; and that the learned judge should have so directed the jury.

J. Wilson, Q. C., and *C. Robinson*, for the appellant.

Robert A. Harrison, for the Crown.

The question involved in this appeal was simply whether the line as run by Mr. Carroll, the surveyor, or the fence enclosing the block on which the Episcopal Church stood should govern; the appellant contending that the line of fence should be the boundary, and that the learned judge should have so charged the jury; that not having so charged there had been such a misdirection as would entitle the appellant to a new trial.

Sir J. B. Robinson, Bart., C. J.—This appeal brings up the question whether the patent dated the 18th day of January, 1836, setting apart for the use of the Church of England the tract of land in the city of London, on which the church then stood, makes the fence which then enclosed the tract the southern boundary, which would leave 100 feet and no more for the breadth of North Street East, or whether in consequence of the government surveyor, Mr. Carroll, having before the issue of the patent run a line and marked it through the inclosed tract, intending it to shew the northern boundary of North Street East, the line so run must govern. In the latter case the fence which was put up before the making of the patent and which is still maintained encroaches upon the street to the extent of 32 feet in depth, and to that extent closes up and obstructs the highway.

This same point had been before discussed in a prosecution for nuisance against another defendant, which case is reported (8 U. C. C. P. 253.), and to which reference was made in the judgment given below in disposing of the case now before us. In that case, which was tried before myself, it was sworn by the surveyor who made the original survey of the new addition to the town plot of London on which the church referred to stands, that he had not run out and marked any line to define the northern limits of North Street East until some time in February, 1836, which was after the issuing of the patent.

If that were so, then the mention made in the patent of the "ground on which the church then stood" could not, I think, be held to have any reference to the line of the street which had not at that time been run out, and for that reason, and upon the other evidence given, I should have thought it clear that by the "ground on which the church stood" we ought to understand the tract as actually inclosed and held with the church at the time the grant was made. And I should have so held, if it had been left to me to determine the legal question, but both parties desired that the point should be reserved for the consideration of the court from which the record came, and I did accordingly reserve it.

It was afterwards discovered, as it seems, that the surveyor was mistaken in supposing that he had not run out and staked the north line of East North Street until after the completion of the patent; and upon the trial of the indictment, which is before us, against this defendant, Mountjoy, the surveyor, swore that he had posted North Street, on the 8th of January, 1836, which was ten days *before the patent is dated.*

This is a very material variation from his former testimony, occasioned, I suppose, from his having in the meantime referred to his field notes. And the question now is what, with the knowledge of this fact before us, we must take to be the southern limit of the land granted by the patent of the 18th of January, 1836, in other words, did the Crown grant, and could the Crown grant, by that patent the land that was inclosed with the church and upon which, in that sense, the church then stood; or was and is the tract granted, necessarily confined on the south to the northern limit of North Street as laid out in the original survey of the new town plot that had been made a few days before?

That survey it is proved had not been returned by the surveyor to the government till the 28th of March following the issuing of the patent, and it is not therefore reasonable to suppose that the government referred to any tract as laid out in that survey, when they used the words "all that parcel or tract of land being part of the town plot of London, on which the Episcopal Church of England now stands." If not then what were they referring to? Not surely to the small space on which literally the church stood, that is, not merely to the land covered by the building, because the tract is described in the patent as containing four acres and two-tenths or thereabouts.

I confess I have a strong conviction that as the government from the words used in the patent, evidently were aware that there was this church standing upon a certain tract in the town of London, which tract could be seen and was notoriously marked by the fence which inclosed it and had inclosed it for a year or more, they meant to grant the tract so inclosed on which the church stood, and not a tract as bounded by a line drawn by their surveyor, of which line they had then no knowledge, nor until more than two months afterwards. What I mean is that they most probably intended to make the grant to conform to the plan which had been made out and submitted by Mr. Askin, and which the rector and congregation had been given to understand had been acceded to.

This plan gave to North Street a width of 100 feet, which was 32 feet more than the width of the streets in the plot before laid out, and more I suppose than either the government or the inhabitants of London would have expected to be the width of the streets, if there had been no such special instruction as was given to the surveyor by Colonel Talbot.

If the church had happened to be placed upon the very southern limit of the tract as inclosed, on the understanding that the patent had reference to the tract which had been asked for, and which they had reason to believe they had obtained, it would have been difficult I think to contend that the land covered by the church was not conveyed by the patent under the words used. The only question then, I think, would have been whether the government could legally grant the land so covered by the church, notwithstanding it was within the street as it had, before the completion of the patent, been laid out in the original survey of the town plot.

That question under any view of the evidence we are under the necessity of considering, for I understand it to be an undisputed fact, that the street had been laid out on the ground two chains wide before the patent was made.

The law existing on that point at the time the patent issued in 1836, was the provision contained in the statute, 50 Geo. III, chapter 1, section 12, which enacted that all allowances for roads in any town or township laid out by the King's surveyors shall be

deemed common and public highways until such roads shall be altered according to the provisions of that statute, which could only be by the justices in quarter sessions

This road or street laid out by the surveyor on the 8th of January, 1836, according to the evidence given in this cause was not altered in that manner, and therefore we cannot hold, I think, that it was less a highway after the patent of the 18th of January than before. Whatever title to the soil of the street as laid out that patent could convey would be subject to the right of the public to use it as a highway. So I think the verdict must stand upon the account which we have of the facts.

I think also that Mr. Justice Richards was right in leaving it to the jury as a mixed question of law and fact, which it was, under the evidence, whether the patent was or was not framed with reference to the tract inclosed by the fence, for that cannot be said to be plain on the face of the patent, and I think we should not disturb the verdict, and that no good would probably arise from doing so, though it seems to me to be a matter for regret that the event of the last trial should have brought the matter to this issue, for certainly 100 feet is in all reason sufficient width for the street, and after an acquiescence of so many years it is hard I think to disturb the boundary of the tract, especially if the alteration will be injurious or inconvenient in regard to any use that has been made of the land in the meantime.

DRAPER, C. J.—The whole question is, what land is granted by the letters patent of the 18th January, 1836, by the words "all that parcel or tract of land being part of the town plot of London on which the Episcopal Church of England now stands, and containing $4\frac{2}{10}$ acres, or thereabouts"

This parcel of land was not part of the first survey of the town of London, which extended no farther than to the south side of North Street. There is no evidence that the north side of North Street was then marked on the ground, though the grantee of any lot on the south side had the assurance of a street immediately north of such lot, which according to the plan adopted for other streets would not be less than one chain wide.

In the latter part of 1835, the government ordered an additional survey, increasing the area of the town, and including the land in question. Mr. Carroll was employed by the Surveyor-General to make this survey, under such instructions as Colonel Talbot might give him, and Colonel Talbot directed him to lay out the new portion of the town in accordance with the part already surveyed, only making the streets two chains wide. Mr. Carrol acted on the instructions, commencing his survey on the 7th December, 1835. On the 8th of January, 1836, he posted East North Street, east of Wellington Street, and *extended the centre of the streets around the church block*, and finished posting those streets. "On the 18th January, 1836, he finished posting Church Street and Mark Lane." *Mark Lane was only one chain wide*, the other streets were two chains wide. This survey with plan, &c., was returned to the Surveyor-General's office on or about the 28th March, 1836, and according thereto this block actually contains $4\frac{2}{10}$ acres, and if the defendant be right it would contain $\frac{1}{4}$ of an acre more. Mr. Carroll never had any other instructions, and his plan has ever since been acted upon in granting lots in the town of London.

The defendant maintained the fence charged as a nuisance, which fence stood within 100 feet of the south side of East North Street. For the Crown, it was contended that the fence obstructed the public highway, inasmuch as Mr. Carroll had laid out the street in that place, 2 chains (132 feet) wide; that his survey was adopted by the Crown, and that the Crown had done nothing directly or indirectly which deviated from that survey, or limited the width of the street to 100 feet.

On the defence Colonel Askin produced a map furnished to him by the government, long before the last survey, of the original town plot of London. He stated that the streets therein were only 66 feet wide, that in the spring of 1833 Sir John Colborne, then Lieutenant-Governor of Upper Canada, visited London, and Colonel Askin, with the intention of obtaining a new site for a church and burial ground, accompanied his excellency to the place now in question, "which was then unsurveyed," and his Excellency replied to his application, "Send me down your plan, make an application for it, and it shall be granted as far as I have any influence." Shortly afterwards Colonel Askin drew a plan, of which he produced at the trial *a copy as near as he could recollect, making all the streets round the block 100 feet wide.* A petition was drawn up and was forwarded with this plan to the government, applying for the land shewn on the plan. This plan or sketch (it was not the result of any survey of the ground) covered land not now claimed to be granted by the patent, for it included Duke Street, since opened, and also part of a block now belonging to the Roman Catholic Church. It made Mark Lane 100 feet wide, though the fence afterwards erected left only 66 feet for Mark Lane, and it covered considerably more land than is specified in the patent.

The Bishop of Huron also proved that the sketch prepared by Colonel Askin was forwarded with the memorial, and that he had since made every possible search for both, but without success, and that the plan never was returned. That in the fall of 1833 he saw the copy of an order in council directing the land to be granted as prayed for; that after getting this copy they began to build the church, which was raised in the spring of 1834, and was opened that season, and the fence was put up immediately after finishing that church, and was completed early in 1835. That a fence of rails was put up on the north boundary, but was afterwards removed to the south, to the line as laid down there by Mr. Carroll. The Bishop further stated that he went to Toronto, just before Sir John Colborne's departure, in reference to obtaining the patents for two rectories; that there was some blunder; that "things were done in a hurry," that he went to the Surveyor-General's office, "and the clerk then said *they had no plan* and were quite at a loss as to the block." The clerk had the *old* plan, and he measured some of the blocks upon it, and said this block would at all events contain as much as those, and he gave that description which was put into the patent. The Bishop explained that the order in council referred to in the margin of the patent was the one *establishing the rectories.*

L. Lawrason, Esq., stated that he remembered seeing the order in council (*i. e.*, the copy); that being churchwarden at the time he might have received it, and if so, it was probably burnt in the old church or at his own place. That he had applied at the government office and could not find it, and was informed it had been mislaid or lost; that he could find no entry in any of the books or records in relation to it before the patent.

The learned judge directed the jury that if there was a part of the town plot of London on which the episcopal church then stood, which was known and recognised as a part of the town plot of London, independent of Carroll's survey, that fact would be evidence for them that the patent was intended to grant such part; or if the grant was made in relation to a fence then standing, in either case they should acquit the defendant. But if the grant was made to cover the part of the town plot *then* being laid out, *i. e.*, the block of land surveyed by Mr. Carroll, as the church block, which survey, as regarded that block, was then completed, they should find him guilty, and he stated that in his opinion the plan made by Mr. Carroll should govern, but he left it to them. They found the defendant guilty.

A new trial was moved for on the law and evidence, and for misdirection, because the learned judge ought to have ruled as a question of law, that Carroll's survey should not govern, and that the patent should be held to embrace the land then known as the church block.

The Court of Queen's Bench discharged the rule, entirely on the authority of the decision of the Court of Common Pleas, in *Regina* v. *The Bishop of Huron*, the learned Chief Justice stating that there was among the judges a considerable difference of opinion. The appeal is against that decision, and the only reason of appeal assigned is, that upon the proper construction of the patent taken in connexion with the evidence given, it should be held to embrace the land upon which the fence complained of in the indictment was erected, and that the learned judge should so have directed the jury. It does not appear that this objection was made at the trial, or that the learned judge was asked to give such a direction. In fact he only expressed an opinion, as I read his charge, on the weight of the evidence, leaving it wholly open to the jury.

The defence rests, as I understand it, on the influence proper

to be allowed to external circumstances, affecting the construction of the letters patent, for without the aid of such circumstances it has not been argued that the defence can succeed

When the case of *The Queen* v. *The Bishop of Huron* was before the Court of Common Pleas, I took every possible pains to ascertain what where the facts, so far as any record could be found of them in the public offices, connected with the issuing of the patent. Whatever my anticipations might have been, I found nothing to strengthen the defence, and on the facts proved in that case I thought and still think the conviction right. I felt the doubt which embarrassed my brother Hagarty, whether the patent did identify the land intended to be appropriated, and whether, therefore, it was not void for uncertainty.

The general rule applicable to the construction of grants from the Crown, is that they shall be construed most favourably for the king Though where the grant is *ex speciali gratiâ, certâ scientiâ et mero motu*, the construction and leaning are to be in favour of the subject (Com. Dig. Grant, G. 12. Bac Abr. Prerog. F. 2. Vin. Abr. Prerog. Ec. 3). And if the grant be capable of two constructions by the one of which it will be valid, and by the other void, it shall receive that interpretation which will give it effect. "For the king's honour and for the benefit of the subject, such construction shall be made, that the king's charter shall take effect, for it was not the king's intent to make a void grant (St. Saviour's case, 10 Co. 676.), and in Sir J. Molyn's case (6 Co. 6) it is said: "Note the gravity of the antient sages of the law to construe the king's grant beneficially for his honour and the relief of the subject, and not to make any strict or literal construction in subversion of such grants."

Looking no further than the language of the patent there is no difficulty. It arises in applying it to the subject matter, to the ascertaining the thing granted. The rule *id certum est quod certum reddi potest* applies in the case of the Crown, and if the grant has relation to that which is certain, even though it be but mere matter of fact, or *in pais*, it is sufficient (Com. Dig. Grant G. 5. Vin. Ab. Prerog. R.).

We may without hesitation interpret the words, that "tract of land being part of the town plot of London on which the Episcopal Church of England now stands," to mean the land on which the church was standing used for divine worship according to the rites of the Church of England, and then one certainty is obtained, and I agree fully with those who contend that something more was meant than the actual ground covered by the fabric itself, the quantity expressed in the patent, $\frac{1}{4}\frac{1}{6}$ acres, is enough to establish that conclusion; and in the quantity expressed we have a second certainty, for I treat the words "or thereabouts" as equivalent to the common phrase "more or less." But I wholly disclaim attaching any importance, in the construction of the patent, to the conversation held by Colonel Askin with the Lieutenant-Governor. For the purpose of generally identifying the locality of the proposed site, it is (assuming it to be evidence at all, on which it is not necessary to express an opinion) really of no value, for we need not seek outside the patent for that purpose, as the land to be granted was that on which the church actually stood at that time though such a description would not have been applicable when his Excellency visited the proposed site. Then the suggestion itself, "send down your plan, &c.," amounts to no more than the expression of a wish that the application might be put into a definite shape, and a readiness to give it the most favourable reception. But it conveyed no authority to survey or mark out and appropriate any particular piece of land, nor did Colonel Askin so understand it, for he made no survey, but merely a sketch to accompany a petition for a certain site for a church and burial ground. As to any order in council for the grant of the land as pointed out by the sketch, I am compelled to say, I think there is no legal evidence that it ever existed, and the evidence tends in my humble judgment to negative its existence. With the utmost confidence in the integrity and good faith of the witnesses who speak of having seen a copy of it, I think they are under some mistake, and if such order is material to the defence it is not proved. All the evidence refers to a copy, for though Mr. Lawrason speaks of "the order in council," he is evidently referring to the same paper of which the Bishop of Huron had just before spoken, as the copy, and he says immediately afterwards that he had applied at the government office *for the original*, and could not find any entry in any of the books or records in relation to it. So far there is no proof of the existence of an original of the supposed copy. And if there had been any such order we might reasonably expect to find it referred to on the face of the patent as the authority for the grant, whereas there is a reference to a different order as the authority, *viz*, an order of the 15th January, 1836. The lapse of more than twenty years may well account for an error of recollection as to the nature of the document which no witness speaks of having seen since the date of the patent. And the well known reputation of the then clerk of the executive council (Mr. Beikie) for scrupulous exactness in the business of his office, renders it next to impossible that he should have issued a copy of an order in council for a grant of land, of which order no trace can be found in any of the books or records of the period. That no such order reached the Surveyor-General's office is pretty clearly established by the Bishop's evidence, who went there and saw in what manner the clerk framed the description, in ignorance, apparently, of Colonel Askin's sketch, and of the memorial which accompanied it. Indeed if things had not "been done in a hurry," it is not improbable that the framing the description for patent would have been delayed until Mr. Carroll, who was then making the survey, had been referred to, or until his plan, report and field notes had been regularly returned. The pressing haste to get the patent completed affords no argument against the Crown, if it has not a contrary tendency.

It appears that in fact, on the very day the patent is dated and recorded, this block of land was surveyed, and its boundaries were marked on the ground by Mr. Carroll. If the grant had in express terms referred to the survey then in progress for the limits of the block, such reference would have prevailed, as affording evidence of the intention of the Crown in making the grant, and would, at least so I apprehend, have been sufficient to define what was granted, or to prevent the grant being held void for uncertainty, Or if Mr. Carroll's plan had been returned to the office before the patent was issued, and then the grant had been made in the terms used, there could have been no doubt that the plan could have been referred to in aid or construction of the grant so as to support its validity. It seems to me, that the fact of the block being actually designated on the ground by an officer employed by the government for the purpose of making the survey of which that formed part, may also be referred to as evidence of a third certainty from which the intention of the grant may be ascertained.

It has been objected to this, that the fact was unknown to the Crown when the letters patent issued. That certainly is so, but the objection does not lie in favour of those who set up the fact of the fence then standing on the ground, as evidence that the Crown intended to grant the land so fenced in and occupied by or for the church. For there is no proof whatever that the Crown or any of its officers were aware that the lot was fenced any more than they were that Mr. Carroll had marked the boundaries; while the fencing was a more private act, the survey was an official one, and these parties claiming under the patent have never pretended that the patent covered the land as fenced in at the date, any more than it covered the land represented by Colonel Askin's sketch. As to the former, the fence was removed from north to south to make it correspond with Carroll's line, and as to the latter, among other changes, Mark Lane, instead of being 100 feet wide, was laid out by Mr. Carroll sixty-six feet wide, and the fence on that side corresponds therewith. Moreover, the fences were not begun until after the receipt of this (supposed) copy of an order in council, and could not therefore have influenced the government in framing such order, if it ever existed.

So far as any objection to the validity of the patent on the ground of uncertainty is concerned, I think I am justified in upholding it, on the facts, that the site was fixed by the existence of the church thereon; that the estimated quantity of land corresponds with the actual quantity; and that the limits were marked on the ground by competent authority. I might add, but that is not distinctly proved, that Carroll's survey has ever since its return been recognised and acted upon by the government. Even if the objection of uncertainty were to prevail, I do not see that it would entitle the defendant to a new trial, for establishing

that the Crown have made no grant would not establish that the *locus in quo* is not a highway. And if it be admitted that Carroll's instructions directed him to make North Street two chains wide, and that he did so mark it out, then the defendant is maintaining a fence which encloses 32 feet of North Street, and is guilty of the nuisance charged.

HAGARTY, J., retained the opinion expressed by him in the case referred to in the Common Pleas.

Per curiam.—Appeal dismissed with costs.

[Hagarty, J., dissenting.]

QUEEN'S BENCH.

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

HUNTER V. FARR AND KING.

Ejectment—Proof of title—Mortgage—Right of executors under Consol. Sats. U C, ch. 81, sec. 5.

In ejectment for 100 acres, the east half of lot 23, the plaintiff claimed under F, his title being a mortgage executed by F. in 1847, and assigned by the executors of the mortgagee to the plaintiff in 1856, and a release of the equity of redemption from F to the plaintiff in 1863 Neither the land nor the mortgage debt were mentioned in F's will It was proved that in 1847 F. owned 100 acres of lot 22 adjoining, and had cleared four or five acres of the half lot in question, of which he was reputed to be the owner. Defendant had occupied about twelve acres of it for nearly fourteen years

Quære, whether this was sufficient *primâ facie* evidence of F. being owner in fee: but, *Held*, that the plaintiff could not recover, for the statute (Consol Stat. U. C, ch. 87, sec. 5) only authorizes executors to convey the legal estate on payment of the mortgage debt, not to a purchaser from them, and it therefore remained in the mortgagee's heir-at-law.

(Q. B., H. T., 1864)

Ejectment for the east half of lot 23, in the 5th concession of North Gwillimbury. Defence for the whole by defendant Farr. Defendant King let judgment go by default.

The plaintiff's notice of title was on a mortgage made by one William Fletcher to one Alexander Dunlop, and an assignment of that mortgage from Dunlop to one William Reid, and an assignment from the devisee and executors of Reid to the plaintiff: also under another mortgage made by William Fletcher to one William Pegg, and an assignment of that mortgage from the executors of Pegg to the plaintiff.

Farr's notice of title was by length of possession in himself and those under whom he claimed.

The trial took place at the York and Peel assizes in October, 1863, before Adam Wilson J.

The plaintiff's right to recover depended upon the right which William Fletcher had in this half lot. In 1847, as a witness swore, he owned the 100 acres adjoining, and was clearing up this half lot, and had then been in possession two or three years His house and clearing was upon lot number 22, and he had cleared four or five acres of the east half of number 23 immediately contiguous, which he fenced in with the clearing on number 22. He was not proved to have been in the actual occupation of any other part It was sworn that he was the reputed owner of it, and it was proved that on the 21st of September, 1847, he mortgaged it in fee to William Pegg, covenanting that it was free from incumbrances. Pegg died before the 11th of November, 1847, having made his will, and thereby appointed his son Samuel, and his sons-in-law Thomas Wilcoxson and Thomas Eck his executors This lot of land was not mentioned in the will, nor was the mortgage specifically referred to.

By indenture dated the 18th of October, 1856, Wilcoxson and Eck, the surviving executors of Pegg, assigned the mortgage and the unpaid moneys secured thereby, and so far as they lawfully might or could the mortgaged premises, to the plaintiff; and by indenture dated the 20th of July, 1863, Fletcher, after reciting that the premises in question had been conveyed to him by one Alexander Dunlop, and that he had mortgaged them to Dunlop, and then to Pegg—released and conveyed to the plaintiff all his right, title and interest, at law and in equity, in this half lot.

There was some slight further evidence given as to the mortgage from Fletcher to Dunlop, but it went no further than the statement of a witness that he thought he had seen such a mortgage, and that there was an assignment endorsed on it, made by Dunlop to William Reid, and that both instruments were lost in Chancery; and upon the assumption of the sufficiency of this evidence, other evidence was given to prove Reid's will: and a deed was proved, executed by parties professing to be devisees or executors named in this will, and conveying this mortgage, the money secured by it, and this land mortgaged, to the plaintiff.

With regard to the defendant Farr, he was proved to have been in occupation of two small fragments of this half lot, *i. e.*, seven acres, where his house stood, at the north-east corner, and another piece at the north-west corner thereof, the two pieces being about eighty rods apart, and containing together about twelve acres. His occupation, however, was not proved to have begun quite fourteen years ago, and Fletcher was the only other person who appeared to have had any possession, or to have claimed any right in this land.

It was objected for the defendant Farr, at the trial, that Fletcher was not shewn to have had any proper legal title, but only a prior possession against a later possession: that in fact he had no possession beyond the four or five acres enclosed in a fence: that no title was sufficiently traced from Fletcher through the mortgage said to have been given to Dunlop: that Reid's will was not properly proved, and the persons professing to convey as his devisees or executors were not shewn to have that character or right: that Pegg's will was not sufficiently proved, and if it were, it did not devise any estate or create any power to sustain the conveyance to the plaintiff professedly made under it.

The learned judge ruled that the possession of Fletcher was *primâ facie* sufficient as to all the half lot: that the admission by the plaintiff that there was a will of Reid must be taken altogether: that the persons stated in it as devisees were the devisees under it, and if so this claim of title was proved: that under Pegg's mortgage the legal estate appeared to be outstanding in Pegg's heir-at-law: that the defendant shewing no title, but a possession at most for thirteen years, was not such a title as put the plaintiff to the proof of a stronger title than he had shewn. And he reserved leave to the defendant to move to enter a nonsuit on these objections, The verdict was entered for the plaintiff.

In Michaelmas Term, *Robert A. Harrison* obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the evidence. He cited *Doe Hill* v. *Gander*, 1 U. C. Q. B 3; *Doe Beckett* v. *Nightingale*, 5 U. C. Q. B. 518; *Roberts* v. *Phillips*, 4 E. & B. 450; *Doe Wilkes* v. *Babcock*, 1 U. C. C. P. 392; *Longford* v. *Eyre*, 1 P. Wms. 741; *Robinson* v. *Byers*, 9 U. C. Chan. R. 572.

In this term, *McMichael* shewed cause, citing *Coltman* v. *Brown*, 16 U. C. Q B. 133; *Eccles* v. *Paterson*, 22 U. C. Q B. 167; *Rogers* v. *Card*, 7 U. C. C. P. 89.

DRAPER, C. J.—Assuming, which is not proved, that Dunlop once owned this land and conveyed it to Fletcher, there was no legal proof that Fletcher ever mortgaged to Dunlop, or that Dunlop assigned this mortgage to Reid A witness merely swore that he thought he had seen these instruments, and that they were lost in Chancery. Not a word was said to prove the execution of either of them. When the rule *nisi* was moved we thought there was no ground for sustaining the plaintiff's claim upon that chain of title, and granted it to hear discussed the questions raised on the claim derived through Pegg.

As to this, there are two questions: 1st. Was there sufficient *primâ facie* evidence of Fletcher's right to mortgage in fee? If so, has the fee so conveyed by the mortgage to Pegg become vested in the plaintiff?

As to the first, the evidence is slight. It shews actual possession and occupation by Fletcher of not more than five acres. His possession of the residue was no more than constructive. If a man has title to a lot of land, though he has never entered into the actual possession of it, the law deems him to be in possession until some one else enters adversely to him, not recognising his title, and so *a fortiori* if he enters and occupies a part. If without title he enters on a lot which is in a state of nature, clearing and fencing a few acres only, leaving the rest open and unimproved, the actual possession of the part will not alone, in my opinion, draw to it the possession of the other part. I do not say what may be the effect of *continuous acts* of ownership over the

residue, though unenclosed or uncleared, but here is no such evidence to rest upon. All we hear is, that Fletcher claimed to own the whole by title: that he occupied a small portion, and by a mortgage executed when no other person was in possession asserted a right over the fee simple. I have great difficulty in in holding this to be sufficient, except as to the part which he actually occupied. Fictitious titles or securities might very easily be created if the owner and occupier of a lot could, by enclosing a few acres of a lot adjoining which happened to be vacant, create evidence of his being in possession of the whole. I cannot persuade myself that such a possession, though lasting for twenty years, would constitute a bar to the entry of the true owner into the residue.

But conceding that there was *primâ facie* evidence that Fletcher was owner in fee, have his rights and estates become vested in the plaintiff? The intermediate steps on which the plaintiff relies are the will of Pegg, the conveyance from his executors, and the release of the equity of redemption from Fletcher.

As to the will, it does not mention the mortgage debt, or the land on which it is secured. The testator devises other freehold estates, but not this. The mortgage debt therefore vested in Pegg's executors as part of the personal estate, and the land vested in Pegg's heir-at-law. Then the conveyance by the surviving executors of Pegg to the plaintiff professes to convey both the debt and the legal estate in the land. This latter conveyance can only be effectual under the Consol. Stats. U. C., ch. 87, sec. 5. Power is thereby given to the personal representative of a deceased mortgagee, to convey, release, and discharge the mortgage debt and the estate in the land in two cases: 1st. If the mortgage money was paid in the life-time of the mortgagee. 2nd. If it was paid after his death. But this act does not empower executors or administrators to convey the legal estate as well as to assign the mortgage debt to a purchaser from them, though perhaps such an extended construction of the statute may be deemed equitable and sustainable. Literally, until the payment of the mortgage debt they have no such power. Then, as on Pegg's death the legal estate vested in his heir, how is it on the facts appearing conveyed to the plaintiff? Can the conveyance by the executors operate to pass it? Fletcher, on the 20th of July, 1863, conveyed his equity of redemption to the plaintiff, and if the legal estate was then vested in the plaintiff by force of the assignment from the executors, the mortgage would be extinguished, as such a transaction between Fletcher and the plaintiff would be a satisfaction of the mortgage debt. But if payment was necessary to enable the executors to convey the legal estate under the statute, I do not think they could execute that power by anticipation; and their deed was made in October, 1856, while the mortgage debt was not extinguished until July, 1863. The case of *Robinson* v. *Byers*, recently decided by the Chancellor of Upper Canada, adopts this view of the statute.

We think the executors could not convey the legal estate until the mortgage debt was paid, and that the legal estate is still vested in Pegg's heir-at-law.

If the plaintiff had succeeded in shewing the legal estate of whatever part of the lot Fletcher had a *primâ facie* title to convey in fee, then the motion for a nonsuit or new trial would fail on a technical ground. The defence is for the whole of the land claimed, and extends to the four or five acres of which Fletcher had actual occupation.

But as I think that, admitting that Fletcher was seised in fee of the whole, the plaintiff has not succeeded in shewing that legal seisin to have passed to himself in any part, I think the rule for nonsuit must be made absolute.

HAGARTY, J.—On a question of boundary a man's title by possession is no doubt confined to what he actually occupies; but in proving a chain of title I think it *primâ facie* sufficient to shew, for example, a conveyance of a lot by a person in possession of any part of it, professing to claim and own the entire. This in no way gives him right against a paper title to the whole, but is merely available as a *primâ facie* deduction of title. On this point I desire to be clear, as it is one constantly arising in practice.

MORRISON, J., concurred.

Rule absolute.

COMMON PLEAS.

(Reported by E. C. JONES, Esq., *Reporter to the Court.)*

QUEEN v. CARTER.

Gift of a chattel inter vivos—Verbal—Validity of—Delivery and change of possession unnecessary.

One C. was owner of an ox and *verbally* gave it to his son, in whose name it was laid as being the owner in the indictment. On a case submitted for the decision of this court under ch. 112, Con Stat. U. C., *held*, that to make a gift of personal property *inter vivos*, it is not necessary that there should be an actual delivery and change of possession. It is sufficient to complete such a gift that the conduct of the parties should show that the ownership of the chattel has been changed.

(C. P., M. T., 1863.)

Case reserved under the Consolidated Statutes for Upper Canada, ch. 112, at the Court of Quarter Sessions holden at Goderich in and for the United Counties of Huron and Bruce, on the 8th day of September, 1863. The following was the case stated for the opinion of the justices of the Court of Common Pleas:

(Indictment.)

United Counties of Huron and Bruce. To wit: } The jurors for our lady the Queen upon their oath present, that Richard Carter, on the 24th day of June, in the year of Our Lord, 1863, at the township of Goderich, in the county of Huron, one of the united counties aforesaid, one ox of the goods and chattels of Arthur Cantelon, feloniously did steal, take, and drive away against the form of the statute in such case made and provided, and against the peace of our lady the Queen her Crown and dignity.

(Signed) IRA LEWIS,
County Crown Attorney.

Goderich, 8th day of September, 1863.

The following was the evidence given:

Arthur Cantelon sworn for the Crown.—I know the prisoner; he used to live in the neighbourhood. I missed an ox of mine in June last; I found it next morning with Mr. Spooner of Clinton. Spooner is a butcher. We had got the track of the ox in that direction; I am certain it is mine; my father had owned it five years. I know nothing concerning the prisoner in connexion with the missing of the ox.

Cross-examined.—The ox was about ten years old; brindled dark brown, streaked—it had horns. He was stated to be five when we got him, and we had him about five years; I was living with my father at that time. I had him in my possession when he was lost; and I have no doubt at all that the ox was mine. I am a hired man with my uncle. My father gave up the ox to me, and that was the way I came to own him; my father gave the ox to me this spring, and I had him in my possession; it was only verbally he gave him to me, and there was no removal at the time, nor delivery, nor change of possession, nor writing.

William Cantelon.—I am the brother of the last witness. He owns the ox. My brother works at uncle Arthur's. The ox was missed, I think, about the 24th of June. The ox found at Spooner's was certainly the same as my brother owns.

Cross-examined.—He got the ox this spring. On a Wednesday evening we tied the ox in a field, and on the following (Thursday) morning we missed him. We had tied him in a little pasture, not over ten yards from the house; we tied his head to his foot. I saw the ox as late as between nine and ten at night, and at six next morning I observed that the ox was gone. The fence was laid down as if by hand—not as if an animal had broke through—and the rails were laid inwards. I tracked the ox to the road about eight rods, and on the road, and saw marks of the rope as if dragging behind the animal. My father worked him a little, but not often. I told my brother about nine on Thursday.

Robert Hunt.—I know the prisoner. On Wednesday the 24th of June, at about five in the morning, he came to me (in Clinton) with an ox to sell; I saw the ox but only at a distance; it was against the storehouse; there seemed to be some white about it—might be brindled or red, but cannot swear to its colour. We were not buying, and I told him so, but he asked who was, and I named Mr. Spooner the butcher.

Charles Spooner.—I live in Clinton. I am a butcher I know the prisoner. On the 24th of June, about six in the morning, when going to the stable, this ox stood near the door, and as I was driving him away prisoner stopped the ox and offered to sell him to me, and I said he did not suit me—he was not in condition; I recommended him to go to the mill (where Hunt is), and he told me he had been there already; he said the ox was very breachy, and he must sell him. At last he said he would take $20; I said $16, and I bought the ox for $16. He said he had brought him about five miles. Prisoner told me his name was Arthur Cantelon, and that if the ox got breachy and got away I should know where to get him. He was a brindled ox about ten or eleven years old, with horns. Arthur Cantelon afterwards claimed the ox, and I had to give him up.

James Churchill.—I have seen the brindled ox in Cantelon's field.

McDermott, for the prisoner, submitted that the ox, if proved to be owned by any of the Cantelons, was proved to be the property of old Mr. Cantelon, and not the property of Arthur Cantelon as laid in the indictment; and contended "that the property was laid in the indictment as the property of the prosecutor, whilst the evidence proved that it was the property of the father," and "that the prosecutor had neither (on the evidence) an absolute or special property in the ox." He had neither an actual nor constructive possession, and that the ox was not owned as stated in the indictment.

No amendment was applied for, and no witnesses called for the defence. The learned judge, after reading and remarking upon the evidence, directed the jury, that admitting that there must be either possession or absolute or limited ownership, it need only be a lawful holding The law to be applied here differs from that which governs disputes in civil courts as to ownership The prosecutor swears that the ox was in his possession, and that it had been made a present of to him by his father. Supposing the gift not to have been sufficient, then counsel is right in saying that in a civil court the father, not the prosecutor, would prevail as between them. Then the possession of the ox by the prosecutor was such as to involve a responsibility to give it up to the father, and in case of such a holding, larceny may be laid as of the goods of either or both In short, there is, if the evidence is believed, proof that there was either actual ownership or a lawful and responsible possession. The rest of the case is made out with remarkable clearness, and the attempt to personate the other man tells remarkably against the prisoner.

The prisoner was found guilty.

S Richards, Q. C., for the Crown, cited *Winter* v. *Winter*, 4 L. T. N. S. 639; *Lunn* v. *Thornton*, 1 C. B. 381; *London & B. Ry.* v. *Fairclough*, 2 M. & G 691, note *a*; *Flory* v. *Denny*, 7 Ex. 583. *R. A. Harrison*, contra, referred to *Shower* v. *Pilch*, 4 Ex. 478, Con. Stat. U. C. ch. 112; *Reg.* v. *Ashley*, 1 C. & K. 198; *King* v. *Whitehead*, 9 C. & P. 429; Archd. Crim. Plea. pp. 34, 198.

RICHARDS, C. J.—On the only question referred to us we think the conviction right. The defendant's counsel, at the trial, seemed to entertain the opinion that to make a gift of personalty by parol valid *inter vivos* it was necessary that there should be an actual delivery and change of possession. This doctrine was strongly supported by the cases referred to by Mr. Harrison in the argument, in *Shower* v. *Pilch* (4 Ex. 478) and *Irons* v. *Smallpiece* (2 B. & Ald. 551), but the notes to *Lunn* v. *Thornton* (1 C. B 381), and *The London & Brighton Railway Co.* v. *Fairclough* (2 M. & G., at 691), approved of by Park, Baron, in *Flory* v. *Denny* (7 Ex. 583), lay down very clearly, and on apparently good authority, the opposite doctrine. They are to the following effect: "Gifts by parol are incomplete, and revocable until acceptance by the donee" (that is, until the donee has made some statement, or done some act testifying his acquiescence in the act.) * * * * * "After acceptance of the gift by parol" * * * * * "the estate is in the donee without any actual delivery of the chattel which forms the subject of the gift." In *Winter* v. *Winter* (4 L. T. N. S. 640) Crompton, J., states, "actual delivery of a chattel is not necessary in a gift *inter vivos*: it is sufficient to complete a gift *inter vivos*, that the conduct of the parties should show that the ownership of the chattel has been changed." He adds, "Although *Irons* v. *Smallpiece* and *Shower* v. *Pilch* have not been overruled, the subsequent cases, to speak familiarly, have hit them hard."

We are all of opinion that the judgment of the Court of Quarter Sessions ought to be affirmed.

Per cur.—Judgment of Quarter Sessions affirmed.

COMMON LAW CHAMBERS.

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

MORLEY v. THE BANK OF BRITISH NORTH AMERICA.

Order to amend on payment of costs—Delay in paying costs—Laches—Rescinding order.

Where plaintiff in September, 1862, obtained an order allowing him to add a count to his declaration on payment of costs, in October served a copy of the order, in December obtained an appointment to tax the costs under the order, in February, 1863, had the costs taxed under the order, in the fall of the same year entered his record for trial without adding the count, and the trial not having taken place owing to pressure of business afterwards in February, 1864, tendered to the agents of defendants attorney the costs taxed under the order, it was held that plaintiff must be taken by his laches to have abandoned the order, and it was accordingly rescinded.

(Chambers, Feb 24, 1864)

M. B. Jackson, for defendants, obtained an order calling on plaintiff to shew cause why the order made in this cause, by the Hon. Wm. B. Richards, at the date of said order a puisne judge of the Court of Common Pleas, now Chief Justice of said court, dated 27th September, 1862, granting the plaintiff leave to add to the pleadings in this cause a count, an abstract of which was annexed to said order, should not be recinded or treated as abandoned by the plaintiff, and why the taxation of costs under said order, and the master's allocatur granted thereon, and the copy and service thereof, and the added count filed in this cause on the 10th day of February, 1864, and the copy and service of the notice to plead to said added count, should not be set aside, and why all proceedings in this cause, taken or had on or pursuant to said order to add said count, and subsequent to the granting of said order, should not be set aside, or why all or some, or one of the above mentioned proceedings, should not be set aside, or why such other order should not be made in the premises, as to said presiding judge should seem fit, on the grounds that said order was abandoned, or virtually abandoned by the plaintiff since the granting thereof, and had not been proceeded on, or taken advantage of within a reasonable and proper time after the granting thereof, and that since the granting of said order plaintiff had given notice of trial and served issue book, passed a record in this cause and entered same for trial, without having taken advantage of the terms of said order, and without having added a count thereunder, or having paid the costs payable under said order, and why such order should not be made as to the defendants costs on opposing said application to add said count and incident to the granting of said order, and as to the costs of the day when said record was entered for trial since the granting of said order to add said count, and as to the costs of this application, as to said presiding judge should seem fit, on grounds aforesaid and on grounds disclosed in affidavits and papers filed.

The material facts disclosed by the affidavits filed, were the following:—

On 27th September, 1862, the order allowing plaintiff to add a count on payment of costs was made.

On 4th October, 1862, a copy of the order was served on the Toronto agents of the attorney for defendants.

On 22nd December, 1862, an appointment to tax the costs having been obtained, the order and copy of the appointment were served in like manner.

On 16th February, 1863, the costs pursuant to the order were taxed at £1 9s. 7d.

During last Fall Assizes, for the United Counties of Frontenac, Lennox and Addington, the record was entered for trial without the added count, and without payment of the costs; but by consent of parties the record was withdrawn without costs of the day to either party—there being no prospect of having the case tried at that assize, owing to the great number of cases preceding it which were entered for trial.

On 10th February, 1864, plaintiff's attorney sent to the agents of defendants attorney, a cheque for £4 9s. 7d. in full of the costs

taxed under the order of 27th September, 1862, which cheque was afterwards returned.

On same day plaintiff filed the added count, and served copy of same with demand of plea.

Robert A. Harrison, shewed cause. He argued that the question of abandonment of the order of 27th September, 1862, was one of intention, that delay was *prima facie* evidence of an intention to abandon, but he filed affidavits showing that the delay in payment of the costs, arose from the fact that plaintiff, until recently, was in such straitened circumstances, that he was unable to pay them. He also argued that delay under any circumstances, was no ground for rescinding the order, unless it could be shewn that defendants had suffered some injury by reason of the delay (*Gurney* v. *Gurney*, 3 D. & L. 736; *Wilkes* v. *McMillan*, 10 U. C. Q. B. 392.) He admitted that if there had been a trial on the record as entered, there could be no subsequent amendment of the pleadings, without payment of the costs of the trial (*Higgins* v. *The City of Toronto*, 9 U. C. L. J. 44, but contended that the position of the parties being in no respect changed by reason of the entry of the record, it was not open to defendants to say they were injured by it. He also admitted that the entry of the record for trial, without the added count, was some evidence of an intention to abandon the order, but filed an affidavit of the attorney for plaintiff, showing that notwithstanding the entry of the record, it was his intention in the event of a trial, to make application to be allowed to add the count. He argued that defendants, in not moving until long after the assizes at which the record was entered, and until after tender of the costs taxed under the order, were themselves wanting in diligence, and should not be heard to make that complaint against plaintiff.

M. B. Jackson, in support of the summons, contended that plaintiff having without reference to the order, and apparently in disregard of it, entered his record as if there was no such order, should not be allowed afterwards to say that he intended notwithstanding to act upon the order, and that under any circumstances the delay in acting upon the order was so unreasonable as in law to amount to an abandonment of it. He relied particularly upon *Black* v. *Sangster*, 3 Dowl. P. C. 206, but also referred to *Charge et al* v. *Farhall*, 4 B. & C. 865; *Segsworth* v. *Allerton*, 7 East. 542: *Kenney* v. *Hutchinson*, 6 M. & W. 134: *Wickens* v. *Cox*, 4 M. & W. 66.

Adam Wilson, J.—The defendant applies to rescind the order of September, 1862, or to have it treated as abandoned, in consequence of the plaintiff not having acted promptly upon it, and in consequence of his having treated the order as abandoned.

It is stated by Mr. Harrison, that the plaintiff was unable to pay the costs sooner, that he never treated the order as abandoned, and although the issue book and *nisi prius* record were made up on the former pleadings, and the cause entered for trial upon such pleadings, it was, notwithstanding, plaintiff's intention to have applied for leave to have added the count at the trial, in case the trial came on.

The practice is, that the order must be drawn up and served within a reasonable time, or the opposite party may treat it as abandoned, and that as soon as it is served, it is binding on the party who obtains it, unless indeed it gives him liberty to amend or the like.

The case of *Black* v. *Sangster*, 3 Dowl. P. C. 206, is very strongly in the defendants favour. There the plaintiff obtained an order also to amend his declaration, by striking out a count on payment of costs. The order was drawn up and served. The plaintiff afterwards delivered the issue without having made any amendment, but the defendant returned it, contending that as the plaintiff had served the order and it was still unrescinded, he was bound to act upon it. The plaintiff proceeded to trial and got a verdict. The defendant applied to set aside the verdict for the irregularity. Parke, B. said, when the plaintiff gave notice of trial upon the whole record, it shewed he did not mean to abandon the 2nd count, so the rule was refused.

Here the long delay on the part of the plaintiff in availing himself of the order, the service of notice of trial, the delivery of the issue book, the making up of the record, and the entry of the cause for trial, all upon the original pleadings, must be taken as shewing that the plaintiff did not mean to add the proposed count. And I cannot under the circumstances treat the statement that it was meant to apply at the trial if necessary to add the count, as any evidence that plaintiff had not abandoned the order, for the defendant knew nothing of his intention, and what else could they think, than that the plaintiff who was proceeding without regard to the order, did not regard it himself, and meant the defendants should not regard it.

I must make an order, declaring that as the plaintiff has by his laches and proceedings, taken inconsistently with the terms of the order, abandoned the the order of September, 1862, that the same be rescinded, and all proceedings had thereon be set aside, with the costs of this application to defendants.

Order accordingly.*

Hall v. Brown.

Arrest set aside upon condition of no action being brought—Subsequent action stayed—Effect of judge's order when not reversed.

Where a person in custody under a writ of capias had obtained a judge's order for his discharge, upon condition that he should bring no action for the arrest, and afterwards acted upon the order, he was held bound by its terms in its entirety, and an action for malicious arrest subsequently brought by him against the party who caused the issue of the writ of capias, was stayed with costs

Graham v. *Thompson*, 16 U. C. Q. B. 259, held inapplicable to the present state of the law.

So long as a judge's order stands unreversed by the court, a judge in chambers will assume that neither party is dissatisfied with it

(Chambers. Feb. 24, 1864.)

Moss, for the defendant, obtained a summons calling on the plaintiff to shew cause why all proceedings in this cause should not be stayed, on the ground that the same was brought against good faith and contrary to the conditions on which an order was granted to the plaintiff, in a suit of the now defendant as plaintiff, against the now plaintiff as defendant, and on grounds disclosed in affidavits filed.

The papers filed shewed that the now plaintiff was arrested at the suit of the now defendant on a capias, and that a judge on the 26th of November last, on an application by the now plaintiff for that purpose, set aside the arrest upon a common appearance being entered to the capias, and upon the condition that the now plaintiff should bring no action against the now defendant for the said arrest, that the now plaintiff took out the judge's order embodying such condition and served it on the now defendant, and that he was bringing this action in breach of the condition of the said order.

The present action was brought, for that the now defendant having no reasonable or probable cause for believing and not believing, that the now plaintiff unless forthwith apprehended, was about to quit Canada with intent to defraud his creditors generally or the now plaintiff in particular, but intending to injure the plaintiff falsely and maliciously represented that such was the fact, and thereupon maliciously procured a judge's order for the issue of bailable process against the plaintiff, and caused the plaintiff to be arrested and held to bail for $500, by reason whereof &c.

H. B. Morphy, shewed cause and contended that on the authority of *Graham* v. *Thompson*, 16 U. C. Q. B. 259, the condition in the order restraining an action was illegal, or if not altogether so that it did not apply to such a form of action as the present for special damage which the plaintiff had sustained, and for which he would have been entitled to sue if he had never interfered with the arrest.

Moss, supported the summons.

Adam Wilson, J.—In *Graham* v. *Thompson*, the order was in form similar to the present one, the subsequent action brought was similar to the present, and an application of a similar kind to the present application was then made to set aside all the proceedings in such subsequent action, on the ground that it was brought in violation of the condition in the order. The Chief Justice in giving judgment said, "It is true the condition is not in words confined to an action of trespass, but it has always been understood that such is the intention and effect of it, and the case of *Lormer* v. *Yule*, 1 Chit. Rep. 134, is an express authority in point; the condition means only that the defendant who has been discharged from arrest, shall bring no action which he could not have brought unless the writ had been set aside." The rule in that case, was therefore discharged.

This decision was pronounced in Hilary Term, 21 Victoria, which would be in February, 1858, and as the law then stood in this Province, a judge had not in general, the power to set aside the arrest on the merits; his powers were confined to cases of irregularity

* Plaintiff afterwards obtained a second order giving him liberty to add the count on payment of costs.—Eds L. J.

or invalidity of the proceedings, and so the arrest in that case must have been set aside on the ground of such irregularity or invalidity merely. The condition of bringing no action, could apply only to the not bringing an action against the party in respect of such irregularity or invalidity, or in other words, to the not suing the plaintiff for anything which the judge had jurisdiction over, and had adjudicated upon. But by the 22 Vic., c. 96, secs. 8–10, passed in August, 1858, and now embodied in the Consolidated Statutes for Upper Canada, ch. 22, sec. 31, it is provided that any person arrested on a capias, may apply to the court or a judge for a rule or order on the plaintiff, to shew cause why the person arrested should not be discharged out of custody, and the court or judge may make absolute or discharge such rule or order, and direct the costs of the application to be paid by either party, or make such other order therein as to the court or judge may seem fit, &c.

By this act there is now power conferred upon the court or a judge, to try the propriety or rightfulness of the arrest upon the merits. Affidavits may be and are received, to disprove the allegations made by the plaintiff, and upon which he procured the order for the capias. Affidavits may be put in on the other side, to repel the defendant's facts and to confirm the original case against the defendant. The judge must then determine whether he is satisfied that the plaintiff has a cause of action to the amount of $100 or upwards against the defendant, and whether there are still "facts and circumstances which satisfy him" that there was probable cause for believing that the defendant was about to quit Canada, with intent to defraud the plaintiff. If the judge be clearly not satisfied of either of these facts charged against the defendant, or if he believe that both or either of these charges are or is untrue, he would set aside the arrest, or if he be left in doubt on either point he might, giving the benefit of the doubt in favour of personal liberty, rather that in favour of the existing proceeding, which is entitled to some presumption in its favour, discharge the defendant. In the last mentioned case, the judge might say entertaining this doubt, it is, so far as I can determine the matter, no condemnation of the plaintiff, and therefore if I do relieve the defendant, I shall only do so upon the condition that he shall not bring an action against the plaintiff, in respect of the matters which have been submitted to me relating to his arrest; I do not say a judge would so act in such a case, but he might do so, although his better course would be not to interfere, that is not to set aside anything which he is not convinced should be set aside. But assuming that he did nevertheless interfere, and did impose such terms, and the defendant did not object, but expressly assented to them, it is only reasonable as he takes the benefit of the order as to his discharge, that he should be bound by it as to the condition.

I am not altogether prepared to say, that if a defendant in such a case were to state to the judge that he did not agree to such a condition, but he would submit to it in the meantime, reserving his right to appeal to the court for the removal of the condition, that he would be precluded from making such application to the court; although he might not be able to do so, for the case of *Hayward* v. *Duff*, 12 C. B. N. S. 364; 6 L. T. N. S. 433, is very strongly against him even to this extent, for that case decides the order must be taken in its entirety, the burden with the benefit.

The cases of *Carpenter* v. *Pearce*, 27 L. J. Exch. 143; *Tinkler* v. *Hilder*, 4 Exch. 187; *Pearce* v. *Chaplin*, 9 Q. B. 802; *Simmons* v. *King*, 9 Jur. 250; *Atherton* v. *Heard*, 8 Jur. 753, are very material as shewing how far judges orders, when not acted upon, are binding upon the parties. So long as the order still stands not "discharged or varied by the court," I must assume that neither party is "dissatisfied" with it, and that it is therefore binding upon both of them.

The order will be, to set aside all proceedings taken by the now plaintiff, contrary to the order of Mr. Justice Morrison, dated the 26th November, 1863, with costs. Summons absolute with costs.*

McCarthy v. Oliver.

Replevin—Statute 23 Vic., cap 45, sec. 2—Sale of growing timber—Dispute as to price—Lien for price—Right to maintain trover.

Where plaintiff being the owner of timbered land verbally agreed to sell growing timber to defendant and there was a dispute as to price, it was held that the property in the trees passed as soon as severed from the freehold, but that plaintiff had a lien upon them for the price, and therefore that defendant without discharging the lien had no right to remove the timber.

Semble, trover may under such circumstance be maintained by the owner of the land against the vendee of the timber.

(Chambers, Feb. 25, 1864.)

D. McMichael, on the part of the plaintiff, obtained a summons under and pursuant to sec. 2 of the act amending replevin in Upper Canada (23 Vic. cap. 45) calling on the defendant to shew why an order should not be granted, authorizing the delivery of the property detained under the writ of replevin in this cause to the plaintiff by the sheriff of the county of Simcoe, and authorizing the said writ of replevin, and directing the said sheriff to whom the writ was directed to replevy the goods mentioned in the writ, in accordance with the instructions contained in said writ, and on grounds disclosed in affidavits filed.

It appeared that plaintiff and defendant had agreed respecting certain trees: that plaintiff was the owner of the land on which the trees grew: that defendant had the right to cut whatever trees he required for the purpose of making them into timber: that no time was mentioned as to the time of payment: that there was a difference as to the price to be paid: that the defendant entered on the land and cut the trees and manufactured them into timber and paid the plaintiff about $25 on account. The whole price was, as the defendant swore, about $140; but as the plaintiff swore, about $300. Plaintiff also swore that he notified defendant not to remove the timber, till the price was paid; but that the defendant nevertheless hauled the timber off the plaintiff's land to a railway station to take it to the market.

Under these facts, the plaintiff obtained a writ of replevin and his present application was under the statute, for an order on the sheriff to deliver over to him the timber.

C. S. Patterson, shewed cause. He contended that the property in the timber had passed to the defendant, that the plaintiff could not maintain trover, and therefore could not replevy.

D. McMichael, supported the summons.

Adam Wilson, J.—I have no doubt the property in the timber passed to the defendant, so soon at any rate, as the trees were severed from the land, but that the plaintiff, as the land was his on which the timber was lying, and as he had not been paid for the timber, had a lien thereon, and the defendant therefore had no right to remove the timber without first getting rid of the lien, and particularly he had no such right after the plaintiff had notified him not to remove the timber until he had first paid for it.

I am inclined to think on the authority of the cases of *Tansley* v. *Turner*, 2 Bing. N. C. 151; *Turling* v. *Baten*, 6 B. & C. 360; *Arcraman* v. *Morrice*, 8 C.B. 449, that the plaintiff could, under the circumstances, maintain trover against the defendant for the removal of this timber from off the plaintiff's land.

I must order the sheriff to deliver up the timber to the plaintiff.

Order according.y.

In the Matter of Francis Martin.

9 Geo. II., cap. 30—59 Geo. III., c. 69—Foreign Enlistment Acts—Sufficiency of Warrant.

A warrant of commitment reciting that F. M. was charged on the oath of J. W., "for that he, F. M., was this day charged with enlisting men for the United States Army, offering them $350 each as bounty" without charging any offence with certainty, without stating that the men enlisted were subjects of Her Majesty, and without shewing that J. W. was unauthorized by license of Her Majesty to enlist, was *held* bad.

(Chambers, March 2, 1864.)

Robert A. Harrison, on 16th of February last, obtained from Mr. Justice Morrison, an order for a writ of *habeas corpus* to bring up the body of Francis Martin, alleged to be illegally in the custody of the sheriff of the County of Welland.

On same day the writ of *habeas corpus* was issued from the proper officer of the Court of Queen's Bench.

The writ was in the following form:—To the keeper of the Common Gaol, in and for our County of Welland, we command you that you have the body of Francis Martin detained in our said gaol under your custody, as it is said under safe and secure conduct, together with the day and cause of his being taken by whatsoever name he may be called in the same, before the Honorable the Chief Justice of Upper Canada, or other judge of one of the Superior Courts of Common Law for Upper Canada, presiding in Chambers at Osgoode Hall, in the City of Toronto, immediately after the

* See *Daniel* v. *Fielding*, 16 M. & W., 200.—Eds. L. J.

receipt of this writ, to do and receive all and singular, those things which our said Chief Justice or other judge shall then and there consider of him in this behalf, and have you then there this writ.

Witness, the Honorable William Henry Draper, C.B., Chief Justice of our said Court of Queen's Bench for Upper Canada, at Toronto, the 16th day of February, in the 27th year of our reign.

(Signed) CHA. C. SMALL.

Issued from the office of the Clerk of the Crown and Pleas in the Court of Queen's Bench, in and for the United Counties of York and Peel. (Signed) CHA. C. SMALL.

Per statutum tricesimo primo Caroli Secundi Regis.

(Signed) JOS. C. MORRISON, J.

On 29th February, the writ was returned by the gaoler to whom it was directed. The gaoler returned that Francis Martin was in his custody, under a warrant which was annexed to the writ.

The warrant was in this form:—

To all or any constables or other Peace officers in the County of Welland, and to the keeper of the Common Gaol of the County of Welland, in the said County of Welland. Whereas Francis Martin of the City of Toronto, was this day charged before me, one of Her Majesty's Justices of the Peace in and for the said County of Welland, at Clifton, on the oath of James Welch, of Montreal, and others, for that he, Francis Martin, was this day charged with enlisting men for the United States Army, offering them $350 each, as bounty. These are therefore to command you, the said constables or Peace officers or any of you, to take the said Francis Martin, and safely him convey to the Common Gaol at Welland aforesaid, and there deliver him to the keeper thereof together with this precept. And I do hereby command you the said keeper of the said Common Gaol, to receive the said Francis Martin into your custody in the said Common Gaol, and there safely keep him until he shall be thence delivered by due course of law. Given under my hand and seal this 6th day of February, in the year of our Lord 1864, at Clifton, in the said County of Welland aforesaid.

(Signed) JOHN BURNS, MAYOR.

Mr. Harrison, upon obtaining leave to file the writ and return, applied to have prisoner discharged from custody, upon the grounds,

1. That the Imperial Statute 9 Geo. II., c. 30, commonly called the Foreign Enlistment Act, was confined in its operation to Great Britain and Ireland.

2. That if ever in force in Canada, it has since been repealed by the Imperial Act of 59 Geo. III., c. 69, which is not in force in Canada.

3. That whether in force or not, the warrant under which defendant was in custody, was illegal, because it charged no offence with certainty, because the persons alleged to have been enlisted, were not shown to be subjects of Her Majesty, and because for all that appeared prisoner had a license from Her Majesty to enlist persons to serve a foreign power, United States of America.

JOHN WILSON, J.—I think the prisoner must be discharged. It appears to me, without determining the questions raised as to the Foreign Enlistment Act being or not being in force in Canada, that the warrant is defective for one or more of the reasons assigned against it. I may add that on this matter I do not rely upon my own judgment alone, but am supported by the opinion of the Chief Justice of the Common Pleas. The prisoner will therefore be discharged.

Order accordingly.

IN THE MATTER OF J. H. GREENWOOD, ONE, &c.

Bills of costs—Reference to taxation at instance of third party—Difference between Act of Upper Canada and English Act.

Where, on a settlement of several suits between the parties, it was agreed that defendant should pay, among other things, all the costs of every kind, including retainer's, for which the plaintiff was liable to his attorney, it was held that defendant, though he had not paid the bills, was entitled in an application against the attorney and his client, intituled in the matter of the attorney, to have the bills referred to taxation on the usual terms

Quære, is a defendant, under such circumstances, a party "liable to pay," within the meaning of sec. 38 of Con. Stat. U. C., cap 35.

(Chambers, March 3, 1864).

Mr. Hamilton, on 11th February, 1864, obtained a summons, calling upon *J. H. Greenwood*, an attorney of the court, to shew cause why certain bills of costs, alleged to have been delivered to Daniel Ebenezer Hedges, should not be referred to the Master for taxation.

The summons was obtained on an affidavit of Mr. Hedges, shewing that three bills of costs had been, in December, 1863, delivered to him by Mr. Greenwood, the attorney for the plaintiff, in three suits to which the bills referred.

The three suits were all brought by Mollison, as plaintiff, two of them against Hedges, as defendant, and the third against Elias Hedges, his father, as defendant.

The first bill was for a malicious arrest, in which the suit had gone as far as the declaration, and in which the costs were stated at	$73 87
The second was for trespass which had proceeded also as far as declaration, and in which the costs were stated at	58 87
The third was for trespass to goods, in which the suit had proceeded the same length, and in which the costs were stated at	58 87
A fourth bill of costs, in a suit in the county court, of D. E. Hedges against Mollison, was allowed to be added to this application, being the costs of defence, of which D. E. Hedges was also to pay. The suit went as far as pleas. The costs were stated at....	56 47
Total.....	$218 08

In each bill there was a large retainer as between attorney and client charged.

Hedges swore he became liable to pay the plaintiff's costs of suit by virtue of a special agreement between himself and the plaintiff, of which he annexed a copy to his affidavit, that Greenwood had notified him that unless the bills were paid to him, he would bring an action for the amount thereof.

The agreement was as follows:—

This agreement, made the sixteenth day of November, 1863, between David Scott Blacklaw Mollison, of the township of Mariposa, in the county of Victoria and Province of Canada, carpenter, of the first part, and Daniel Ebenezer Hedges, of the same township, county and province, yeoman, of the second part, witnesseth, that whereas the said party of the first part, did, heretofore, rent a farm from one Elias Hedges, father to the said party of the second part, and for which rented premises there will be due to the said Elias Hedges, the landlord, on or about the month of December next, the sum of one hundred and thirty dollars, or thereabouts.

And whereas the said Elias Hedges, and the said party of the second part, did, on or about the second day of October, last past, by distress for rent, and by their bailiff, seize on the goods and chattels of the said party of the first part, there being no rent due.

And whereas the said party of the first part, on such seizure, did employ an agent to transact for him business in the premises; and whereas such agent did so act, and was paid for such service by the said party of the first part.

And whereas a suit in the Superior Court has been instituted by the said party of the first part, against the said Elias Hedges, and also a suit against the said party of the second part, for damages for illegal seizure.

And whereas the said party of the first part had contracted with the said party of the second part, to do carpenter work to the amount of two hundred dollars, for the said party of the second part.

And whereas the said party of the second part, by writ of capias, did cause the said party of the first part to be arrested, and to be confined in the common gaol of the county of Victoria.

And whereas the said party of the first part did cause an action for malicious arrest and false imprisonment to be instituted against the said party of the second part.

And whereas the said parties hereto of the first and second parts are willing to privately settle and arrange the before-mentioned suits, and every thing arising therefrom, or thereout, or in any wise relating thereto, in a manner so as to avoid further litigation. And the said party of the first part proposes to the said party of the second part, that if he the said party of the second part will procure a clear receipt for all rent and arrears of rent due by the said party of the first part to the said Elias Hedges, and will also

give to the said party of the first part, a clear receipt for the two hundred dollars' worth of work before mentioned, and will also pay the costs incurred by the said party of the first part, and his loss of time and personal expenses in and about the premises, and will in addition thereto pay all the law costs and agencies fees of the said party of the first part, and all his retaining fees which he has made himself liable for, and all his agents' costs and charges, and all his attorneys' cost and charges, of every kind, that he the said party of the first part would thereon cause the said suits to be abandoned, and all further proceedings stayed, both against the said party of the second part, and against the said Elias Hedges. And the said party of the second part agrees to the before mentioned propositions in manner following, that is to say: that he the said party of the second part will pay the rent before mentioned, and get for the said party of the first part a receipt therefor, that the suit in the county court of Victoria, *Hedges* v. *Mollison*, is hereby cancelled and withdrawn, the debt of two hundred dollars on which said suit was instituted being hereby paid; that he will also pay all the agents' fees and charges in the premises, which were incurred by the said party of the first part; and will also pay all the attorneys' fees and costs of the said party of the first part, and also all agents' fees and costs, and all attorneys' fees and costs that he the said party of the first part is in any way liable for up to the present time, and will pay the retaining fee in *Mollison* v *Elias Hedges*, *Mollison* v. *Daniel E. Hedges*, and *Mollison* v. *Hedges*; and will also, as far as the costs of the party of the first part is concerned in the premises, and his loss of time and damage consequent on the arrest and proceedings before mentioned, submit the same to an arbitration, to be adjudicated on by three arbitrators indifferently chosen; and the said party of the first part agrees to each proposition; and it is agreed by and between the parties hereto, that the arbitration only applies to the personal costs of the party of the first pars, to his loss of time and dam ges before mentioned only.

It is further agreed that the costs of the party of the first part incurred by him, a bill of the same shall be furnished to the said party of the second part, by the agent or attorney of the party of the first part, within a reasonable time; and the parties are agreed to the several matters herein contained

In witness whereof the parties hereto have hereunto set their hands and affixed their seals, the day and year first above written.

Signed and sealed in presence of JOSHUA JOHNSTON, THOMAS SMITH. } (Signed) DAVID S. B MOLLISON, [L.S.] DANIEL E. HEDGES, [L.S.]

Robert A. Harrison showed cause. He filed an affidavit by Mr. Greenwood, to the effect, that he is a duly admitted practitioner of all Her Majesty's Courts in Upper Canada; that he was retained by Mollison to prosecute D. E. Hedges in two superior court suits, and also E. Hedges in the Queen's Bench; that the parties, or some of them, settled the suits about the 16th November last; that Mollison had paid and satisfied him for his costs, that he did not know anything of Hedges in the matter of his bills, nor were his bills by his instructions ever served on Hedges; that he sent his bills to his client Mollison, who, on the 2nd January last, paid and satisfied him for the same in full, and he was satisfied therewith, that he never notified Hedges that he would sue him for the amount of the bills if not paid to him, but he did notify him that he had been instructed by Mollison to proceed against him to recover the costs paid to him by his client Mollison; and that previous to the proceedings in the several cases referred to, his client Mollison gave him the written retainers annexed to the affidavit, and which retainers had been respectively paid to him by Mollison.

Mr. Harrison argued, that neither court nor judge had power to refer an attorney's bill to taxation, independently of Con. Stat. U.C. cap. 35 (*Weymouth* v. *Knight*, 3 Scott, 764; *Slater* v. *Brooks*, 9 Dowl. P. C. 349; *Ex parte Cardross*, 5 M. & W. 515. *In re Jones*, 3 U. C. L. J. 167; *In re Smith and Henderson*, 13 U.C.C.P. 262); that sec 38 of that statute commonly called "the third parties' clause," did not aid this application; that applicant was not a party "liable to pay, or who had paid," the bills within the meaning of that section; that it was clear he had not paid them; that he was not a party "liable to pay," because the liability intended was one to the attorney, and not the case of a mere volunteer, who, for purposes of compromise, had agreed, as between himself and the client, to pay the attorney's bill (*Longford* v. *Nott*, 1 Jac. & W. 291; *In re Becke & Flower*, 5 Beav. 406); that the cases to which he referred, decided under the corresponding English enactment, sec 38 of 6 & 7 Vic cap 73, were conclusive on the point, that the reference might in England be made under what is commonly called "the trustees clause" (sec. 39 of 6 & 7 Vic. cap 73), that for some reason or other the trustees clause had not been made a part of our act, that *Ex parte Glass*, 9 U. C. L. J. 111, is erroneous, because based on decisions had in England under "the trustees clause,' which is not in force in this country; that the attention of the learned judge who decided that case was not drawn to the fact that "the trustees clause" was not made a part of our act; that even if the reference could be made under our "third parties clause," it could only be successful in case the party chargeable himself made the application; that after payment he could not make it, unless under "special circumstances" (Con. Stat. U. C. cap. 35, sec. 42); and that no special circumstances were shown (*In re Kinnear*, 5 Jur. N. S. 423).

Mr. Hamilton supported the summons, contending that the third parties clause was applicable, and that if special circumstances were necessary to the success of the application, the enormous nature of the charges made were sufficient special circumstances.

ADAM WILSON, J.—The retainers in the four suits amount to $110; and the total amount which this distress for rent and arrest of Mollison appears to cost Hedges, is as follows:

The four suits	$248 08
Rent mentioned in the agreement	130 00
Carpenter's work released	200 00
	578 08
To which, from some memoranda on the papers, would appear to be also claimable the agent's costs	64 00
Mollison's account (referred to in the agreement) for his personal expenses	214 00
Making a total claim of	$856 08

imposed upon Hedges, besides all his own costs in these four suits and proceedings for some kind of action taken by him, which does not seem to me to call for such heavy vengeance.

These circumstances seem to me to entitle him to the protection of the court against such monstrous charges, so far as it is possible for the court or a judge to extend protection to him.

It is argued by Mr. Harrison that as Mollison has settled these bills with his attorney, so that he cannot call upon him to have them referred for taxation, so neither can Hedges call upon the attorney to refer them; and that under any circumstances Hedges cannot, under our statute, have these bills referred (even if Mollison could do so), because Hedges has not *paid* them.

The agreement referred to is drawn with extraordinary care to compel Hedges, among numberless other penalties, "to pay all the law costs and agency fees of Mollison, and all his retaining fees which he has made himself liable for, and all his agent's costs and charges, and all his attorney's costs and charges of every kind." So that it seems very improbable this could have been done, or was in fact done, without Mr. Greenwood's knowledge and advice, if it were not actually prepared and approved by himself. And as it is provided in this agreement that Mollison would furnish a bill of these costs to Hedges in a reasonable time, I must assume that Mr Greenwood knew, when he was furnishing these bills, he was furnishing them for the purpose of Hedges paying them according to the agreement. As they were delivered in December last, I cannot allow a supposed settlement between Mollison and Greenwood in February afterwards to be made for the purpose of excluding Hedges in any manner from the fullest revision of these bills, and as it may be necessary to have Mollison before me, I shall retain the present application, and enlarge it until Mollison can be called upon to show cause why the bills should not be referred to taxation.

If Hedges had been told, at the time of the settlement, how much his costs were, and had assented to them, and had paid them, or if Mollison had then paid the amount, I should not have felt at liberty to re-open the matter; but when it does not appear that Hedges knew anything of the amount, or, even if he did, that he is yet concluded from disputing it, so long as it has not been paid by him, I think I am not warranted in refusing a reference.

The control exercised by the court over its own officers is for the protection of suitors; and an attorney can no more insist upon an

exhorbitant damand, if it be one, because he has it in writing, than he can do so when he has no writing whatever If a writing were to be a protection to the attorney, he would be as thoroughly beyond the control of the court as if he were a stranger to, instead of being an officer of the court, and exemption has never been claimed to such an extent as this yet.

I do not think it necessary at present to express any opinion upon the other very important point raised by Mr. Harrison.

On the 24th February, Mr. Justice Adam Wilson granted a summons to the applicant entitled in the matter of the attorney, calling upon Mollison to show cause why the several bills of costs rendered by Greenwood to Mollison, and delivered to Hedges, should not be referred to the master for taxation, and at the same time ordered the former summons, calling on the attorney, to stand enlarged until the return of the second summons.

On the 2nd March both summonses were returnable in Chambers before Mr. Justice John Wilson, who was then in Chambers.

Robert A. Harrison shewed cause as well for Mollison as for Greenwood. He filed on the part of Mollison an affidavit of Joshua Johnston, wherein it was sworn: That on or about the fifth day of October last past, Mollison employed him, deponent, as his agent, to attend to a certain matter for him, wherein Elias Hedges and Daniel E. Hedges had by distress for rent seized the goods and chattels of Mollison; that at the time above referred, Mollison gave to deponent the inventory and notice which was served on him, Mollison, by the bailiff who acted for Hedges; that the said inventory and notice stated that the seizure before referred to was made for arrears of rent due in the month of December previous, whereas there was no rent due, Mollison having paid the same and produced to deponent a receipt for all rent due up to the 1st of March, 1863, and signed by the landlord, Elias Hedges; that at or about the time Mollison (who is a carpenter by trade) rented the farm from Elias Hedges, he, Mollison, purchased goods and chattels consisting of horses, harness and waggon, with other farming implements, from Daniel E. Hedges, the son of Elias Hedges, amounting to the sum of two hundred dollars, and which amount Mollison agreed to pay to Hedges in carpenter work, and which work was to be done and performed in one year thereafter; that Hedges did not require the work to be done within the time limited for the performance of the same, and requested Mollison to extend the time for a year longer, and Mollison consented thereto; that before the seizure before mentioned, Hedges required Mollison to give his note for $200, payable in one year after date, instead of the carpenter work before mentioned, but Mollison refused to pay for the goods and chattels in any other way than in carpenter work, as was agreed on; that subsequent to the periods in the preceding paragraph mentioned, Daniel E. Hedges informed deponent that he, Hedges, was advised to join in the warrant with his father (the real landlord), so that Mollison could not make a witness of Daniel E. Hedges, in the matter of the rent claimed to be due by Mollison to Elias Hedges, by virtue of a certain memorandum by way of lease, made by and between Mollison and his landlord, E. Hedges, and to which memorandum of lease D. E Hedges was the only subscribing witness, that the seizure before mentioned was made as deponent verily believed, for the purpose of bringing a pressure to bear on Mollison, to compel him to give his note for the goods and chattels before mentioned; that E. Hedges and D. E. Hedges did not sell the goods and chattels seized before mentioned, but did, on the 7th day of October last, surrender the same, that being the day on which they were advertised to be sold, that, on the 8th day of October last, D. E. Hedges did, at the town of Lindsay, make oath that Mollison was about to abscond, whereupon a capias was issued on the ninth day of October, and the sheriff of the county of Victoria, arrested Mollison and conveyed him to the common gaol of the county of Victoria where he was kept confined for eight days, at which time he was liberated on bail; one Reuben King, a farmer, residing in the township of Mariposa, in the county of Victoria, and who is a man of irreproachable character, and whose truth and veracity cannot be doubted did make affidavit before deponent to the following effect, namely: That he saw D E. Hedges, when going to the town of Lindsay, on the 8th of October last, that Hedges informed him, King, that his seizure of the goods and chattels of Mollison was illegal, and that he was forced to surrender the goods and chattels, and that Hedges further said, that he, Hedges, would capias Mollison, and that he would put him in a tight place, that Mollison employed deponent to retain for him John Hamer Greenwood, attorney at law, to attend to his interests in the premises, and that at such request, deponent communicated with the said Greenwood that in consequence of the said Mollison residing at a considerable distance from any county town, and it being inconvenient for him to attend to all matters himself, and so much as to insure on the part of Greenwood extra diligence, and at the smallest trouble possible to Mollison, he agreed and bound himself to pay to Greenwood a retaining fee in each suit over and above his costs; that the following actions at law were instituted, viz., *Mollison* v. *Elias Hedges*, illegal seizure, and *Mollison* v. *Daniel E. Hedges*, malicious arrest and false imprisonment, and by D. E. Hedges *Mollison* ats *Hedges*, capias; that in each of the causes of the next preceding paragraph mentioned, Mollison gave a retainer to the said Greenwood, and deponent wrote the same; that they were given on the day of the date thereof, that on the sixteenth day of November last, or thereabouts, deponent first spoke to Daniel E. Hedges, he having requested Mollison to stay proceedings and settle all matters, and he also expressed his regret that he acted as he had done, but he excused himself that he got bad advice from his advisers; that Mollison for a length of time refused to compromise, he feeling very indignant and outraged at the course pursued by Hedges, and which Mollison declared to be an outrageous persecution, that deponent advised Mollison to settle with the Hedges; that deponent wrote the agreement entered into between the parties; that deponent, wrote down as nearly as possible the agreement as made; that deponent read it over at least twice, slowly and distinctly, to the parties, before they executed the same; that they clearly and distinctly stated that the agreement was correct and as they made it, and that they understood the same; that Greenwood did not dictate the agreement, that he was not present when it was written; that he did not know the terms of settlement; and that he had not anything to do with it in any way or manner; and that deponent, as Mollison's agent, wrote the agreement; that some time subsequently, the said Greenwood sent to deponent bills of costs to be given to Mollison, and which bills deponent afterwards, as Mollison's agent, delivered to D. E. Hedges, requesting payment of the same.

Mr. Harrison argued before Mr. Justice John Wilson, to the same effect as he had done before Mr. Justice Adam Wilson.

C. S. Patterson supported the application.

John Wilson, J.—I have consulted Mr. Justice Adam Wilson. We have come to the conclusion that there ought to be a reference in this matter, and that the reference ought to be on the usual terms. If Mr. Greenwood is dissatisfied, he must take the opinion of the Court on the questions raised by his counsel.

In re William Ross.

Habeas corpus—Sufficiency of materials—Effect of defective materials—Sufficiency of commitment in default of sureties to keep the peace—Power of judge in chambers.

Held, 1st. That the affidavit upon which an order for a writ of *habeas corpus* is moved should be intitled in one or other of the Superior Courts.

Held, 2nd. That as a general rule the affidavit should be made by the prisoner himself, or some reason, such as coercion, &c., shown for his not making it

Held, 3rd. That it is discretionary with the judge to whom the application is made to receive an affidavit of a different kind

Held, 4th. That it is sufficient to return to a writ of *habeas corpus* a copy of the warrant under which the prisoner is detained, and not the original

Held, 5th. That a commitment in default of sureties to keep the peace should show the date on which the words were alleged to have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily fear.

Quære. Can a judge in chambers rescind his order for a *habeas corpus*, or grant the writ itself on the ground that it issued improvidently.

Quære also Has a judge in chambers power, by summons to call upon the prosecutor or magistrate to shew cause why a writ of *habeas corpus* should not issue instead of at once ordering the issue of the writ.

[Chambers, March 3, 1864.]

M. C. Cameron, Q. C., on the 29th of February last, had made application to Mr. Justice John Wilson, sitting in Chambers, for an order for a writ of *habeas corpus*, directed to the gaoler of the county of Waterloo, to bring up the body of William Ross, detained in illegal custody as it was alleged.

The application was made upon an affidavit (not intitled in any court) the gaoler of the county of Waterloo, to the effect that on the 25th of February, William Ross was delivered into his custody by Thomas Armstrong, a constable, under and by virtue

of a warrant of which he annexed a true copy, and that William Ross was not detained in his custody under any other process, civil or criminal.

The order was made, and on the same day a writ of *habeas corpus* was issued from the Court of Queen's Bench, directed to the gaoler at Berlin, commanding him forthwith to bring up the body of William Ross.

Robert A. Harrison, on the 1st of March, upon reading the affidavit on which the order was made, and the order itself, obtained from Mr. Justice Adam Wilson a summons, returnable on the next day before Mr. Justice John Wilson, calling upon William Ross, his attorney or agent, to shew cause why the order of Mr. Justice John Wilson should not be set aside, and all proceedings subsequent thereto, including the issue of the writ of *habeas corpus*, upon the grounds:

1st. That said order was made without any affidavit intitled or styled in this court being first filed on the application for said order.

2nd. That said order was made without an affidavit of said William Ross first being filed, or it being first shown that he was coerced and unable to make an affidavit.

On the 2nd of March the gaoler returned that he had the body as he was commanded, and that the cause of his detention was a warrant, of which he annexed a copy to the writ. The warrant was in this form:

PROVINCE OF CANADA, County of Waterloo, to wit: } To the constable of Berlin and to the keeper of the common gaol of the said county at Berlin in the said county of Waterloo: Whereas on the twenty-fifty day of February, instant, complaint on oath was made before the undersigned, one of Her Majesty's Justices of the Peace in and for the county of Waterloo, by James Glennie, of the township of Woolwich, said county and Province, that William Ross, of the same place, in the county aforesaid did (omitting date) threaten to take revenge on said James Glennie, that he had an instrument, showing a revolver, and would use it in some convenient place (omitting statement of fear of bodily injury). And whereas the said William Ross was this day brought and appeared before me the said justice to answer unto the said complaint, and having been required by me to enter into his own recognizance in the sum of £200, with two sufficient sureties in the sum of £100 each, as well for his appearance at the next general quarter sessions of the peace to be held in and for the said county of Waterloo, to do what shall be then and there enjoined him by the court as also in the meantime to keep the peace and be of good behaviour towards Her Majesty and all her liege people and especially towards the said James Glennie, and the said William Ross hath refused and neglected and refuses and neglects to find such sureties. These are therefore to command you, the said constable of the town of Berlin, to take the said William Ross and him safely convey to the common gaol at Berlin aforesaid, and there to deliver him to the keeper thereof together with this precept: and I do hereby command you, the said keeper of the said common gaol, to receive the said William Ross into your custody in the said gaol, there to imprison him until the said general quarter sessions of the peace, unless he in the meantime find sufficient sureties as well for his appearance at the said sessions as in the meantime to keep the peace as aforesaid.

Given under my hand and seal this twenty-fifth day of February, in the year of our Lord 1864, at the village of Conestogo, in the county aforesaid. [Signed,] WILLIAM HENDRY, J. P. [L.S.]

Mr. Cameron asked leave to file the writ and return, and having done so moved for the discharge of the prisoner upon the grounds:

1st. That the warrant did not contain the day on which the alleged threatening words were used, and for all that appears they were too remote to cause a present apprehension at the time the information was laid.

2nd. That the warrant omitted all mention of fear or apprehension on the part of James Glennie, at the time the information was laid.

It was then agreed that the summons to set aside the *habeas*, and the prisoner's right to his discharge under the *habeas*, should be argued together.

Mr. Harrison contended that the writ was issued improvidently and should be quashed, or the order for it rescinded upon the grounds.

1st. That the affidavit, not being intitled in any court, was not such an affidavit as perjury could be assigned upon, and therefore was no affidavit, citing *In re Eccles*, 6 U. C. L. J. 59; Con. Stat. U. C. ch. 24, sec. 6; *Palmer* v. *Rodgers*, 6 U. C. L. J. 188.

2nd. That the affidavit, even if properly intitled, not being made by the prisoner himself, and it not being shown that he was coerced or unable to make an affidavit, was insufficient, citing the case of the *Canadian Prisoners*, 5 M. & W. 32.

He also objected to the return as insufficient because a copy only and not the original was returned, and for all that appeared the original was without a seal.

He argued against the prisoner's discharge:

1st. That the date was immaterial, that the court could not and would not presume a remote date, but rather that the date was so recent as to justify the magistrate in what he had done, and cited *The King* v. *Tregarthen*, 5 B. & Ad. 678; *The Queen* v. *Dunn*, 12 Ad. & El. 599.

2nd That it was enough for the warrant to show words calculated to produce a breach of the peace, without in so many words shewing actual apprehension of bodily injury, that the object of the proceeding was to prevent the commission of a crime involving an assault, that the words used indicated an intention to commit a crime of that nature, and that the effect of the commitment was to prevent that intention being carried into effect, citing *Haycock* v. *Spark*, 1 El. & B. 471, 478, 482, 486, 487; *Burns*, Justice, "Surety to keep the Peace."

M. C. Cameron, contra, argued that the order for the writ might be made without any affidavit; that the affidavit used, though not intitled in any court, was a sufficient affidavit; that it was in the discretion of the judge to have required an affidavit made by the prisoner himself, that having dispensed with it it was too late after issue of the writ to raise the objection; that the return was sufficient, though not having the original warrant annexed; that the uttering of the words involving the threat, and not the warrant, was "the cause of the detention", that the warrant was rather "the means" and not the "cause" of the detention; that the warrant was defective for the two reasons assigned, as might be seen by reference to Con. Stat. Can. p. 1131, 1132, that a blank is there left for the date of the speaking of the words, and that as to the fear it is there stated, "and that from the above and other threats used by the said A. B. towards the said C. D., he the said C. D. is afraid that the said A. B will do him some bodily injury and therefore pray, &c." He cited *Eden's* case, 2 M. & S. 226; *Nash's* case, 4 B. & Ald. 295; *Souden's* case, 4 B. & Ald. 294.

JOHN WILSON, J., having heard the argument, remanded the prisoner to the custody of the gaoler of the county of Waterloo, to be by him delivered to the gaoler of the united counties of York and Peel for safe custody till next morning, then to be produced before him in Chambers to hear judgment.

JOHN WILSON, J., 3rd March, 1864—I think the objection to the affidavit, that it is not intitled in any court, a good objection. Had my attention been drawn to that fact at the time application was made to me for the writ, I most certainly should not have made the order. As a general rule also the affidavit should be made by the prisoner himself, or reason shewn why he does not and cannot make an affidavit. Still I apprehend it is in the discretion of the judge to receive an affidavit of a different kind. Whether I should have done so or not at the time the application was before me, had my attention been directed to the fact that there was no affidavit made by the prisoner, I need not say.

I think the writ issued improvidently; but I am not sure that I can now quash it or rescind my order upon which it issued. Even if it were clear to me that I had the power, I do not know that I would exercise it now that the writ has been returned and filed, and the prisoner is here awaiting my judgment.

In England I find it is often the practice, instead of allowing the writ to issue in the first instance, to grant a rule *nisi* only. Had that been done here the writ would not have been issued upon the defective materials. Whether a judge in Chambers can grant a summons only for the writ is a question. I have not found the report of any case in England where a judge in Chambers has done so. I intend to bring this matter before my brother judges in order that some settled practice may be agreed upon in regard to the issue of writs of *habeas corpus* in Upper Canada.

In the meantime I must order the discharge of this prisoner. I

think the warrant bad upon both grounds of objection against it. In my opinion it should have contained the date on which the words were alleged to have been spoken, and also a statement to the effect that complainant was apprehensive of bodily injury. Both seem to be required by the forms of information and warrant given in Con. Stat. Can p. 1133, and neither ought, I think, to be dispensed with. Let the prisoner be discharged.

Order accordingly.

CHANCERY.

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

MUNSON v. HALL.

Partnership—Principal and agent.

By articles of agreement entered into by several persons, it was stipulated that one of them should furnish the premises, in which to carry on the business at a stipulated rental, and capital for carrying on the business at a certain rate of interest, and that he should receive a stipulated sum annually for his time and expenses, and the others certain stipulated sums, together with a certain proportion of the net profits: *Held*, this contract had the effect of creating a special agency, not a partnership, between the parties.

The bill in this cause was filed by Roswell Carter Munson against Joseph Hall, praying an account of certain partnership dealings between them and certain other persons; that an injunction might issue against the defendant from collecting, alienating and intermeddling with the assets of the partnership, and that a receiver might be appointed on the grounds stated in the bill; that defendant was a citizen of and resided in the United States of America, whither it was alleged he was about removing the assets of the firm, and had excluded the plaintiff from all arrangements of the partnership affairs.

The defendant answered denying that a partnership had ever existed between him and the plaintiff and the other persons mentioned in the pleadings, and that plaintiff, in acting under the agreement, was so acting only as the agent of the defendant. The agreement under which the transactions took place was as follows:

"This memorandum of agreement, made this first day of January, 1862, between Joseph Hall, of Rochester, New York, of the first part, and R. C. Munson, Ira S. Otis, and C. R. Cook, of the second part, of the village of Oshawa, Canada West, witnesseth, that for the purpose of carrying on a manufacturing business similar to that carried on by the party of the first part during the past three years, the party of the first part agrees to furnish the premises, machinery, and tools now owned and occupied by him in the village of Oshawa at an annual lease of $2,200, and also furnish capital for carrying on the business at an interest of seven per cent.; said Hall determining the amount and kind of business to be done, and receiving a salary of $500 per annum for time and for expenses to Oshawa and about Rochester; extraordinary expenses to be charged additional.

"The parties of the second part agree to render their time and services in managing and conducting the business carried on, receiving therefor each as follows:—said Munson $500 and one-fourth nett profits; said Otis $800 and one-eight nett profits, at the expiration of each year. This contract to continue in force three years unless written notices be given by one of the parties within two months of the expiration of each year; said party of the second part agree to furnish a statement of the transactions of business each month.

"It is agreed between the parties that the machinery, except the natural wear and tear, shall be kept in repair at the expense of the business.

"It is further agreed between the parties that the portion of premises now occupied by A. S. Whitney & Co. do not come into the possession of said business, nor the rents, until the first day of July, 1862; but the business shall receive a proportional cost of expense furnishing power to said Whitney & Co.

"It is further agreed that the party of the first part shall receive the capital advanced by him out of the proceeds of the business first, and that the rent shall be paid on the 1st July and 1st January of each year."

It appeared that Otis and Cook had assigned all their interest under this agreement to the defendant.

The question principally discussed at the hearing was whether a partnership had existed between the parties, or whether they stood in the relation of principal and agent to each other.

The cause came on to be heard before his Honour V. C. *Esten*, at the sittings of the court in the town of Whitby in October, 1863.

Blake, for the plaintiff.

Fitzgerald for defendant.

After taking time to look into the evidence

ESTEN, V. C.—Upon the question whether the agreement in this case constitutes a partnership or special agency different minds might well arrive at different conclusions. The construction of the agreement is extremely doubtful, and either view might be adopted with much reason. I am bound to to say, however, that I have great difficulty in distinguishing this case from *Kurtsch* v. *Schenck*, 18 L. J. N. S. Ch. 386. I think the agreement must determine the relation of the parties, as the answer does not suggest that it was not correctly drawn or did not truly express their intention: and even if it did, the evidence is altogether too slight to vary the written instrument. Upon the whole, however, I incline to the opinion that it created a special agency, and not a partnership. Fortunately the result is the same, or nearly the same, whichever construction is adopted. The only difference that occurs to me is, that in case of a partnership and in regard to unfinished stock after a deduction for labour and expense bestowed upon it by Mr. Hall, the whole value would belong to the partnership, whereas in case of a special agency the agents would be entitled only to a share of profits arising from the time, labour and expense bestowed previously to the termination of the agency. I think the agents were entitled to shares of the profits, and were liable to third parties as partners upon the authority of the cases cited by Mr. Fitzgerald. Their right to a portion of the profits gave them an interest in the things from which the profits are to arise, namely, the debts and the stock unsold. They have a right to see that the debts are judiciously and carefully collected, and the unsold stock, finished and unfinished, disposed of to the greatest advantage so as to yield the greatest amount of profit. This circumstance alone, it would seem, would give a right to a receiver and injunction. But Mr. Hall, acting doubtless in good faith, excluded the plaintiff from this interest—claimed the property as his own absolutely, and insisted that the plaintiff should look to him personally for his remuneration. With regard to the stock remaining at the termination of the business, I presume it must be now nearly if not entirely consumed. No good would be done to the plaintiff but much harm to the defendant by stopping his trade in order to separate what remains from the new stock, which if effected, it would be difficult to dispose of, and it would be better for the defendant to use and account for it.

The agreement created a special agency with a right to a share of the profits and a consequent interest in the proper disposition of the stock.

Decree for account of transactions to 1st of January, 1863, and of dealings with stock, finished and unfinished, since. Master to apportion profits of unfinished stock between old and new business. Further directions reserved.

A receiver will be appointed, and an injunction will go as to debts due in respect of the year's business.

CARROLL v. PERTH.

Injunction against municipality—Void by-law.

Where parties complaining of the illegality of a by-law of a municipal corporation permit a term of the courts of common law to pass without moving therein to quash it, this court will refuse to interfere by injunction to restrain the municipality from proceeding to enforce the provisions of their by-law.

This was a bill filed by *John Carroll*, and others on behalf of themselves, and all others, the ratepayers and inhabitants of the county of Perth; the Stratford gravel road, and several of the township corporations praying, amongst other things, to have the by-law of the county, therein mentioned (and known as by-law No. 91) passed for the purpose of constructing certain roads in the county, declared illegal and void, and to restrain the muni-

cipality from acting on such by-law, and from making, issuing, or negotiating any of the debentures ordered by it to be issued.

A motion was made upon notice, before his Lordship, the Chancellor, for an injunction, in the terms of the prayer of the bill, which application was refused, liberty being given, however, to the plaintiffs to put the cause in the list of causes for re-hearing and which, accordingly came on before the full court.

Strong, Q. C., and *Blake* for the plaintiffs.

McLennan, contra.

The judgment of the court was delivered by

VANKOUGHNET, C.—When this case was before me on the motion for an injunction to restrain the defendants from acting on their by-law, passed the 16th September, 1863, and numbered 91, I expressed an opinion that the by-law was bad, on the ground that it was not based on the assessment as made and revised last before the by-law was passed, but I refused the injunction at the instance of the plaintiffs, because I thought they had not come for it as promptly as they should have done, and had waited till after a term in the common law courts had elapsed, during which the validity of the by-law might have been tested before one or other of those tribunals, specially charged with the cognizance of such matters, and all necessity for the aid or intervention of this court thus have been avoided. On this rehearing my brothers, with myself, are of opinion that the by-law is invalid, on the ground mentioned, and we have not considered it necessary, therefore to examine any other of the objections to it. They, however, think that the plaintiffs may have been misled by the action of the court in *Smith* v. *Renfrew*, before my brother *Esten* and by the absence. hitherto, of any rule requiring parties to proceed at the earliest opportunity to obtain the action of a court of law, and that to refuse intervention, therefore, in the present case, might be acting somewhat hastily. I yield to this view, but with some reluctance. The bill in this case was filed on the 20th October. Nothing new has transpired since; nothing has been added to the plaintiff's case. A term of the common law court intervened before this motion was made, and a prompt application then and there would have rendered the action of this court unnecesary. Our jurisdiction in such matters, it seems to me, is essentially preventive, and, therefore, ancillary. It should only be invoked and employed where absolutely necessary; and this cannot be where the parties seeking it might have gone to the proper tribunal, and had removed or abolished the enactment which they ask this court to restrain the use of till its validity can be ultimately settled. The remedy by application to the courts of law is speedy and inexpensive, compared with proceedings in this court. That remedy might have been pursued last term in this matter, and this court relieved of the trouble, and the parties of the expense, of an application here. When there has been no opportunity to apply to a court of law, the exercise of the jurisdiction of this court, by way of prevention, may be most salutary, and even where there has been opportunity, and no default in the parties applying, the court may, under special circumstances deem it right to interfere; but certaintly not at the instance of any rate-payer who might have gone to law, and had the matter settled there, instead of coming into this court, and placing it in the embarrassing position of restraining action on a doubtful by-law, which may be afterwards upheld by the court which is moved to quash it.

McANANY v. TURNBULL.

Statute of Frauds—Equities before 1816—Sale of right to dower under Execution—Costs.

The several parts of a contract not taken out of the Statute of Frauds by part performance, must be proved by writing.

There being no court of equity in 1816, makes no difference in the rights of a purchaser at that time, as all that can be said is, that the laws of the Province had not then provided the machinery for dealing with equitable rights

A mere right to dower is not such an estate or interest in land, as can be seized and sold by the sheriff under an execution.

The sole defence having failed and the grounds on which, on rehearing judgment, defendants favour rested, were not here pointed to by defendant, the bill though dismissed was dismissed without costs.

The plaintiff filed his bill, as having acquired the title to dower of Agnes Smith, widow of Robert Smith, in a parcel of land in the Town of Belleville, against the defendant, as claiming under one to whom Robert Smith conveyed the land after his marriage with Agnes.

The defendants case at the hearing, was, that before his marriage, Robert Smith had contracted to sell the land in question to Kimmerly and Hubbard, under whom he claims.

The material dates were contract of sale before or on 12th September, 1816, Robert Smith not having then received a patent from the Crown; issue of the patent to Robert Smith on 30th November, 1816; marriage 4th April, 1817; conveyance to Robert Smith to Kimmerly and Hubbard, the 17th of the same month.

It was admitted that the puchase money was paid to Robert Smith, before the marriage.

The contract or memorandum set up, read as follows:—"Memorandum of agreement, entered into at Thurlow, the twelfth day of September, 1816, between Andrew Kimmerly and John Hubbard of the one part, and Robert Smith of the other part, as follows—the said Kimmerly and Hubbard having purchased of Robert Smith, lot number twenty-four, situate in the village of Belleville, together with the buildings thereon standing, it is mutually agreed upon by the said parties, that the said Robert Smith is to remain in possession of such part of said premises, as are occupied as a dwelling house (until he prepares another place of residence) free of rent. It is also understood and agreed upon, that whatever expenses may attend the finishing off of the kitchen in the rear of the house, agreeable to the mode intended by the said Smith, are to be paid to the said Smith by the said Kimmerly and Hubbard, and at the nett price of the materials and work required."

Strong, for plaintiff; *English*, for defendant.

SPRAGGE, V. C.—This paper, it is to be observed, is silent as to any consideration paid or to be paid. It is said for the defendant that it assumes that the consideration, the purchase money, had already been paid. If it had been a contract to convey, there would be room for such construction. But it is not. It is only an agreement, collateral to contract of sale, which it recites, in relation to possession, and the finishing of a kitchen The contract of sale itself, whether verbal or in writing, may, consistently with this instrument, have been silent as to consideration, or may have provided for its payment at a future time.

The legal estate being in Robert Smith at the time of the marriage, the defendant must shew that the equitable estate was in those under whom he claims; and to do this, must establish, I apprehend, that there was a binding contract of sale, enforceable in equity. The paper which I have referred to, would be, I think, a sufficient memorandum or note within the Statute of Frauds, though not itself a contract of sale: if the consideration had been expressed; but without that, it is imperfect. Part performance by possession is urged; but it does not appear whether the possession was before or after the marriage. But suppose possession proved, there is still wanting evidence of a perfect contract by parol or otherwise, because the price of the thing sold is not proved. It may be that the price was to be ascertained in some way which the court cannot execute.

It must then rest upon this, that as a fact, the purchase money whatever the amount was, was paid before the marriage. It has been decided that payment of purchase money, is not part performance to take the case out of the statute. But the purchaser's position would be this, he had a sufficient writing within the statute, except as to one point, the consideration, and that it might be agreed had become immaterial, because, whatever it was, it had been paid. But I am not satisfied with this reasoning; because, the contract not being taken out of the statute by part performance, the several parts of the contract must be proved by writing, one as much as the another; in proving payment of the purchase money, the *amount* of that purchase money is of course essential, and that would be proving one term of the contract by parol.

I do not agree in the plaintiffs contention that there being no Court of Equity in Upper Canada at the date of these transactions, can make any difference in the rights of the purchaser. All that can be said is, that the laws of the Province had not at that time, provided the machinery for dealing with equitable rights.

But I think I ought not to conclude the defendant by the evidence now before me I have very little doubt that there was a contract of sale before the marriage, and think it very probable that

it is capable of proof, by evidence of possession or otherwise, and it may properly, as this is a motion for decree, be by affidavit; but it must be upon payment of the costs of the day, which I fix at £2 10s.

The cause being reheard, the judgment of the court was delivered by the chancellor.

VANKOUGHNET, C.—The only position taken before us by the defendant, is that the land out of which dower is bought, had been sold by the husband prior to his marriage with the widow, whose right to dower the plaintiff claims to have acquired by virtue of a sheriff's sale and deed. As such assignee he asks that the dower may be set out as assigned.

We were of opinion at the close of the argument, that the alleged sale was not supported in proof, and that this the only defence urged to us, failed.

The court, however, doubted whether the sheriff could sell this right to dower, and having given the learned counsel for the plaintiff, an opportunity of sustaining the sale if he could, and heard his argument thereon, we are of opinion, that the sheriff's sale did not pass any interest to the plaintiff.

It is clear that at Common Law, such right would not be saleable. The widow has no estate in the land till her dower is assigned to to her. She has not even a right of entry. The freehold falls at once upon the heir, who holds it in its entirety till the dower is assigned. Until then, the widow really has nothing in the land. She merely has a right to procure something, viz., dower. She cannot until assignment, enter upon the land or any portion of it, or assert any description of right in it, except by action to procure an assignment. She is a mere stranger to it, and like any other stranger, a trespasser if she ventures upon it (Parke on Dower, 283, 268, *Smith* v. *Angel*, 7 Mod. 40; *Rex* v. *Inhabitants of Northweald, Bassett*, 2 B. & C. 724; *Rex* v. *Inhabitants of Berkswell*, 2 B. & C. 542). This right she may now assert. She may not choose to disturb the heir or interfere with his freehold; and if she does not, who at law can do so for her? I asked in the argument if there was any instance to be found of an assignee of a doweress bringing a writ of dower in his own name? None such was shown, and I am not aware of one.

This being the position of the right to dower at Common Law, it is nevertheless contended that it may be sold under the 5 sec. of ch. 90 of the Consolidated Statutes of U. C., as being "a contingent, an executory, or a future interest, or a possibility coupled with an interest in land." We think not Looking at the character of the inchoate interest which a widow has before the assignment of dower, we do not think it falls within the meaning of the words quoted. If it is an interest at all, it is not a future but a present interest. It is not contingent or executory, in the sense in which the legislature use these words, because it is only by reason of the exercise of the right being dependant on her own will, that it can, if at all, be called contingent or executory. Those words, we think, must be treated as having been used by the legislature in reference to certain estates and interests well known to the law as expressed or covered by them, among which a right to call for an assignment of dower, was never classed. It is clearly not a possibility coupled with an interest; nor is it a right of entry which does not arise till the assignment has been had.

We think therefore, that the plaintiff has acquired no right to demand an assignment of dower, and that his bill must be dismissed; but without costs, as not only did the sole defence fail, but the ground on which our judgment rests was not even pointed to by the defendant.

Per cur.—Bill dismissed without costs.

CHANCERY CHAMBERS.

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

THE MERCHANTS' BUILDING SOCIETY v. HAYES,

Practice—Party made in master's office—Service upon, by advertising.

Service upon an absconding defendant, made a party in the master's office, ordered to be made by publishing master's notice in newspapers.

S. G. Wood, for plaintiffs, moved on affidavits for an order directing that service upon D. K Feehan, made a party defendant in the master's office, should be effected by advertising.

The affidavits shewed that D. K. F., had left or absconded from Toronto several months ago, and set forth in detail various inquiries respecting him and his present place of abode, made at his last places of business in Toronto, and from friends and persons connected with him in business and otherwise in that city. They also stated that inquiries had been made as to his wife's residence, and that she was believed to have joined her husband. Also that ineffectual inquiries had been made for him at an hotel in New York, where he was supposed to be.

The affidavits shewed that no information could be obtained as to his whereabouts, though it seemed probable that he had been in New York, and was still there or in some other part of the United States.

VANKOUGHNET, C., granted an order, that the master's notice to incumbrancers should, together with the order, be served by being published in a Toronto newspaper and in one published in New York, for four weeks preceding the day fixed by the master's for proceeding with the inquiries in his office.

HARKIN v. RABIDON.

Attachment for costs—Liability of sheriff for an escape—Measure of damages.

Costs were ordered to be paid, and in default attachment issued, (prior to 22 Vic., ch 33) under which the sheriff arrested the defendant, and accepted bail to the limits, from which he escaped.

Held, that the sheriff was personally liable for the damage occasioned thereby, to be measured by the value of the custody.

Held, also, that issuing a *fi. fa.* for these costs had not waived the right of plaintiff to apply against the sheriff.

The plaintiff obtained a decree in this cause, with costs, against the defendants, as is reported in Grant's Ch. Rep., vol. viii., p. 243.

The defendant Rabidon, being served with this decree, made default in the delivery and execution of deeds, as directed thereby, and also in payment of the costs taxed, and an attachment issued in the month of June, 1858, directed to the sheriff of Essex.

The sheriff, soon after, made his return of *cepi corpus*. In the month of October following the plaintiffs learned that the sheriff had taken bail to the limits, that the defendant had escaped, and had removed to the state of Michigan, thereupon, the plaintiffs' solicitors wrote to the sheriff, expressing their dissatisfaction with this step, and explaining the reasons on which they objected, and especially because the defendant had been ordered to deliver up and execute deeds, as well as pay the costs, which had not yet been complied with.

After this, a writ of sequestration and a writ of *fi. fa.* goods issued, upon which the sheriff made a portion of the costs, leaving £35 8s. 3d. due.

The plaintiffs then applied on notice, supported by affidavits, for an order to compel the sheriff to pay this sum, and the costs of application, alleging that he had, without the authority of the court, or consent of the plaintiffs, permitted the escape. The other material facts are stated in the judgment

J. C. Hamilton, for the plaintiffs, cited *Solly* v. *Greathead*, 11 Vesey 170; *Brown* v. *Paxton*, 19 U. C. Q. B. 426, (afterwards reversed on appeal); *Collard* v. *Hare*, 5 Sim. 10; Beames on Costs, 352; Smith's Chancery Practice, edition of 1857, p. 118, and Daniel's Chancery Practice, edition of 1857, p. 118, and Daniel's Chancery Practice, p. 325.

Douglas, contra, contended that this court will now view with more leniency than formerly such unintentional breaches of duty. The sheriff is shewn by the evidence to have acted under the advice of counsel, and with the conviction that he had fulfilled his duty when he had taken bail, which he is now ready to assign to the plaintiffs. He contended that at law the plaintiffs would be entitled to claim from the sheriff only so much of the amount due as they can prove the defendant's custody to have been worth at the time of his escape; that action on the case, not action of debt, would lie at common law. He cited *Morris* v. *Hayward*, 6 Taunton 569; *Kerr* v. *Fullarton*, 10 U. C. C. P. 250, (affirmed on appeal); *Calcutt* v. *Ruttan*, 13 U. C. Q. B. 220, Imperial Act, 5 & 6 Vic. ch. 98, sec. 98, and 20 Vic., ch. 57.

ESTEN, V. C.—This is an application to make the sheriff of the county of Essex pay the sum of about thirty five pounds costs, directed by the decree of this court to be paid by the defendants to the plaintiffs. The grounds of the application are, that the

sheriff permitted the defendant Rabidon, after he had been arrested under an attachment for disobedience to the decree to be at large. The decree directed the defendant Rabidon to execute a conveyance of the lands in question to the plaintiffs and both defendants to pay the costs of the suit. This decree not having been obeyed an attachment issued, under which the defendant Rabidon was arrested. This occurred in July, 1858. In October of the same year, the plaintiffs' solicitor having heard that the defendant Rabidon was at large, a correspondence ensued between them and the sheriff on the subject, which leading to no satisfactory result, a sequestration was issued in August, 1859, and in November of the same year, the act of Parliament abolishing arrest for non-payment of money, and costs having in the meantime passed, a *fi. fa.* was issued, under which a sum of about six pounds was levied and paid to the plaintiffs; and this application is made to compel the sheriff to pay the balance of the costs. The defendant Rabidon had in the meantime absconded to the United States, and the defendant Thibodo has resided there ever since the commencement of the suit.

It is quite clear that an attachment for non-payment of costs was not bailable, and that the sheriff was wrong in permitting the defendant Rabidon to be at large. The questions are whether any liability he may have incurred in consequence of acting in this manner has been affected by the act of parliament to which reference has been made, or by the conduct of the plaintiffs in issuing first a sequestration and then a *fi. fa.* for the purpose of levying the costs. I think the act of parliament had no effect on the liability of the sheriff. From the time that it passed no doubt the defendant Rabidon was entitled to his liberty, and it would have been unlawful to have detained him in custody so far as the costs were concerned. But if the sheriff had rendered himself liable previously to the payment of the costs, I do not think the act of parliament affected this liability. Then did the plaintiffs waive their claim upon the sheriff by continuing the process of contempt against the defendant Rabidon, and afterwards issuing a writ of *fi. fa.* under the act. I cannot see that any such effect follows. It was natural and proper that they should employ all means of obtaining the costs from the defendant Rabidon before they resorted to the sheriff's liability, and it would, I think, be unreasonable to hold that such resort operated as a waiver of that liability. It would be injurious to sheriffs themselves to establish the contrary doctrine. If it should be considered that proceedings for the recovery of the costs against the defendant himself operated as a waiver of the claim against the sheriff, no plaintiff could venture to the least step for that purpose, but must always proceed against the sheriff in the first instance, although the defendant might have goods or lands from which the costs could be levied. According to the best judgment I can form I do not think any waiver has occurred in the present case. The gentlemen who attended to this matter on either side argued it extremely well, and did themselves great credit, but I should have been glad to have had the assistance of practitioners of more experience in this, which is a matter of some nicety. So far as I have been able to gather the law from the adjudged cases, it appears that the remedy at common law for an escape was an action on the case in which damages were recoverable, proportionate to the injury sustained. Acts of parliaments were, however passed, which gave an action of debt in such cases in which action the whole amount of the debt was recoverable. It was in this state of the law that some cases were decided in courts of equity, in which the sheriff was ordered to pay the whole amount claimed against the prisoner whom he had suffered to be at large, and it is said that these orders were founded on the fact of the whole amount being recoverable at law.

Then came the 5th and 6th Victoria, chapter 98, which provided that in cases of escape the common law remedy of an action on the case should be resorted to; and in consequence of this enactment, damages proportionate to the injury actually sustained can alone be recovered in England, in case of an escape. Although this statute does not apply to courts of equity, their practice in this respect is controlled by it, and the rule in equity as well as at law in England now is, that in case of an escape the sheriff shall be liable only to the extent of the injury actually sustained. I do not know what the rule in this country in this respect is, but whatever it is, it will regulate the order that I shall make in the case, that is, I shall either make an order for the payment of the whole sum demanded, or direct an enquiry, for the purpose of ascertaining the extent of the damages actually sustained by the escape of the defendant, according as the rule is one way or the other. It is quite clear, I think, that up to the passing of the late act the sheriff was liable to this claim. I am not aware that any other enactment affects this liability. It is impossible, I think, that this one should have such effect. The present application might have been made at any time after the escape, and before the passing of the act in question, and the sheriff cannot complain that in case of him the plaintiffs have forborne to exercise their strict rights, with a view to recover the amount demanded, if possible, from the defendant himself. It would be very unjust that such should be the case. Had the defendant been detained in custody, he might have paid the costs before the passing of the act. The plaintiffs had a right to the custody of the body during every hour, until the demand was paid. The sheriff was liable the moment he liberated the defendant, and the legislature could not have intended that this act should affect any liability already incurred.

The question as to the measure of the sheriff's liability was afterwards spoken to by *Hector*, Q. C., for the plaintiffs, and by *Prince*, for the sheriff, whereupon his honour decided that this was to be equal to the value of the custody of the defendant when the escape was permitted; and it was referred to the master to ascertain this; the sheriff to pay such sum, and the costs of this application.

The case was afterwards heard before the three judges, by way of appeal, when the decision of his honour was affirmed.

GENERAL CORRESPONDENCE.

Practice in Chambers—Consulting brother Judges.

To the Editors of the Law Journal.

Gentlemen,—Occasionally, in reading your reports of Chamber decisions, I find that Mr. Justice So-and-so, "having consulted his brother judges," did so-and-so, &c.

Now, I object to this practice of consulting "brother judges" as pernicious. The effect of it is, that the judges who determine the cases do so *without* argument!

Surely if a case is of such importance as to render it necessary for the judge before whom it is argued to consult his brother judges, it is worth being argued before his brother judges.

I admire the man who has independence enough to give his own judgment, be it right or wrong, on the case argued before him, instead of making the impressions of a judge who heard no argument the rule of decision.

If "brother judges" must determine a case, the proper way of having their determination is either by having the case in vacation argued before them, or, if preferred, having the summons enlarged till term, in order to the adjudication of the full court of judges.

Sat. sap. Junius.

Kingston, April 8, 1864.

[Our inclination at first was not to publish the above; but on reflection, seeing that the writer is not personal in his remarks, and animadverts generally on what he conceives to be an evil in the administration of justice, we have concluded to give the communication a place in our columns.—Eds L. J.]

Coroners—Searching for writs for or against sheriffs—Legislation needed.

To the Editors of the Law Journal.

Gentlemen,—It is sincerely to be hoped, for the credit of the country, that some such suggestion, made by you in the last number of your valuable journal with respect to "the Coroner nuisance," may be carried out.

Perhaps the most crying evil is the amazing number of coroners that flood the country; and this may partly be accounted for by the well known fact, that doctors are generally the most successful and energetic canvassers during election times, and the services of some of them are rewarded by an appointment as "associate coroner," to the great detriment of the community, and to the disgrace of the important office they are appointed to.

Besides the evils of the present system, so powerfully portrayed in the article alluded to, there is another, of minor consequence certainly, but nevertheless deserving of notice.

Since the act doing away with the registration of judgments, it has become necessary for intending purchasers or mortgagees of land to make search in the sheriff's office in the county where such lands are situated, to ascertain what incumbrances in the shape of executions may be there which affect those lands.

I believe the law to be, that all writs of execution to which a sheriff is a party, and which are intended to operate within the bailiwick of such sheriff, must be placed in the hands of a coroner for the same county. Now, it may and often does happen that a sheriff is an execution creditor of, or a joint execution debtor with, another person.

The effect of this is rather curious, and in fact startling, as it is absolutely necessary, to ensure perfect safety in *any* intended purchase, particularly if a sheriff has been a party to the title, that a search should be made in the office of *every* coroner throughout the county where the lands lie, as to whether he holds any execution for the sheriff against the lands of the person whose title is under investigation, or against the lands of the sheriff and such person jointly. Practically it would be impossible to do this; and the profession, or those of them who have ever thought on the subject, know the risk they run, and have to run it accordingly. They can of course reduce this risk by making enquiries on the subject from the sheriff; but the sheriff might be absent at the time, or might naturally refuse to give any information as to his private business, even if he did happen to remember the position of all the suits for or against him.

In case of loss to a purchaser or mortgagee, the professional man acting for him would, I presume, be *prima facie* liable, and liable for something which he can scarcely avoid. However this may be, it is a state of things which ought in some way to be remedied.

Yours truly, Vendee's Solicitor.

Toronto, April 19, 1864.

[The subject matter of the above letter deserves the most serious consideration. The liability suggested is frightful, and one which cannot well be avoided. As the law stands, the only remedy of the professional man called upon to investigate a title whereto a sheriff is a party, would appear to be to decline to have anything to do with it, and in any case to limit his liability as to any question that might arise from any of the difficulties suggested by our correspondent. If we consider what "offices" some coroners keep, the absurdity of making inquiries at such places becomes supremely ridiculous. Legislation of some kind as to coroners is certainly much needed. Our hope is that a man equal to the task will be found ready and willing to assume the responsibility of such legislation.—Eds. L. J.]

The mode of giving Judgment in the Superior Court.

To the Editor of the Upper Canada Law Journal.

Sir,—Would you allow me to make a suggestion to the Bench of Upper Canada, with reference to the mode in which judgments of the whole Court are given, and that is that when one judge reads or states a judgment on which the whole court is agreed, he should state it as given by the court, and not by himself, using the plural number in every instance throughout the judgment when speaking of those whose judgment is being given. I think that this plan would not only look much better, but would give far more weight to the judgment.

I am glad to see that it was adopted by one judge of the Court of Common Pleas, in a case reported in the last number of the reports of that court; and if a strong instance of the inexpediency of the other course were wanting, I beg to refer you to another case in that number in which a learned judge in giving the judgment of the court, says, "I do not feel at all certain that I have arrived at the correct conclusion, but according to the best opinion which I can form, and which I express with great distrust, in the face of the opposite opinions before referred to. I think I have not repeated the citations already made in the two cases in our own courts. I have availed myself of them, but I have nothing to add to them. I may also say that I have not gone out of my way to decide anything further than this case strictly calls for." At the end of this we read "*Per cur.* Judgment for," &c. Till one does come to that, few could imagine that they were reading an important judgment duly considered and agreed upon by the whole court, and merely read by one its members as a matter of convenience; and I may add that this very judgment overrules a judgment of the Court of Queen's Bench, in which all the judges were unanimous.

I am Sir,

Your obedient Servant,

A Barrister.

Waterloo, April 29, 1864.

[The above letter speaks for itself. It comes from an observing and intelligent correspondent. The suggestion which he makes is not unworthy of the consideration of the high functionaries for whom it is intended. We are sure that none are more ready to adopt suggestions, if useful, than the able and upright men who now preside in our courts of superior jurisdiction in Upper Canada.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. SOLOMON v. BARBER AND ANOTHER.

Right of action—Breach of duty—Broker—Employment to sell—Selling under value—Duty to value—Due diligence and care—Pleading—Trial—Amendment.

A declaration against brokers for selling goods under their value having been framed in three counts, upon a duty to make a valuation of the goods before selling them, the judge directed the jury that it was the duty of brokers to use due care and diligence, whatever might be the terms on which they were employed, and left it to them whether the defendants had used such due care and diligence, whether or not the terms of the employment, either express or implied, involved a duty to value.

Held, that this was no misdirection, and that if it had been intended to raise the objection that the declaration did not proceed upon a general duty, but on a specific undertaking to make a valuation before the sale, such objection should have been pressed at the trial, when the judge might and ought to have amended.

C. P. SKULL AND ANOTHER v. GLENISTER AND OTHERS.

Right of way appurtenant to land—Demise passing right of way.

A piece of land having been conveyed together with a right of way from it over a new road to a highroad, the person to whom it was conveyed demised the said piece of land by parol to a yearly tenant: the demise being general, and making no mention of the right of way.

Held, that the right of way having been made appurtenant to the land, it passed by the parol demise to the yearly tenant, although not expressly mentioned in the parol demise.

C. P. READER v. RINGHAM.

Frauds—Statute of, sec. 4—Promise to answer for the debt of another person.

A. recovered judgment against B. in the County Court; B. was arrested under the authority of the County Court for not paying the sum required; the bailiff in whose custody he was, being authorized by A. to receive £17 from B., C. promised the bailiff that if he would release B. from custody he, C., would produce B. on the following Saturday, or pay the £17.

Held, that this was not a promise by C. to answer for the debt of another person, within sec. 4 of the Statute of Frauds.

CHANCERY.

V. C. S. PRICE v. LEY.

Agreement—Rescinding—Parol evidence—Specific performance.

Where a plaintiff proved by unquestionable evidence that there was a mistake in essential parts of a written agreement.

Held, that he was entitled to have it set aside.

To sanction the right to set aside an agreement on the ground of fraud, mistake, or surprise, parol evidence is in most cases essential; but where specific performance is asked the Court has a discretion which is not permitted when it is called to set aside an instrument on any of those grounds.

L. C. CLARK v. LEACH.

Partnership—Expiration of term—Continuance of business—Notice of dissolution—Application of restrictive clauses in original articles.

A provision in partnership articles for a term of years, that if either partner neglects the business, the other may send him a notice of dissolution, and continue the business for his own benefit is not applicable to a partnership continued between the same partners without written articles, after the term of the original partnership has expired.

V. C. K. WOODHATCH v. FREELAND.

Practice—Production of documents—Sufficiency of affidavit.

Where, in the affidavit made by a defendant on an order for production of documents, the ordinary words "or in possession, custody, or power of my solicitor or agent" are omitted, the Court will not hold such affidavit insufficient if a satisfactory reason is given for such omission, and will hold that it is a satisfactory reason that an exception involving documents in the hands of the defendant's solicitor has been overruled; the documents such as books, diaries, &c., in the hands of a solicitor, not being documents of the client, although they may be liable to be produced.

The words "I am informed," where there is no personal knowledge, are the same as "I believe," and where an affidavit is sworn at different places, by different defendants, one date is sufficient.

L. J. RE TIEL.

MILLS v. BARLOW.

Practice—Decree—Death of one plaintiff.

Where husband and wife were co-plaintiffs, and a decree was made ordering the plaintiffs to pay certain costs, such costs to be paid by the husband, and the husband died before the decree was pronounced, but the fact was not known till after it had been passed and entered, and the widow subsequently took out a summons under the decree.

Held, that by so doing she adopted the suit, and was bound by the decree, and that the decree must be altered so as to make her liable to pay the costs.

L. J. WARNER v. SMITH.

Partnership—Division of profits.

Where two persons, carrying on business together as partners, and one person carrying on business alone agreed by parol to join in a particular adventure, it is a question of evidence whether the intention was that the first two persons should be considered for the purposes of the adventure as one person; and where there is evidence that such was the intention, the profits or losses of the adventure will be divided into moieties, and not into thirds.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

WILLIAM GEORGE DRAPER, of Osgoode Hall, and of the City of Kingston' Esquire, Barrister-at-Law, to be Judge of the County Court of the United Counties of Frontenac and Lennox and Addington, in the room of Kenneth Mackenzie, Esquire, resigned. (Gazetted April 23, 1864.)

JAMES O'REILLY, of Osgoode Hall, and of the city of Kingston, Esquire. Barrister-at-Law, to be Recorder of the City of Kingston, in the room of Archibald Macdonell, Esquire, deceased. (Gazetted April 23, 1864.)

QUEEN'S COUNSEL.

JAMES O'REILLY, of Osgoode Hall, and of the City of Kingston, Esquire' Barrister-at-Law, to be one of Her Majesty's Counsel Learned in the Law for Upper Canada. (Gazetted April 23, 1864.)

CORONERS.

JOHN WIGELSWORTH, of Beachburgh, Esquire, Associate Coroner. (Gazetted April 2, 1864.)

NAPOLEON LECLAIRE, of Alexandria, Esq., M.D., Associate Coroner, United Counties of Stormont, Dundas and Glengarry. (Gazetted April 2, 1864.)

NOTARIES PUBLIC.

LAMBERT R. BOLTON, of Bolton, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 2, 1864.)

DAVID LEY, of Orono, Esq., to be a Notary Public in Upper Canada. (Gazetted April 2, 1864.)

JOHN CASSIE HATTON, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 2, 1864.)

TO CORRESPONDENTS.

GENERAL CORRESPONDENCE—"JUNIUS," "VENDEE'S SOLICITOR," and "A BARRISTER."