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DIARY FOR JUNE.

1. SUNDAY ..... 1st *Sunday after Ascension.*
2. Monday ..... Last day for Notice of Trial County Court.
8. SUNDAY ..... *Whit-Sunday.*
10. Tuesday ... . Quarter Sessions and Co Court Sittings in each County.
12. Thursday..... Sittings of Court of Error and Appeal commences.
15 SUNDAY ..... *Trinity Sunday.*
22. SUNDAY ..... 1st *Sunday after Trinity.*
29. SUNDAY ..... 2nd *Sunday after Trinity.*
30. Monday ..... Last day for County Council finally to revise Assessment Rolls, and to appoint School wardens by C S S Chief Superintendent to report state of Grammar School.

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

JUNE, 1862.

BAIL TO THE LIMITS.

The law of debtor and creditor is much less rigorous at present than it was in the early history of Upper Canada. Both in England and here much has been done to relax if not to abolish imprisonment for debt.

The first step was to suppose the debtor in custody when he had the privilege of locomotion within circumscribed limits, from time to time increased in extent. The next step was to suppose him on the limits when he had the privilege of going where he pleased.

It is interesting to trace the gradual relaxations of the law on the subject of bonds to the limits, and in truth it is necessary to do so in order to understand the effect of that which now goes by the name of a limits bond.

Close custody is the starting point: originally the only limits were the four walls of the gaol. This was the law till 1822.

On 17th January, 1822, the Legislature passed the 2nd Geo. IV., cap. 6, intituled "An Act for assigning limits to the respective Gaols of this Province." It recited that it was expedient to assign certain limits to the gaols within Upper Canada in which debtors might have the benefit of exercise and air without subjecting the Sheriff or other officer in whose custody the debtor might be to any action at law for an escape. It authorized the Justices of the Peace, in Quarter Sessions assembled, from to time, in each district in Upper Canada, to order, determine and appoint certain limits of ground not exceeding six acres to each and every gaol, and that after the establishment of such limits it should be lawful for any debtor confined in such gaols to be and remain at any part or place within such limits without subjecting the Sheriff or other officer in whose custody such debtor might be, to any action or suit for an escape from such gaol or limits. It was not made incumbent on the Sheriff to give the benefit of the limits to a debtor till furnished with satisfactory security that the debtor should not at any time during his confinement "go or remove beyond such established limits." If there was a breach of the condition of the bond, the Sheriff was enabled to sue upon the bond and to recover the amount for which the debtor was in custody, and costs. Provision was made for the assignment of the bond to the judgment creditor upon request. The assignee was authorized to sue upon the bond in his own name. An acceptance of an assignment of the bond was made to operate as a discharge of the Sheriff from all responsibility in respect of the debtor. The Act was an experiment merely, and was made to have force for four years and no longer.

On 30th January, 1826, the Legislature passed the 7th Geo. IV., cap. 7, by section 1 of which the previous Act was extended for four years further. Provision was by the same act made for the surrender of the debtor into close custody by his bail.

On 17th February, 1827, the Legislature passed the 8th Geo. IV., cap. 9. It recited the 2nd Geo. IV., cap. 6, and authorised the Justices of the Peace for the District of Niagara, in sessions assembled, from time to time to order, determine and appoint certain limits for the Gaol in that District, not exceeding sixteen acres.

On 30th January, 1830, the Legislature passed the 11th Geo. IV., cap. 2, continuing the 2nd Geo. IV., cap. 6, for four years longer.

On 6th March, 1830, the 11th Geo. IV., cap. 3, was passed. It consolidated and made permanent the provisions of previous acts. It authorized the Justices of the Peace, in general Quarter Sessions assembled, in each and every district other than the District of Niagara, to assign and make as limits to the respective gaols "sixteen acres of ground contiguous to the gaols." Authority was given to extend the limits of the gaol in the Niagara District to twenty-six acres. The debtor while on the limits was in law considered as in the custody of the Sheriff. The judgment creditor was authorized to administer interrogatories to his debtor while on the limits. Neglect or refusal to answer for twenty days subjected the debtor to confinement in close custody.

On 6th March, 1834, the Legislature passed the 4th Wm. IV., cap. 10. It enacted that the limits of the respective gaols situate in any town in Upper Canada should be co-extensive with the limits of the towns in which situate. In the case of gaols not situate in towns, the justices of the peace were authorised to extend the limits

to the distance of half a mile on each side of the gaols. A debtor upon the limits withholding, upon request of the creditor, an account of his effects, was made liable to be committed to close custody. Provision was made for the examination of a judgment debtor as to his means of satisfying the debt. If it were made to appear that he had the means, he was liable to be committed to close custody. Provision was also made for enabling, under him certain circumstances, to regain the limits.

On 28th July, 1847, the Legislature passed the 10th & 11th Vic., cap. 15. It enacted that the gaol limits to the respective gaols should consist of the whole of the district in which situate. Persons in gaol under process for non-payment of costs, were declared to be entitled to the benefit of the limits in the same manner as if in custody in execution for debt. Persons entitled to the limits were required to enter into a recognizance or bail piece, conditioned that the debtor "should remain and abide within the limits of the gaol of the district, and not depart therefrom unless released by due course of law," and also "should well and truly obey all notices, orders and rules of court, touching *or concerning such debtor remaining or continuing upon* the limits, or being remanded or ordered therefrom." The sureties were required to justify in double the amount of the sum for which the debtor was arrested. The recognizance was then filed in the office of the clerk of the court from which the writ authorizing the arrest issued. Notice thereof was then given to the creditor in like manner as in case of bail to the action. Upon the production to the Sheriff of a certificate from the clerk of the court that the recognizance of bail and affidavit of justification had been filed, the Sheriff was authorized to give the debtor the benefit of the limits, and the Sheriff himself was thereupon discharged from all responsibility respecting the debtor, unless again committed to close custody by due form of law. The bail were bound to produce the body of the debtor within such time as the court or judge might direct, but provision was made for granting such further time and relief to the bail as the court or judge might deem equitable.

On 14th June, 1853, the Legislature passed the 16th Vic., cap. 175; section 7 enacted that it frequently happened that persons in custody entitled to the benefit of the gaol limits were compelled to go to prison until a rule or order for the allowance of the recognizance of bail. For remedy it enacted that it should be lawful for the Sheriff to take from the party arrested a bond conditioned "that such person would not depart the gaol limits," and "should forthwith surrender himself to the custody of the Sheriff for re-committal to close custody, upon a rule of court or judge's order being made for that purpose, and should in other respects well and truly observe and obey all rules of court or judge's orders in relation to such party." Upon receipt of this bond the Sheriff was required forthwith to allow the party arrested the benefit of the limits. If after the giving of the bond the debtor delivered to the Sheriff the certificate that the recognizance of bail above mentioned and affidavit of justification had been duly filed, the debtor and his sureties were discharged from all liability on the bond to the Sheriff. If the certificate were not produced within one month from the execution of the bond the Sheriff was authorized to commit the debtor to close custody. A right of action on the bond was given to the Sheriff in the event of a breach. It was, however, provided that the Sheriff, upon request of the creditor, might assign over the bond to him and so release himself from responsibility. The party accepting the assignment of the bond was authorized to sue in his own name.

On 3rd April, 1855, the Legislature passed the 18th Vic., cap. 69; section 5 of which enacted that notwithstanding the dissolution of a union of Counties, debtors on the limits at the time of the dissolution should, continue to have the benefit of the limits of both counties.

On 19th June, 1856, the Legislature passed the 19th Vic., cap. 43, commonly called "The Common Law Procedure Act, 1856." It consolidated all previous acts, without substantial variation.

On 10th June, 1857, the Legislature passed the 20th Vic., cap. 57; section 25 of which enacted that in all cases in which any Sheriff should take a bond to the limits, to enable the debtor to put in the ordinary recognizance of bail to the limits, such bond should, in addition to the ordinary conditions, contain a further condition that the debtor "should within thirty days from the delivery thereof to the Sheriff, cause and procure the bond or that substituted for it, according to provisions hereinafter mentioned, to be allowed by the Judge of the County Court wherein the debtor was confined." For this purpose, upon reasonable notice by the debtor given to the Sheriff, the latter was required to cause his bond to be produced before the Judge. Upon allowance endorsed by the Judge the Sheriff was discharged from all responsibility unless the debtor was committed to close custody in due form of law. The allowance was required to be made upon motion by the debtor, and four clear days notice thereof given in writing to the plaintiff or his attorney. If the Judge refused the allowance of the bond then the debtor was enabled to cause another bond to be made to the Sheriff in the same terms and under the same conditions, to be executed without any further application to the Sheriff, and was also enabled to move in the like manner and upon the like notice for the

allowance thereof. The bond if allowed and endorsed was substituted for and took the place in all respects of the bond first given.

On 6th May, 1859, the Legislature passed the 22nd Vic., 2nd Sess., cap. 33; section 6 of which enacted that persons giving bail under a writ of *ca. sa.*, or writ of attachment should not be bound to remain or abide within the gaol limits, but might depart therefrom at their discretion. It also enacted that the bond to the Sheriff should not contain that part of the usual condition that the debtor should remain and abide within the limits of the gaol, but that the condition should provide that the person arrested "should observe and obey all notices, orders and rules of court touching or concerning the debtor or person ordered to pay, or his answering interrogatories, or his appearing to be examined *viva voce* or otherwise, or his returning or being remanded into close custody." It was declared that the party or his bail should not be entitled to claim longer time for so observing and obeying than he would have been entitled to if the party had remained on the limits as before the passing of the Act. Power was given to the Court to grant further time if the Court were of opinion that the same might be done without substantial injury to the interests of the party entitled to receive the money.

Such is now the law as consolidated in Con. Stats. U. C. cap. 24, sec. 24, *et seq.*

The effect of 22 Vic., 2nd Sess., cap. 33, was to make a bond to the limits a bond without limits. It is as it were the retention of the shadow by some process of Legislative photography, though the substance is no more. One step more and legal custody for debt is gone—vanished like a dream. We have seen how, little by little, it was blotted out of the Statute book, till now its appearance is so faint that its very existence is a matter of uncertainty. What it is can only be ascertained by a knowledge of what it was. That knowledge we have here endeavored to impart.

COMMON LAW COURTS.

DELIVERY OF JUDGMENTS.

QUEEN'S BENCH.

Monday, 16th June..... 10 o'clock.
Saturday, 21st June..... 2 o'clock.

COMMON PLEAS.

Monday, 16th June..... 2 o'clock.
Saturday, 21st June..... 10 o'clock.

COMMON LAW—RULES OF COURT.

FEBRUARY 14TH, 1862.

It is Ordered, That the several sheriffs in Upper Canada shall be allowed, in addition to the fees and disbursements heretofore authorised for services rendered by them in the county courts, to charge and receive the fees and disbursements following:

For return of Writ of Execution against Lands or Goods, where nothing has been made under the writ..£0 2 6

For removing or retaining property taken under any statute of this province relating to replevin, reasonable and necessary disbursements and allowances, to be approved by the clerk, or by order of the judge.

JOHN B. ROBINSON, C. J.
W. H. DRAPER, C. J., C. P.
WM. B. RICHARDS, J.
JOHN H. HAGARTY, J.
ROBERT E. BURNS, J.

FEBRUARY, 15TH, 1862.

It is Ordered, That the form of Writs of Assignment of Dower to be used under the statute 24th Vic., ch. 40, shall be as follows:

The Writ of Assignment of Dower required to be issued after a judgment in an action of Dower has been entered in favour of the demandant, shall be in the form hitherto in use in Upper Canada.

And the Writ of Assignment of Dower required to be issued under the second clause of the said statute, when the right of dower is acquiesced in by the owner of the estate, may be as follows:

UPPER CANADA. County of—— } VICTORIA, by the Grace of God, &c.

TO THE SHERIFF OF THE COUNTY OF ——

GREETING:

WHEREAS, A. B., widow, who was the wife of C. D., deceased, demands against E. F., the third part of (here describe the estate in which dower is claimed, as in other writs of assignment of dower) as the dower of the said A. B. of the endowment of the said C. D., heretofore her husband: *And whereas* it has been made to appear to us in our Court of Queen's Bench, (or Common Pleas, as the case may be,) in Upper Canada, that the said E. F. is the owner of the said real estate out of which such dower is claimed, and that he acquiesces in the said claim, and is willing to assign to the said A. B. her proper dower, but that the said A. B. and E. F. are not agreed as to the admeasurement thereof: *We therefore command you*, that without delay you do deliver to the said A. B. seisin of her third part of the said —— with the appurtenances, to hold to her in severalty by metes and bounds; *And* that you do proceed in the execution of this our writ, according to the provisions of the statute, in that behalf passed by the Legislature of our province of Canada, in the twenty-fourth year of our reign.

Witness, &c.

(When the Demandant has married again since the death of her late husband, under whom she claims dower, her name and description must be made such as to suit the circumstances.)

JOHN B. ROBINSON, C. J.
W. H. DRAPER, C. J., C. P.
ROBERT E. BURNS, J.
WM. B. RICHARDS, J.
JOHN H. HAGARTY, J.

BILLS BEFORE THE LEGISLATURE.

An Act respecting the appointment of Commissioners for taking affidavits and affirmations in the United Kingdom of Great Britain and Ireland, to be used in this Province.

(Introduced by John Crawford, Esq., M.P.P.)

WHEREAS it is desirable that the Governor in Council should be empowered to appoint Commissioners for taking affidavits and Affirmations in the United Kingdom of Great Britain and Ireland to be used in this Province: Therefore Her Majesty, &c., enacts as follows:

1. The Governor in Council may, by one or more commission or commissions under his hand and seal, from time to time empower such and as many persons as he may think fit and necessary (such persons being practising Attorneys of Her Majesty's Courts of Record at Westminster, or Writers to the Signet in Scotland, or Attornies of the Four Courts in Dublin,) to administer oaths and take and receive Affidavits, Declarations and Affirmations in the United Kingdom of Great Britain and Ireland, in or concerning any cause, matter or thing depending, or in any wise concerning any of the proceedings to be had in the Courts of Queen's Bench and Common Pleas, the Superior Court, and the Court of Chancery, or any other Court at Law or Equity of Record in this Province, whether now existing or hereafter to be constituted; and every oath, affidavit, declaration or affirmation taken or made as aforesaid, shall be of the same force as if taken or made in the particular Court to which the same relates, or in which any such affidavit, declaration or affirmation is entitled or intended to be used.

2 The oaths, affidavits, declarations and affirmations aforesaid, shall be of the same force as if taken or made in open Court, and shall be filed in the office of the Court in which the same are intended to be used, and may be read and made use of in the said Court as other affidavits or affirmations taken in such Court; and any person wilfully forswearing himself in any affidavit or making false declaration or affirmation made or taken before any of the Commissioners appointed under this Act, shall be liable to the same pains and penalties as if such affidavits, declarations or affirmations had been taken in open Court.

3. Any affidavit or affirmation proving the execution of any Deed, Will or Probate or Memorial thereof, for the purpose of registration in this Province, may be made before a Commissioner appointed under this Act.

4. The Commissioners so to be appointed shall be styled "Commissioners for taking affidavits in and for the Canadian Courts."

5. No informality in the heading or other formal requsites to any affidavit, declaration or affirmation made, or taken before any Commissioner under this Act, shall be any objection to its reception in evidence if the Court or Judge before whom it is tendered shall think proper to receive it.

An Act respecting the Court of Error and Appeal in Upper Canada.

(Introduced by Hon. J. A. Macdonald, M.P.P.)

Her Majesty, &c., enacts as follows:

1. The Presiding Judge of the Court of Error and Appeal in Upper Canada, whenever appointed as such by commission under the great seal, according to the provisions of the Act passed in the twenty-fourth year of Her Majesty's reign, chaptered thirty-six, shall have rank and precedence over all the other Judges of Her Majesty's Courts of law and equity in Upper Canada.

2. The said Presiding Judge appointed by commission under the great seal as aforesaid, previous to entering upon the duties of his office, shall take the following oath before the Governor in Council:

OATH.

I, —— ——, do solemnly and sincerely promise and swear that I will, duly and faithfully, to the best of my skill and knowledge, execute the powers and trusts reposed on me as the Presiding Judge of the Court of Error and Appeal in Upper Canada. So help me God.

3. Any retired Judge heretofore or hereafter appointed the Presiding Judge as aforesaid, who shall hold a patent for an annuity of two-thirds of the salary annexed to the office from which he had retired, shall be entitled in addition to the same, to receive yearly from and out of the Consolidated Revenue Fund of this Province, a sum equal to one-third of the amount of his annuity, which additional sum shall be paid in the same manner and at the same time as such annuity.

4. The sixth section of the thirteenth chapter of the Consolidated Statutes for Upper Canada is hereby repealed, and the following substituted therefor, that is to say:

"Five Members of the Court shall be necessary to constitute a quorum."

5. The eighth section of the Act in the next preceding section mentioned is hereby repealed, and the following substituted, that is to say:—

"The Court of Error and Appeal shall hold its sittings at the City of Toronto, on the fourth Thursday next after the several Terms of Hilary, Easter and Michaelmas, and may adjourn from time to time and meet again at the time fixed on the adjournment for the transaction of business.

An Act to render Wills made in conformity with the laws of either Upper or Lower Canada, effectual to pass Real Estate in the other section of the Province.

(Introduced by A. Morris, Esq., M.P.P.)

WHEREAS, owing to the intimacy of the subsisting relations between Upper and Lower Canada, persons domiciled or temporarily resident in one section of the Province, frequently die possessed of Real Estate in the other section, and greater facilities ought to be afforded for the easier transmission of such property by Will, and a remedy ought to be provided for inconveniences that are of frequent occurrence, arising from the absence of such provisions:

Therefore, Her Majesty, &c., enacts as follows:

1. In case of the death of any person in either Upper or Lower Canada, after the passing of this Act, having regularly and legally made a Will according to the forms and solemnities required to pass Real Estate, (*immeubles*) by the law of that section of the Province in which the Will is made, such Will shall be held and taken to be, and shall be effectual and sufficient to pass Real Estate (*immeubles*) situate in the other section of the Province, in accordance with the true intent and meaning of such Will.

2. Wills made and executed in Lower Canada, in the customary manner, may be registered in Upper Canada in the same manner that other Wills made and executed or published out of Lower Canada, may be registered; and a notarial or other authentic copy of such Will, shall, for the purpose of registration thereof, have the same force and effect that a probate of Will now has.

LAW SOCIETY OF UPPER CANADA.

EXAMINATION FOR CERTIFICATES OF FITNESS.

STORY'S EQUITY JURISPRUDENCE.

1. State the two kinds of mistakes and the general rules as to the interference of the court in each kind.

2. What are the rights of the *cestui que* trust in respect of a purchase of his estate by his trustee?—and on what principle are these rights founded?

3. Define constructive notice, and give an example.

4. When is time deemed in equity to be of the essence of the contract?

5. What is the effect when property, real or personal, is willed in trust, without the appointment of a trustee?

6. Against what classes of persons will the vendor's lien attach? and what is the effect on the lien of a receipt for the consideration money expressed in or endorsed on the deed?

STATUTES, PLEADINGS AND PRACTICE.—EQUITY.

1. What jurisdiction has the Court of Chancery for Upper Canada in respect of wills?

2. In what cases can the court make a vesting order?—and what is the effect of such an order?

3. Under what circumstances and on what terms will the time fixed for payment of mortgage money be delayed?

4. What is the effect of the defendant's not denying in his answer an allegation of the bill?

5. How can a plaintiff bring before the court facts which have occurred since the institution of the suit?

6. State the process for obtaining the usual administration order.

SMITH'S MERCANTILE LAW.

1. Define "a general agent" and "a particular agent," and state the rule as to the authority of each to bind the principal.

2. What is the *jus accrescendi*?—and what is the exception to its application? How is the exception worked out in cases of real estate?

3. What is the meaning and result of *barratry*? Give an example.

4. In sales of goods under an agreement to be completed *in futuro*, when does the property in the goods pass to the buyer?

5. What are the rights of a creditor who has contracted to receive payment by a bill, if the bill be not delivered as agreed?

6. State the origin and limitations of the doctrine of lien at common law.

WILLIAMS ON REAL PROPERTY.

1. How can a person seised in fee simple convey so as to vest the fee in himself and another as joint tenants?

2. What is requisite to entitle a man to take lands as tenant by the curtesy of England?

3. Do the words "grant" and "demise" respectively imply any, and if any, what covenants?

4. An estate is limited to A. for life, with remainder to B. in tail, remainder to C. in fee. How can the issue in tail, and how can the remainder in fee be barred?

5. What leases must be by deed?

6. Explain the law of Hotchpot, and the effect of the statute of this province on the subject.

7. A lease to A. for life, remainder to B. for life; is this a vested or contingent remainder?

8. How must a will to pass lands by devise be executed?

9. Explain the object and effect of the statute "De Donis," 13, Ed. I.

10. A. leases lands to B., and in the lease B. covenants with the lessor for himself and assigns to dig a well on the demised premises during the second year of the term; B. during the first year assigns to C. The well is not dug at any time. Can the lessor sue both B. and C., or which?

11. A. conveys land to B. in 1861, who does not register the conveyance; A. subsequently conveys to C. who does register; what must C. prove beyond conveyance to establish priority over B., in ejectment against him?

12. An estate is conveyed to A. and B. in fee in trust to sell; do the grantees take as joint tenants or tenants in common? Give the reasons for your answer.

13. A lessee for a term assigns to B. to the use of C.; in whom is the legal estate?—and why not in the party other than him you may name?

STATUTES PLEADING AND PRACTICE LAW.

1. Can an action be brought as for lands bargained and sold on an *indebitatus* count, when no conveyance is made? Give the reasons for your answer.

2. Draft a plea in abatement for non-rejoinder of a co-contractor as a defendant.

3. How many days are allowed to plead in abatement?

4. Are goods of a defendant bound as against a purchaser from the time of the delivery of the execution against them to the sheriff, or from time of their seizure?

5. State what must be shown by affidavit to obtain the oral examination of a judgment debtor, pursuant to 22 Vic., c. 96—Consol. Stats. U. C., cap. 24.

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. Does the law recognise an absolute ownership in real estate? Give reasons for your answer.

2. Mention the incidents of the usual covenants in an indenture of lease.

3. Can one person have more than one estate in the same land at the same time? Answer fully.

4. Give instances of technical rules, or canons, which obtain in the construction of wills, even against the intention of the testator.

5. What is meant by an innocent conveyance?

STORY'S EQUITY JURISPRUDENCE.

1. What are the requisites to constitute a valid assignment of equitable property?

2. What jurisdiction has Equity in cases of awards?

3. When will Equity decree the cancellation of a deed?—and on what principle is the jurisdiction exercised?

4. Distinguish between the Stat. 13 Eliz. and the Stat. 27 Eliz., as to fraudulent conveyances.

5. How may incumbrances on an estate be extinguished?

TAYLOR ON EVIDENCE.

1. When may interrogatories be administered?

2 When are declarations against interest admissible, and why?

3. Mention some of the matters of which the courts will take judicial notice.

4 In what cases will a leading question be allowed?

5 How is the question of a privileged communication affected by the doctrine of *lis mota*?

BYLES ON BILLS.

1. In what material respects do promissory notes and bills of exchange differ from ordinary simple contracts?

2. Is evidence admissible to show that the true relation of the parties to a bill or note is different to their apparent position on the same?

3. If the time of payment of a note is uncertain, does that vitiate it?

4. When may a note become extinguished?

5. Distinguish between a guarantee and a promissory note?

SMITH'S MERCANTILE LAW.

1. What is the difference between an *open* and a *valued* policy on a ship?

2. What is general average, and what articles are liable to contribute to it?

3. Is it necessary in order to make a binding contract within the 17th section of the Statute of Frauds, that both parties should sign the memorandum? Give your reasons.

ADDISON ON CONTRACTS.

1. Are there any, and if so, what contracts under seal, to the validity of which as between the parties to the instrument, a consideration is necessary?

2. Is it a defence for the non-performance of an absolute contract, that such performance became impossible? Give your reasons.

3. Can money given to a person to be employed for an illegal purpose, be recovered back at any, and if so, what time?

BLACKSTONE, VOL. I.

1. Upon what statutes does the right of a subject to a writ of Habeas Corpus depend?

2. In what instances has Parliament assumed the right of altering the succession to the Crown of England?

3. What is the common law duty of a coroner; are there any statutory duties imposed on him in this province?

STEPHENS ON PLEADING.

1. When does a discontinuance take place in pleading?

2. What is the difference between the old and present system of pleading as regards profert and oyer?

3. Is the damage in any, and if so, what cases, a material point put in issue, and if so how is it put in issue?

4. What is the method, if any, at present for taking objection to a pleading which under the old system would have been bad on *special* demurrer?

STATUTES, PLEADINGS AND PRACTICE.

1. State the effect of the "Dormant Equities Act."

2. What statutory provisions exist as to partition?

3. In what cases is it necessary to make all the *cestui que trustent* parties to a bill in Chancery, notwithstanding the recent Orders?

4 Give a definition of "multifariousness."

5 What is the practice of bringing defended and undefended causes to a hearing?

6. What cases, if any, are there over which a County Court has no jurisdiction?

7. Can an equitable defence be set up at law to an action of ejectment? Give your reasons

8. What is the effect of an omission to state in the margin of a demurrer some substantial matter of law intended to be argued? Is it any objection to the demurrer being *argued*?

9. Are there any, and if so, what cases in which mesne profits can be recovered on the trial of an action of ejectment?

10. How many different kinds of juries can be had for the trial of civil causes in Upper Canada?

THE BENCH AND THE BAR.

On Friday, 23rd May, ult., a meeting of members of the Bar of Upper Canada was held at Osgoode Hall. Resolutions were passed for a dinner to be given to Sir J. B. Robinson, Bart., upon the occasion of his retirement from the Chief Justiceship of Upper Canada, and congratulating him on his appointment to the office of President of the Court of Appeal. It was also resolved that an Address be presented to the Hon. Wm. Hume Blake, late Chancellor of Upper Canada, on the occasion of his retirement from that office, and that the members of the bar should attend in open Court to congratulate Hon. Archibald McLean on the occasion of his elevation to the Chief Justiceship of Upper Canada. Resolutions were also passed congratulating Hon. P. M. Vankoughnet on his elevation to the office of Chancellor, and complimenting Hon. Joseph Curran Morrison on his appointment as a puisne Judge of the Common Pleas.

On the following day, all the Judges of the Queen's Bench, Common Pleas and Chancery, assembled in the Court of Queen's Bench to witness the presentation of the addresses authorized by the resolutions. The bar attended, and Henry Eccles, Esq., Q. C., Treasurer of the Law ciety, *pro tem.*, acting as spokesman, made an appropriate address to Chief Justice McLean, Chancellor Vankoughnet, and Mr. Justice Morrison, to which they severally replied.

The dinner to Sir J. B. Robinson will take place on Thursday, 19th June, instant.

SELECTIONS.

IS A WITNESS BOUND TO CRIMINATE HIMSELF?

The rule, that a witness shall not be compelled to answer questions tending to criminate him, is a well known and established rule of English law, to which it seems peculiar. The policy of the principle which it embodies has, indeed, been questioned, but with little reason, although it must be admitted that it has sometimes been pushed too far in practice. Our object at present is not to discuss the merits of the rule, but

to direct attention to an important practical question affecting its application which has been raised in our times, and, after having during several years caused no little difference of opinion on the Bench and in the Profession, appears settled by a recent decision in the Court of Queen's Bench.

The point is this:—A witness refuses to answer a question on the ground that the answer might tend to criminate him. If the judge sees that the answer might have that effect, he ought, of course, to allow the objection. But suppose he does not see that—an event likely enough to occur, for the witness must necessarily know much more about the matter than the judge—is he conclusively bound by the statement of the witness that it would have that effect, so as to be compelled to allow the privilege, and excuse the witness from answering?

This question was started, we believe, for the first time, in *Reg* v. *Garbett* (1 Den. C. C. 236), on a case reserved from the Old Bailey; but it became unnecessary to decide it, as the case went off on another point. A few years after, however, the case of *Fisher* v. *Ronalds* (12 C. B. 762) came before the Court of Common Pleas. In that case a new trial was moved for on the ground that the judge at Nisi Prius had improperly refused to compel a witness to answer a certain question; and the Court unanimously held, in a decision which we think no person would question, that he had done right as, under the circumstances, the witness was privileged. But two of the judges went far beyond the actual point before the Court. Maule, J., said, "It is the witness who is to exercise his discretion, and not the judge. The witness might be asked, "Were you in London on such a day?" and though apparently a very simple question, he might have good reason to object to answer it, knowing that if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless if the witness were required to point out how his answer would tend to crimmate him." And Jervis, C. J., uses language somewhat similar. The first idea that suggests itself to the mind on reading this case is, that no judge could have used language so sweeping and dangerous, and consequently that there must be some error in the report. But the other reports of the case (22 L. J., C. P., 62; 17 Jur., part 1, p. 393) completely agree with the above, so that this hypothesis must be abandoned.

The startling proposition that every witness, the most mendacious or the most profligate, may effectually shelter himself from giving any evidence if he will only swear that the answer to every question put might criminate him, soon attracted attention. In *Osborn* v. *The London Dock Company* (10 Exch. 701; 1 Jur., N. S., part 1, p. 93), Parke, B., on the above dictum being cited, denied the doctrine in the most positive terms, referring to various authorities as inconsistent with it. Alderson, B., however, spoke with considerable diffidence upon it; and in that case also it became unnecessary to decide the point. In a subsequent case, however, of *Sidebottom* v. *Adkins* (3 Jur., N. S., part 1, p. 631), in 1857, the question arose whether, where interrogatories are administered to a defendant in Chancery, his statement on oath, that the answers to the interrogatories would criminate him, is conclusive on the judge, so as to compel him to disallow them. *Fisher* v. *Ronalds* and other cases were cited; but Sir J. Stuart, V. C., ruled in the negative, saying that some surprise had been excited in his mind by the opinions expressed by Jervis, C. J., and Maule, J., in that case. On the other hand, in 1858, the case of *Adams* v. *Lloyd* (3 H. & N. 351: 4 Jur., N. S., part 1, p. 590) came before the Court of Exchequer, in which Pollock, C. B., expressed himself as follows:—"Certainly I have always thought that the law on that subject was correctly stated by Maule, J., in the case of *Fisher* v. *Ronalds* * * * The only exception I know is this—where the judge is perfectly certain that the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the judge is right in insisting on his answering the question." And, lastly, in the case of *Ex parte Fernandez* (10 C. B., N. S., 30, 40; 7 Jur., N. S., part 1, p. 579), Willes, J., expresses himself in a way which shews that at least he entertained doubts respecting the correctness of the doctrine in *Fisher* v. *Ronalds*.

In this state of the authorities arose the case of *Reg.* v. *Boyes* (1 B. & S. 311; 7 Jur., N. S., part 1, p. 1158), decided in Trinity Term, 1861, which seems conclusive on the question. That was an information for bribery at an election for a member of Parliament, and one of the witnesses who was called on the part of the prosecution refused to give evidence as to the alleged bribery, sheltering himself under the rule of law before us. A pardon for the supposed bribery was then given him, but he still refused to answer, until the judge decided that he was bound to do so. A rule for a new trial having been obtained, on the ground, among others, that the judge had done wrong in this respect, it was argued in support of it, that although by the pardon the witness was protected from prosecution on the part of the Crown, he was still liable to impeachment by the House of Commons for bribery, in which event, according to the express provision of the Act of Settlement, 12 & 13 Will. 3, c. 2, s. 3, the pardon of the Crown would not avail him. *Fisher* v. *Ronalds* and some other authorities were referred to during the argument, but it is worthy of observation that *Sidebottom* v. *Adkins*, *Adams* v. *Lloyd* and *In re Fernandez* were not. Perhaps the last had not then been reported, but the first is expressly cited, and the second obviously referred to in the judgment. The Court (consisting of Cockburn, C. J., Crompton, Hill, and Blackburn, JJ.) took time to consider; and Cockburn, C. J., afterwards delivered their unanimous judgment as follows:—

"Upon a review of the authorities we are clearly of opinion that the view of the law propounded by Lord Wenslevdale in *Osborn* v. *The London Dock Company*, and acted upon by Sir J. Stuart, V.C., in *Sidebottom* v. *Adkins*, is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We, indeed, quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by Alderson, B., in *Osborn* v. *The London Dock Company*, that a question, which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril.

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford a party, called upon to give evidence in a proceeding inter alios, protection against being brought, by means of his own evidence, within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable,

was sufficient to justify the withholding of evidence essential to the ends of justice. * * * It appears to us that the witness in this case was not, in a rational point of view, in any way in the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings, and that it was therefore the duty of the presiding judge to compel him to answer."

The rule for a new trial was accordingly discharged.

CHARITABLE TRUSTS.

(*Read by* VICE CHANCELLOR SIR W. PAGE WOOD, *before the Jurisprudence Department of the National Association for the promotion of Social Science*)

I would willingly bring before the consideration of this Department several subjects of deep interest, which I could only refer to very briefly in my general Address; but many reforms of the most pressing importance involve considerations too extensive to be dealt with in any paper that I have leisure to frame, or indeed that the Department would have patience to listen to.

A general revision of the law of property is required. The distinctions of property into real and personal—its transmission, and the evidence of transmission—its appropriation to the discharge of the general liabilities of the owner—are matters the importance of which, as subjects to which Social Science should be applied, can scarcely be exaggerated; and they may well occupy the attention of several committees to be appointed for their detailed examination. I will venture, therefore, only to offer some remarks upon a portion of our jurisprudence with regard to the disposition of property, which appears to me to be sufficiently isolated for the purpose of separate discussion. I refer to the laws which regulate the disposition of property for purposes called charitable.

The power over property, which our law concedes to its immediate possessor, has become so extensive, that many persons appear to forget the mode in which such power has been acquired, and the gradual advancement of civilization which is indicated by its existence.

There is in many minds a vague notion that man has a natural right to 'do what he likes with his own,' and that this right extends not merely to his enjoyment, during his own life, of such material advantages as he may acquire, but to the disposition of those advantages, and their mode of enjoyment by others, after his decease. That there is a natural *desire* on the part of all men to exercise such control over that which they possess is indisputable; but, whatever view may be taken of the existence or non-existence of a moral sense, anterior to positive legislation, which by forbidding violence, secures to the individual the enjoyment of the acquisitions of his own industry there cannot, upon reflection, be any doubt that upon positive law alone must depend the disposition of such acquisitions on his decease. When by death he necessarily parts with their possession, who is to become their owner?

Accordingly we find, as might be expected, considerable variety in laws relating to the succession to property of deceased owners; sometimes it is reclaimed by the State, sometimes by the original donor; more frequently it is allotted to the family of the deceased; but with a variety of modifications as to their respective shares, and it is only at a late period of civilization that an owner is allowed by testamentary provision to exercise a posthumous control over its destination, either to the partial or entire exclusion of the State or of his kindred.

This control is in addition to any 'natural rights' he may be supposed to possess, whatever meaning be assigned to that expression.

No doubt, as civilization has advanced, it has been found that industry is encouraged, and the stability of political institutions is secured in proportion to the security afforded to the possession of property, and the enhancement of the privileges conferred on those who acquire it. Nevertheless a limit has, in every system of jurisprudence, been found necessary, beyond which the owner *at any given period* of *a given property* has not been allowed to control its destination.

Thus in our own country, property cannot, as a general rule, "be tied up," to use a very suitable expression, beyond a period of twenty one years after the decease of persons in existence when the act of disposition takes effect; those persons may be many or few, and may be selected arbitrarily, but a limit, and a sufficiently precise one, is secured. In order to prevent a repetition of such wills as that of Mr. Thellusson, the postponement of enjoyment of *income* is restricted to the still narrower limit of twenty-one years, simply.

But to this limitation of the owner's control over the disposition of property, the power allowed of making what are called charitable gifts or bequests, forms a remarkable exception. The history of this exception in countries where Christianity has prevailed (and I believe a similar history might be written with reference to all countries where any religious system is established), is so well known that I shall not dwell upon it. As soon as corporate bodies acquired property for religious purposes, the combination of an undying succession in the owners, and of a religious trust fixed upon the property, rendered it in fact inalienable, or, in other words, the owner at any given period was thus empowered by his donation of property to a religious corporation irrevocably to fix its destination.

On the formation of mercantile and trade guilds, donations, either for the general use of the guild, or for application to charitable purposes connected with it, had the like effect.

The evil consequences of such an anomalous power were soon felt, and gave rise to the various Statutes of Mortmain. These statutes, however, were levelled principally at the withdrawal of land from general commerce, and from the feudal consequences of changes of ownership, and were passed, moreover, at a period when personal property, from its nature, could scarcely be so "tied up."

Before the existence of either public funds or shares in large adventures, such as those of the East India and South Sea Companies, perpetual trusts could scarcely be attached to personalty, otherwise than by transforming it into land, either by purchase or mortgage, and the trust would then fall within the operation of the mortmain laws.

The Act of George II., however, by which the alienation of *property for charitable purposes is now principally governed*, effected to deal with donations of stock, but in such a manner that the statute is, in that respect, almost a dead letter.

I may, with sufficient accuracy for the purpose of this paper state our present law as to charitable gifts or bequests to be as follows:—

1. No posthumous or testamentary disposition whatever can be made, either of land, or of any interest in land (such as a term of years, rent-charge, mortgage, or the like), for a charitable purpose.

2. No charitable gift can be made of land or any interest in land by the owner in his life-time unless certain formalities are observed, and unless he survive the gift twelve months, and if he reserve any benefit to himself the whole gift is void. Subject to these conditions, land to any extent may be devoted to charity.

3. As to purely personal estate, whether consisting of stock or otherwise, there is an unlimited power in the owner of devoting it, either in his life-time or by will, to any charitable purpose, subject merely to certain formalities as to gifts of *stock, not important to be noticed.*

I shall not dwell on the various modifications made by special statutes, whereby the alienation of land to a limited extent for certain descriptions of charitable endowment is authorized.

The purpose of my present paper is to call attention, 1stly, to the apparent policy of our law with regard to charitable bequests; 2ndly, to the inconsistency and incompleteness of the law with reference to that policy; and, 3rdly, to the expediency of revising that policy itself.

1.* The policy of that law appears to be this, to discourage on the one hand the withdrawal of land either from the family of the owner, or from general commerce, in order to devote it to charitable objects; but, on the other hand, to permit or even, I may say, encourage the devotion of personal estate by its owner to the same class of objects. I say encourage, because our law sanctions the exercise of a power on the part of the existing owner of personal property by which he can direct and control its application to any amount for centuries, provided the object be one which the law recognises as charitable. A power which it does not concede to him with reference to trust for his own family.

2. The mode in which that policy is effected is inconsistent and incomplete. It is inconsistent, because in its effort to prevent land being withdrawn from commerce, and at the same time to leave personal estate unfettered, it has effectually prevented the application of a considerable portion of such personal estate to charitable objects; for instance, all money laid out on mortgage, no doubt from the possibility of the foreclosure of the mortgage converting it into real estate. But it would have been very easy to provide specially for "interests in land" of such a description, by simply prohibiting the gift of anything but the money secured, to be realized by a sale, for there are few mortgage deeds in which there is not a power of sale. No ground can be assigned for preventing a person holding stock and mortgages from dealing with the money value of the one in the same way as with that of the other. If it were thought advisable to prohibit a sale of land under a will, and the application of its produce to the endowment of a charity, regard being had to the interests of the heir, surely no such ground exists with reference to the mortgages which, like stock, vest in the executor.

But, further, the law is incomplete with reference to its own policy. I need hardly do more than allude to its incompleteness of definition, partly indeed touched upon under the last head, and the many nice distinctions to be found in decided cases of what is, or is not, 'an interest in land.' I would rather, under this head, indicate the want of completeness of the law, which endeavours to discourage the withdrawal of land from general commerce, and yet permits its alienation to any extent by an act, *inter vivos*, for charitable purposes. It is true that the conditions imposed, namely, that the property shall be parted with absolutely without any interest being reserved to the donor, and that the gift shall, even then, fail, if the donor die within the year, have tended greatly to check any such alienations of land; but these special regulations would rather appear to be pointed to another very serious difficulty regarding the policy of charitable gifts, namely, the necessity of preventing gifts made under a superstitious notion of purchasing the favour of the Almighty in the last moments of earthly infirmity. It is difficult, in this point of view, however, to suggest any reason why such precautions should be confined to the disposition of real estate.

3. The more important question remains—Whether it be not expedient to revise the whole policy of our law with reference to so-called charitable dispositions of property?

First let us consider the extent of the legal signification of the term charity.

A charitable disposition, in law, is the appropriation of property to some general public purpose, as contrasted with gifts to individuals for their own use: and the only limit to such gifts (provided the regulations of the Statutes of Mortmain be observed) is that the purpose be not contrary to positive law, or to the policy implied in all law, viz.: to the principles of religion or morality. In other words, the existing owner, although he is confined to the limits of twenty-one years after lives in being with regard to any power over property to be exercised on behalf of his family is allowed to appropriate the same property for ever to any public purpose (consistent with law, religion, and morality) that his imagination may devise.

I will give an instance or two of bequests upheld as charitable.

One testator, not long since, bequeathed £300 a year to be for ever applied as a pension to some person who had been *unsuccessful* in literature, and whose duty it should be to support and diffuse by his writings the testator's own views as enforced in the testator's own works. An inquiry was directed as to whether the testator's publications contained anything contrary to religion or morals, and this being answered in the negative, the so-called charity was established.

In another case a testator gave a fund to trustees, one half of the income of which was to be distributed amongst fifteen maidens of his parish of the poorer sort, between eighteen and twenty-five years of age, who should be the prettiest, and should have been most regular in their attendance at church, and the other half among fifteen spinsters, who should be upwards of fifty years old with the like 'qualifications.'

The trustees declined so invidious a selection of objects except under the direction of the Court of Chancery, which established the charity, independently, however, of the personal qualifications.

I have purposely selected these fanciful dispositions, in order to bring fully before you the question whether it be reasonable that the owners of property should have the power of fixing its destination for ever to upholding such whims.

But a much wider field offers itself in the consideration of the numerous bequests of greater or lesser amount for specific charities, not absurd in themselves, but as experience has shown, far from beneficial in their application, such as doles of bread or other food, small pensions, clothing, coals, and the like, frequently qualified also with a preference to those who have attended the church services.

Upon this part of the case two questions arise. First, how far experience will justify us in saying that society is benefited in any degree by gifts of this description?

I ask you to inquire into their results in practice. I believe that in all towns where such gifts exist to any great amount, you will find the paupers more numerous than in other towns of like population; and if they should happen to be, as is often the case, old boroughs returning members to Parliament, you will find the grossest political corruption and jobbing in the disposition of this petty patronage. I have had information on these points from a most intelligent gentleman, whose official duty it was to inquire into such charities. In one city five brothel-keepers were for some time annual recipients of small pensions left by some charitable testator. I have very recently been staying in Essex, where a parish was pointed out to me, the poor of which receive a large amount of like bequests, and the wages of independent labourers in that parish have sunk to 8s. a week, whilst in every parish around it they stand at 10s.

Secondly. A question arises whether, if gifts of this kind be objects deserving so much consideration as to justify the extraordinary power over property involved in their creation, there ought not at least to be some qualification imposed upon that power, subjecting the bequest from time to time to a legal control, which may give it a more useful direction.

This last observation leads me to the consideration of the degree of control already exercised by the Court of Chancery over charitable bequests. If a testator points out by his will a precisely defined object or institution to which the bequest

* In the valuable observations made by Mr Hodgkin during the discussion that ensued on this paper, it was correctly observed that all the earlier statutes were levelled against the withdrawal of land from the feudal consequences of change of ownership

is to be applied, the Court of Chancery has nothing to do but to execute the trust; but if the testator merely indicates the general character of the charity, then a scheme is directed by the Court for the application of the fund. Again, if the intention of the testator, however well defined, cannot be carried into effect exactly according to his conception, or if the objects he has pointed out subsequently cease to exist, the Court of Chancery directs a scheme for the appropriation of the fund *cy près*, as it has been termed, that is to say, approximating as nearly as possible to the testator's directions, rather than that his (so-called) charitable purpose should fail. I may give, as a well known instance of this doctrine, the case in which a Jewish testator made a bequest in order to found a school for the instruction of children in the Jewish religion. This bequest failed from its being then contrary to law so to instruct children; but Lord Hardwick applied the fund to *the instruction of children at the Foundling Hospital in the* Christian religion. It would probably have surprised the testator, could he have known that this was considered to be executing his intentions as nearly as possible. Another more satisfactory instance is the case of Bettin's Charity for the Redemption of Slaves taken by Barbary Corsairs. This fund had accumulated, for want of objects, to nearly £20,000, and was applied by Lord Cottenham to schools, the testator having, in another part of his will, devoted a large portion of his property to that purpose.

I need not pause to inquire how this power has been derived, nor to investigate the original power of Commissioners under the Statute of Charitable Uses; but it is important to notice its existence, for to my mind it indicates a reasonable mode of dealing with the whole subject of charitable gifts in future.

Having now reviewed our existing law, I will proceed, briefly, to state what appear to me to be its leading defects.

1. I think it unreasonable to allow any existing owner the privilege of fixing for ever the destination of any portion of his property, whether real or personal. It is impossible that any human sagacity can foresee the best mode of promoting, through all time, the welfare of the nation or any less extensive section of the community, such as the testator's native county, or town, or parish. But to allow the owner of a given field, or a given amount of stock, to say that it shall for ever be devoted to that *which* at the moment appears to such owner to be of public benefit, is to constitute him, in effect, a legislator, whose enactments can only be reversed by the sovereign will of Parliament. The evil has been felt, and partially met by the limited power vested in the Court of Chancery of filling up the crude and incomplete sketches of testators, and remodelling them entirely when they are incapable of any effect as originally framed. But in the far more numerous class of cases, these petty enactments must be allowed their full operation, and it is only when some paramount interest of the community calls attention to the evil that the Legislature interferes to remedy it. Of this we have a recent example on a large scale, in the Acts relating to our two Universities, which have authorised the Colleges and the Commissioners to set at nought multitudinous provisions in the deeds and wills of benefactors to Colleges confining the benefit of the foundation within narrow limits, as being at variance with a more enlightened view of public benefit.

2. I am of opinion that the distinction between the devotion of real or personal estate to charitable purposes is not sound. The feudal consequences of a tenure by a corporate body no longer require our consideration. No economical evil results from the mere fact of land being held by corporate bodies on charitable trusts. The estates held by the Colleges in our Universities, and still more the land held by the public Companies of the City of London in Ireland, will bear comparison, as to their cultivation and management, with any lands held by individual proprietors. Full powers of sale and exchange should be conferred on trustees for charities, and the evils to be apprehended from motives of superstition or vanity with regard to posthumous charity ought, I think, to be met. But this latter mischief affects bequests of personalty, as well as those of realty.

3. I am of opinion that all posthumous charity should be very strictly regulated. It is very rare that charity properly so called can, in any sense, be predicated of posthumous gifts. The preference of the poor in general to the testator's own relatives is far more often the result either of superstition or vanity than of benevolence. I remember having heard the late Sir Robert Peel state that the grand-children of a so called munificent founder of a great public institution in London had applied to him for a grant of public money on the ground of their having been beggared for the public benefit. At the same time I recollect an anecdote of a man at Marseilles *having borne through life the character of a miser, who by his* will stated that he had observed the suffering occasioned by want of water in the town, and had resolved to sacrifice all his own comfort to provide for that want, and now devoted his accumulations to that purpose. This, no doubt, was true charity. I would not then prohibit, but regulate very strictly, gifts by will for charitable purposes.

4. With regard to the directions of schemes for the application of indefinite charitable gifts, and remodelling charities by *cy près*, I think that less expensive machinery than the Court of Chancery is desirable; and further, that the regulating power should be extended so as to make charitable endowments more generally available to the exigencies of the time.

I will proceed now to throw out some suggestions for the remodelling of the law with reference to Charitable Endowments, rather with a view to elicit opinion and to direct public attention to the subject, than as an elaborate scheme, ripe for legislation.

My proposals then would be to the following effect:

I. That either real or personal estate may be disposed of by deed for any charitable purpose selected by the donor, subject to the following conditions:

i. That a definite scheme be laid by him before the Charity Commissioners and approved of by them.

ii. That the *gift is not to take effect until* the expiration of one year from the execution of the deed, with power for the donor to revoke the deed at any time during the year; and the deed to be *ipso facto* revoked by his death within that period.

iii. The gift to be absolute, without reserving any beneficial interest to the grantor beyond any patronage he may exercise with regard to the charity.

iv. The deed itself to be executed in the presence of, and attested by the Commissioners, or some person deputed by the Commissioners to witness its execution, and not necessarily in the presence of any other witness, and to be enrolled as now provided.

The control of the Commissioners should extend only to the details of the scheme in cases of additional endowment of any existing charity already established under any degree or order of Commissioners under the statute of Elizabeth, or by the Court of Chancery, or with the assent of the Charity Commissioners, and in certain other cases to be specified, as for example, hospitals, schools, or the like. But, in other cases, the Commissioners to have power to reject a scheme, but for the cause to be assigned, either wholly or in part subject to an appeal to the Court of Appeal in Chancery.

Simple gifts of stock or money or other chattels to the treasurer or trustees of any existing charity, already approved by the Commissioners, or established by any order of the Court of Chancery, for the general purposes of the charity, to be free from the above provisions. But with that excep-

tion, no gift *inter vivos* is to take effect without conforming to them.

The Legislature might provide, of course, limits within which alone the power of the Commissioners should be exercised other than those I have suggested; and in any discussion of a Bill there would be numerous suggestions to that effect. I am not proposing a Bill, but suggesting a line of action.

2. That there should not be any power of making a charitable devise of land or any bequest of money exceeding a given amount, in value (say £200), to endure beyond the period allowed by law for the appropriation of money in other cases, except in favour of some existing charity already established under any decree or order of the Commissioners under the statute of Elizabeth or of the Court of Chancery, or already established with the assent of the Charity Commissioners. And if exceeding the above amount, such devise or bequest, even though it be to any such existing charity, to be by will executed at least twelve months before testator's decease, and attested by a solicitor.

3. That the Charity Commissioners shall have power from time to time (subject to an appeal to the Court of Appeal in Chancery), on the application of the Attorney-General, either *ex officio* on the relation of responsible relators, to remodel the application of the income of any charitable funds in cases where such income is applicable in sums not exceeding, say £10 each for the benefit of individuals by way of pension, dole, clothing, or the like, so as to apply the whole or any part of such income towards the permanent endowment of hospitals, schools, or other like general charities, either already existing or to be newly established.

4. That there be a general power of revision in the Commissioners (subject to appeal to the Court of Appeal in Chancery) of all charitable endowments whatever, on application by two-thirds of the governors or other persons having the government or control of the charity, and with the assent of the Attorney-General, for the purpose of enlarging the scope of the charitable trust, or varying the application of the funds to other charitable purposes.

These proposals are, as I have said, mere general suggestions for the purpose of eliciting discussion, and are no doubt capable of much improvement; but I trust that the Legislature will no longer permit mere vanity or caprice, on the one hand, to devote large resources to frivolous objects, nor, on the other, allow so much wealth as is at this moment frittered away by its useless, if not mischievous application, to be longer withheld from really great and permanent public objects.

DIVISION COURTS.

CORRESPONDENCE

The removal of Judgments of Division Courts into the County Court—The certificates of County Court Judges to prevent the operation of the Exemption Law of 1860.

To the Editors of the Law Journal.

Gentlemen,—The caption of this letter points to two matters of practice, under the Division Court laws, not satisfactorily settled, and with which I have frequently had difficulty of late.

For instance, some Division Court and County Court Clerks think that the 142nd section of the Division Court Act (Con. Stat. U. C., p. 160) has reference to judgments of the Division Courts where the judgment for debt, exclusive of costs, is for $40. Viewing the law in this way, they think that they are not obliged to give certificates to file in the County Court to sell lands, unless the original judgment for debt amounts to or exceeds $40. That if the judgment for debt or damages was less than $40, although it may be more, including costs, or if the debt has been reduced to a sum below $40, they should not certify for the purpose of filing in the County Court. The Clerks of the County Court (at least one of them) seems to doubt whether in such a case as last referred to, he should file a certificate in order that it "may become" a judgment of the County Court.

The point is a very important one in many respects, and I would feel much obliged for your opinion in the *Law Journal*. The words of the section are, "In case an execution be returned *nulla bona*, and the *sum remaining unsatisfied on the judgment* under which the execution issued amounts to the sum of forty dollars, the *plaintiff* or *defendant* may obtain a transcript," &c.

The 143rd section then requires the County Court Clerk to file the transcript and to enter in four separate columns in his judgment book four different things.

The 2nd the amount of the judgment (which I think means the original amount), and the 3rd the amount remaining unsatisfied thereon.

Now, I understand the "amount remaining unsatisfied thereon" to mean the amount of *debt, interest and costs* remaining unsatisfied. If so, and they together exceed $40, lands can be sold on a judgment, grounded on a transcript from a Division Court.

For instance a judgment may have been given originally for $30 debt, $6 costs, and subsequently $5 interest may accrue on the judgment of $36 debt and costs.

Thus when the transcript is applied for there may be the sum of $41 remaining unsatisfied on the judgment.

Or the judgment may have been originally for $80 debt and $5 costs; $50 of this may have been paid, leaving $35 unpaid. Subsequent interest may have accrued until the amount due (when the transcript is applied for) is $42.

Can a party legally in either case file a transcript in the County Court, and sell lands by virtue of the judgment?

I would remark that the 135th section of the same Act clearly makes interest accruing a part of the judgment, because it allows it to be levied by execution. But the question is not confined to interest, for a judgment may be given for $20 debt and $21 costs, in all $41, and be, as I take it, within the meaning of the 142nd section.

The other question arises under chap. 27th, section 2 of the Act passed in 24th Victoria, relating to the power of County Court Judges to certify on executions, to prevent the operation of that Act on all contracts made prior to the 19th May, 1860. There is some diversity of opinion among County Court Judges as to the proof they should have before them before certifying. His Honor Judge Smart of the County of Hastings has had some correspondence with me in relation to the question, in which I think, with deference to his opinion, he has taken an extreme view of the law. If his view be correct the law should be altered otherwise there are cases where the law cannot be carried out.

The case in question is this: "A" in Toronto, during the time Judge Harrison was Judge of the Toronto Division Court, obtained a judgment against "B" for $80. "B" lived at the time in Hastings, having removed from Toronto.

The Clerk at Toronto in 1857 sent a transcript to Hastings, which on the face of it shews that the debt must have been contracted before 1860. It thus becomes a judgment of the Court in Hastings.

Now the Clerk in Hastings issues an execution upon this judgment, and lays it with the transcript before the Judge of Hastings, and asks him to certify under the last named Act. He refuses to do so for want of sufficient evidence that the contract accrued before May, 1860.

It so happens in this case that the only person who could certify on the original judgment is Judge Harrison, who does not now preside over the Division Court in Toronto.

Judge Duggan presides over that Court, and has no better knowledge of the grounds of the judgment than Judge Smart. He did not give the judgment, and has to look to the Clerk's

entry to see when it was given, and moreover the execution is not issued in his county. Thus if Judge Smart does not certify the plaintiff must lose his remedy.

Now one would think that these facts were quite sufficient to warrant a certificate.

1st. The transcript comes to the Judge in Hastings in regular course in 1857 under the seal of seal Court.

2nd. On the face of it he sees it is for a debt that must have accrued before May, 1860, or judgment would not have been given for it.

3rd. There is nothing in the Act which authorizes the Judge of an outer county to certify on a transcript in every case merely to satisfy the judgment of the Judge in whose county the execution issues. In this case the same evidence would be before Judge Duggan that is produced before Judge Smart—Judge Duggan not having given the original judgment.

In the superior Courts I have obtained certificates, and all the Judges there require is the production of the original judgment roll. In the case in Hastings the transcript is a certified copy of the judgment under the seal of a Court authorized to give it by law, evidence equally as good as that produced before the superior Court Judges—I say equally as good, because the law allows every proceeding to be taken on a transcript judgment that can be taken on an original judgment.

There is another case in which, under this Act, some difficulty occurs in certifying. Thus Judge Wilkes of Grey will not certify on an execution issued on a transcript from an outer county of proceedings had on a transcript sent from another outer county.

I mean a case like this: "A" obtains a judgment in Toronto—sends a transcript to Guelph, where it is partly collected, and costs in addition are made.

Thus there may be $20 costs made in Guelph. The defendant then moves to Grey, and a second transcript, or a transcript on a transcript, is sent from Guelph to Grey to collect the balance of the costs and debt there.

Judge Wilkes requires a transcript from the original county, and will not take as evidence the Guelph certificate.

I think in all these cases transcripts under the seals of the respective courts ought to be sufficient evidence for a Judge to certify, if on their face it appears that the contract arose prior to May, 1860.

Yours truly,

CHARLES DURAND, *Barrister.*

Toronto, April 21st, 1862.

[The 143rd to the 146th sections of the Division Courts Act were obviously passed to enable a judgment creditor in the Division Courts to reach the lands of the defendant, which he could not do by the ordinary process of these Courts. The 143rd to the 145th sections enabled the judgment to be transferred by a simple process to the County Courts, which have the power to issue execution against lands, and the 146th section (now repealed by 24 Vic., cap. 41) enabled a registration of the judgment to bind the lands as in the Superior Courts.

In the first place we would observe upon our correspondent's letter, that no Clerk of a Division Court should take it upon himself to refuse a transcript of the judgment, or assume to himself the right of deciding the point against the plaintiff. If he certifies to the facts as they are he has done his duty. The question as to whether an execution against lands may issue upon the transcript he has nothing to do with. Under the 142nd section, if a Clerk finds that books and papers in his office answer in the affirmative the following questions he is, in our judgment, bound to grant the transcript:

1. Did A. B. recover a judgment in the Court against C. D.?

2. Was execution issued thereon and returned by the Bailiff nulla bona?

3 Does the sum remaining unsatisfied on the judgment exceed $10?

With reference to the words "remaining unsatisfied," &c., so far as the Clerk is concerned at all events, we think he must be guided in this way: Suppose I was called upon to issue an alias execution in my own Court, for what amount would it be? Why, for the sum or balance due to the plaintiff, in other words, for the sum left unpaid and unsatisfied, and that sum must be $10 at least to warrant the issue of a transcript.

Upon the question itself we never had any doubt that the sum for which the verdict is given by the Judge is not the criterion—his judgment is for debt and costs, and is so entered in the procedure book, and if these *together* come up to the required amount that will be sufficient under the clause and that for the purposes of the clause the costs are not distinguishable from the debt. The words remaining "*unsatisfied on the judgment*" can have no other meaning. The language of the 143rd section is more pointed in this particular than the repealed section 146, and the latter requires the amount to exceed $40, but even that section, we think, would bear the construction suggested, "a party who has *obtained judgment* in a Division Court exceeding $40." If it was intended to make the amount relate to the *debt* or *claim* alone it would have been so stated, as for instance in section 12 of cap. 24 Con. Stat. U. C., relating to arrests—"recovered judgment against defendant for $100 or upwards *exclusive of costs.*"

As to whether the interest may be brought into account in making up the $10, it is more questionable, as the interest, strictly speaking, is not part of the judgment, but the payment of it may be claimed and, under the execution, enforced.

The case of *Farr* v. *Robins* reported elsewhere, will be read with interest as having some bearing upon the subject of our correspondent's communication.

As to certifying an execution, probably the Judge might with propriety be satisfied with less evidence than suggested, but the simplest thing possible is to send with the transcript an affidavit from the plaintiff or his agent that the debt was contracted before May, 1860. No Judge, we think, would make any difficulty in certifying in such case when it appeared to accord with the transcript of judgment.—EDS. L. J.]

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN.—You are wrong, in your last issue, in assuming that the Division Court at Sarnia is the only one shabbily treated by the County Councils, about getting accommodation in the Court House. In this town, the Court Room can only be had for Division Court uses by the payment by the Clerk of $3 per day—$1 50 to the County Treasury, and $1 50 to Court House Keeper. In 1857 I paid $14 to the Court House Keeper; this was before the price was *raised.* As $3 a day would involve an outlay of at least $25 a year, I have for the last four years hired other places for the Court. It generally costs one dollar each Court—for the last two Courts, $2 each time. I quite sympathize with my brother Clerk at Sarnia. Hope he has got a good long purse to pay these "extras" out of! But really it is a strange state of affairs, that a *Court* House, built by the people's money, cannot be got for *Court purposes,* unless somebody pays for it out of his own private means.

Yours respectfully,

THE CLERK OF THE FIRST DISTRICT COURT, GREY.

Owen Sound, 15th April, 1862.

[We really do not understand on what principle accomodation is denied to division court offices in any court house, unless upon payment, as if the rooms were let for a concert or ball. The law in this respect needs some amendment.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

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

IN THE MATTER OF JOSEPH THOMPSON AND THE CORPORATION OF THE UNITED TOWNSHIPS OF BEDFORD, OLDEN, OSO, AND PALMERSTON.

By law—Uncertainty—Mistake in name of applicant—Costs.

A by law described a new road to be opened as follows :—"Commencing on the Green Bay line of road on lot 22, and crossing part of lot 22, and lots 23, 24, and 25 in the sixth concession of Bedford, until it intersects the old travelled road and continuing on to Bob's lake in the said township of Bedford, the said road to be thirty feet wide."

Held, bad for uncertainty.

In the copy of the rule nisi first served, the applicant's name was by mistake written *James* instead of *Joseph* Thompson. The road in question also passed through the land of one James Thompson, with whom an arbitration had taken place, and the corporation supposing him to be the applicant, prepared affidavits in answer. Afterwards the mistake was discovered, and a correct copy of the rule served. The court in making it absolute with costs directed the costs incurred by the corporation in consequence of the error to be deducted.

(H. T., 25 Vic.)

R. A. Harrison obtained a rule in Michaelmas Term last on the corporation, to shew cause why their by-law No. 60 should not be quashed, with costs.

1st. Because the by-law (which was for the establishing of a new road) did not with sufficient certainty define the line and limits of such road. 2nd. Because the road, so far as it could be said to be defined, encroached upon the dwelling-house, barn, stable, out house, orchard, garden, and pleasure grounds of Thompson, the applicant, whose consent had not been obtained.

The by-law moved against was passed on the 2nd of September, 1861, and described the new road as follows:—"Commencing on the Green Bay line of road on lot 22, and crossing part of lot 22, and lots 23, 24, and 25, in the sixth concession of Bedford, until it intersects the old travelled road, and continuing on to Bob's lake in the said township of Bedford." And it enacted that the said line of road be established and remain open for the use of the public; the said road to be thirty feet wide.

It appeared by the affidavits filed that the rule *nisi* for quashing the by-law being itself properly intitled, as above, a mistake was made in the copy served, the name of *James* Thompson being inserted as the name of the applicant instead of *Joseph*.

The new road also passed through land belonging to one James Thompson, in the same township, and the corporation, supposing that he really was the mover in the application, had affidavits drawn and sworn to, and were put to considerable expense in preparing themselves to shew cause last term against the application believed to have been made by him. There had been an arbitration between the corporation and James Thompson respecting the compensation to be paid to him for taking the road through his lot, and he had accepted the money, so that there were special grounds to be urged in answer to an application in his name to quash the by-law.

The counsel for the applicant afterwards, at the end of Michaelmas Term, discovered the mistake, and obtained leave to amend his rule by making it returnable in this term, in order to serve a correct copy of it.

Britton shewed cause, and urged that the applicant should be made to pay the costs occasioned by the mistake. He cited *Smith* v. *The City of Toronto*, 10 U. C. C. P. 225; *Janson* v. *The Corporation of Reach*, 19 U. C. Q. B. 591.

R. A. Harrison, contra, cited *Dennis* v. *Hughes et al*, 8 U. C. Q. B. 111; *Smith* v. *The Municipal Council of Euphrasia*, Ib., 222; *Brown* v. *The Municipal Council of York*, Ib., 596.

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

As regards the quashing of the by-law, we think it cannot be allowed to stand, for it does not sufficiently define the line of road as it ought to do. The width is specified, but not the course of the road, so that no one can tell where it begins, nor through what parts of the lots named it was intended to cross. No one can tell from the description in the by-law when he is on the public highway, and in case of any contention about it there would be no means of determining the point. For the reasons that we have given in several former cases, we think we must make absolute the rule for quashing this by-law, which is so clearly bad upon the face of it; and we quash it with costs, but with a direction that the master shall tax the costs incurred by the corporation in preparing to answer the supposed application in the name of James Thompson, and deduct them from the costs of this application.

Rule absolute.

ROW v. QUINLAN ET AL.

Ejectment—Plea of confession—Verdict taken after—Laches.

Plaintiff brought ejectment upon a mortgage. Defendant appeared, and notice of trial was served on the 18th September for the 30th October. On the evening of the 29th October the defendant served a notice of confession on the plaintiff at his residence thirty miles from the assize town where his attorney had gone; and on the 30th a verdict was taken, defendant not appearing, and the attorney being ignorant of the confession.

The court under these circumstances refused to set aside the verdict.

[H. T. 25 Vic. 1862.]

Ejectment for part of lot No. 9, on the south-east side of the Carrying-place road, at the head of the bay of Quinte, in the township of Ameliasburg.

The action was brought upon a mortgage executed by the defendant Quinlan to the plaintiff, the defendant Shears being the mortgagor's tenant.

The defendants both appeared, and defended for the whole premises: but being called at the trial, which took place at Picton, before Richards, J., they did not answer, and judgment was entered for the plaintiff under the Ejectment Act.

Hector Cameron moved, on the part of the defendants, to have the entry of the record and the verdict, and all proceedings subsequent to the service upon the plaintiff of a notice of confession of the plaintiff's title, set aside for irregularity, on the ground that the plaintiff could not legally proceed in his action after such notice. He cited Consol. Stats. U.C. cap. 27, sec. 45.

Richards, Q. C., showed cause, and cited Ch. Arch. Prac. 212; Lofft, 232; Rule of Court 135.

The facts of the case sufficiently appear in the judgment of the court, delivered by

ROBINSON, C. J.—The case was called on, and a verdict taken, on the 30th of October last. The defendant Quinlan took, as he swears, a notice of confession to the plaintiff, not to his attorney, on the evening of the 29th, and the plaintiff's residence was about thirty miles from Picton, where the assizes were to be held.

The plaintiff's attorney had left on the 29th October for Picton, and he swore that he knew nothing of the confession being given till after the verdict had been taken.

After reading the affidavits on both sides, we do not think we should be justified in determining that the plaintiff's attorney had acted unfairly in the case. The attorney for the defendant Quinlan had refused to admit the mortgage upon notice. So long before the trial as the 18th of September, the notice of trial had been served, and the defendants had, therefore, ample time to have given the confession long enough before the assizes, which opened on the 30th of October, to have rendered unnecessary these proceedings of which they complain. If their object was to save costs by allowing the plaintiff to get judgment without the necessity of going to trial, the defendants should have served the notice of confession not on the plaintiff, but on his attorney, who was conducting the suit, and it should have been served in time to stop the proceeding to trial.

The 45th clause of the Ejectment Act (Consol. Stats. U. C. cap. 27) contains nothing that should deprive the plaintiff in this case of his costs, but the contrary; and upon the facts appearing in the affidavits, it would be unreasonable that the plaintiff should lose the costs of preparing for trial, or of the trial, or entering judgment on the confession, because a notice of the confession had been served on the evening of the 29th October, at Picton, thirty miles from the town where the assizes were to be opened the next day, and served not upon the attorney but upon the client, who would probably know nothing of the meaning of such a proceeding. It was sworn that the verdict was taken on the next day for the plaintiff, without knowledge on the part of the attorney that such a notice had been served, or that a confession had been given.

Rule discharged with costs.

IN RE KEENAHAN AND PRESTON.

Appeal from county court—Mandamus.

A county court judge refused to certify the papers for appeal because the bond was not conditioned to abide by the decision of the court above as the statute requires. The plaintiff who desired to appeal then applied for a mandamus, contending that this part of the condition was unnecessary, as only costs could be in question, but the court refused to interfere.

A. McNab obtained a rule *nisi* for a mandamus to the judge of the county court of Ottawa, to certify an appeal. Cause was not shown.

The action was brought for not returning a conviction made by the defendant as a magistrate. On demurrer to the declaration, judgment was given for the defendant, from which the plaintiff desired to appeal.

The objection which induced the learned judge to decline certifying was, that the bond, which had been executed for the purpose of the appeal, according to the 68th section of the County Courts Act, Consol Stats U C cap 15, did not make it one of the terms of the condition that the appellant would abide by the decision of the court appealed to.

The party desirous of appealing contended that that was not necessary in this case, because the appeal only regarded costs.

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

We have considered the affidavits filed in support of this application for a mandamus, and have determined to discharge the rule

The County Courts Act, sec. 68, requires that the bond given by the party desirous of appealing shall contain as one of the terms in the condition, that the party appealing shall "abide by the decision of the cause by the court to be appealed to," and this without making any distinction between the cases of a plaintiff or defendant appealing. This bond contains no such words, though the legislature has required them to be inserted.

It is argued that they are unnecessary in this case, because it is the plaintiff who appeals; but that is not alone a good reason for omitting that part of the condition, for a defendant in actions for money demands may on a plea of set-off have a verdict in his favour for a considerable amount. This, it is true, is not such a case. It is not necessary for us to say whether such a bond might or might not with propriety have been accepted.

The learned judge, finding it deficient in what the statute positively requires, thought he ought not to receive it, and we shall not command him to disregard or dispense with the act. We should be encouraging unnecessary deviations from prescribed forms by doing so, and should be interfering improperly with the discretion of the judge. The writ of mandamus is a remedy for compelling parties to carry a provision of a statute into effect, not for compelling him to violate a statute, even in point of form.

We discharge the rule, but not with costs, as no cause has been shown and no costs incurred.

Rule discharged.

EVANS ET AL. V. MORLEY.

Promissory note—Consideration—Preexisting debt—Lottery—12 Geo. II. ch. 28—New trial refused

Semble, that there is no distinction, as regards consideration, between a promissory note given for a pre-existing debt and for a new consideration

Held affirming *Evans v. Morley*, 20 U. C. Q. B. 236, that under 12 Geo. II. ch. 28 securities given for the price of lottery tickets are not void in the hands of a *bonâ fide* holder for value

Where the jury found that the plaintiffs had not notice of the illegality the court refused a new trial, holding that the defence was not one to be favoured

(H. T., 25 Vic.)

Action on a note for £15, made by the defendant, on the 2nd of July, 1856, payable to one Gillespie or bearer, 12 months after date.

Pleas—1. That the note was given to Gillespie for an illegal consideration, namely, for a ticket in a lottery set up for sale of land; that the plaintiffs knew that when they took the note as bearer, that they took it after it became due, "and without any value or consideration for it and always held and now hold the same without value or consideration"

2. That the defendant was induced to make the note by the fraud covin, and mi-representation of Gillespie and others: that the plaintiffs took the note when it was over-due, without value or consideration, and with notice of the premises.

The plaintiffs replied to the first plea that they took the note before it was due, for a good and valuable consideration, and without notice of illegality, and had always held and now hold the same for such consideration.

And they took issue on the defendant's second plea.

At the trial, at Kingston, before Richards, J., the learned judge left it to the jury to find upon the evidence, which it is not material to report, whether the plaintiffs' agent (that is, their attorney at Belleville) had knowledge of the illegality of the consideration. They found for the plaintiffs, for the note and interest $75 78

O'Hare, for the defendant, moved for a new trial on the law and evidence, and for misdirection, contending that the plaintiffs should have shewn that they gave value for the note, which was not done by proving that their agent or attorney received it on account of a pre-existing debt, and that the evidence shewed that the plaintiffs had through their agent (the attorney's clerk) notice of the illegality, and that it was not material at what time the clerk first had notice He moved also in arrest of judgment, on the ground that on the pleadings it was admitted that the note was given for an illegal consideration, and therefore there could be no recovery on it.

MacLennan shewed cause, and cited *Evans et al* v *Morley*, 20 U C Q B 236; *Gooderham et al* v. *Hutchinson*, 5 U C C P. 248, 258; *Goodman* v *Harvey*, 4 A. & E 870; *Wallbridge* v. *Beckett*, 12 U. C Q. B 395; *Swift* v *Tyson* 16 Peters 1.

Richards, Q C, contra, cited *Harvey* v. *Towers*, 6 Ex. 656; Byles on Bills, 28; *De la Chaumette* v. *The Bank of England*, 9 B. & C. 208.

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

The motion in arrest of judgment is disposed of by the judgment already given to the same case on demurrer (20 U. C. Q. B 236), where we held that the English Act against such lotteries (12 Geo. II, ch. 28) does not make void the securities given for the price of lottery tickets, and does not therefore render such negotiable securities void in the hands of a *bonâ fide* holder for value, without notice of the illegality.

It does not appear that any objections were taken at the trial to the judge's charge, on the point that the pre existing debt from Elmore to the plaintiffs, who took the note from him, was not a valuable consideration, and that they do not stand in that respect on as favourable ground as they would have done if they had advanced money or given any other new consideration relying upon the note. That is a point upon which the courts have differed, but there is much authority at the present day in favour of holding that there is in general no such distinction The learned judgment given in the Court of Common Pleas in *Gooderham* v. *Hutchinson* (5 U. C. C. P. 248) is strongly in the plaintiff's favour. I refer also to the cases collected in Byles on Bills, 3rd Am. Ed., p. 28 and 95, note (*l*).

Then as regards the plaintiffs having notice of the illegality when they took the note, that cannot be said to have been proved. There was evidence to the contrary, and the question whether they had notice or not was left to the jury, and they found that the plaintiffs had not notice. The defence is one of that description that the law should not be at all strained in the defendant's favour, and fortunately the amount is not large. We should not, we think, give him a second chance of setting up such a defence against a transferee of the note by any exercise of our discretion in his favour.

Rule discharged.

COTTON V. MCCULLY.

Ejectment—Description of land.

In ejectment for twenty acres of land the plaintiff claimed under a patent from the crown. Defendant endeavoured to defeat his recovery by putting in a mortgage from the plaintiff to one P of 1500 acres described as "being comprised in the schedule and map attached" The land in the plaintiff's patent was not mentioned in the schedule, though it was laid down on the map but it was proved that the map contained other lands belonging to other parties and was not made with reference to the mortgage, and that the schedule embraced lands not appearing on the map.

Held, clearly insufficient to disprove the plaintiff's claim

(H. T, 25 Vic)

Ejectment for water lot No 1, on the east side of the river Credit, in the village of Port Credit, in the county of Peel, being the corner lot at the intersection of Toronto and Brock Streets in

the village of Port Credit, as shewn on a plan of the village made by J. S. Dennis, Esq., being composed of that parcel of land and marsh, containing twenty acres, situate on the north east side of the river Credit, and bounded on the west and north-west by the north-western boundary of the town-plot; on the north and north-east by Lot and Brock streets, and on the south-east by Toronto street.

The plaintiff claimed under a patent, dated the 11th of November, 1851.

At the trial, at Toronto, before Draper, C. J., the defendant put in and proved a mortgage, dated the 20th of April, 1854, from the plaintiff to William Proudfoot, Esq., of 1300 acres of land at Port Credit, in which mortgage the land was described as "being comprised in the schedule and map attached to the deed." The land mentioned in the patent (the twenty acres) was not mentioned in the schedule. It was laid down on the map, along with other lands belonging to other parties, but there was nothing in the map to distinguish the twenty acres intended to be conveyed from the other lands which it comprised, either by difference of colour or otherwise; and it was sworn by the surveyor who made the map, that it was not made in order to shew what was the land mortgaged, nor with any reference to the mortgage, but for a wholly different purpose, and that there were parcels of land in the schedule which were not embraced within the map.

Harman obtained a rule *nisi* accordingly.

A verdict was entered for plaintiff, with leave to defendant to move to have a verdict entered for him upon the evidence.

R. A. Harrison shewed cause, citing *Kingston* v. *Chapman*, 9 U. C. C. P. 130.

Cameron, Q. C., supported the rule.

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

The defendant shews no right in himself to the property in question, but is only endeavouring to defeat the plaintiff's recovery by setting up a mortgage to a third party, in which it was not shewn that he has any interest. It need hardly be said that the evidence ought to be perfectly clear to prove that this particular lot is included in the mortgage before the defendant should be allowed to have a verdict entered in his favour. So far from that, it seems clear the other way, even without taking into consideration what seems to be the case, that the mortgage was made before the patent had been issued to the plaintiff, and could not therefore convey a legal interest in the land unless under certain circumstances.

But as it was conceded that the lot, though embraced in the map, is not included in the schedule referred to in the mortgage and annexed to it, and as moreover it was not shewn that the premises in question formed any part of the mill lot, or of the three other town lots specially named in the mortgage, we have no hesitation in discharging the rule.

Rule discharged.

REGINA v. THE GREAT WESTERN RAILWAY COMPANY.

Highways—Indictment for obstructing—22 Vic., ch. 116, sec. 15; Consol. Stats. U. C., ch. 54, secs. 313 & 8; 16 Vic., ch. 99, sec. 4, 16 Vic., ch. 101; 4 W. IV., ch. 29, sec. 9, 12 Vic., ch. 35, sec. 41.

In September, 1852 a tract of land upon the river St. Clair, adjoining the town plot of Sarnia to the south, was ceded by the Indians to the Crown, to be disposed of for their benefit. In the same year this tract was surveyed under instructions from the government, and three streets laid out upon the plan, one called Front street, running north and south, parallel with the river, and the others, Wellington and Nelson streets, running westerly through the tract, crossing Front street at right angles, and continuing to the river bank, which was distant only 1 chain 50 links from Front street along Nelson and 50 links along Wellington street. This plan was reported to the government, with the surveyor's field notes, but Nelson and Wellington streets were not laid out upon the ground west of Front street and that portion of them had never been opened or used so as to give access to the water—the river bank there being abrupt. A sale was held in 1853, at which some lots were sold with reference to this plan, one on Nelson street, but none west of Front street.

In 1854 the Great Western Railway Company purchased from the government the tract west of Front street along the river between Wellington and Nelson streets and beyond them to the north and south, including the water lots in front, for which they paid the sum awarded by arbitration. Afterwards a public sale of lots in the tract ceded by the Indians was held by government, at which a plan was referred to made for the company by the same surveyor who first laid out the tract, shewing the ground which the railway and its terminus would occupy, but exhibiting no streets leading through it to the river, and this was the plan used before the arbitrators, and upon which their award was made.

The company, without objection on the part of the municipality, entered upon the land bought by them, made new ground in front by filling up the river, and completed their buildings and other works which obstructed Wellington and Nelson streets running through the land purchased to the river, according to the first plan proposed. After this the municipality by letters applied to them for compensation for the injury caused to the town in consequence of the access to the water by these streets being cut off, claiming that they should be paid a fair value for the streets thus taken and remunerated for a purchase of land which it was proved they had made higher up at a cost of $3,200 in order to obtain access to the river. They made no complaint, however, that the defendants had acted illegally.

Defendants being afterwards indicted for obstructing these streets, it was left to the jury to say, with reference to the 15th clause of 22 Vic., ch. 116, whether the municipality or the government had permitted defendants to occupy the streets before that act, and if so, to find for defendants. The jury gave a general verdict of guilty, and being asked how they found as to the permission, said only that they thought the municipality ought to be compensated for the land.

By 22 Vic., ch. 116, sec. 15, it is enacted, in substance, that all highways occupied by this railway with the written assent of the municipality wit. in which they are situated, shall be declared vested in them to the extent of the user permitted or enforced by the municipality, and all proposed or contemplated streets occupied by the company or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be lawful.

Held, that defendants were clearly entitled to an acquittal under this clause, for 1st, as to the first part of the clause, a written assent given afterwards by the municipality would suffice and might be inferred from their letters, in which they asked only for pecuniary compensation; and 2ndly, these were proposed or contemplated streets occupied by the company, and not leading to any place beyond the railway, in which case no assent was required.

Held, also, that the Consol. Stat. U. C., ch. 54, sec. 333, had no application, for it could not be said that these streets had not been opened by reason of any other road being used in lieu thereof.

That under 16 Vic., ch. 99, sec. 4, and 16 Vic., ch. 101, defendants had clearly a right to take possession of this land for their railway, with any easement thereto.

Quære, whether the 4 W. IV., ch. 29, sec. 9, which requires this railway company on intersecting any highway to restore it to its former state, or in a sufficient manner not to impair its usefulness could have been applied in this case; the streets in question never having been opened or used, being covered by the works of defendants, so that they could not be restored without dispossessing them and leading to no place beyond. *Semble*, that at all events a mandamus would not, under the circumstances, have been granted at the instance of the municipality.

Under Consol. Stats. U. C., ch. 54, sec. 313, these streets being laid out on the original plan made by the Crown surveyor, would be public highways, though not staked out upon the ground and never opened or used.

Semble that under 12 Vic., ch. 35, sec. 41, the Indians, or the government acting for them, had power to alter and amend the survey by striking out these streets where they ran through the land sold to defendants.

(H. T., 15 Vic.)

This was a prosecution for nuisance, in obstructing two common and public highways. The indictment was preferred at the assizes for the County of Lambton, and was removed into the Court of Queen's Bench by *certiorari*, at the instance of the defendants, and was tried before Robinson, C. J., at Sarnia, in October last.

The indictment charged that on the 1st of January, 1857, and thereafter continually until the committing of the grievance complained of, there were certain common and public highways, to-wit, Wellington street and Nelson street, in the town of Sarnia, in the county of Lambton, terminating on the river St. Clair, in front of the said town of Sarnia, which were used by Her Majesty's subjects residing in the said town, and by others, to pass and re-pass over, for the purpose of procuring from the waters of the said river a supply of water for their use and that of their families, and to water their cattle, horses and stock; and that the waters of the said river were at the terminations of the said streets open and accessible for the purposes aforesaid, for all the said subjects, and others, and the same had for many years past been constantly used by the said subjects and others for such purposes. And that the defendants, on, &c., unlawfully and injuriously cut down and carried away the earth and soil of the said streets, and made divers erections and buildings thereon, and at the termination thereof, and constructed portions of their depot, grounds, platforms, and wharves thereon, and in front thereof, and piled large portions of earth and soil upon Nelson street, and thereby then obstructed the said streets, and prevented their continual use by the said subjects as aforesaid, and also obstructed the said access by the said subjects to the said waters of the river, and prevented their obtaining and using the said waters, as they had been accustomed to do as aforesaid, to the common nuisance of Her Majesty's subjects and others using the said streets and waters.

The defendants pleaded not guilty, referring in the margin of their plea to the statutes 4 Wm. IV., ch. 29, sec. 26; 16 Vic.,

ch. 99, sec. 10; 18 Vic., ch. 176, sec. 26, and 22 Vic., ch. 116, sec. 5.

The first witness for the Crown was Henry Glass, Esquire, the registrar of the county of Lambton. He produced a copy of a plan, certified by the Commissioner of Crown Lands on the 29th of September, 1854, of an addition to the plot of Sarnia, consisting of certain land ceded by the Indians to her Majesty in Sept., 1852, and adjoining the former town plot of Sarnia on the south. The river St. Clair formed the front of that tract (the addition) running in direction nearly north and south. A little way back (that is, easterly) from the river a street was exhibited on this plan called Front street, parallel nearly with the river.

On the south side of this lately ceded tract, as laid down on this plan, and near but not exactly at the southern limit, there was exhibited a street or allowance for a street called Nelson street, which touched the southerly limit of the tract several chains back from the river, and ran westerly towards the river, diverging in its course from the southerly limit of the ceded tract a little to the north, so as to leave a small gore between that limit and Nelson street. On this plan Nelson street was represented as crossing Front street at right angles, and continuing from the west side of Front street to the river.

Then on the northern side of the ceded tract, as laid down on this plan, and near the northern limit, but separated from it by a small gore, there was laid down a street called Wellington street, running from the east through several blocks of village lots as laid out on this plan to Front street near the river, crossing Front street at right angles, and continuing westerly from Front street to the river. Front street on this plan was laid out of the width of 70 feet, and Nelson street and Wellington street of the width of one chain.

The whole width of this tract ceded by the Indians to the Crown in 1852 was about 900 feet, and the space along the bank of the river between the two streets was about 750 feet. The distance from the west side of Front street to the river, along Nelson street, as laid down on the plan, was one chain and fifty links, and the distance from Front street to the river along Wellington street was only fifty-seven links.

This plan, the registrar stated, was received by him from the Commissioner of Crown lands in the autumn of 1854, but was not filed by him as it would have been if it had been a plan deposited by a private proprietor according to the statute.

A copy of this plan, recently certified by the assistant Commissioner of Crown lands, was also produced on the trial.

Mr. Glass further stated that before the Indians made the surrender spoken of to the Crown this tract formed no part of the town, but it was afterwards laid out into town lots, as this plan shewed: that since the cession and survey all the land between Nelson and Wellington streets, and lying between Front street and the river, having been purchased and occupied by the defendants, the Great Western Railway Company, they had made a considerable quantity of land by filling up from the bank of the river as it was formerly, out towards the deep channel, so that at this time there was a wide space of firm land in a continued tract along the whole space between the two streets, and in front of the two streets themselves. This was land made by the company at their own expense, and entirely occupied by them for purposes connected with their railway, and interposing between the termination of the streets respectively, as laid down in the plan spoken of, and the waters of the river as seen at present.

The natural bank of the river at the terminus of Wellington street was about twenty feet above the water, being an abrupt bank, at the time of the survey. At the end of Nelson street the bank of the river was not so high, and not so inaccessible. But they had neither of them, as Mr. Glass (the registrar) stated, been used as streets, nor so shapened as to give access by them from Front street to the water of the river, before the defendants took possession of the ground.

There had, however, been a ditch made from that part of Wellington street which was east from Front street to the river, for the purpose of draining Front street and the streets back of it. This was done after the cession of the tract by the Indians. Front street was at that time a travelled highway.

Mr. Alexander Vidal, the Provincial land surveyor who laid out the ceded tract by order of the government, was next examined. He stated that the town of Sarnia was incorporated in 1856, and that it then included these two streets: that under instructions by letter from the superintendent of the Indian Department, dated 15th September, 1852, which he produced, he made the survey and plan referred to by the first witness; and he produced his field notes, shewing that he had laid out the two streets in question as extending from Front street westerly to the river, and reported such survey with his plan to the government, Mr. Young being at that time Reeve of Sarnia: that there was no street laid out between Wellington and Nelson streets leading from Front street to the river, but that twelve or fourteen chains up the river, that is, north of Wellington street, there was now a street leading down to the river. South of Nelson street the land yet belonging to the Indians came up to the southern limit of the ceded tract. Both these streets in question, Mr. Vidal stated, were now closed west of Front street, the whole tract in front, including the two short streets, being fenced off and occupied by a freight house and the railway track, and by a dock which extended along the whole front on the river between the two streets, and beyond them north and south.

Mr. Vidal on cross-examination stated, that he had made out a map for the defendants of the defendants' land along the river and up to Front street, in which no such streets as Wellington and Nelson streets were laid down from Front street to the river. He did this, he said, at the desire of the company; that is, he made the plan at their request. He was asked to produce the letter of their secretary, Mr. Hatt. but it was not produced. He supposed, he said, that when he made out that plan the streets never entered into his mind, adding that he had recommended to the government not to sell any lots between Front street and the river, and that his intention in continuing these two streets to the river in his survey was to give access to the water.

Dr. Thomas W. Johnson, the Mayor of Sarnia, swore that the public were cut off from access to the river by the defendants' fences, freight-houses, and other works. In 1853 or '54, he said, and as he thought after the tract was laid out, it was talked of generally that the defendants would require to have their western station and terminus upon the ceded tract in question: that on the first day of the public sale no lots were sold between Front street and the river: that the company had cut away the bank, and built out wharves in front, which obstructed the two streets and filled up the space between and in front of them: that the corporation of Sarnia had since bought from a private proprietor, for $3,200, a piece of land about six hundred feet north of Wellington street; that is, above the lately ceded tract, over which they had made a street leading from Front street to the river, and they had called it North Wellington street: that the land south of Nelson street was private property.

On cross-examination, he said that the Great Western Railway was finished and opened to Sarnia about four years ago, and that he did not know that any objection was made to the works going on while they were in progress.

A letter was shewn to him, and admitted, which was written on the 31st of July, 1858, by the town clerk to the company, calling to their attention that a portion of Front street, Wellington and Nelson streets "had been obstructed by the engineer and contractors," and stating that the damage to the inhabitants from their being cut off from access to the river, on which they depended for water for their daily use, was serious. This was not, however, complained of in the letter as an illegal act on the part of the company, and the letter concluded thus, "I am now therefore directed, on the part of the corporation, to demand an adequate compensation for the damage thus suffered by the town, and I am to request that you will be pleased to inform the town council what amount the company will be willing to pay for this damage."

William McIlwhain was next called, and he stated that at the first government sale of town lots laid out on the new tract, held in 1853, he bought a lot on Nelson street east of Front street, supposing that he would have access by Nelson street to the river: that he built on his lot: that he and others had used Nelson street, passing along it to the water's edge: that he did not know

of any statute labour having been done on it (west of Front street): that part of the Company's engine-house for their elevators now covered Nelson street, and there were fences across it, and a dock built out in front of it, covering part of the river, so that there was no access to the water for the public at that part of the river.

This was the testimony on the part of the Crown.

Becher, Q. C., counsel for the defendants, referred to sec. 333 of the present Municipal Council Act, as bearing on this case. He contended, also, that a by-law of the municipality was necessary, if it was intended to open these streets for public use: that the only proper proceeding open to the corporation of Sarnia to adopt, if they had any ground of complaint, was by applying for a mandamus to the company "to restore the alleged streets to their former state of usefulness" as provided by statute: if this should appear to be a case in which that provision should, in the nature of things, be carried out. And he referred to 22 Vic, ch. 116, sec. 15, which was passed on the 16th of August, 1858, and to 16 Vic., ch. 101, secs. 8, 9 and 21; and then he proceeded to call the following witnesses:—

Peter T. Poussett, who stated that he was clerk of the town council of Sarnia in 1858, and wrote the letter dated 31st of July of that year, and also one dated 16th November, 1858, to the defendant's solicitor, both by direction of the council. Both were written after the railway had been opened and in use, which it was in January, 1858. The latter merely pressed for an answer to their former letters. He proved also other letters from the Mayor of Sarnia to the company, of the 15th of March, 1859, and 11th of July, 1859, the former enclosing a resolution from the town council, and the latter another resolution pressing for a definite answer from the company (these defendants).

It appeared from these documents that the council were pressing upon the company the reasonableness of their making compensation to the town for closing up the two streets, has the town council had in consequence to make the purchase of land higher up the river, at a cost of $3,200, in order to give the inhabitants access to the water. They intimated that they were not disposed to insist upon the company removing the obstruction from the streets, but that they trusted "they will not hesitate to allow fair value for the continuation of the streets referred to, which have been used by them" (that is, the continuation of them from Front street to the river.

John O. Hatt, Esquire, stated that he was solicitor for the railway company (defendants) in 1851-2 and 3: that under instructions from them he applied to the Indian Department for a right of way over the Indian lands, and for lands for their station and depot, &c., at their intended terminus on the river: that he saw Colonel Clench, the Indian agent, and made an agreement with him for the price of all the land that they would require between Front street and the river. This he thought was sometime in 1854. He learned from Colonel Clench the upset price that had been fixed by the government for the land, and told him that the company were willing to pay that, but that it would be proper to have a reference to arbitration and an award fixing the amount.

A reference was accordingly made to three arbitrators under the statute, and it was stated to the arbitrators that the company and the Indian Department had agreed upon the sum of £1500 to be paid for the 900 feet along the river, being the front of the ceded tract (which government were to dispose of for the benefit of the Indians). The arbitrators being Mr. Burritt, the judge of the county court, Mr Vidal, the witness in this case, and Mr. George Durand, accordingly made a formal award under their hands and seals on the 10th of May, 1854, as upon a submission between the railway company and the Indian Department, for the purpose of settling the compensation to be paid to the Indian Department by the company for the location or right of way of the Sarnia branch of the Great Western Railway Company through the Indian reserve in the township of Sarnia, including station-ground and water lots, as laid down in a certain plan thereof made by the company marked A, and they awarded for the right of way and station-grounds, comprising twenty-four and one-half acres, £900; and for the water lots aforesaid, comprising a frontage on the river St. Clair of 900 feet, more or less, the further sum of £1500.

On the same day (10th of May, 1854,) the principal chiefs of the Chippewa Indians, occupying and claiming to be sole proprietors of the upper reserve on the river St. Clair, executed a deed of surrender to her Majesty of all the claim and right in and to the several pieces of land described on the map annexed, containing 24½ acres, "including the ten water lots fronting the river St. Clair," the same being a portion of the said Chippewa reserve, and required for railway purposes "to the end and purpose that her Majesty may be graciously pleased to order and direct that the said land and water lots be sold to the Great Western Railway of Canada, their heirs and assigns for ever."

Mr Hatt proved that he had furnished Colonel Clench with a plan of the land which the company would require, which plan the arbitrators had before them. It did not lay down any streets leading from Front street to the river. He was at the public sale of town lots made afterwards. That plan was exhibited and put up in the room in which the sale took place, that all might see what ground the railway terminus would occupy; and the witness swore that there was no doubt the lots sold higher from its being thus shewn to all present where the railway and works were to be—that is, on the same ground which they now occupy. He heard nothing said about any streets through the front tract till long after, when he was told that the town council were making some difficulty about these alleged streets. At that time all the price of the land had been paid to the Indian Department.

It was stated at the public sale that the land sold by Colonel Clench on behalf of the Indians was 900 feet along the river, as shewn upon the map hung up in the room (and of which a copy was produced at the trial), on which no streets were shewn leading through that tract to the river. This plan was made by Mr. Vidal. It was in 1856 or 7 that the witness first heard any thing said of the two streets. He produced receipts for that $2400 paid to the Indian Department according to the award, and he swore that what he agreed to buy from the Indian Department was all the land west of Front street, which included the two streets in question.

Judge Burritt, one of the arbitrators, was also called, and proved that he was judge of the county court and living at Sarnia in 1854, when this land was sold to the railway company: that he was at the sale of town lots spoken of by the other witnesses, when Colonel Clench and Mr. Hatt were also present. He heard nothing said then about streets. He heard afterwards some regret expressed that the town had not secured a passage to the river; and that the town council were endeavouring to acquire some land from one Wood, in order by that means to continue Cromwell street down to the river some distance north of Wellington street. At the arbitration Colonel Clench and Mr. Hatt stated to the arbitrators that they had agreed upon a certain sum to be paid for the land taken, and the award was then made adopting the sum agreed upon. The witness understood that all the land west of Front street (that is, between it and the river) was sold.

Mr. T. S. Bell, an assistant engineer of the defendants, proved that he measured the whole front possessed by the company along the river, and found it to be 914 feet: that it was all absolutely necessary for the purposes of the company at their station on the river, and was in fact too little. The company had made much land west of what used to be the margin of the river. Wellington street, he stated, was obstructed by fences of the company, and partly by their freight house. He put in a plan of the ground, shewing the works, &c.

Mr. Vidal, being re-called for the Crown, stated that the distance along the river mentioned in the award was taken by him from the plan: that when he made his survey he did not plant any stakes at the water's edge: that he knew that the government claimed the right to sell water lots extending into the river to the deep channel but that such land covered with water had never been owned by the Indians.

The evidence of R. T. Pennefather, Esq., Superintendent General of Indian affairs, being taken in Lower Canada under a commission, was read at the trial.

He swore that the management of Indian affairs was under the control of the Governor-General: that he had held his office since

February, 1856: that the tract of which what were called Nelson street and Wellington street formed parts had never till lately been surrendered by the Indians to the Crown, and was in the occupation of the Indians of Sarnia: that it was surrendered in July, 1852, to her Majesty and Her successors, by an instrument of which he produced a copy: that it was ceded on condition that it should be laid out in town lots, and sold to the best advantage for the benefit of the Indians: that the department acted in the case of the sale to the railway company as it would for the Indians in any other case of sale of lands surrendered by them: that the company on the 22nd of November, 1851, first applied for a right of way, by a letter produced. That there were public sales of parts of the tract surrendered in 1852 on the 2nd of May, 1853, and on the 8th of May, 1854: that the original award spoken of by the other witnesses had never been in his possession, and he knew nothing of the map referred to in it as annexed: that it appeared from documents in his office that the Indian Department laid out a portion of the Indian Reserve in 1852 into town lots for sale and settlement: that Colonel Clench was instructed to cause a survey to be made, and that Mr. Vidal was proposed as the surveyor.

In the letter of the 22nd of November, 1852, produced by this witness, the Great Western Railway Company wrote to Colonel Bruce, the witness' predecessor in office, that they had completed the survey of the lands on the St. Clair river that would be required for their track, depot, and station: that they were anxious to procure the right of way through and in front of the Indian Reserve, and requested to know on what terms the Indian Department would grant it, and also the frontage on the river.

The copy of the deed of cession from the Indian chiefs, dated the 28th of July, 1852, shewed that what was then surrendered to the Crown was about eighty acres, described as follows:—bounded on the west by the river St. Clair, on the north by the present (that is, the first or old) town plot of Sarnia, on the east by a line produced by a continuation of the rear or easterly boundary of the (old) town plot of Sarnia, and on the south by the possessions of an Indian chief named in the deed; and it was expressed that the land was surrendered for the purpose of being laid out into town lots and sold to the best advantage for the benefit of the said Chippewa Indians and their posterity.

There was produced upon the trial a plan of the location of the Sarnia branch of the Great Western Railway through the Indian Reserve and town of Sarnia, certified on the 12th of October, 1860, under the statute, chapter 80, Consol. Stats. U C., under the seal of the company, to be a true copy of the original map. This exhibited Nelson street and Wellington street as carried no further west than the east side of Front street, and the whole 900 feet frontage upon the river, forming the whole front of the tract surrendered by the Indians in July, 1852, as taken by the company for their railway.

At the conclusion of the case, the learned Chief Justice desired the jury to consider whether they were satisfied by the evidence that either the corporation of the town of Sarnia, or the government or the Indian Department, licensed,—or, in other words, permitted—the defendants to construct their road and put up their buildings and works where they were, and to occupy the ground in front on Front street on the river, including the two small pieces claimed as streets; and whether this license or permission had been given before the passing of the statute, 22 Vic., ch 116. He left that to the jury to find in reference to the 15th clause of that statute, telling them that if they found such permission he thought their verdict should be given for the defendants.

But if they did not find that there was any such permission, and that what had been called Nelson street and Wellington street had been obstructed, of which there could be no doubt, then he recommended them to find the defendants guilty, which should be subject to the opinion of the court on the points, whether these ever were in law public highways, or either of them a public highway; and if they were, then whether the defendants had and have a right to occupy the ground on which they were by virtue of authority given by the legislature, and by reason of the facts proved.

He observed upon the fact that Mr. Vidal, the surveyor, had stated that he never posted the lines of these streets beyond Front street: that he had returned a map to the government with such streets marked upon it, while in his plan made for the defendants he had laid down no streets through the tract west of Front street, which he explained only by saying, that he supposed they never entered into his mind when he was making out that plan,

He remarked also, that if the town council really meant to object to the company occupying the small pieces of the land in question, which he could hardly suppose possible, if they acquiesced in the station and track being there at all, that they should not have suffered the company without objection or remonstrance to take and retain exclusive possession of the lands as they had done, and to construct the railway and erect their buildings and dock upon and in front of them; and then after that to institute this criminal prosecution, with a view to compel the Company to give up the land and submit to have their works abated as a nuisance, after the railway, which had probably cost some hundreds of thousands of pounds, had been completed and had been for a long time in daily use.

The jury brought in a general verdict of "guilty," which was understood to be subject, as mentioned, to the opinion of the court.

The learned Chief Justice asked them whether he was to understand from the verdict that neither the corporation of Sarnia, nor the government, nor the Indian Department, had in their opinion consented that the defendants should occupy these streets spoken of. The foreman answered that they all thought that the corporation should be compensated for the land: that is, for the small pieces exhibited on the plan as streets between Front street and the bank; and the learned Chief Justice did not press for any further examination.

Becher, Q. C, for the defendants, obtained a rule last term on the Attorney-General to shew cause why the verdict should not be set aside and a verdict of not guilty entered, on the grounds, that until a by-law had been passed to open the alleged highways the defendants were entitled to occupy the ground: that upon the evidence the only course open was, not to prosecute by indictment for nuisance, but to apply for a mandamus to restore the alleged streets to their former state, or so as not to impair their usefulness: that what were called streets were not shewn in evidence to be actual legal highways: that if they were such, they were and are no longer of use as highways; and that the defendants were by statute entitled to take the grounds for their railway; or why a new trial should not be granted on the law and evidence.

Robert A Harrison shewed cause, and cited *Aspendall* v. *Brown*, 3 T. R. 265; *Rowe* v. *Bardin*, 1 H. Bl. 351; *Rex* v. *Hammond*, Str. 44; *Rex* v. *Allan et al.* 1 O. S. 90.

Becher, Q. C, and *Irving*, contra, cited *Brewster* v. *The Canada Company*, 4 Grant Rep. 443; *Rejna* v. *Brewster*, 8 U. C. C. P. 208.

Consol. Stats. U C., ch. 54, secs. 313, 333, 424, sub-sec. 6; 4 Wm. IV., ch 29; 16 Vic, ch. 99, sec. 4; 16 Vic, ch. 101, secs 8, 9, 12, 14; 22 Vic., ch. 116, sec. 15, were referred to on the argument.

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

The defendants in this case, among other grounds of defence, relied upon the 333rd section of the Municipal Institutions Act, *Consol Stats. U. C, ch 54, which provides that*, "*In case a* person be in possession of any part of a government allowance for road laid out adjoining his lot, and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, or in case a person be in possession of any government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall be deemed legally possessed thereof as against any private person, until a by-law has been passed for opening such allowance for road by the council having jurisdiction over the same," and sec. 334, that, "No such by-law shall be passed until notice in writing has been given to the person in posses ion eight days before the meeting of the council, that an application will be made for opening such allowance."

This clause, however, it is clear, does not apply to the case before us, for it cannot be said that these two small pieces of land marked on a plan as streets leading from Front street to the river had not been opened "by reason of another road being used in lieu thereof." They were not opened, so far as we can see, only because the company had occupied them with their railway track and other works, claiming a right to do so under certain statutes, and also under their purchase from the government or from the Indian department; and because the municipality had, as the company contends, suffered them to occupy these pieces of land for their railway and station without opposition or remonstrance, making no complaint that by occupying the land the company were unlawfully creating a public nuisance, until they had at an immense expense erected works upon and in front of these alleged streets, which works they could not now abandon without ruinous expense and inconvenience

The defendants also relied upon the several statutes of this Province which gave authority to them to occupy the ground which they have occupied for their railway and station, on such conditions as to compensation, where compensation can be claimed, as the legislature have thought proper to impose. Among these provisions is the 5th section of 22 Vic., ch 116, which enacts that the words "railway," "roadway," and "railroad," used in any statute, shall, as far as regards the Great Western Railway Company, include and be construed to cover all viaducts, bridges, stations, freight and station houses, depots, and other works, machinery, and the land covered by the same, &c., which may be necessary or convenient to the making or using of any railway, from whence it may be argued, though that clause was passed probably with another object in view, that the powers given by these acts to occupy land for the railway allow of the occupation equally for any purpose immediately connected with the construction or use of the railway.

We have no doubt that such is the law, either under that clause or without the aid of it, under the general powers given by the act.

The 4th section of 16 Vic., ch. 99, was also relied upon by Mr Becher on the part of the defendants, as being material to be considered, and that enactment does appear to me to be most material, for it authorises this company "to take, hold, use and occupy all such land or ground, with the privileges which appertain thereto, and which may be found necessary for the same, in, along, upon, and across any navigable stream, lake, river, or waters whatsoever, and for the uses of such railway to use, occupy and take possession of the shores or banks thereof, and any easement thereto, being of a public or private nature or character: provided always, that the free and uninterrupted navigation of the said streams, lakes, rivers, or other waters so used, for all boats, ships, and vessels passing and repassing the same, shall not be interfered with by the said railway, and also that the owner or owners, occupier or occupiers of any lands, grounds or private privileges so taken, shall be compensated therefor as is provided by this act and the several acts incorporating said company and amendments thereto."

This statute was passed in 1853, in the same year that by another statute, 16 Vic., ch. 101, these defendants, the Great Western Railway Company were authorised, to construct a railway from the foot of Lake Huron at or near Port Sarnia to intersect the Great Western Railway at or near the town of London, by which act all the powers were given to them to occupy any lands of the Crown, or of any corporation or individual, which were given to them by the statutes that had already been passed respecting the Great Western Railway Company.

It seems to us to be quite clear, therefore, that the defendants had a right, under this 4th section of 16 Vic., ch 99, to occupy as they have done the 900 feet along the river St Clair, with the privileges which appertain thereto, and to take possession for the use of the railway of the shore or banks thereof, and any easement thereto being of a public or private nature or character.

If there had been no enlargement of this authority given to them by any statute of a later date, it still could not, we think, be denied that they had power under the above act, if not under the earlier statutes, to occupy the bank of the St. Clair with their railway and works to whatever extent might be required for providing all the accommodations and conveniences necessary for conducting their proper business at this termination of the road, on the bank of the river St Clair

It must be assumed, we think, that if on the shore or bank of the river there were at the time of their taking possession the two short allowances for road in question legally established, which if they should be afterwards actually made into streets would lead from Front street through the defendants' station and over the railway to the water's edge, it would be quite incompatible with the public safety and convenience that such allowances should be actually opened and used as highways, at the same time that the defendants were on the same spot carrying on the business of the railway.

Either the use of the lands for one purpose must be abandoned or its use for the other, and there can be no question which ought to give way; for these short pieces of streets, proposed but never formed, one of them 57 links in length only, the other a chain and a half, led to no place beyond the bank of the river as it flowed in its natural state, and could not, in order to reach the water, be carried through the artificial works which the defendants were authorised to construct along and over the waters of the river. They could not, therefore, be made of right to serve the purpose of giving to the people of Sarnia access to the river for obtaining water for household purposes, or for watering their cattle. It is, however, the loss of this convenience which is principally complained of in the indictment. As to any other use that could be made of them as highways, it is evident, when all the circumstances are looked at, that they could serve no purpose but to lead people into the way of danger.

If these intended streets had been parts of highways that had been travelled and were in use at the time the defendants took possession, and if there had been no legislative provision to meet the peculiar case of their leading through and over the works of the company, but to no place beyond them, then the 9th section of the act of incorporation, 4 W. IV., ch. 29, which was referred to in the argument, would have required to be considered. It is that clause which provides that when it shall be necessary to intersect or cross any road or highway "the company shall restore the road or highway thus intersected to its former state, or in a sufficient manner not to impair its usefulness."

Whether that clause could in reason have been applied to these pieces of land, which had never been actually opened and in use as highways, would then have been the question; and another question would have been, whether that provision could be held to apply not only to an actual highway intersected by the railway, but to land that had been merely marked out as an intended road over a piece of ground wholly covered by the station and works of the company, and through which the public could have no right to go to any place beyond; and which could not in the nature of things be restored to its former state, otherwise than by dispossessing the defendants of that which the law allowed them to occupy.

To any one looking at the plans on which the situation of the streets in question is represented with reference to the works by which they are surrounded, it need hardly be said that if an application were made to a court to compel the defendants by writ of mandamus to restore these allowances for streets to their former state, or in a sufficient manner not to impair their usefulness as highways, the court could not fail to look upon the application as most unreasonable, and one which they could with no propriety grant, especially at the instance of any party who had without remonstrance or objection seen the defendants constructing the railway, and erecting their buildings, and forming their quays along the river as they have done, and who had only complained of the occupation as illegal after the railway had been completed and in use. The judgment of the Court of Chancery in this Province, in the case cited on the argument of *Brewster* v. *The Canada Company* (4 Grant Rep. 452), and the language of English judges in the cases there referred to, would have applied strongly against such an application.

But it is not left to us to deal with this case upon the clause to which we have last referred, or with a view only to the statutes which we have cited, for there is besides them the statute 22 Vic., ch. 116, sec. 15, on which the defendants mainly rely,

and by which, after all, it seems to us the case must be governed. That act was passed in August, 1857, and the 15th clause is as follows:

"And whereas the Great Western Railway Co have, in the construction of their railway, encroached upon certain proposed streets or allowances for streets, or highways, or roads, and not only such as known as original allowances, but which encroachments have been licensed by the respective parties in whom the title to the said streets was vested, and by the municipality within whose boundaries the said original allowances are situated Therefore, all highways, roads, or streets which have been occupied by the Great Western Railway Company with the written consent of the municipality within which the same are situated, shall be hereby declared vested in them to the extent of the user permitted or enforced by the said municipality; and all proposed and contemplated streets occupied by the said company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful; saving, nevertheless, the civil rights and remedies of all parties who may have sustained or shall sustain any damage or injury by reason of obstruction or injury to any such highway; and nothing herein contained shall be construed to bar or prejudice any party or parties, in or from any remedy at law or in equity in the nature of a civil action or proceeding against said company or other parties for obstructing or injuring any such highway, but such civil action and proceedings may be had, taken, and prosecuted in the same manner and to the same extent as if this act had not been passed, but not hereby giving any right which does not now exist."

With a view to this clause, to which my attention was called upon the trial, I requested the jury to find upon the evidence whether the pieces of land called in the indictment Nelson street and Wellington street had or had not been occupied by the defendants with the written assent of the municipality, or by the license, written or otherwise, of the Provincial government or of the Indian Department, representing the interests of the Indians But the jury bringing in no other verdict than the general verdict of guilty, I asked them whether they had or had not made up their minds upon the questions of fact regarding the permission to occupy, to which the answer was that the company ought to compensate the municipality for the land.

That was a point on which opinions might differ. It may be thought by the municipality that the company ought to pay the whole or some part of the price which the municipality has paid to Mr. Wood for the ground for the new street spoken of, which now affords the inhabitants access to the river, while the defendants may think that the municipality had no just claim upon them for any contribution of the kind, as they have paid for all the land taken at the price which was awarded.

But in truth that question of right to compensation is something altogether distinct from the question whether the defendants should be found guilty of nuisance in obstructing a highway; for if the defendants gave and the municipality of Sarnia had accepted the fullest compensation for the ground in question, that would not have settled the legal question, whether her Majesty's subjects, and not only the inhabitants of Sarnia, could or could not rightly complain of the occupation by the defendants of the land in question as constituting a public nuisance.

The first question is, were these streets as they are called, ever in law public highways.

And the second is, have they been and are they unlawfully obstructed by the defendants.

On the first point, we see that in July, 1852, the Indians ceded to the Crown the tract which includes these streets, to be disposed of by the government to the best advantage for the benefit of the Indians. Very soon after, at the suggestion of the Indian Superintendent, Colonel Clench, Mr. Vidal was employed by the Government to lay out the tract so ceded, or at least that part of it east of Front Street, into blocks and lots, with a view to sale for the benefit of the Indians, for whom the Government held the tract, as it were, in trust; and Mr. Vidal, in making the survey, marked upon the plan, which he sent to the Government with his report, two short streets intended to lead from Front Street to the water; but he did not actually lay them out upon the ground; that is, he planted no stakes west of Front Street to mark such streets.

About the time he was making the survey, if not before, the Great Western Railway Company were making their arrangements for laying out their track, and fixing upon the station at the river, and they were communicating with Colonel Clench and the Government upon the subject of the ground which they wished to acquire. Before their negociation was closed a sale was publicly made of some village lots in the new plot that Mr Vidal had surveyed, and some were sold, in view, as we infer, and with reference to the plan made by Mr. Vidal. Soon after that the bargain between the Railway Company and the Government was concluded, so far that it was settled that the Company would purchase a tract of 900 feet along the river and between it and Front Street, which embraced these two short streets. Mr. Vidal, at the request of the Company, made out a plan of the tract, and the plan which he so made out exhibited no such streets Mr. Vidal did not assert that he omitted them in consequence of any instructions to do so. Then another sale took place of town lots, which brought high prices, in consequence of its being known that the railway station and depots would occupy the position which they now do, and Mr Vidal's plan last mentioned was publicly exhibited for the information of the public, shewing the whole 900 feet between the river and Front Street as one tract, not broken by any streets leading down to the river.

Soon after that the Company paid for the land the price awarded by three arbitrators, being the sum which had been agreed upon between them and the agent for the Indians, and they took possession as soon as they had occasion to do so, and constructed their railway upon it, and erected large buildings and works, and made a dock along the river occupying the front, and extending some distance into the river, upon land which they have made at a great expense by filling up the water.

What are called Wellington Street and Nelson Street had not been opened—that is, not shaped or graded—and no statute labor had been done or money expended on them. They had not been used as highways, for they led to no accessible place beyond, the bank of the river being high and steep, though less so at the end of one street than of the other.

It is plain from these facts that the claim to have these two pieces of land between Front Street and the bank of the river regarded as public highways, as things stood in 1852 and 1853, or at any time afterwards, stands on the most slender grounds possible. It has only the single fact to rest upon, that the surveyor, Mr. Vidal, marked them out as streets upon the plan returned to the government, and that those who bought town lots at the first sale (in 1853) bought with the knowledge that he had done so.

But under the 313th clause of the present Municipal Institutions Act (Consol. Stats. U. C ch. 54), the fact of a Government surveyor laying out certain allowances for roads or streets in the plan of the original survey of Crown lands would be sufficient, we think, to give such roads or streets the legal character of highways, though there may have been no stakes planted on the ground to mark them out, and they would be deemed in law highways before they were actually opened and used, and before statute labour or public money had been expended upon them.

If there be any room for doubt whether these small streets marked on the surveyor's plan, in 1853, were to be regarded as being still common and public highways at the time these defendants took possession of land along the river for their railway, it could only be, we think, in consequence of the statute 12 Vic. ch. 35, sec. 41, and under the railway acts which we have referred to.

The statute 12 Vic ch. 35, sec 41, makes this provision respecting allowances for streets laid down by private proprietors, namely, that they "shall have lawful right to amend or alter the first survey and plan made by them of any such town or village, or any original particular division thereof, provided no lots of land have been sold fronting on or adjoining any street or streets, common or commons, where such alteration is required to be made"

The Indians, though they had ceded this land to the Government, did so upon the trust or condition expressed in their deed, that it was to be disposed of for their benefit; and the Indian

agent, we see, was allowed to negotiate and settle with the Company for the sale and the price to be paid; and it must have been quite well understood by all parties that the tract which the Company acquired along the river was required for the purposes altogether incompatible with the opening and use of the two streets by the public, and inconsistent with the only object which could have led to their being originally laid out, for when the docks and other works of the Company should come to occupy the ground in front of the streets they could no longer afford access to the water.

And as there had been no lots sold fronting on or adjoining these streets, it would have been within the spirit of this provision in 12 Vic. ch. 35, that the Indians, as the beneficial owners, or the Government acting for them, should have had the right to alter and amend the survey so as to prevent these allowances for streets interfering with the location of the railway terminus upon the river at that point.

In point of fact, it does not appear from any thing proved at the trial, that the obliteration of those streets, only existing upon paper, which it was clear must follow the occupation of the bank of the river by the Railway Company, met with any opposition at the time, nor during the construction of the railway, nor until after it had been for some time in operation, and then in no other sense and with no other object than to ground upon the fact of their occupation a claim to some pecuniary compensation.

But supposing it to be as free from doubt as in this criminal prosecution for a nuisance it ought to be, that up to the time when the defendants took possession of the ground, Nelson Street and Wellington Street were, in law, common and public highways, the next question is, whether they continued after that occupation to be public highways, and are still public highways, so that sentence of a criminal court can properly be passed for abating as a public nuisance the railway and all belonging to it which interferes with the free use of those streets by the public.

Upon that point we do not think it necessary to go into any further consideration than we have done of those provisions of the Great Western Railway Acts which authorised the Company to take possession of lands, public or private, but shall only refer again to the 15th section of 22 Vic. ch. 116, which, in our opinion, is conclusive on this question. The first part of that clause cannot apply unless there be proof of the written assent of the municipality to the occupation of these streets by the defendants.

There was no written assent shown to have been given beforehand by the municipality, but a written assent given afterwards would suffice, in our opinion; and in the correspondence produced on the trial there was, we think, such evidence as should have satisfied the jury that the municipality was not at any time desiring any thing so unreasonable as that the defendants should throw open these streets to the public, but were endeavoring (whether fairly or not it is not for us to judge) to found upon what had been done, a claim to pecuniary compensation; and the jury shewed at the trial that this was in fact the view which they took of the matter.

But in the latter part of the same section there is this distinct provision carrying the enactment further in favour of the Company, and as regards streets situated on this river. We refer to the words, "And all proposed or contemplated streets occupied by the said Company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful."

We may read as in a parenthesis the words "or which they have been permitted to occupy by the license of the owner in fee," because that is one of the two classes of cases which are separated from each other by the disjunctive "or," and then the enactment reads thus: "And all proposed or contemplated streets occupied by the said Company, and which shall not lead to any place beyond the railway," which precisely describes the present case; and the words which follow, "shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful," in our opinion clearly put an end to all doubt that could otherwise be entertained in this case, and entitle the defendants clearly to an acquittal.

The enactment is in itself reasonable, and seems intended to meet just such a case as this has been shewn to be.

COMMON PLEAS.

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

KENT v MERCER.

Sheriff—Bond—Vacation of office—Sureties—Liability of for moneys received between vacation and discharge from office.

Defendant L. W. M. was appointed sheriff of the county of Norfolk on the 9th of March, 1858, and gave a bond with the other two defendants as sureties covenanting that L. W. M., as sheriff, should pay over all moneys received by virtue of his office as sheriff.

On the 19th of February, 1859, judgment was given for the Crown against L. W. M., whereby his office became vacated, but no writ of discharge issued. On the 14th of March, 1859, a writ of *fi. fa.* was placed in his hands at the suit of the now plaintiff against one G. W. K., and on the 29th of June, 1859, the said L. W. M. received the amount endorsed on the said writ, but has never paid the same to the plaintiff.

On special case, *held*, that the sureties of said L. W. M. were liable for all moneys received by him *colore officii*. The mere fact of the term and tenure of L. W. M.'s office as sheriff having expired is not sufficient to incapacitate him from doing acts of sheriff.

(H. T., 25 Vic.)

On the 9th of March, 1858, defendant, L. W. Mercer, was (except so far as the effect of the judgment on *sci. fa.* hereafter mentioned affected the same) duly appointed sheriff of Norfolk, and thereupon he and the other defendants executed a bond dated the 13th of February, 1858, as follows: "Know all men by these presents that we" (the defendants) "do hereby jointly and severally for ourselves and each of our heirs, executors and administrators, covenant that L. W. M. as sheriff of the said county shall well and truly pay over to the person or persons entitled to the same, all such moneys as he shall receive by virtue of his said office of sheriff from the date of the covenant, and that neither he nor his deputy shall, within that period, wilfully misconduct himself in his said office to the damage of any person being a party in any legal proceeding." The liability is limited, the sheriff to £1,000, and each surety to £500. And defendant Mercer thereupon and thenceforth, until the appointment of his successor, assumed the office, and performed the duties of sheriff. Afterwards, on the 31st of August, 1858, a *sci fa* at the instance of the Crown was brought to cancel the appointment of the defendant Mercer, and on the 12th January, 1859, judgment for the Crown was pronounced by the court of Queen's Bench, and on the 10th of February, 1859, judgment was entered for the Crown on the writ of *sci. fa*, and on the 3rd of October, 1859, E. D. was duly appointed sheriff, and on the 29th of June, 1859, defendant Mercer, previous to the transfer by him to his successor of the prisoners, and writs which he held as such real or pretended sheriff, assuming to act, and (if under the circumstances he could) acting as sheriff, received for the plaintiff under a writ of *fi. fa.*, which had been delivered to him on the 13th of March, 1859, in a suit in which the now plaintiff was plaintiff and G. W. K. defendant, the sum of £80 10s, besides his fees as sheriff, which sum the defendant Mercer did not pay over to plaintiff. No writ of discharge was ever issued founded on the judgments on the *sci. fa.*

The question was, whether the two defendants, the sureties, were liable under the circumstances to the plaintiff upon their said covenant for Mercer's default in not paying over the money to the plaintiff.

J. B. Martin, for the defendant, cited 5 & 6 E. 6, ch. 16, sec. 5; Sewell on Sheriff 20; *Wesley* v. *Skinner*, Croke Eliz. 365.

Anderson, contra, referred to the Consol. Stats. U. C., ch. 38, sec. 10.

DRAPER, C. J.—By the statute 5 & 6 Ed. VI., ch. 16, if any person bargain or sell any office or deputation of it, or any part of it, or take any reward or profit directly or indirectly, or any bond, &c., for any office, &c., which concerns the administration or execution of justice, or the receipt, controlment or payment of the king's treasure, &c., account, auditorship, or surveying of any of the king's honours, manors, &c., or customs, or attendance in the custom house, or the keeping of any town, castle, &c., used as a place of strength or defence, or any clerkship in any court of record, &c., he shall forfeit his right, interest, &c., in such office, deputation, or gift, or nomination to it. And he that gives any money, reward, &c., or any bond, promise, &c., for such office, deputation, &c., shall thereupon immediately be a disabled person to have and enjoy it, and such bond, &c., shall be void. Sec. 5 provides that if any person do hereafter offend in any thing contrary to the tenor and effect of this act, yet, that notwithstanding

all judgments given, and all other act or acts executed or done by any such person or persons so offending by authority or colour of the office or deputation, which ought so be forfeited, &c., by the persons so offending as is aforesaid *after* the said offence so by such person committed or done, and *before* such person so offending for the same offence be removed from the exercise, &c., of the said office or deputation, shall be and remain good and sufficient in law to all intents, constructions, and purposes in such like manner and form as the same should or ought to have remained and been if this act had never been made. Extended to colonies and enlarged by 49 Geo. III., ch. 126

By the terms of their covenant the sureties engaged that Mercer, as sheriff of the County of Norfolk, should well and truly pay over to the person entitled thereto any money which he should receive by virtue of his office. Now, the fact that a sheriff's term and tenure of office has expired is not of itself sufficient to incapacitate him from doing acts of office after that term, or to vacate the acts so done. Thus in *St John's* case, Moore (Sir F.) 186, 362, 364, 496, an arrest by a sheriff before he had notice of his discharge was held legal, and that an action for false imprisonment would not lie against him. And in *Boucher* v. *Wiseman*, Cro. El. 597, the sheriff was held chargeable for money made by his deputy on a *fi. fa.* upon which he levied after a writ of discharge was actually issued, but before he had notice of it. And in *Reynell's* case 9, Co. 95, it is said, (p. 98.) "So when an office is found forfeited presently by the law the party is out of possession and the king is in possession, and yet the use is, and to good purpose, to have a writ of discharge, and the sheriff till he is actually removed shall answer for all escapes, for he who occupies or has the custody of a gaol by right or wrong shall be charged for escapes of prisoners" See also *Fleming* v. *Cheverley*, Dy 355; *Palmer* v *Potter*, Cro. El 511, in which case a writ of discharge had issued.

And in this case it appears to me the defendant against whose goods and chattels the *fi. fa.* issued—a writ directed to the sheriff, not by his individual name, but to the person in office—would be discharged by levy, or payment without levy, though the person be found in apparent possession of the office, and holding the writ might no longer in law be the officer, at least so long as no successor had been actually appointed, and even after that if execution had been commenced before then. For if a sheriff commence execution he shall complete it after he goes out of office. See *Ayre* v. *Aden*, Cro. Jac 73; *Doe* v. *Dunston*, 1 B. & A. 230; Rolles Ab. 893, 4; *Clerk* v. *Withers*, 6 Mod. 295; *Doe Tyfany* v. *Muller*, 6 U. C. Q. B. 426.

I think, therefore, that although the writ in this case did not come into the hands of Mercer until after the judgment on the *sci. fa.* had been entered, yet, that he would not have been a trespasser in levying on this *fi. fa.*, that payment to him would have discharged the debt named in that writ; so that defendant Mercer was in possession of the office and of the writ, and he would have been responsible to the execution plaintiff for moneys received by virtue of the *fi. fa.*

The 5th section of the statute of Edw. VI., fully sustains this conclusion, unless the judgment of the court, *per se*, effected an actual removal of Mercer, and as it is admitted there never was a writ of discharge issued, and as Mercer's successor was not appointed until after this money was received, I am of opinion he continued *de facto* in the possession of the office of sheriff, and answerable for all the acts done by him in that character.

The question, however, still remains as to the liability of his sureties, and that must depend on the language and effect of the covenant. The words used, that Mercer "shall well and truly pay over to the person or persons entitled to the same all such moneys as he shall receive by virtue of his said office of sheriff," are by no means necessarily limited to moneys received by him during his tenure of office, and would certainly apply to a case where he had received a *fi. fa.*, and commenced execution while he was in office, and had completed the same and made the money after his removal and the appointment of his successor. In such a case I feel no doubt the sureties would be liable under the covenant, and I cannot satisfy myself that his removal in the manner stated in this case makes any difference.

The form of the covenant is prescribed by the legislature, and the intention is obvious that it should be a security for all suitors' moneys received *colore officii*. There is an apparent hardship on the sureties on the facts stated, and my first impression was in their favour, so much so that I have reluctantly adopted an opposite conclusion. The hardship arises out of the express words of the covenant, and it would be even greater if either the plaintiff were to lose the money collected for him, or the defendant on the *fi. fa.*, who has paid it once, had to pay it over again. I have carefully considered the authority referred to in the notes to *Lord Arlington* v *Merrick*, 2 Wms. Saund. 403, as well as *Bamford* v. *Hee*, 5 Exch. 380; *Kitson* v. *Julian*, 4 E. & B. 854; *Oswald* v. *Mayor of Berwick*, 1 E. & B. 295 affirmed in 3 E. & B. 653, and 2 Jur. N. S. 743; *Mayor of Cambridge* v. *Dennis*, 5 Jur. N. S. 265; E. B. & E. 660. And on the whole I am of opinion that our judgment should be in favour of the plaintiff

Per cur.—Judgment for plaintiff.

FARR v. ROBINS.

Division court—Transcript of judgment—Fi. fa. lands.

A having obtained a judgment in one of the division courts in the county of Welland, in order to issue a *fi. fa.* lands, caused a transcript thereof to be made by the clerk of the said court, and under his seal of office, which he caused to be filed in the county court in supposed compliance with the mode required by Cons. Stat. U. C., ch. 19, sec. 142, but the transcript not stating that a *fi. fa.* goods had issued and been returned

Held, under the provisions of the statute, in order that a *fi. fa.* lands may issue, there must be a *record* of the judgment on which it is founded, and for this purpose it appears out a mode by which a division court judgment for the sum of $10 or upwards can be made a *judgment of record*, and in this case the transcript being informal the record was a nullity, and therefore that a *fi. fa.* lands could not issue thereon.

(C. P. H. T. 25 Vic.)

Ejectment for part of the west half of lot No. 159, Thorold, described. Defence for the whole. The plaintiff claimed title under a deed made by Robert Hobson as sheriff of Welland, to James McCoppen, on an execution against the lands of the defendant, and by deed of James McCoppen to the plaintiff. Defendant claimed title by a deed made by one James Robins to him.

The trial took place in October, 1861, before *Hagarty*, J., at Welland. The plaintiff put in evidence a *fi. fa.* issued out of the county court of the county of Welland, against the lands of the defendant, at the suit of one Murray, received by the sheriff on the 1st of August, 1860; also a deed from the sheriff dated the 31st August, 1861, to James McCoppen, of these premises, and a deed from James McCoppen and wife to the plaintiff, dated 2nd September, 1861. On the defence it was proved that a transcript of a judgment given in the division court in favour of Andrew Murray against the defendant, for $76 10c., damages and costs, was filed in the office of the clerk of the county court on the 31st of July, 1860, and the execution against the land was issued on the same day, but no execution against goods was issued from the county court. The writ against lands was received by the sheriff's officer on the 1st August, 1860, and the sheriff's sale took place on the 31st of July, 1861.

The defendant's counsel then objected that the transcript filed in the clerk's office was not in proper form, not containing any statement that a *fi. fa.* against goods had issued, nor that it had been returned and how; that no *fi. fa* against goods ever issued from the county court, and that by law there must be an execution against goods before one against lands is issued. Also that the sheriff cannot legally sell lands upon an execution until after the expiration of twelve months from the time he has received the execution.

It was agreed that a verdict should be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit on these objections

In Michaelmas Term, *W. Eccles* obtained a rule *nisi* to enter a nonsuit accordingly.

In Hilary Term *R. Miller* shewed cause. He cited *Doe Spafford* v *Brown*, 3 O. S. 92; *Eades* v. *Maxwell*, 17 U. C. Q. B. 173; *Delisle* v. *Dewitt*, 18 U. C. Q. B. 155, to shew that the objection for want of a *fi. fa.* against goods was not maintainable. As to the latter objection he cited *Doe Boulton* v *Ferguson*, 5 U. C. Q. B. 515.

W. Eccles in reply, said the transcript was not in accordance with the 142nd and 143rd sections of the division court act, and therefore the foundation for the sale was defective, for the transcript should shew that the *fi. fa.* against goods had been issued.

DRAPER, C. J.—The Consol. Stat. U. C., ch. 19, sec. 142, provides that in case an execution in the division court be returned *nulla bona*, and the sum remaining unsatisfied on the judgment on which the execution issued amounts to $40, the plaintiff or defendant may obtain a transcript of the judgment from the clerk under his hand and sealed with the seal of the court, which transcript shall set forth: 1. The proceedings in the cause. 2. The date of issuing execution against goods and chattels. 3. The bailiff's return of *nulla bona* thereon as to the whole or a part, and by the 143rd section, such transcript may be filed in the office of the clerk of the county court, and on such filing shall become a judgment of the county court, and (s. 145) on such filing and the entry thereof by the clerk of the county court as prescribed, the same remedy may be had to recover as if the judgment had been originally obtained in the county court.

The transcript before us is obviously made under the 139th section of the act, and contains what that section requires when the object is to obtain execution out of any other division court than that wherein the judgment was rendered.

The cases cited for that purpose by Mr. Miller establish that the want of proof of the issue and return of a *fi. fa.* against goods is not an answer to an action like the present, but the objection takes a more serious form when it strikes at the transcript for want of its containing that which the statute requires in order to make it such as that it may on being filed and entered "become a judgment of the county court." It is as if there were no judgment on which the *fi. fa.* against lands issued, not merely that there has been some irregularity or formal error in the entry, but an entry so defective as to be a nullity.

The legislature have apparently adopted the principle that an execution against lands must be founded on a record, and as the division court is not a court of record, they have provided a method by which its judgment may be made a record of the county court, and thereupon that an execution against lands may issue. But in order that the transcript may become a judgment of record they have required that it should among other things shew the date of issuing the execution against goods, and the return to that writ in order to avoid any conflict with or departure from the 252nd section of ch. 22 of the Consolidated Statutes, which enacts that no execution shall issue against lands and tenements until the return of an execution against goods and chattels.

I am unable to see that the general principles enunciated in *Doe Boulton* v. *Ferguson*, will help this case. The objection is not to irregularities in the proceedings anterior to the judgment, nor can I look upon this transcript as having become the judgment of the county court, because it is not such a transcript as upon filing and entry, the statute clothes with that character. To make that case applicable we must hold that the *fi. fa.* against lands rests upon a sufficient judgment of a court of record. There is no such judgment unless this transcript filed and entered be one, and it as appears to me is not such a judgment, because it does not contain what the statute requires.

The objection that the sale was too soon would appear also extremely formidable, but resting only on the one I have discussed I think the rule must be made absolute.

Per cur.—Rule absolute.

HAMILTON ET AL. v. HOLCOMB.

Bill of exchange—Action against parties thereto—Judgment recovered—Joint judgment—Merger of respective liabilities by joint judgment.

The defendant drew upon McP. & C., who accepted the draft for his accommodation, which at maturity was unpaid, and the holder thereof, the now plaintiff, sued all the parties thereto, and recovered a judgment against them. Subsequently he caused McP. to be taken in execution on a *ca. sa.*, and while he was a prisoner on the limits caused him to be discharged therefrom.

This action is brought on the above mentioned judgment against the now defendant, the declaration stating it to continue in full force unreversed and unsatisfied. To the declaration the defendant pleaded that the said judgment was recovered jointly with McP. & C. and the plaintiff having taken McP. (one of the defendants) in execution and caused him while a prisoner on the limits to be discharged therefrom, thereby released the other defendants from the effect of the said judgment, which was thereby satisfied and discharged. On demurrer, *held* good.

Replication on equitable grounds that the judgment was recovered on a bill of exchange drawn by the defendants upon and accepted by McP. & C. for the accommodation of the defendant without value to McP. & C. who were only sureties for the defendant. Replication held good.

Draper, C. J., *dissentiente.*

The plaintiffs declared upon a judgment recovered on the 12th January, 1858, against the defendant, and John McPherson and Samuel Crane for £525 19s. 2d., which judgment remains in full force unreversed and unsatisfied, and the plaintiffs have not obtained any execution or satisfaction thereof.

Pleas—2nd. That the said judgment was recovered jointly against the defendant, and the other two persons named, and that after that recovery there was a deed dated 2nd January, 1858, but executed after the judgment was recovered, made between the said McPherson & Crane of the first part, their respective wives of the second part, Thomas Kirkpatrick of the third part, and those creditors of McPherson & Crane who should execute that deed, of the fourth part; that the plaintiffs became parties thereto of the fourth part, as creditors of McPherson & Crane, for and on account of the said judgment, by signing and sealing the same, and they did thereby release the said McPherson & Crane from all action, &c., in respect of the said judgment, and the demand thereby secured.

3rd. That before action this judgment was satisfied, for after the recovery of that judgment about the 1st of July, 1858, the plaintiffs issued a *ca. sa.*, directed, &c., whereby the sheriff was commanded to take the body of the said McPherson in satisfaction of the said judgment, by virtue of which writ McPherson was arrested and detained in close custody of the sheriff, or on the gaol limits, until he was by order and authority of the plaintiffs discharged, whereby the judgment was satisfied.

The plaintiffs replied to the second plea on equitable grounds, that the judgment was recovered on a bill of exchange drawn by the defendant upon and accepted by McPherson & Crane for the accommodation of the defendant without value to McP. & C., who were only sureties for the defendant; that the debt for which such judgment was recovered was the debt of the defendant; that since McPherson & Crane made the "assignment" in the second plea mentioned, the plaintiffs have received no dividend thereunder, nor any thing on account of the judgment, which is not in any way satisfied, &c.

And for a second replication to the third plea after stating that the judgment was recovered as in the first replication, and that the debt was the debt of the defendant as above; the plaintiffs say that after the arrest of McPherson he obtained the benefit of the limits, and that while he was on such limits the plaintiffs consented to his discharge from such limits, which is the discharge from custody referred to in the third plea, and the plaintiffs say that they received nothing on account of the judgment, which is in no way satisfied, &c.

The plaintiffs demurred to the third plea, because the arrest and discharge of one defendant on a *ca. sa* is not such a satisfaction of the judgment as to discharge another defendant, and that it is not shewn that by the arrest and discharge of McPherson the defendant lost any remedy over, and that it did not appear the judgment was satisfied as against the now defendant.

The defendant demurred to the second replication to the second plea, because the action being on a joint judgment the plaintiffs cannot set up in reply the position in which McPherson & Crane and the defendant stood with regard to each other on the instrument on which the judgment was recovered, and they demurred on similar grounds to the 2nd replication to the third plea.

R. A. Harrison, for the plaintiff, cited *Hamilton* v. *Holcomb*, 11 U. C. C. P., 95; *Fox* v. *Soper*, 18 U. C. Q. B., 258; *Strong* v. *Foster*, 17 C. B. 201; *Pooley* v. *Harradine*, 7. E. & B. 431; *Rayner* v. *Fussey*, 28 Law J. 128.

Galt, Q. C., for the defendant.

DRAPER, C. J.—This case has already been before the court on motion, (11 U. C. C. P. 93.) and I then expressed the doubts I had on the disposition of the question arising; I have now considered the matter with the best attention in my power, and deliver the conclusion at which I have arrived with diffidence as to its correctness, as we are not unanimous.

The demurrer to the third plea brings up no other question than whether, if one defendant is arrested on a *ca. sa.* founded on a judgment against several defendants, and is afterwards discharged from custody by the plaintiff's consent and authority, such discharge operates as a satisfaction of the judgment, or at all events, prevents any proceeding by execution or otherwise against the

other defendants. I am of opinion that it has that effect. I refer to *Hayling* v. *Mulhall*, 2 W. Bl. 1235, merely for the purpose of observing that there the question was different. We are dealing with the case of a judgment recovered against three, and its effects, not looking at the position of the parties before the judgment was recovered The legal authorities are collected in the case of *Katlin* v. *Kernot*, 3 C. B. N S. 799, where Williams, J., after referring to several cases, says: "On that ground it is that if a plaintiff takes one of several joint debtors in execution and discharges him, he cannot afterwards take the others." *Thompson* v. *Parish*, goes no further than to decide, that taking a defendant in execution is not an absolute extinguishment of the debt, so as to prevent the plaintiff from applying to the equitable discretion of the court to set off interlocutory costs due to the defendant in the *same suit*. There the defendant is still in custody. I think the defendant is entitled to judgment on this demurrer.

As to the demurrer to the second replication to the 2nd plea. This replication seeks to avoid, on equitable grounds, the plea, that one of the judgment debtors was released, by averring that the judgment on which this action is brought was recovered against the defendant and McPherson and Crane, not on an ordinary joint cause of action, but in a suit brought under the Consol. Stat. U. C., ch. 42, on a bill of exchange, of which the defendant was the drawer, and McP. & Co, the acceptors, for his accommodation, and without value, and that plaintiff has obtained no benefit or satisfaction under the deed of release.

The argument for the plaintiffs is, that the release of the acceptors of an accommodation bill is no release of the drawer, who, as the pleadings admit, gave no value for the acceptance, and that the plaintiffs ought not in equity to be prevented from shewing such to be the case here; that the plaintiffs only sued the drawer and acceptors in one action, in compliance with the statute, and that the judgment should in equity be treated as a several judgment against the drawer and acceptors, according to their respective liabilities. But by the declaration it appears to be a *joint* recovery, nor does the replication state that it is otherwise in fact, and if the answer to the plea be sustainable, it must be on the ground that a court of equity would grant a perpetual injunction to prevent a defendant from setting up that the legal consequences of an act done by the plaintiffs, after this judgment was recovered by them at law, operate to bar an action at law brought by the plaintiffs on that very judgment. Against the act itself, *i. e.*, the release, nothing is urged, its force and validity as regards McPherson & Crane are not impugned, nor is it denied that the effect of it at law is to destroy the plaintiff's claim against this defendant on the judgment, but it is submitted that this joint judgment should in equity be viewed as a several judgment, according to the position of the three defendants before judgment. As at present advised, it appears to me, that unless the replication contains a good answer at law, it does not contain any upon equitable grounds.

It cannot be said that the plaintiffs *could* not have brought separate actions against the acceptor and the drawer, though it presses strongly upon them to take the course they did take to bring a joint action, in which they have recovered judgment and issued execution as the statute says—"as though all the defendants were joint contractors." Having done this they have released two of the defendants, by an instrument under seal, which they do not pretend is avoidable or void through fraud, error, or mistake. I do not mean to assert that the legislature foresaw such a result, but I cannot say that I have found any sufficient ground for holding that these distinct liabilities are not by the judgment merged and blended into one, and that the plaintiffs having got the judgment, were bound to treat it as a joint judgment, recovered upon an ordinary joint liability. It appears to me that it concludes all parties from going behind it to ascertain in what way or on what grounds it was obtained. In *Hopkins* v. *Francis*, 13 M. & W. 670, Park, B, upon a question of alleged variance in the statement of a judgment says, it is only necessary to shew a recovery by a judgment; whether that is obtained by default or in any other way, is quite immaterial, and Alderson, B., adds: "The statement of the mode in which the judgment was obtained has no more to do with the judgment itself, than the reasons of a judge for giving his judgment."

The 25th and 32nd sections of the statute contemplate several judgments being entered in the one suit according as the various liabilities of the defendants are established or not in the course thereof The plaintiff does not fail against all because he may fail against one, and the discharge of a person liable on a bill or note in one character does not necessarily discharge another person liable on the same instrument in another character. There is before judgment no room for applying the consequences which would arise in a suit against joint contractors. The statute authorises the several parties to be sued as being jointly and severally liable, and the 25th section is in furtherance of that course, and directs that the judgment shall be entered "according as the rights and liabilities of the respective parties may appear." I do not see that the plaintiffs were prevented from obtaining a verdict severing the damages, and thereupon entering separate judgments against the drawer and against the acceptors in the original cause here. As against the drawer and the subsequent endorser of a bill, it might be right to do so, for the latter would not be liable for the costs of protest and notice of dishonour given to the drawer. A similar practice obtains in trespass, where there are several defendants, 11 Co. 56. *Austen* v. *Willward*, Cro. El. 860. It is easy to put a case in which it would appear just to some of the defendants that a plaintiff should be compelled to do so, as where endorsers or drawers seek to defend themselves on grounds not available to makers or acceptors, or *vice versa*, or where an expensive litigation follows the pleadings of one defendant while the others let judgment go by default. It could never be the intention of the statute that a plaintiff should recover the costs of such a defence which failed, against a party who made no defence at all.

The 26th section of the act must also be considered. It is in these words: "The rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though this act had not been passed, *saving* only the rights of the plaintiff so far as they have been determined by the judgment," that is, as I understand the meaning, so far as the rights and responsibilities of the plaintiff, as between him and any other party to the bill are concerned, the judgment determines *them* and they are not to be brought into question again. As to all other parties, their rights and responsibilities as between one another are unaffected. I do not perceive how that strengthens the plaintiffs' contention in this case. He has obtained a judgment against this defendant jointly with McPherson & Crane, founded on two several simple contract demands; those demands, at least as I understand the law, are merged in the judgment, (see *Drake* v. *Mitchell*, 3 Ea. 251, per Lord Ellenborough, C J.) and thus his prior rights are determined by the judgment, while any rights and responsibilities as between the defendant and McPherson & Crane, arising from the latter having accepted for the accommodation of the former, remain unchanged.

Suppose the defendant, and McPherson & Crane, had, at the plaintiff's request, after this same bill was dishonoured, accepted a bill drawn by the plaintiff on the three, in satisfaction of the dishonoured bill, and that the last accepted bill being also dishonoured, the plaintiff sued and recovered judgment thereon against the three. Then if the same facts happened, as this plea sets up, I presume it would not be contended that the defence could be rebutted. It must, I apprehend, be held that whatever the nature of the dealing was originally, the plaintiffs by taking the joint acceptance had altered it and must abide the consequences. What real difference is there between taking a new joint bill or entering a joint judgment against the three parties to the old one? If there be any it is rather against than in favour of the plaintiffs. In each case the plaintiffs would have by their own act changed their position and the character of their demand, and as much voluntarily in the actual as in the supposed case, if, as I have already endeavoured to shew, the plaintiffs might have entered several judgments against the drawer and the acceptors, and, if they could not, I have as yet heard no satisfactory argument against, or answer to the proposition that the simple contract several claims became merged in the joint judgment; wherefore I conclude that the defendant is entitled to judgment on the demurrer to this replication.

Then comes the demurrer to the replication to the third plea.

The following facts are admitted on these pleadings That the judgment on which this action is founded was recovered on a bill of exchange drawn by the defendant on McPherson & Crane, and accepted by them for the defendant's accommodation, against those three parties. That a *ca sa.* was sued out upon that judgment on which writ McPherson was arrested, and after McPherson was admitted to, and while he was a prisoner upon, the gaol limits, the plaintiffs discharged him from custody, and that the plaintiffs have not received any money or other thing in payment or satisfaction of their judgment.

I have already given my reasons for concluding that the plaintiffs cannot go behind their judgment, or escape its legal consequences as a merger of these prior rights. If that be so, then the simple fact is that the plaintiffs have discharged one defendant out of three against whom they had recovered a joint judgment out of custody on a *ca. sa.* issued in that cause. Without referring to other authorities, the case of *Clarke* v. *Clement*, 6 T. R. 525, appears to me conclusive in the defendant's favour, unless the fact that McPherson was only a prisoner on the limits makes any difference. The statute certainly enables a plaintiff at whose suit a debtor is in execution, when such debtor obtains the benefit of the limits, to issue execution against his lands or goods, and if the debtor shall afterwards be re-committed to close custody, such execution is not to be stayed. This, so far differs from the law of England, where the arrest and committal of a debtor to close custody on a *ca. sa.* if not an absolute satisfaction, at least is a suspension of all other remedy, and if the debtor be discharged from such custody by the plaintiff's consent or authority is a complete satisfaction. *Tanner* v. *Hague*, 7 T. R. 420, and *Cattlin* v. *Kernot*, already cited.

If while McPherson was confined on the limits, the plaintiffs had issued an execution against his lands, upon which lands sufficient to pay the debt had been seized, I cannot think that he (McP.) must have been kept a prisoner until the lands were sold, lest by consenting to his discharge the plaintiffs should be deemed to have obtained a satisfaction in law, which would prevent their realising an actual payment of the debt due to them. I think, rather, that the legislature in permitting an execution against the debtor's lands and goods while he is confined to the limits on a *ca. sa.* must be considered as creating an exception to, and not as abrogating, the previous rule, and that subject to that exception, confinement in execution on the gaol limits is to be deemed equivalent to close custody within the walls of the gaol. If so the defendant is in my opinion entitled to judgment on this demurrer also

RICHARDS, J.—Plaintiff's demurrer to the third plea seems to be bad, for whatever doubt there may be as to how far the mere taking a defendant in execution is a satisfaction of a judgment whilst he is in custody or when he dies in custody (*Thompson et al.* v. *Parish*, 5 C. B. N. S 685) it seems clear if he is discharged from custody by the consent of the creditor the debt is extinguished *Catlin* v. *Kernot*, 3 C B. N. S. 799, fully sustains this doctrine, which is also affirmed by WILLES, J., in the case 5 C. B., where the former cases are referred to and commented on.

It does not seem to be disputed that if McPherson & Crane were mere accommodation acceptors for the benefit of the defendant of the bill on which the original action was brought, that a discharge of them by the plaintiffs would not release the defendant; but it is urged that the plaintiffs having brought an action under our statute against all the parties to the bill, and having recovered a judgment against them, the judgment is in its nature joint, and that a satisfaction or discharge of the judgment as to one defendant is satisfaction as to all, though such satisfaction arises merely as a legal result from discharging a defendant from custody without in any way receiving compensation for the debt.

If the action had been a separate one against the several parties to the bill, merely signing a composition deed and discharging McPherson & Crane in the suit against them, would not destroy the plaintiff's right to collect the amount from the defendant in this action brought against him. The case then turns upon the effect of our statute (Consol. Stat U C, ch 42, sec. 23, 24, 25, 26, 31, 32, and 35), under which the plaintiffs must include all the parties to the note or bill in any action to be brought to recover the same under the penalty of recovering full costs in only one of the suits and disbursements in the others.

This mode of joining the makers and endorsers of bills and promissory notes in this province was first permitted as to bills and notes under £100 by provincial statute, 5 Wm. 4, c. 1. The mode of declaring under that statute was on the money counts and attaching to the declaration a copy of the note or bill sued on. This section was repealed by prov stat., 3 Vic., ch. 8, when the form now in use was established by that Act. The sections referring to set-off in the stat. of 5 Wm. 4, were as follows:— Sec. 6: "That in any such action any person or persons sued shall be entitled to set off his or their demands against the plaintiff in the same manner as though such defendant or defendants had been sued in the form heretofore used. Section 7 provides that if upon the trial of any such action the whole amount of the demand set off by any or all of the defendants and allowed by the jury shall be equal to or shall exceed the amount of the plaintiff's demand as proved on the trial, the jury shall find a verdict in favour of the defendants generally, but if the jury shall allow any demand as a set-off, and still find a balance in favour of the plaintiff, they shall state in their verdict the amount which they allow to each defendant as a set off against the plaintiff's demand." The title of the Act 5 Wm. 4, is: "An Act to prevent the unnecessary multiplication of law suits and *increase of costs* in actions on notes, bonds, bills of exchange, and other instruments," and the preamble recites that it is expedient to make such alteration in the law as will prevent the necessity of bringing separate actions for sums not large in amount, against the several makers of a bond or other instrument, or against several persons liable to be sued upon a bill of exchange or promissory note, as maker, endorser, and acceptor. The 5th and 6th sections above quoted were also repealed by statute 3 Vic , ch. 8 and sec. 3 of that statute was substituted for them. This is section 32 of the Consol. Stat. It provides that in such action any person sued may set off against the plaintiff any payment, claim, or demand, whether joint or several, which in its nature and circumstances arises out of or is connected with the bill or promissory note that forms the subject of such joint action, or the consideration thereof, in the same manner and to the same extent as though such defendant had been separately sued; and if the jury, after allowing any demand as a set-off, shall find a balance in favour of the plaintiff, they shall state in the verdict the amount which they allow to each defendant as a set-off against the plaintiff's demand.

The effect of the enactment, as I understand it, is to confine the set-off of the defendants, or any of them, to any payment, claim, or demand, which in its nature or circumstances arises out of or is connected with the bill sued on. Whereas under the former Act any of the defendants were allowed to set off any of their demands in the same way as if they had been sued alone. Under both Acts if the set-off of all the defendants was less than the note the plaintiff had a verdict for the balance. If the set-off of the defendants equalled the note the verdict would be for all the defendants

By sec. 26, Con. Act (the sections being the same in both Acts) the rights and responsibilities of the several parties to any such bill or note as between each other are to remain the same as if the Act had not been passed, save only the rights of the plaintiff so far as they may have been determined by the judgment.

The object the legislature had in view was undoubtedly the saving of costs, and the most convenient mode of doing so seemed to be by allowing all the parties to be sued in the same action, and in the form of the declaration they are stated to be jointly and severally liable, the joint liability being created by the statute, the several liabilities arising from the legal effect of the instrument.

The proposition that the rights of the plaintiffs merged in the judgment when that was perfected, as a general one, would hardly be disputed, and if the legislature had merely declared that the liability of the maker and endorsers of a promissory note should be that of joint and several makers, and had made no further provision indicating an intention of preserving their individual rights, then if a plaintiff sued defendants jointly it might well be held that he treated them as only jointly liable, and that a discharge

of one was a discharge of the whole, no matter if the person so discharged was primarily liable to pay the debt or not. But the legislature have unmistakably declared their intention of preserving the right to the defendants to call each other as witnesses, and to allow to each any set off that arose out of the note transaction (and as the first statute stood, any set-off whatever) which could not be done if they were to be viewed merely as joint contractors; and then as if to put the matter beyond doubt the 26th section already quoted declares that the rights of the parties to the note or bill between themselves are not to be affected

This section, in my judgment, may be fairly read as applying to the preservation of the plaintiff's rights as well as to those of any other of the parties to the bill or note. If the exception had not been introduced it might be contended that the words "several parties" to the bill or note in the way they are inserted in the statute mean parties other than the plaintiff in the action. The exception being introduced, it is then manifest the plaintiff is one of the parties referred to in the section, for it says—"Saving only the rights of the plaintiff so far as they may have been determined by the judgment." Then are there are any rights of the plaintiff undetermined by the judgment which exist and which are to remain the same as though the Act had not been passed? The wording of the section seems to imply that such rights do exist, and that only such of them as have been determined by the judgment are taken away. Were it otherwise intended the section would have simply declared that the rights of all the other parties to the bill except the plaintiff should remain the same as if the Act had not passed. The amount the plaintiff is entitled to recover from the defendant and the right to recover against each is determined by the judgment, and under the statute as between the plaintiff and the other parties to the bill or note that is so far determined that the right to bring them into discussion again does not "*remain*." But the right to release a drawer or endorser without thereby releasing the maker or acceptor, still in my judgment remains. That was a right which existed before the Act was passed, and which ought to remain. There is no justice in the ground taken by the defendant—it is purely technical—and if we can, without doing violence to any principle of law, preserve to the plaintiffs their right to recover money undoubtedly due them—we ought to do so. I do not think the legislature ever intended to place a plaintiff in any worse position than he would have been in if he had sued separately when they compelled him under the penalty of losing costs to sue all the parties to the bill in one action, and if the effect of the enactment is that the plaintiff cannot compound with an insolvent endorser on a bill without discharging the maker his rights are prejudicial, without any corresponding advantage to himself, and without any apparent reason therefor.

Why should not the plaintiffs' rights in this respect be preserved after the judgment as well as before? The proceeding authorised by the Act was certainly a novel one—practically it was found to work well, and after it had been in operation about fifteen years, the clause limiting its operation to bills under a hundred pounds was repealed. I doubt if this would have been done if it had been supposed that the construction now contended for by the defendant was the true one. The rights of all parties to a bill were to be protected so far as was consistent with the bringing of the action in this form, and as I cannot see any reason why the legislature did not intend to preserve to a plaintiff rights similar to those exercised by these plaintiffs, and as the words of the 26th section seem to me to be broad enough to cover such rights, I think they ought to recover, and are entitled to judgment on the demurrer to the replication to the second and third pleas. I think it sufficiently appears from the replication that the judgment sued on was an action under our statute against the drawers and acceptors of a bill of exchange.

HAGARTY, J.—Our legislature, for reasons satisfactory to themselves, made an innovation on long-established law by permitting, and under penalty of loss of costs practically compelling, the joinder of the various parties to a bill or note in the same action. It appears to me, after the best consideration I can give the point, that in so doing it was intended to leave the respective rights and responsibilities of the parties amongst themselves untouched. And that although in form the recovery of judgment presented the several defendants as joint debtors, that it was designed to leave the plaintiff to deal with them, and them to deal with each other, as if separate judgments had been recovered. The rule of law that the taking in execution the body of one joint debtor was in effect a discharge of all others, is at best one of a technical far more than a meritorious character.

It seems to me that to apply it to the case of a judgment recovered solely on the authority of our provincial statutes, would be to extend the technicality instead of confining it within its well established bounds An opposite view might be pushed to inconvenient lengths. *Prima facie*, any one defendant paying the whole of a joint judgment in contract, has his claim for contribution against his co-defendants. I think it certain that the co-defendant is allowed to go behind the judgment, as it were, and shew that he was a mere surety for, or joint maker with the other defendant for the latter's accommodation.

I do not see why a plaintiff who obeys the plain requirement of our statute, may not have as good a right to shew that although in form his judgment against several defendants as co-contractors, yet that in substance they must stand towards him in the same footing as if he had sued them separately. I give this opinion with some hesitation, but I see no other way by which I can carry out what appears to me to be the intention of an Act of Parliament, which, it is admitted, makes a clear alteration in the ordinary course of law. It has not been argued before us that separate judgments might have been entered under our statute, and it is possible that plaintiffs should have sought the aid of the court to amend the entry to entitle him to the full benefit of the construction we place on the statute.

Judgment for plaintiff—DRAPER, C. J., dissenting.

CHAMBERS.

Reported by ROBERT A. HARRISON, Esquire, Barrister-at-Law.

SKELSEY v. MANNING ET AL.

Issue book—Replication in denial of plea—Service of Notice of Trial.

Held. 1. That where notice of trial is irregular defendant is not bound to wait till a verdict is rendered against him, and then move against it on the ground of irregularity: his more proper course is to move to set aside the notice before trial too

Held. 2. That there can be only one issue book in a cause, which issue book must contain all the pleadings in the cause to issue. Where an issue book omitted the pleas of one of several defendants it was held to be irregular

Held. 3. Plaintiff can only serve notice of trial with his replication where that replication is in denial of defendant's pleading. Where notice of trial was served with a replication confessing and avoiding the plea of defendants, it was set aside with costs.

(Chambers, May 9, 1862.)

This was an action on contract brought against three defendants. Two of them, Manning and McDonald, appeared by one attorney, and the remaining defendant, Wright, appeared by a different attorney.

The declaration in the first count set out the contract for the doing of certain work in the County of Grey, and averred non-payment as a breach. The common counts were added.

Defendant Wright pleaded to first count that he did not agree in manner and form as alleged in the declaration. He pleaded never indebted to the common counts.

Defendants Manning and McDonald pleaded—

1st. To first count. Did not agree.

2nd. To second count. That no estimates were to be paid unless upon certain monthly certificates, and that before action defendants paid all estimates given upon monthly certificates.

3rd. To third count. That work to be done to satisfaction of County Engineer, and not so done.

4th. To so much of first and second counts as regards extra work, that none was to be paid for unless ordered in writing, &c.; and that defendants paid for all so ordered.

5th. To so much of first and second counts as regards extra haul of gravel, &c; non-performance of, a condition precedent.

6th To second count—never indebted.
7th. " —payment.
8th. " —set-off.

Plaintiffs took issue on the first, second, third, fifth, sixth, seventh, and eighth pleas of defendants, Manning and McDonald, and replied, waiver of orders for extra work as to fourth plea Plaintiffs at same time served on defendants, Manning and McDonald, an issue book, omitting the pleadings relating to defendant, Wright, and served notice of trial for the last assizes for the county of Grey.

The attorney for defendants, Manning and McDonald, on the next day returned the issue book with a written notice informing plaintiffs that he would not accept the issue book and notice of trial as regular—

1st. Because issue had not been joined between the parties on plaintiff's replication to the fourth plea of defendants.

2nd. Because the said replication was in denial of defendants' fourth plea.

3rd. Because of the omission of the pleadings as regards defendant Wright.

Plaintiff not having signified his intention of abandoning his proceedings as irregular,

R. A. Harrison obtained a summons calling on plaintiff to show cause why the issue book and notice of trial should not be set aside with costs on the grounds above stated. He referred to Rule Pr. No. 36. Har. C. L. P. A. 612.

Cause was shewn.

McLEAN, C. J.—This summons must be made absolute with costs. I do not think defendants are obliged to wait till plaintiff obtains a verdict, and then move to set aside the verdict for irregularity. It is more proper for them to apply, as they have done, here; and to have the proceedings, if irregular, set aside before further costs are incurred by either party. I think there can only be one issue book in a cause, and that it should contain all the pleadings in the cause to issue. The objection to the issue book, as not containing the pleadings of the defendant Wright, is good. Besides it cannot be said that plaintiffs replication to the fourth plea of defendants, Manning and McDonald, is in denial of that plea. (Rule 36. Har. C. L. P. A. 612.) Not being so, plaintiff was not in a position to serve notice of trial with that replication.

Summons absolute with costs.

STEEL v. MANNING.

Death of plaintiff's attorney between replication and notice of trial—Notice of trial by new attorney—Setting aside.

Where the attorney for plaintiff died after service of replication and before service of notice of trial and a new attorney, signing himself plaintiff's attorney, gave notice of trial without a notice of the appointment of a new attorney having been previously given, the notice of trial was set aside with costs

(Chambers, May 12, 1862.)

This was an action on a contract for the performance of work by defendant for plaintiff—breach non-payment.

The declaration also contained the common counts for work and labour.

On 20th April, 1861, the declaration was filed. During the same month defendant pleaded, and replication was filed. Notice of trial was given on 15th August, 1862 for the last Assizes for the County of Grey. Between replication and notice of trial A. G. Fraser, plaintiff's attorney on the record, died. The notice of trial was signed "Duncan Macdonell, plaintiff's attorney."

R. A. Harrison obtained a summons calling on the plaintiff to show cause why the notice of trial should not be set aside upon the ground that the attorney for the plaintiff named in the proceedings died between the service of the replication and the notice of trial, and no notice of the appointment of a new attorney was given to defendant before service of the notice of trial.

M. B. Jackson contra

John Paterson supported the summons, citing *Ryland* v. *Noakes*, 1 Taunt. 342; *Ashley* v. *Brown*, 15 Jur. 399.

RICHARDS, J., upon the authority of the cases cited, made absolute the summons with costs.

REVIEWS.

THE STATUTES, GENERAL ORDERS AND REGULATIONS RELATING TO THE PRACTICE, PLEADING AND JURISDICTION OF THE COURT OF CHANCERY, WITH COPIOUS NOTES, CONTAINING A SUMMARY OF EVERY REPORTED DECISION THEREON. By George Osborne Morgan, M.A., of Lincoln's Inn, Barrister-at-Law, late Stowel, Fellow of University College, and Eldon Law Scholar in the University of Oxford. Third edition, considerably enlarged. London: V. & R. Stevens and Haynes, Law Booksellers and Publishers, 26 Bell Yard, Lincoln's Inn, 1862.

Mr. Morgan has done for the Chancery Acts and orders what Mr. Finlayson and others have done for the English Common Law Procedure Acts, and Mr. Harrison for the Upper Canada Common Law Procedure Acts. He has taken the Acts and Orders section by section, and thereunder noted every decided case bearing upon the section noted. In this way the reader is enabled to read each section by the light of adjudged cases. The volume has little of the formality of a treatise, but for practical purposes is really more convenient.

The first edition of Mr. Morgan's work was published in 1858. At that time he noted no less than twelve hundred reported cases. The second edition was issued in 1860. In that edition he noted nearly three thousand cases. He enlarged the first part of his work containing the statutes relating to the practice and jurisdiction of the court. In reality the second edition of the work was a new work. The second edition was rapidly sold, and now in 1862 we have the third edition. In this edition the whole of the notes have been carefully collated with the works of Daniell, Sidney Smith, and other approved text writers, as well as with the references in Chitteys' Equity Index, under the tittle "Practice." The whole is accompanied with an elaborate index, not the least useful part of the work.

The Legislature and the courts have of late done much to consolidate the practice of the courts both of Law and Equity. Formerly the practice could only be found by reference to well known treatises, such as Tidd and Archbold's Practice, and Maddock and Daniell in Equity.

That which formerly could only be found by reference to the pages of several ponderous volumes may nowbe found tersely and succinctly expressed in the well arranged sections of a Consolidated Act, with rules and orders made in pursuance thereof and notes thereunder, published within the covers of an ordinary volume of 500 or 600 pages.

Mr. Morgan has done his work well and done it at the proper time. Of this the best proof is the flattering reception accorded to each edition of his work. He so far appears to be without a competitor worth naming.

The edition before us is, like former editions, divided into two parts. The first contains statutes regulating the practice and jurisdiction of the Court of Chancery. The second, the consolidated general orders of the court.

The first, contains the Act to amend the law relating to the custody of infants (2 and 3 Vic., c. 54.)—The Act for perpetuating testimony in certain cases (5 and 6 Vic., c. 69,)—The Attornies and Solicitors Act (6 and 7 Vic., c. 73.)—The Act amending the latter Act (23 and 24 Vic., c. 127,)—Several clauses of the Lands Clauses Consolidation Act (8 Vic., c. 18,)—The Trustee Relief Act (10 and 11 Vic., c. 96,)—The Act for the further relief of Trustees (12 and 13 Vic., c. 76,)—The Trustee Act of 1850 (13 and 14 Vic., c. 60,)—The Trustee Extension Act of 1852 (15 and 16 Vic., c. 55,)—The Act for diminution of Delay and expense in proceedings in Chancery (13 and 14 Vic., c. 35,)—The Act establishing the Court of Appeal in Chancery (14 and 15 Vic., c. 83.)—The Master in Chancery Abolition Act (15 and 16 Vict., c. 80.)—The improvement of Jurisdiction of Equity Act (15 and 16 Vic., c. 86,)—The Suitors in Chancery Relief Act (15 and 16 Vic.,

c. 87,)—The Act relating to the appointment of persons to administer oaths in Chancery (16 and 17 Vic., c. 78,)—The Infants Settlement Act (18 and 19 Vic , c. 43.)—The Leases and Sales of Settled Estates Act (19 and 20 Vic., c. 120.)—The Act amending the last named Act (21 and 22 Vic , c. 77,)—The Chancery Amendment Act (21 and 22 Vic., c. 27)—The Law of property and Trustees Relief amendment Act (22 and 23 Vic., c. 35,)—The Act amending the last named Act (23 and 24 Vic , c. 38.)—The Chancery Evidence Commission Act (23 and 24 Vic., c. 128.)—The Trustees and Mortgagee's Act (23 and 24 Vic., c. 145.)—The Act for the Relief of Prisoners in contempt (23 and 24 Vic., c. 149.)

The second, contains: I. The preliminary order. II. Conveyancing Counsel of the Court. III. Solicitors and parties acting in person and service on them respectively. IV. Commissions to administer oaths in Chancery. V. Official attendance and vacations. VI. Selection of Court. VII. Parties, and persons under disability and paupers. VIII. Pleadings and written proceedings generally. IX. Bills. X. Service of copy of Bill. XI. Interrogatories. XII. Process for want of answer. XIII. Traversing note. XIV. Demurrers and Pleas. XV. Answers. XVI. Procedure. XVII. Replication and joinder of issue. XVIII. Affidavits. XIX. Evidence. XX. Preliminary accounts and inquiries. , XXI. Setting down and hearing causes. XXII. Taking bills *pro confesso.* XXIII. Decrees and orders. XXIV. Receivers. XXV. Injunctions. XXVI. Stop orders. XXVII. Destringas. XXVIII. Subpœnas. XXIX. Process to enforce descrees and orders. XXX. Process generally. XXXI. Rehearings, Bills of Review, &c. XXXII. Review and supplement. XXXIII. Motions. XXXIV. Petitions. XXXV. Proceedings in Chambers. XXXVI. Office copies. XXXVII. Computation of time, &c. XXXVIII. Solicitors fees. XXXIX. Court fees. XL. Officers of Court. XLI. Proceedings under Statutory jurisdiction of Court. XLII. Miscellaneous points, regulations as to fees, costs, and charges.

We have only to add, that many provisions contained in our statutes regulating the jurisdiction of the Court of Chancery in Upper Canada are taken from English statutes, and that very many of the general orders of our Court of Chancery correspond with orders of the English Court of Chancery. This of itself is a sufficient recommendation of Mr. Morgan's work to Canadian practitioners.

The English decisions, so far as applicable, will be found invaluable in the construction of our statutes and orders.

Messrs. Rollo & Adams, the well known and enterprising law publishers and booksellers, of Toronto, are the agents of Messrs. V. & R. Stevens & Haynes. Orders given to them will receive prompt attention from the English publishers.

THE LAW MAGAZINE AND LAW REVIEW FOR MAY, 1862, Butterworths, 7 Fleet Street, London, is received.

The contents are as usual learned, interesting and instructive. They are, 1. Holy orders as disqualifying for the House of Commons or the Bar. 2. International general average 3. The rights, disabilities and usages of the Ancient Peasantry. 4. The machinery of legislation. 5. The science of civilization. 6. On equitable interests in ships. 7. The law of judgments. 8. On charitable trusts. 9. On insanity and prodigality. 10. Decrees nisi in divorce. 11. Case of W. Digby Seymour, Q.C., M.P.

This magazine retains unimpaired its reputation for learning and ability. It is a great pleasure to be enabled to read its pages. The articles are always well written, and often deeply interesting to the lawyer and legislator. We hope in our next issue to republish the paper on "Holy Orders as disqualifying for the House of Commons or the Bar." It will be read here with as much interest as in England.

We have received THE LONDON QUARTERLY, THE EDINBURGH, and THE WESTMINSTER, for May, together with BLACKWOOD, from Messrs. Leonard, Scott & Co.

Messrs. Leonard, Scott & Co., do great service to the cause of literature in re-printing these standard Reviews. The best talent in England is employed upon them. The papers on religion, philosophy, and statesmanship, are of a very high order. All are profound—not the ephemeral papers of a day, but essays the result of full investigation and great thought. We are informed that the circulation of these Reviews is much greater in the United States and Canada than in Great Britain. We are not surprised at this information. The American reprints are not nearly so expensive as the English copies. This, when we mention the fact, that Messrs. Leonard, Scott, & Co., pay the English publishers for the privilege of re-printing, is greatly to their credit. Any one of the four Reviews may be had for $3, any two for $5, and all together for $10 per annum.

GODEY'S LADY'S BOOK for June is received. The first plate is sitting for a portrait. Then a magnificent colored fashion plate for June; then several other plates of lesser importance. The letter press is as usual all that can be desired. We know of no Magazine so well adapted to the purposes for which it is published. The reading is entertaining and instructive. No lady should be without it. It is welcome to every household. It is edited with great care and much wisdom, and richly deserves the immense patronage bestowed upon it.

APPOINTMENTS TO OFFICE, &c.

CROWN LAW OFFICERS.

The HON. JOHN SANDFIELD McDONALD Q.C, to be Attorney General for Upper Canada, in the room and stead of The Hon. John A. Macdonald, resigned.—(Gazetted May 31, 1862.)

The HON. ADAM WILSON, Q.C., to be Solicitor General for Upper Canada, in the room and stead of the Honorable James Patton, Q.C, resigned.—(Gazetted, May 31, 1862.)

PROVINCIAL LAW CLERKS.

GUSTAVUS WILLIAM WICKSTEAD, Esquire, to be Law Clerk of the Legislative Assembly of the Province of Canada.—(Gazetted May 17, 1862.)

EDWARD LEWIS MONTEZAMBERT, Esquire, to be Law Clerk of the Legislative Council of the Province of Canada.—(Gazetted May 17, 1862.)

NOTARIES PUBLIC.

JAMES F. MACLEOD, of Bowmanville, Esq, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted May 3, 1862.)

SAMUEL GOODENOUGH LYNN, of Eganville, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 3, 1862.)

JAMES VINE, of Ingersoll, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 10, 1862.)

GEORGE CARR SHAW, of Smith's Falls, Attorney at Law, to be a Notary Public.—(Gazetted May 10, 1862.)

LAWRENCE ENGLISH, of Oshawa, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

JOHN DEWAR, of Milton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

SAMUEL GEORGE WOOD, of Toronto Esquire, Barrister at-Law, to be a Notary Public in Upper Canada.—(Gazetted, May 17, 1862.)

JOHN A. SHIRLEY, of Zarbor, Esq, to be a Notary Public in Upper Canada.—(Gazetted, May 17, 1862.)

JOSEPH CURRAN, of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

THOMAS CRAIG, of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

CORONERS.

HENRY MASON, Esquire, and CHARLES E. EWING, Esquire, to be Associate Coroners for the United Counties of Northumberland and Durham.—(Gazetted May 3, 1862.)

THOMAS ASHTON, Esquire, to be an Associate Coroner for the United Counties of Frontenac, Lennox and Addington.—(Gazetted May 3, 1862.)

TO CORRESPONDENTS.

"C. DURAND," "THE CLERK OF THE FIRST DISTRICT COURT, GRAY,"—Under "Division Courts."