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THE

UPPER CANADA LAW JOURNAL,

(NEW SERIES,)

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FROM JANUARY TO DECEMBER, 1866.

EDITED BY

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

BARRISTERS-AT-LAW.

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TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

DIARY FOR JANUARY.

1. Mon. ..*Circumcision.* Heir and Devisee Sittings com. [Co. Ct. & Sur. Ct. Term begins. Taxes to be [computed from this day. Municipal Elec.
4. Thurs. York and Peel Winter Assizes commence.
6. Satur. *Epiphany.* Co. Ct. and Sur. Ct. Term ends.
7. SUN...*1st Sunday after Epiphany.*
8. Mon. ..Election of Police Trustees in Police Villages.
10. Wed. ..Election of School Trustees.
14. SUN...*2nd Sunday after Epiphany.* [Board of Audit.
15. Mon. ..Treasurer & Chairm. of Muns. to make return to
16. Tues...Heir & Devisee Sitt. end. Muns. & M. C. (except [Co.'s) & Trs. of P.V. to hold 1st meeting.
20. Satur. Articles, &c., to be left with Secretary of L. S.
21. SUN...*3rd Sunday after Epiphany.*
23. Tues...Mun. County Council to hold 1st meeting.
25. Thurs. *Conversion St. Paul.*
28. SUN...*Septuagesima.*
31. Wed. ..Last day for Cities & Counties to make return to [Gov. Grammar School Trustees to retire.

NOTICE.

Subscribers in arrear are requested to make immediate payment of the sums due by them. All payments for the current year made before the 1st March next will be received as cash payments, and will secure the advantages of the lower rates.

THE

Upper Canada Law Journal.

JANUARY, 1866.

AN ADMIRALTY COURT.

We have already* drawn attention to the necessity for some court expressly constituted for the administration of Admiralty or Marine Law. The importance of the subject is our excuse for again adverting to it.

Every one conversant with the necessities of our marine trade, has his own individual case of hardship to complain of—his own particular view of the deficiency of the present system, or rather *want* of system, of administering justice between those who "go done to the sea in ships and occupy their business in great waters."

What have we in the shape of statutory enactments, which bear upon this subject? With the exception of the Registry Act for vessels and that for allowing a mortgage to be taken on the keel of a vessel as soon as laid, as security for advances for building, we know of no act in force in Upper Canada relating to vessels as distinct from other chattel property. Courts to administer "Admiralty Law," of which as we before remarked there is no lack, we confessedly have none.

Now there are continually matters arising which ought not only to be capable of adjustment in a Provincial Court of Admiralty, but should be promptly adjusted. For instance, a vessel comes into port, and a sailor is discharged and payment of his wages refused. It is usual to bring the master before a magistrate's court, and bring the case under the Master and Servant's Act; in some cases an attachment from a Division Court is asked for —and sometimes obtainable, for it is not clear that the defendant comes within the provisions of the absconding debtor's clauses of the Division Courts Act—and redress is attempted to be obtained in that way. Several results may follow. The sailor *may* know the name of the owner, or if not, the master, who *may* be the owner of the vessel, and who *may* have hired the plaintiff, or be liable for his wages, *may* wait in port till judgment is given and an execution issued and executed, or until the bailiff makes a seizure under the attachment. But then it may turn out that the master never hired the sailor, and is *not* liable for his wages, and that the master, as is generally the case, is *not* the owner of the vessel; even if the circumstances are otherwise favorable, the sailor and the bailiff may, whilst gazing on the delinquent vessel, "hull down" in the distance, have to console each other by mutual moral reflections upon the wisdom of Canadian legislators in refusing to protect the interests of those who are amongst a country's most useful servants.

This is given as one of the most common instances which fortify our position, but it is not the most important in other respects. We have already alluded to cases of collision, salvage, general average, bottomry, &c., all cases in which no adequate or appropriate remedy or relief can be obtained in the ordinary courts of the country. And as the commerce of this colony increases, and the resources of the immense tracts of land, fertile both in agricultural and mineral wealth, which lie to the west of us, are brought into the market, and vessels from all parts of the world find their way in and out of the ports of this marvellous chain of lakes, it will be absolutely necessary to have a court of judicature, instituted to meet and adjust the numerous important and ever varying questions which must continually arise.

*1 U. C. L. J., N. S., 225.

And now for a suggestion as to the most feasible and least expensive mode of carrying out what we think is generally admitted, by those concerned, as almost a necessity. Let us not go on too fast—"Half-a-loaf is better than no bread." Any scheme which would entail a large expenditure upon our already heavily taxed resources, would be unwise, not to say impracticable, at the present time. Promptitude of action in obtaining redress in the administration of justice, and uniformity of decision in the various questions that will arise, are, we apprehend, two of the most vital points in the administration of admiralty law. To obtain the first it would be necessary to have some competent person, say a practising barrister, in every port of any consequence, except in Toronto, where the admiralty judge would reside, who should have power, in certain cases, upon complaint made, to detain a vessel until security for the payment of the claim, if subsequently substantiated, should be given. He might also have jurisdiction to dispose of cases of minor importance; such for example, as seamen's wages and some other matters, up to a limited amount. In county towns, situated on the coast, it might be advisable to appoint the county judges, though this should only be as a temporary measure, till we could feel our way to a more complete system, and one which would not impose any unnecessary burden upon these hard-worked officials. The business would at first necessarily be light, so far as these deputy judges are concerned, and their remuneration should of course be in proportion. The bailiffs or deputy marshalls, would be paid by fees; and we venture to say that in the course of a comparatively short time the courts would be self-sustaining.

To secure uniformity there should be an appeal in certain cases to an admiralty judge, who should adjudicate, with or without the assistance of nautical men or "assessors," upon all important cases, such as collisions and matters of salvage, and general average, &c., besides performing all the duties of a judge in granting attachments, &c., in the port of Toronto, and who should decide all appeals from the barristers or deputy judges, before referred to.

It is an acknowleged fact that the judges of our Superior as well as our County Courts, have enough and to spare of work to do. This work is increasing every year, and if the labour were divided, beneficial results would follow. And this is especially the case with reference to nautical affairs, with which our judges have necessarily little acquaintance, and but little opportunity of making themselves acquainted.

Were we proposing to institute a court which did not exist in any other part of the world or were we suggesting laws and regulations which had never been enforced by other countries, it might then indeed be a matter of grave consideration, whether it would be advisable to make any change such as that spoken of. But when we see every maritime power, of any importance, on the face of the globe, with a marine code of some kind, and with a more or less effective mode of administering it—and when we hear continual complaints as to the wants of, and injustice to those connected with shipping in Canada, it cannot be said that we are proposing any new or untried thing, nor but that the institution of some court for administering justice in the premises, would be acceptable, and highly useful and beneficial to those engaged in a most extensive and important branch of our commerce.

THE PATENT LAWS.

The laws passed in various countries for the protection of the rights of inventors, are a fruitful subject of controversy, and many are the amendments that have been made, and many more are the amendments which have been suggested; no system, however, has yet been proposed which seems to answer the purposes intended. The subject has lately received the attention of many able men, both in England and America, and should not be passed over as unworthy by the thinking men of this country. We are not at the present—for the matter requires full consideration and has puzzled wiser heads than ours—prepared to assert that it would be advisable to resort to the extreme measure of repealing the Patent Laws *in toto*, but many powerful arguments may be brought forward in favour of such a course. These arguments, as they strike us, we now propose—without expressing any opinion on the subject—to bring forward.

Nothing seems more reasonable in theory, than the protection afforded to individuals by the operation of the "Patent Law;" and yet

nothing is in practice more liable to become an instrument of injustice and oppression. The intention of the law is to leave to the individual the benefit arising from the exercise of his ingenuity, and the use of his own brains, in the same manner that the law ought to secure to him the result of the good management of any other property belonging to him; but like some other good intentions, its effect, instead of doing the good intended, is generally a most unjust and mischievous monopoly. It is intended to stimulate and foster ingenuity, enterprise and perseverance; its effect is generally the reverse. In theory, the patent is to protect the poorer individual in the exercise of his brains against the power of monopoly and construction, especially of wealthy companies, while in practice, as shown by the evidence given before the Committee of the House of Lords, it not only excludes the ingenious but poor mechanic from the benefit of his own inventive skill and perseverance combined, and places him at the mercy of the rich man—probably himself a mere theorist, for mechanical skill is by no means necessary to a patentee—but it materially hampers, and often prevents the large manufacturer from taking advantage of the improvements pointed out in some minor department of his factory, by the skilled workman whom he would willingly, and does actually pay higher wages to on account of that very skill, but of which improvements neither ever take advantage of, because some theorist, among a score of random shots, has hit, under entirely different circumstances, on that particular idea.

But this mischievous effect of the law of patents is not confined to the manufacturer or mechanic; it meets us at every turn, and is likely to become in this country even a greater nuisance than in England, inasmuch as from the circumstances in which we are placed as arising from the difficulty of communication and expense both of material and workmanship, men are often driven to invent some way of supplying an obvious want, which in England would be supplied by the next village. The following instance may be taken as an example of the working of the Patent Law here: A friend of the writer, wanting a small hopper or box to be attached to a plough for the purpose of sowing peas in a drill under the plough, described what he wanted to a tradesman for the purpose of having one made, when he found that what he required had already been patented: and what ought not to have cost above $2 50, could not be obtained under $12. On another occasion, a particular part of this gentleman's fences, made with standards and rails something similar to the fences used by the railroad companies, required more secure fastening. Having some old iron rods about, which would exactly answer the purpose, he proposed using them, but was prevented from doing so, because it would have been an infringement of a patent right. About three years ago a particular gate, cheap and useful under particular circumstances, was patented. This gate would cost about one dollar, and could be made by any rough carpenter or handy man, with a saw and hammer. The principle was as old as the old pole and weight balance used for wells by the settlers fifty years ago, and a precisely similar gate was described to the writer several years ago; but, being patented, all others were prohibited from making use of an obvious and well known mechanism unless at a cost of nearly $3—besides the trouble of hunting up the patentee. Not a hundred miles from Toronto, a carpenter turned a small stream to account by making it drive a wheel, by means of which a churn is worked; but the man is said to be liable to an action for infringement of a patent right of somebody that he never heard or dreamt of, who has secured to himself the exclusive right to use rotatory motion in his churn to force the beater up and down.

The enactment of a Patent law was for the promotion of invention—of novelties. This may have been a right measure when manufacturers were wide and undeveloped; and when novelties, as such, except where utterly and obviously useless, were valuable. But at the present time, circumstances are so entirely altered as to make what was a wise protection *then*, a most unjust measure and an intolerable nuisance *now*. So intimately and wide spread has the knowledge of machinery been diffused among all men, and its uses among all departments of life, that a patent to an individual *now* becomes almost necessarily an injustice to many. In some department of a large manufactory, or in some small establishment where an effort is being made to supply the wants of a country place, or it may be on some

farm, a want is found which can be supplied by the application of a well known principle, or by a new material convenient at the time, but not perhaps generally used—can it therefore be contended for one moment, that any man, simply because he was intelligent enough to take advantage of the circumstances in which he was placed to his own advantage, should be allowed to prevent another under similar circumstances from doing the same? And yet such injustice is the very essence of a Patent law.

It has already been stated that the intention of the Patent law is to secure to the individual the benefit arising from the exercise of his own brains, in the same manner that the law ought to secure to him the result of the good management of any other property belonging to him. But is this possible? Is not this first inception and intention of the law a mistake? and the very first principle on which the law is based, unsound? The two descriptions of property, mind and matter, are too entirely distinct and different to permit any law of protection common to both. Matter tangible, palpable and capable of being clearly defined requires protection as individual property, and the Almighty has ordained that this shall be so, as history and the experience of every day life teaches us. Mind, thought and intellect on the contrary cannot be defined, and any attempt to do so by law for the purpose of guidance and protection, becomes simply oppression. Thought becomes common property the moment it is put in the form of words; and in opposition to matter, the same power which has ordained matter as a subject for protection by man's law for man's uses, has in an equally unmistakeable manner, proclaimed that the mind of man and the thoughts of man shall be left free and untrammelled. I may sell my property and turn it into gold and throw it into the bottom of the ocean, so that it shall be as useless as if it were not, and the loss is mine, the gain nobody's; but a thought once uttered or an idea once expressed not only ceases to be mine but is from that time entirely beyond my control or withdrawal.

The drift of our argument and the manner in which the Patent laws bear upon the matter of thought cannot be better exemplified than by the following incident which took place at Liverpool some years ago:—Three or four persons, one a practical man, a sugar refiner, and the other a mere theorist, entirely unconnected with manufactures or machinery, were discussing the effect of centrifugal motion which one of them had recently introduced into his factory, when the sugar refiner observed that it might, he thought, be used most advantageously in such and such a manner, in his business, and that he would go home and work it out, which he did very successfully. Having at much trouble and cost perfected his idea and brought it into a practical working shape, he proceeded to patent it. But what must have been his astonishment and disgust at finding himself forestalled by the theorist, who having overheard this observation made by the sugar refiner, immediately patented the *idea* of the latter. The practical man who had taken time to work out his idea, was thus absolutely deprived, by the protective law, of the benefit of his own thought and experience in his own business, which the law handed over to another, who had no more right to it than the thief has to the goods he steals.

No, the true and immutable principle is that intellectual powers given to any individual, are given him not for any selfish purpose or for his own aggrandizement, but for the benefit and improvement of his fellow men, and to glorify not himself but the Almighty who made him.

(To be continued.)

JUDGMENTS.—MICHAELMAS TERM, 1865.

QUEEN'S BENCH.

Present: DRAPER, C. J.; HAGARTY, J.; MORRISON, J.

Monday, December 18, 1865.

Fitzgibbon v. *The Corporation of the City of Toronto.*—Postea to plaintiff.

Hunter et ux. v. *Hunter et ux.*—Rule discharged.

The Great Western Railway Company v. *The Grand Trunk Railway Company.*—Judgment for defendants on demurrer to plaintiffs' replication; and judgment for plaintiffs on demurrers to declaration; and judgment, *pro forma*, for defendants on plea as to public policy.

Corby v. *Winter.*—Judgment for plaintiff on demurrer, with leave to apply to amend, on an affidavit of merits, within three weeks.

Scott v. *The Niagara District Mutual Insurance Company.*—*Held*, that there can be no waiver of a contract under seal by parol. Rule absolute to enter nonsuit.

Greaves v. *The Niagara District Mutual Insurance Company.* — Rule absolute to enter a nonsuit.

Perdue v. *The Corporation of Chinguacousy* — Judgment for plaintiff on demurrer to the 5th and 6th pleas, with leave to defendant to apply to amend; and for plaintiff on demurrer to plea setting up want of notice of action; and for defendants on demurrer to plaintiff's replication.

Miller v. *The Corporation of North Fredericksburgh.*—Appeal allowed, and rule absolute to enter nonsuit in court below.

Boulton v. *The Corporation of the United Counties of York and Peel*—*Held*, that money paid to a county treasurer after sale of his lands, is, though paid under protest, money paid to the use of the purchaser and not to the use of the plaintiff, so as to entitle plaintiff to maintain an action for money had and received. Appeal disallowed with costs.

Kinloch v. *Hall.*—*Held*, in case against a sheriff for an escape that the measure of damage is *the value* of the custody of the debtor at the time of the escape, which the jury found only to be one shilling, Rule discharged.

Grimshawe v. *Burnham.*— Appeal dismissed with costs.

Merick et ux. v. *Sullivan.*—Rule absolute to enter nonsuit.

Mackay v. *McKay.*—Rule discharged.

Stevenson v. *Calvin.*—Rule discharged.

Hughes v. *Pake et al.*—Rule absolute to enter nonsuit as to each of the defendants.

The Queen v. *Nicholas Hogg.*—*Held*, that no indictment can be framed at common law for falsely personating a voter at a municipal election. Judgment arrested.

Parker v. *Watt.*—Judgment for plaintiff on demurrer.

The Queen v. *Coffee.*—Evidence of a confession improperly received, and conviction quashed.

Taylor v. *Jarmyn.*—Judgment for defendant on demurrer to the general plea.

Clissold v. *Moseley.*—Rule discharged.

Cameron v. *Gunn.*—*Held*, that the words "to quit, claim and release," are not sufficiently operative words in a deed to pass an estate, unless there be a previous estate for the release to operate upon. Rule absolute to enter a nonsuit.

McGillivray v. *The Great Western Railway Company.*—Rule absolute for a new trial without costs.

Hunt v. *McArthur.*—Rule absolute for a new trial without costs.

The Bank of Montreal v. *Reynolds.*—Rule absolute for a new trial, within one month, on payment of costs, otherwise rule discharged.

Saturday, December 23, 1865.

Present: Draper, C. J.; Morrison, J., Hagarty, J., being absent, holding City Assizes.

Provident Life Assurance Company v. *Wilson.* —Appeal from the decision of the Judge of the County Court of the United Counties of York and Peel allowed, and rule absolute to enter nonsuit in court below.

Huskinson v. *Lawrence.*—Judgment for defendant on demurrer to first count, and for plaintiff on demurrer to second count

In re Robert Munn.—Writ of *Habeas Corpus:* applicant to be remanded.

Howard v. *The Western Assurance Company.*— Rule absolute for new trial, costs to abide the event, unless plaintiffs within a month consent to reduce the verdict to $400, in which event the rule to be discharged.

Hicks v. *Ross.*—Judgment for defendant on demurrer to plea.

Bletcher v. *Burn.*—Rule to enter satisfaction on payment of such sum as the Master on taxation shall find due between attorney and client.

Bletcher v. *Marsh.*—Same as foregoing and same judgment.

In re Jones and McLean —Rule discharged.

COMMON PLEAS.

Present: Richards, C. J.; Adam Wilson, J.; John Wilson, J.

Saturday, December 18, 1865.

Tobin v. *Spence.*—Stands for inquiry as to facts.

Whelan v. *McLaughlin.* — Rule absolute to enter verdict for defendant. Application for leave to appeal granted.

Milligan v. *The Grand Trunk Railway Company.* —Rule absolute for new trial without costs, as commission was defectively executed in Boston and improperly received at the trial.

Edseal v. *Hamell.*—Judgment for plaintiff on demurrer to declaration, with leave to defendant to apply on affidavits to amend.

McCollum v. *McKinnon.*—Judgment for plaintiff on demurrer to plea.

Kreutz v. *The Niagara District Mutual Fire Insurance Company.*—Judgment for defendant on demurrer.

Converse v. *Michie.*—Judgment for defendant on special case.

Carpenter v. *Hall.* — Rule discharged with costs.

Lyon v. *Tiffany.*—Rule discharged.

Davidson v. *Reynolds.*—*Held*, that a horse ordinarily used in the debtor's occupation, not exceeding $60 in value, is a chattel within the meaning of the Exemption Act, and so not liable to seizure. Rule discharged.

The Queen v. *Field.*—Conviction affirmed.

Hamilton v. *Covert.*—Rule to set aside nonsuit discharged.

Corporation of Wellington v. *Wilson.*— Rule discharged with costs.

Reeves v. *Epps.*—*Held*, that it is still necessary to serve issue books. Rule absolute with costs.

The City Bank v. *McDonald.*—Judgment for defendant on demurrer to second plea; and for plaintiff on demurrer to remaining pleas. If

plaintiffs apply to amend, then defendant to have leave to amend.

Saturday, December 23, 1865.

Cousins v. *Merrill.*—Rule absolute for new trial on payment of costs.

Davis v *The Scottish Provincial Assurance Company.*—Rule absolute for new trial on payment of costs.

The Queen v. *Hunt.*—*Held*, that both Ridout Street and Talbot Street are public highways to the river Thames, and wrongfully obstructed by the defendant under pretence of a grant from the Crown granting a mill-site covering the extension of these highways. Judgment for the Crown, and sentence to be passed at next assizes (John Wilson, J., having been concerned in the subject matter of the litigation when at the bar, took no part in the judgment of the court.)

Puertell v. *Bailan.*—Stands.

Helm v. *Crossen* —Also stands.

Nicholls v. *Lundy.* — *Held*, proceedings in County Court of Peterborough, in relation to interpleader matter, are *coram non judice.*

Smith v. *Richardson.*—Appeal allowed without costs, and rule in court below to be discharged.

Cutten v *Ker.* — Rule absolute to enter verdict for defendant.

Boomer v. *Anderson.*—*Held*, that under the statute, an order for the taxation of an attorney's bill should not be the same order as that which orders the delivery of the bill. *Held*, also, that there is no power to order a stay of proceedings in an action pending for the account of an allowed bill, unless on an order for the taxation of the bill. Rule absolute to rescind order of learned judge without costs.

SELECTIONS.

THE CASE OF CONSTANCE KENT AND THE PLEA OF GUILTY.

(*Continued from page* 316.)

That so eminent and acute a personage as the late Lord Chancellor was satisfied that Constance was not the guilty party, appeared from this, that after the most careful inquiry, and after bringing his powerful mind to bear upon the case, he directed the nurse to be apprehended and accused, and a great deal of evidence was given against her. The great fact, to begin with, was that she had the care of the child, and that he was in her bedroom. Added to that was the fact, that although she admitted having missed the child as early as five in the morning, she made no alarm until two hours later, and then gave as a reason one which her mistress deemed unsatisfactory. Further, it was proved that it was impossible she should have observed from her own bed, as she stated, that the child was gone. Further, it was proved that she had said, before the child was found, that the blanket was missing, although, as it was said, she could not have seen whether it was there or not. And then there was the fact of her having said that she had seen Constance's dress put into the basket, which she denied. But the fact that the dress of Constance *was* missing being unexplained, and there being no evidence to connect the nurse with it, or anyone else, the magistrates felt that it was impossible to convict the nurse, and therefore improper to commit her for trial, and she was discharged, but not until after an inquiry which lasted several days.

Her discharge was the ruin of Constance Kent. Everyone saw, and she must have felt, that so long as the missing dress was unaccounted for she would be suspected as the murderess. That the consciousness of this suspicion must have entailed upon her a load of mental anguish absolutely unendurable must be obvious to anyone. It is evident that it drove her from home; for although her family, it appeared, corresponded kindly with her to the last, she remained away for the whole of the five years which elapsed before her surrendering herself to justice.

That these were years of crushing anguish, which might well drive her to desperation and despair, no one can doubt. She must have felt at last that she might as well almost have been the murderess, as she had to bear the brand of murder—bearing the doom of Cain, if not his guilt. Life must at last have become a burden too grievous to be borne, and death itself have assumed the aspect of a welcome relief. Nor was this all. To add to her anguish on her own account, was the consciousness of the heavy doom which had fallen upon her family. They had literally been overwhelmed with ruin; her father and brother especially – to both of whom she was tenderly attached—were utterly beggared. The one had to give up his appointment, the other, it appeared, found it impossible to obtain one. These facts have been stated publicly by a friend of the family, a Mr. Stapleton, who, on behalf of the girl herself, avowed that she was most anxious to exonerate her father and brother from the load of obloquy which attached to, and had utterly overwhelmed them. And one cannot conceive a more cruel fate than this befalling any relatives so near and dear, nor one more calculated to weigh upon and crush to the earth the soul of that young girl.

Here, then, were the two most powerful motives which could ever influence the human mind, to prompt her to a false confession—affection and despair. Affection for those she most deeply loved, for herself the darkness of a black despair. For herself she must have felt hopeless. Upon the hypothesis of her innocence, someone else, really guilty, had secreted her dress to throw suspicion upon her, and, having cruelly succeeded, was not likely to acknowledge the dark deed. In the future, therefore, there was for herself no hope. She was branded, until death, as a murderess.

And meanwhile, her father and her brother were ruined for her sake. She could save them by a false confession, which could hardly render her own fate worse than it was. Meanwhile, she had been for some years under morbid religious influences, she had been for two years at a Tractarian Religious House, under the "spiritual care" of a Miss Graeme, who called herself her spiritual mother, and a Rev. Mr. Wagner, who assumed to act as her spiritual father. Of the part played in the case by these two persons, we care not to speak, except so far as it bears on the case of Constance. No one, we think, can consider that the influences they were likely to exert were healthy; on the contrary, they were far more likely to augment the morbid feelings of despair; and, perhaps, ill-regulated religious sentiment may have suggested the idea of a voluntary sacrifice of herself for the sake of those she loved. If we can rely on Mr. Wagner's statements, "It was entirely her own voluntary act." "It was entirely her own proposition." This very much confirms the view we suggest. For, as he stated that she had made secret confessions to him, and it would be his duty to tell her that she must disclose the circumstances, so as at once to test her truthfulness, and clear others who had been suspected, her not doing that, and her proposing to make a public surrender of herself as the guilty party, are strong to show that conscience was not the real motive; and, therefore, that the confession was not true. For, if conscience had been the motive, she herself would have suggested, if her "spiritual father" had not, that, in order to clear others, it would be proper to enter into circumstances and details. This, however, it will be seen she did not do, and her "spiritual father" and herself were equally regardless of her duty in this matter, assuming her to be guilty. That duty clearly was to make such a disclosure as should clear others, by disclosing details which the guilty only could disclose. This alone could clear others; for it was the only thing which the guilty alone could do. The guilty party alone could know the details, and therefore that party only could disclose them. And the suspicion resting upon other persons had arisen from circumstances which could only be explained by a full disclosure. No such disclosure, however, was made; but Constance Kent, accompanied by her "spiritual father and mother," went to a police court and put in a cut-and-dried admission of her guilt, which ran thus,—"I, Constance Emilie Kent, alone and unaided, on the night of the 29th of June, 1860, murdered at Road-hill House, Wiltshire, one Francis Saville Kent. No one before the deed aided me in its execution, nor afterwards aided me in concealing it."

We well remember, on the morning when this extraordinary statement was published, no one could be met with in Westminster Hall who was satisfied with it. It was so unlike a real confession—it was general in its tone—it showed such an evident desire to clear some other parties—yet, on the other hand, it was destitute of that fulness of disclosure which alone *could* do so.

It was difficult to explain this, except upon the theory that her confession was not true, so that it was necessarily thus curt and general in its terms, lest, by lapsing into detail, it should expose its falsity. However, to this course she adhered throughout, and at her trial, in perfect consistency, pleaded *guilty*. Throughout, her evident object was to clear others and to restore the character of her family. Thus, while in prison, she wrote a letter with a view to disclaim the imputation of any unkind treatment. "I have received the greatest kindness from both the persons accused of subjecting me to it." The difficulty was only increased by this, for where could be the motive? She was proved to have been fond of the child, and the child was fond of her. She had no ill-treatment to revenge, and of course no ill-feeling for the child. At the trial, she publicly disclaimed both motives. By the lips of her counsel she declared that she had been treated with the utmost kindness; and by her own, she disclaimed any dislike of the child. This only heightened the mystery, for it destroyed the only theories of motive which any human imagination could conceive, and it supplied no other. Yet, if she did the deed, there must have been a motive, and a strong one. It was a terrible, unnatural deed for a young girl to do—to cut the throat of a sleeping child—the child of a fondly-beloved parent, who was deeply attached to her and treated her with every kindness. Motive there must have been; but the only conceivable motives were disclaimed, and no other was suggested, though a clumsy attempt was made, in equivocal language, to insinuate the motive which was denied. And it is curious to observe the difficulty in which the girl has evidently found herself placed by these contradictory statements. This she could not avoid—her great object evidently being to clear others. She admitted the deed, but denied the only motive which could have led her to it. She publicly denied either jealousy or revenge. No other motive could be conceived by any one for *her* murdering the child; though there was more than one which might very easily have led some other person to do it. Therefore her denial of the only conceivable motive for her doing the act, tended, along with the unusual character of her confession, to produce an impression on the public mind that was very unsatisfactory.

Suddenly there appeared in the *Times* the following letter:

"Sir,—I am requested by Miss Constance Kent to communicate to you the following details of her crime, which she has confessed to Mr. Rodway, her solicitor, and to myself, and which she now desires to be made public.

"Constance Kent first gave an account of the

she afterwards acknowledged to me the correctness of that account when I recapitulated it to her. The explanation of her motive she gave to me when, with the permission of the Lord Chancellor, I examined her for the purpose of ascertaining whether there were any grounds for supposing that she was labouring under mental disease. Both Mr. Rodway and I are convinced of the truthfulness and good faith of what she said to us.

"Constance Kent says that the manner in which she committed her crime was as follows:—A few days before the murder she obtained possession of a razor from a green case in her father's wardrobe, and secreted it. This was the sole instrument which she used. She also secreted a candle with matches, by placing them in the corner of the closet in the garden, where the murder was committed. On the night of the murder she undressed herself and went to bed, because she expected that her sisters would visit her room She lay awake watching until she thought that the household were all asleep, and soon after midnight she left her bedroom and went downstairs and opened the drawing-room door and window shutters. She then went up into the nursery, withdrew the blanket from between the sheet and the counterpane, and placed it on the side of the cot. She then took the child from his bed and carried him downstairs through the drawing-room. She had on her night-dress, and in the drawing-room she put on her goloshes. Having the child in one arm, she raised the drawing-room window with the other hand, went round the house and into the closet, lighted the candle, and placed it on the seat of the closet, the child being wrapped in the blanket and still sleeping, and while the child was in this position she inflicted the wound in the throat. She says that she thought the blood would never come, and that the child was not killed, so she thrust the razor into its left side, and put the body, with the blanket round it, into the vault. The light burnt out. The piece of flannel which she had with her was torn from an old flannel garment placed in the waste bag, and which she had taken some time before and sewn to use in washing herself. She went back into her bedroom, examined her dress, and found only two spots of blood on it. These she washed out in the basin, and threw the water, which was but little discoloured, into the footpan in which she had washed her feet over night. She took another of her nightdresses and got into bed. In the morning her nightdress had become dry where it had been washed. She folded it up and put it into the drawer. Her three nightdresses were examined by Mr. Foley, and she believes also by Mr. Parsons, the medical attendant of the family. She thought the blood stains had been effectually washed out, but on holding the dress up to the light a day or two afterwards she found the stains were still visible. She secreted the dress, moving it from place to place, and she eventually burnt it in her own bedroom, and put the ashes or tinder into the kitchen grate. It was about five or six days after the child's death that she burnt the nightdress. On the Saturday morning, having cleaned the razor, she took an opportunity of replacing it unobserved in the case in the wardrobe. She abstracted her nightdress from the clothes-basket when the housemaid went to fetch a glass of water. The stained garment found in the boiler-hole had no connection whatever with the deed.

"As regards the motive of her crime, it seems that although she entertained at one time a great regard for the present Mrs. Kent, yet if any remark was at any time made, which in her opinion was disparaging to any member of the first family, she treasured it up, and determined to revenge it. She had no ill-will against the little boy, except as one of the children of her stepmother. She declared that both her father and her stepmother had always been kind to her personally, and the following is the copy of a letter which she addressed to Mr. Rodway on this point, while in prison before her trial:—

"'Devizes, May 15.

"'Sir,—It has been stated that my feelings of revenge were excited in consequence of cruel treatment. This is entirely false. I have received the greatest kindness from both the persons accused of subjecting me to it. I have never had any ill-will towards either of them on account of their behaviour to me, which has been very kind.

"'I shall feel obliged if you will make use of this statement in order that the public may be undeceived on this point.

"'I remain, Sir, yours truly,

"'Constance E. Kent.

"'To Mr. R. Rodway.'"

"She told me that when the nursemaid was accused she had fully made up her mind to confess if the nurse had been convicted, and that she had also made up her mind to commit suicide if she was herself convicted. She said that she had felt herself under the influence of the devil before she committed the murder, but that she did not believe, and had not believed, that the devil had more to do with her crime than any other wicked action. She had not said her prayers for a year before the murder, and not afterwards until she came to reside at Brighton. She said that the circumstance which revived religious feelings in her mind was thinking about receiving sacrament when confirmed.

"An opinion has been expressed that the peculiarities evinced by Constance Kent between the ages of 12 and 17 may be attributed to the then transition period of her life. Moreover, the fact of her cutting off her hair, dressing herself in her brother's clothes, and leaving her home with the intention of going abroad, which occurred when she was only 13 years of age, indicated a peculiarity of disposition, and great determination of character, which forboded that, for good or evil, her future life would be remarkable.

"This peculiar disposition, which led her to such singular and violent resolves of action, seemed also to colour and intensify her thoughts and feelings, and magnify into wrongs that were to be revenged any little family incidents or occurrences which provoked her displeasure.

"Although it became my duty to advise her counsel that she evinced no symptoms of insanity at the time of my examination, and that, so far as it was possible to ascertain the state of her mind at so remote a period, there was no evidence of it at the time of the murder. I am yet of opinion that owing to the peculiarities of her constitution it is probable that under prolonged solitar confinement . . . . . .

"The validity of this opinion is of importance now that the sentence of death is commuted to penal servitude for life; for no one could desire that the punishment of the criminal should be carried out so as to cause danger of a further and greater punishment not contemplated by the law.

"I have the honour to remain your very obedient servant,

"John Charles Bucknill, M.D.

"Hillmorton Hall, near Rugby, August 24."

Everything about this letter was considered unusual and unsatisfactory; and indeed, like the case itself, it was extraordinary. It did not appear to whom it was addressed, or how it came to have been written. It was pretty clear why it was put forth. It was an attempt to explain the mystery which people found so extremely unsatisfactory. It revealed an effort to elicit from the girl some statements of detail by which the truth of her confession could be tested. But in that point of view, if even on the face of it the statement had been credible, it would have been worthless. The whole value of a confession is its voluntariness. This was not a confession: it was not voluntary: it was a statement got up for an object; very likely by leading questions suggested by the very difficulties it was intended to meet. But there are more fatal difficulties in the statement. It is contradicted on all the material points by the facts of the sworn evidence. This was the very result which a real confession would have led to, and which for that reason she had avoided. On every material point the statement thus elicited from her will be found at variance with the undoubted facts of the sworn evidence. First as to the *time:* she puts it at soon after midnight: the evidence of Mrs. Kent and the surgeon puts it at between three and four; a difference of three hours. Next as to the weapon: she says it was a razor, which has no point; the surgeons are sure that it must have been a long sharp pointed knife, as everyone can see it must have been, to inflict a deep stab half through the chest. Then as to the circumstances of the act: she says the piece of flannel was merely a rag used for washing; whereas the police-searcher stated it was a chest flannel which fitted the nurse. She says nothing as to the suffocation which had evidently taken place. Then she talks of blood not having come, upon the arteries of the throat being severed by a cut right through to the bone. Why the blood as the doctors said, must have burst forth in a jet, and covered the murderer with its crimson tide. She says there were only two spots of blood on her night-dress, which no one for a moment can believe. She says she washed out the stains; and that the next morning the sergeant and police superintendent examined all her three nightdresses, and they observed nothing; to which may be added that the policeman's wife examined them later in the same day and observed nothing; yet she says that some days afterwards she found the stains still visible, and therefore secreted the dress In the meanwhile, according to her account, she had gratuitously contrived to fasten a fatal suspicion upon herself by withdrawing from the basket the nightdress which had already passed repeated inspections with perfect impunity, and when washed would have been rendered secure for ever. Can anyone credit such a tissue of self-contradictory statements? The greatest difficulty, however, is as to the motive for the crime. As already stated, before and at the trial she had disclaimed both jealousy and revenge—the only motives conceivable, and no others could possibly be imagined. There is, therefore, in the above an equivocating attempt to reconcile two utterly contradictory statements—that there was no unkindness, and yet there was a desire of revenge; there was no unkindness from the stepmother, and no ill-will towards the little boy; and as to her father, he was kindness itself, and she was very fond of him and the child. Then why on earth should she have done so horrible and unnatural an act as to cut the throat of her father's infant child, without any motive either of jealousy or revenge? This is a difficulty which is utterly insuperable by any sophistry, and it is quite untouched by the above elaborate attempt at explanation. The whole document is equivocating, and leaves upon the mind the impression of untruth.

We have said enough to show that the whole aspect of the case is exceedingly unsatisfactory, and that it is still plunged in mystery. That such should be the result, is discreditable to our criminal proceedings. It is already a great evil that persons should be allowed to prevent inquiries by pleading guilty. For certain reasons in the present case it was desired by certain persons that a trial should not take place, and those whom it might have exposed no doubt did their best to prevent it. They had the girl—for reasons we have already explained—completely under their influence; and they easily induced her to adhere to the course she at first had adopted, of avoiding any course which might lead to *disclosure.* It might have defeated the great object of the confession, for it might have exposed its untruth. If its object were to remove suspicion from others, and not to promote justice, or disclose truth, then of course a trial would be the last thing that would be desired, and the plea of guilty would prevent it. It ought not to be in the power of anyone thus by false pleas to baffle justice, and defeat the ends of law. The great object of the administration of justice is that it should give satisfaction to the public, and the public have an interest in it. It is not like a civil matter which merely concerns the individual. The essence of criminal procedure is that it concerns the whole realm, and no one ought to be allowed by a collusive or colourable plea to assume the guilt of another's crime, in order to prevent an inquiry and conceal the truth. The judge ought

to be able to order a plea of Not Guilty to be entered, and to direct the trial to proceed. Had it been possible to take this course in the present case, probably the mystery might still have been cleared up; or at all events it would have left it open for future and further inquiry, and the ends of justice would not have been defeated by a false confession, as they have been, it is to be feared, in the present instance. —*Law Magazine.*

"Lord Cranworth's first exercise of judicial patronage since his return to the woolsack will, we believe, give general satisfaction. So speaks the *Pall Mall Gazette*, and we heartily agree with it; though, having done so, we can find little more worthy of agreement in the article of which it is the commencement. Mr. Justice Lush is a hard-working lawyer, who owes his promotion entirely to his professional merits. He has never been in Parliament, and this appears to have been the true cause why he was so long left among the rank and file of the Bar. It has been suggested that his Nonconformist principles* stood in the way of his advancement, but that is pure nonsense. Not long ago we showed that of the entire bench of which he is now a member, one only was "in conformity"—*i.e.*, a member of the Church of England. Then it is said "a barrister who ascends the bench permanently surrenders a large share of the income he is earning. This suggests an obvious answer to the question why men do not reach the bench at an earlier age. The truth is that they cannot afford to leave the bar until they have enjoyed its profits for a considerable number of years." But that also is nonsense. Some men indeed have been said to decline the woolsack from this reason—though we doubt if it ever was really done—but the position of a puisne judge is such that anyone who would take it at all can afford to take it without any previous hoard to eke out his salary. In the present instance the Lord Chancellor has adhered to his favourite policy of recruiting the bench from the purely professional class, who have never divided their allegiance between law and politics. There are now six judges who have attained their present position without passing through the House of Commons—Mr. Justice Willes, Mr. Justice Byles, Mr. Justice Blackburn, Mr. Baron Bramwell, Mr. Baron Channell, and Mr. Justice Lush, who succeeds Mr. Justice Crompton, another of the same class.

This is the true principle of selection. There is nothing more calculated to sully the fountain of justice, nothing which has, at critical periods of our history, been productive of more injury to the administration of our law than the practice of making parliamentary success a stepping stone to the bench of judges. True, the claims of a lawyer should not be overlooked merely because he writes M.P. after his name, and, so long as the exigencies of party require the Attorney and Solicitor-General to be members of the House of Commons, it is likely that the political lawyers will keep a monopoly of the very great places.

Again, when we see, as has occasionally been the case, the high reputation of a political adversary recognized and rewarded by a place upon the bench, notwithstanding years of parliamentary antagonism (as in the case of Mr. Justice Smith), it is hard to say whether the appointment reflects more credit on the appointor or appointee. But the claims of the mere political partizan are but too often superior to all other circumstances.

Among the nine English judges who have enjoyed the honour of a seat in Parliament, at least four could never have hoped even to see the bench at a distance, had it not been the reward of their services, not in the forum, but in the senate; and should many more vacancies occur during the continuance of the present government, we can hardly expect to avoid an addition to their number in the person of the Solicitor-General. In Ireland the case is, however, far worse, and we do not believe that there is on the bench of that country a single judge, except Mr. Baron Fitzgerald, who owed his promotion solely to his professional eminence. We do not mean to say that all the others are purely political judges, though doubtless too many of them are so. Mr. Justice Christian, for instance, though he acted as Solicitor-General for Lord Palmerston's first administration, was never in Parliament, and never took any prominent part in political life. But it is impossible to appoint the law officers of the Crown without reference to political parties, and therefore it is that we regret to see these appointments so invariable a prelude to the bench in Ireland. Of course we do not say that none of those who have reached the bench through official political life deserve their high position, far from it; but even Chief Justice Monahan himself, in some respects, perhaps, the ablest man on either bench, owed his elevation, not to his undeniably great forensic abilities, but to the fact that there was no other Irish lawyer on the Whig benches of the House of Commons at the time when Sir Robert Peel's government went out in 1846, and a vacancy was created in the ranks of the new law officers by the promotion of Mr. Pigott to the Cushion of the Exchequer.

The system which fills the bench exclusively with the adherents of the party for the time being in favour, essentially vicious as it is, is greatly aggravated when the choice of judges is further limited to such of those adherents as can win the "sweet voices" of a majority of borough electors. In the meantime let us congratulate ourselves that the second Chancellorship of Lord Cranworth will help to keep the Bench—in England at least—comparatively free from Keatings and Keoghs.—*Solicitors' Journal.*

* The learned judge is a Baptist, and married to the daughter of a London Baptist minister.

UPPER CANADA REPORTS.

PRACTICE COURT.

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

In re Roberts and Lorimer.

Arbitration and award—Reference limited—Excess of authority—Award set aside.

Where a reference was specific of accounts rendered up to 31st December, 1864, and the award went far beyond this, the court, upon the application of the person against whom the award was made, denying any binding authority to thus extend the reference, and his oath being unanswered, set aside the award.

[Practice Court, H. T., 29 Vic.]

Freeman, Q. C., for Roberts, moved to set aside an award for excess of jurisdiction.

No cause was shewn.

It appeared that by lease dated 16th May, 1862, Lorimer demised premises to Roberts for five years from 1st September, 1862, at $160 yearly rent, payable last day of each year. Lorimer agreed to fit up a building on the premises, and make it suitable for a shop and dwelling house, and other improvements, to tenant's satisfaction, to be completed by the 1st of September then next, and to pay $20 a week liquidated damages, until completion, after that period. If landlord made default, tenant might complete the work, landlord to pay therefor on demand. Tenant covenanted to make advances in goods and money to landlord to assist him in performing the work to $900, the receipt whereof landlord acknowledged, and lumber to $200, at specified prices, and goods and painting to $250. Tenant to keep premises insured to $500; if burnt, landlord was to release his reversion in fee to tenant, who was to receive such conveyance in satisfaction of the principal sum of $900, secured by mortgage thereinafter mentioned; and tenant to receive the insurance money. It was then recited that landlord had at the same date mortgaged same premises in fee to tenant for $900, payable in five years from 1st of September (the day of commencement of term) with interest payable yearly at same dates with the rent, and that sum included the advances agreed by the lease to be made. It was then declared that $54, the interest on the mortgage money, should be applied in reduction of the rent, and that tenant should make further advances to landlord to an amount not exceeding $250, to be secured by a further charge on the premises at 10 per cent. interest, to be repaid by equal yearly instalments during the term, with interest with each instalment, to be deducted (that is, instalment and interest) out of the rent, the balance only being payable to landlord. Then there was a provision for a further insurance to cover the further advance. It concluded with a provision for an arbitration if any dispute should arise touching the construction of the lease, or any thing therein contained.

On the 22nd of September, 1864, the parties signed a short memorandum of reference to submit their accounts as rendered up to the 31st of December, 1862, and also the question of damages spoken of in the lease, which lease was the basis of arbitration. On the 15th of November, 1864, the referees awarded that Roberts was entitled to recover from Lorimer, after applying the following sums of money: $108 to be endorsed as the interest for two years on the $900 mortgage, and the further sum of $145 to be endorsed on a certain other mortgage made by Lorimer to Roberts specified in the lease; and after examining all the accounts submitted, and after applying these sums as above mentioned, Roberts was entitled to recover from Lorimer $208 55, after applying two mortgages for $1,400 and $320, two years' rent up to the 1st of September, 1864, and it was awarded that the costs of arbitration were to be borne equally.

The only affidavit filed was one made by Roberts, who moved to set aside the award.

He swore that the $250 advance mentioned in the lease was not secured by mortgage as agreed, as he expected to pay it out of the rent, and that he also advanced other $500 not provided for in the lease, for which he took a mortgage; that the arbitrators had no authority to go into or determine matters subsequent to period named in submission; that Lorimer was insolvent, and that applicant was seriously prejudiced by their directing the endorsements to be made on the mortgages.

Hagarty, J.—The transactions between the parties is of a curious nature. It is not usual to find at the same date the owner of the fee demising for a term of years, and mortgaging in fee simple to the same person, who is thus supposed at the same moment to be the termor and the reversioner in fee.

I do not see how under any view of the case, or whatever may be his position, the award can be supported.

The reference is specific of accounts rendered up to the 31st of December, 1864, two or three months after the commencement of the term, and before the accruing due of any rent, and also of the damages spoken of in the lease, being I suppose the liquidated weekly damages for noncompletion of the improvements by the appointed day. The award goes far beyond this, directing the application of several years' interest and rent. Any binding authority to thus extend the reference is denied by Roberts, and his statements remain uncontradicted.

The award must be set aside.

Rule absolute.

Severn et al. v. Cosgrave.

Arbitration and award—Setting aside—Grounds—Discovery of new evidence—Improper amendment of pleadings—Merits.

Where parties to a protracted reference thought their case so strong that it would be impossible for the arbitrator to find against them, and did not do all that it was in their power to do to repel the case of their opponent, relief against an adverse award was refused on the ground of surprise and discovery of new evidence.

Where the arbitrator, having power to amend the pleadings in the exercise of discretion, allowed a plea to be added, and the parties affected, instead of applying to have the reference revoked, proceeded with it notwithstanding the amendment, which they contended was improper and unjust, and applied for relief against, the award on this ground, it was refused them, although the Court thought on the materials before it, if the same was before the arbitrator, that the amendment ought not to have been allowed.

So where the arbitrator, having power to allow or disallow a claim set up by one of the parties to the reference in the exercise of his judgment decided to allow it, and his motives were unassailed, the Court, though differing from

him as to the propriety of allowing the claim referred to, set aside the award on the merits.

[Practice Court, E. T., 1865.]

Read, Q.C., obtained a rule *nisi* on the defendant to shew cause why the award in this case should not be set aside, or the matters referred back to the arbitrator, on the following grounds:

1st. That the arbitrator exceeded his jurisdiction by taking into consideration a claim made by the defendant prior to the 14th of September, 1858.

2nd. That the arbitrator also exceeded his jurisdiction by taking into consideration matters not in question in this cause.

3rd. That the arbitrator let in stale claims requiring a plea of set-off, and no such plea had been pleaded.

4th. That the plaintiffs were taken by surprise by the arbitrator letting in matters between the 30th of August, 1856, and the 15th of September, 1858, while the plaintiff's claim was all subsequent to the latter date.

5th. That the arbitrator examined the parties, and he also swore the parties and the witnesses, while he had no power to examine the parties or to administer an oath.

6th. That there was false swearing by the defendant, and the plaintiff is entitled to relief on the facts set forth.

7th. That new evidence and other witnesses have been discovered so as to establish that the defendant was paid the amount of his commission claimed and allowed to him by the arbitrator, between the 30th of August, 1856, and the 14th of September, 1858; and on grounds disclosed in affidavits and papers filed.

George Severn swore the action was brought to recover $1,507.83—that is, $641.14 for what is called the ledger account, and $866.69 on what is called the beer account; that the beer account was made out in January or February, 1863, by and between deponent and defendant, and then admitted by defendant to be correct; that it extended from the 14th of September, 1858, to the 27th of April, 1861, when the defendant left plaintiff's service; that defendant never pretended he had any unsettled account against plaintiff from the 30th of August, 1856, to the 14th of September, 1858, for commission on the sale of beer by defendant for plaintiff, and in fact he had no such account, for it had been paid to him before the 14th September, 1858, upon their weekly settlement of accounts for beer sold, monies collected by defendant, &c.; that the deponent's initials, "G. S.," at the foot of the accounts, are to show how far his accounts had been rendered, and not as a receipt of all the monies there specified, not deducting his commission: whereas the arbitrator treated the initials, "G. S.," as a receipt of all the monies therein mentioned by the plaintiffs; that the allowing of the commission to the defendant between the 30th of August, 1856, and the 14th of September, 1858, by the arbitrator, was a great injustice to the plaintiff, and was, in fact, a payment twice over to the defendant of a sum of $1,525; that the deponent had no idea the arbitrator would have considered the account prior to the 14th of September, 1858; that the defendant swore before the arbitrator that this commission had not been paid to him, while the deponent swore it had; that in December, 1860, when plaintiffs and defendant went over the accounts, he owed plaintiffs $800 on the beer account, and he did not pretend then that he had any account for commission or salary of any kind against the plaintiffs; that it was assumed, as of course, on both sides that it had all been paid, and defendant then admitted he owed the plaintiffs the $800 besides the ledger account; that in January or February, 1860, defendant went over the accounts again and admitted he owed $1,100, *i. e.*, $640 for ledger account, and $460 on beer account, and agree to give notes for the $1,600; but as he wanted four years without interest, the plaintiffs would not agree to the time, the plaintiffs offering to give one year, but the defendant would not give them at that date; that this claim for commission had never been a matter in difference, and when it was first put forward at the reference, plaintiffs' counsel objected to it as tending to open up matters that had all been settled, and which it would be difficult for the plaintiffs to prove, but the arbitrator decided to go into such matters; that the plaintiffs have discovered witnesses who can prove this claim for commission was paid to defendant; that proceedings were taken to indict defendant for his perjury before the arbitrator, but it was discovered the arbitrator had no authority to administer an oath to him.

John Severn and Henry Severn made affidavits testifying in like manner to several of the same facts.

Mr. Read swore that the pleadings have never been amended to let in the claim of commission by the defendant.

The award was for $217.54 only, in favor of plaintiffs.

Mary Beck swore she was housekeeper of G. Severn from 1855 to 1857, and while she was there defendant frequently attended at plaintiffs' office and paid over his weekly collections, first deducting his commissions.

Mr. McMichael, who was defendant's counsel at the arbitration, swore that his plea of set-off was added to the issue books and was treated by both parties before the arbitration as having been added in fact; that the claim for the disputed commission was put forward by the defendant in June, 1863, before the arbitration, and the plaintiffs' counsel was aware of this, and stated how he proposed to meet it; that the plea of set-off had not originally been pleaded, because it had not been supposed to be necessary to do so; that the parties were examined by consent; that the two new witnesses spoken of by plaintiff were examined at the Police Court, and testified to facts not material to the questions at issue, and that the reference lasted six or eight months.

The defendant made no affidavit. It was stated by his counsel that he would be placing himself in the power of the plaintiffs, and of John Severn to prosecute him for perjury, while he would not have the means of defending himself.

McMichael, for defendant showed cause.

Plaintiff cannot complain of defendant's claim being stale, going back to 1856, when part of their own claims, the ledger account, goes back to the year 1856. The parties were examined

by consent, and both parties and witnesses were sworn without objection on either side, and the plaintiffs began it because their witnesses were first sworn. John Severn, a witness for plaintiffs, was present at the arbitration, when defendant was examined, and he himself questioned witness, while his affidavit would lead one to think he was not present, nor even in the country at that time; that the arbitrator was right in treating the initials "G. S." as receipts, because it was was proved that from time to time the defendant paid plaintiff money and took receipts for them, and when the settlements were made the defendant produced these receipts. They were then checked off against these lists on accounts which were made up, and on the accounts being found correct the plaintiff, George Severn, put his initials to them, and the receipts were then given up to the plaintiffs and destroyed. It was at any rate a question for the arbitrator. The new witnesses spoken of could have been produced before. Their evidence too is not material, but at any rate it is very unusual to let such evidence in, and it should not be, at all events, after such a protracted examination as this was. He referred to *Eardley* v. *Otley*, 2 Chit. Rep. 42; Russel on Awards, 655.

Read, Q.C., in support of the rule.

Various attempts at settlements were made between the plaintiffs and defendant of the accounts between the 14th of September, 1858, and the 27th of April, 1861, when all before that time was assumed to have been settled, and the defendant advanced no claim for any previous account, which showed he had none in fact; that he could not be supposed to have lived to the present time without his wages, for six or seven years after they had been earned, and without claiming them until he was before the arbitrator; that the initials "G. S." did not warrant the inference that "G. S." had received all the money mentioned in these accounts, but only that the accounts had been settled; that the plea of set-off, letting in this newly set-off claim, should not have been allowed. The reference of the cause was as it stood, and although amendments were properly to have been made; yet such a change as this should not have been allowed when it was to alter the whole character of the accounts. That parties and witnesses should not have been sworn; that the award should be referred back for discovery of new evidence. He referred to *In re Huntley*, 1 El. & B. 787; *Hutchinson* v. *Shepperton*, 13 Q. B. 957; *Hall* v. *Hinds*, 2 M. & G. 847.

The following cases were also referred to by counsel during the course of the argument: *Fuller* v. *Fenwick*, 3 C. B. 705; *Phillips* v. *Evans*, 12 M. & W. 309; *Larchin* v. *Ellis*, 11 W. R. 281; *Solomon* v. *Solomon*, 28 L. J. Ex. 129.

Adam Wilson, J.—I do not think I can entertain the application on the alleged discovery of new evidence, because this enquiry lasted before the arbitrator from the 16th of May, 1863, when the order of reference was made, until the 7th of March, 1864, when the award was made; and the plaintiffs knew from the month of June, 1863, that this claim for commission was to be put forward by the defendant, and had to be repelled by them, and had therefore abundant time afforded them to meet any such claim, or if they had not should have applied to the arbitrator to grant such time, which they did not do. The truth is they thought their case so strong a one that it would be impossible for the arbitrator to find on this part of it for the defendant. The case of *Eardley* v. *Otley* shows I ought not to interfere on this ground.

As to the power of the arbitrator to amend the pleadings by adding the plea of set-off, there can be no question of it; but as to the exercise of it, there may be much to be said against it. Still when the arbitrator determined to grant the leave to amend, the plaintiffs might then have applied for leave to the court or a judge to rescind the reference, which is a course usually adopted in practice (Chitty Pr., 11 Edn., 1635; *Hart* v. *Duke*, 9 Jur. N. S. 119). I incline to think the amendment should not have been made, but the difficulty is in interfering with it nearly a year after it has been allowed, and after both parties have been acting upon it as if rightly made. The reason why it would have been better not to have let in this plea is, that the effect of it was to let in an old claim which had apparently never been thought of until the case was brought before the arbitrator.

This brings me to the only other part of the case which I feel at liberty to notice, or to which I can attach any importance. Has the arbitrator justly determined this disputed claim in favor of the defendant? and if it be doubtful whether he has or has not, or even if it be pretty clear that he has not, can I properly interfere with his discretion, after a long and attentive consideration to the facts which were laid before him? And more particularly can I do this, or ought I to do it, when the arbitrator is a legal gentleman of standing and ability in his profession, and against whom neither party has made or can make the slightest or remotest imputation? I think I might not have formed the opinion that the defendant's claim to the commission for the period between the 30th of August, 1856, and the 14th of Sept., 1858, was correct. All before that time had been settled for. All since that time had been paid for by the defendant retaining his commission out of his collections. And it seems extraordinary that for two years before this last period, that is between 1856 and 1858, he should not have done the same thing, or that he should not have been paid anything at all. The initials "G. S." are conclusive evidence that the accounts to which they are attached have been audited, and so far as they go have been approved of by the plaintiffs; but they are not conclusive evidence that the plaintiffs *received* all the monies therein mentioned from the defendant. They admit the correctness of the defendant having *accounted* with the plaintiffs for all their monies. But this accounting would in the ordinary course of things include and import a deduction by the defendant from the monies in his own hands of his own certain stipulated commission and remuneration. The signature is perfectly consistent with this view, it is more consistent with it, I should have thought, than with the contrary view, and it is reconcileable with the actual dealings of the parties both before and since this period, and with the facts of the case, and with the condition and station in life of the de-

fendant, and with the common sense proceeding of persons in such cases.

Why should this defendant, with the monies in *his own* hand, and *entitled* to deduct his own commission, not do so? Why is it he never made any claim for it *at any time* on the several attempted settlements that were made between the parties? Why did he admit balances against himself for the later period, without requiring this claim for the earlier period, if it really existed, to be deducted from them? How did he live during these two years without his pay? for he was not compelled to do without it, he had the monies with which to pay himself. How has he contrived to do without it for about six years? for he need not have done so, he might have deducted it from his later collections. All these are questions which I cannot understand, and which are not explained, if they can be explained, which I very much doubt. It is not either that this defendant just at one single time or occasion paid over two years' collections, which he might have happened to do without retaining his own proportion, knowing that the moment he laid it down it would be restored to him again; but he paid his monies over nearly every week—and it seems scarcely credible that in every week for these two years he should always have paid over the whole of his collections, and never once have deducted the amount of his own commission, not even one shilling of it.

But the difficulty is to afford relief when the matter has been carefully and deliberately considered, and a conclusion arrived at, not by mistake, or error, or misapprehension, but by intention, and upon a clear view of all the facts, and as the result of sound judgment exercised upon the facts by an impartial and able referee.

In *Phillips* v. *Evans* the court would not even set aside the award where the arbitrator had by mistake entirely omitted a sum admitted by the defendant to be due to the plaintiff of £119 7s. 4d., by which the balance was turned in favor of the defendant instead of against him.

The same doctrine is repeated in *Haggeer* v. *Baker*, 14 M. & W. 9, and it is added, "if no corruption be shewn, the court ought not to interfere."

In *Fuller* v. *Fenwick*, it is said the court generally speaking holds awards "to be final unless some substantial objection appears upon the face of them.

There was no surprise, nor ought there to have been any to the plaintiffs, and even if I could say I differed from the arbitrator in the amendment he made, and in the conclusion he came to under it, I think it is quite clear that the plaintiffs proceeded with the cause in its amended form, believing they would succeed notwithstanding all the evidence which the defendant might give or had given. George Severn says in his affidavit, after saying he had protested against the disputed claim being entertained, "I was taken by surprise, and astonished that the defendant swore to the contrary," that is, that he had not been paid commission, "still having shown the said arbitrator, as I thought I had done satisfactorily, that the defendant's statement in reference thereto was wholly untrue, evidenced, as I conceive, by shewing, &c." He then states five different reasons which he says he thinks entitled him to prevail against the oath and case of the defendant, and he concludes as follows, after stating his reasons at length: "I rested my case in confidence that the arbitrator would not allow the said commission to said plaintiff (no doubt he means defendant) as not having been paid him."

I must on the practice and rule in such cases refuse the relief which is asked, although I may say I regret this course, as the defendant does not now (and perhaps wisely) make any affidavit asserting the truth and correctness of his claim. In making these observations it must be remembered how much less competent I must be to decide upon the application for amendment, and upon the weight and character of the testimony submitted at the reference than the gentleman who had all the parties personally before him, and also the whole of the books and vouchers, and who saw all that passed, and heard all that was said, and had therefore these higher means of judging of the facts and circumstances than I can have. But upon the materials before me, I may say without the slightest reflection upon him or upon the correctness of his judgment (the same as I should equally have said against one of my brother judges) that I do not altogether agree with him in the amendment he has allowed, or in the result at which he has arrived.

The rule must therefore be discharged, but without costs.

Rule discharged, without costs.

COMMON LAW CHAMBERS.

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

Fisher v. Green.

Statute 23 *Vic. cap.* 42, *sec.* 4—*Sufficiency of notice of trial—Waiver—Application to stay proceedings.*

Held, 1st, That a defendant complaining of an insufficient service of notice of trial, in a cause pending in the Superior Court, but sent to a County Court for trial, under 23 Vic. cap. 42, sec. 4, may, without waiving the irregularity, apply, within four days after the trial, to the county judge or a stay of proceedings till the fifth day of the following term of the Superior Court of Law.

Held, 2nd, That he may, within the like period, make a similar application to a judge of one of the superior courts of law sitting in Chambers.

Quære: If he delay for seven days after the verdict, without making an application of any kind, has he not thereby waived the irregularity?

Proceedings on the execution were stayed till the fifth day of term, to enable the defendant to take the opinion of the full court on the latter point.

Remarks as to improper expressions in affidavits, and the same censured.

[Chambers, May 15, 1865.]

T. H. Spencer obtained a summons calling on the plaintiff, his attorney or agent, to show cause why all proceedings in this cause, on the verdict obtained herein and otherwise, should not be stayed, and why the signing judgment on such verdict, and, if signed, why all proceedings on such judgment should not be stayed until the fifth day of term, in order to give the defendant an opportunity to move to set aside the said verdict, on the ground of irregularity in this, that no notice or no sufficient or proper notice of trial was served in this cause, and no one attended said trial on behalf of the defendant, and on the ground of

merits, and on grounds disclosed in affidavits and papers filed.

The attorney for defendant made oath: that this action was commenced in the Superior Court; that by an order, dated the 2nd day of June, 1865, of the Hon. Mr. Justice John Wilson, the issues joined in the cause were by him ordered to be tried before the judge of the County Court of the united counties of Huron and Bruce, at the next sittings of said court, after granting such order, to be holden on the 13th day of June, 1865, for trials and assessments: that on Monday, the 5th day of June, being the last day for service of notice of trial for the County Court of the united counties of Huron and Bruce, deponent was in his office until half-past four of the clock in the afternoon, and no notice of trial was served on him in this cause: that about five o'clock of same evening, deponent proceeded to Bayfield on important business, and did not return until one o'clock on the following morning: that when he went to his office on the morning of Tuesday, the 6th day of June, the day following, he found that notice of trial in this cause had been put under the door of his office: that the order of the Hon. Mr. Justice Wilson, directing the cause to be tried in the County Court of the united counties of Huron and Bruce, did not arrive in Goderich till the evening of the 5th, about six o'clock; and that the notice of trial was put under his office door, as he believed, about ten o'clock of the evening of Monday, the 5th day of June, and long after office hours: that deponent, on the 8th day of June, served the plaintiff's attorney in this cause with a notice, that if he would proceed to judgment in this cause, application would be made to set aside any judgment he might obtain: that plaintiff's attorney entered his record on the 13th day of June, at the sittings of the County Court of the united counties of Huron and Bruce, and obtained a verdict for plaintiff for six hundred and four dollars and seventy-seven cents: that no one attended at said trial on behalf of the defendant; and that the judge of the County Court of the united counties of Huron and Bruce did not endorse a stay of proceedings on the record in this cause, in pursuance of 23 Vic. cap. 42, sec. 4: that judgment had not, as deponent believed, been signed in this cause: that the verdict was for a much larger sum than the plaintiff was entitled to recover against the defendant; and that the defendant had a good defence to part of the said action on the merits.

On the part of the defendant there was also filed an affidavit of a clerk in the office of defendant's attorney, corroborating the foregoing in some particulars.

On the part of the plaintiff, several affidavits were filed, showing that on the evening of the 5th June, diligent search had been made in Goderich for the defendant's attorney, both at his dwelling-house and his office, but without success; that his dwelling-house as well as his office, on the evening of that day, was closed; that notice of trial was placed under the door of his office before 7 o'clock that evening; that there was reason to believe he had been keeping out of the way to avoid service; that there was no defence to the action; that the application was made for mere purposes of delay; and that if successful, plaintiff would lose his debt, by reason of other executions coming into the sheriff's hands.

Robt A. Harrison showed cause. He contended that, under statute 23 Vic. cap. 42, sec. 4, the order for trial of the issues at a particular sittings of the County Court having been served, no further or better notice of trial was necessary; that if necessary, the service, under the circumstances, though not personal, was sufficient; that, if not sufficient, defendant, not having applied to the county judge, under the statute, to stay the proceedings, had waived the irregularity; that by delay he had at all events waived the irregularity, and that the application, if tenable at all, should be made to the county judge. He also argued that the affidavit of merits was not sufficient, and that if sufficient was fully answered by the affidavits which he filed. He cited *Smith* v. *Roblin*, 10 U.C.L.J. 43; *Allen* v. *Boice*, *Ib.* 70; *Anderson* v. *Culver*, *Ib.* 159; *Skelsey* v. *Manning*, 8 U. C. L. J. 166; *Ham* v. *Egan*, 3 U. C. Pr. Rep. 16; *Lander* v. *Gordon*, 7 M. & W. 218; *Bromley* v. *Gerish*, 6 M. & G. 750.

T. H. Spencer, in support of the summons, argued that notice of trial was necessary; that personal service was, under all circumstances, necessary to constitute good service; that there had been no waiver of the irregularity; that had application been made to the county judge to stay proceedings, there would have been a waiver; that the county judge was not the proper person to dispose of the present application; and that it was properly made to a judge of the Superior Court sitting in Chambers. He cited *Carruthers* v. *Rykert*, 7 U. C. L. J. 184: *Consumers' Gas Co.* v. *Kissock*, 5 U. C. Q. B. 542; *Bloor* v. *Bacon*, 5 O. S. 343; *Grand River Navigation Company* v. *Wilkes*, 8 U. C. Q. B. 249; *Brown* v. *Wildbore*, 1 Scott, N. R. 159; *Collins* v *Thompson*, 5 Jur. O. S. 270; 1 Chit. Archd. 11 edn. 317.

John Wilson, J.—For the purpose of staying the entry of the judgment in a case from the Superior Courts, which has been ordered to be tried, and has been tried, in a County Court, the statute gives four days to make the application to the County Court judge, who seems for that time and purpose to have the control of the record.

It could scarcely have been considered a waiver of this defendant's rights to object to the insufficiency of the notice of trial, to have applied to the County Court judge, and asked him to stay the entry of the judgment for that cause.

Besides, the defendant might, I think, within that time, have applied to a judge in Chambers, as he has now done.

I think the Legislature intended that the defendant should have only the four days next after the trial to make such an application, and that he is now too late to ask to stay the entry of the judgment, for he did not make this application till the seventh day after the trial.

In analogy to the practice in England, I think the defendant may, after the entry of the judgment, and until the expiration of the first four days of the term following the trial, apply to stay proceedings on the execution, to enable him to move in term against the verdict.

It does not appear here whether judgment has been signed or not, but no order will be made to prevent the entering of his judgment by the plaintiff, but the order will be to stay the proceedings on the execution in the sheriff's hands after the seizure.

Whether the neglect of the defendant to move within the four days next after the trial to stay the entry of the judgment, is a waiver of the alleged irregularity of which he now complains, will be a question for the court to determine. In the meantime the order will be made to stay proceedings on the execution after seizure by the sheriff.

It is not to be understood but that the plaintiff is to proceed on his own responsibility in regard to entering the judgment and issuing the execution thereon.

The order is intended that his execution shall stand in its place, if the court sustains his judgment.

I regret to find, in several instances lately, that superlative words are used in stating facts in affidavits, and I find them here. There can be no stronger expression of the very truth, than that it is stated on oath. If less certainty is intended, the statement should be qualified. The terms to which I object are, "I *most positively* swear," &c. I can only show my disapproval of such language, by refusing to allow costs to be taxed for affidavits drawn in this style, when costs are in my discretion. In one of the affidavits before me, I observe the expression, that the statement made by another person in another affidavit was "false." I suppose the affidavit was drawn by a young man of little experience, for the one had detailed a transaction in one light, and the other had stated the same transaction in another light; but the term "false," as applied by one to the other, could in no way verify the statement of him who used the offensive expression.

Order accordingly.*

In the matter of Robert McCall.

Temperance Act 1864, 27 & 28 Vic. cap. 18—Penalty for infraction—To whom to be paid—Form of adjudication and warrant of commitment.

If the Collector of Inland Revenue prosecutes under the Temperance Act of 1864 (27 & 28 Vic. cap. 18), two-thirds of the penalty belong to and may be retained by the collector, but he must pay one-third to the person on whose information he instituted the prosecution, and the remaining one-third must be paid by the collector to the Receiver General.

If a municipal corporation, or some person authorized by them, prosecutes, the whole penalty belongs to the corporation, and the council of the municipality may pay over not more than half to any other person upon whose information the prosecution was instituted.

If a person not so authorized prosecutes, the penalty belongs to the corporation of the municipality whose by-law is thereby enforced, and the council may pay over to any other person upon whose information the prosecution was instituted, not more than half the penalty.

In the two last cases, where the corporation is not the prosecutor, the statute does not give them costs, but only the penalty.

The conviction must adjudge that the penalty enforced shall be paid to the party entitled according to one of the foregoing provisions to receive it.

Where, instead thereof, it was, according to the conviction as stated in the warrant of commitment, adjudged that the penalty be paid to one J., who was not shewn to be the collector of inland revenue, in which character alone he would be entitled to it, the warrant of commitment was held bad and the prisoner discharged from custody.

[Chambers, July 6, 1865.]

This was an application under writ of *habeas corpus* for the discharge of Robert McCall, a prisoner in the custody of the gaoler at Cobourg, from alleged illegal custody.

The warrant under which he was detained in custody was in the following words:

Province of Canada, County of Durham, one of the United Counties of Northumberland and Durham. } To all or any of the bailiffs, constables, and other officers of

the peace in the United Counties of Northumberland and Durham, in the province of Canada, and to the keeper of the gaol of the same United Counties.

Whereas Robert McCall, of the township of Cavan, in the county of Durham, one of the United Counties aforesaid, carpenter, hath been convicted before us of having at Cavan, on or about the 6th day of March, 1865, sold intoxicating liquor contrary to the provisions of the 12th section of "the Temperance Act of 1864," and for such offence adjudged to pay George Jamieson, of the said township of Cavan, the sum of twenty dollars, and also the further sum of six dollars and eighty cents for costs in that behalf.

And whereas the said Robert McCall was called upon by us to declare whether or not he possessed sufficient goods and chattels to satisfy the same, but answered in the negative.

These are therefore to command you, the said bailiffs, constables, or officers of the peace, or any one of you, to take the said Robert McCall and him safely to convey to the gaol of the said United Counties, and there deliver him to the said keeper thereof, together with this warrant; and we do hereby command you, the said keeper of the said gaol, to receive the said Robert McCall into your custody in the said gaol, and to imprison him for the space of six weeks from the day of his arrival, as a prisoner thereat, unless the said last mentioned sum of twenty dollars, and all the costs of the commitment and carrying to the said gaol of the said Robert McCall, amounting to the sum of six dollars and sixty cents, are sooner paid to you the said keeper, and for so doing this shall be your sufficient warrant.

Given under our hands and seals the seventh day of June, in the year of our Lord one thousand eight hundred and sixty-five, in the township of Cavan aforesaid.

John Walsh, J.P.
Edward Sanderson, J.P.

It was objected, among other things, on the part of the prisoner—

1. That by the 15th section of the Temperance Act of 1864 (27 & 28 Vic. ch. 18), the prosecution must be commenced within three months after the alleged offence; that the conviction stated that the offence was committed on or about the sixth day of March, 1865, and therefore it was uncertain whether the prosecution was commenced within proper time, the warrant of commitment bearing date on the 7th June.

2. That in the 12th section of the Act which creates and defines the offence, there are certain

* The suit was afterwards settled between the parties, so that no motion was made in term.—Eds. L. J.

exceptions to the general prohibition against selling liquor, and that it should have appeared on the conviction and warrant, that the sale which the prisoner was convicted of having made did not come within these exceptions.

3. That the penalty was adjudged to be paid by the prisoner to one George Jamieson, who for all that is shown is a stranger to the whole proceeding.

T. H. Spencer for the prisoner.

C. S. Patterson contra.

Draper, C. J.—It is apparent on perusing this act that it was passed under the influence of a strong desire not merely to amend the laws respecting the sale of intoxicating liquors, and issuing licenses to sell, but to repress the sale altogether.

It is for this purpose that it has authorized the municipal councils to pass prohibitory by-laws in a very succinct form; and in case the councils do not exercise the authority, a similar power is conferred on the electors of the municipality; and it seems, from the 9th section of the Act, that no such by-law can be repealed within a year from the day of its coming into force, though if an attempt to pass such a by-law be made and fail, there is no provision to hinder its being renewed immediately.

The passing or adoption of such by-law brings the statute into operation within the municipality, and the violation of the prohibition to sell is not an offence as against the by-law, but as against the statute thus introduced.

By sec. 16 it is made unnecessary to set forth or mention the by-law on the face of the complaint, summons, conviction, or warrant, and unless the accused specially denies that the by-law is in force, that fact is to be presumed, and a certificate given by a named officer of the municipality is, if such proof becomes necessary, to be conclusive proof of the passing and of the tenor thereof.

If the defendant, being summoned, does not appear, the justice may proceed *ex parte*, the complaint may be amended in form or substance on behalf of the prosecutor, and without costs; and if it be so defective that a legal conviction cannot be based upon it, and it is not amended, it may be dismissed with or without costs.

No prosecution is to be dismissed for any defect, informality, error or omission, but the proceedings may be adjourned if the defendant may have been materially misled.

Though the prosecution be dismissed, the defendant is not to have costs if the justice thinks there was reasonable ground for the complaint.

The depositions of witnesses are, in the discretion of the justice, to be reduced to writing by him or his clerk, and the clerk is to be paid certain fixed remuneration by such party as the conviction may direct; and if no judgment is given within two months after the taking of the evidence the fees of the clerk are to be paid in equal shares by each party, so that, apparently, if all the witnesses are called for the prosecution, and the justice gives no decision, the defendant must pay half the expense of taking down the evidence.

It is not necessary to prove that the offence was committed on the day laid in the complaint. It is enough to prove "that the same was committed on or about such day, and before the date of the complaint."

A previous section enacts that two or more offences by the same party may be included in one complaint, provided the time and place of each offence is stated; but whatever be the number of offences included in one complaint, the penalty to be imposed for them all shall not exceed $100.

There are some provisions which very materially facilitate the proof of sale, and in certain cases a justice is authorized to summon any person who is represented to him as a material witness, and, on his non-obedience to the summons, to issue a warrant on which he may be brought before the justice, and if he refuses to answer any question touching the case, he may be committed.

A witness is bound to answer all questions which the justice deems relevant, though his answers may disclose facts tending to subject himself to a penalty or other criminal proceeding, but his answers are not to be used against himself.

The present warrant of commitment is based upon a new authority conferred on the convicting justice.

No conviction, judgment, or order, can be removed by *certiorari*, nor can there be an appeal to the Quarter Sessions, except when the conviction has taken place before ordinary justices of the peace.

These provisions in relation to prosecutions, where the statute is brought into operation by a by-law, sufficiently demonstrate that the Legislature intended to facilitate the conviction and ensure the punishment of offenders against the Temperance Act, as a means of repressing abuses resulting from the sale of intoxicating liquors; and that with this object they have deprived parties accused of violating the Act of some protection to which by the common or statute law they would have been entitled, as well as weakened that presumption of innocence which exists in favour of every person before conviction.

The 39th section, though inapplicable to the present case, still further illustrates the spirit and intention of the statute and leads one to the conclusion above expressed.

As a consequence, I feel that it is only on a clear ground, untouched by the statute, that I can discharge this prisoner, though, but for the provisions above noticed, there might be found more than one sustainable objection to his being detained in custody on this warrant.

I think however the third objection fatal, because in my opinion the adjudication that the prisoner should pay the penalty to George Jamieson is a substantial part of the judgment, and is not only not sustained by the language of the Act, but, so far as is disclosed by what is brought before me, is in direct opposition to it.

The 34th section directs the application of penalties in Upper Canada.

1. If the collector of inland revenue prosecutes, two-thirds of the penalty shall belong to and be retained by the collector, but he must pay one-third to the person on whose information he instituted the prosecution, and the remaining one-third shall by the collector be paid over to the Receiver General.

2. If a municipal corporation, or some person authorized by them, prosecute, the whole penalty shall belong to such corporation, and the council of the municipality may pay over not more than one-half either to that prosecutor or to any other person upon whose information the prosecution was instituted.

3. If a person not so authorised prosecutes, the penalty shall belong to the corporation of the municipality whose by-law is thereby enforced, and the council may pay over to any other person upon whose information the prosecution was instituted not more than half the penalty.

It will be observed in the two last cases, where the corporation is not the prosecutor, the statute does not give them the costs, but only the penalty.

Now it appears to me that the conviction must adjudge that the penalty imposed shall be paid to the party entitled according to one of the foregoing provisions to receive it. If the adjudication is under the first, it should be to pay to A. B., being the collector of inland revenue, for, as to two-thirds, the statute declares they belong to such collector; and it requires him to pay over the remaining third, which makes it clear that he should receive it. For substantially similar reasons the payment, according to the second or third provisions, should be adjudged to the proper municipal corporation, for in both the penalty is declared to belong to them.

Instead thereof, it is here adjudged that the penalty be paid to Jamieson, who is not shown to be the collector of inland revenue, in which character alone he would be entitled to it, and it is not pretended that he held that office, while for the prisoner an affidavit was tendered to prove that he does not. In fact, it was rather urged against the prisoner's discharge, that the case fell within the third provision, and that when he received the penalty he would hold it as a trustee for the corporation. But the question is not whether he could keep the money if it were paid to him, but whether an adjudication that it should be paid by the prisoner to him is in accordance with the statute.

I am of opinion that, as an adjudication in favour of Jamieson as a mere private individual, the conviction is wrong, and that if he were (which I take it he is not) collector of inland revenue it should in some way appear on the face of the conviction, so that the adjudication would be plainly in accordance with the statute, and that, owing to this defect, there is no legal adjudication, and therefore the warrant is on the face of it unsupported by the statute.

I therefore order that the prisoner be discharged.

Order accordingly.

Bank of Montreal v. Campbell et al.

Ca. Sa.—Application to set aside order for, or for discharge from custody—Con. Stat. U. C, cap. 22, s. 31, inapplicable.

Held, 1. That s. 31 of C. L. P. A. extends only to writs of *capias* in the nature of mesne process, and has no application whatever to writs of *ca. sa.*, or final process.

Held, 2. That a judge in Chambers has no jurisdiction at common law to discharge a defendant from custody on the ground that he had no intention to quit Canada when the *ca. sa.* was issued.

[Chambers, July 15, 1865.]

J. Sydney Smith obtained a summons upon reading a copy of the order made herein on the first day of May, A.D. 1865, a copy of the affidavit of Benjamin Franklin Fitch, filed on application for said order, and the affidavits of Josiah Campbell, Andrew Ross, Henry Burkett Beard, George Haight and Joseph Henry Nellis, and all other the affidavits and papers filed on this application, calling on the plaintiffs, their attorney or agent, to show cause why the said order made herein on the said first day of May, A.D. 1865, the writ of *capias ad satisfaciendum* issued thereon, the arrest of the said defendant Josiah Campbell on the said writ, and all proceedings had thereunder or connected in any way therewith, should not be set aside with costs, and the bail bond given by said defendant should not be ordered to be delivered up to be cancelled, and the said defendant discharged from all proceedings under said writ, order arrest or bail, on the ground that there was not previous to, at, or since the issuing of said order and proceedings thereunder, any facts or circumstances sufficient to satisfy a judge that there was or is good or probable cause for believing that the said defendant Josiah Campbell, unless forthwith apprehended, was or is about to quit Canada, with intent to defraud his creditors generally, and the said plaintiffs in particular; or that he had or has parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent it being taken in execution; and that the said defendant Josiah Campbell has not made any such conveyance or transfer of his property as aforesaid, or any part thereof with such intent; and that the said defendant Josiah Campbell had not been held to special bail upon a writ of *capias* issued upon a judge's order previously to the granting of said first mentioned order, or issuing of said writ of *capias ad satisfaciendum*; and on other grounds disclosed in affidavits and papers filed.

Robert A. Harrison showed cause, and contended that a judge in Chambers had no jurisdiction to set aside an order for a writ of *ca. sa.*, or a *ca. sa.* upon affidavits contradicting those on which the order had been obtained; that there is no authority for discharging a debtor in execution or on bail under such circumstances; that his only remedy is by action for malicious arrest; that Con. Stat. U. C., cap. 22, s. 31, as to discharge of debtors in custody is restricted to writs of *capias*, and has no application whatever to writs of *ca. sa.* He referred to *Palmer* v. *Rodgers*, 6 U. C. L. J. 188; *McInnes* v. *Macklin*, Ib. 14; *Terry* v. *Comstock*, Ib. 235. He filed several affidavits in answer to those on which the summons was granted.

J. Sydney Smith, in support of the summons, contended that s. 31 of Con. Stat. U. C. cap. 22, is not restricted to writs of mesne process, but extends to all writs of *capias* including writs of *ca. sa.*, and that whether or not, where an order is made on false affidavits, there is jurisdiction at common law to set aside the order and process issued thereon, as being an abuse of the process of the court.

John Wilson, J.—I read s. 31 of the C. L. P. A. as extending only to writs of *capias* in the nature of mesne process and not as applicable to writs of *ca. sa.* or final process. The writ of

capias under the Common Law Procedure Act is the old writ of *ca. re.*, and nothing more. And this it seems to me is the only writ intended by the sections from 23 to 31, both inclusive, of the Common Law Procedure Act. Being of this opinion I cannot make this summons absolute under the statute, and I know of no authority for my interfering at common law. The summons must therefore be discharged, but without costs.

Summons discharged, without costs.*

ELECTION CASE.

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

The Queen ex rel McManus v. Ferguson.

Election of warden—Proper description of warden—Sufficiency of certificates of reeves and deputy reeves—Duty of clerks—Nature and effect of certificates—New election—Costs.

Held 1. That the proper designation of a warden in a *quo warranto* summons, is "warden of the corporation of the county of ——."

Held 2. That "warden of the county of ——" is not improper, as there is no particular name or designation in the Municipal Institutions Act.

Held 3. That "warden of the County Council of the County of Simcoe" might, if deemed necessary, be amended by striking out the words "of the County Council" after the word "warden," and before the words "of the County of Simcoe" in the writs to be issued in pursuance of the judgment in a *quo warranto* matter.

Held 4. That after appearance by defendant in a *quo warranto* matter, the 18th Rule of court applicable to such proceedings, is against holding any proceeding irregular or void, which does not interfere with the just trial of the matter on the merits.

Held 5. That a reeve of a township who was duly elected and had made and subscribed the declarations of office and qualification, had not a right under sec. 67 of the Municipal Institutions Act to take his seat in the County Council, when the certificate of the township clerk did not state that he "had made and subscribed the declarations of office and qualification" but only that he had "taken or made the declaration of office."

Held 6. That where reeves and deputy reeves who had filed defective certificates were notwithstanding allowed by the clerk to take their seats in the County Council, their votes therein could not be challenged for such defective certificates, sec. 67 of the Municipal Institutions Act being only directory and not imperative.

Held 7. That the certificate is only evidence that what is contained in it was done—if it have not been done, or the reeve or deputy reeve have not been duly elected, the mere certificate would not give the party holding it, a right to sit and vote in the council.

Held 8. That where a vote is improperly rejected in a County Council on the election of warden, and it does not appear that the reeve or deputy reeve whose vote was rejected tendered it for the complaining candidate, though his vote if recorded might and probably would have influenced the result of the election, the proper course is to order a new election instead of seating the complaining candidate.

Held 9. That where the clerk properly refused to allow a reeve to take his seat, but allowed several reeves and deputy reeves whose certificates were equally if not more defective, to take their seats and vote, the proper course was to order a new election.

Held 10. That no costs should be given against the sitting member, although he accepted office and was sworn in and his seat was afterwards vacated on the grouud of the improper decision of the County Clerk, unless shown that he in some manner directly interfered with the decision of the clerk or otherwise misconducted himself.

[Chambers, April 10th, 1865.]

This was a proceeding in the nature of a *quo warranto* to unseat Thomas R. Ferguson, warden of the corporation of the county of Simcoe for the year 1865, based on the statement and relation of George McManus, of the township of Mono, in the county of Simcoe and province of Canada, Esquire, reeve of the said township of Mono, who complained that Thomas R. Ferguson had not been duly elected, and had unjustly usurped the office of warden of the County Council of the county of Simcoe, and province of Canada, under pretence of an election held on Tuesday the 24th day of January, A.D. 1865, at the town of Barrie, in the said county of Simcoe, and had accepted and acted in the said office of warden; and that George McManus, the relator, was duly elected thereto, and ought to have been returned at such election, and declaring that the said relator had an interest in the said election as a candidate for the said office of warden, and also as a municipal voter at the said election. The relator stated and showed the following causes why the election of the said Thomas R. Ferguson to the said office should be declared invalid and void, and the said George McManus be declared duly elected thereto:—

First. That the said election was not conducted according to law, in this, that Duncan Mathewson, the reeve of the township of Sunnidale, in the said county of Simcoe, was not allowed by the clerk of the County Council of the said county of Simcoe to vote at the election of warden of the said County Council: but on the said Duncan Mathewson offering to take his seat at the said election for the purpose of giving his vote at the said election, Robert T. Banting, the clerk of the said County Council, who was then presiding as such clerk at the said election, told him to withdraw from the Council, alleging that he the said Duncan Mathewson had no right to remain in the Council, in consequence of certain informalities in his certificate of election. The said Duncan Mathewson then withdrew from the Council and was prevented from voting at the said election of warden, which took place immediately after his withdrawal; and if the said Duncan Mathewson had been allowed to vote at the said election, he would have voted for the relator, who was a candidate for the office of warden at the said election, which election was at first a tie between the said Thos. R. Ferguson and the relator, and was only carried against the relator by the casting vote of the said Thos. R. Ferguson, who for the second time at said election voted for himself as the reeve of the municipality having the largest number of names on its last revised assessment roll.

Second. That the said election was not conducted according to law in this also, that John Craig, John Hogg, William D. Ardagh, Thomas R. Ferguson, William C. Little, and J. Rowatt were allowed by the said clerk to take their seats in the County Council of the said county of Simcoe at the said election as the reeve of the township of Medonte in the said county, the reeve of the town of Collingwood in the said county, the reeve of the town of Barrie in the said county, the reeve of the township of Innisfil in the said county, the deputy reeve of the said township of Innisfil, and the reeve of the town-

* Application was subsequently made to the full Court of Queen's Bench to set aside the order of John Wilson, J., in this case discharging the summons, but the court having taken the matter into deliberation refused the rule. Defendant then brought an action against the attorney who made the affidavit on which the order for the *ca. sa.* was issued, for malicious arrest, and recovered $200 damages.—(Eds.L.J.)

ship of Flos, in the said county, respectively; and to vote at the said election when they had not, nor had either or any of them filed the necessary certificates from their respective township and town clerks certifying that they had respectively been duly elected reeves and deputy reeves of their townships and towns, and that they had made and subscribed the declarations of office and qualification as such reeves and deputy reeves respectively, as required by law, inasmuch as the said reeves and deputy reeves had all of them, without exception, filed certificates not in accordance with the requirements of the act respecting the municipal institutions of Upper Canada.

Third. That the said Thomas R. Ferguson was not duly or legally elected or returned in this, that by reason of his not having filed a proper certificate of his due election as reeve of the said Township of Innisfil, and of his having made and subscribed the declaration of office and qualification as such reeve, he was not entitled to a seat in the said County Council, and in consequence could not be legally elected warden thereof.

Fourth. That the said Thomas R. Ferguson was not duly or legally elected or returned in this also, that the aforesaid John Craig, John Hogg, William D. Ardagh, Thomas R. Ferguson, William C. Little, and James Rowatt, voted for the said Thomas R. Ferguson as such warden at such election when they were not nor was either of them entitled to vote thereat by reason of their not having filed proper certificates as aforesaid; and without the votes of the said John Craig, John Hogg, William D. Ardagh, Thomas R. Ferguson, William C. Little, and James Rowatt, or without the vote of either or votes of any of them, the said Thomas R. Ferguson would not have been declared elected warden of the said County Council, inasmuch as with the said votes there was a tie between the said Thomas R. Ferguson and the relator, as aforesaid.

Fifth. That before the said election and after the said council was called to order by the said clerk, the certificate of the aforesaid John Hogg was openly objected to, and the attention of the said clerk was called thereto, but he overruled the objection and allowed the said John Hogg to keep his seat and to vote in the said council at the said election as the reeve of the town of Collingwood.

Sixth. That just before the said election, it was suggested to the said clerk that some of the other certificates besides those of the said Duncan Matthewson and John Hogg might be defective; but he paid no attention thereto, although charged at the time with acting partially in the election, and in favour of the said Thomas R. Ferguson.

Seventh. That the said relator was duly elected to the office of warden aforesaid, and ought to have have been returned thereto in this, that he received the largest number of legal votes for the said office at the said election; whereas the said clerk declared the said Thomas R. Ferguson duly elected to the said office of warden which office he accepted and acted therein.

The certificates to which objection was made were in the following forms:—

"To T. R, Banting. Esq, County Clerk.

"Dear Sir,—I hereby certify that Duncan Matthewson, Esq., was duly elected as councillor for this township, and that he has made and subscribed the declaration of office and qualification of office as such, and that he has been also "*appointed* reeve" of said township, and has taken or made the declaration of office of reeve for the said township of Sunnidale.

"I have the honour to be, yours, &c.,

Alex. Hislop, { *Corporate Seal.* }
T. C."

The objection raised to this certificate was that it did not state that Mathewson was *elected* reeve.

"This certifies that at the first meeting of the Municipal Council of the corporation of the town of Barrie, held on the 16th January, inst., William D. Ardagh, Esq., was *unanimouly* elected reeve of said corporation for the current year, A.D. 1865.

(Signed) George Lane,
Council Room, Barrie, } *Town Clerk.* { *Corporate Seal.* }
Jan. 20th, 1865." }

The objection to this certificate was that it did not state that Mr. Ardagh was *duly* elected, or that he had taken the *declarations of office and qualification*, as required by C. S. U. C., ch. 54, sec. 67.

"I do hereby certify that on the sixteenth day of January, 1865, at the first meeting of the Municipal Council of the corporation of the township of Innisfil, held in the village of Victoria, in the said township, Thos. R. Ferguson, Esq, was *unanimously* elected reeve of the said township for the year 1865, and that he has made and subscribed the declaration of office and qualification.

(Signed) Benjamin Ross, . [*Seal.*]
Township Clerk.

Innisfil, Jan. 17, 1865."

The objection to this certificate was that it did not state Mr. Ferguson was *duly* elected, nor that the declaration of office and qualification were made and subscribed as "*such reeve.*"

"I do hereby certify that on the sixteenth day of January, 1865, at the first meeting of the Municipal Council of the corporation of the township of Innisfil, held at the village of Victoria, in the said township, William C. Little, Esq., was *unanimously* elected and chosen deputy reeve of the said townships for the current year 1865, and that he was made and subscribed the declaration of office and qualification.

(Signed) Benjamin Ross [*Seal*]
Township Clerk."

The objections to this certificate were the same as to that of the reeve of Innisfil.

"I, Joseph Hill Lawrence, clerk of the municipal council of the town of Collingwood, do hereby certify that John Hogg, Esquire, of the town of Collingwood, has been duly elected reeve of the corporation of the said town of Collingwood, and that he has made the declaration of qualification of office prescribed by law as such.

Witness my hand and seal, this twentieth day of January, 1865.

J. H. Lawrence, [*Seal*]
Clerk"

The objections to this certificate were, that it did not state for what year Mr. Hogg had been elected.

"This is to certify that James Rowatt, Esq., has been duly elected reeve of the township of Flos for the year 1865, and that he has made and subscribed the declarations required by law. Given under may hand at Flos, this 16th day of January, 1865.

(Signed) W. Harvey, *Township Clerk of Flos.* { *Corporate Seal.* }

The objections to this certificate were that it did not state Mr. Rowatt had made and subscribed the declarations of office and qualification; that "the declarations required by law" may have been the proper ones, but this depends upon the clerk's reading of the law, and wants explanation. They may not have been as "such reeve," but merely as a councillor.

[*Corporate Seal.*]

"I, Edward Moon, clerk of the municipality of the township of Medonte, hereby certify that John Craig, Esq., has been elected reeve of the municipality for the year 1865, and that he has made and signed the declarations of qualification and office.

(Signed) Edward Moon,
Medonte, Jan. 16, 1865. *Town. Clerk.*"

The objections to this certificate were that it did not state that Mr. Craig was duly elected, and that he made and *subscribed* the declarations of office and qualification as "such reeve," and that it had no seal.

The relator made oath that he was the reeve of the township of Mono, having been duly elected to such office at the last annual election held in the month of January last, and had made and subscribed the declarations of office and qualification as such reeve. That he was present at the Court House in the town of Barrie, in said county of Simcoe, on Tuesday the 24th day of January, A.D. 1865, at the election of warden of the County Council of the said county, and at such election he took his seat and voted as such reeve of the township of Mono. That at such election there were three candidates proposed for the office of warden, namely, Thomas R. Ferguson, John Hogg, and deponent. That the said John Hogg withdrew his name as a candidate for the office, leaving the election to be contested between the said Thomas R. Ferguson and deponent. That previously to the Council being called to order by the clerk of the said Council, the said clerk ordered Duncan Mathewson and Anson Warburton, the reeves of Bradford and Sunnidale respectively, to leave the Council, alleging that their certificates of election and qualification were informal. Whereupon the said Duncan Mathewson and Anson Warburton had to leave the said Council, and did leave the same, and were not allowed to and did not give their votes, nor did either of them give his vote at the said election. That both before and after the said election of warden the said Duncan Mathewson and Anson Warburton told deponent they intended voting for him as warden at the said election, and deponent verily believed that both of them would have voted for him at such election if allowed to take their seats. That on the vote being taken at the said election for the said Thos. R. Ferguson, the result was declared by the said clerk as follows: for the said Thos. R. Ferguson, the reeve of Barrie, the reeve of Medonte, the reeve of Tiny and Tay, the reeve of Flos, the deputy reeve of Nottawasaga, the reeve of Collingwood, the reeve and deputy reeve of Adjala, the reeve and deputy reeve of Essa, the reeve and the deputy reeve of Innisfil, and the deputy reeve of West Gwillimbury, in all thirteen. Against the said Thomas R Ferguson the reeve of Tecumseth, the reeve of Oro, the deputy reeve of Oro, the reeve of Vespra, the reeve of Tosorontio, the reeve of Mulmur, the reeve of West Gwillimbury, the reeve of Nottawasaga, the reeve of Tecumseth, the reeve of Mono, the reeve of Orillia and Matchedash, the reeve of Morrison and Muskoka, the deputy reeve of Mono, in all thirteen. The result being a tie; a vote was then taken for deponent, which also resulted in a tie, the various reeves and deputy reeves last before mentioned who voted against the said Thomas R. Ferguson voting for the deponent, and the various reeves and deputy reeves last before mentioned who voted for the said Thomas R. Ferguson voting against deponent. The clerk of the said Council then requested the said Thomas R. Ferguson, as the reeve of the municipality having the highest number of names on its last revised assessment roll, to give the casting vote, which he did in his own favour. Whereupon the said clerk declared the said Thos. R. Ferguson duly elected warden of the said council, after which deponent protested against such election, and requested the said clerk to enter his protest on the minutes of the Council. The Council then adjourned until the following morning, when the said Thomas R. Ferguson took the oath of office as warden of the said Council, and took his seat as such warden, and called the Council to order and presided over the Council as its warden during the remainder of the session. That during the discussion in the Council, before the said election, deponent distinctly heard Thomas Saunders, the deputy reeve of Tecumseth, call the said clerk's attention to the certificate filed by John Hogg, the reeve of Collingwood, as being informal, and not sufficient to entitle the said John Hogg to take his seat in the Council: But the clerk ruled the certificate sufficient and allowed said John Hogg to take his seat and vote as the reeve of the town of Collingwood. That previous to such election deponent also heard the said Thomas Saunders suggest to the said clerk that some of the other certificates filed by the various reeves and deputy reeves present might be informal, and that they ought to be all looked into. Which suggestion was taken no notice of by the said clerk, who declared all the certificates filed, except those of the said Duncan Mathewson and Anson Warburton, were sufficient and correct. That on the said clerk so ruling deponent charged him with acting partially in the election, and deponent heard Thomas Saunders, the deputy reeve of Tecumseth, also charge him with acting partially, yet the said clerk neglected to make any further examination of the aforesaid certificates.

Affidavits of Thomas Saunders, J. McManus, and Duncan Mathewson, corroboratory of the foregoing, were also filed.

The following abstract of the Minutes of the Council of the corporation of the Count of

Simcoe, as to the 1st days proceedings relative to the election of warden, was also filed:—

"The certificates of the reeves of Bradford and Sunnidale being presented, were considered informal by the clerk; the members present suggested that he do take legal advice, which advice being had, the clerk felt justified in not allowing said gentlemen their seats in the council, and consequently they were requested to leave their seats and retire."

"The clerk called the council to order and requested them to elect their warden. It was moved by Mr. Hogg, seconded by Mr. Clarke, that Thomas R. Ferguson, Esq., M.P.P, be and he is hereby elected the warden of the county for the current year.

"It was moved by Mr. Kean and seconded by Mr. Murphy, that George McManus, Esq, reeve of Mono, be warden of this council for the current year. It was moved by Mr. McMurchy, seconded by Mr. Rowatt, that John Hogg, Esq., reeve of Collingwood, be the warden of this council for the current year. The first motion was put in order by the clerk—Yeas—Messrs. McClain, Davis, Little, Dewson, McMurchy, Kelly, Langley, Ardagh, Ferguson, Clark, Craig, Rowatt and Hogg, 13—Nays—Messrs. Saunders, Steele, Scott, Sissons, Murphy, Aberdeen, Armson, Russell, J. McManus, G. McManus, Kean, Stewart and Elder, 13. The second motion was then put by the clerk for McManus—Yeas—Messrs. Saunders, Steele, Scott, Sissons, Murphy Aberdeen, Armson, Russell, G. McManus, J. McManus, Kean, Elder and Stewart, 13—Nays—Messrs. McClain, Davis, Little, Dewson, McMurchy, Kelly, Langley, Ardagh, Ferguson, Clark, Craig, Rowatt and Hogg, 13.

"The last motion nominating Mr. Hogg was then put by the clerk, and lost; Mr. Hogg requesting his name to be withdrawn, there being an equality of votes for both the other candidates. The clerk upon ascertaining from the Assessment Rolls in his possession, that the Township of Innisfil had the largest number of inhabitants, suggested to Mr. Ferguson the reeve of said township, to give the casting vote in accordance with the statute in such case made and provided; whereupon Mr. Ferguson voted for himself. The clerk then declared Thomas R. Ferguson, Esq., reeve of Innisfil, duly elected warden of the County of Simcoe, for the current year. Mr. George McManus requested the clerk to enter his protest against the election of Mr. Ferguson."

D. McCarthy, jun., shewed cause. He objected, that there is no such office known to the law as "warden of the County Council of Simcoe." Subject to this objection, he argued that Mathewson's vote was not improperly rejected; the clerk of the County Council is the proper and only judge of such a matter and has decided against it; it was not shown that Matthewson, had his vote been received, would have voted for relator; and in the absence of fraud, the acts of the clerk and of the council were binding at law. *The Queen ex rel Hyde* v. *Barnhart*, 7 U. C. L. J., 126. If an appeal lay from the decision of the clerk, the several certificates objected to were sufficient as against the objections taken. *Rex* v. *Swyer*, 10 B. & C. 486; *In re Hawk and Ballard*, 3 U. C. C. P. 241; *Reg. ex rel Helliwell* v. *Stevenson*, 1 U. C. Cham. R. 270; *Reg. ex rel McGregor* v. *Kerr*, 7 U. C. L. J. 67, 69. But if not so, similar objections existed against the certificates of Robert Murphy, the reeve of Toscorontio, John E. Steele, the reeve of Oro, Michael Scott, the deputy reeve of Oro, Thomas Saunders, the deputy reeve of Tecumseth, John McManus, the reeve of Tecumseth, Roderick Stewart, the reeve of Morrison and Muskoka, James Aberdeen, the reeve of the township of Mulmur, John Kean, the reeve of Orillia and Matchedash, George McManus, the relator, reeve of the township of Mono, and Thomas Elder, the deputy reeve of the township of Mono.

He filed several affidavits, to which it is unnecessary to refer.

Robert A. Harrison and *W. Boys*, in support of the application, argued that the warden of a county is not a corporation sole having a corporate name; that the only question is one of identity; and that there being no dispute as to identity, the description contained in the statement and writ is sufficient.—*Johnston* v. *Reesor et al*, 10 U. C. Q. B. 101; *Fisher* v. *The Council of Vaughan*, 10 U. C. Q. B. 492; *In re Barclay and the Township of Darlington*, 11 U. C. Q. B. 470; *In re Hawkins and Huron and Bruce*, 2 U. C. C. P. 72. Effect should not, after appearance by defendant, be given to objections of a technical character, rule No. 18; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44, 45. Mathewson's vote had either been improperly rejected, or if properly rejected, several who voted for the defendant ought equally to have been rejected. The clerk of the council is not the sole judge on such matters; his decision is subject to review in this case, Con. Stat. U. C. cap. 54, ss. 127, 133. Notwithstanding his receiving and filing the certificates of the several persons to whom objection is now made, inquiry can now be had as to their legal sufficiency, and for that purpose the court may go behind the act of the clerk, and is not bound by his receipt or rejection of a certificate *Harding* v. *Carry*, 10 Ir. C. L. Rep. 140; *Re Jennings*, 8 Ir. Ch. R. 421; *McDowell* v. *Whealy*, 7 Ir. Com. L. Rep. N. S. 562. Unless the certificate comply with the statute, the person presenting it is not entitled to his seat Con. Stat. U. C. cap. 54; *The Queen* v. *Mayor of Bridgnorth*, 10 A. & E. 67; *The Queen* v. *Humphery*, ib. 335; and all the certificates objected to were defective under the statute.

Richards, C.J.—As to the point raised for the defendant that he is called upon in the summons to show by what authority he exercises the office of "Warden of the County Council of the County of Simcoe," whereas it should have been "Warden of the Corporation of the County of Simcoe." According to sec. 65 that would seem to be the proper designation; but sec. 148 speaks of "the Warden of a County." There is no particular name specified in the statute. The defendant cannot be misled in any way by the description in the summons. If the words "of the County Council" be rejected, it would correspond with the name in the 148th section. He has appeared, and the 18th Rule of Court applicable to proceeding in *quo warranto* is against holding any pro-

ceedings irregular or void which do not interfere with the just trial of the matter on its merits. The cases referred to, of *Hawkins* v. *Huron and Bruce*, 2 U. C. C. P. 72, and *Barclay* v. *Municipality of Darlington*, 11 U. C. Q. B. 470, are authorities to shew that a slight difference from the true name of a corporation, will not invalidate proceedings. I am of opinion that the objection referred to cannot be sustained.

Then as to the merits, the first question to be considered is, whether, under the 67th sec. of Con. Stat., cap. 54 (U. C. Municipal Institutions Act), a reeve of a township, who was duly elected, and had made and subscribed the declarations of office and qualification, had a right to take his seat in the County Council, when the certificate of the Township Clerk did not state that he had made *and* subscribed the declarations of office *and* qualification, but that "he had taken or made the declaration of office."

I am of opinion that the reeve furnishing the certificate mentioned had not the right to take his seat; and that the Clerk of the County Council, if considered as acting in relation to this certificate alone, was right in refusing to allow Mr. Mathewson, the reeve of Sunnidale, to take his seat in the County Council of Simcoe, at its first meeting this year, as such reeve, on account of the certificate produced by him being defective in the manner above stated.

The section of the statute is positive, and seems to be reasonable, as requiring the person claiming the seat to furnish evidence that he was entitled to it. The statute expressly requires that the declarations should be made and subscribed. According to the certificate, this may have been made, but not *subscribed* at all. It is not unreasonable to require the person making the declaration to *subscribe* it as a means of indentification and of binding the party making it to the matters therein stated; I do not consider the omission to subscribe the declaration would be a mere matter of form. Whether the defect be considered as a matter of form or substance, the certificate not being according to the statute, as a general rule, would well justify the Clerk in declining to permit the bearer of it to take his seat in the Council.

It is alleged, and is no doubt true, that there were other reeves who were allowed to take their seats in the County Council, whose certificates were as faulty, if not more so, than that of the reeve of Sunnidale.

The next question is, assuming these reeves to be in other respects well qualified, and to have taken their seats in the County Council, can their votes therein be challenged for such defective certificates, and any by-law or other proceeding of the Council be set aside because carried or passed by the votes of reeves who have been allowed to take their seats on such defective certificates? I think not. The 67th section of the statute does not declare that the votes of any reeve taking his seat without such certificate shall be void, nor say that the proceedings supported and carried by such votes shall not be binding. I think this section may properly be considered directory, and so construed.

The fifth sub-section of section 66 enacts that the County Council of every county shall consist of the reeves and deputy-reeves of the townships and villages within the county; and the 175th and subsequent sections, under the head of Official Declarations, seems to provide that every person elected or appointed to office under the Act shall, before entering on the duties of his office, make the proper declaration of qualification of office required by the Act.

The 67th section does not require that the reeves or deputy-reeves should make and subscribe the declarations of qualification and of office,—that is provided for by other sections of the Act. The certificate is only evidence that what is contained in it has been done. If it has not been done, or the reeve or deputy-reeve had not been duly elected, that certificate would not give the party holding it the right to sit and vote in the Council. That right comes from his being the reeve or deputy-reeve and having made the required declarations. If the certificate were the essence of his qualification and not merely the evidence of it, then it might be held that the acts done by the reeve who did not possess it, or only possessed a defective one, were void; but merely being evidence of his qualification, if it turns out that he is duly qualified, then I think it cannot be properly held that his acts, as a member of the County Council, are void; nor can they in any way be impugned on account of the imperfect certificate.

It is admitted, as I understand, that the reeves and deputy-reeves, whose certificates are attacked on either side as informal, were really duly elected as Reeves; and had made the proper declarations of office and qualification at the time of the first meeting of the Council, and before the election of Warden had been proceeded with.

In the view I take of the statute on this point, it will not be necessary to go over the certificates of the different reeves and deputy reeves to see if they correspond in word and letter with the section of the statute. Though the county clerk might well have declared that some of them ought not to have taken their seats; and if he refused to allow the reeve of Sunnidale to take his seat, as a matter of consistency, to say the least, he was bound to reject some others, whose certificates were quite as defective as his; yet these reeves and deputy reeves having *taken their seats*, and not being disqualified, save in the point in dispute. I cannot question their right to vote as members of the County Council.

It is urged, on behalf of the relator, that inasmuch as the vote of the reeve of Sunnidale would have elected him as warden, and his certificate is not as defective as the certificates of several of those who voted for the defendant, I ought to declare the relator duly elected, as Mr. Mathewson was unfairly excluded from his seat; and he states by his affidavit that he would have voted for the relator if he had been allowed to vote.

I do not see my way clear in acting on this suggestion—the reeve of Sunnidale did not, in fact, tender his vote for any one. If he had offered to vote for relator, and his vote had been rejected, then in the event of my deciding that he was entitled to vote, I could have put his vote down for the relator; but as it now appears, I can only say that he intended to vote for relator; but did not at the time disclose his intention. I do not feel at liberty to say that his vote can or

be considered as cast for the relator, even if I am satisfied that that he ought to have been allowed to vote. Under the circumstances, if I hold that he is entitled to vote, then this result follows:—That he was a person properly qualified to vote; that he has been wrongfully deprived of his right to vote; and that his vote *might* have influenced the result; and from what is before me, it is probable, would have influenced the result. In this view, I should feel bound to set aside the election, and order a new election to remedy the injustice that has been done.

The facts necessary to be referred to, seem to me to be as follows:—

On the 25th January last, the reeves and deputy reeves forming the County Council for the county of Simcoe, met at Barrie. R. T. Banting, Esq., the county clerk, examined the certificates of the different reeves and deputy reeves, and pronounced them regular, until he came to the reeve of Sunnidale, Duncan Mathewson, Esq., and the reeve of Bradford, Anson Warburton, Esq., when he objected to their certificates of election and qualification, and finally directed them to leave the Council, which they did without voting. The relator states that these persons, both before and since the election, stated that they had intended to vote for him as warden.

There seems to be very little said about Mr. Warburton's certificate being defective; but when Mr. Mathewson's was brought up, a good deal of discussion followed; some of the members of the Council contended that his certificate was as good as those of some others, which had been pronounced sufficient by the clerk, and the clerk took the opinion of a professional gentleman before finally deciding. It was also stated that it was suggested that the other certificates should be looked into; but the clerk declined doing so, and decided that all the certificates filed, except those of Mathewson and Warburton, were correct and sufficient. That particular attention was called to the defect in the certificate of John Hogg, reeve of Collingwood, but the clerk, nevertheless, ruled it was sufficient, and allowed him to vote as such reeve.

The votes stood, 13 for relator, and 13 for defendant. The clerk of the Council then requested defendant, as reeve of the municipality having the highest number of names on its last revised assessment roll, to give the casting vote, which he did, in his own favor, and was then declared duly elected warden. Relator protested against the election.

That portion of the statute necessary to be transcribed in order to understand the objections urged to the certificate of the reeves of Sunnidale and Collingwood, reads as follows:—

Sec. 67.—That no reeve *shall take his seat* in the County Council, until he has filed with the clerk of the County Council, *a certificate* under the hand and seal of the township or town clerk, that such *reeve was duly elected, and made and subscribed the declarations of office and qualification as such reeve.*

The certificate of the town clerk of Sunnidale, so far as is necessary to be considered, reads as follows:—

"I hereby certify that Duncan Mathewson, Esquire, was duly elected as councillor for this township, and that he has made and subscribed the declarations of office and qualifications of office as such; and that he has also been appointed reeve of said township, and has taken or made the declaration of office of reeve for the said township of Sunnidale."

The certificate varies from the statute in stating he was *appointed* instead of *elected reeve*, that he had taken or *made* the *declaration of office* of reeve, instead of "*made and subscribed the declarations of office, and qualification as such reeve.*"

That part of the certificate of the town clerk of Collingwood, necessary to be transcribed, is as follows:—

"I, Joseph Hill Lawrence, clerk of the Municipal Council of the town of Collingwood, do hereby certify that John Hogg, Esquire, has been duly elected reeve of the corporation of the said town of Collingwood, and that he hath made the declarations of qualification and of office prescribed by law as such."

This varies from the statute, in stating that he had made the declarations of qualification, instead of saying "made and *subscribed* the declaraions, &c."

The certificate produced by the reeve of Sunnidale uses the words of the statute in relation to the declarations made for the office of councillor of the township; but the latter and more important part, relating to the office of reeve, is erroneous; and the most important error is common to both the certificates of Sunnidale and of Collingwood, viz.: the omission to certify that they had *subscribed* the declarations.

It certainly does seem singular that the clerk should have held one of these certificates regular and declare the other bad. My attention has been particularly directed to the certificate allowed, and considered regular by the clerk, as produced by the reeve of Barrie. The part of that necessary to transcribe, is as follows:—

"This certifies that at the first meeting of the Municipal Council of the corporation of the Town of Barrie, held on the 16th January instant, Wm. D. Ardagh, Esq., was unanimously elected reeve of said corporation for the current year, A.D., 1865."

There has not been any suggestion offered how this certificate, far more defective than either of the other two, should have been received as regular, whilst that of the reeve of Sunnidale was pronounced bad.

This view was presented on the argument that the clerk having declared the certificates all regular until he came to those of Sunnidale and Bradford; and no objection having been made by any one up to that time, he could not recall his decision as to the prior ones, though they might be more defective than those he was rejecting; and the reeves and deputy reeves in the certificates allowed having *taken their seats*, he could not afterwards direct them to leave the council.

It certainly seems strange that he should not have been alive to the irregularities until the certificates of but two persons remained to be disposed of; and the votes of either of these two it now appears, would have decided who was to be warden for the year, and he rejected both of these.

I can not say, under the circumstances, that it is at all surprising that he should have been

charged at the time with partiality in relation to these matters,

If this election is allowed to stand, this result will follow, that at any time a county clerk may, according to his own caprice or preferences of any kind, decide in favor of and allow certain persons with defective certificates to take their seats and vote in the council, whilst as to others whose certificates are quite as good, and in some cases even less defective, he may reject them and refuse to allow them to vote without any reasonable ground being assigned for such inconsistent decisions. I do not think it is desirable that any judicial decision should be arrived at that would furnish an excuse for such a course of conduct, and I shall therefore set aside the election of the defendant to the office of warden.

The question of costs is somewhat embarrassing.

There is nothing to show any direct interference with the decision of the County Clerk, on the part of the defendant, and he appears to have been called upon by that officer to give his casting vote, when the election was had. It is true he accepted the office, and was sworn in. There is nothing to show that he was aware of the defects in the certificates of the reeves who were allowed to vote by the clerk; and the plaintiff claimed on this application that he ought to be declared warden, which I do not think, on the facts disclosed, he was entitled to; so to that extent the defendant was justified in opposing this application. I do not therefore think I can properly direct the defendant to pay the costs. The learned judge who granted the summons in this matter did not think proper to direct the County Clerk to be made a party to these proceedings. If the County Clerk had been called upon, he might have been able to explain satisfactorily the seeming inconsistencies in his conduct in relation to the election; if he had not done so he would probably have been directed to pay the cost of this proceeding. As, however, he is not now before me, I cannot assume that he would not have been able, if he had been called upon, to show sufficient grounds to excuse him from the payment of costs.

Under these circumstances I must decline giving costs to any of the parties.

A writ will go to remove the defendant from the office of warden, and to hold a new election.

The relator may, if he deem it necessary, amend the style of the office, by omitting the words "of the County Council," after the word "Warden," and before the words "of the County of Simcoe," in the writs he may issue in pursuance of this judgment.

Judgment accordingly.

INSOLVENT ACT OF 1864.

(Reported by H. McMahon, Esq., *Barrister-at-Law)*

Before Stephen J. Jones, Esq., Judge County Court, Brant.

In the matter of William Atkins an Insolvent.

Place where assignee should call meetings of creditors—Computation of time for publication of notice—Where notice must be published.

Held, that the county town of the county, in which the assignment is filed, is the place where the assignee should call all meetings.

That not less than two weeks should intervene between the first publication of the notice and the day of meeting.

That the notice must be published in a newspaper, at or nearest the place where the meeting is to be held.

That all papers and minutes of proceedings in insolvency should be forthwith filed and entered of record in the proper office.

[Brantford, 27th July, 1865.]

A. S. Harvey appeared for the insolvent.

Webster handed in a brief prepared by Mr. *Burton*, Q. C., for the assignee.

The arguments fully appear in the judgment of

Jones, Co. J.—The petition of the insolvent asked, 1st—That the notice of the meeting of the creditors of the insolvent at Hamilton, on the 18th July, 1865, for the public examination of the insolvent and the ordering of the affairs of the estate, may be set aside, or declared null and void, on the ground that the said notice was not published in a Brantford newspaper, and was not published for two weeks in the *Canada Gazette*, and that the said meeting held at Hamilton on the 18th of July, may be declared void on the grounds above stated, and because it could not be legally held out of the county of Brant, the place where the proceedings are carried on. 2nd—That the assignee may be directed to call a meeting of the creditors forthwith at Brantford, for the public examination of the insolvent; and 3rd—That the assignee may be ordered to pay the costs of this application.

Mr. Burton, for the assignee, contends that as the creditors have all been notified of this meeting, and the meeting is called to be held at Hamilton, the proceedings may be considered as carried on there, and publication in the *Canada Gazette* and in the Hamilton paper is sufficient, and that a notice inserted in the *Gazette* on the 8th and 15th of July is in time for a meeting on the 18th of July; also that the insolvent has no interest in the matters in which he petitions, and that the judge has no jurisdiction in the case, but that it is for the creditors themselves to regulate their own meetings and proceedings.

On the latter point it can scarcely be argued that there is no jurisdiction, when sec. 4, sub-sec. 16, Insolvent Act of 1864, provides that the assignee shall be subject to the summary jurisdiction of the court or judge in the same manner as the ordinary officers of the court are, and the performance of his duties may be enforced by the judge on summary petition, under penalty of imprisonment.

As regards the place of meeting for the public examination of the insolvent, the second section of the act gives the insolvent the option of calling the first meeting of his creditors *at his usual place of business*, which was Brantford; and he has done so. The assignment was made there and filed in the office of the Clerk of the County Court at that place. The proceedings were therefore properly originated at Brantford, and the suit became one intituled in this court, and subject to the jurisdiction of the "court or judge" of this county, as explained in the interpretation clause, sub-sec. 4 of sec. 12. Several sections of the act bear more or less directly upon this point, showing I think that the proceedings should be carried on at the place where

instituted, and that the County Court of that county or a judge thereof, has jurisdiction in the matter. See sec. 2, sub-sec. 8, as to filing the assignment. See sec. 11, as to all notices being published in the newspaper "at or nearest" to the *place*—not places—where the proceedings are carried on.

All the clauses referring to compulsory liquidation, show that all the proceedings in those cases are to be carried on in the county and court where the attachment issues. Sec. 7, in giving an appeal from the award of the assignee to "the judge," and sec. 9, sub-sec. 6, providing for the insolvent's application to "the judge" for a confirmation of his discharge, evidently refer to the judge of the County Court where the proceedings are intituled and carried on. Besides the attendance of the insolvent for examination before the assignee is made compulsory on him, and if he could be compelled to go to Hamilton to attend such examination, he might be also obliged to go to Cornwall or Ottawa, notwithstanding the act having given him the right of having the suit commenced in his own county. This examination is in some respects analogous to the compulsory examination of a judgment debtor, in which case both the Superior and County Courts hold that the defendant should not be required to attend out of his own county.

On the question as to whether the proceedings can be partly carried on here and partly in some other county or place, the 24th and 25th of the Lower Canada Rules state that the judges of the Superior Court for that part of the Province, are of opinion and have ordered that all the proceedings both before the court or a judge and in the assignees office, shall be forthwith filed and entered of record in the office of the clerk of the district where the suit is prosecuted. This necessary practice of filing all papers and minutes of proceedings with the clerks of the court, is I fear very much neglected in this country, and may hereafter occasion serious inconvenience, both to creditors and insolvents.

Upon the whole, I am of opinion that all the proceedings should be carried on at the place where the suit is intituled—except perhaps when otherwise specially ordered by the judge—and that the meeting for the examination of the insolvent could not be held at Hamilton, but must be held in Brantford.

The decision of this question also determines the other point, that the notice of this meeting should have been advertised in a Brantford newspaper—as the 11th sec. provides that it must be published at or nearest to the PLACE where the proceedings are carried on.

On the point as to whether the notice was published a sufficient length of time before the meeting, I am not clear, but I think that not less than two weeks should intervene between the first publication of the notice and the day of the meeting. The 11th sec. requires it to be published "for two weeks" in the *Canada Gazette*, and "in every issue during two weeks" of the local paper.

If it were put in a daily paper there could be no question but that it must be inserted for two weeks; but when published in the *Gazette* or a local weekly paper, it is open for argument, whether two insertions is not a publication thereof for two weeks. If so, then a notice might be published in a weekly paper on the 1st and 8th of the month for a meeting on the 9th, thus giving but eight days notice of the meeting, instead of two weeks.

I think there is nothing in the allegation that the insolvent was not summoned by the assignee to attend this meeting. The act does not require a judge's order for his attendance, but the 10th sec. provides that the assignee shall summon the insolvent to attend. This I take it, merely means that he shall be notified by the assignee to attend, which he has done.

As to the objection of the assignee's solicitor, that the insolvent has no interest in the matter on which he has filed his petition, I think as far as the meeting for his examination is concerned, that he has an interest in having it held at the proper place; the statute requires him to attend at this meeting and be examined; and this examination may affect the application for his discharge. This meeting is also called "for the ordering of the affairs of the estate generally," and although I think the meeting for this purpose should have been held at Brantford, yet as the petition is not by a creditor but by an insolvent who I think is not interested therein, I would not feel authorised on this application in setting aside the meeting for the latter purpose, although improperly held. It would be otherwise were the application made on behalf a creditor.

I therefore order that the notice of the meeting for the public examination of the insolvent and the publication thereof, be set aside, and I declare the said meeting, if held, and the proceedings thereat, so far as the relate to the said insolvent or his said examination are null and void, and I order that the said assignee do in pursuance of the 10th sec. of the said act, call a meeting at Brantford aforesaid, for the public examination of the said insolvent.

I make this order without costs on account of the practice under this statute being new and unsettled. What makes it more difficult to establish a uniform practice in the several County Courts throughout Upper Canada, is the fact that no rules or regulations have been framed, as provided for by sub-sec. 18 of sec. 11 of the act.

GENERAL CORRESPONDENCE.

British Oaths Act, 5 Geo. II., cap. 7, secs. 1 and 2—Its repeal demanded.

To the Editors of the Law Journal.

Gentlemen,—It seems to have escaped the attention of our law makers and law amenders that it would be well to repeal the provisions of the imperial statutes 5 Geo. II., ch. 7, secs. 1 and 2, and 5 and 6 Wm. 4, ch. 62, secs. 15 and 17, which enable a person resident in Great Britain, plaintiff or defendant in an action pending in our courts, to verify any matter or thing by affidavit or declaration in writing, made as required by those acts, such

affidavit or declaration to be received with the same effect as if the deponent had appeared in open court.

The imperial statute 22 and 23 Vic., ch. 12, enacts, that it shall be lawful for the legislature of any of Her Majesty,s possessions abroad, to which the said enactments apply, to repeal, alter, or amend all or any of the provisions so far as applicable to such possession, in like manner, and subject to the same conditions as if the same had been originally made by such legislature.

Perhaps if the subject is mentioned in your columns, it may lead to some action towards their repeal, certainly a very desirable end.

Your obedient servant,

Barrister.

Toronto, Dec. 20, 1865.

[Our correspondent will find upon reference to the issue of the *Law Journal* for June last, that we then and there took occasion to draw attention to the fact, that the enactment to which he refers had not been repealed, though its repeal ought without further delay to be expected. We trust that some "law amender" equal to the task will be found sufficiently alive to his duty to accomplish the needed repeal during the coming session of the Legislature. —Eds. L. J.]

Exemption Act of 1860—*What covered by.*

To the Editors of the Law Journal.

Gentlemen,—A question frequently arises under the 6th sub-sec. of 4th section of the Exemption Act of 1860. Would a baker's bread cart, or a peddler's wagon, horses and harness be exempt as being chattels ordinarily used in the debtor's occupation? Would a a physician's gig or sulky be so exempt, or a wagon and harness used by a merchant to send home goods to his customers, always supposing that the value was under sixty dollars? Would you be good enough to give your opinion on these points?

Yours, &c. Jus.

Toronto, Dec. 21st, 1865.

[It was decided by the Court of Common Pleas in *Davidson* v. *Reynolds*, not yet reported, during last term, that a horse, sleigh, and harness ordinarily used by a farmer in his occupation are exempt from seizure under the act to which our correspondent refers. We apprehend that the bread cart of a baker, the wagon of a peddler, the gig of a physician, ordinarily used in the debtor's occupation, would, if not exceeding $60 in value, be equally exempt.—Eds. L. J.]

Renewing fi. fa. lands—Stamps necessary.

To the Editors of the Law Journal.

Gentlemen,—In renewing a *fi. fa.* lands it is the almost universal practice in Upper Canada to require the same stamps that are necessary by the tariff and statute for obtaining the writ itself. One county, at least, follows a different practice. The clerk there only exacts for the renewal the 50c. C. F. stamp and the filing, alleging as his reason that while the tariff says that 2s. 6d. will be charged for all writs, aliases, renewals, &c., the statute relating to the Law Society, under which the other 2s. 6d. is payable, is silent as to renewals. It is only for the seal of the court that this latter L. S. stamp is affixed, and as the said seal is not affixed at the time of the renewal, that therefore the charge should not be made.

The reply to questions on this point recently, that the renewed writ is the same, to all intents and purposes, as a new writ, and therefore should require all the stamps of the original, cannot be taken as wholly satisfactory, looking at the positive wording of the statute and the tariff. The reply, too, that the 2s. 6d. L. S. is charged for renewing the seal, is not warranted by any wording of the statute.

The point is a new, and, I think, an important one to the profession, upon which, too, there has been no decision; and I would feel obliged by your opinion on the matter through the pages of your valuable journal.

I am, Gentlemen, &c.,

Galt, Jan., 1866. A. G. McM.

[The point is new, inasmuch as there appears to be no decision on it, but the principle upon which the clerks act is as old as the renewal of writs—stamps being only in the place of money. The practice in the Crown Offices in Toronto is to insist upon the 2s. 6d. L. S. stamp. We, however, have doubts as to whether the charge is warranted: but it is one of those things that the majority of practitioners think it much better to take as they find it than run the risk of loss by trying the question of its legality.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. PYPER v. McKAY.

Accommodation note—Negotiation after payment—Pleading.

Declaration, on a promissory note made by defendant payable to the order of S. T. & Co. and indorsed by them to plaintiff. *Pleas*, (4th) that the note was made by defendant for the accommodation of the payees to raise money thereon, and indorse the same to their own use before it should become due and payable, and not otherwise; and that there never was any value or consideration for such making, or for the payment by defendant of the note, except as aforesaid; that the payees indorsed and negotiated it with the Commercial Bank for their own use according to said terms; that it was afterwards protested, and S. T. & Co., on behalf of defendant, subsequently paid it to said bank, and it was then returned by S. T. & Co. by the bank for and on account of defendant; that S. T. & Co. afterwards and in fraud of defendant first indorsed it to plaintiff. The 5th plea was similar to the 4th, only that it concluded thus, "and S. T. & Co., without defendant's authority, first indorsed the note to plaintiff after the payment and discharge." *Held*, on demurrer, pleas good. (16 U. C. C. P. 67.)

L. C, MORTIMER v. BELL. Nov. 16.

Vendor and purchaser — Specific performance—Sale by auction—Puffing.

At a sale of real estate by auction the vendors are not authorised in employing two persons to bid against each other, although there is a reserved price; and such persons do not, in fact, bid beyond that price. *Semble*, the right to fix a reserved price ought to be stipulated for and expressly notified. (Per Lord Chancellor.)—The rule, said to exist in equity, allowing one puffer to be employed, without notice, to prevent a sale at an under value, is abstractedly less sound than the rule at law, which declares such employment to be fraudulent, and rests only on the authority of decisions in lower branches of the court. (14 W. R. 68.)

CHANCERY.

Chan. McDONALD v. BOICE.

Fraudulent judgment.

A judgment, recovered at law, by the fraudulent acquiesence of the defendant in the action, will be inquired into in this court at the instance of a subsequent judgment creditor; although the rule at law is that only the party to the action can move against the judgment there. (12 U. C. Chan. R. 48.)

Chan. LUNDY v. McKAMIS.

Mortgage on wrong lot.

Where a mortgage was, through error, created upon a wrong lot of land, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had title, the court, upon a bill filed for that purpose; ordered him to account for the proceeds of the sale, not exceeding the amount secured by the mortgage, with interest and costs of suit. (11 U. C. Chan. R. 578.)

Chan. PARKE v. RILEY.

Sale under fi. fa. against lands previously contracted to be sold.

Where a debtor had entered into a binding contract for the sale of his land, before execution against his land had issued, *Held*, that his interest as vendor was not saleable under the execution. (12 U. C. Chan. R. 69.)

New Orders have just been promulgated by the Court of Chancery—which came into operation on the 1st day of the present month. They were not received in time for publication in this number; will appear in our next.

APPOINTMENTS TO OFFICE.

NOTARY PUBLIC.

CORNELIUS HARPER, of Durham, Esquire, to be a Public Notary in Upper Canada. (Gazetted Dec. 9. 1865.)

TO CORRESPONDENTS.

"BARRISTER"—"JUS"—"A. G. McM."—under "General Correspondence."

(Examination Papers, as perused and settled by John Punch, Gent., one, &c.)

COMMON LAW.

1.—Divide the foreigners of distinction now in London into—

Common Counts, Work and labour Counts,
Money Counts, Superfluous Counts.

2.—"Britannia rules the waves." Will she "rule them to bring in the body?" What sort of a rule does she employ for the purpose? Is it an eight-day rule, a side bar-rule, a foot rule, or a rule nisi? Which of these was the rule in Shelley's case?" Was Shelley unruly, or did he submit to be ruled? What was the rule in the "Six Carpenters' Case?" Was this a carpenter's rule or a sliding scale?

3.—To bring into England any bull from Rome was formerly a *præmunire*. How is this affected by the new tariff? How of bull terriers? What is the law of England as to Irish bulls? Why are "old terriers" allowed in courts of justice? Do they "run with the Case." How would you "serve" a bull in a china shop? Supposing him to do damage taerein to the amount of 20s. would he carry costs into the "*locus in quo?*" Would it be pound-breach?"