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OF THE

CASES REPORTED IN THIS VOLUME.

TABLE OF TITLES

CONTAINED IN THE

DIGEST OF ENGLISH LAW REPORTS.

DIARY FOR JANUARY.

1. Frid.. *Circumcision.* Taxes to be comp. from this date.
3. SUN.. *2nd Sunday after Christmas.*
4. Mon.. Co. Ct. and Surr. Ct. Term begins. Municipal Elections. Heir and Devisee Sit. com.
6. Wed.. *Epiphany.* Elec. School Trustees. Christmas Vacation in Chancery ends.
8. Frid.. Last day for Township, Vill. and Town Clerks, to make return to County Clerk.
9. Sat. .. County Court and Surrogate Court Term ends.
10. SUN.. *1st Sunday after Epiphany.*
11. Mon.. Election of Police Trustees in Police Villages.
15. Frid.. Treas. & Chair. of Mun. to make ret. to Bd. of Audit. School Rep. to be made to L. S.
16. Sat. .. Articles, &c., to be left with Sec. Law Society.
17. SUN.. *2nd Sunday after Epiphany.*
18. Mon.. Municipalities and Munic. Councils (exc. Co.'s) and Tr. of Police Vil. to hold 1st meeting.
19. Tues.. Heir and Devisee Sittings ends.
24. SUN.. *Septuagesima.*
25. Mon.. *Conversion of St. Paul.*
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29. Frid.. Examination of Law Students for Call to Bar.
30. Sat. .. Sch. Finance Report to Board of Audit. Last day for Co. and Cities to make ret. to P. S. Exam. of Art. Clerks for certif. of fitness.
31. SUN.. *Sexagesima.*

THE

Canada Law Journal.

JANUARY, 1869.

LAW REFORM ACT OF 1868.

This high sounding title requires an interpretation, otherwise, the uninitiated might confound this effort at law reform on the part of the Attorney-General for Ontario with the result of the learning foresight and perseverance of the eminent men who were instrumental in giving to the country such a measure as the Common Law Procedure Act.

The Act before us, when in the shape of a Bill, was entitled "An Act to reduce the Sittings of the County Courts and General Sessions of the Peace, to abolish Recorders' Courts and for other purposes." The sting is in the tail. The "other purposes" seem to be some of the objects of the Act, and the result of these purposes we propose shortly to discuss. The whole thing has been done so suddenly and so little time for discussion has been given to the interested public that it is now too late to reason upon the necessity for or propriety of such a measure or combat the argument of the supporters of the bill which has, with some amendments, now become law.

We give in another place a copy of the Act as it appears in the *Ontario Gazette.*

The principal features of this Act are these: Recorders Courts are abolished; the Equity Jurisdiction of the County Courts is done away with; the Terms and Sittings of the County Courts (except in the County of York) are reduced to two in each year; the Courts of General Quarter Sessions, now to be called the Courts of General Sessions of the Peace, are to be held semi-annually; all issues of fact and assessments of damages in actions brought in County Courts may be tried and assessed, in the election of the plaintiff, at any sittings of Assize and Nisi Prius for the county in which the venue is laid; all issues of fact and assessments of damages shall in the absence of a notice to the contrary be heard, tried and assessed by the presiding judge without the intervention of a jury; and lastly, the City of Toronto is re-united for judicial purposes to the County of York.

Some of these changes introduced by the Act will meet with approval, and the expenses of criminal justice may be lessened; but, upon the whole, we venture to assert that the opinion of the judges, the bar, and practitioners generally, is largely opposed to the Act.

Upon the County Judges in those Cities where Recorders Courts have hitherto existed will devolve increased work with reference to criminal business in their capacity of chairmen of the General Session in their respective Counties. But the other changes introduced by this Act will as we shall shew hereafter much decrease their civil business. On the other hand, the criminal business in the Sessions throughout the country will as a rule be reduced, for much of it must necessarily (as there will be only two Sessions in the year and prisoners cannot be kept lying in jail untried) be sent to the assizes to be disposed of. The effect of this will be of course incidentally to swell the calendars at Assizes.

It has been thought by some, that the provisions of this Act respecting the alterations in the Quarter Sessions are unconstitutional, as beyond the powers of the Local Legislature. But we do not pause to consider this at present; and leaving that part to the Act which affects the organization of Criminal Courts (or Criminal procedure if such be the proper reading), we now turn to the sections, commencing with sec. 17, which make some important changes affecting trials and assessments in civil cases.

By 23 Vic., chap. 42, any action depending in either of the Superior Courts of Common

Law in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a judge of either of such courts is satisfied that the case may be safely tried in a County Court, such judge may order the case to be tried in the County Court of the County where such action was commenced, &c.

This was an intelligble provision found to be of much benefit to the mercantile community and largely taken advantage of, and under which no question could arise as to the proper forum, when the case came on for trial, and it had the advantage of relieving, and was intended to relieve the Superior Court Judges of that part of their Circuit work which could as well be done by an inferior court.

Section 17 is now to stand in the place of this provision, and whilst the new section, as we think, changes the practice for the worse, the subsequent sections in a measure nullify the advantages it might possess. The practice under the new Act provides that all issues, &c., in certain actions in the Superior Courts may be tried in the proper County Court, where the amount is liquidated, or ascertained by the signature of the defendant, "unless a Judge of such Superior Court (does this mean a Judge of the particular Court in which the action is brought, or *any* Superior Court Judge?) shall otherwise order, and upon such terms as he may deem meet. Now, according to our view, the result of this Act will be to take as much responsibility as possible from the County Court Judges, but here, by what seems to be nothing but a "penny wise" attempt to reduce costs in doing away with the order required by the Act of 23 Vic., very important Superior Court cases may come before County Judges for trial, which is not always to be desired, and the very thing this Act apparently seeks to prevent, but which is impossible under the law still in force. The guarantees that such will not be the case are in the nature of the action, and in the power given to a Judge to "otherwise order." But as to the first, it is notorious that many very special defences may arise in suits where the amount is ascertained (or rather technically supposed to be ascertained) by the signature of the defendant. And in the next place there will be the danger, when an application is made to a judge to "otherwise order" of the parties in a contested case, being in doubt until the last moment whether it will be necessary for them to prepare evidence and summon witnesses for the trial of the cause at the time and place for which notice has been given.

The bill as originally introduced gave no power to a judge to prevent a Superior Court case from being tried before a County Court judge, from which it might be argued that it was not the intention of the former to take away the chance of special cases occasionally coming before the County Courts, but if the proviso means anything, it must mean that a judge is to exercise some discretion with reference to the importance of the case, when a defendant seeks to prevent it being tried before a County Judge. If it only has reference to the *time* of the trial and not to the difficulties or importance of it, that power is sufficiently given without this provision.

In sub-section 3 of the same section, a difficulty will often arise in practice when an application is made, before trial, to postpone such trial. The application it is said must be made to "a judge of the Court in which the action is brought." If the action is brought in the Queen's Bench a judge of the Common Pleas may be sitting in Chambers. This may be a small matter, but a little more attention to details of this kind is necessary to make the machinery of litigation run smoothly.

It does not seem quite clear whether the next sub-section refers only to Superior Court cases, or to all cases, no matter whether in Superior or County Courts. The words "or unless a Judge of one of the Superior Courts shall otherwise order," would seem to imply the former, and the first part of the clause the latter view.

We presume the word *cause* or *suit* has been accidentally omitted after the words "County Court" in the second line of the 5th sub-section.

As to the two next clauses, if there is one thing that the Judges object to, it is their notes becoming the property of suitors, and with very good reason, as we have explained in a former occasion. Why, by the way, should the unfortunate clerks be made to pay out of their own pockets the cost of these note books. The only answer we apprehend is the "economical one," that no expense should be thrown on the public purse that can by any means, prudential or otherwise, be cast upon private

individuals, without reference of any kind to the moral obligation of the public to pay.

It is not, however, because some of the clauses in this Act are defective in detail and crude in form that we object to it. It is because we think the effect of its principal provisions will work injuriously to the Superior Court judges, to the County Court judges, to practitioners and to the public. This is a sweeping assertion, but we nevertheless think that argument certainly is in our favour, whether experience will prove us to be wrong we know not, but time will tell. If we are wrong we will be the first to note the fact, and be only too glad to do so.

It will scarcely be denied that this Act will largely increase the duties of the Superior Court judges; if they had not enough to do now there would be no harm in this, but such notoriously is not the fact, rather the contrary. Litigation may be less in quantity than formerly, but the special business will increase with the wealth and business of the country, and is increasing. There is, therefore, no reason to suppose that their work is decreasing or will decrease. This Act, we contend will both directly and indirectly increase the duties of the Superior Court Judges, and that not in simple cases only, but in special cases. *Directly*, because there will be two courts less for the trial of civil cases than formerly, and so of necessity County Court suits, where speed is of any object and can by that means be obtained, will be brought down to the assizes for trial, and perhaps for subsequent adjudication in Term, for by section 17, sub-section 5, any motion to be made in respect to any verdict in any County Court cause trial at the Assize shall be heard in one of the Superior Courts of Law in Toronto.*

Indirectly, the business of the Queen's Bench and Common Pleas will be increased, because the inclination will in all special cases be to take cases before Superior Court Judges, and for various reasons—

1. The expense is not thereby increased.

2. Parties will be saved the costs of appeals which might be necessary if the cases were tried in County Courts.

3. There is not the same confidence, as a rule, in the County Judges as in the Superior Court Judges, and clients as well as practitioners will doubtless make their selection in favor of the latter. And this will be especially the case in certain Counties that need not now be specified.

If then the duties of these judges are increased, some part of their work must be neglected, or arrears will accumulate. In either case there will be public dissatisfaction which must eventually bring about a cure, either by a return to the system before the "Law Reform Act," at which time the County Judges will necessarily be less competent for the work than now, or by increasing the number of Superior Court Judges, which would be unobjectionable except on the score of expense, or by increasing the jurisdiction of the Division Courts, a measure which would only make bad worse, for it is absurd to imagine that cases would be *more* satisfactorily disposed of in the hurry of a Division Court, than when they have the safeguards of written pleadings, &c., and the presence of counsel to assist the Judge, combined with the more deliberate investigation in a County Court—clearly, vastly *less* so—certainly the last eventuality would be most deplored by those who are the best acquainted with these Courts, as administered in some counties. It would necessitate some mode of appeal and destroy the advantages of the present system without sufficient to compensate for what would be lost.

So much, then, for the probable effect of this Act as to the Superior Court Judges, and now as to the County Judges.

We do not pretend to say that the County Court Bench is all that could be desired. But we do assert that many of the judges are as efficient, as hardworking, and as learned as any members of the profession who would accept appointments as such. The really first class men at the Bar will not take a County Judgeship; the inducements are not sufficient, except, perhaps, in the County of York. Appointments, also, have been made which did not redound to the credit of the various Governments that made them. But in addition to all this, the very position of a County Judge is a trying one, and it is not every good lawyer that would make a good County Judge. And their tendency is, if anything,

* Only County Court fees are taxable in such cases, but will Counsel consent to accept fees on that scale under the circumstances? We imagine not. If not, we presume whoever may be the successful party, though successful, will have to lose the difference.

to deteriorate rather than to improve, as has been found to be the case even in England.*

If the special business of the Superior Courts is increased by this Act, the special business of the County Courts will be proportionately decreased. Whatever other effect that may have, it will, we fear, tend to the gradual deterioration in the learning of the County Judges, they will in fact get "rusty;" they are likely to, and doubtless many will become more and more careless and pay less regard to legal principles; decisions when any thing special does come before them will be given more and more at haphazard; practitioners will be "at sea;" the laws will be administered without uniformity, and the general legal business of the country will suffer. The growth of the evil may in some counties, owing to the strength of character of the judge, be slow, but we fear the seeds of evil have been sown.

It is proposed we believe to give to the County Judges jurisdiction in those minor criminal cases which magistrates have hitherto disposed of, to be decided by them on their Division Court circuit. Whatever might be the advantages or disadvantages of such a provision it would not compensate for what the judges will lose in the way we have pointed out.

Attrition of one mind with another of equal, or better if of greater calibre is one secret of judicial success. What the county judges have of this advantage will in a measure be taken away by this Act. Better far to try if some scheme could not be devised to group the judges together so as to have an appeal from one judge to several and so increase the attrition.

As far as the profession are concerned, anything that is injurious to the *status* of the Judges by a reflex process operates injuriously on the profession.

The probable effects, as far as the public are concerned, have already incidentally been considered.

We do not propose at present to discuss other Acts of this Session which effect the tenure of office and dismissal of County Judges, they may possibly be disallowed by the Dominion Government as unconstitutional. But we must in conclusion protest against the absurdity of saying "the county judges are a bad lot, but we will remedy that by making them worse, though in the process we may do much harm to the country. The Superior Court judges have plenty to do, but we will remedy that by giving them more, though the effect may be to injure the public, and in the end bring things to a somewhat similar but infinitely worse position than they are at present."

Whilst feeling bound to make these observations on some of the provisions of this Act, we are, on the other hand, glad to think that some of the provisions will be beneficial to the public. The decrease in the number of Criminal Courts (we allude particularly to cities,) will be a great boon to that most long-suffering class of men who have, as jurors, to sacrifice themselves for the supposed good of their neighbours, and the expenses of criminal justice will be largely decreased. By sec. 18 of the Act suitors will have the privilege (whether this is an advantage or not is too long a subject for discussion at present,) of having their cases decided by a Judge who can decide both the law and the facts together, and this without the public being deprived of the safeguard of a trial by jury, when such a safeguard is required.

* See "Fallacy of Local Tribunals," *ante* vol. IV. p. 276.

THE NEW DOWER ACT.

We publish in another place the "Dower Act of Ontario." If any subject required the manipulation of an experienced and careful law framer, this did. Whether it has now received the necessary treatment we are not at present in a position to say; a cursory glance would seem to show some great improvements.

We presume that sections 19 and 43, which at first glance might seem to conflict with each other, mean that the Common Law Procedure Act and Rules of Court are to regulate the practice as far as possible, but when these make no adequate provision, practitioners must fall back on the old practice in dower suits before 10th August, 1850.

Mr. Blake introduced an act to amend this Act, which he alleges will destroy vested rights. It is contained in a few lines:—

"1. The provision in the third section of the said Act contained shall not affect the right of any widow who shall have been married before the first day of February, A. D. 1869, to recover Dower out of any estate to which her husband

shall have been before the said day entitled, and out of which Dower would, but for the said provision, be recoverable.

"2. This Act shall take effect upon, from and after the first day of February, A. D. 1869."

Whatever may have been the rights of widows under the former law in this respect, and they were shadowy enough, the evils of enactments having a retrospective effect should be carefully guarded against. Mr. Blake's bill was thrown out.

DEATH OF JUDGE DRAPER, OF KINGSTON.

We regret to announce the death of William George Draper, the eldest son of the President of the Court of Appeal, and Judge of the County Court of the County of Frontenac, on Thursday, the 17th December last.

He was a man of very considerable natural ability, and a universal favorite with all who knew him, from his generous and manly disposition. He was favorably known to the profession as the compiler of "Draper's Rules," and a useful handy book on the Law of Dower.

At a meeting of the Bar of Kingston, held on Friday, the 18th ult., Mr. Thomas Kirkpatrick, Q. C., in the chair, the following resolutions were unanimously adopted:—

Moved by Mr. James O'Reilly, Q. C., seconded by Mr. Alex. S. Kirkpatrick,

Resolved,—That it is with feelings of the deepest regret that we have heard of the death of William George Draper, Esq., Judge of the County Court of Frontenac, and for many years a leading member of its Bar.

Mr. Draper, in the discharge of the onerous duties of Judge, won the respect and esteem of the community; and by his ability and courteous demeanour towards the Profession, gained their highest regard and confidence. The Bar of Kingston, therefore, with unfeigned sorrow mourn his loss, and sympathise with his widow in her affliction.

Moved by Mr. James Agnew, seconded by Mr. Daniel Macarow,

Resolved,—That the Bar, as a mark of respect, do attend the funeral of the late Judge Draper in costume, and do wear mourning for thirty days.

Moved by Mr. J. A. Henderson, D.C.L., seconded by Mr. Thomas Parke,

Resolved,—That a copy of the foregoing resolutions be sent to Mrs. Draper.

INCREASE TO SALARIES OF THE SUPERIOR COURT JUDGES.

In response to a message received by the House of Assembly, from the Lieutenant-Governor, it was moved by Hon. Mr. Wood, seconded by the Attorney-General, that the sum of $1,000 be granted to each of the Judges of the Superior Courts of Ontario, to be paid out of the Consolidated Revenue Fund. The motion was carried without debate.

It is unnecessary for us to say that we are especially pleased at this, as we have time and again spoken of an increase to the salaries of the Judges, as a matter of simple justice. If the increase had been double what it is, there would have been but a contemptible few to complain of it. But taking it as it is, the suggestion was an admirable one, and gracefully carried out by the Government, who have in this instance, at least, acted in a spirit of liberality which will be appreciated as an act of the truest wisdom and economy. Whether the increase would or would not have come more properly from the Dominion government, we need not at present discuss.

Necessary Funeral Expenses.—We find the following in the *Chicago Legal News*, as a part of the procedings in the court held by the husband of the editress. In the county court of Cook county, of the 8th of October, upon the petition of Captain Wiley M. Egan, administrator of the estate of B. S. Shepard, it appearing that the deceased left four thousand dollars in personal estate, and that he was an old resident moved in good society, and had, in buisness matters, been the equal of our best buisness men, it was ordered that the administrator purchase, and place over the grave of the deceased, a monument, to cost not less than one thousand, and not more than fifteen hundred dollars. Some have doubted the power of the proper court to make an order of this character, but the judge said he had no doubt of his jurisdiction to make such an order, and that in the absence of friends, it was the duty of an administrator to bury the deceased, and pay the necessary funeral expenses, and that the word "burial" in the statute meant a decent burial, and that no person was decently buried who had means sufficient for that purpose, unless he had a monument or tombstone at his grave, and that the cost of furnishing the same would be a proper item to allow under the head of "necessary funeral expenses." *Wood* v. *Vandendur*, 6 *Paige*, 282; *Stag* v. *Punter*, 3 Atkyans, 119; Willard on Ex., 272.—*Exchange.*

ACTS OF LAST SESSION.

The following are some of the most important of the Acts which were passed last session. Our readers will be glad to see them at once.

THE LAW REFORM ACT OF 1868.

[Assented to 19th December, 1868.]

Whereas the multiplicity of Courts of inferior jurisdiction entails great and unnecessary expenses upon the country, and it is advisable to amend the laws relating thereto, and to make certain other provisions with a view to lessen such expense: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Sections thirteen and fifteen of chapter fifteen of the Consolidated Statutes of Upper Canada respecting County Courts, are hereby repealed from the time this Act shall take effect; but nothing herein contained shall invalidate any proceeding theretofore had or taken in any of the County Courts of this Province.

2. The several County Courts of this Province from the time this Act shall take effect, shall hold two terms in each year, to commence respectively on the first Monday in July and January in each year, and end on the Saturday of the same week; except the County Court of the County of York, which last mentioned Court shall hold three terms in each year, to commence respectively on the first Monday in the months of January and April, and the last Monday of August, in each year, and end on the Saturday of the same week.

3. The sittings of the said County Courts for the trial of issues of fact and assessment of damages, shall thenceforth be held semi-annually, to commence on the second Tuesday in the months of June and December in each year; except the County Court of the County of York, which last mentioned Court shall hold three such sittings in each year, to commence respectively on the second Tuesday in the months of March, July and December in each year.

COUNTY COURTS' EQUITY JURISDICTION—REPEAL.

4. Sections thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, and sixty-nine of the said Statute, chapter fifteen, respecting the equity jurisdiction of the County Courts, are hereby repealed from the time this Act shall take effect, except as to any suit or proceeding then pending; but any suit or proceeding then pending may be prosecuted and proceeded with as if this Act had not passed.

2. In any suit or proceeding, which, before the passing of this Act, might have been brought, instituted or carried on under the equity jurisdiction of the County Courts, and which may hereafter be brought or carried on in the Court of Chancery, the stamps required, and the fees, costs and charges payable in respect thereof, shall be on a scale bearing, as far as practicable, the same proportion to the stamps, fees, costs, and charges payable in other suits or proceedings in the said Court of Chancery, as the stamps, fees, costs, and charges in actions in County Courts bear to the stamps, fees, costs and charges in actions in the Superior Courts of Common Law; and it shall be lawful for the Judges of the said Court of Chancery to prepare a table of fees, costs and charges applicable to all such proceedings.

5. In amendment of the sixty-seventh section of the said Statute, chapter fifteen, it is hereby enacted that the word "four" shall be struck out of the said section, and the word "ten" be substituted and read in lieu thereof; and in further amendment of the sixty-eighth section of the said Statute, chapter fifteen, and in amendment of the Act of the Parliament of the late Province of Canada, passed in the second session, in the twenty-seventh year of Her Majesty's reign, chapter fourteen, it is hereby enacted that the words "party wishing so to appeal," used in said section sixty-eight, shall for all purposes be taken and held to mean, as welt parties on whose behalf, or for whose benefit, any suit is prosecuted or defended, and parties suing or defending in the name of others, though not named on the record as parties so named; and the words "himself and" between the words "by" and "two" shall be struck out of the said section and omitted therefrom.

GENERAL SESSIONS.

6. Section three of chapter seventeen of the Consolidated Statutes of Upper Canada, relating to Courts of Quarter Sessions of the Peace, is hereby repealed from the time this Act shall take effect.

7. The Courts heretofore known as the Courts of General Quarter Sessions of the Peace in and for the several Counties and Union of Counties in this Province, shall, after this Act takes effect, be called and known as the Courts of General Sessions of the Peace of the respective Counties, and shall thenceforth be held semi-annually, to commence on the second Tuesday in the months of June and December in each year; except in the County of York, in which County the said Courts of General Sessions of the Peace shall be held three times in the year, to commence on the second Tuesday in the months of March, July and December in each year, so that said sittings may come as nearly as may be midway between the sittings of the Courts of Oyer

and Terminer and General Gaol Delivery in and for the several Counties of this Province.

8. The fees and charges payable and pertaining to officers of the County Court, the Jury fees, the Law Stamps of fees of office, and the dues and duties payable to the Crown upon all actions, suits or proceedings, brought in the County Courts and tried or assessed in the Superior Courts, shall be chargeable and paid as if the same were being tried or assessed in the County Courts as hitherto; and no other fees, stamps or dues shall be chargeable thereon, and the Clerk of the County Court shall be entitled to receive and take such part thereof as pertains to him, to his own use.

9. In amendment of section two of chapter eight of the Act of the Parliament of the late Province of Canada, passed in the twenty-third year of Her Majesty's reign, it is hereby enacted that the appointment of Constables and High Constables may hereafter be made at any sitting or adjourned sitting of said Courts of General Sessions of the Peace.

2. Section one of chapter one hundred and twenty-one of the Consolidated Statutes of Upper Canada, entitled "An Act respecting the expenditure of County Funds for certain purposes within Upper Canada," is hereby repealed; and in lieu thereof it is hereby enacted, that all accounts and demands preferred against the County, the approving and auditing whereof heretofore belonged to the Quarter Sessions, shall henceforth be audited and approved by the Magistrates of the respective Counties and union of Counties; and in amendment of section three of the said Act, it is hereby enacted that such accounts and demands shall henceforth be delivered to the Clerks of the Peace of the respective Counties on or before the first day of each General Sessions of the Peace, and of each sitting of the Courts of Oyer and Terminer and General Gaol Delivery in the respective Counties and union of Counties.

3. Such of the said accounts and demands as shall be so delivered on the first day of the sittings of the said Courts of Oyer and Terminer and General Gaol Delivery, shall be audited by a Bench of at least seven Magistrates, of whom the Chairman of the Court of General Sessions of the Peace shall be one, and shall be taken into consideration in the week next succeeding the week in which such sittings ended, and disposed of as soon as practicable, and such of the said accounts and demands as shall be so delivered on or before the first day of the General Sessions of the Peace, shall be audited at the time and in the manner provided by the said Act.

4. In amendment of sections one and four, of chapter one hundred and twenty-four of the Consolidated Statutes of Upper Canada, entitled "An Act respecting the Returns of Convictions and Fines by Justices of the Peace, and of fines levied by Sheriffs," it is enacted, that the returns of convictions and fines by Justices of the Peace therein mentioned, shall henceforth be made to the Clerks of the Peace instead of the Courts of Quarter Sessions, and shall be made quarterly on or before the second Tuesday in the months of March, June, September and December in each year, and shall embrace, in every instance, all convictions not embraced in some previous returns, and shall be published and fixed up by the Clerks of the Peace in manner in said fourth section provided, within two weeks after the times hereby limited for the making of such returns; and in amendment of section five of the said Act, the words "Minister of Finance of the Province" shall be struck out of said section, and the words "Treasurer of Ontario" inserted in their place.

RECORDERS' COURTS—REPEAL.

10. Sections three hundred and sixty, three hundred and sixty-eight, three hundred and sixty-nine, three hundred and seventy, three hundred and seventy-three, three hundred and seventy-five, three hundred and seventy-six, three hundred and seventy-seven, three hundred and seventy-eight, three hundred and seventy-nine, three hundred and eighty-one, three hundred and eighty-two, three hundred and eighty-three, three hundred and eighty-four, three hundred and eighty-five, three hundred and eighty-six, three hundred and eighty-seven, three hundred and eighty-eight, and three hundred and ninety-four of the Act of the Parliament of the late Province of Canada, passed in the session held in the twenty-ninth and thirtieth years of Her Majesty's reign, entitled, "An Act respecting the Municipal Institutions of Upper Canada," and all Letters Patent issued to any Recorder under the said section three hundred and eighty-one, are hereby repealed from the time this Act shall take effect: and the several Recorders' Courts of the cities of Toronto, Hamilton, London, Kingston and Ottawa, as well as also the Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery for the County of the City of Toronto, are from thenceforth abolished; and the said cities shall thenceforth, for judicial purposes, be respectively united to and form part of the several Counties in which they are respectively situate.

11. In lieu of the said section three hundred and seventy-three, it is hereby enacted, that every Police Magistrate shall *ex-officio* be a Justice of the Peace for the City or Town for which he holds office, as well as also for the County or Union of Counties in which such City or Town is situate; and no other Justice of the Peace shall adjudicate upon, admit to bail, discharge prisoners, or otherwise act, except at the Courts of General Sessions of the Peace, in any case for any Town or City where there is a Police Magistrate, except in case of the illness or absence, or at the request in writing of the Police Magistrate.

12. Section three hundred and eight of the said Act is hereby amended by substituting

the words "Judge of the County Court" for the words "Recorder of the City," and the words "Judge of the said County Court" for the word "Recorder," wherever they respectively occur throughout the said section.

13. In lieu of section three hundred and eighty-seven of the said Act, it is hereby enacted, that in any prosecution, suit, action or proceeding in any civil matter to which a corporation is a party, no ratepayer, member, officer, or servant of the corporation shall, on account of his being such, be incompetent as a witness; but they and every of them, shall be liable to challenge as a juror, except where the Municipal Corporation, the party to such prosecution, suit, action or proceeding, be a County.

14. From the time this Act shall take effect all indictments, suits, proceedings and matters then pending, or commenced in any of the said Recorders' Courts, and not tried and finally determined, ended and completed, shall appertain and be transferred to the several Courts of General Sessions of the Peace of the respective Counties in which the said Cities are respectively situate, and the said Courts of General Sessions of the Peace shall have full jurisdiction and cognizance of all such indictments, proceedings and matters, and all such indictments, proceedings and matters shall be tried, proceeded with, conducted, done, performed and completed in and by the said last mentioned Courts, as if such indictments, proceedings, and matters had originated in or been pending therein.

15. In amendment of the three hundred and ninety-fourth section of the said last mentioned Act, respecting the Municipal Institutions of Upper Canada, it is hereby enacted that the Board of Police in every City shall consist of the Mayor, the Judge of the County Court of the County in which the City is situate, and the Police Magistrate, and if there be no Police Magistrate, the Council of the City shall appoint a person resident therein, to be a member of the Board of Police of such City.

16. After this Act shall take effect, the several powers, duties, matters and things which theretofore appertained to or were authorized, or required to be exercised, done or performed in or by the said Recorders' Courts respectively, are hereby transferred, and shall appertain to and be exercised, done and performed by the Courts of General Sessions of the Peace of the Counties in which the said Cities are respectively situate, and the several duties, powers, acts, matters and things theretofore authorized, or required to be exercised, done or performed by the said Recorders, shall thenceforth be exercised, done and performed by the Judges of the County Courts of said respective Counties.

TRIALS AND ASSESSMENTS.

17. All issues of fact and assessment of damages in the Superior Courts of common law relating to debt, covenant and contract, where the amount is liquidated or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the County where the *venue* is laid, if the plaintiff desire it, unless a Judge of such Superior Court shall otherwise order, and upon such terms as he may deem meet, in which case, an entry shall be made in the issue and subsequent proceedings in words, or to the effect of Form A in the schedule to this Act, in place of the *venire facias*; and in the roll the *postea* shall be entered in words, to the effect of Form B in said schedule.

(2.) All issues of fact and assessments of damages in actions in any County Court, may be tried and assessed, at the election of the plaintiff, at any sittings of Assize and *Nisi Prius* for the County in which the *venue* is laid, without any order for that purpose, in which case an entry shall be made in the issue and subsequent proceedings in words, or to the effect of the Form C in the said schedule, and in the roll the *postea* shall be entered in words, or to the effect of Form D. in said schedule.

(3.) In any of the said cases, the notice of trial or assessment shall state that the cause will be tried, or the damages assessed at such sittings according to the fact; and in cases in the Superior Courts where the trial or assessment is intended to be had in the County Court, the issue shall be delivered, and the notice of trial or assessment served, ten clear days before the sittings of such County Court; Provided always, that nothing herein contained shall prevent a Judge of the Court in which the action is brought, or after the record is entered for trial or assessment, the Judge before whom the trial or assessment is intended to be had, from entertaining applications to postpone such trials or assessments.

(4.) Subject to the provisions herein contained, the record shall be made up, and entered and tried as in other cases; and in any of the said cases judgment may be entered on the fifth day after verdict rendered or damages assessed, unless the Judge who tried the cause shall certify, on the record under his hand, that the case is one which, in his opinion, should stand to abide the result of a motion that may be made therein in term, or unless a Judge of one of the Superior Courts shall otherwise order: Provided always, that in any such case the Judge may certify for immediate execution.

(5.) Any motion to be made in respect to any verdict or assessment of damages in any County Court, tried or assessed at any sittings of Assize and *Nisi prius*, shall be made, heard and determined in the Superior Court of Law at Toronto, which the party moving or applying shall elect, and according to the practice of that Court; and any rule or order made in such cause by such Court shall be valid and binding.

(6.) The Clerks of the several County Courts shall provide books in which the Judges sit-

ting in the Courts of Assize and *Nisi prius*, where cases brought in any County Court shall be tried or assessed under this Act, may enter their notes of such trials and assessments; which books, immediately after such trials or assessments, shall be returned to and remain in, the offices of such Clerks.

(7.) On the application of any of the parties, the County Court Clerks shall, at the cost of such party, forward to the Clerk of the Crown and Pleas at Toronto of such of the Superior Courts as such party shall designate, a certified copy of the Judge's notes of the trial or assessment of any such cases, together with the record and exhibits, to enable such Superior Court properly to dispose of any application made, or to be made in or respecting such cases.

(8.) The costs on all such proceedings in the said several Courts, shall be the usual cost of such cases in the Court in which the action is brought.

18. In amendment of the second section of of chapter thirty-one of the Consolidated Statutes of Upper Canada, entitled *An Act respecting Jurors and Juries*, it is enacted.—

(1.) That all issues of fact in any civil action when brought in either of the Superior Courts of Common Law, or in any of the County Courts in Ontario, and every assessment or enquiry of damages in every such action, may, and in the absence of such notice as in the next sub-section mentioned, shall be heard, tried and assessed by a Judge of the said Courts, without the intervention of a Jury;

(2.) Provided that if any one or more of the parties requires such issue to be tried or damages to be assessed or enquired of by a Jury, he shall give notice to the Court in which such action is pending, and to the opposite party, a notice in writing to the effect following, that is to say:—

"The Plaintiff" (or *one or more of them*) or *the Defendant* or *one or more of them as the case may be*), requires that the issues in this cause be tried, (or the damages assessed) by a Jury, and a copy of such notice shall be attached to the record." (*Sic.*)

(3.) That the verdict or finding of the Judge by whom any such issue shall be tried or damages assessed, shall have the like effect, as the verdict or finding of a jury, and the like fees and charges shall be payable in respect of the same: Provided that the parties shall be entitled to move against such verdict or finding by motion for non-suit, new trial or otherwise, within the same time, and on the same grounds (including objections against the sufficiency or the erroneous view taken of the evidence) as allowed in cases of trial or assessment by a jury.

(4.) That whenever any one or more of the parties to any such action shall have given such notice, requiring a jury as hereinbefore provided, the cause shall be carried down to trial in the same manner and with the like effect as if this section had not been passed; Provided always, that it shall be competent for the parties present at the trial to consent that the said notice shall be waived, and the case tried or damages assessed by the Judge, and to endorse a memorandum of such consent upon the record, and thereupon the said Judge shall proceed to the trial of the issues or assessment of the damages without the intervention of a jury.

(5.) Provided always, that it shall be competent for the Judge in his discretion to direct, that notwithstanding anything hereinbefore contained, any such action shall be tried or the damages assessed by a jury.

19. Sections ten, one hundred and thirty-two, one hundred and thirty-three, one hundred and thirty-four, one hundred and thirty-five, one hundred and thirty-six, and one hundred and thirty-seven of the said Act, entitled *An Act respecting Jurors and Juries*, are hereby repealed.

20. Section fifty-one of the said Act as amended by the Act passed in the twenty-sixth year of Her Majesty's Reign, chapter forty-four, entitled "An Act to amend the Consolidated Act of Upper Canada intituled An Act respecting Jurors and Juries," is hereby further amended by inserting next after the words "Deputy Sheriff of the County" in the fifth section of said last mentioned Act, the words "and the Junior Judge of the County Court, and the Mayor of any City situate in such county."

21. The words "The Governor" in section fifty-eight of the said Act, shall be held to mean "The Lieutenant-Governor of this Province," and the words "The Official *Gazette* of the Province" and "The *Gazette*" in the said section, shall be held to mean "The Ontario *Gazette*."

CITY OF TORONTO RE-UNITED TO THE COUNTY OF YORK.

22. Sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen of the Act of the Parliament of the late Province of Canada, passed in the twenty-fourth year of Her Majesty's reign, chapter fifty-three, entitled "An Act to provide for the separation of the City of Toronto from the United Counties of York and Peel for certain judicial purposes," and also the Act passed in the twenty-fifth year of Her Majesty's reign, chapter twenty-four, entitled "An Act to explain the Act to provide for the separation of the City of Toronto from the United Counties of York and Peel," are hereby repealed from the time this Act shall take effect; and the City of Toronto shall thenceforth, for judicial purposes, be re-united to, and be part of County of York.

2. All recognizances conditioned that any person, whether as witness, prosecutor, defendant or otherwise, shall appear at any Recorder's Court of any City, to be held next after the time this Act shall take effect, shall be obligatory to compel the appearance of such

party at the Court of General Sessions of the Peace of the County in which the City is situate, to be held next after this Act shall take effect, and the conditions of all such recognizances shall be construed as if so expressed; and all recognizances conditioned that any person, whether as witness, prosecutor, defendant or otherwise, shall appear at any sitting of the Court of Oyer and Terminer or General Gaol Delivery for the County of the City of Toronto, to be held next after this Act shall take effect, shall be obligatory to compel the appearance of such party at the sitting of the Courts of Oyer and Terminer and General Gaol Delivery for the County of York, which shall be held next after the passing of this Act, and the condition of all such recognizances shall be construed as if so expressed.

23. Nothing herein contained shall render invalid any indictment, information, action, or proceedings heretofore prosecuted, had, taken or pending in any sitting of the Courts of Assize and *Nisi Prius*, Oyer and Terminer, or General Gaol Delivey for the County of the City of Toronto; but all such indictments, informations, actions and proceedings shall be transferred to, and may be continued, prosecuted and proceeded with in the Courts of Assize and *Nisi Prius*, Oyer and Terminer and General Gaol Delivery for the County of York.

24. Nothing in this Act contained shall alter or affect the existing arrangements between the City of Toronto and the County of York respecting the use of the Gaol.

25. All enactments inconsistent with any of the provisions of this Act are hereby repealed, but no Act previously repealed shall be thereby revived.

26. This Act shall take effect from and after the first day of February next.

Form A.

And the plaintiff, in order to expedite proceedings in this case, having elected to try the issues (or *assess the damages* or *as well to try the issues as to assess the damages, as the case may be*) at the sittings of the County Court of the County of ———, to be held at———, in the said County, on the —— day of ——, 18—, the said issues will be tried (or *the said damages will be assessed*, or *both as the case may be*) at the said sittings accordingly.

Form B.

And the Jury (or *Judge*) at the said County Court found that (*stating the finding on the issues*, or *as the case may be*) and the Jury (or *Judge*) at the said County Court assessed the damages of the plaintiff at ——— over and above his costs; therefore, it is considered, *&c*, (*as the case requires*).

Form C.

And the plaintiff, in order to expedite proceedings in this case, having elected to try the issues (or *assess the damages* or *both as the case may be*) at the sittings of Assize and *Nisi Prius*, to be holden at ———, in and for the County of ———, on the —— day of ———, 18—, the said issues will be tried (or *the said damages will be assessed*, or *both as the case may be*) at the said sittings accordingly.

Form D.

And the Jury (or *Judge*) at the said sittings of Assize and *Nisi Prius* found that (*stating the finding on the issues* or *as the case may be*) and the Jury (or *Judge*) at the said sittings of Assize and *Nisi Prius* assessed the damages of the plaintiff at ——— over and above his costs; therefore, &c., (*as the case requires*).

AN ACT

To alter the Law of Dower and to regulate proceedings in actions for the recovery of Dower in Upper Canada.

[Assented to 19th December, 1868.]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The twenty-eighth chapter of the Consolidated Statutes of Upper Canada, intituled: *An Act respecting the procedure in actions of Dower* and the Act passed in the twenty-fourth year of Her Majesty's Reign, intituled: *An Act for the better assignment of Dower in Upper Canada*, are repealed upon, from and after the day this Act shall come into force.

2. All actions of right of dower or of dower *unde nihil habet* shall be brought and carried on according to the provisions of this Act.

3. Dower shall not be recoverable out of any separate and distinct lot, tract or parcel of land, which, at the time of the alienation by the husband or at the time of his death, if he died seized thereof, was in a state of nature, and unimproved by clearing, fencing or otherwise for the purpose of cultivation or occupation; but this shall not restrict or diminish the right to have woodland assigned to the demandant under the thirty-first section of this Act, from which it shall be lawful for her to take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her of the same lot, tract or parcel.

4. Every action for dower shall be commenced by writ of summons, which shall be addressed to the person in actual possession of the land out of which dower is claimed, and to every other person who is tenant of the freehold of the same land, and in every such writ, and in every copy thereof, the place and county of the residence and abode of each party defendant shall be mentioned, and the land or property out of which dower is claimed shall be described by the number of the lot or otherwise, with reasonable certainty, and such writ shall be tested as in personal actions, and may be according to the form following:

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To ——— of ——— [*naming each defendant and the place and county of the residence and abode of each defendant.*]

We command you (*and each and every of you*) that you render to ——— who was the wife of ——— now deceased, her reasonable dower which falleth to her of the freehold which was of the said ———her late husband, of and in (*describe the land and property by the number of the lot, or the part of the lot, concession, name of the Township, City, Town or place, or with such other reasonable certainty as will shew out of what land and property dower is claimed,*) and whereof she complains that you deforce her, or that you appear within sixteen days either to disclaim any right or estate of freehold in the said land and property, or to defend yourself against her claim.

Witness, &c.

5. Every such writ shall bear date on the day on which it is issued, and shall be issued out of the proper office, in the county wherein the lands lie, and shall be in force for six months, and shall be returnable on the sixteenth day after service thereof, and shall be indorsed with the name and place of abode of the Attorney suing out the same, or (if no Attorney) the name and residence of the demandant shall be indorsed thereon in like manner, as the indorsements on writs of summons in personal actions; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the Attorney whose name appears indorsed thereon, and who the demandant is, and her abode, and as to the staying proceedings upon writs issued without authority as in personal actions.

6. On every such writ and on each copy thereof shall be indorsed a notice addressed to the defendants, which may be to the effect following:—"You are served with this writ to the intent that you may enter an appearance and denial that you are tenant of the freehold of the lands mentioned in the writ, or that you may enter only an appearance; and take notice that unless within sixteen days of the service hereof, you enter an appearance with or without such denial, the demandant will have a right to sign judgment to recover as against you the dower claimed with costs of suit."

7. In case the demandant claims damages for detention of her dower, such notice shall contain a further statement that the demandant claims damages for the detention of her dower from some day to be stated in the notice.

8. Any defendant named in the writ may appear within the time appointed, and with the appearance may file a notice addressed to the demandant setting out that he denies that he is tenant of the freehold of the lands mentioned in the writ, which denial shall as against that individual defendant be taken to admit the claim of the demandant to dower as stated in the writ.

9. Any defendant named in the writ may appear within the time appointed, and by filing an appearance without such denial, shall be taken to admit that he is tenant of the freehold, and shall not afterwards be allowed to deny the same.

10. Every tenant in possession, who is not also tenant of the freehold and who is served with a writ under this Act, shall forthwith give notice thereof to his landlord or other person under whom he entered into possession, under the penalty of forfeiting the value of three years' improved rent of the premises in the possession of such tenant, to the person under whom he entered in possession, to be recovered by action of debt to be brought in either of the Superior Courts of Common Law in Ontario.

11. The landlord or other person under whom such tenant, as is mentioned in the next preceding section, holds or entered into possession, may, if he has not been served with the writ of dower, apply to the Court or a Judge upon affidavit, that he is tenant of the freehold, and is advised and believes that there is good ground for disputing the demandant's claim to dower, and the Court or Judge may, after summons to or rule upon the demandant, order that such applicant be substituted as defendant in the action, in lieu of the tenant in possession, upon such conditions as shall to the Court or Judge appear just.

12. If no person be in actual occupation of the lands of which the demandant claims dower, the writ shall nevertheless be served on the tenant of the freehold, who shall be named therein.

13. The writ of summons may be served in Ontario, and the service shall be personal whenever that is practicable, but the demandant may, on affidavit, apply from time to time, either to the Court out of which the writ issued or to a Judge of either Court in Chambers, and if it appear to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of defendant, or that he wilfully evaded service of the same, and has not appeared thereto, such Court or Judge may, by rule or order, grant leave to the demandant to proceed as if personal service had been effected, subject however to such conditions as to the Court or Judge seem fit.

14. In all cases where the tenant of the freehold resides out of Ontario, the demandant may issue a writ of summons in the form above set forth by giving a sufficient number of days, not less in any case than twenty one, for the defendant to appear, according to the distance of the place of the defendant's residence, and having due regard to the means of and reasonable time for postal or other communication; which writ of summons shall bear the same

indorsement and notice or notices as the writ of summons hereinbefore set forth, making such changes as the nature of the case renders indispensable.

15. Upon the Court or Judge being satisfied that such writ has been personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof on the defendant so resident out of Ontario, and that it came to his knowledge, and that he has not appeared, such Court or Judge may from time to time, direct that the demandant may proceed in the action in like manner as if the defendant had been served under this Act in Ontario, subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed to the defendant to appear being reasonable, and to the other circumstances of the case.

16. Any defendant named in the writ may, within the time appointed, file an appearance and acknowledgment that he is tenant of the freehold of the land named in the writ, together with his consent that the demandant may have judgment for her dower therein, and may take the proceedings authorised by this Act to have the same assigned to her, unless the parties shall otherwise agree, and he shall forthwith serve the demandant or her attorney with a copy of such appearance, acknowledgment and consent, together with an affidavit of the day of the entering and filing the same in the proper office, and in every such case when the defendant so admits the right to recover, the demandant may enter judgment of seizin forthwith, and may obtain a writ of assignment of dower in manner hereinafter specified, but she shall not be entitled to tax or recover the costs of suit or entering such judgment against the defendant.

17. In case an appearance be entered with a denial by the defendant that he is tenant of the freehold, the demandant may at once and without further pleadings take issue on that denial and make up an issue book, setting out the writ, the appearance and denial and the issue thereon, and may give notice of trial and proceed to trial as in personal actions, and if she obtains a verdict she shall be entitled to costs and to enter judgment of seizin of her dower, as against such defendant.

18. In case only an appearance be entered, the demandant may at once declare, and when damages are claimed in the writ, they may also be claimed in the declaration which may be to the effect following:

(*The Rule of the Court.*)

In the County of ——— to wit:

The —— day of ——, 18—.

A. B. widow, (*as the case may be*) who was wife of C. B. deceased by———her attorney, demands against (*the defendant*) the third part of (*the land and premises as described in the writ*) with the apurtenances in the (*township, &c.,*) of———in the said county of——— as the dower of the said A. B. of the endowment of C. B., deceased, heretofore her husband, whereof she had nothing (*and if damages are claimed*) and she also claims damages for the detention from her of her endowment in the said lands from the———day of——— 18——and she claims $———.

19. The several enactments in the Common Law Procedure Act relative to pleas, demurrers, replications and subsequent pleadings, and the periods appointed within which the same must be pleaded, and in which notice of trial must be given and countermanded, and as to amending pleadings, and as to practice not herein provided for, and making all or any other amendments, and as to the authority of the Court or of a Judge in such matters, and also the rules of Court, from time to time in force relative to pleading and practice, shall, so far as they can be made applicable, and are not at variance with this Act, be in force and apply to and regulate the course and practice of pleading and procedure in actions of dower.

20. Special cases may be stated by leave of the Court or a Judge in like manner as in other actions.

21. In estimating damages for the detention of dower or the yearly value of the lands, for the purpose of fixing a yearly sum of money in lieu of an assignment of dower by metes and bounds, the value of permanent improvements made after the alienation of the lands by the husband, or after the death of the husband, shall not be taken into account; but such damages or yearly value shall be estimated upon the state of the property at the time of such alienation or death, allowing for the general rise, if any, in the price and value of land in the particular locality.

22. No action of dower shall be brought but within twenty years from the death of the husband of the demandant.

23. No such action shall be hereafter maintained, in case the demandant has joined in a deed to convey the land or to release her dower therein to a purchaser for value, although the acknowledgment required by law at the time may not have been made or taken, or though any informality may have occurred or happened in the making, taking or certifying such acknowledgment.

24. All actions of dower which shall be pending at the time this Act shall come into force, may be continued and carried on to judgment in like manner as if this Act had not been passed.

25. Unless where it is in this Act expressly declared to the contrary, costs shall be taxed and allowed to, and be recoverable by either party in an action of dower, in like manner as in personal actions, and writs of execution to levy the same with damages, where damages have been adjudged, may be sued out and executed as in in personal actions.

26. After judgment has been rendered in the demandant's favour to recover dower, whether with or without costs or damages,

she shall be entitled to sue out a writ of assignment of dower, founded upon such judgment, directed to the sheriff of the County in which the lands lie, in which writ shall be set forth the lands out of which the demandant has recovered judgment to recover her dower.

27. The sheriff, on receipt of such writ, shall by writing under his seal of office, appoint two resident freeholders of his county who are rated on the assessment roll for real estate of a value not less than two thousand dollars each, and a licensed deputy provincial surveyor, and each of whom would in other respects be eligible to serve as a juror between the parties named in the said writ, to be Commissioners to admeasure the dower, and the sheriff shall in such writing set out a copy of the writ of assignment, and shall name therein a day on or before which the Commissioners shall make and return to him a report of their proceedings and determination in the execution of the duty assigned to them.

28. In case of the death of, or refusal by any or all of the Commissioners so appointed, the sheriff shall, from time to time, in like manner appoint another or others to perform the duty of such as die or refuse.

29. Every Commisssoner so appointed shall, before entering upon the execution of his duty, take and subscribe an affidavit in the form or to the effect following, which oath any person duly authorized and appointed to take affidavits in the Superior Courts of Common Law, is hereby empowered to administer, and the said Commissioners shall annex to their report the affidavits sworn by them, and return them to the sheriff.

"I ———, do swear that I am not of kin "to the demandant (*naming her*) nor to the "defendants (*naming him or them*) nor in any "way interested in the lands out of which the "assignment of dower is to be made by me, "and that I will honestly, impartially, and to "the best of my skill and ability, execute and "perform the duties imposed upon me by the "appointment of ——— Esquire, Sheriff of "the county of ——— as a Commissioner for "the admeasurement of dower between the "said demandant and the said defendants ac- "cording to law."

30. After taking and subscribing such affidavit, the Commissioners and each of them shall, for all purposes in the fulfillment of the duties by law required of them, be considered as officers of the Court out of which the writ of assignment issued, and shall be entitled to the same immunities and protection and be subject to the same liabilities and proceeding as a Sheriff in the discharge of his duty.

31. It shall be the duty of the Commissioners—

(1.) To admeasure, designate and lay off without delay, by sufficient marks, descriptions, boundaries or monuments, one-third of the lands and premises mentioned in the writ of assignment, according to the nature of the land, whether meadow, arable, pasture or woodland, being a part of the lot or parcel of land and premises mentioned in the writ, and having always due regard to the nature and character of the buildings and erections on such lands and premises.

(2.) To ascertain and determine what permanent improvements have been made upon such lands and premises since the death of the demandant's husband, or since the time her said husband alienated the same to a purchaser for value, and if it can be done, they shall award the dower out of such part of the lands as do not embrace or contain such permanent improvements, but if that cannot be done, they shall deduct either in quantity or value from the portion to be by them allotted or assigned to the demandant in proportion to the benefit she may or will derive from the assignment to her as part of her dower of any part of such permanent improvements;

(3.) If, from peculiar circumstances, such as there being a mill or mills or manufactory upon the land, the Commissioners cannot make a fair and just assignment of dower by metes and bounds, they shall assess a yearly sum of money being as near as may be one-third of the clear yearly rents of the premises after deducting any rates or assessments payable thereon, and in assessing such yearly sum they shall make allowances and deductions for permanent improvements, as above provided for, and in their report to the Sheriff, they shall state the amount of such yearly sum and set forth all the evidence taken by them in relation to the same, such evidence to be reduced to writing and taken upon oath (which any one of the Commissioners is hereby authorized to administer), and to be subscribed by the witness examined;

(4.) Such yearly sum shall be a lien upon the lands mentioned in the writ of assignment, unless the Commissioners specially direct otherwise and make the same issuable and payable out of some specific portion of such lands, and the same shall be recoverable by distress as for rent or by action of debt against the tenant of the freehold for the time being;

(5.) The report of the Commissioners shall be in writing, subscribed by them and directed to the Sheriff and shall contain a full statement of their proceedings, and, where the dower is assigned by metes and bounds, shall distinctly point out and describe the same and the posts, stones or other monuments designating the boundaries, and, for the purpose of planting and marking such posts, stones or monuments, they may, if necessary, employ chain-bearers and labourers.

32. The Sheriff may in his discretion upon the request of the Commissioners, enlarge the time for making their report, for not more than ten days, and he shall, within twenty-four hours after the receipt thereof, endorse thereon the day and hour of such receipt, and he shall then forthwith return the writ of admeasurement of dower, together with the report and all papers annexed thereto, to the

office wherein the suit was commenced and carried on, and the Deputy Clerk of the Crown, into whose office such writ and other papers have been returned, shall, on the application of either party, transmit the same to the proper principal office in Toronto, in like manner, and on the same conditions as he is required to transmit any record of *Nisi Prius* and subject to the same liabilities, in case of his default.

33. Either party may, after the expiration of ten days from the filing of the Sheriff's return to the writ of assignment, provided such ten days have elapsed before the first day of the term next after such filing, and if not, then within the first four days of the succeeding term, apply for, and the Court may grant a rule calling on the opposite party to shew cause why the Commissioners' report should* be set aside upon grounds apparent on the report and papers filed therewith, and upon such other grounds as the Court may see fit, the same being supported by affidavit, and every such ground being set forth in the rule; and the Court, after hearing the parties may order the report to be varied or amended, if in their judgment they have sufficient matter before them to amend by, or may annul and set aside the report, and may appoint three new Commissioners or direct that the sheriff shall do so, and such new Commissioners shall have the same powers and execute the same duties and be subject to the same conditions and responsibilities as are in that behalf hereinbefore expressed, and the report of such new Commissioners shall be treated as if no other report had been previously made and shall be dealt with and proceeded upon accordingly.

34. If the report is moved against upon the ground of any misconduct or fraud on the part of the Commissioners, the Court may, in its discretion, make them parties to the rule, and if wilful misconduct or fraud be established in the opinion of the Court, the report may be set aside and the Commissioners be adjudged to pay the parties injured all the costs which have been incurred and have been rendered useless by such misconduct or fraud, and all the costs of the rule to set aside the report, and such payment may be enforced by the like process and proceedings as are or may be in use to compel a sheriff to pay costs of any rule or summary proceeding against him.

35. The rule to set aside the report may be discharged with or without costs, and the Court may order the party at whose instance, or on whose complaint or representation, the Commissioners may have been parties to the rule, to pay such Commissioners their costs of answering the same, and if the rule be discharged, or if the report be not moved against within the proper time, or if the court refuse to grant a rule to shew cause, the report shall thenceforth be final and conclusive on all parties to the dower action, and a copy of such report, certified by the clerk of the Crown, under the seal of the Court, shall be registered in the Registry office of the county or place where the lands lie, for which service the Registrar shall be entitled to receive one dollar.

36. After such registration the demandant shall be entitled to sue out a writ directed to the proper sheriff, commanding him to put her into possession of the lands and premises assigned and admeasured to her for her dower, and to levy all such costs as by the judgment and any rule of Court, or either, shall have been awarded to her against the tenant.

37. In case judgment shall have been given against the demandant and costs be awarded to be paid by her to the defendant by such judgment, or by any rule of Court, such defendant may issue a writ of *fieri facias* to recover the same.

38. In case it is desired by either party to produce any witnesses before the Commissioners, such party may, on application to the Court out of which the writ of assignment issued, or to any Judge of either of the Superior Courts of Common Law, on affidavit that the evidence of any such witness is necessary, obtain an order commanding the attendance of any such witness before the said Commissioners, and, if in addition to the service of such order, an appointment of time and place of attendance in obedience thereto, signed by one of the Commissioners, be served on the person whose evidence is required, either with or after the service of the order, non-attendance shall be deemed a contempt of Court, and shall be punishable accordingly, but the person required to attend shall be entitled to be paid the same fees, allowance and conduct money as if he had been subpœnaed as a witness in an ordinary suit, and no witness shall be obliged to attend more than two consecutive days.

39. The Commissioners shall be entitled to receive from the demandant the sum of four dollars for each day's attendance, not, however, to exceed two, and may also charge at the rate of twenty cents for every hundred words for drawing up their report, and ten cents for every hundred words of each copy furnished by them to either party.

40. The demandant shall pay the cost of suing out, and the cost of the Commissioners in executing the writ of assignment of dower and making the report thereof, but each party shall pay his own costs of witnesses, or of attorney or counsel attending before the said Commissioners.

41. The demandant and the tenant of the freehold may, by any instrument under their respective hands and seals, executed in the presence of two credible witnesses, agree upon the assignment of dower, or upon a yearly sum, or a gross sum to be paid in lieu and satisfaction of dower, and a duplicate of such instrument proved by the oath of one of the subscribing witnesses, which oath any Commissioner duly appointed for taking affidavits may administer, shall be registered in the

* *Quære*—"Not" omitted.—Eds. L. J.

Registry office of the county where the lands lie, and shall entitle the demandant to hold the land so assigned to her, against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for, or to sue for, and recover in any Court having jurisdiction to the amount, the annual or other sum agreed to be paid to her by such tenant of the freehold, and such instrument so registered shall be a lien upon the land for such yearly or other sum, and shall be a bar to any other action, suit or proceeding by the demandant for dower in the lands mentioned therein.

42. The several clauses of this Act, numbered from twenty-six to forty, both inclusive, shall not apply to or affect cases in which the right to dower became consummate by the death of the husband, before the eighteenth day of May, which was in the year of our Lord one thousand eight hundred and sixty-one.

43. In all cases not otherwise provided for by this Act, the pleadings and proceedings shall be regulated by the law as it was in force in Upper Canada, relative to suits and actions of dower, before the tenth day of August, which was in the year of our Lord one thousand eight hundred and fifty.

44. This Act may be cited as *The Dower Act of Ontario*, shall take effect upon, and from and after the first day of February next.

AN ACT

To amend the Law as to Wills.

[Assented to 19th December, 1868.]

Whereas it is expedient to amend the law as to Wills, Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Every Will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the Will.

2. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised (except an act by which the Will is revoked) shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall nave power to dispose of at the time of his death.

3. Every will shall be revoked by the marriage of the testator, except a Will made in exercise of a power of appointment when the real or personal estate thereby appointed would in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the statute of distributions.

4. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

5. No Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another Will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is by law required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some one in his presence and by his direction, with the intention of revoking the same.

6. This Act shall not apply to the Will of any person who is dead before the first day of January, one thousand eight hundred and sixty-nine.

AN ACT

To amend the Registry Act, and to further provide as to the Certificates of Married Women, touching their consent as to the execution of Deeds of Conveyance.

[Assented to 19th December, 1868.]

Whereas it is desirable to amend the Registry Law of Ontario, so far as to give certainty to the right of married women jointly with their husbands to execute certificates of discharge of mortgage: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. From and after the passing of this Act, when any registered mortgage of lands wherein a married woman may happen to be a mortgagee therein, or whereof the assignee is a married woman, shall have been satisfied, the Registrar, on receiving a certificate, executed jointly by such married woman and her husband, in the form prescribed by the Registry Act of Ontario, shall register such certificate in the same manner provided by said Act for registering certificates of discharge of mortgage, and such certificate shall be deemed a discharge of such mortgage to the same effect as any other certificates registered under the said Act; and it shall not be necessary to produce any certificate of such married woman having been examined before any Judge or Justice of the Peace touching her consent therein in anywise, nor shall such examination be necessary.

2. In case more than one married woman executes the same deed of conveyance mentioned and referred to in the second section of chapter eighty-five of the Consolidated Statutes of Upper Canada, the Judge or Justices of the Peace therein mentioned, may include the examination and names of all or any number of such married women in one certificate in the form mentioned and set out in said section as far as applicable.

SELECTIONS.

A MINISTRY OF JUSTICE.

In addressing the electors of the Elgin District of Burghs last week, Mr. Grant Duff handled the subject of law reform. There were, he said, many signs that in Scotland, as in England, great changes in the law were needed. The most necessary changes, in his opinion, were the substitution of a code for our voluminous law libraries; an improved system of legal education to rear lawyers fit to reason from principles rather than decisions; and an assimilation of the English and Scotch systems of law, "so as to permit of their being fused together." "This consummation," said Mr. Grant Duff, "*we* shall not see, but there is a change in our arrangements which I hope we may see—the creation of a Minister of Law and Justice in England and Scotland." The suggestion that we should have a government department for law and justice is not new; but little has been heard of it of late, and it may be worth while briefly to consider whether it is a suggestion that ought to be seriously entertained.

It might be too much to say that there was a presumption in favour of such a department derivable from the experience of other States. The British government system is "so much better than any other" that, instead of seeing ground for such a presumption in the fact that other States have a department of Law and Justice, many might regard our being without one, a fundamental point of superiority in our system over the others. Let us note, however, at what it is worth the singularity of our position in regard to this matter. If any one will take the trouble to look into that useful work, the "Statesman's Year Book," he will see that there is no State of any pretension, except our own and the United States of America, without a Ministry of Justice charged with the supervision of the judicial system and the continuous improvement of the law on consistent and homogenous principles. A catalogue is rarely interesting, but it is frequently most useful, and the reader may glance as quickly as he likes over the following list of States having Ministers of Justice:—Belgium, Denmark, France, Prussia, Italy, the Papal States, the Netherlands, Portugal, Russia, Spain, Sweden, Norway, Saxony, Bavaria, Wurtemburgh, and Baden. Turkey, Brazil, Chill, and Peru have each of them a Minister of Justice; and a department of Justice is comprised in the governmental departments of Canada and British North America. We of the United Kingdom and our congeners of the United States are singular, as we said, in having no department of State corresponding to the Administration of Justice. Looking to this and considering that in the principal, at least, of the States from which we differ in this respect the law is in a condition so far superior to our own that it is codified, while ours is of unmanageable mass and of infinite intricacy, it seems not too much to say that there is a suggestion, if not a presumption, that had we had a Department of Justice we should have benefited by it.

If the proposal to establish a Ministry of Justice be considered on its merits, it is difficult to see what reasons can be urged against it. Our commerce and manufactures, our pauperism, and even our Post Office, are represented in the Cabinet by special Ministers. The President of the Council is, in a sense, our Minister of Education. Why should we not have a Minister of Law and Justice, the administration of justice being a chief (Mr. Herbert Spencer would persuade us that it is the *sole*) duty of the Government? It may be said, no doubt, that the duties of a Minister of Justice are divided between the Home Secretary and the Attorneys-General in England and Ireland, and the Lord-Advocate in Scotland. But how are they discharged? It is long since we have had a Home Secretary to whom any one would think of assigning the office of Minister of Justice if it existed. On the other hand, the duties proper to a Minister of the Interior might be supposed sufficient in this, as in other countries, for a single person. The Attorney-General and the Lord-Advocate, again, are overworked officials; and, however competent they may be to discharge in their respective divisions of the kingdom the duties of a Minister of Justice, they are rarely free to perform them. "Nothing is more disheartening," said Mr- Grant Duff on this point, "than to see the way in which law reforms, which are acknowledged by all reasonable persons to be necessary, hang fire, because no one except a great lawyer and member of the Government can deal with them, and the official gentleman who answer to this description are so overwhelmed with the mass of private practice that they can only rarely and fitfully give an undivided attention to public affairs. We have often had examples of this in Scotland; but in England it is far worse. The small amount of law reform that the country gets out of its highly paid Attorney-General is only more remarkable than the almost incredible sums which he hives up out of his private practice as a foundation for the peerage to which he usually looks forward as the reward of his toils." Thus the facts are that the Home Secretary, cannot, and the chief law officers of the Crown are rarely free to discharge the duties of a Minister of Justice. These duties are left to the intermittent and desultory efforts of individuals and voluntary associations. The result, of course, is that they are frequently long neglected and rarely well formed. The judicial system is without regular supervision, and receives attention only when its condition evokes popular clamour. The process of improving the general laws of the country goes on at haphazard and very slowly in the intervals of party strifes. There are blots in the law that were pointed

out in the time of Lord Bacon. We have made little progress in the art of *publishing* law. We have no code and no hope of soon getting one; and even as regards consolidation, we have scarcely passed the point reached in France in the time of Charles VII. Is it possible to disconnect the state of backwardness and the fact that we have never had a special organization for securing progress?

Of course the absence of the organization and the state of the law also may be referred to the genius of our people. Things would have been different had the people felt the want of the former much, or been properly impressed with the intolerableness of the latter. The popular temper in regard to changes in the law may be inferred from the system of rules which Lord Macaulay correctly represented the Legislature to have followed from the age of John to the age of Victoria:—"To think nothing of symmetry and much of convenience; never to remove an anomaly because it is an anomaly; never to innovate except where some grievance is felt; never to innovate except so far as to get rid of the grievance; never to lay down any proposition of wider extent than the particular case for which it is necessary to provide." These rules breathed the spirit of a cautious conservatism. That, at any rate as regards the law, the consequences of these principles having so long been observed are deplorable every one knows who is acquainted with the subject. It is not likely, however, that these rules will be much attended to in future, the disposition to depart from them having yearly of late been acquiring strength under pressure of the inconveniences they have entailed upon us. But if henceforth we are to study symmetry in the law and consistency of principle in its parts, and if we are to give up the system of patching, mending, and bit-by-bit legislation, will not a Minister of Law and Justice become an indispensable auxiliary in the new course? Mr. Grant Duff may be over sanguine in saying we shall have such a Minister soon, but we shall be surprised if there be not soon an effort made to procure one.—*Pall Mall Gazette.*

NEED A DISTRESS WARRANT GIVEN BY A CORPORATION AGGREGATE BE UNDER THE CORPORATE SEAL?

In the case of *Strong* v. *Elliot*, which has recently been decided by Mr. Serjeant Petersdorff in the Exeter County Court, and which we report in another column, the question was raised whether a distress warrant given by a corporation aggregate need be under the corporate seal. The decision of the learned serjeant turned upon another point, but he expressed a very decided opinion on the question to which we have alluded. The matter is one of considerable importance to all corporate bodies, and some doubt exists on the subject. It may, therefore, be well briefly to remind our readers of the present state of the law on the point.

As Serjeant Petersdorf remarked it has now become a common practice not to affix the corporation seal to distress-warrants. Nevertheless until the last few years it was generally understood in the profession that the formality could not safely be omitted, and many of the older practitioners still adhere to the practice. Strangely enough the text-books on the law of landlord and tenant give no information on the subject; even Woodfall preserves a discreet silence. On turning to the authorities we find them somewhat conflicting. Although it was formely held (see the Year-books, 4 Hen. VII. 6; 13 Hen. VII. 17; 13 Hen. VIII. 12) that a corporation could do no act whatever without deed, it was soon afterwards allowed that in all *ordinary* matters—such as *e. g.*, the appointment of a cook or butler—it might act without seal. The earliest case, however, directly bearing on the present point is that of *Horn* v. *Ivie*, 1 Vent. 57, 1 Sid. 441, 1 Mod. 18, decided in Michaelmas Term, 20 Car. 2. This was a very peculiar case. Charles II. had granted a patent to the Canary Company which conferred on it the exclusive right of trading to the Canaries, and provided that all other merchants who should bring goods from there should "forfeit such ships and goods" to the company. The plaintiff was alleged by Company to have traded to the Canaries in violation of the patent, and the defendant Ivie had, as the company's bailiff, seized a certain ship and sails belonging to the plaintiff. The defendant by his plea, justified the seizure under the patent but did not allege any authority under the corporate seal. On demurrer the Court of King's Bench held that the appointment of a bailiff by a corporation must be under the corporate seal, and that the plea was bad. Only a few years after this, however, we find the Court of Common Pleas deciding, in the case of *Manby* v. *Long*, 3 Lev. 107, that a bailiff who had seized cattle *damage feasant* need not allege, in his plea of justification, that his appointment was under the corporate seal. The cases of *Horn* v. *Ivie* and *Manby* v. *Long*, therefore, established that, as a general rule, the bailiff of a corporation must be appointed by writing under the corporate seal; but that a bailiff to distrain cattle *damage feasant* need not be so appointed. This rule is accordingly laid down in Viner's Abrig. Tit. *Corporation* (B.) 5; where however, it is added that if the corporation have a head an appointment under seal is not necessary. It should be noticed, however, that *Cary* v. *Mathews*, which we shall presently notice, is the only authority cited in support of the passage. In *The East London Waterworks Company* v. *Bailey*, 4 Bing. 489, the necessity for an appointment under seal is asserted by Best, C. J., in a considered judgment of the Court of Common Pleas. Moreover, in the last edition of Chitty on Contracts, the judgment in *The*

East London Waterworks Company v. *Bailey* is cited with approval as showing the existing law. Notwithstanding these authorities, however, we have no doubt that both *Horn* v. *Ivie* and the rule established by it are now overruled. In the first place, as was pointed out in *The Dean and chapter of Windsor's case*, 2 Wms. Saund. 305 a., and in *R.* v. *Bigg*, 3 P. Wms. 423, the service in *Horn* v. *Ivie* can hardly be said to have been an ordinary service, and indeed was not in truth a distress at all, but a seizure of forfeited goods. Moreover it is laid down in Bro. Abridg. *Traverse per sans ceo*, pl 3; and is still clear law, that a subsequent ratification by a landlord of a bailiff's authority is as effectual as a previous command, and it is hard to see why this rule should not apply in the case of corporations. Independently of this, too, there are several direct authorities on the other side. The first is a note in 1 Salkeld, 191, in the following words: "A corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler, for it neither vests nor divests any sort of interst in or out of the corporation: so held inter *Cary* v. *Mathews* in Cam. Scacc." This case, however, is also reported in 1 Shower, 61, and 3 Mod. 137, and from these reports it would appear that the real question there, as well as in one or two earlier cases, was whether a bailiff of a corporation, who was duly appointed for general purposes, could distrain without a special authority. Perhaps, therefore, neither *Cary* v. *Mathews*, nor the above cited passage in Viner's Aridg., which depends upon it, can be considered as of any authority on either side of the question. Far more weight, however, is due to a passage in Viner's Abridg. Tit. *Corporations* (K), 25 and 29, where it is said that "He who distrains as bailiff of a corporation, and is not bailiff, may make conusance, &c., if they agree to it, and good without deed; and the case was that one of the corporation had distrained in right of the corporation, and had not their deed." *Though the law is that a bailiff may justify in trespass*, as bailiff to a corporation without a deed, yet it is not like to a bailiff *in an assize*. *Doe* v. *Peirce*, 2 Camp. 96, though indirectly bearing on the present question, may be considered as shaking the authority of the old decisions, as it was there held that a verbal notice to quit given by a steward of a corporation was good, without showing his authority. The old rule, however, seems to have received its great blow from the Court of Queen's Bench, in *Smith* v. *The Birmingham Gas Company*, 1 A. & E. 526. After considering the authorities the Court there held unanimously that a bailiff need not be appointed by writing under the corporate seal. An attempt may indeed be made at some future day to place this case on the narrow basis of the company's Act, the 9th section of which would have quite supported the decision. It is clear, however, from their judgments, that the learned judges did not decide the case on any such narrow basis, but intended to lay down a broad general rule. Indeed they refused to recognise *Horn* v. *Ivie* as a general authority, and Lord Denman, C. J., said that it proceeded simply on the ground that the service of the bailiff was not an ordinary one.

On the whole the weight of authority seems very strongly in favour of the view that the corporate seal is not necessary; but at the same time, both corporations and bailiffs will do well to have the corporate seal affixed whenever circumstances will allow this to be done.—*Solicitors' Journal.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter to the Court.)*

Taylor v. Grand Trunk Railway Company.

Railway Co.—Service of writ of summons on Station Master.

The station master of a railway company, the head office of which is not within Ontario, is not an agent on whom service of a writ of summons against the company can properly be effected, under C. L. P. Act, sec. 17.

[Chambers, Oct. 13, 1868.]

Lauder obtained a summons calling on the plaintiff to show cause why the service of a writ of summons against the defendants, which had been effected on a station master of the company, should not be set aside as irregular, on the ground that the station master was not an agent of the company within the meaning of section 17 of the Common Law Procedure Act, which enacts that "every person who, within Upper Canada, transacts or carries on any of the business of or any business for any corporation whose chief place of business is without the limits of Upper Canada, shall for the purpose of being served with a writ of summons issued against such corporation, be deemed the agent thereof."

Osler showed cause, and contended that the words were so wide and general as necessarily to embrace the case of a station master or agent.

Morrison, J., held that the agent contemplated by the act was in his opinion a general agent, or superintendent, or some other officer of that description; and that the service of the writ on the station master was irregular.

Summons absolute, without costs.

Neill v. McLaughlin et al.

Action on administraton bond—Breaches—Staying proceedings.

On an application made to stay proceedings on an administration bond:

Held, 1. That no citation is necessary to compel the delivery of an account by an administrator, or to make it necessary for an administrator to collect and pay debts.

2. The want of a decree of distributions is an answer by way of plea to a breach for not distributing.

3. Full damages may be recovered on breach for not administering. *Quære*, if the breach should show receipt and misappropriation of funds; but if declaration defective in that respect, defendants should demur.

Stay of proceedings refused.

Dictum in Earl of Elgin v. Cross, 10 U. C. Q. B., 246, doubted and distinguished.

[Chambers, Oct. 19, 1868.]

This was an action by the assignee of an administration bond, on which the plaintiff declared, assigning for breaches, 1st, that the administrator, for whom defendants are sureties, did not well and truly administer; 2nd, that he did not make or cause to be made a just and true account of his administration; 3rd, that he did not deliver and pay over to the person or persons entitled, the rest, residue and remainder of the goods, chattels and credits which remained, and that a large sum of money remained in his hands unpaid and unaccounted for.

Boswell, for the defendants, moved to stay proceedings, on an affidavit that no decree of distribution had been obtained against the administrator, and that no citation had been issued out of the Surrogate Court, calling on the administrator to file an inventory or to administer.

He cited *Earl of Elgin* v. *Cross*, 10 U. C. Q. B. 97 & 256, and cases there referred to, also *Archbishop of Canterbury* v. *Tupper*, 8 B. & C. 151.

Draper, C. J.—*Archbishop of Canterbury* v. *Wells*, 1 Salk. 115, shows that no citation is necessary to compel the delivery of an account. Still less can it be necessary, in order to make it the duty of the administrator to administer, *i.e.*, to collect assets and pay debts. The condition of the bond is sufficient, and the duty attaches immediately on the taking out administration. The want of a decree is an answer to the breach for not distributing, though it would be a good plea to that breach, and a partial stay of proceedings cannot be granted.

On the breach for not administering full damages may be recovered, *Archbishop of Canterbury* v. *Robertson*, 1 Cromp. & M. 690. Perhaps the breach should show the receipt and misappropriation of funds, in order to the recovery of full damages; but if the breach as it stands be insufficiently assigned, that is rather ground of demurrer than of staying proceedings.

The dictum of Sir John B. Robinson, in *Earl of Elgin* v. *Cross*, 10 U C. Q. B. 246, was not necessary for the decision of that case. It is founded on the case of *The Archbishop of Canterbury* v. *House*, Cowp. 140, which does not apply to a breach similar to the first breach in this case, where it may be that the administrator has wasted the assets. I have not succeeded in finding any case in which the proceedings on the particular breach have been stayed on the grounds of the want of a decree for distribution, or of a citation for an inventory.

The summons was moved with costs; it mus be discharged with costs.

Summons discharged with costs.

The Queen v. Mullady and Donovan.

Application for bail by prisoners committed for murder—Delay in trial.

On an application by prisoners in custody on a charge of murder, under a coroner's warrant, to be admitted to bail, it is proper to consider the probability of their forfeiting their bail if they know themselves to be guilty.

Where in such case there is such a presumption of the guilt of the prisoners as to warrant a grand jury in finding a true bill, they should not be admitted to bail.

The fact of one assize having passed over since the committal of the prisoners, without their having been brought to trial, is in itself no ground for admitting them to bail.

The application is one to discretion, and not of right, the prisoners not having brought themselves within 31 Car. II. cap. 2, sec. 7.

[Chambers, Nov. 18, 1868.]

This was an application to admit the prisoners to bail. It was grounded upon two principal allegations: 1st, that the prisoners were committed on a charge of murder to the common gaol of the county of Huron, before the last assizes for the county of Huron, at which court no indictment was preferred against them; and, 2nd, that upon the depositions which were taken at the coroner's inquest, the case against the prisoners was one of circumstantial evidence only, and amounted to no more than a case of suspicion, which, however strong, would not justify the detention of the prisoners in gaol.

The prisoners were committed in June last, upon a coroner's warrant, founded on an inquest, by which it was declared that they were guilty of wilful murder.

Gwynne, Q. C., for the Crown, showed cause. The prisoners are not entitled to bail as of right, unless they bring themselves (which they do not) within 31 Car. II. cap. 2, sec. 7: *Anon.* 1 Vent. 346; *Lord Aylesbury's Case*, 1 Salk. 103; *Reg.* v. *Barronet*, 1 E. & B. 1, Dears. C. C. 51; *Barthelemy's Case*, 1 E. & B. 8, Dears., C. C. 62.

Nor are they entitled as a matterof discretion; 1st, because in such case they must bring the deposition before the Court, which they do not do, and must establish by the depositions that there was nothing to justify the verdict of the coroner's jury: *Rex* v. *Mills*, 4 N. & M. 6; 1 Ch. Crim. Law, 98. 2nd, because the Crown now brings those depositions, which establish sufficient to justify the conclusion arrived at by that jury. 3rd, because a sufficient explanation is given on affidavit, on the part of the Crown, that a due regard to the ends of justice demanded that the case should be postponed to the next court, for the purpose of obtaining evidence to supply certain missing links in the chain of circumstantial evidence, and to show why the case was not proceeded with at the late court.

The judge cannot try the case. If there be sufficient to justify the charge being made, so as to put the prisoners on their trial, that is a sufficient reason why bail should be refused. The lapse of an assize can make no difference, except in so far as it may enable the prisoners to take such steps as, under 31 Car. II., would entitle them of *right* to bail.

McMichael contra. 1st. We do not ask bail as a matter of right, but appeal to the discretion of the court: *Reg.* v. *McCormack*, 17 Ir. C. L. Rep. 411. 2nd. The Crown have allowed an assize to pass since the prosecution, and this entitles us to ask for bail: *Fitzpatrick's Case*, 1 Salk. 103; *Lord Aylesbury*, Ib.; *Lord Maughan's Case*, Ib.; *Reg.* v. *Wyndham*, 3 Vin. Ab. 515. 3. It does not appear from the depositions that it was a clear case of murder, and therefore a judge has discretion to bail: O'Brien, J., in *Reg.* v. *McCarthy*, 11 Ir. C. L. Rep. 210 & 226.

Draper, C. J.—The prisoners did not pray, on the first day of the assizes, under the Habeas Corpus Act, to be brought to trial, and the Crown was not therefore bound to indict them at that court,

and therefore they cannot claim to be discharged as of right. The present application is therefore one to discretion; and the fact that one assize has passed over without their being proceeded against, can have no other influence than to induce a somewhat closer examination of the evidence on which the prisoners were committed.

The offence charged involves the lives of the prisoners: and it is not too much to say, that if they are self-convicted of guilt, and have no hope but that the prosecutor may not be able to produce sufficient evidence to satisfy a jury, or that some fortuitous circumstance may save them, they will rather forfeit their bail than their lives. There is a peculiar atrocity attaching to one of the prisoners if he be guilty, which must extinguish any hope that capital punishment will not follow conviction. This consideration must have its proper weight in disposing of the present application.

The inquiry that is of principal importance, then, is, as to the sufficiency of the evidence to establish a case to go to the jury. I certainly am not called upon to express any opinion as to whether the evidence is such that, if believed, it ought to induce the jury to convict. It is going quite far enough to inquire if there be evidence which would sustain a conviction; and I am compelled to say that after going through the depositions, I think they contain a strong *primâ facie* case, though one which, if there be additional evidence, I think ought not to have been tried without it, or until proper efforts to procure it have been made and have failed.

I abstain advisedly from going into a particular consideration of the facts which I think bear against the prisoners. I will go no farther than to say that, as they stand, they afford a presumption of guilt, at least so strong that a grand jury would, in my opinion, find a true bill against the accused. Of the fact of murder having been committed, there can, I apprehend, be no doubt; and I go no farther than to say that there is in my judgment sufficient evidence to put them on their trial.

So far as regards the charge, and the evidence supporting it, I think the application should be refused. I have already observed on the probable result, if the prisoners, knowing themselves to be guilty, should be admitted to bail.

ENGLISH REPORTS.

CROWN CASES RESERVED.

Reg. v. Crab.

False pretences—Inducing persons applying for situations to deposit money as a guarantee for honesty—Pretence of carrying on business as a house agent.

The prisoner was convicted for obtaining money by falsely pretending that he carried on an extensive business as a surveyor and house agent, &c.; and the jury found that he carried on no business whatever. *Held*, that the conviction was right.

[C. C. R. 16 W. R., 732, May 16, 1868.]

Case reserved by the Assistant-Judge of the Middlesex Sessions:—

John Augustus Crab was tried before me on the 27th March, 1868, for having obtained various sums of money from several persons by false pretences, with intent to defraud.

The pretences relied upon were, that he was at the time he obtained the moneys, carrying on an extensive business as a surveyor and house agent, and that he had employment for several clerks to collect rents and assist in the conduct of the said business. By these pretences he induced individuals to deposit sums of money with him as a guarantee of their honesty, and it was proved that he was not carrying on an extensive, or *any* business as a surveyor or house agent, and that he had not any employment for several or any clerks to collect rents, or to assist in the conduct of any business whatever.

The prisoner's counsel declined to address the jury on the facts, and relied on the objection that the above pretences were not in point of law sufficient to sustain a criminal charge. The prisoner was found guilty, and sentence was deferred. He is now in the House of Correction in and for the county of Middlesex, awaiting the decision of this honourable Court upon the above objection.

The question I have to submit to this honourable Court is whether the pretences above set forth are or are not sufficient in point of law to sustain the charge upon which the prisoner was convicted.

[The case as above stated having been called on for argument upon the 25th April, was sent back to the learned judges for amendment, and was now returned by him amended as follows:—]

James Hawkins was induced by an advertisement in the *Times* to see the prisoner, who was found in the occupation of a room in Margaret-street, Cavendish-square, having the appearance of an agency office.

The prisoner said that he was the advertiser, and wanted several clerks to assist in carrying on his business as a surveyor and house agent, that his business was of great extent, and that as the clerks he wished to engage would be entrusted to collect rents to a large amount, he should require the sum of £25 to be deposited with him by each as a security for his honesty.

In consequence of these pretences James Hawkins was induced to hand £25 to the prisoner.

James Cirmichael was induced by the same pretences to give the prisoner £10, and several other witnesses proved that they were about to deposit money with the prisoner under similar circumstances, but that they were prevented doing so by the interference of the police.

It was proved to the satisfaction of the jury that the prisoner was not carrying on the business of a surveyor or house agent; that he had not employment in such trades for any clerks, and that the prisoner's office was open for the sole purpose of defrauding persons invited to it by the advertisement published by the prisoner.

The prisoner's counsel contended that the pretences used were only exaggerated representations of the extent of his business, but as the jury found that he was not carrying on any business whatever I thought the pretences were such as would support the charge against him.

M. Williams, for the prisoner, said that in a case similar to the present, tried before Byles J., at the last Kingston Assizes, his Lordship had said that a false representation by a man of his

doing a good business was ground for a civil action, but not for indictment, as it was a question merely of degree. [Smith J.—But here the learned judge reports that the prisoner was carrying on no business whatever, and, therefore, no such question arises.]

Besley, for the prosecution, was not called on; but stated that in the case referred to, before Byles, J., there was evidence that business to some extent was in fact carried on.

Kelly, C. B.—I do not think the objection can be maintained. In order to support this indictment there must be a pretence of an existing fact. It must appear that the party defrauded has been induced to part with his money by the pretence, and the pretence must be untrue. There is all that here. The jury find that he was not carrying on any business whatever.

Conviction affirmed.

QUEEN'S BENCH.

Kettlewell v. Dyson.

Common Law Procedure Act, 1854 (17 & 18 Vic. cap. 121, sec. 51—Interrogatories—Grounds for not answering—Action of ejectment.

A plaintiff in ejectment is bound to answer an interrogatory in which a defendant who is in possession asks him to state through what links he (plaintiff) traces his claim as heir-at-law; and therefore where A. and B. claimed in an action of ejectment, brought by the former against the latter, certain premises, each alleging that he was the heir-at-law of C., deceased, but A. claimed through a maternal, and B. through a paternal, ancestor; a judge at chambers having made an order calling on A. to answer the following interrogatory—"If you claim as heir-at-law to C., through what links do you trace?"

Held, on motion to rescind the order, that A. (the plaintiff) was bound to answer this interrogatory, though it appeared that the judge who made the order had declined, on the application of A., to make an order on B., the defendant, to answer a similar interrogatory.

[Q. B., 16 W. R., 851, April 13, 1868.]

This was a motion to set aside or rescind an order made by Willes, J., at chambers, calling on the plaintiff in an action of ejectment to answer the following interrogatory—"If you claim as heir-at-law to Sarah Kettlewell, through what links do you trace?" The order after directing the plaintiff to answer this interrogatory, concluded thus—"or give particulars of how you claim at your election." The plaintiff and defendant both claimed certain premises, of which the latter was in possession. Each claimed as heir-at-law, the plaintiff through a maternal and the defendant through a paternal ancestor. The plaintiff had previously applied to the same judge to order the defendant to answer a similar interrogatory, but he refused to make it.

Anderson now moved to rescind the order. You cannot obtain discovery on a matter which is the case of the other side. The right of the defendant to administer such an interrogatory depends on the case of *Flitcroft* v. *Fletcher*, 11 Ex. 543, and that case has not been approved of in some cases which followed it. In *Pearson* v. *Turner*, 16 C. B. N. S. 157, 12 W. R. 801, it was held by Erle, C. J., and Willes, J., that a defendant was not entitled to administer such an interrogatory to the plaintiff, except under special circumstances, as where the defendant has been a long time in possession, and knows nothing of the nature of the plaintiff's claim. The case of *Stoat* v. *Rew*, 14 C. B. N. S. 209, 11 W. R. 295, is to the same effect. Again, it is laid down in *Moor* v. *Roberts*, 5 W. R. 693, that the defendant cannot interrogate the plaintiff on the plaintiff's case, or *vice versa*.

I submit it would be very hard if the plaintiff should be compellable to answer this interrogatory, while the plaintiff is not entitled to have a similar question answered by the defendant. [Cockburn, C. J.—We must at present confine our attention to the order which is before us. Besides, there is a very great difference between administering interrogatories to a person in possession whom another seeks to oust, and administering them to the person who thus seeks to oust him.] Lush, J.—I think the distinction between the two cases was drawn in *Horton* v. *Bott*, 5 W. R. 792, 26 L. J. Ex. 267, where it has been held that a plaintiff in ejectment cannot interrogate the defendant as to his title, though the defendant may interrogate the plaintiff.] I submit that the case of *Flitcroft* v. *Fletcher* (*ubi sup.*) after the other cases cited, cannot be safely followed. He also cited Chitty's Forms, 9th ed. p. 165, note; Cole on Ejectment, 204.

Cockburn, C. J.—I think, independently of the Common Law Procedure Act, 1854, the Court may order particulars of claim to be furnished in a case like the present. We think that *Flitcroft* v. *Fletcher* (*ubi sup.*) is a very sound and salutary decision, and we must refuse the rule.

Lord v. Lee.

Award—Power to enlarge time—Common Law Procedure Act, 1854 (17 & 18 Vict. cap. 125) sec. 15.

The Court or a judge has power under the Common Law Procedure Act, 1854, to enlarge the time for making an award, although the arbitrator has actually made his award after the time originally limited, and before the application to enlarge, and the effect of such enlargement is to give validity to the award already made.

[Q. B., 16 W. R. 356, April 27, 1868.]

This was an action on an award tried before Mellor, J., at the sittings in Middlesex, after Trinity Term, 1867.

At the trial of the cause it appeared that an agreement to refer certain matters in dispute between the plaintiff and the defendant was made on the 8th of August, 1866. No time was mentioned in the submission for making the award, and on the 17th of January, 1867, the arbitrator gave notice that it was prepared. On the 27th of February, 1867, the submission was made a rule of Court.

The Common Law Procedure Act, 1854 (17 & 18 Vic. cap. 125) sec. 15, enacted that the arbitrator, acting under any such document [*i.e.* any document authorizing a reference to arbitration, or compulsory order or reference, or under any order referring the award back] shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may, by consent in writing, enlarge the time for making the award; and it shall be lawful for the superior Court, of which such submission, document, or order is or may be made a rule or order, or for any judge thereof,

for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award, and if no period be stated for the enlargement in such consent, or order for enlargement, it shall be deemed to be an enlargement for one month.

On the 11th of March a judge's order was obtained, enlarging the time for making the award until the 15th of the same month, so as to include the time at which the award was made after the expiration of the three months limited by the statute.

The award was taken up by the petitioner within the enlarged time, and this action having been brought, the petitoner recovered judgment.

A rule *nisi* to enter the verdict for the defendant having been moved for and obtained.

Denman, Q C., and *Willoughby*, showed cause, and argued that the statute gave power to enlarge the time for making the award after the term originally limited had expired, and that the award was therefore good. The same course had been taken before the Common Law Procedure Act, under 3 & 4 Will. 4, cap 42. sec. 39. They referred also to *Re Burton*, 6 W. R. 656, and to *Ward* v. *The Secretary of State for the War Department*, 11 W. R. 88, 32 L. J. Q. B. 53.

M. Chambers Q.C., *Joyce*, and *Bush Cooper*, in support of the rule, argued that the arbitrator had exhausted all his powers, and that consequently the enlargement was not within the statute. The award was a nullity, because the time had expired. They referred to *Reid* v. *Fryatt*, 1 M. & S. 1, and *Mason* v. *Wallis*, 10 B. & C. 107.

Blackburn, J.—I have no doubt on this point that the true construction is that a judge may enlarge the time for making an award, that is, make an order giving extra time, as if it had been in the original submission, and if so any step taken by the arbitrator in the meanwhile would be valid. An arbitrator originally was appointed by the parties to determine the matters referred to him, but his authority, on the ground that the appointment was a personal submission, was revoked by the death or at the will of either of the parties. Now at common law, where an act has been professed to be done by authority, but has not been in fact so done, the person supposed to have given the authority may at any time ratify the act done, and then the ratification gives to the act the same effect as an original authority. Thus where authority is given to an arbitrator to act within a certain time, and he acts after the expiration of the time, he does so as if he had authority, but in reality without it. Then if the parties afterwards agree to waive the objection, that amounts to a ratification of all that has been done in the interval, and an enlarged authority is substituted for the previous one. Various statutes were passed to remedy this state of things, and various enactments as to what should amount to ratification. Then by 3 & 4 Wm. 4, cap. 42, it is provided that the authority of an arbitrator shall not be revocable by any party to the reference, without leave of the Court or a judge, and it also gives authority to the Court or a judge to enlarge from time to time the term for an arbitrator making his award.

The Common Law Procedure Act gives power to parties themselves to agree to enlarge the term for making an award, and the effect is the same as to the parol ratification at common law in affecting an alteration in the original submission, which has then to be read as though the whole time originally named and subsequently added had formed part of it. The statute further says that the Court or a judge shall have the same power as parties themselves have, and as this award, made after the expiration of the original time, purports to be made by authority of the submission, and was made within the time arrived at by incorporating the new term with that originally named, the effect of the order is to make it a ratification of all that had been done, just as if the original submission had been for the whole time so enlarged. In *Mason* v *Wallis* the enlargement was a nullity, and *Reid* v. *Fryatt* is not an authority adverse to the opinion I am now expressing, as the Court had no occasion to express an opinion. Then in the two late decisions the Court refused to interfere without deciding on this point, while it appears that the leaning of their opinion was strongly in favour of construing the Act as we are now doing. The weight of authority coincides, therefore, with the opinion at which I have arrived, that this award is valid, and the plaintiff in consequence ought to keep his verdict.

Mellor and Lush, JJ., concurred.

Rule discharged.

Watkin v. Hall

Defamation—Rumour—Justification—Innuendo—Common Law Procedure Act, 1852, sec. 61—Demurrer.

To an action for slander the defendant pleaded that in speaking the words he meant, and was understood to mean, that there was a rumour current to the effect of the words used, and that such a rumour was actually current.

Held, that the existence of the rumour was no justification, and that the plea was bad.

[Q. B., 16 W. R., 857, April 28, 1868.]

Declaration.—That the plaintiff was the chairman and a director of a railway company, established by Act of Parliament, to wit the South Eastern Railway Company, for reward and salary to the plaintiff in that behalf; and was also the chairman and a director of a certain other railway company, established by Act of Parliament, to wit the Manchester, Sheffield and Lincolnshire Railway Company, also for reward and salary for him in that behalf; and then was also the chairman and a director of the Grand Trunk of Canada Railway, also for reward and salary to him in that behalf; and was a holder and proprietor of a large quantity of shares of great value, and was otherwise interested in the said several companies, and the concerns and affairs thereof respectively, and in the welfare and prosperity thereof respectively, and devoted and gave much of his time and attention to the management and business of the said several companies respectively, and greatly occupied himself therewith, and thereby acquired great gains. And the plaintiff further saith, that shortly before the committing of the grievances hereinafter mentioned, a fall in the market value of the shares in the said South-Eastern Railway Company had occurred and taken place. And the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of

and concerning him as such chairman and director of the said South-Eastern Railway Company, and of and concerning him in his connection with the said company, and of his position therein, and of and concerning the said fall in the market value of and concerning the said shares in the said South-Eastern Railway Company, and of and concerning a rumour assumed by the defendant to have existed and been circulated respecing the plaintiff, and respecting his pecuniary position and solvency, and of and concerning the premises, the words following, that is to say, "You have heard what has caused the fall," meaning thereby the said fall in the market value of the said shares in the said South-Eastern Railway Company. "I," meaning the defendant, "mean the rumour about the South-Eastern chairman having failed," meaning thereby that the plaintiff so being such chairman of the said South-Eastern Railway Company had become embarrassed in his pecuniary affairs, and had become and was insolvent. The declaration then alleged special damage.

Plea.—That in speaking the said words in the declaration mentioned the defendant meant, and was understood by the bystanders to mean, that there had been, and there was, a rumour current in the Stock Exchange about the chairman of the South-Eastern Railway Company having failed, and not that the plaintiff had become embarrassed, and had become and was insolvent, as in the inuendo in that behalf in the declaration alleged. And the defendant further says that it was and is true that there had been and then was a rumour current in the Stock Exchange about the said chairman of the South-Eastern Railway Company having failed.

Demurrer on the ground that the existence of a rumour did not justify the repetition of the slander.

Joinder in demurrer.

Beasley, in support of demurrer, was stopped.

Holl. contra, cited *Lake* v. *King*, 1 Wm. Saunders, 130, n. 1; *McPherson* v. *Daniels*, 10 B. & C. 263; *Bremridge* v. *Latimer*, 12 W. R. 878.

Blackburn, J.—The only real question here is whether an action will lie for stating, without the existence of any reason that makes the communication privileged, that there is rumour existing that the plaintiff, a trader, was in insolvent circumstances, and whether it would be a justification for the defendant to show that he was merely repeating a rumour which was actually current, without giving on his own part any opinion as to its truth or falsity. The rule I understand to be that where the words spoken are such as might be injurious to your neighbour, and are followed by actual injury to him, or are of such a nature that the law will imply damage as a necessary consequence (as in the case of words spoken of a man in his trade); then in such cases the law implies malice in the speaker. But when there is a justification for uttering the words, that *primâ facie*, negatives malice, and in such case, express malice must be proved. The question then is, whether in this case where there is clearly no question of privilege, and in which the law implies malice, it is any answer to say that there was a rumour, and that the defendant only repeated the words as a rumour. I cannot use better words to express the principle that governs the case than those of Littledale, J. He says, "It is competent to a defendant upon the general issue to show that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on ground of public policy allows, as in the course of a parliamentary or judicial proceeding, or giving the character of a servant. But if the defendant relies upon the truth as an answer to the action he must plead that matter specially, because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true, and thereby subject himself to an indictment); but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess. Now, a defendant, by showing that he stated, at the time when he published slanderous matter of the plaintiff, that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion or under circumstances which the law, on grounds of public policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover damages. As great an injury may accrue from the wrongful repetition as from the first publication of slander, the first utterer of which may have been insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows, not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant, and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant."

I adopt these words, used in *McPherson* v. *Daniels*, as expressing accurately my view. The fact that other people had spread the report before it was repeated by the defendant, does not disentitle the plaintiff from recovering damages for the unlawful repetition and spreading of such a report, that must, in the nature of things, be injurious to a man in his trade. Then, as to the argument that, looking at the inuendo, the plea amounts to the general issue, and that the latter part of it may be rejected as surplusage, before the alteration in the law the inuendo must have been proved as laid when supported by prefatory matter, and, when not so supported, the prefatory matter might be rejected. This the Legislature considered to be injurious, and they have ordered that "in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment, to show how such words or matter were used in that

sense, and such averment shall be put in issue by the denial of the alleged libel or slander." Now every inuendo must be good in itself and none can be rejected because unsupported by prefatory matter. Then the statute continues, that where the words or matter set forth with or without the alleged meaning show a cause of action, the declaration shall be sufficient, this must mean that where there is an inuendo, the count containing it shall be to all intents and purposes two counts, one with, the other without, the inuendo. The case referred to in 12 W. R. was decided rightly enough, because there, when you look to the whole context, the plea amounted to the defendant setting up a different libel, and then pleading not guilty to that and this was rightly held to be embarrassing, but the case does not apply here.

Lush, J.—I am of the same opinion. The defendant admits that he used these words, and says in effect, I am not responsible, because there was a rumour to that effect which came to me, and which I repeated without saying anything as to its truth. This amounts to the broad assertion that a person may justify giving currency to that which injures the character of another because he did not originate the report, but heard it from some third person, and merely repeated it without giving an opinion as to its truth. This manifestly cannot be supported. As to the other point the argument for the defendant would neutralize the 61st section of the Common Law Procedure Act 1852, because the words used here were actionable in themselves, whether the precise meaning attached to the inuendo is borne out or not.

Judgment for the plaintiff.

COMMON PLEAS.

Tompkins v. Beard.

County Court Acts, 19 & 20 Vict. c. 108, sec. 26—Order to try in County Court.

An order to try in the County Court made under the 19 & 20 Vict. c. 108, sec. 26, will not be rescinded or the subsequent proceedings set aside, on the ground, that it was made before issue joined, where the cause has been tried in the County Court, and both parties have appeared at the trial without objecting to the validity of the order or to the case being heard.

[C. P., 16 W. R., 729, May 6, 1868.]

Davin moved for an order calling on the plaintiff to show cause why an order of the master directing this cause to be tried in the County Court should not be rescinded, and all subsequent proceedings in the cause be set aside.

It appeared that before any declaration was delivered in the action the plaintiff took out a summons before the master to have the cause tried in the County Court. The defendant opposed the application on the ground that the case was not one in which such an order ought to be made, but no objection was then taken to the master's jurisdiction to make such an order before issue joined. The order was made and the case tried before the County Court judge of Berkshire. The defendant appeared at the trial by attorney, but no objection was raised as to the validity of the order or to the trial proceeding, and the plaintiff had a verdict.

By the 19 & 20 Vict. c. 108, sec. 26, it is enacted that "where in any action of contract brought in any superior court the claim endorsed on the writ does not exceed £50, a judge of a superior court, on the application of either party after issue joined, may in his discretion order that the cause may be tried in any County Court which he shall name."

The 30 & 31 Vict. c. 68, with the rules made under it, extends this power to the master.

In support of the rule it was contended that as the order was made before issue joined it was bad, and the whole of the subsequent proceedings irregular.

Bovill, C. J.—There are no sufficient grounds for this application. The act gives authority to the master to make the order after issue joined, but at the time this order was made both parties were before the master, and both knew that issue had not been joined. They discussed whether the case was fit to go to the County Court, but no such objection as this was taken, and therefore the order must be taken to have been made with the implied consent of the defendant. The defendant might have afterwards applied to have the order rescinded, but he did not: he appeared at the trial and took his chance of a verdict. He is now far too late, and is concluded by having acted under the order without protest.

The other judges concurred.

Rule refused.

Pell v. Linnell and Others.*

Not proceeding to trial—Costs of day.

After notice of trial had been given one of several defendants died. The plaintiff did not countermand his notice, or proceed to trial.

Held, that as no suggestion of the death had been entered, the surviving defendants were not entitled to their costs of the day.

[C. P., 16 W. R., 704, May, 1868.]

This was an action brought by the plaintiff against Linnell and two co-defendants.

Notice of trial was given for the Bristol Summer Assizes, the commission day of which was the 13th of August. After such notice had been given, Beasley, one of the defendants, died. Notice of countermand was given on the afternoon of the 12th, which was admitted to be too late.

The dendants went to Bristol with their witnesses, and the plaintiff not having appeared or set down the cause for trial, afterwards obtained the usual side bar rule for the costs of the day. The master refused to tax the costs, on the ground that as no suggestion of Beasley's death had been entered, the plaintiff had made no default in not proceeding to trial.

Pigott, B., having made an order that the defendant's cost should be taxed under the rule,

C. Russell had obtained a rule, calling on the defendants to show cause why the order should not be set aside.

Henry James now showed cause. The defendants are entitled to their costs, as it was impossible for them to tell that the plaintiff would not enter the suggestion (which might be done at any moment) and proceed to trial. [Bovill, C.J.—To entitle yourself to these costs, you must show

* Before Bovill, C.J., and Byles, J.

that the plaintiff made default in going to trial; whereas his default, if any, was not in entering the suggestion, for until it was entered, the cause could not proceed.] But it might have been entered at any time without notice to the defendants. [Bovill, C. J.—Surely it is traversable.] The 136th section of the Common Law Procedure Act, 1852, enacts that the action shall not be abated. [Byles, J.—Yes, but it is suspended until the suggestion is entered. It may be that the defendant who died was the substantial defendant, and that the others were merely joined for conformity. Is not the plaintiff to have the opportunity of considering whether it is worth while to proceed?] [Bovill, C. J, referred to *Pinkus* v. *Sturch*, 5 C.B. 474.]

C. Russell, in support of the rule, referred to *Barnewall* v *Sutherland*, 19 L. J. C. P. 291; *Mullings* v. ————, 5 Taunt. 88; Day's Common Law Procedure Act, 3rd ed. pp. 90 and 116.

Bovill, C.J.—It seems to me that the defendants are not entitled to their costs. I assume that the countermand of notice of trial was too late, but the mere absence of such countermand does not give the defendants a right to the costs of the day. The 99th section of the C. L. P. Act, 1852, does not give the costs of the day; it only shows the mode of proceeding to obtain those costs, which are regulated by the former practice. The plaintiff was always at liberty to show any good excuse for not going to trial. Here the cause, though not abated, was suspended, and no trial could take place till the suggestion was entered. The cases establish that if the trial takes place without such a suggestion, and a witness is prosecuted for perjury, he would not be responsible (*R* v. *Cohen*, 1 Stark. 511), showing that the whole proceeding would be a nullity. Mr. James assumed that it was the imperative duty of the defendant to make the suggestion, but there is no authority for that, and the defendants might equally. if they desired to have the record complete, suggested the death. But neither party chose to enter it, and so the cause could not be tried by reason of the death, that is, by reason of the act of God. Suppose, however, it were the duty of the plaintiff to have entered it, it does not follow that the defendants are entitled to their costs of the day. If the plaintiff has any reasonable excuse for not proceeding to trial, the costs of the day need not be given. The absence of a material witness has been held such an excuse (*Eastern Union* v. *Symonds*, 4 Ex. 502), and surely, then, the death of one of the parties to the action may be so considered. The death here took place shortly before the trial, and I do not think there is any default on the part of the plaintiff, or anything entitling the defendants to their costs of the day. Mr. James must contend that the plaintiff would be bound to enter the suggestion if the death took place upon the commission day itself.

Byles, J.—I am of the same opinion. At common law this action would have abated, and the costs on both sides been thrown away. In the present state of the law the action is not abated, but it is suspended by the act of God and the act of the law, unless one or other party enter a suggestion, which neither of them did here.

Rule absolute.

IRISH REPORTS.

Brady v. Pickering.

Practice—Pleading—Extension of time to plead—Construction of order.

A defendant having, two days before the ordinary time for pleading had expired, obtained an order granting him a week further time to plead.

Held, upon motion to set aside judgment for having been marked before the time for pleading had expired, that the further time to plead was to be computed from the expiration of the ordinary time for pleading, and not from the date of the order.

[C. P. (Ir.) 16 W. R. 730, Apr. 20, 1868.]

This was an application on behalf of the defendant that the judgment in this case might be set aside, on the ground of its having been marked before the time for pleading had expired. The summons and plaint was served upon the defendant on the 27th of February, and the ordinary time for pleading thereto would have expired on the 12th of March following; but two days previous to the latter date, namely on the 10th of March, the defendant applied to Mr. Justice O'Hagan for an extension of time for pleading, and obtained an order in the following terms:—"On motion of Mr. Keogh, the counsel for defendant, it is ordered by the Right Honorable Mr. Justice O'Hagan, that the defendant do have a week further time to plead, undertaking to take short notice of trial, if necessary." This order was dated the 10th of March, and a copy of it was, on the 12th of March following, served upon the attorney for the defendant. Notwithstanding this, the plaintiff caused judgment by default to be marked on the 18th of March, and on the next day issued a notice of inquiry before the Master of the Court to assess damages.

P. Keogh, for the motion, relied upon the order of the 10th of March, as having given the defendant a week to plead from the day on which the ordinary time for pleading would expire.

J. A. Byrne and *E. M. Kelly*, *contra*, contended that the order was to be taken as giving a week's time from the date of the order; and relied upon 1 Lush Prac. 445, 3rd edit.

Per Curiam.—The construction contended for by the defendant seems the most reasonable. The judgment must be set aside on payment by the defendant of the costs incurred in marking judgment.

GENERAL CORRESPONDENCE.

Unprofessional business.

To the Editors of the Law Journal.

Gentlemen,—Will you be good enough to explain to me to what branch of our learned profession "Lehigh Egg Coal" belongs. I have searched in vain all works on real and personal property, special pleading, and conveyancing, to which I have access. And yet from day to day I see an advertisement signed by gentlemen describing themselves as "Barristers, &c.," wherein it is announced that they have for sale "a quantity of Lehigh Egg Coal on reasonable terms." To what part of

General Correspondence.

a barrister's vocation does the "sale of Lehigh Egg Coal" belong? I find that the word egg (Sax. *æg*. G. and D. *ei* Dou. *eg* Qu. L. *ovum* by a change of *g* into *v*) is a "body formed in the body of the females of fowls and certain other animals, containing an embryo or fetus of the same species, or the substance from which a like animal is produced." But as applied to coal, I can find no description of the word in any law book of authority that I possess. Supposing, however, that "Egg Coal" means coal that is produced from eggs, *i. e.*, from a body formed in the body of females, &c., I am utterly at a loss to understand the meaning of the word "Lehigh" as applied to "Egg Coal" thus defined and thus understood. Le, Lea, or Lay (Sax. *legh* or *ley*), means, I, find, a meadow or plain. This being so, "Lehigh" must, I take it, mean a high meadow or plain, and so have reference to locality of some kind. Hence we have it that "Le high Egg Coal" is coal produced from an egg on a high meadow or plain. But this, as connected with the profession of an advocate, is not satisfactory to my mind. It appears to me, on further consideration, that the prefix Le (Sax. *legh* or *ley*) must mean Law (*vide* Termes de la Ley). Still I yet find it difficult to connect the words "Egg Coal" with the word *Le* or *Ley* in the latter sense. It must be that this business (sale of Lehigh Egg Coal) is not intended to be denoted by the word "Barristers" at the foot of the advertisement, but by the "&c." which follows the word "Barristers." And if so, the word "Barristers" had better be dropped from such an advertisement. Can you assist me? If so, any assistance will be thankfully received by your anxious correspondent. Enquirer.

Toronto, Dec. 17, 1868.

[We really cannot assist our correspondent, but hope that the gentlemen whose advertisement has caused him so much trouble will give him some light. It seems to us that our correspondent is "heaping coals of fire" on their heads.—Eds. L. J.]

Quashing conviction—Chairman and Justices at Quarter Sess.—Their respective positions.

To the Editors of the Law Journal.

Gentlemen,—At a late Court of Quarter Sessions, an application was made to quash a conviction made by two Justices of the Peace against A, for obstructing B when performing labour on the highway. A made an affidavit of the fact of his being convicted, and also swore that the Justices had no jurisdiction. The notice of appeal appeared to have been regularly served. No record of the conviction was returned by the convicting Justices, neither did they or the complainant appear.

On this affidavit of the appellant, the court, against the opinion of the chairman, quashed the conviction and ordered the complainant to pay costs.

It is the first instance that I am aware of in which a court has, on affidavit, quashed a conviction, when neither the record or a copy of it was before the Justices.

The complainant had no power to compel the Justices to return the record of conviction, neither had the Court of Quarter Sessions; yet the Justices assumed the power to compel the complainant to pay the costs of the appeal.

The best of the joke is that when the notice of appeal was served, the convicting Justices became alarmed and gave a written notice to A that the conviction had been abandoned and would not be acted upon, and this previous to his attending the court.

Since the sitting of the court, the convicting Justices have been into town to the County Attorney, to see if the order for the payment of the costs could not be set aside, and they were told that they must apply to the Court of Queen's Bench in Term. Please insert this with your comments thereon.

Yours, J. P.

January 1, 1869.

[We think the Justices acted without authority in quashing this conviction. There was nothing before them to quash, the conviction, not having been returned to the Sessions. There is another view of the case, which it is important to notice, assuming that the County Judge was the acting chairman, and it is this: if the Justices set at naught the opinion of the chairman upon a point of law, their conduct was most presumptuous. It is simply absurd for magistrates to set up their opinion in matters of law against that of the County Judge; and if the law gives them power to pronounce on questions with which, such as this, they are in all probability profoundly ignorant, it is time some change were made to prevent the recurrence of such acts.]—Eds. L. J.

Attorneys' Fees in Division Courts.

To the Editors of the Law Journal.

Gentlemen,—I see in the last *Law Journal*, under the head of "General Correspondence," and over the signature of "An Attorney," a letter tending to bring into disrepute one of the most popular, and deservedly so, young Judges in Ontario, considering his age and experience. Since he has been appointed to the Bench he has become beloved and esteemed by the people of his County generally. No person can be more conversant with the case referred to than your subscriber. One of the complaints mentioned in "Attorney's" letter was an action brought by the bailiff of the Second Division Court of a County near Toronto, on the grounds of a breach of covenant on a bond. A jury was called by the plaintiff. It appears that an agreement was made with "Attorney" by defendant's brother to defend the suit. The brother swore at the trial that he agreed with "Attorney" for six dollars to carry the case through and win it; that "Attorney" got a note for the six dollars, and that the note was paid. The case referred to was left to arbitration at the request of defendant's attorney, and the award was given in favour of the plaintiff. The attorney at once applied for a new trial, and supported the application for a new trial by his own affidavit, and before the day of hearing it appears he saw the defendant, and got something like a written retainer to attend the hearing, although by the evidence of the defendant's brother it was originally agreed that "Attorney" was to carry the suit through and win it for the six dollars. The Judge gave the defendant a new trial on paying the costs of the day into Court. The defendants were present at the hearing, and afterwards settled the award with the plaintiff, together with all costs. Hence the trial for costs referred to. The Judge, after patiently hearing the case through, and, contrary to the defence set up, that the attorney had agreed to carry the case through for six dollars, and that he was entitled to no more, came to the conclusion that the retainer was a new contract, and gave his judgment, as "Attorney" says, for six dollars. By giving the above an insertion in the next *Law Journal* you will oblige,

Yours, &c., J. T.

January 1st, 1869.

REVIEWS.

The London Quarterly—The Edinburgh Review—The Westminster Review—The North British Review and Blackwoods Magazine. The Leonard Scott Publishing Company, 140 Fulton Street, New York.

In other columns we publish an advertisement showing the terms on which these Reviews or any of them can be had from the New York Publishers. No educated man, and no man who takes any interest in the world of thought should be without these Reviews. The price at which they are offered by the Leonard Scott Publishing Company, places them within the reach of all. In Politics the Whigs lean on the *Edinburgh Review*. The *London Quarterly* is the organ of moderate Conservatives. The *Westminster* is the organ of Liberalism both in Church and State. The *North British* which is Whig in Politics, was for many years the organ of the Scottish Free Church. *Blackwoods Magazine* equals the more sedate quarterlies in its Literary and Scientific Departments. But the chief attractions of *Blackwood* are the clever papers that from time to time appear on its pages, from the pens of well known authors whose productions afterwards appear in book form. Bulwer and Mrs. Oliphant have written much of late in its pages. Lever, up to the time of his death was also a frequent contributor. The influence of the Reviews is world wide. Thought is not the product of any one nation, and mind speaks to mind in all parts of the world through the pages of these Reviews.

The Statutes and Orders relating to the practice and jurisdiction of the Court of Chancery and of the Court of Error and Appeal, with notes, by Thomas Wardlaw Taylor, M.A., &c. Third Edition. Toronto: Adam, Stevenson & Co., Law Publishers, 1868.

This book is one of the most complete things of its kind that has been issued from the press. It contains a large fund of information on the various subjects that are of daily occurrence in a Solicitor's office; comprising in addition to the new orders all the sections of the following acts which affect chancery practice, *i. e.*, the acts providing for the Court of Chancery and proceedings therein, Surrogate deserving of attention in these acts are discussed and cases decided on different sections are referred to in their proper places. This comprises Part I.

Part II., contains the most important part of the work and that most fully annotated, viz.: the orders in chancery, as lately consolidated—principally by the labours of Mr. Taylor himself, who is, therefore, the person most likely to be successful in imparting information to others as to the effect and the proper interpretation to be given to these orders.

These notes are much more full than in his last edition and the number of English cases referred to—but not merely strung together by an apparent similarity of subject, as is too often the case with less laborious and painstaking men than Mr. Taylor—shew that he has spared no labour to make the book as complete as is possible otherwise than by an elaborate treatise on chancery practice. All the cases in our own Courts touching on the matters treated of appear to be appropriately worked in.

In the appendix are given the Error and Appeal Acts, and the orders of that Court of the 13th July, 1850. Speaking of this calls to mind the necessity for a speedy remodelling of these rules. It is to be hoped the President of the Court will be able to direct his attention to this at an early day.

Then comes an appendix of forms over and above those given in the consolidated orders. There are some thirty-eight of these, which may be considered as of a semi-official nature, whether we look upon them as having been prepared by the Secretary, or as having been settled in the course of practice.

A table of the abrogated orders, shewing the consolidated orders into which they are now incorporated is prefixed to the edition. This table is interesting, besides its practical usefulness, in shewing the extent to which the orders of the Court have been from time to time altered, re-altered, amended, and re-amended. It would appear from this table that since 3rd June, 1853, there have been twenty-nine different sets of orders passed—small chance there was, therefore, to expect any settled practice in the Court of Chancery with such shifting sands to build upon. If things are let alone for a few years it may be hoped that upon the present foundation, a a superstructure will arise which will be no discredit to the administration of Equity in this Province. The ever varying phases of business especially incident to a young country, and which operate so much more quickly upon procedure in Courts of Equity than at Common Law, will render changes in the mode of conducting the business of the Courts necessary from time to time, but there may be too much of a good thing, even of chancery orders.

Such a work as that before us, will very materially help to settle and give solidity to Courts, Arrest and imprisonment for debt, Solicitors, Religious institutions, Custody of infants, Foreign affidavits, Law stamps, Quieting titles, Property and trusts, &c. Points the practice, and carry out the object intended to be gained by the consolidation of the orders.

We wish Mr. Taylor every success with this his third and best edition, and hope it may be as remunerative as other law books and publications in this country, *ought* to be—but are not.

No Solicitor's office can afford to be without it, and we doubt not the sale will be large and rapid. The price is, we believe $5.

APPOINTMENTS TO OFFICE.

LIEUTENANT GOVERNORS.

THE HON. WILLIAM PEARCE HOWLAND, C. B., to be Lieutenant Governor of the Province of Ontario. (Gazetted July 18, 1868.)

THE HON. LEMUEL ALLEN WILMOT, to be Lieutenant Governor of the Province of New Brunswick. (Gazetted July 18, 1868.)

JUDGES.

THE HON. WILLIAM HENRY DRAPER, C. B., late Chief Justice of Upper Canada, to be the Presiding Judge of the Court of Error and Appeal for Upper Canada, now the Province of Ontario. (Gazetted October 31, 1868.)

THE HON. WILLIAM BUELL RICHARDS, late Chief Justice of the Court of Common Pleas for Upper Canada, to be Chief Justice of Upper Canada in the room of the Hon. William Henry Draper, C.B. (Gazetted Nov. 21, 1868.)

THE HON. JOHN HAWKINS HAGARTY, late a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, to be Justice of the Court of Common Pleas for Upper Canada, in the room of the Hon. William Buell Richards (Gazetted November 21, 1868.)

THE HON. ADAM WILSON, late a Puisne Judge of the Court of Common Pleas for Upper Canada, to be a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, in the room of the Hon. John Hawkins Hagarty. (Gazetted November 21, 1868.)

JOHN WELLINGTON GWYNNE, of Osgoode Hall and of the City of Toronto, in the Province of Ontario, one of Her Majesty's Counsel learned in the Law, to be a Puisne Judge of the Court of Common Pleas for Upper Canada, in the room of the Hon. Adam Wilson. (Gazetted Nov. 21, 1868.)

COUNTY JUDGES.

ROBERT DENNISTOUN, of Osgoode Hall and of the Town of Peterborough, in the Province of Ontario, Esq., Barrister-at-Law, to be Judge of the County Court of the County of Peterborough, in the said Province, in the place and stead of Robert M. Boucher, Esq., deceased. (Gazetted July 18, 1868.)

POLICE MAGISTRATES.

ABRAHAM DIAMOND, Esquire, of Osgoode Hall, Barrister-at-Law, to be Police Magistrate of the Town of Belleville, in the room and stead of Smith Bartlett, deceased. (Gazetted September 19, 1868.)

COUNTY CROWN ATTORNEYS AND CLERKS OF THE PEACE.

JOHN DEWAR, jun., of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace for the County of Halton, in the room and stead of G. T. Bastedo, Esquire, deceased. (Gazetted August 22, 1866.)

ALEXANDER SUTTON KIRKPATRICK, of Osgoode Hall, Esquire; Barrister-at-Law, to be County Attorney and Clerk of the Peace in and for the County of Fron enac, in the room and stead of R. M. Wilkison, Esquire, deceased. (Gazetted August 22, 1868.)

REGISTRARS.

THOMAS HALL JOHNSON, of Pembroke, in the County of Renfrew, Esquire, to be Registrar for the unorganized District of Nipissing, in the room and stead f Richard O'Reilly, deceased. (Gazetted Sept. 12, 1868.)