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## DIARY FOR JUNE.

2. Thursday .. *Ascension Day.*
5. SUNDAY... *Sunday after Ascension.*
9. Thursday .. Last day for Notice of Trial for County Court.
12. SUNDAY... *Whit Sunday*
14. Tuesday ... Quarter Sessions in each County, and County Court sittings.
19. SUNDAY... *Trinity Sunday.*
26. SUNDAY... *1st Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

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

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

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

# The Upper Canada Law Journal.

## JUNE, 1859.

### IMPRISONMENT FOR DEBT, "THE 91ST CLAUSE."

"Abolish imprisonment for debt!" "Relieve the poor debtor!" are cries we have been accustomed to hear of late years.

At times indeed, they were feeble enough, when more effective political material was at hand; on other occasions, when they served a purpose, the key note was given and taken up throughout the whole country.

We do not deny that the law of debtor and creditor needed improvement, and the wisdom and justice of the Legislature in the changes made we readily admit. But men run wild on the subject, and in their anxiety to relieve the "poor debtor" forget what was due to the poor creditor. "I really pity you," said a person to a man who had just failed, —"you need not pity me," he replied, "pity my creditors, if you please, *they* stand more in need of your commiseration."

And so it is, we believe, in many cases—the creditor oftener suffers by the fraud and misconduct of his debtor than does the purely unfortunate debtor by harsh treatment at the hands of a merciless creditor.

Persons also frequently take a very superficial view of the subject, forming their opinion as to what the law is, from the manner in which it happens to be administered by some particular functionary on a certain occasion. A few cases of hardship are hunted up, a pitiable tale is echoed from the lips of a prisoner, possibly with some heightened color thrown in by the sensitive and imaginative narrator himself, and upon this and such like foundations, a law is *pronounced* to be a cruel law—a bad law—and its repeal demanded.

Nothing can be more absurd and unreasonable; and yet the melodramatic expressions recently so much indulged in respecting the power of Division Courts to imprison ("*the 91st clause!*") had no better base of reality.

Recorder A., or Judge B., were said to have committed poverty-stricken men, having large families dependant upon their day's labor for support, merely because they did not do that which they were quite unable to do—pay their debts. Well, suppose they did,—what then? It by no means follows that the law is in fault. The fault may be wholly in the administration of it; and if any Division Court debtor was sent to jail simply because he did not pay a debt—if he was imprisoned for inability to meet his engagements merely, we are bold to say the judge who ordered it acted upon a grossly mistaken view of the law.

The total abolition of the power to imprison by the Division Courts was advocated by many members on the discussion of this subject in the House last session—though all appeared to agree that fraud on the part of debtors should render them liable to very severe punishment.

If the provision of the Division Courts' Act had been referred to and fairly examined at the first, much discussion might have been avoided. As the agitation may be again renewed, we desire to place the subject in its proper light before the public, and with some statistics from the Clerks of the Division Courts, to show the practical value of this 91st clause.

The credit system is universal in the business of this Country, and we speak the opinion of men well informed as to the Courts, when we say, that the repeal of that clause would strike a fatal blow at the small debt courts, and give scope to the genteel swindler—the low swindler—swindlers of all sorts, in their operations upon the pockets of tradesmen and storekeepers and others.

It is probable that the claims entered for suit amount to not less than $7,000, (as an average) in each County, or over two million of dollars, for the whole of Upper Canada, and legislation affecting rights of such magnitude, and as the sums sued for do not we think average over $30 each, touching so many individuals, should be very delicately handled. How it could have been supposed that the 91st clause warranted imprisonment for debt, as popularly understood, we cannot conceive. As early as 1847, the grant of power to the Division Courts for the examination of defendants and to imprison for fraud or unfair dealing was strongly urged by Mr. Justice Burns, then judge of the County of York.

The want of such a power in this Country, "he declared, had been felt as a real grievance by a large portion of the community."

He spoke of the existing act for the punishment of fraud as affording inadequate remedy to creditors, and that "the

small creditor would find, were he to proceed under it, that it would cost him to follow up the tedious and troublesome remedy by indictment more than any benefit he would derive; besides, in case of failure, exposing himself to a suit for malicious prosecution, in a case too, perhaps, where if the defendant could have been interrogated the creditor might have triumphantly succeeded in punishing the party, and might have made such discovery as would have led to the ultimate payment of his debt.

And he urged the enactmant of the very provision which afterwards passed into law. The Hon. J. Sanfield Macdonald introduced the act consolidating and improving the Division Courts law, and embodied in it a provision such as Mr. Burns suggested.

When the question of imprisonment for debt was debated before the House last session, Mr. Macdonald declared himself the author of the provision referred to—stated that it was not designed by it to confer any power to imprison for debt—that it certainly was not his intention to enable a creditor to imprison his debtor for non-payment merely of a trifling debt, and he believed that the law would not bear any such construction.

Such, we believe, is the view almost universally taken of the act, and if in any particular locality a different principle is laid down, the injurious effects are not, we repeat, chargable on the system.

We have before us an address by Judge Gowan, made at the Division Courts in his County (in 1851).

In this address which appeared in the papers at the time, all the provisions of Mr. Macdonald's Act then just come into force were entered on very fully. In referring to the 91st clause, Judge Gowan, after speaking of the various fraudulent acts resorted to by unprincipled debtors to get rid of their honest debts, and the ability to elude detection from the previous defective state of the law—which in fact fostered a system of fraud—said, "The new provision (91st clause) will be a great blow to fraudulent practices, and will also be some check on persons about to contract debts who have no reasonable prospect of being able to discharge them afterwards. The powers given are for the discovery of the property withheld or concealed, and for the enforcement of such satisfaction as the debtor may be able to give, and for the punishment of frauds.

"This last is by no means to be understood as imprisonment for the debt due. Under the Statute a debtor cannot be imprisoned at the pleasure of a creditor merely, without public examination by the Court, to ascertain if grounds for it exist in the deceitfulness, extravagance, or fraud of a debtor. The man willing to give up his property to his creditors, ready to submit his affairs to inspection, and who has acted honestly in a transaction, although he may be unable to meet his engagements, has nothing to fear from the operation of this law. It is the party who has been guilty of fraud in contracting the debt, or by not afterwards applying the means in his power towards liquidating it, or in secreting or covering his effects from his creditors, upon whom the law looks as a criminal and surrounds with danger."

Here, then, are the recorded views of one who first publicly urged the extension of this power to the Division Courts, the testimony of the gentleman who introduced the law, and the exposition of it by a Judge who had carefully studied it, given years ago, all going to show that the object was to facilitate the enforcement of such satisfaction as a debtor may be able to give, and for the punishment of fraud. Surely, then, there can be no exception taken to such powers. In point of fact, it was agreed on all hands that just such powers should be possessed by the Courts?

In the practical working of the law, individual cases of hardship did in some instances occur in this way. In case of the non-appearance of the debtor at the time appointed on the summons, the plaintiff could apply to the Judge for an order to commit him for the default, which the Judge was required to grant, unless a sufficient reason for non-attendance was shown on the part of the defendant. This was not always understood, or if known, defendants failed to communicate the reason to the Court, and an order went as of course. It must be confessed also, that the clause was sometimes used vindictively by summoning parties and exposing them to examination, when it was quite within the knowledge of the creditor that they were entirely without means and could not pay the claim.

The "Division Courts" sections in the Act of last session (published in our May No., p. 108) amply remedies these defects by providing, that a party failing to attend shall not be liable to be committed for the default unless the Judge is satisfied that his non-attendance is wilful, or that he has been *twice* summoned and failed to appear without any reason for the same shown, and that if the Judge sees at the hearing that the party ought not to have been summoned, he may order the plaintiff to pay him for his trouble and attendance. The examination also may be taken in the Judge's private room; and if a party be once discharged upon examination he is not liable to be again summoned, except the creditor can shew that the debtor has not made a full disclosure of his property, or has since acquired means. As the law now stands, it is scarcely possible that the power can be abused in any way, and it ought to be let alone. But we fear that "clap trap" or sentimentalism may again raise a cry, and we desire to have the subject fairly and fully discussed, and reliable informa-

tion given, that small creditors may not be stripped of their surest guard against dishonest and fraudulent practices by unprincipled debtors.

## THE CONSOLIDATED STATUTES.

We publish below the Report of the Chairman of the Statute Commissioners,—The Hon. Sir James Buchanan Macaulay, C.B., late Chief Justice of the Common Pleas.

The Consolidation as reported, has passed the Legislature, and we published in last number the Act giving it the effect of law. To the gentlemen who assisted in the work of consolidation, but more particularly to the able jurist, who as chairman directed, and by his learned and laborious exertions brought the arduous undertaking to a close, the public are largely indebted.

When the Acts of last session are incorporated, the profession and the public will have the incalculable benefit of "The Statute Law methodically arranged and reduced into a moderate compass." We have not heard what are the arrangements for publication, but we presume the Consolidated Statutes for United Canada and Upper Canada will be issued in perfect form possibly by the 1st of September next. Mr. Attorney General Macdonald has done much to simplify and improve the law, but no Act of any government he has been connected with, or of any other Government whatever, at all approaches in public value the great work of Consolidation which he, as head of the Law Department so wisely devised, and by a judicious selection of able and experienced lawyers was enabled to carry to a successful consummation.

The mass of Statute law being sifted and methodised, we make a new start in 1860, with two volumes only of public General Statutes instead of some thirty, the matter in them properly arranged, and the whole rendered more concise and uniform in style.

## SUPPLEMENTARY REPORT.

MADE BY THE CHAIRMAN OF THE UPPER CANADA STATUTE COMMISSION.

To His Excellency The Right Honorable Sir Edmund Walker Head, *Baronet, Governor General of British North America, &c., &c., &c.*

The Chairman of the Commissioners for Revising and Consolidating the Public General Statutes of Upper Canada most respectfully reports to your Excellency as follows:

1. Referring to that part of the report of the Commissioners dated 19th April, 1858, which stated (No. 55) that the Upper Canada Consolidation was not reported as a finished work, and recommended a further revision before it should be submitted to the Legislature, I have now to add:

2. That the other Members of the Commission considered their joint labours terminated when the arduous duty of advancing the work to the state in which it was then reported had been performed.

3. Being all professional gentlemen of high standing and in full practice, they had rendered their able services in the process of consolidation through its most difficult and laborious stages, at much personal inconvenience, and they could not, without serious prejudice to their regular professional business, continue to bestow further attention upon the subject.

4. It had not been in their power previously to devote to the work that continued attention which from the time of joining the Commission I felt to be most desirable if not essential to the successful accomplishment of the work in hand, and they have not taken part in what has since been done, all of which therefore rests upon my responsibility.

5. No effectual steps towards a re-examination could be made during the last Session of the Legislature in consequence of the new enactments in progress which it would be necessary to incorporate in the former revision.

6. What remained to be done could not be effected by a single individual, and I was anxious to obtain the aid of some gentleman of competent attainments who would devote himself for a few days in succession to the necessary re-perusal and additions which the further revision required.

7. Entertaining a high opinion of the qualifications and abilities of his Honor Judge Gowan, the Judge of the County Court of the County of Simcoe, I, at the close of the Session, solicited his assistance in the prosecution of this very important public object, should it be in his power.

8. He readily consented to give his services at intervals, as circumstances might admit, and upon my application, your Excellency was pleased to request that he would meet my wishes so far as compatible with his judicial duties.

9. He has consequently attended from time to time at great personal inconvenience, and we have together gone over all the Public General Statutes relating to Upper Canada, and also that portion of the joint work of consolidation which belongs to the Upper Canada Commission, and we have incorporated the Acts of the last Session with the former text.

10. I have found Judge Gowan animated with the most lively interest in the successful issue of a work the importance of which he fully appreciates, and I have been greatly assisted by his able co-operation. His knowledge of the Provincial Statutes throughout, and his familiar acquaintance with the details and practical working of some of the most important as respects their general and constant use, has enabled me to correct various inaccuracies and to adopt many material amendments. A comparison of the consolidation in its present state with the form in which it was originally reported will shew the additions and alterations that have been made, including of course the Acts of last Session.

11. I have also to acknowledge the valuable assistance rendered by Thomas Hodgins, Esq., a gentleman of the Bar, in revising the Grammar and Common School Acts. His intimate acquaintance with them in all their bearings and details has been of especial advantage to me, and without his aid those Acts could not have been consolidated by me in the methodical form and with the accurate rendering which I trust they will be found to possess.

12. Having had the able assistance of the other Commissioners in the first instance, and afterwards of Judge Gowan in retesting the whole, I now submit the revision of the Upper Canada Statutes as compiled to the best of our ability and judgment, and recommend it for final adoption, should the way in which it has been executed meet the approval of your Excellency and the two Houses of the Provincial Parliament.

13. At the same time however, I by no means submit the work as perfect or free from errors. Several have been detected since the final proofs were struck off. In the difficult process of consolidation upon the plan of an improved and systematic arrangement of the Statute Law, inaccuracies have occurred, notwithstanding my best endeavours to avoid them. They are principally of a trivial nature and obvious when attention is drawn to them. In the official copies they are corrected with a pen.

14. But although still imperfect and although I cannot vouch that the rendering invariably expresses the Law as it might by judicial construction be held to exist in the Statutes, scattered and detached as they are at present, still I regard it as sufficiently accurate to justify the Revised Consolidation being substituted for the Acts proposed to be repealed, trusting nevertheless to the healing efficacy of future Legislation should any very material errors or omissions be afterwards discovered.

15. The numerous changes which have been found necessary have required corresponding alterations in the printed copies that had been previously prepared, and as the amendments would be in a great degree useless, if confined to a few copies corrected in manuscript only, without affording the means of the usual distribution in print of proposed Parliamentary Bills, a new edition of 500 copies has been struck off, containing the amendments and also the additions rendered necessary by the Acts of last Session. The final copies are now in the hands of Her Majesty's Printer.

16. I avail myself of this opportunity to express my sense of the skill and promptness with which the Queen's Printer and those employed in the *Gazette* Office have executed the work required of that department, and also to express my satisfaction with the polite attention with which every one connected with the Commission has uniformly experienced throughout much necessary intercourse with that Office.

17. It is proper to remark that "TITLES" have been added in conformity with the original plan, also that the two first chapters necessarily contain new matter, the first repealing the Statutes to be superseded, saving existing rights, &c., and the second interpreting certain terms and expressions to facilitate the construction of the Consolidated Law.

18. In some instances foot notes have been added for reasons which they will themselves explain.

19. A uniformity of style has been attempted in the language of the Revision, with the exception of the Statutes relating to Real Estate.

20. It has been deemed better to adhere closely to the original of those Acts, and to give them a retrospective operation to the day on which they first had force of law, rather than by internal changes to risk any variance in the legal effect.

21. Their important bearing upon rights of property and vested interests rendered this the safer course; but I am not satisfied that those Acts might not, with equal facility, be made to harmonize with the rest of the revised work, and with no greater hazard of deviation in the technical construction than necessarily attends any attempt to improve the Statute Law in composition or arrangement, saving of course all rights and interests acquired under the Statutes for which they are substituted. This might, with a view to uniformity, be still attempted, should it appear desirable to your Excellency.

22. It has been suggested that it would be safer to leave the Statutes which introduced the law of England relative to Property and Civil Rights, and the Criminal law of England unconsolidated and unrepealed, and merely to reprint them entire, in order to avoid the possibility of inadvertent changes by repealing and re enacting them. I am fully impressed with the delicacy of the process, but it appears to me that in the qualified and guarded terms in which the changes have been made, there is no serious danger of any innovation affecting the import or legal effect of those comprehensive enactments.

23. The manifest advantage to the public of having so much of the Statute Law methodically arranged and reduced into a moderate compass, thereby rendering the same more accessible than it possibly can be in its present state, far outweighs the expenditure, without which this most desirable public object cannot be attained.

24. A separate report will accompany the printed copies of the consolidated Statutes which apply to both Upper and Lower Canada jointly.

All of which is most respectfully submitted.

(Signed,) J. B. MACAULAY.

Toronto, January, 1859.

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## FIRST REPORT

OF THE COMMISSIONERS APPOINTED TO REVISE AND CONSOLIDATE THE STATUTES WHICH APPLY TO UPPER CANADA.

TO HIS EXCELLENCY THE RIGHT HONORABLE SIR EDMUND W. HEAD, *Baronet, Governor General of British North America, &c., &c., &c.*

The undersigned Commissioners appointed by Commission and Supplemental Commissions under the Great Seal of the Province of Canada, dated respectively the 7th day of February, 1856, the 17th December, 1856, and the twenty-sixth day of January, 1857, "To examine, revise, consolidate and classify the Public General Statutes of Upper Canada, and in conjunction with the Commissioners appointed for Lower Canada, to examine, revise, consolidate and classify the Public General Statutes of the province of Canada," most respectively report to your Excellency as follows:

1. The Commissioners held their first meeting on the 7th day of February, 1856.

2. At a meeting held on the 8th March, 1856, David B. Read, Esquire, one of the Commissioners, was appointed Secretary.

3. The Honorable Joseph Morrison having resigned, Samuel Henry Strong, Esquire, was, on the 14th December, 1856, appointed to succeed him.

4. The Honorable John Hillyard Cameron having also resigned, the Honorable James B. Macaulay, was appointed Senior Commissioner in his place, on the 26th January, 1857.

5. Dr. Connor, Q. C., and Oliver Mowat, Esquire, Q. C., resigned previous to their being elected Members of the Legislative Assembly at the last general election.

6. At a meeting of the Commissioners for both Upper and Lower Canada, on the 12th April, 1856, it was resolved:

1st. That the Commissioners for Lower Canada should proceed with the Statutes relating exclusively to Lower Canada, and that the Commissioners for Upper Canada should proceed with these relating exclusively to Upper Canada, before entering upon the Statutes that apply to the whole Province.

2nd. That the Commissioners understood their duty to comprise the following three distinct particulars, and which they were to keep separate;

1st. To ascertain what Provincial Statutes and parts of Provincial Statutes relating to either part of the Province are still in force; to classify and arrange those and the several clauses thereof in such manner as may seem best, retaining the language of the enactments as they now stand.

2nd. To abbreviate and improve the language, and consolidate to the utmost extent practicable and convenient, but so as not to change the law.

3rd. To suggest such amendments of the law as in the course of the work they may find necessary or desirable.

7. At a subsequent meeting on the 14th April of the same year, the Commissioners were informed that the Attorney General for Lower Canada and the Attorney General for Upper Canada approved of the views expressed in the foregoing resolutions.

8. It was a subject of consideration with the Commissioners whether it would be more expedient to prepare and report from time to time on Statutes detached subjects separately consolidated, or to defer a Report of the Revision until the whole could be submitted entire, and the undersigned were of opinion that it would be better to present the whole in one uniform series of Acts.

9. Two leading objects naturally presented themselves, namely; *Classification* and *Consolidation*. both essential in the process of an orderly and effectual revision.

## 1.—CLASSIFICATION.

10. We have perused printed copies of the first and second Reports made to Her Majesty by the Royal Commissioners who were appointed in England by Her Majesty's Commission dated the 23rd August, 1854, for the purpose of consolidating the Statute Laws of the Realm or such parts thereof as they might find capable of being useful and conveniently consolidated, &c.

11. The objects and duties indicated in that Commission exceed those assigned in the Commission under which we have the honour to act, but the Reports and the documents which accompanied them contain many valuable observations applicable to the revision of the Statutes of Canada, and we propose appending some extracts to this Report. A.

12. We have likewise examined the plans pursued in the revision of the laws in the State of New York and in the State of Massachusetts, and in the Provinces of Nova Scotia and New Brunswick.

13. The Commissioners in Nova Scotia were empowered to "consolidate, simplify the language, and publish the Statutes in one uniform Code."

14. We think that much skill and judgment have been shewn in those revisions, and although the subjects of legislation in Upper Canada do not render a similar classification, in our judgments, expedient, we have not failed to regard attentively the able analysis therein displayed.

15. Our powers and duties are limited to the Public General Acts, and do not, like the Royal Commissioners in England and in Nova Scotia, embrace the whole body of the Statute Law.

16. The public General Statutes applicable to Upper Canada consist of detached and isolated enactments engrafted upon both the Common and Statute Law of England. And the Provincial Statutes to be consolidated by this Commission, consist of two separate parts requiring separate consolidation.

1stly. The Statutes which apply exclusively to Upper Canada, including both those passed before and those passed since the Union; and

2ndly. Those passed since the Union that apply to both Upper and Lower Canada in common.

17. This consideration, combined with the variety and promiscuous nature of the subjects of our various local Statutes, precludes any scientific analysis in their arrangement, however expedient it no doubt is to classify them, as far as practicable, in systematic order.

18. It appears to us that the best classification is to group the Statutes under specific heads methodically arranged as far as practicable, each head containing a series of chapters, sections, and sub-sections.

19. The outlines of the arrangement proposed have been adopted in concert with the Commissioners for Lower Canada, with a view to the Statutes of joint application, and will appear in the printed Schedule which accompanies this Report. B.

20. The present General Statute Law, whether of Upper Canada or of the Province of Canada, may be readily arranged under one or other of the leading heads, though not without materially affecting the order in which many of the Statutes and sections at present stand, nor without leaving some heads with little or nothing under them, in consequence of the separation of the Acts which apply exclusively to Upper Canada from those which pervade the whole Province.

21. The Statutes having joint force can be more consistently arranged under those heads than those which are restricted in their operation to Upper Canada exclusively, and having been devised before the consolidation of the Acts, it may in the end be found expedient to reduce the number and perhaps the arrangement. Indeed, as the work has proceeded and the internal contents of the Statutes have been more fully considered, it becomes questionable whether any titles distinct from the chapters are advisable, the chapters being nevertheless arranged in a corresponding order.

## 2. CONSOLIDATION.

22. The term *Consolidation* is obviously susceptible of different meanings, and we are told in the printed papers which accompany the Report of the Royal Commissioners, that many able Jurists in England who have attempted the task of Consolidation, have found themselves sliding into *Codification*.

23. That it does not mean codifying is manifest, but within its own legitimate sphere the process of consolidation may be more or less abridged, and one difficulty is to define and adhere to the just medium that ought to be observed.

24. The opinion we at present entertain is, that we should attempt an effectual consolidation without deviating from the original text when the language is explicit and concise, and only expunging or recasting where it appears that partial alterations or greater brevity may be safely adopted without affecting the import and meaning of the original Statute. In short, that the object should be succinctly to consolidate and embody in one Statute the several Acts relating to one and the same subject.

25. The Statute of Canada, 18 Vic., chap. 8, prescribes some rules by which, so far as applicable, we have been guided, such as the style of reference to the authority by which the Legislature passes the Law, the precise and enunciative form in which the enacting clauses are required to be expressed whenever any new matter is introduced or the present text has been deviated from. When any thing more substantial than verbal alterations in the language or style of the Statute has been found necessary, we have endeavoured not to infringe upon the true spirit and meaning of the existing law.

26. We now proceed to explain the steps taken to accomplish what has been done.

27. Satisfied that in the first place the Statutes in force should be separated from those that had expired or been repealed, or become effete, and then that of those still in force, the Public General Statutes should be separated from those of an occasional, or local, or merely private nature; we commenced with the last Act of the Session of 1856, and tracing back to the first Act of the first Session of Parliament in Upper Canada, we noted each Act in succession, distinguishing those in force from such as had expired or been repealed or become effete, and likewise distinguishing Public General from Occasional, Local and Private Acts.

28. We then prepared Schedules of the whole, and of each class separately, and also separated those of each class that related to Upper Canada only, from those that were joint, or that applied to Lower Canada exclusively. (*See Schedules herewith separate, Nos.* 1 & 2.)

29. The performance of this revision and the preparation of the several Schedules which seemed necessary to check and test this portion of the work required much time and care, and we do but justice to Mr. Wicksteed, one of the Commissioners for Lower Canada, in acknowledging the assistance and corroboration afforded us, not only by the very accurate and copious Indices of the Statutes prepared by him in obedience to resolutions of the Honorable the Legislative Assembly, but by repeated personal reviews of the Schedules which, as respects the joint work, were finally settled with his able co-operation.

30. It will appear by the Schedules which accompany this Report, that between the period of the separation of the Province of Quebec into Upper and Lower Canada, in the year 1792, and the re-union in the year 1841, 1253 Statutes were passed by the Legislature of the Province of Upper Canada.

31. That since the Union of the two Provinces, 1969 Statutes

have been passed, of which some are exclusively applicable to Upper or to Lower Canada respectively, and others jointly applicable to the whole Province of Canada.

32. The Schedules will exhibit the relative numbers and subjects of each, and show which have ceased to operate and which still continue in force.

33. It will be readily supposed that one point of difficulty experienced has been to determine what Acts or parts of Acts had from time to time become effete or been repealed, not specifically or in express terms, but by implication or by general references to inconsistent enactments.

34. The Public General Statutes having been selected, they were in the next place subdivided, by separating such as were joint from those applicable to Upper Canada only.

35. The last belonging exclusively to the Commissioners for Upper Canada, were placed in Schedules under what seemed the most appropriate heads, and the Acts thus arranged were then distributed among the Commissioners for consolidation.

36. The first or joint division having been arranged in like manner, the first half of it was assigned to the Commissioners for Lower Canada, and the other moiety to those for Upper Canada.

37. The Acts of the last Session of Parliament were passed after the foregoing process of expurgation and classification had been performed, and of course required a revision of the whole so far as those enactments affected former or introduced new provisions.

38. In connection with the above, the preparation of a new Municipal Bill with a view to the consolidation and amendment of the present Municipal Laws, engaged the attention of the Commissioners and consumed a great deal of their time. When it becomes a Law it will constitute the Consolidated Municipal Act for Upper Canada.

39. In that Bill the practicability of a more concise mode of expression has been attempted.

40. The Statutes at large exhibit two peculiarities which many have thought defects, namely:

1st. Long sections, with numerous provisoes and redundancy of words.

2nd. Language used in the future instead of the present tense, when the present is more appropriate.

The remedy suggested for the first is distinctness of subjects, short clauses and sentences, and the avoidance of tautology in words or in ideas.

To avoid the frequency of provisoes, substantive sections or language qualifying the text may be substituted.

The remedy for the second required the adoption of the present instead of the future tense, which is a more familiar style and prevents the frequent use of the auxilliary verb "shall," for the two-fold purpose of simply placing the verb in the future tense at one time and of expressing obligation or command at another time, frequently in the same sentence and more frequently in the same Act.

41. The propriety of the present tense depends of course upon the principle that in a Statute as at Common Law, the law is always speaking.

42. The use of the future tense rests upon the principle that a Statute is construed as speaking at and from the time of its becoming a law, and that so speaking prospectively, its provisions must be expressed not only hypothetically but in the future tense; and as the auxilliary "shall" is properly used for that purpose, its adoption (often misplaced), forms a prevailing practice in the composition of legislative enactments.

43. But if it be a correct rule of jurisprudence that a law being once enacted speaks at all times, the correctness of expressing it in the present tense, whether in reference to passing or present events, or in relation to past or future contingencies, cannot be denied.

44. Though not the usual style in England, even in modern Statutes, it is not without precedent, as may be seen by reference to the Imperial Statutes 15 & 16 Vic., chap. 44, and 17 & 18 Vic., chap. 104. (*See* U. C. Vols., 16 V. & 18 V.)

45. We have attempted the Revision entrusted to us on this principle, but not, we apprehend, with uniform success, especially as respects the Real Property Acts, in which we have ventured upon little innovation.

46. If there exist any serious objection to the method pursued, the language of the revised Acts can be easily changed and made to conform to the more usual or old style of composition. If approved of, the whole can be readily expressed in a uniform style in the present tense.

47. We have omitted Local or Occasional as well as Private Acts. Of the former some would have been consolidated had the time admitted, such as the Rideau and Welland Canal Acts, the Grand Trunk Railway, and some others which relate to works either strictly public or of the highest public importance, and therefore fairly within the scope of the Commission.

48. If deemed advisable to include them in the revision, it would we think be better to consolidate all Acts of that nature separately from the general Acts.

49. We also beg to suggest the expediency of prefixing to the general Acts such extracts from the Imperial Statutes of 14 Geo. III, chap. 83,—31 Geo. III, chap. 31, and 3 & 4 Vic., chap. 35, and from Treatise, and from the Proclamations dividing the Province of Quebec, and sub-dividing Upper Canada into Counties, &c., as are essential to shew the original Constitution and Territorial Divisions of what now forms the Province of Canada.

50. The Ordinances of the Province of Quebec before its division in 1792, have been long regarded as either repealed or obsolete, although no general repeal of them has been made. And we do not propose incorporating any of them in the Revised Statutes as still having force of law in Upper Canada.

51. In preparing the Statutes for consolidation it has been found convenient to set copies of the printed Acts upon strong paper and often to reset them in arranging the clauses, after which the text has been reduced by striking out expired, repealed, superseded and effete clauses, and rejecting redundant words and expressions.

52. In addition to this, it has often become necessary to re-write sections or series of sections, as the only practicable means of effectually consolidating several Acts passed at different periods in relation to the same subject.

53. Having taken this first step in the process of consolidation, it became a question whether it would be more judicious to have manuscript copies prepared for the press or to print at once from the rough revision, though at the risk of future corrections and transpositions. Being of opinion that written copies would consume much time and create much additional expense without obviating the necessity of further corrections; considering also that the work must be ultimately printed, and finding the Queen's Printer prepared to proceed in its prompt execution, we deemed it best to have the new Bills set up from the original revision; which being done, the proofs have from time to time been revised and corrected and finally struck off.

54. Those which relate to Upper Canada only, contain 1025 pages, and have been printed in consecutive chapters without the insertion of any leading heads or titles, but (with a few accidental exceptions) in a classified order. If deemed expedient, titles can be hereafter inserted.

55. Before noticing the joint Acts, we beg to remark in reference to the Upper Canada consolidation, that it is not now reported as a finished work. It is as perfect however as we could make it without delaying this Report for another year, and will we trust be sufficient to shew the plan we have pursued and what may be accomplished in the reduction of the Statute Book. Before being submitted to the Legislature for

adoption we would recommend a review of the whole, impressed with the importance of accuracy throughout and of the difficulties of attaining it, and sensible that what has been done requires correction and is susceptible of improvement.

56. Such a review may be had with the greater facility, as the whole of the present work, both joint and separate, is still in type, and can, we understand, be so retained by the Queen's Printer, without serious inconvenience, until the the Revised Statutes are finally struck off.

57. We recommend the prosecution of a thorough revision in the conviction that its ultimate and successful completion will be of great public benefit, and will warrant any reasonable expenses that may attend its execution.

58. With respect to the half of the joint work assigned to the Upper Canada Commissioners, we have to state that the principal part of it is in type and will soon be struck off in the shape of separate Bills. We have been anxious to have this done in order to exhibit the resemblances as well as the differences between the Upper Canada and the joint legislative enactments, especially in relation to the Criminal Acts. Several of the latter applying at present only to one division might be blended and applied equally to the whole of Canada: the Criminal Law of England being common to both sections of the Province.

59. We think many of the clauses of the Criminal Acts in those parts which relate to the nature of the offence and the punishment of offenders, might be shortened and expressed more strictly in the present tense than we have ventured to attempt. They will answer in their present state for the purpose of comparison and can be hereafter more thoroughly revised and rendered uniform in language.

60. We of course do not regard the consolidation of the joint Acts as finished, but submit it in its present shape with a view to the considerations above expressed.

61. Although under the present Commission the General Statute Law will appear in two parts, one exclusively applicable to Upper Canada and the other joint, it may be remarked with reference to the Act 20 Vic., chap, 43, that when a codification of the law in Lower Canada in relation to civil matters is effected, the Code will embrace all the present Statutes of joint application except those of a criminal nature, and will in itself constitute a Statute, exclusively applicable to Lower Canada; the effect of which will be to leave the principal part of the joint as well as the exclusively Upper Canadian Acts now in course of consolidation solely applicable to Upper Canada.

62. Had we considered what is now reported a final revision, it would as a part of our plan have been accompanied by a Schedule of each consolidated Act in sections, with references explaining how each clause had been disposed of.

63. Such a Schedule would occupy too much time to be now completed, and in the inchoate state of the work is the less important.

J. B. Macaulay.
Adam Wilson.
D. B. Read.
S. H. Strong.

Toronto, 19th April, 1858.

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## THE LEGAL IMPOSITION OF OATHS.

In the present state of society, oaths are required, in order to supply the unavoidable defects of human knowledge and legislation, by calling to their aid the sanctions of religion, and individual sense of accountableness, to the Supreme Law-giver and Judge.

Thus, the legal imposition of oaths amounts to an acknowledgment, that the welfare of the community depends upon the religious principles of its members.

On this security rests our political Constitution, the impartiality of judges and witnesses, the fidelity of sovereigns and subjects.

Every requirement of an oath is, therefore, an appeal to religion in support of social order and mutual confidence.

The frequency of such appeals may become, and in fact does become an occasion of irreverence; yet such is not its nature, but its accidental tendency. For the frequency of religious acts ought not to disqualify for serious attention to them.

He who abhors the crime of wilful and corrupt perjury, may yet be wanting in the reverence with which an oath should always be regarded. It may be hoped that direct and intended false swearing is rare, the brand of a few, who, through guilty ignorance or daring impiety, "fear not God neither regard man." But instances are fearfully common in which the important procedure of making oath, is treated with unbecoming levity. Pious observers are often deeply pained at the thoughtless manner in which such engagements are approached; the glaring inattention with which they are transacted, the apparent want of conscientious regard to the obligations incurred, and the trifling apologies sometimes made for indifference, or the petty shifts employed for covering evasion.

It must be owned that there are not wanting circumstances, which as they tend to weaken impressions of solemnity and awe, increase the danger of an evil so justly to be dreaded. To some persons, the occasions of making oath are frequently recurring, and what has once become familiar by custom, it is difficult to hold in reverence. The subject of the oath may seem frivolous, and the requirement a mere ceremony of form or law. Hence, the importance of the act may escape reflection, because it is connected with unimportant business, or is considered by the individual to be nothing more than matter of legal etiquette. Official indifference in administering, also, may produce practical indifference in taking oaths. And the hasty utterance of a few simple, however emphatic words, accompanied by an action yet more rapidly performed, nay, often exciting in the mind some ludicrous idea, tends to fix a sentiment that the whole is as trivial in its nature, as it is momentary in the transaction. But circumstances do not always alter the nature of things. An oath is not less an oath, because required frequently and on unimportant occasions; or because administered with apparent indifference, and taken with an action transient as it is easy.

The circumstances above noticed, cannot therefore furnish any just ground of apology for the want of reverence.

A place for the foregoing in the pages of the *Law Jour-*

*nal*, is earnestly desired by one who has been often shocked at the irreverent and unseemly way in which oaths are administered, particularly in the Division Courts. *If it really be, as lawyers say*, that Christianity is part of the common law of the land, the subject is fairly within the proper range of a Law Journal, and the Editors may think its importance merits notice at their hands.—*Communicated.*

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[We willingly place the above on our pages. It is a great and well settled principle that Christianity is the basis of our common law, not sectarian or denominational christianity, but that general or common christianity, which has for its foundation the Holy Scriptures. The administration of justice, Civil and Criminal, is grounded upon the truths of religion. Every witness, in every cause and in every court, is with certain statutory exceptions, sworn on the Holy Gospels to speak the truth in his evidence, every juror is in like manner sworn to render a true verdict, and there are few public offices from that filled by the highest functionary in the country, down to that occupied by the humblest constable, the duties of which are not secured and fortified by the sanction of an oath upon the gospels of God. All the obligations whereby our civil rights are preserved, owe their vigor to the sanctions of religion. With all respect for our correspondent, we must say his remark about lawyers, savors somewhat of the vulgar sneer which might well have been spared; every educated laymen, as well as lawyer, *knows* that "Christianity (in the words of Lord Hale,) is parcel of the law of England."

We have noticed nothing irreverent, and unseemly, in the administering of oaths in any of the courts we have acquaintance with. There may be, it is true, that "official indifference" sometimes shown. This should not be, and there cannot be a doubt that it has a tendency to produce practical indifference in taking oaths.

Every officer who administers an oath should do it with gravity, repeating slowly the words of the oath, and seeing that the party sworn performs the act necessary to signify his assent with befitting decorum.

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## PRODUCTION OF DOCUMENTS.

As an abstract proposition, a plaintiff has a right to have inspection of every paper and writing in possession of the defendant, which will assist the plaintiff's case, but he has no right to see any document in the defendant's possession, only tending to make out the defendants case; and if the two cases are founded on different deeds, the defendant's destroying the plaintiff's case, the plaintiff has no right to inspection, but must wait till the hearing.

The case of a Mortgage has been by some supposed to stand on some special footing, but it can hardly be said to do so; it is only a peculiar case to which the principle is applicable.

Where a mortgagor files a bill against a mortgagee ordinarily speaking, he cannot see the mortgage deed without redeeming. There may be cases in which a Mortgagor, or a person in the same situation, may have a special case to entitle him, because it may make out the plaintiff's case, but a mortgagee, ordinarily, may put the deeds in a box sit upon it, and defy the mortgagor to make him move from it, until he engages to pay principal, interest and costs. If a mortgagor files a bill simply to redeem and states the mortgage deed in his bill, and the defendant by his answer, as he is bound, admits it to be to the effect stated, when the cause comes to a hearing the mortgagor has a right to redeem in accordance with the deed, and there is then for the first time a right to see the deed.

These observations will serve to introduce the following points recently decided by V. C. Kindersley.

A plaintiff has a right to inspection of any document in the defendant's possession which will assist him (the plaintiff); and a mortgagor has the same right, although ordinarily speaking, the mortgagee is not compelable to produce his deed except upon payment of principal, interest and costs. Where, by the ordinary rule, the plaintiff has no right to the production of a deed, a reference to that deed in the answer, "for the greater certainty" does not entitle him to such production; but where the defendant sits upon his deed and refers to it, the plaintiff has such right if it will assist his case. A mortgagee who advances money to a trustee to pay debts, and general and not specific legacies, is not bound to see to its application unless he knows of a fraud by the trustee. Where a plaintiff (not a mortgagor), charges a mortgagee with knowledge of a fraudulent purpose to which the money advanced by him was applied, and the mortgagee denies that, but admits possession of the mortgage deed, and craves leave to refer to it, the plaintiff is not entitled to the production of that deed.

A prior mortgagee has no right to see the deed of a subsequent mortgagee. *Howard* v. *Robinson*, 7 Week. Rep. 223.

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## REPORT OF CASES IN APPEAL.

It is a subject of complaint with the profession that cases in appeal are not regularly reported. Our attention has been frequently directed to the subject. It is obviously a great evil where the practitioner has no means of knowing how far the judgments of the Superior Courts, contained in the regular reports, have been effected, and this is felt doubly by the members of the profession out of Toronto.

Where we are asked, does the fault lie? This is a question which we are not at this moment in a position satisfactorily to answer. Reports of cases in appeal are thought by some to be more convenient in separate form, while others think that they should appear in the Reports of the Court whose judgments respectively are affected by the decision of the Court of Appeal. The regular Reporters in the English Courts publish the cases decided on error from their Courts, and surely the same thing might be done here.

In our judgment the Law Society should take up the subject; they certainly could make rules requiring each of the Reporters of the Courts of Common Law and Equity to publish all judgments in appeal, affirming, reversing, or varying the judgment of his particular Court. The 18th Vic. c. 128 evidently intended this, and the Law Society may well be asked to give the enactment effect. It has been suggested to us that the Reporters might not all of them be disposed to obey this order, we cannot contemplate such a contingency as a refusal on their part, and we do not believe they would disobey the rule. But if an order was made and disobeyed, we have no doubt an action on the case under the 4th section of the statute for neglect of duty would lie against any Reporter who failed to do what was required of him. In the meantime if each reporter gave on a fly leaf a digest, however brief, of appeal cases affecting decisions in his own Courts, it would put the practitioner on his guard, and would in this way serve both the profession and the public.

With these remarks we leave the matter for the present. While on the subject of reports we must credit the Reporters of the Common Law Courts with a most decided improvement (which by the way the Reporter of the Court of Queen's Bench commenced) the addition of a table of contents to each number of the Reports. The value of this for facilitating references during a current year, it is only the busy practitioner, can fully appreciate, and thanks are due to the reporters for the expense and trouble they have voluntarily assumed for the benefit of their legal brethren. We would ask these gentlemen to consider whether adding the year after the year of the reign at the head of each page, would not be a permanent improvement? It is done elsewhere in Law Reports.

## LIBEL—COMPARISON OF HAND WRITING.

The 164th sec. of our C. L. P. Act, which is copied from the 27th sec. of the English Act, provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute," and the case of *Hughes* v. *Dinorben* (reported 32 *Law Times* 271), is an important decision to be noted.

It was an action for libel, and to prove that the libels declared on were written by the defendant, certain documents admitted to be in her hand writing were used as standards of comparison; and the plaintiff called several witnesses, and to support and strengthen such evidence, he produced seven anonymous letters generally relating to the same matters as the libels declared on. This evidence was admitted to prove malice, and they were also used as a comparison of the handwriting in dispute, and no objection was made by defendant's counsel: *Held*, that these seven anonymous letters were admissable, that they were relevant to the issue to show malice; but that if a proper objection had been made at the time of the trial, they could not have been received as evidence of hand-writing.

## LAW SCHOOLS.

It is with pleasure that we in this number refer to the Law School of the University of Albany. A School of the kind is a rarity. Schools of Medicine abound in all parts of the United States and Canada, but Schools of Law are few and far between.

In the Law School of the University of Albany law is taught not only as a science but as an art. This is done in a variety of ways, "principally, however, by accustoming the young man to do that as a student which will afterwards be required of him as a lawyer."

There are annually three terms of the Law School; the first, commencing on the first Tuesday of September, will continue for twelve weeks; the second will commence on the last Tuesday of November, and will continue for thirteen weeks; the third will commence on the first Tuesday in March, and will continue for twelve weeks. The fee for a single term is $40; for two terms, $70; and for three terms, which includes the whole course, $100, in each case payable in advance.

*An Act to amend and explain An Act to define the Elective Franchise, and to provide for the Registration of Voters, and for other purposes therein mentioned.*

[Assented to 4th May, 1859.]

WHEREAS it is in and by the fourth section of the Act passed in the twenty second year of her Majesty's Reign, and intituled *An Act to define the Elective Franchise, to provide for the Registration of Voters, and for other purposes therein mentioned*, amongst other things enacted, that the Clerk of each Municipality in Upper Canada shall, after the final revision and correction of the Assessment Roll, forthwith make a correct alphabetical list of all persons entitled to vote at the election of a Member of the Legislative Council and Assembly within such

Municipality, according to the provisions of the said Act; and that all such lists shall be completed and delivered as thereinbefore mentioned on or before the first day of October in each year; And whereas doubts have arisen as to the effect of the enactment requiring that the said lists should be completed and delivered on or before the first day of October in each year; Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, declares and enacts as follows:

1.—It was and is the meaning and intention of the said Act and of the clause hereinbefore recited, that the period therein mentioned within which the lists should be completed and delivered, that is to say, the first day of October, in each year, shall be directory only to the Clerk of each Municipality in Upper Canada, and that nothing therein contained is intended to render null, void or inoperative the said lists, in the event of their not being completed and delivered as in the said Act mentioned on or before the period aforesaid, but that the said lists shall be valid and effectual for the purposes of the said Act, even though not so completed and delivered by the said period of time.

2.—If any Clerk of a Municipality in Upper Canada shall omit, neglect or refuse to complete or deliver the said lists on or before the first day of October in each year, according to the directions of the fourth section of the said Act, or to perform any of the obligations or formalities therein required of him, such Clerk for each such omission, neglect or refusal, shall incur a penalty of two hundred dollars.

And for avoiding doubts under those provisions of the said Act which relate to Lower Canada, it is declared and enacted by the following sections of this Act which apply only to Lower Canada, as follows:

3.—Notwithstanding any thing contained in *The Lower Canada Municipal and Road Act of* 1855, in the Acts amending the same, or in any Act incorporating any City or Town in Lower Canada, every Assessor, Valuator or other person employed to make the Valuation or Assessment Roll of property in any City, Town, Village, or other local Municipality in Lower Canada, shall insert in such roll, in separate columns and in addition to the information now required by law to be inserted, the actual value of every real property, the annual value of, or income derived or derivable from every such property, and the names of the owners, tenants or occupants, (each in separate columns) of every such property:

2.—And whenever the rent, or any part of the rent of any real property is made payable in produce, or otherwise than in money, or any premium is paid, or any improvements are to be made by the tenant, or any other consideration is stipulated in favor of the owner, in reduction of the rent,—the Assessor or Valuator shall take into consideration and allow for such produce, premium, improvement or consideration in establishing the annual rent or value of such property.

4.—Every Valuation or Assessment Roll, and every revised Valuation or Assessment Roll, and every list of Voters, made under the provisions of this Act, of the Acts hereby amended, or of any other Act, shall be subscribed or attested by the person or persons making the same, and by any person employed under the authority of the second sub-section of the sixty-fifth section of *The Lower Canada Municipal and Road Act of* 1855, if any such person be so employed, and attested by his or their oath or affirmation, in the following form:

"I,————(*or* we severally and each for himself,) do swear (*or* solemnly declare) that to the best of my (*or* our) knowledge and belief, the above (*here insert title of document as* Valuation *or* Assessment Roll, revised Valuation or Assessment Roll, *or* list of Voters, *as the case may be,*) is correct, and that nothing has been improperly and fraudulently inserted therein, or omitted therefrom."

And such oath or affirmation shall be made before a Justice of the Peace who shall attest the same;—and the wilful making of any false statement in any such oath or affirmation, shall be wilful and corrupt perjury, and punishable as such, as provided by the Interpretation Act, which shall apply to this Act.

5.—If at the time of any election, no list of Voters for the current year shall have been made or shall exist, the Returning Officer or Deputy Returning Officers for such election shall be furnished with the list of Voters last made or existing and shall govern themselves thereby, and such list shall have the same effect as if it were the list for the current year.

6.—Whenever the name of any Voter entitled to have his name entered on the Valuation or Assessment Roll, or on the revised Valuation or Assessment Roll, is omitted from the list of Voters, in consequence of its having been omitted from any such Roll or Revised Roll, it was and is the intention of the Act herein first above cited and amended, that such person should have the same right of complaint and of appeal in order to have his name placed on the said list of Voters, as if it had been omitted from the said list after having been inserted in such Roll or revised Roll.

7.—If the Clerk or Secretary Treasurer of any City or Municipality in Lower Canada does not furnish to every Deputy Returning Officer acting in such City or Municipality, or in any Ward or Division thereof, a true copy or copies of the proper list of voters, or of so much thereof as relates to the locality for which such Deputy Returning Officer is to act, or as required by the eighth sub-section of the fifth section of the said first cited Act, the Returning Officer shall procure from the Registrar of the County or registration division, or if he be himself such Registrar shall furnish a copy certified by him to be correct, of the then last list of voters for such Municipality, part of a Municipality or Ward, filed in his office, and shall cause the same to be delivered to the Deputy Returning Officer; and the cost of such copy shall be paid by the Clerk or Secretary Treasurer, in default, and may be recovered from him or from the Municipality of which he is such Officer, by the Returning Officer or Registrar who shall have procured or furnished such copy.

8.—The word "Occupant" in the said first cited Act shall, in Lower Canada, signify a person occupying property, otherwise than as Owner Tenant, or usufructuary, either in his own right, or in the right of his wife, but being in possession of such property and enjoying the revenues and profits arising therefrom,—and the word "Tenant" shall include any person who instead of paying rent in money is bound to render to the owner any portion of the produce of such property.

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*An act to amend the Acts under which Joint Stock Roads and other similar works are constructed in Upper Canada.*

[Assented to 4th May, 1859.]

WHEREAS doubts exist as to the rights which pass under sales of Roads and other works constructed in Upper Canada, under the Joint Stock Companies' Acts, and it is expedient to remove such doubts: Therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Whenever any Road, Bridge or Pier, or Wharf constructed by any Joint Stock Company, incorporated under the Laws of Upper Canada, shall have been or shall hereafter be sold, either by such Joint Stock Company, or under some power granted by them, or under legal process against such Company, the sale or sales shall, in all cases, be deemed to have passed and to pass such Roads, Bridges and Piers, or Wharves to the purchaser or purchasers thereof, with all the rights, privileges and appurtenances, and subject to all the duties and obligations which the Law gave or imposed with reference to such Road, Bridge, Pier or Wharf, whilst the same continued the property of the Joint Stock Company which had constructed the same.

*An Act to enable certain Municipal Corporations in Upper Canada, to aid in the establishment of internal means of communication.*

[Assented to 4th May, 1859.]

Whereas that section of the Peninsula of Western Canada lying north-westerly from the Town of Guelph, and embracing the greater part of the Counties of Wellington and Bruce, as well as portions of the Counties of Grey, Perth and Huron, is entirely destitute of the proper facilities for communicating with the produce markets of the Province: And whereas the Reeves of the Municipalities of Fergus, Puslinch, Normanby, Brant, Elora, Minto, Pilkington, Saugeen, Arthur, Nicol, Kinloss, Howick, Greenock, Culross, and Kincardine, and many others, have by their petitions prayed that those Municipal Corporations desiring a means of communication may be enabled to aid in the establishment of the same, and may be empowered to distribute any liability which they may see advisable to incur thereby, over the various sections of each Municipality incurring such liability, in an equitable proportion to the benefits which they may derive from the improvements, or so far as it is practicable so to do; And inasmuch as the construction of Railways and other roads has been found to enhance to the largest amount the value of property within easy access of these lines of traffic, and it is believed that the various degrees of additional value given to property within the influence of these works may be taken as a fair standard by which to measure the different degrees of benefit received from their establishment: And whereas it is expedient to empower the various Municipalities aforesaid to aid in the promotion of their own prosperity, in accordance with the equitable principle expressed in the prayers of the petitioners: *Therefore, her Majesty, by and with the advice and consent* of the Legislative Council and Assembly of Canada, enacts as follows:

1.—On and after the passing of this Act, and so soon as a majority of the rate-payers in any section or sections of a Municipality, representing at least half in value of the real property in such section owned by the residents of the County, have by a requisition (agreeable to form A, setting forth in general terms the character of the improvements they desire, and the rate per cent. for assessment purposes they are willing to bear,) required their Municipal Council or Councils, to incur any such liability as by this Act they are empowered to incur, it shall be lawful for the County Council of Wellington, the Provisional County Council (or in process of time the County Council) of Bruce, and any lesser Municipal Corporations either in or adjacent to these Counties, to guarantee to give a yearly bonus to any Company or Companies, party or parties who shall undertake to build and complete a Railway, or a gravel or other improved road or roads through or along or across any of the Municipalities aforesaid; Provided always, that such guarantee shall be limited as hereinafter pointed out.

2.—Any bonus guaranteed to be given under this Act shall be the aggregate proceeds of a rate to be prescribed by the rate-payers' requisition aforesaid, levied (except in the case provided for by the fifth section) on the future increase of the assessed value of real property in such Municipalities or sections of Municipalities as aforesaid, which rate is not to exceed one per cent. annually on the increase of the assessed value, and which increase is to be taken to mean the difference between the assessed value of real property in the year during which any such guarantee may be given, and the assessed value in each year after the contemplated improvements are in operation or in use.

3.—Each Municipal Corporation giving such guarantee as they are by this Act empowered to give, shall annually so soon as the gravel roads or railways or both, shall be made and in use, assess and levy upon the ratable real property within the limits prescribed by the guarantee, situate within fifteen miles of the railway or of such part of it as may be in operation, or within five miles of any gravel road or roads which shall be made and fit for use, such rate or rates as may be determined upon as aforesaid, not exceeding one per cent. per annum on (except in the case provided by the fourth section,) the increase as aforesaid; but the rate or rates shall not be levied on any property situate more than five miles from any gravel road, nor more than fifteen miles from any Rail-road or such part of it or them as may be then in operation, whether or not the said property be within the Municipality or section of the Municipality which has concurred in giving the guarantee.

4.—So soon as it shall be necessary to levy any special rate on the increase of the assessed value of any of the Municipalities which may under authority of this Act undertake to aid in carrying out internal improvements, it shall be the duty of the Clerk of the Municipality to procure a plan verified by some Provincial Land Surveyor, showing the exact position of the improvements then in use, and also the relative position thereto of all taxable real property situate within the limits prescribed as aforesaid; And he shall from this plan and from the Assessment Roll for the current year, make out a special Collector's Roll, or make an addition to the ordinary Collector's Roll having opposite the names of all taxable persons and property within the specified distance of the improvements, the information mentioned in Schedule B; and the various amounts calculated on the increase, at the special rate determined by the rate-payers' requisition and the guarantee, and set down in the last column, according to Form B, shall be collected in addition to all other local rates and taxes in the manner provided by the Assessment Laws of Upper Canada, all the provisions of which, not inconsistent with this Act, shall be so applied as to carry out the true intent and meaning of this Act.

5.—Should the total assessed value of real property within the limits prescribed as aforesaid in any Municipality aiding under the authority of this Act in the construction of such works, be found on their completion to have increased less than fifty per cent. over the total assessed value within the same limits at the time the guarantee was entered into, then, and in that case one-half the rate determined as aforesaid by the Rate-payers' requisition, shall be calculated on the whole assessed value of real property within the limits aforesaid and levied accordingly; and such half rate on the whole assessed value within the limits aforesaid, shall continue to be assessed and levied until the total assessed value within the limits referred to exceeds the original total assessed value by fifty per cent. thereof: But whenever the total assessed value of real property in a Municipality within the limits aforesaid, exceeds by fifty per cent. or upwards the original assessed value within the same limits, then the whole rate shall be assessed on the increase only, as described in the previous section.

6.—All gravel roads constructed by any Company, under the guarantee of an annual bonus from a Municipality, shall be kept in reasonably good repair and shall be free from toll or other charges within the limits of the Municipality, so long as the bonus continues to be paid; and it shall be competent to the Municipal Corporation, to bargain and agree with the Company, either for a reduction of the bonus or the rates aforesaid, or their suspension at a fixed period, for the transfer of the roads to the management of the Municipalities, or for their continuance free of toll and kept in repair by the Company, under a modified bonus; Provided always, that the rate to be levied shall not in any case exceed the maximum rate consented to by the rate-payers.

7.—After a guarantee of a bonus has been given under authority of this Act, with the consent of the rate-payers obtained as aforesaid, and action taken towards the commencement of the improvements contemplated, it shall be valid and binding upon the Municipality; and when the works are sufficiently advanced towards completion, then the rates shall be levied as herein described, and the proceeds without de-

duction paid over as the first annual bonus to the parties who may make the improvements in good faith.

8.—This Act shall be deemed a Public Act.

SCHEDULE—FORM A.

*Rate-Payers' Requisition.*

County of —— } We, the undersigned rate-payers of the Town-
TO WIT: } ship of ——, in the County of ——, being desirous of having established, (*here describe in general terms the character of the improvements desired,*) and approving of the general provisions and equitable principle of assessment embodied in the Act Vic., cap. ; a copy of which is hereunto attached—hereby authorize and request our Municipal Council to guarantee an annual bonus to any Company or Companies, who shall undertake to construct and carry out the improvements above referred to, agreeably to the provisions, conditions and limitations of the Act aforesaid; and we do further authorize and consent that a maximum rate of —— per cent. on the increase, as explained in the second section of the Act aforesaid, subject to any reduction that the Council may determine, shall or may be levied annually on real property in this section of the —— for the purpose of paying the said bonus.

| Name of Rate-payer. | Concession. | Lot. | Witness to Signature. |
|---|---|---|---|
| | | | |

FORM B.

Additional columns to Collector's Roll for Special Assessment.

| 1. | 2. | 3. | 4. | 5. |
|---|---|---|---|---|
| No. of miles from Railway or Gravel Road. | Original assessed value (being that of the year during which the Guarantee is given.) | Corrected assessed value for the current y'r. | Increase in value being the difference between the amounts in the two next preceding columns. | Amount to be collected (*this is to be calculated at the rate fixed by the Rate-payers' Requisition, and the Guarantee on the sums set down in the next preceding column.*) |
| | | | | |

*An Act to amend the Act for the qualification of Justices of the Peace.*

[Assented to 4th May, 1859.]

WHEREAS it is not expedient that the Sheriffs and Coroners of other Districts in Lower Canada than those of Montreal and Quebec should be disqualified for acting as Justices of the Peace in and for the respective Districts; and whereas it is expedient to declare valid the acts of any Sheriffs of the new judicial Districts in Lower Canada who may inadvertently have continued to act as Justices of the Peace, and to relieve them from any penalties which they may have incurred by reason of their having so acted: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Hereafter the sixteenth section of the Act passed in the sixth year of Her Majesty's reign, and intituled *An Act for the qualification of Justices of the Peace*, shall not apply to Sheriffs or Coroners in Lower Canada, except to the Sheriffs and Coroners of the Districts of Montreal and Quebec.

2.—Any act or proceeding done or taken since the twenty-sixth day of November, one thousand eight hundred and fifty-seven, under the authority of a Commission of the Peace, by the Sheriff of any of the new Judicial Districts in Lower Canada, shall be as valid and have the same effect as though the Act cited in the preceding section had never been passed; and no such Sheriff shall be held to have incurred any penalty by reason of any such act or proceeding.

*An Act further to amend the laws relating to the crime of Forgery.*

[Assented to 4th May, 1859.]

WHEREAS it is expedient further to amend the laws relating to the crime of forgery: Therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Every person who shall knowingly and wilfully, and with intent to deceive and defraud, forge or counterfeit, or cause or procure to be forged or counterfeited any private mark, token, stamp or label of any manufacturer, mechanic or other person being a resident of this Province, upon or with respect to any goods, wares or merchandize whatsoever, shall be punished by imprisonment in the Common Gaol for a term not exceeding six months, or in the Penitentiary for a term not exceeding six years.

2.—Every person who shall vend any goods, wares or merchandize, having thereon any forged or counterfeited private mark, token, stamp or label purporting to be the private mark, token, stamp or label of any other person being a resident of this Province, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, shall be guilty of a misdemeanor, and shall be punished by imprisonment in the Common Gaol for a term not exceeding six months, or by a fine of not more than one hundred dollars, or by both, in the discretion of the Court.

*An Act further to provide for the accommodation of the Courts of Superior Jurisdiction in Upper Canada, and for that purpose to amend, extend and continue certain Acts therein mentioned.*

[Assented to 4th May, 1859.]

WHEREAS it has been found that the sums of money granted for the erection of buildings suitable for the accommodation of the Superior Courts of Law and Equity in Upper Canada, by the Act passed in the eighteenth year of Her Majesty's Reign, chaptered one hundred and twenty-two, and by the Act passed in the twentieth year of Her Majesty's Reign, chaptered sixty-four, are insufficient for the purpose; and whereas it is necessary to grant additional aid therefor, and for the purpose of liquidating the debt incurred thereby to increase the fee fund as established by the last named Act: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—For the purposes aforesaid it shall be lawful for the Governor of this Province to authorize the issue of debentures for the sum of thirty thousand pounds, over and above the amounts authorized by the above named Acts, and by the Act passed in the ninth year of Her Majesty's Reign, chaptered thirty-three, in such form and in such sums as may be found convenient—such Debentures to be at a rate of interest not to exceed six per centum per annum and to be redeemable within twenty years.

2.—For the purpose of paying the interest on the Debentures issued or authorized to be issued under the said Acts and under this Act and liquidating the principal thereof, there shall be imposed, levied and collected on the proceedings in the Superior Courts of Law and Equity in Upper Canada, including the Practice Court and proceedings before the Heir and Devisee Commission, the sums set forth in the Schedule hereunto subjoined instead of those set forth in the Schedules attached to the said Acts passed the ninth and in the twentieth years of Her Majesty's Reign; and such sums shall be in addition to all fees authorized to be levied for other pur-

poses and to be otherwise applied, and law proceedings shall be subject to the said levy whether had in the Court of Queen's Bench, or the Court of Common Pleas, or the Practice Court.

3.—All the provisions of the said Act passed in the ninth year of Her Majesty's Reign, so far as the same may be applicable, are hereby extended to the Debentures to be issued under the authority of this Act, and to all matters relative to the said Debentures, and to the sum to be thereby raised, in as full and ample a manner to all intents and purposes as if the said sum of thirty thousand pounds to be raised under the authority of this Act had formed part of the sum to be raised under the provisions of the said Act passed in the ninth year of Her Majesty's Reign.

## SCHEDULE.

*On proceedings in the Queen's Bench, Common Pleas and Practice Court.*

| | $ | ct. |
|---|---|---|
| On every Writ of Summons or Capias, and on every other Writ or other Document of what nature or description soever, having the Seal of the Court affixed thereto | 0 | 50 |
| On every Judgment entered | 0 | 60 |
| On every Certificate of Judgment | 0 | 50 |
| On setting down on the paper for argument of every demurrer, special case, points reserved, special verdict or appeal case | 0 | 30 |
| Every record of Nisi Prius entered for trial or Assessment | 1 | 00 |
| On every Rule of Court issued | 0 | 20 |
| On Taxation of every Bill of Costs | 0 | 15 |

*On proceedings in the Court of Chancery.*

| | | |
|---|---|---|
| On filing every Bill or amended Bill | 2 | 40 |
| On passing and entering every Decree or Decretal Order | 1 | 00 |
| On every Certificate of Bill filed, on every Certificate of Decree or Decretal Order made, on every Subpœna, and on every other Writ or Certificate issued under the Seal of the Court | 0 | 50 |

*On proceedings in the Court of Error and Appeal.*

| | | |
|---|---|---|
| On every Appeal entered | 4 | 00 |
| On every Judgment, Decree or Order of the Court passed and entered | 2 | 00 |

*On proceedings in the office of the Surrogate Clerk in Chancery.*

| | | |
|---|---|---|
| On every Certificate issued by the Surrogate Clerk in Cancery | 0 | 50 |
| On every order made on application to a Judge in Chancery | 0 | 25 |

*On proceedings in the Queen's Bench, Common Pleas and Practice Court—Continued.*

| | | |
|---|---|---|
| On entering every Appeal | 0 | 50 |
| On every Decree or order on Appeal | 1 | 00 |

*On proceedings before the Heir and Devisee Commission.*

| | | |
|---|---|---|
| On every claim entered and received | 0 | 50 |
| On every claim allowed | 0 | 50 |

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*An Act to repeal certain provisions of law relating to the recovery of Bills of Exchange and Promissory Notes, in Upper Canada.*

[Assented to 4th May, 1859.]

WHEREAS it is desirable to repeal those clauses of the Common Law Procedure Act, 1857, of which the operation is suspended by the Act Twenty-second Victoria, Chapter Ten: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The fourth, fifth, sixth, seventh, eighth and ninth clauses of the Common Law Procedure Act, 1857, and also the words: "And with respect to Bills of Exchange and Promissory Notes, Be it enacted as follows," preceding the said fourth clause, are hereby repealed.

2.—The Act passed in the Twenty-second year of Her Majesty's Reign, chapter ten, extending to the First day of January next, the time fixed in the said fourth clause for the operation of the said clauses, is hereby repealed.

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*An Act to relieve Registrars of Counties in Upper Canada from certain disabilities.*

[Assented to 4th May, 1859.]

WHEREAS it is expedient to relieve the Registrars of Counties in Upper Canada from the disability to practice as Attorneys or Solicitors, imposed upon them by the Act hereinafter cited: Therefore, Her Majesty by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—So much of the fifth section of the Act twenty-second Victoria, chapter nine-four, *to extend the provisions of the Act to amend the law for the Admission of Attorneys*, as provides that no person shall practice as an Attorney or Solicitor of any Court of Law or Equity in Upper Canada, who shall, either in his own person, or by his partner, deputy or agent, or in the name of any other person, or otherwise, directly or indirectly hold, possess, practice, carry on or conduct the office of Registrar of any County or Union of Counties in Upper Canada, and that every such person so practising shall be subject to the forfeiture of such office, and shall, in addition thereto, be subject to a penalty of five hundred pounds, shall be, and the same is hereby repealed.

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*An Act to amend the Act respecting the Municipal Institutions of Upper Canada.*

[Assented to 4th May, 1859.]

WHEREAS it is necessary to amend the *Act respecting the Municipal Institutions of Upper Canada*, twenty-second Victoria, chapter ninety-nine, in respect to the dividing of Townships into Wards: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Section two hundred and sixty-four of the said recited Act is hereby repealed, and the following substituted therefor: "In case a majority of the qualified electors of a Towhship on the last revised Assessment Roll do, by petition in writing signed by them, apply to the Council of the Township to divide the Township into Wards, if not already so divided, or to abolish or alter, in manner specified in the petition, any existing division into Wards, the Council shall, within one month thereafter, pass a By-law to give effect to the petition, and shall in the By-law recite the Petition, and also the present section of this Act, and shall declare that the By-law is passed in compliance with the prayer of the petition; And the By-law shall take effect on the first day of December next after one month from the date of its first publication in some newspaper published in the County or Union of Counties in which the Township is situated, or by printed handbills post in at least twenty public places in the Township."

2.—Section two hundred and sixty-five of the said recited Act is hereby repealed, and the following substituted therefor: "In case the petition is for a division into Wards (and does not specify the manner of the division,) the Council shall so arrange the Wards that they may be as compact, and contain as nearly an equal number of electors, as may be consistent with the convenience of the inhabitants; the number of wards being five in all cases."

3.—If any person steals, or unlawfully or maliciously either by violence or stealth, takes from any Deputy Returning Officer or Poll Clerk, or from any other person having the lawful custody thereof, or from its lawful place of deposit for the time being, or unlawfully or maliciously destroys, injures or obliterates, or causes to be wilfully or maliciously destroyed, in-

jured or obliterated, or makes or causes to be made any erasure, addition of names or interlineation of names, into or upon, or aids, counsels or assists in so stealing, taking, destroying, injuring or obliterating, or in making any erasure, addition of names or interlineation of names into or upon any Writ of Election or any return to a Writ of Election or any Indenture, Poll Book, Certificate or Affidavit, or any other document or paper made, prepared or drawn out according to or for the purpose of meeting the requirements of the law in regard to Municipal Elections—every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned in the Provincial Penitentiary for any term not exceeding seven nor less than two years, or to be imprisoned in any other place of confinement for any term less than two years, or to suffer such other punishment by fine or imprisonment, or both, as the Court shall award; And it shall not in any indictment for any such offence be necessary to allege that the article in respect of which the offence is committed, is the property of any person, or that the same is of any value.

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*An Act to avoid doubts as to a certain provision of the Act respecting the Municipal Institutions of Upper Canada.*

[Assented to 4th May, 1859.]

WHEREAS doubts have arisen as to the true intent and meaning of the two hundred and forty-sixth section of the Act passed in the twenty-second year of her Majesty's Reign, intituled, *An Act respecting the Municipal Institutions of Upper Canada*, (22 Vic. c. 99,) as regards the application of the sums to be paid for Tavern Licenses: Therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly, of Canada, enacts as follows:

1.—It was and is the intent and meaning of the said section, —that the Provincial duty payable on Tavern Licenses, under the fourteenth section of the Act passed in the said Session, and intituled, *An Act to amend the law relative to Duties of Customs and of Excise, and to impose new duties, and a duty on Tavern Keepers*, should be paid over by the Municipal Officer receiving the same to the Receiver General, (after deducting four per cent. for his trouble in collecting it)—in the manner provided by the said last mentioned Act, and subject to all the enactments thereof,—but that the duty under the Imperial Act, cited in the said two hundred and forty-sixth section and any further sum payable for such Licenses over and above the said Provincial duty, should be applied to the use of the Corporation.

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*An Act to prevent the carrying of Bowie-knives, Daggers, and other deadly weapons about the person.*

[Assented to 4th May, 1859.]

WHEREAS the practice of carrying deadly weapons about the person is attended with great danger, and tends to aggravate the consequences of sudden quarrels, and it is therefore expedient to put a stop to it: Therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—If any person shall, from and after the passing of this Act, carry about his person any Bowie-knive, Dagger or Dirk, or any weapons called or known as Iron Knuckles, Skull-crackers, or Slung Shot, or other offensive weapons of a like character, or any instrument loaded at the end, or shall sell or expose for sale, publicly or privately, any such weapon, he shall be subject, on conviction, to a fine of not less than ten nor more than forty dollars, and in default of payment thereof, to imprisonment for a term not exceeding thirty days, at the discretion of the Court wherein the offence is tried.

2.—Any person charged with having committed any offence against the provisions of this Act, may be tried and dealt with in pursuance of the Act twentieth Victoria, chapter twenty-seven as amended by the Act twenty-second Victoria, chapter twenty-seven.

3.—It shall be the duty of the Court or Magistrate before whom any person is convicted under this Act, to impound the weapon, for carrying which such person is convicted, and to cause the same to be destroyed.

4.—All prosecutions under this Act shall be commenced within one month from the offence charged; and from any conviction or decision under this Act, an appeal shall lie to the Court of General Quarter Sessions of the Peace for the County in Upper Canada or District in Lower Canada wherein the same takes place, subject in Upper Canada to the provisions of the Act thirteenth and fourteenth Victoria, chapter fifty-four, and in Lower Canada to the provisions of law regulating appeals to the Quarter Sessions generally.

5.—This shall be a Public Act.

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## DIVISION COURTS.

### OFFICERS AND SUITORS.

#### THE JUDGMENT SUMMONS.

In an article elsewhere we have noticed fully the misunderstanding as to the 91st section of the Act. There is reason to believe that the move to repeal it in toto will be renewed next session. Regarding it as the mainstay of the Courts, we are anxious to collect undeniable testimony as to its value, which we will place before the public. Let Clerks of Division Courts, therefore, who have the best opportunity of forming a judgment, furnish us with such particulars as may serve the object in view; embracing, if possible, a period of eighteen months, and showing, for example, aggregate amounts upon which Judgment Summonses issued—the amounts paid thereon—the numbers of orders of commitment—numbers of actual commitments to gaol and any other item serving to a better understanding of the 91st clause.

We give timely warning, and point out the surest mode of preventing an impending evil, the rest must remain with others.

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#### ANSWERS TO CORRESPONDENTS.

*To the Editors of the Law Journal.*

GENTLEMEN:—Happening to be in the Division Court in Brantford, I was not a little surprised at a very singular decision rendered by his Honor Judge Jones, with regard to permitting an endorser of a note, on which judgment had been obtained by a third party, and which had been paid, to bring up the maker of the note (who had not been previously sued on the note by the endorser), on a Judgment Summons. The facts of the case are briefly these: The Bank of B. N. A. in the town, brought an action in the Division Court against J. K. as maker of the note, and P. W. & Co., as endorsers. Judgment was obtained, and the amount of the note subsequently paid to the Bank by P. W. & Co. At the Division Court to-day, J. K, being brought up on a Judgment summons by P. W. & Co., contended that the latter not having sued the note, or brought any other action against (him) J. K. could not legally compel him to appear on a Judgment Summons. Strange to say, however, Judge Jones decided that he could. Trusting that you will favour the public with your opinion of the matter, I remain, yours truly,

LEX.

[We have struck a few words out of the foregoing which might appear offensive. The uses of the communication will not be impaired in the present form.

As given by "Lex," the decision certainly seems a singular one. The judgment after having been paid by one of the defendants could not be enforced against the other, and the Judgment Summons being a proceeding in aid must have some valid and subsisting judgment for its support. A case exactly similar fell under our own observation,—a Bank, also plaintiffs—and it coming out at the hearing that the plaintiffs had no interest, their judgment being paid, but had allowed the proceedings to go on for the benefit of the endorser; the Judge (Gowan) declined to proceed in the matter.—EDS. L. J.]

## U. C. REPORTS.

HILARY TERM, 1859.

*Reported by* C. ROBINSON, ESQ., *Barrister-at-Law.*

### JOHNSON v. THE PORT DOVER HARBOUR COMPANY.

*Wharf—Duty to repair—Proof of Ownership—Excessive damages.*

*Held*, that under the evidence, set out below, the ownership and possession by defendants of the wharf in question was sufficiently shewn to sustain an action against them by the plaintiff for injuries occasioned to him by not keeping it in repair; and that the damages given were not excessive.

The declaration charged the defendants as being upon the 24th of May, 1853, the possessors and occupiers of a certain wharf, with the appurtenances, situate in the township of Woodhouse, which wharf before and at that time was kept and maintained by the defendants for the purpose of thereat and thereby loading and unloading, and shipping and unshiping to and from the vessels frequenting the said wharf, divers quantities of goods, &c., for reward, and the plaintiff, during all the time, was hired and employed, and but for the grievances complained of would have continued to be hired and employed as a sailor on board the vessel called "La Fayette," at £4 10s. per month; and while the plaintiff was so employed, the said vessel was at the said wharf for the purpose aforesaid: that the said wharf was, at the time aforesaid, in an unsound, ruinous, dangerous, unsafe and improper state and condition, yet the defendants knowing the premises, whilst they were the possessors and occupiers, and after a sufficient time had elapsed, in which they might have repaired the wharf, wrongfully and unjustly permitted the wharf to continue dangerous, &c., and for want of proper repair the plaintiff, who in his employment, had stepped from the vessel upon the wharf, while lawfully there, fell through the upper part of the wharf into and between the materials thereof, and one of his legs was fractured, and the plaintiff became ill, lame and disordered, and remained so for a long time, and suffered and underwent great pain, and was prevented from attending to his affairs and business, and was deprived of his hiring and employment and his wages, and was also crippled and injured in his legs, and debilitated in bodily health and vigour, and rendered incapable at any future time to resume his said or any similar employment, and during such time did necessarily incur great expense in procuring meat, drink, &c., and did lay out large sums in and about endeavouring to be cured.

*Pleas*:—1st. Not guilty. 2nd. That the defendants were not the possessors or occupiers of the wharf. 3rd. That the wharf was not kept or maintained by defendants for the purposes stated. 4th. That it was not the duty of the defendants to have the wharf repaired.

At the trial, at Simcoe, at the autumn assizes in 1857, before *Burns*, J., the facts appeared as follow: Previous to October, 1850, the harbour, piers, wharf and works at Port Dover belonged to the government, and the tolls and harbour dues were taken and received under the authority of government. At the end of the pier stood a lighthouse, which was under the management of the government, and the lighthouse keeper was paid by government up to the 1st of May, 1853. The government sold the harbour and pier, wharf, and other premises at public auction in October, 1850, and a company of individuals purchased the same under the authority of the statutes 13 and 14 Vic., ch. 14, and 12 Vic., ch. 5. These individuals six in number, formed themselves into a company under the 12 Vic., ch. 84, and divided a capital of £8000 into 1600 shares, and called the company "The Port Dover Harbour Company." A deed signed by them for the shares and stock was executed on the 14th of October, 1850, and registered in the county of Norfolk on the 11th of December, 1850, containing a receipt on the face of the deed by the secretary and treasurer for the six per cent. required by the act to be paid. From the year 1850 up to the 1st of July, 1853, the tolls and harbour dues were received for, and on behalf of the company so formed, or of individual members thereof. At the time of the transfer of the harbour by the government to the company, it was proved that the wharf, which was composed of the pier, was in a good state of repair, but afterwards was allowed to be out of repair. The pier was partly planked, and a hole had been made in the planks by the landing of some iron works from a vessel, and this hole was from seventeen to twenty inches in length, and 9 inches in breadth. It was occasioned by the planks becoming rotten, and it was not repaired at the time of the accident to the plaintiff. On the 24th May, 1853, the vessel, on board of which the plaintiff was engaged as a deck hand, was moored to the wharf, about three or four feet from the place where this hole was. It was proved that some persons knew of the hole, and had got in, and also horses had got in, but no injury had happened until that which occurred to the plaintiff. Those persons who knew of the hole of course took care to avoid it when going on the pier. It was proved by the captain of the vessel that he had several times during that day passed the place and did not observe the hole, though he said it was in the usual place where vessels load and unload cargoes. The vessel was, during that day, loading with lumber, and the plaintiff assisted as a hand of the vessel to load. Between 10 and 11 o'clock at night of the 24th May, the plaintiff went ashore from the vessel to the wharf, and walking thereon fell into the hole, and his leg was broken. He was confined in the doctor's hands for a space of upwards of five months, during all which time he was not only out of work, but at expenses. Evidence was offered also that the plaintiff would sustain thereby a permanent injury. It was proved that the company of individuals so purchasing the harbour sold it to The Lake Erie and Woodstock Railway Company, but the transfer, dated the 25th of June, 1853, was that of four of the shareholders of the amounts of their shares to five other individuals. The Railway Company only received the tolls of the harbour after the 1st of July, 1853, and up to that time the company called the *Port Dover Harbour Company*, or the individual members thereof, received the tolls, and also received the dues in May, 1853, from the vessel on board of which the plaintiff was engaged. The railway company, it seemed, paid the lighthouse keeper from the 1st of May, 1853.

It was objected at the trial against the plaintiff's recovery,—1st. That the government having paid the lighthouse keeper to the 6th of May, 1853, and then after that time the railway company paying him, and the evidence shewing that the payment of the tolls and harbour dues was to two of the individuals of the company, rather than the company, up to the 1st of July, 1853, and then to the railway company after that time, there was no duty established upon the defendants as a corporation, as alleged in the declaration, to repair the wharf in any way.

2nd. That it was not proved that the defendants were in fact a corporation under the statute, for there was no proof of payment of the six per cent. of the capital stock in the first formation thereof.

3rd. That to render defendants liable, there should be some proof of transfer from the Crown to them in some way; the production of a deed of association of a certain number of individuals, with the evidence of receipt of tolls by some members of that association, not being sufficient to make a corporation liable.

The learned judge overruled the objections, but reserved leave to the defendants to move to enter a nonsuit.

The jury was directed to consider, 1st. Whether defendants, as a corporation, were, on the 24th of May, 1853, the possessors or occupiers of the wharf and harbour, or whether two of the individual shareholders were the occupiers, against whom it was contended the action should be brought, instead of the corporation.

2nd. Whether the defendants were guilty of carelessness in

leaving the hole in the wharf, and whether the plaintiff had any knowledge or intimation of it, or that it was so apparent that he ought to have exercised some judgment in avoiding it: in fact, whether he contributed to the injury himself: for if so, though the defendants might be to blame, yet if he acted without proper care and caution himself he could not make the defendants responsible.

3rd. With respect to damages, the jury would consider whether the plaintiff had sustained any permanent injury, beyond the length of time he had been out of work, and other expenses.

The jury found a verdict for the plaintiff, and £250 damages.

*M. C. Cameron* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial for excessive damages.

*Martin* shewed cause.

ROBINSON, C. J.—Why the plaintiff deferred bringing his case to trial so long is not stated. He received the injury in May, 1853, and brought his action in March, 1854. The evidence seems to have established very clearly that the wharf or pier in question was carelessly suffered to be for a long time out of repair on that part on which the plaintiff received the injury, while nothing more seems to have been necessary than the substituting a sound plank for one that had become rotten.

The defect was apparent; others had fallen into the hole; it was considered dangerous; and it was suffered to be in that state, though it was on that part of the wharf at which vessels generally lie while they are taking in or discharging their cargo. The plaintiff was a deck hand on board of one of their vessels. He stepped from the vessel on the wharf after dark, got his leg into this hole, and broke it. Considering that he was five months disabled from the accident, and suffered much pain, and that his leg is not now well, and, as it seems, never will be as serviceable as it was before, I do not think we can possibly say that the damages were excessive, though the jury gave the full amount of damages laid in the declaration, which shews that they took a favourable view of the plaintiff's case. Some juries might perhaps have thought a less sum would be sufficient compensation, but we cannot pronounce the amount that was given to be outrageous, and cannot interfere properly on that ground.

Then, as to the injury being occasioned by the culpable negligence of the parties that were bound to keep the place in repair, there is no denying that the evidence made that out plainly; and the only remaining question is whether the defendants, the Port Dover Harbour Company, were the parties chargeable.

In my opinion it is proved by the evidence that they were, and that the plaintiff was entitled to succeed upon all the issues. The declaration does not found the action upon any of the statutes respecting public works made by joint stock companies, or acquired by such companies by purchase from the government, and there is nothing that I see in any of those statutes either conferring or interfering with the right of a person to sue for any injury sustained under circumstances like the present. The principles of the common law sustain this action, if it be true, as the jury found it was, that the pier in question was in the possession of the defendants, and used and enjoyed by them, under their control.

The evidence, in my opinion, was sufficient to shew that this was the state of things, and the contrary was not established. I think, therefore, the rule should be discharged.

MCLEAN, J.—The defendants are sued as a corporation, for an injury sustained by the plaintiff while engaged in his occupation as a sailor attached to a vessel lying at the pier at Port Dover, in consequence of a defect in the planking of the pier while the harbour was the property of the defendants.

It appeared in evidence that on the 24th day of May, 1853, the vessel on which the plaintiff was serving was lying at the pier at Port Dover, taking in a load of lumber, and that the plaintiff, on the night of that day, fell through the planking and broke his leg, so as to occasion him a permanent injury. It was also shewn that a company was formed under the statute authorising the formation of joint stock companies under a deed duly registered, dated the 14th day of October, 1850, to purchase and hold the harbour, and that they were the owners and occupiers at the time of the injury to the plaintiff; the assignment alleged to have been made to Messrs. Farmer and others, bearing date on the 25th of June, 1853, after the injury had been sustained.

By the 12 Vic., ch. 81, sec. 35, it is made incumbent upon any joint stock company formed under that act for the construction of any road or public work to keep the same in repair after completion and the receipt of tolls; and any company failing to do so may be indicted. But though a mode is thus prescribed for proceeding on behalf of the public, individuals who sustain injury in consequence of such default may proceed by action to recover any damage sustained.

By the 13th & 14th Vic., ch. 14, sec. 1, the provisions of 12 Vic., ch. 81, are extended, and made to apply to any company to be formed for the purpose of acquiring for ever, or for any term of years, any of the public roads, harbours, &c., so that from the time the Port Dover harbour was acquired by the defendants, it became their duty "to keep the same in good and sufficient repair."

The testimony shews that the pier was in good repair when it was purchased by the defendants, and that nothing was done by them to keep it in repair, and that the want of such repair was the cause of the injury to the plaintiff for which this action is brought.

As to the damage being excessive, the plaintiff appears to have been long confined, and to have suffered greatly by the fracture of his leg, and it further appears that the injury is one of a permanent nature, disqualifying him in a great measure from earning his living by his former occupation as a sailor. The jury having heard the evidence, found a verdict for £250, and under such circumstances the amount cannot be considered excessive, or at all events so excessive as to justify the granting of a new trial on that account.

BURNS, J., concurred.

Rule discharged.

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THE QUEEN v. THE GRAND TRUNK RAILWAY COMPANY.

*Indictment against a railway company for nuisance in obstructing the highway, by improper construction of their road in crossing it—Conviction—Motion for judgment—Practice.*

Indictment for a nuisance to a public highway, between concessions A. & B., in the the township of Etobicoke, in the County of York.

The Indictment was removed into this court by *certiorari*, and after an ineffectual attempt at arbitration, it was tried upon a *nisi prius* record, before *Draper*, C. J., at the assizes held in Toronto, in October, 1857, and the defendants were found guilty.

The nuisance complained of was, that the defendants, in taking their railway across the highway in question, had lowered the highway at the point of the intersection, so as to make it inconvenient and dangerous, especially for loaded teams to descend upon and ascend from the railway track in passing along the highway across it, and that the danger was much increased by the circumstance that the railway came upon the highway from a deep cutting, which made it impossible to observe the approach of trains at a distance, or in time to take warning before crossing the track of the railway.

In Easter Term, 1858, nothing having been done towards abating the nuisance complained of, as the prosecutors had been led to expect there would be, *C. S. Patterson* moved for judgment upon the conviction. Affidavits were filed on the part of the prosecution; none on the defendants' part.

Neither of the defendants' counsel, nor any of their officers, were in court when judgment was moved.

At the sittings after the term to deliver judgment, *Robinson*, C. J., said:

"I do not think we can properly, under the Common Law Procedure Act, sec. 316, give judgment out of term in a matter of this nature, though perhaps we might.

"Supposing nothing has been done, we should in the general course give judgment to abate the nuisance, and inflict a nominal fine; but *quære*, in this case is the abatement or prostration spoken of in the books applicable; there is nothing here to pull down; and can the nuisance be abated, properly speaking, otherwise than by crossing at some other point; and should not the prosecutors have proceeded by *mandamus* to compel the company to carry the

statute into effect, by restoring the road to its former state of usefulness?

"It may be that the company not having done it, are properly held to be guilty of nuisance, though authorised to lay the track across the road, because, if they have not performed the conditions on which the authority was given to them, they are to be looked upon as occupying the highway without authority.

"The defendants' counsel should have notice that judgment has been moved for, and an opportunity of filing affidavits or addressing the court."

Afterwards, in Trinity Term, no arrangement having been come to respecting the nuisance complained of, *Patterson* again asked for judgment. *Mr. Bell*, solicitor for the Grand Trunk Railway Company, being in court, and having received notice that judgment would be moved for, said he had no instructions; that he was not solicitor for this part of the line, (in Etobicoke,) but at Belleville; that the solicitor here, *Mr. Galt*, was absent, that he was not prepared to engage for any thing, or to represent the company in the matter.

He urged that the prosecutors and the company should refer to some competent and disinterested engineer, as to what was reasonable and proper to be done for obviating the detriment complained of to the highway, and that this conviction should stand as it was, without sentence passed upon it, till the result was known.

The prosecutors' counsel did not object to this, but complained that he had met with nothing but delay in his efforts to have something done, and that the company would give no attention to it.

It was intimated that there was some difficulty between the company and contractors in *regard to this matter, and that this* had induced the company to delay taking such steps as would otherwise be proper.

The prosecutors filed affidavits, the defendants filed none.

Those on the part of the prosecution stated various attempts made to procure the abatement of the nuisance without proceeding to extremities, repeated promises on the part of the defendants, but nothing done, and the highway in the meantime becoming worse, and for a time last spring nearly impassable. And that the costs of the prosecution, including disbursements, amounted to £84 13s. 6d.

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

This case is very like *Regina* v. *Scott et al.*, 3 Q. B. 543; see also *Regina* v. *North of England R. W. Co.*, 9 Q. B. 315.

The defendants have had ample notice of the moving for judgment, and opportunity of producing affidavits in mitigation: they show nothing, and apparently take no trouble in the matter.

The proper sentence seems to be that they should pay a fine, and that the nuisance complained of be abated.

As to abating the nuisance, there may be great practical difficulties in the way, and such as, if the parties had in a proper manner laid them before us, might have influenced our judgment, but we are left to conjecture upon that point. Under the Railway Law in Ireland there are commissioners, who on behalf of the public would have had the highway restored to its proper state at the expense of the company, and in England, or here, another course was open than that by indictment, namely, by moving for a *mandamus* to the company to carry the statute into effect, by restoring the highway to its former state as nearly as circumstances will permit; but the course which has been taken is a legal course, though perhaps not the most convenient, and we must give effect to the conviction.

Our judgment is that defendants pay a fine to the Queen of £100, and that the nuisance complained of be abated.

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### Wilson v. Kerr et al.

*Assignment in trust for Creditors—Improper stipulations—Change of possession—Description of goods.*

"All and singular the stock in trade of the said W." (the assignor) "*situate on Ontario Street*, in said town of Stratford, and also all his other goods, chattels, furniture, &c."

*Held*, an insufficient description as to all the goods.

In an interpleader issue to try the validity of an assignment in trust for creditors, the court being left to draw the same inferences as a jury.

*Held*, that it was fraudulent for the assignor to assign on the understanding that he should be allowed to keep possession of his household furniture.

*Held*, further, that the assignment was also fraudulent, because it contained a stipulation that no creditors should share except those executing within forty days and a release in full on condition of their getting the dividend out of the proceeds of the goods assigned, with a proviso that the surplus should go to the assignor.

*Held* also, that the facts stated below did not show a sufficient change of possession to dispense with filing

Interpleader. The plaintiff claimed under an assignment from R. D. Wilson, his brother. The defendants were execution creditors of R. D. Wilson.

The assignor, R. D. Wilson, being insolvent, proposed to some of his creditors to make an assignment to them for the benefit of his creditors generally, but he wanted to reserve to himself the privilege of being unmolested in the possession of his household furniture. This was declined.

He then made an assignment to his brother, the plaintiff, who lived at Hamilton, sixty or seventy miles from the shop in which the goods were, and he gave as a reason for this, that his brother would be more anxious to make the most of the property. His brother did go up to Stratford, and stayed two or three days, and assisted in taking stock, and then he locked up the building and returned to Hamilton, leaving the key in possession of the postmaster at Stratford, from whom it seemed to have got into the possession of R. D. Wilson, who had constant access to the shop by a back entrance, though the street door was kept fastened.

The assignment was dated 15th of March, 1858. It was made to the plaintiff, in trust for creditors who should execute within forty days. A clause of release by creditors executing of all claim beyond what the dividends might produce was contained in the instrument, and the surplus, after paying out the proceeds rateably to the creditors *who should execute, was by the terms of the* trust to be paid over to the assignor.

The property intended to be transferred by the deed was described as "all and singular the stock in trade of the said R. D. Wilson, situate on Ontario street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years, leases, securities for money."

At the trial, at Stratford, before *Robinson*, C. J., after all the evidence had been given, the parties agreed that it should be left to the court to determine whether the plaintiff was entitled to succeed in regard to all or any part of the property claimed, or whether a nonsuit should be entered.

The defendants objected on the trial, that the goods assigned were not sufficiently described, and especially as to the household furniture, and everything besides the stock in trade; and also that the assignment which had been filed under the act was fraudulent, because there was no such change of possession as could make it valid.

A verdict was taken for the plaintiff, subject to the opinion of this court upon the evidence, the court to be at liberty to draw the same inferences as they might think the jury should have done.

*Martin*, for the plaintiff, cited *Gildersleeve* v. *Corby et al.*, 15 U. C. R. 153; 27 L. J. Ex. 378; *M'Pherson* v. *Reynolds*, 6 C. P. 496; *Congreve* v. *Evetts*, 10 Ex 298, *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Florry* v. *Denny*, 7 Ex. 581; *Gildersleeve* v. *Ault*, 16 U. C. R. 401.

*Burton*, for defendants, cited *Short* v. *Rattan*, 12 U. C. R. 79; *Olmstead et al*, v. *Smith et al.*, 15 U. C. R. 121; *Balkwell* v. *Beadome*, 16 U. C. R. 206; *Harris et al.* v. *Commercial Bank*, *Ib.* 437.

Robinson, C. J.—There was a visible change in this respect, that the shop was no longer kept open, but it is hard to say that there was such a change made of the custody of the goods from the hands of the assignor, to the hands of the assignee as might be expected to follow a *bona fide* transfer. The assignment was filed according to the statute, and therefore the objection as to possession not being changed could only be urged as constituting a badge of fraud.

Then, further, I think the goods were not sufficiently described by stating them to be situated on Ontario street, without saying they were in the shop or on the premises of the assignor situate upon that street; and as to any thing but the stock in trade there really was no description at all.

It was fraudulent, too. I think, for the assignor to assign only

on the understanding that he should be allowed to keep possession of his household furniture, which he did keep and enjoy just as before.

In my opinion it was also fraudulent by reason of the stipulation contained in the assignment that no creditors should share in the proceeds, except such as should execute the assignment within forty days, which assignment contained a release by the creditors who should execute of all the debts in full, on condition of their getting the dividend out of what the effects might produce, and a provision that after the execution creditors should be paid their dividend any surplus that there might be should go to the assignor.

This comes, I think, within the principle of these cases in which assignments have been held void as to creditors, who could not execute without coming under such conditions as would subject them to be treated as partners in a continued business, proposed by a deed of trust to be carried on in order to the better winding up of the affairs of the estate. It is an attempt to coerce the creditors to come under a disadvantageous condition at the peril of getting nothing.

In my opinion a nonsuit should be entered.

BURNS, J.—The only point which I have considered is, whether in describing what was intended to pass by the deed the fourth section of the statute 20 Vic., ch. 3, has been complied with, and upon that I think the plaintiff's case fails.

According to the wording of the deed the case presents two questions; first, with respect to the *stock in trade*, and next, with respect to *all other goods, chattels, furniture, household effects, horses, cattle, and also all bonds, &c.* The latter cannot be held a compliance with the provision that they are so to be described, that the same may be thereby readily and easily known and distinguished. Where all or any of these things then were, or were to be found, the deed is silent. Of course it could not be expected that every chair or table must be so described that by reading the description in the deed a person could go and identify them, but surely the legislature meant something when the enactment was made. If it would be inconvenient to describe each article or each set of articles, either as to numbers or quantities, marks or otherwise, that they might be known, yet a description by locality might be given which would enable a person to go with the deed in his hands and point out the goods transferred. No one, however, on reading this deed, could possibly say any of these *other* things mentioned could either be readily or easily known or distinguished. *Quoad* these things the plaintiff's case must, I think, fail

Then with regard to the stock in trade. This is a term very well known in bankruptcy matters, and I should find no fault with that expression if we had further information to tell us what it was that was assigned. There is an attempt in this to give information as to locality, but it is very vague. The deed simply says, the stock in trade situate on Ontario street, in the town of Stratford. In what part of the street we are to look for it, the deed does not tell us. Further, we are not informed what description of stock in trade it is; there is nothing on the face of the deed to give us the slightest idea whether it was the stock in trade of a dry goods dealer, a grocer, a distiller, a brewer, or of any kind of business which the assignors carried on. The deed is singularly silent with respect to any information from which a person reading it might draw an inference, except that the assignor is described himself to be a merchant. Without that term used in describing him we should not know what he was; but will that do from which to draw an inference that the stock in trade was that of a merchant? It does not appear to me that would be a compliance with the act of parliament. The term merchant, with reference to the business carried on, is as convertible as that of stock in trade, The proper definition of the term is applicable to one who traffics or carries on trade with foreign countries, as an exporter or importer The popular usage of the expression is to apply it to any trader, or one who deals in the purchase of goods. There are wheat merchants, timber merchants, lumber merchants, and a thousand others, as well as a dealer in cottons, calicoes, and what not. I do not see that we are helped at all in finding out what the stock in trade was by being told that the assignor was a merchant. To be sure we discover it by reference to the evidence; but the question is, whether this information should not exist on the face of the deed. The statute says it shall contain such efficient and full description thereof, &c. It does not appear to me this deed does contain such efficient description as that any one can possibly say what the stock in trade was that was transferred. If we had been told in what house it was, or on what premises the same might be found, that perhaps might have helped, but here we are told the stock in trade will be found *on* the street in Stratford. To take this literally the public would have the opportunity of helping itself, or the corporation would complain of a nuisance, I think we should scarcely look for the goods upon the street, but the parties might have told us better where to find them.

MCLEAN, J., concurred. Judgment for defendants

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(CHAMBERS.)

(*Reported by* MR. J. G. WOOD.)

PERRIN, TRUSTEE, &c., v. BOWES.

*Setting aside irregular execution on motion of strangers.*

An execution will not be set aside at the instance of a subsequent execution creditor, even although eight days from the last day for appearance had not expired at the time when such execution issued.

(29th March, 1859.)

This was a summons calling on one J. G. Bowes to shew cause why the writ of *fi. fa.* issued by him against the defendant's goods should not be set aside with costs for irregularity, on the grounds that the writ should not have issued until the 23rd March, whereas it was issued on the 21st March, and also upon grounds disclosed in affidavit filed.

The affidavit put in stated that final judgment was entered up in this cause on 22nd March, 1859, and execution issued against defendant's goods on the same day. That final judgment had been entered up in default of appearance against the defendant at the suit of one J. G. Bowes, on 19th March, (the writ of summons upon which the last mentioned judgment had been signed, having been served upon the defendant on 4th March) and that execution had issued on such last mentioned judgment, and been placed in the hands of the sheriff on the 21st March.

*L. W. Smith* shewed cause.

ROBINSON, C. J.—The execution against the defendant by J. G. Bowes was issued a day too soon; but I find no authority for setting aside an execution at the instance of a stranger to the action. The cases are all the other way. The plaintiff's summons must therefore be discharged with costs.

*Summons discharged with costs.*

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CHAPMAN v. DELORME.

*Practice—Service of Writ of Attachment—Reference to the Clerk of the Court.*

When a writ of attachment has been served upon the wife of an absconding debtor, who has fled to parts where personal service cannot be effected, the plaintiff's damages may be ascertained by the Clerk of the Court under section 143, C. L. P. Act.

(18th May, 1859.)

This was an application for leave to proceed under sections 45 and 143 of the C. L. P. Act, 1856. The affidavit put in stated that diligent enquiry had been made as to the place where defendant had fled to; that he was believed to be in California or in parts adjacent to Fraser River, and that personal service upon him could not be effected. That the writ had been served on defendant's wife who was residing in the city of Toronto, and that no special bail had been put in. That this action was brought to recover the amount due on certain acceptances made by defendant, and for goods sold and delivered, and that the amount for which judgment was to be signed could be correctly ascertained by reference thereof to the Clerk of the Court. Upon which

BURNS, J., granted an *order* that the amount for which final judgment was to be signed should be ascertained by the Clerk of the Court, and that judgment for the amount so ascertained might be signed without further notice to the defendant, except serving a copy of the order and of the Master's appointment upon defendant's wife.

## COMMON PLEAS.

HILARY TERM, 1859.

*Reported by* E. C. JONES, Esq., *Barrister-at-Law.*

### SCATCHERD v. THE EQUITABLE FIRE INSURANCE COMPANY.

*Registration of vessels—Mortgagor considered owner when registered—Insurance of mortgagee's interest.*

Upon an action for insurance upon a vessel under the usual interim receipt.

*Held*, that the mortgagor of a non-registered vessel had not such an interest as was saleable under a *fi. fa.*, the 23rd sec of the statute 8 Vic., ch. 5, only declaring that the *registered* owner, although he shall have mortgaged the vessel, shall be considered to be the owner thereof; and that by a purchase under a *fi fa.* of the mortgagor's interest in a *non registered vessel*, the legal estate did not pass.

The plaintiff, at the trial, claiming as owner under a sale as above stated, and the judge ruling against him, applied and was allowed to prove his interest as mortgagee.

Upon a motion for a nonsuit upon that ground.

*Held*, that it was a matter in the discretion of the judge at *nisi prius* to permit such a variance in the line of proof, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused.

The declaration states, that, on the 1st of April, 1858, plaintiff applied to defendants to insure against fire in the sum of $5000, the hull, standing rigging and machinery of the steamer "Forest City," of which the plaintiff was the owner, as then lying at Port Stanley, for one month, from the 1st of April, and plaintiff paid the premium, and defendants granted plaintiff a receipt therefor, and also insured in the sum of $5000 the said property, until within thirty days from that date a policy should be issued, if approved by the local directors at Montreal, or until the insurance should be cancelled by defendants. That afterwards, and whilst the insurance created by the receipt was in force, before the policy issued and before the local directors approved or cancelled the same, the steamer was accidently destroyed and damaged by fire, to the value of £1500, whilst still plaintiff's property; yet defendants have not paid. Second count for money had and received.

Pleas to 1st count: 1st. Did not issue the receipt. 2nd. The property not the plaintiff's. 3rd. That the receipt was subject to all the terms and conditions of the policy in use by defendants, among which is the following. "All persons insured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the agent through whom insured, or to the nearest agent, and, within one calendar month after such loss or damage has occured, are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and, if required, make proof of the same by their oath or affirmation, according to the form used in the said office, and by the production of the books of account and other proper vouchers, and give such further information thereon as shall be necessary, and shall, if required, procure a certificate under the hands of three or more respectable householders nearest to the place where the fire has happened, and not concerned in such loss, importing they are acquainted with the character and circumstances of the person insured, and do know or verily believe that he, &c., really and by misfortune, without any kind of fraud or evil practice, has sustained by such fire loss and damage to the amount therein mentioned. Until such affidavit, account and certificate are produced, and such explanation given, the amount of the loss shall not be payable. Also, if there be found to be any false swearing or attempt at fraud, collusion, or wilful mis-statement on the part or in the behalf of the person insured, or if it should appear that the fire shall have been occasioned by any wilful act or connivance on his part, he shall forfeit all claim to restitution or payment by virtue of his policy." That defendants required plaintiff to furnish them with a statement shewing his title and interest in the steamer, together with all deeds and instruments evidencing such title and interest, and to furnish them with copies of all accounts and transactions between plaintiff and one Paul Phipps, and to state what securities plaintiff then held, or, at the effecting the insurance on the said steamer, did hold for securing payment of any debt due from Phipps to plaintiff, and how and for what consideration plaintiff acquired the interest of Phipps in the steamer, and whether the interest of the plaintiff in the steamer was that of owner or mortgagee, and required plaintiff to make proof of the said deeds, instruments, accounts, matters and things under his oath, none of which plaintiff has done, contrary to the condition, &c. 4th. Plea to second count never indebted. 5th. To the first count that the insurance was effected through the fraud, misrepresentation and concealment of the agent of the plaintiff, through whom the same was effected.

Replication takes issue on 1st, 2nd, 4th, and 5th pleas. To the 3rd plea, that defendants did not at any time before the commencement of this suit require the plaintiff to do as in that plea is alleged, defendants demur.

The trial took place at London, in November, 1858, before *Burns*, J. The receipt for insurance, signed by the defendants' agent at London, and dated the 1st of April, 1858, was proved. It was as follows: "Received of Thomas Scatcherd, Esq, the sum of $16.63, for the insurance of $5000, agreeable to instructions received this day, for which a policy will be issued by the Equitable Assurance Company, within 30 days from this date, if approved of by their local directors at Montreal, or otherwise this insurance to be cancelled and a *pro rata* premium returned for the unexpired term. (Signed, &c.)

"This receipt is subject to all the terms and conditions of the policy in use by the company at the date hereof."

To prove property in the plaintiff, was put in an exemplification of a judgment (under the seal of the Court of Common Pleas) recovered by *Thomas Mason* v. *Paul Phipps*, for £311 damages and £15 17s. 5d. costs, in an action on promises. Judgment entered the 10th of April, 1857. A *fi. fa.* issued to the Sheriff of Elgin on this judgment, and on the 27th of June, 1857, he sold the vessel, executing a bill of sale by which, after the usual recitals, the sheriff, in consideration of £14. granted, bargained, sold, assigned and set over "as much as in me lieth by virtue of the said writ and of my office," to the plaintiff, the said steamer, goods and chattels, furniture, tackle, anchors and appurtenances. *Habendum* all the estate, right, title, interest, claim and demand which the said Paul Phipps had in the same, to plaintiff, his executors, administrators and assigns. The sheriff proved that this sale was subject to mortgages, one to one Morton, the other to plaintiff: that the plaintiff claimed a mortgage of $4000 on her, and on this account she sold only for £14. Paul Phipps was called as a witness, and swore he formerly owned the "Forest City:" that she was worth $10,000, and was burned in April, 1858. On cross-examination he stated that he had effected an insurance on her for the plaintiff, in the Times and Beacon office, for a term that expired in March, 1858: that he applied to the same office for a further insurance, to commence from such expiration, and it was refused, because, as he swore he believed, that Company would not insure for a month: that he then applied for the present insurance to the defendants' agent, and did not tell him that the Times and Beacon would insure for so short a time, but told him they would not insure for less—he thought—than six months. He said he was under an indictment for having caused the firing of the vessel. The destruction of the steamer, except what the boiler and old iron might be worth, was proved.

The defendants' counsel objected, that no title to the vessel in Phipps was shewn; that the Provincial statute 8 Vic., ch. 5, is repealed by the imperial statute 17 and 18 Vic. ch. 104, under which every vessel must be registered, and that no registry having been shewn with respect to this vessel, no title to her is proved: and that the title relied on being the sheriff's deed, and the sale having been sworn to be subject to two mortgages, one claimed by the plaintiff to be held by himself, Phipps, if he had any title at *all*, had only an equity of redemption, which was not, on the 27th of June, 1858, subject to be sold on a *fi. fa.*, for the act 20 Vic., ch. 3—by the 11th sec. whereof the interest or equity of redemption, in chattels mortgaged, of the mortgagor was made saleable in execution—did not come into force until the 1st of August, 1857.

The plaintiff's counsel then, by leave of the learned judge, (the defendants' counsel strenuously objecting,) put in a mortgage of this vessel dated the 9th of May, 1857, from Paul Phipps to the plaintiff for £942 10s., and there rested his case.

The defendants' counsel urged that the plaintiff should be required to elect, whether he claimed as owner or as mortgagee, admitting that a mortgagee's interest was insurable. This was declined, and the learned judge allowed the case to proceed, to settle the issues, and reserved leave to the defendants to move to enter a nonsuit on any or either of the objections raised. On the defence it was then proved that when Phipps applied to defendants'

agent to insure, he was asked if she had been previously insured, and stated that she had been, with the Times and Beacon, but that they would not re-insure for a less time than three months, and as the navigation would be open by the 1st of May, he did not wish to insure against fire for a longer time than one month. The agent swore that the insurance was a *special* risk, and therefore he would not have granted it, had he known that the Times and Beacon had been applied to take it, and had refused. He would then have forwarded the application to Montreal. But he accepted it, and gave the receipt on the 1st of April, on Phipps promising to bring the premium on that day. It was not until the 5th of April that Phipps brought the plaintiff's check to the agent for the premium, who then took it. The next morning the vessel was burnt. It was also proved that on the 19th of March, the day after the previous insurance expired, Phipps applied to the agent of the Times and Beacon office at London, to insure the "Forest City" for one month, to the 19th of April, for £1250. That company declined the insurance, and the premium was returned to Phipps, who stated that the plaintiff was informed that the insurance was declined, by a letter from the company from Montreal.

The learned judge left it to the jury to say whether Phipps fraudulently withheld from the defendants' agent the information that an application had been made to the Times and Beacon Company to insure for a month, and whether it was material for the defendants to have had that information. They answered that the information was not fraudulently withheld, and that it was not material, &c, and gave a verdict for plaintiff for £1294 15s.

The defendants had further leave to move to reduce the verdict to the amount of the mortgage money, if the Court should be of opinion that the plaintiff could only recover on that title.

In Michaelmas Term, *Galt* obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for surprise, because the plaintiff, after closing his case, was allowed to put in the mortgage as proof of his insurable interest, after opening his case as owner; or to reduce the verdict to the amount of the mortgage money and interest.

*Eccles*, Q. C., shewed cause. He argued that the 23rd section of the statute 8 Vic., ch. 5, applied to vessels, although not registered under that act. The enactment is that when any transfer of any ship or vessel, or of any share thereof, shall be made only as a security for the payment of a debt, either by way of mortgage or of assignment to a trustee, for the purpose of selling the same for the payment of any debt, the collector of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the indorsement on the certificate of ownership, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt, or by way of mortgage, or to that effect, and the person to whom such transfer shall be made, or any person claiming under him as a mortgagee or a trustee only, shall not by reason thereof be deemed to be the owner of such ship or vessel, or shares thereof, nor shall the person making such transfer be deemed by reason thereof to have ceased to be an owner any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship, vessel, or shares so transferred available, by sale, for the payment of the debt, to secure which such transfer was made. And the argument was, that notwithstanding the mortgage, Phipps was, under this enactment, to be treated as owner of the vessel, and therefore his interest as owner was a legal interest, saleable under the *fi. fa.*, and so passed to the plaintiff. As to the alleged fraudulent concealments by Phipps, he argued that the reasons of the Times and Beacon Company for not renewing the insurance were, it must be presumed, contained in the letter to the plaintiff spoken of, and it was not shewn that the reason given was not that they would not insure for so short a period as one month, or for a less period than three or six months, a reason for no re-insurance by them which had been communicated to the defendants agent, though he swore he did not understand the application had been made and refused on that ground, but rather put it as if he understood no application for re-insurance on that ground had been made. He argued that it really made no difference to defendants to know that no re-insurance had been applied for because of this determination or practice of the Times and Beacon office, or that having been applied for it was refused upon that ground. There was nothing to shew that Phipps had misrepresented the reasons why there was no such re-insurance.

*Galt*, contra, urged that the 23rd sec. of the 8th Vic. was plainly limited to vessels registered under that act, a construction which he contended derived force from the 10th sec. of the 20 Vic., ch. 3, which provided that the latter act should not apply to mortgages of vessels registered under the 8th Vic., and therefore shewed that the clause permitting the sale of an equity of redemption of a mortgage chattel was not intended to apply to a mortgage of a vessel registered under the 8th Vic., but that it would apply where such vessel was not registered, in which case the mortgagor would be regarded as having only the equity of redemption and not the ownership, subject to the satisfaction of the mortgage by payment of the debt. He renewed, but did not strongly press the argument, that the imperial statute 17 and 18 Vic., ch. 104, virtually repealed the provincial statute 8 Vic. He referred to Abbott on Shipping, 1, 2, ch. 1, s. 4; Angell on Insurance, ss. 174 to 177.

It is of great importance to the defendants that the title of the plaintiff should be accurately determined. If he be absolute owner, then he may have a right to the full amount insured; but if only mortgagee, the defendants have a right to enquire how much is due upon the mortgage.

He contended that if, at the trial, the defendants had asked to have the trial put off, when the plaintiff was allowed to amend his case after closing it, by putting in the mortgage, it must have been granted, and the plaintiff have paid the costs, as a condition of the indulgence which saved him from being nonsuited, and that for the same reason a new trial without costs should be granted now.

He urged, also, that Phipps had absolutely misrepresented the refusal of the Times and Beacon Company. For he never said, which turned out to be true, that the agent of the company had given him a receipt for a month's insurance, which the company itself rejected and annulled as soon as the fact became known at the head office at Montreal. He cited *Anderson* v. *Fitzgerald*, 17 Jur. 995; 1 Arnould, s. 190, *et seq.*; Phillips on Insurance, sec. 39, *et seq.*; *Quebec Fire Assurance Company* v. *St. Louis*, 7 M. P. Cu., 286; *Mason* v. *Harvey*, 22 Law J. N. S. Ex. 335.

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

I am of opinion that the 23rd sec. of 8 Vic., ch. 5, is limited to cases in which vessels registered under that act, or any shares therein, were mortgaged, and that it extends only to declare that the registered owner, notwithstanding that he has mortgaged the vessel to secure payment of a debt due by him, shall still be deemed the owner. Consequently as the steamer "Forest City" was not a registered vessel, the mortgage from Phipps passed his legal interest in her to the plaintiff, and left no interest in him on the 10th of June, 1857, which was on that day saleable under a *fi. fa.*; that nothing in fact passed by that sale. In my opinion, therefore, the defendants were entitled to have prevailed in their motion for a nonsuit at that particular stage of the trial.

It was a matter, however, in the discretion of the learned judge, to give the plaintiffs an opportunity of curing this defect by shewing that he had, at the time this insurance was effected, an insurable interest under the mortgage from Phipps, who swears he was owner, and whose right to mortgage is not denied. The terms on which this indulgence should be granted were also with the learned judge, and it does not appear that the defendants objected to it on the ground that it became necessary for them to produce evidence which they were not then prepared with. It is not suggested even now that the admission of evidence shewing the plaintiff's interest as a mortgagee, has rendered it necessary for their defence to give further evidence, nor that they had further evidence to offer; they went on with their defence, calling witnesses upon another branch of it, a branch equally applicable whatever the nature of the plaintiff's insurable interest was. Under these circumstances it does not appear to me that we ought to grant a new trial on account of the indulgence granted, or any consequence shewn to have resulted from it.

As to the finding of the jury upon the matter submitted to them, the contest of the defendants was that a material fact was concealed from them by Phipps, acting as agent for the plaintiff. This fact had no relation to the vessel herself, or anything con-

nected with her situation or the value of the risk. It was, that an application to insure her for a month had been made to, and accepted by, the agent of the Times and Beacon Company, which, on being reported to the directors in Montreal, had been cancelled and a letter on the subject was written by their direction to the plaintiff. Phipps did not communicate the fact of this application, but on being asked by defendants' agent why he had not re-insured with the Times and Beacon, he replied to the effect, because they would not insure for so short a time as one month. There was nothing proved at the trial, nor is there any thing now suggested, to shew that the refusal arose from any other cause. And if the cause was truly represented by Phipps, I do not see that we can hold that the jury wrongly decided the question submitted to them, whether the non-representation was of a fact material to be known, and whether the information was fraudulently withheld. They negatived actual fraud, and the probable influence on the mind of the insurer was the only question that could arise. It is true that the defendants' agent swore that if he had known he would not have taken the risk on his own responsibility. Possibly not, and yet we ought not to forget he stands by the result in a situation naturally affecting him with a desire to place himself favourably with his principals. But what would have been the probable effect on the principals, if they had known that there had been a previous insurance with the Times and Beacon Company not renewed, and the fact that the Times and Beacon would not insure only for a month? Would it have probably made any difference that they refused for that reason on being applied to, or that they were not applied to because that was their rule? It is not shewn when the defendants' agent communicated the fact of the application, and his accepting it subject to their approval; whether he wrote immediately after giving the receipt on the 1st of April, or not until after receiving the premium on the 5th. I think this ground also fails to justify our granting a new trial.

As I am of opinion the plaintiff's right to recover rests on his being mortgagee and not owner, it follows that he should recover only the amount due on the mortgage with interest.

I have considered the provisions of the imperial statute 17 and 18 Vic., ch. 104, but I do not find that they touch this question, which is not whether the "Forest City" had become entitled to the privileges and character of a British ship.

Upon the argument of the demurrer to the replication, it appeared from the statements of the defendants' counsel that the real point intended to be raised by way of defence was, that after the action was brought, the defendants had called upon the plaintiff for certain information which they were entitled to demand under the terms and conditions subject to which this insurance was made, and that the plaintiff had not given them such information; and that they had demurred to the replication, stating that the defendants did not at any time, before the commencement of the suit, require the plaintiff to do as in the plea alleged. My brother *Richards* drew the attention of the defendants' counsel to the 117th sec. of the Common Law Procedure Act of 1856, which enacts that any plea which does not state whether the defence therein set up arose before or after action, shall be deemed to be a plea of matter arising before action. We did not give judgment immediately after hearing the parties on the demurrer, and when the rule *nisi* came on for argument on the following day, Mr. *Galt* applied for leave to withdraw the demurrer and amend and that application is now before us also. No affidavit was filed for the defendants, explanatory of the facts, or swearing to merits in the matter of the third plea. By the record we perceive that the writ of summons in the cause was sued out on the 14th of May, 1858, and if for this purpose we are at liberty to look at the evidence given at the trial, we see that the fire took place on the 6th of April preceding. We have nothing before us to shew that the defendants were bound by the terms of the policy to pay within any fixed period, from which it might be inferred that they should within that period demand the information or make the enquiries, on the result of which it might depend whether they would dispute the claim or no, or whether it was a matter to be done within a reasonable time. The declaration was apparently filed on the 9th of October; the pleas on the 18th; the replication on the 23rd; the demurrer on the 26th, and since then the trial has taken place, and the plaintiff has a verdict.

I have already expressed my opinion that upon the matter appearing at the trial, the plaintiff was entitled to recover in respect of his interest as mortgagee, and that the verdict should be reduced to that amount and interest; that so much in fact of the defendants' rule should be made absolute, and I think, also, the defendants should not be put to the costs of that application.

But on the demurrer, I am clear the plaintiff is entitled to judgment. And I do not see how we can grant the present application to amend. We feel that on the facts brought out at *nisi prius*, the plaintiff should himself be entitled to recover as mortgagee, and no new matter is now before us to lead to a contrary conclusion. It is not sworn that the plea, if altered as it is proposed to alter it, would then be true. We are not informed, in the only way in which we can act upon the information, when this matter of defence arose, or whether it is such matter of defence as would or would not come within the 118th sec. of the Common Law Procedure Act of 1856, as arising after the last pleading; or if it arose before the declaration was filed, but after the commencement of the suit, why was it pleaded as arising before action brought? In the absence of any new matter, and considering that the application is after verdict, and no merits are shewn, I do not see how we can grant leave to amend. The new trial was moved on grounds wholly independent of these set forth in this plea, and though, if moved on affidavit of such facts, and coupled with a motion to amend, both might have been granted on terms; such is not the present application, and to the plea as it stands on the record, the replication is, I think, a good answer. In fact the demurrer was given up, and the plaintiff is entitled to judgment on it.

*Galt* then pressed strongly that he might have leave to apply to a judge at chambers for leave to amend; and the court ordered that he might apply within fourteen days, and if no leave granted, plaintiff to have judgment on the demurrer; and they directed that no rule discharging the rule for a new trial should issue until the application to amend had been disposed of, provided it was made within fourteen days; and if it were granted, that such rule should not issue without further application to the Court.

## CHANCERY.

(Reported by THOMAS HODGINS, Esq, LL.B., Barrister-at-Law.)

(IN BANC.)

### JOICE v. DUFFY.

*Principal and surety—Mortgagor selling subject to mortgage—Parties.*

Where a purchaser of a mortgaged estate takes the same subject to his vendor's mortgage, and sells to another without paying off said mortgage he will be compelled to fulfil his undertaking to do so. Thus A being the owner in fee of a certain lot of land mortgaged the same to B, and then sold to C, leaving the mortgage to be paid by C to B as the balance of the purchase money. C then sold to D without paying the mortgage, and default having been made B sued A at law on his covenant; whereupon A then filed a bill against C and D to pay off the mortgage.

*Held*, that A as surety for C had a right to call upon him to pay the mortgage to B, and also his costs of the action at law.

*Held, also*, that D was a proper party where the vendor sought to enforce his lien on the land.

(12th May, 1859.)

This was a bill filed by two joint mortgagors against their purchaser, Geo. Duffy, and the party who purchased from him (Edward Duffy) to compel the payment of a mortgage created by the plaintiffs, and which George Duffy undertook to pay as the balance of the purchase money. There was nothing stated in the deed as to George Duffy taking the property subject to the mortgage; but the witness to the deed proved that such was the agreement, and the defendant George Duffy admitted it by his answer. The mortgagors being sued at law on their covenant filed their bill against both parties.

*Hodgins*, for the plaintiffs, moved for a decree that the defendants be ordered to pay off the mortgage. It is laid down (1 Hilliard on Mortgages, 238) that in cases like the present, the mortgagor becomes a surety to the mortgagee for the party who buys the equity of redemption subject to the mortgage debt. The son is a party to the suit, either to enforce the vendor's lien, or

to give the father a remedy over against him, should he not have contributed his share of the debt in the purchase money. *Lee* v. *Rook*, Mos. 318; *Bond* v. *England*, 1 Jur. N. S., 918; *Roberts* v. *Rees*, 5 U. C. Law Jour. 41. The plaintiffs are also entitled to their costs of the action at law: *Jones* v. *Brooke*, 4 Taunt., 464; *Stratton* v. *Matthews*, 18 L. J., Ex. 5; *Pierce* v. *Williams*, 23 L. J., Ex. 322.

*G. Morphy*, for defendant *George Duffy*, contended that such defendant was not liable, and that *Edward Duffy* was the party who should pay, he now having the property. It is laid down in several cases that he who has the land is the proper party to discharge the incumbrances thereon. The transfer of the fee must be held to have also transferred the liability to pay the incumbrance.

*Hodgins*, in reply. The contract here is not one to which the rule in *Evelyn* v *Evelyn* 2 P, Wms. 663, applies. The contract is one which affects the conscience of the father, and the equity of it is not transferred to the son, except as before stated.

ESTEN, V. C, delivered the judgment of the Court. I think the transfer of the property to *Edward Duffy* makes no difference in regard to the liability of *George* to discharge the mortgage according to his undertaking. I quite agree with the principles laid down in Hilliard on mortgages, that where a mortgagor sells subject to his mortgage, the rule in regard to principal and surety applies, and the mortgagor becomes a surety to the mortgagee for the payment of the mortgage debt; and he may apply to this Court for relief in case his purchaser makes default. The defendant *Edward* is, I think, a proper party, where the vendor seeks to enforce his lien against the land. The plaintiffs are entitled to their costs at law; and the decree will therefore be that the defendants do discharge the mortgages, and pay the costs at law and of this suit, and in default a sale of the property. I may remark, that, in suits like the present, I think the mortgagor is entitled to something more than mere payment of the mortgages; I think he is entitled to have them discharged from the registry; and as he is sued at law, and perhaps a judgment entered and registered against him, it is only proper that he should also have a release or discharge of that judgment, and also satisfaction entered up in the proper form.

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CAWTHRA v. MCGUIRE.

*Practice—Injunction against Mortgagor after Decree for foreclosure—Waste.*

After a decree for foreclosure, if the mortgagor in possession commits waste, the Court will enjoin him, though an injunction may not have been prayed for in the Bill.

(27th May, 1859.)

This was an ordinary case of foreclosure; and it appeared that after the decree the defendant was committing waste. The affidavit showed that the land was a scanty security.

*Hodgins*, for the plaintiff, moved for an injunction restraining the defendant from cutting down timber. No injunction had been prayed for in the bill; but it was laid down in *Wright* v. *Atkyns*, 1 V. & B. 314, and *Goodman* v. *Kine*, 8 Beav. 379, that a mortgagee was entitled to such relief as was now asked for.

ESTEN, V. C. The affidavit is satisfactory as to the scanty security of the property, and according to the rule laid down by Sir *James Wigram*, a mortgagee is entitled to a security of one-third more than the amount of his mortgage. The cases quoted are authorities that the injunction may issue against a mortgagor committing waste after a decree for foreclosure, and the injunction may go in this case; but I am not quite satisfied whether an injunction would be granted where the property is not shown to be of or less than the security I have referred to.

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## MONTHLY REPERTORY.

### COMMON LAW.

EX. *Jan.* 13.

THE NATIONAL GUARANTEED MANURE COMPANY v. DONALD.

*Parliamentary corporation—Their right to an easement no longer required by them—Prescription.*

A Canal Company incorporated by Act of Parliament, in order to obtain a fall of water to be used for purposes connected with their canal, erected a sluice and so dammed up the waters of the river C., on which the defendant's mill was situate. Subsequently the canal company was converted into a railway company, and the fall of water was no longer required. The defendant, whose mill was injured by the water being dammed up, thereupon made a cut and let off the water.

*Held*, in an action against him by plaintiffs, the lessees of the railway company for so doing, that the canal having ceased to exist, the easement claimed with respect to the river C. had ceased with it.

*Held*, also, *per* Pollock, C. B., and Channell, B., and *Semble per* Martin, B., that the Prescription Act does not apply to a parliamentary corporation exercising such a right as this.

It was contended for the plaintiffs, that the right to dam up the water conferred on the canal company, was transferred to the railway company, who might therefore grant it to the plaintiffs.

POLLOCK, C.B.—A parliamentary corporation exists only for the purposes of the Act of Parliament which created it. The plaintiffs exist only as a railway company, and therefore can have no right to take water from a river, which right was granted for the purposes of canal navigation only. It was said that there had been an uninterrupted enjoyment of this right by the canal company for more than twenty years, and therefore it has become indefeasible, by reason of the provisions in the Prescription Act 3 and 4, W. 4, cap. 71. But I am of opinion, that the Act does not apply to such a case as this. A prescription under that act stands in the place of a grant, but a railway company could not take by grant, the power the plaintiffs have here assumed to exercise.

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EX. HARDON v. HESKETH. *Jan.* 15.

*Use and occupation—Evidence for the Jury.*

It is some evidence to go to the jury in support of a count for use and occupation, that a fixed payment has been made for many years in respect of the land in question, by the defendant to the plaintiff; the defendant abstaining from all explanation of the origin or grounds of that payment which it seemed he was able to give.

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Q. B. REGINA v. SMITH. *Jan.* 18.

*Conviction under 4 & 5 Wm. IV. c. 85, s. 17,—Evidence of selling beer.*

Upon information for unlawfully selling beer under 4 & 5 Wm. IV., c. 85, s. 17, it was proved that the appellant's wife had actually supplied the beer to three persons who had asked the appellant for beer and to which he had said whilst pointing to his wife, 'you must ask her.'

*Held*, that upon this evidence the conviction was right.

In this case there was an appeal against the decision of Justices. It was argued that if the wife acted as agent for her husband they both ought to have been summoned and convicted together. However the court gave judgment for the respondent.

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Q.B. FLETCHER v. FLETCHER. *Jan.* 18.

*Lunatic—False imprisonment—Justification.*

A plea of justification to an action for false imprisonment, that the plaintiff had conducted himself as a person of unsound mind, and incapable of taking care of himself, and that the medical certificate required by 8 and 9 Vic., cap. 100, had been obtained, and that defendant had reasonable grounds for believing him to be of unsound mind.

*Held*, bad on demurrer. In support of the demurrer it is said the plea is bad for not alleging in terms, that the plaintiff was a lunatic.

The Court per LORD CAMPBELL, C. J., We think the plea is clearly bad. At Common Law, only persons who are actually of unsound mind, and whom it would be dangerous to leave at large, can be restrained of their liberty. Mr. Bovill has gravely argued, that persons who *sham* madness may be shut up in lunatic asylums. It would be most dangerous to the liberty of the subject

if that were so. There are many *eccentric* persons, as we know from cases of contested wills, who are not by any means to be treated as lunatics.

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Q.B. EX PARTE BRADFORD. *Jan.* 17.

*Attorney—Service of articles by B.A.—6 & 7 Vic., c. 73, s. 7.*

A person who takes a degree of B.A., after the commencement of his service as an articled clerk to an attorney, cannot avail himself of sec. 7, of 6 and 7 Vic, cap. 73, so as to be capable of being admitted as an attorney, upon having served a clerkship of three years. The act provides for those who shall, within four years after taking any degree mentioned, be bound by contract in writting and serve as clerk to a practising attorney for three years.

LORD CAMPBELL, C. J., said he should have great pleasure in granting a rule calling on the examiners to examine the applicant, with a view to his being admitted an attorney, if he could; but did not think that the case was brought within the statute.

In moving for the rule it was contended, that the intention of the statute was, that the articles should be entered into within a reasonable time of taking the degree, and whether before or after the event, is immaterial.

However, the Court thought otherwise.

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Q.B. BLYTH v. LAFONE. *Jan.* 20.

*Agreement to refer—Staying proceedings under s.* 11 *of the C. L. P. Act*, 1854.

There is no power under the above statute, to stay proceedings in an action, unless the agreement to refer to arbitration is contained in the instrument upon which the action is brought.

The action was brought for certain alleged breaches of a charter-party, which contained no agreement to refer certain disputes arising out of it. to arbitration, but after the charter-party was entered into, and before action was brought, an agreement to refer certain differences which had arisen was made *in writing* by the parties.

LORD CAMPBELL, C. J.,—The agreement to refer in order to confer upon us this jurisdiction, must have been contained in the instrument itself out of which the dispute arises, and on which the action is brought.

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Q. B. JACKSON AND ANOTHER v. FOSTER. *Jan.* 21.

*Life policy—Exception in condition.*

A life policy contained a condition that the policy would be void if the life assured died by suicide but if any third party had acquired a *bona fide* interest therein by assignment or by legal or equitable lien for a valuable consideration or as security for money, the policy to the extent of such interest was to be valid.

*Held*, that an assignment by the operation of the bankruptcy law was not within the exception.

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C. C. R. REGINA v. ROBINSON. *Jan.* 22.

*False pretences—Dogs not chattels—7 & 8 Geo. IV., ch.* 29, *sec.* 53

Dogs not being the subject of larceny at Common Law are not chattels within 7 & 8 Geo. IV. ch. 29, sec. 53.

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C. P. HAZARD v. HODGES. *Jan.* 19.

*Goods sold and delivered—Delivery.*

The defendant in London buys of the plaintiff a ship which the plaintiff builds beyond seas. The defendant writes to the plaintiff ordering him to provide a captain and crew to load the vessel and to insure her. The plaintiff carries out the order and the captain and crew sail in the vessel, which is lost on the voyage. The plaintiff may recover the price of the vessel under a count for goods sold and delivered.

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Q. B. LOFFT AND OTHERS v. DENNIS. *Jan.* 21.

*Landlord and tenant—Insurance against fire by landlord.*

Where a landlord insures premises with the knowledge of the tenant and does not expend the money in rebuilding which he has received from the insurance company in respect of the destruction of the premises, the tenant is nevertheless liable to pay rent for the destroyed premises.

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C. P. THOMPSON v. PARISH. *Jan.* 28.

*Interlocutory costs—Set off—Effect of taking in execution under a Ca. Sa.*

The plaintiff having obtained judgment in two actions issued writs of *ca. sa.* and arrested the defendant upon one and lodged a detainer upon the other. The writs being informal, application was made by the defendant for his discharge and a cross application was made by the plaintiff to amend the proceedings. This was accordingly ordered to be done, with a direction that the plaintiff should pay to the defendant the costs of the two applications. The defendant remained in custody.

*Held*, that these were interlocutory costs which the plaintiff was not bound to pay to the defendant, but which the Court might by virtue of its equitable jurisdiction to prevent its process being abused, order to be set off against the judgment, notwithstanding *that the defendant had been taken in execution.*

The mere taking in execution of a debtor does not extinguish the debt, and the expressions to that effect in the judgment in *Beard* v. *McCarthy*, 9 Dowl. 136, cannot be supported.

The power of the Court to order a set off against a judgment debt for which the debtor is in execution only extends to matters arising out of the same suit as that in which the judgment was obtained.

*Simpson* v. *Hanley*, 1 M. and S. 696, and *Peacock* v. *Jeffery* 1 *Taunt.* 426, and overruled by *Taylor* v. *Waters*, 5 M. and S. 104.

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C. C. R. REGINA v. FLETCHER. *Jan.* 22.

*Rape—Girl of imbecile mind—Without consent "Against the will" —13 Edward* 1, *Westminster*, 2 *cap.* 34.

The prisoner forcibly had carnal knowledge of a girl, thirteen years of age, who, from defect of understanding, was incapable of giving consent or exercising any judgment in the matter.

*Held*, that he was guilty of rape, and that it was sufficient in such a case to prove that the act was done without the girl's consent, though not against her will.

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C. P. BALFOUR AND OTHERS v. ERNEST. *Jan.* 24, 25.

*Joint-Stock company—Power of directors to draw bills of exchange.*

The A company, upon which the plaintiffs had a claim in respect of a policy issued by them, attempted to amalgamate with the B company. The directors of the B company drew a bill of exchange and gave it to the plaintiffs in liquidation of their claim. The amalgamation turned out to be ineffectual.

*Held*, that the directors had no power under the deed of settlement to draw such a bill, and that it was no answer that the plaintiffs did not know that they had no such authority, for they must be taken to know the contents of the deed of settlement.

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## CHANCERY.

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C. C. R. REGINA v. DARIUS CHRISTOPHER. *Nov.* 22.

*Larceny—Finding lost property—Felonious intent to appropriate at time of finding—Direction to Jury.*

In order to convict the finder of lost property of larceny, it is essential that there should be evidence of a felonious intention to appropriate the property at the time of finding, and evidence of a subsequent intent is insufficient. Upon the trial of the finder of a purse for larceny, the jury were directed that a felonious intent was necessary in every larceny, but that it might be inferred from subsequent as well as immediate acts, and that if they were satisfied *that the prisoner heard* the landlady of a public house, where he subsequently went, speaking of the loss and then did not take measures to make restitution, they might infer felonious intention.

*Held*, that the direction was wrong, as it was calculated to mislead the jury to suppose that a felonious intent subsequent to the finding was sufficient.

[In this case it was submitted, that the nature of the property was such that the finder could not do otherwise than believe that the owner might be found. And that having converted it to his own use under these circumstances, it might be inferred that it was his intention to do so at the time of finding.

The inference was disallowed on considering all the concomitants of the case by Pollock, C. B.]

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V. C. W. GROSVENOR v. GREEN. *Dec* 13.

*Vendor and Purchaser—Purchase of Lease—Notice—Specific performance.*

Leasehold property was put up for sale without any statements in the condition of sale or otherwise as to the nature of the covenants contained in the lease. The lease contained a covenant against carrying on certain specified trades or any other noisome or offensive trades.

*Held*, that the purchaser was bound and must be taken to have informed himself of the contents of the lease, and that he was not entitled to compensation or to be discharged from the contract by reason of the covenant against trade.

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L. J. RAWLINS v. WICKHAM. *Dec* 13, 14, 15, 16.
WICKHAM v. BAILEY.

*Fraud—Misrepresentation—Scientia—Opportunity of ascertaining the truth—Setting aside contract—Partnership—double remedy at law and in equity.*

B and W were partners in a Bank. B being the managing partner and W not interfering or knowing anything of the state of the business. They negotiated with the plaintiff to take him into the partnership, and during the negotiation W showed the plaintiff a written statement of the debts and credits of the bank, from which it appeared that the bank was solvent. This statement was false to the extent of several thousand pounds, the bank really being insolvent, but W was ignorant of the fraud, the plaintiff joined the firm and remained in it for four years, during which time he never examined the books or discovered the fraud. At length the business was sold and the fraud detected. The plaintiff brought an action at law against B (W being dead) upon the fraud and recovered damages, B became insolvent and the plaintiff then filed a bill against B and the representatives of W to set aside the contract for partnership, and to make W's estate liable to indemnify the plaintiff against the claims of the creditors.

*Held*, that the plaintiff was entitled to the relief prayed. If on the treaty for a contract a party makes a representation as to a fact of which he knows nothing and the representation turns out to be false, he is equally liable as if he knew it to be false.

If, upon the treaty for a contract, a party makes a false representation as to part of the matter of such a nature as to induce the other party to enter into the contract, the Court will not rectify the contract *pro tanto* but will set it aside altogether.

The fact that the plaintiff never attended to the business or examined the books and so remained in ignorance of the fraud did not bar his rights, it not being his duty as between himself and his co-partners to do so; and there being no suggestion that they had complained of his inattention to the business or that the bank had suffered from his negligence.

The fact of the plaintiff having brought an action against the surviving partner did not prevent him proceeding in equity against the estate of the deceased partner.

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V. C. K. POTTER v. PARRY. *Jan.* 15.

*Specific performance—Covenant—Fences—Highway.*

When in a suit for specific performance it appears that a covenant has been entered into by a former purchaser of the property for himself, his appointees, heirs, and assigns (to the interest that it should run with the land), with the owners and occupiers for the time being of certain adjoining lands, at all times thereafter, at his and their expense, to make and maintain the boundary fences between the lands and abutting on a road (afterwards made), the question of the obligation being binding on a future purchaser, is too doubtful to admit of the title being forced upon him.

*Semble*, there is no general law imposing the obligation on the owner or occupier of lands abutting on a public road to keep up the fence.

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V. C. W. *Dec.* 2, *Jan.* 14.

TAYLOR v. GREAT INDIAN PENINSULA RAILWAY COMPANY.

*Vendor and Purchaser—Transfer of shares in blank—Agency—Fraud.*

A who was a holder of £20 and £2 shares in a railway company instructed B his broker to sell sixty of his £2 shares. B brought to A for his signature two deeds of transfer, the numbers and particulars of the shares, and the name of the transferee in which were left in blank. The transfer deeds which bore a stamp sufficient to pass sixty £20 shares were signed in this state by A in the belief that his £2 shares would be thereby transferred.

B fraudulently offered for sale upon the stock Exchange A's £20 shares which were purchased by C at the market price. The certificates and the blank transfer deeds were handed to C who subsequently filled in the number of the shares and the name of the transferee.

*Held*, that notwithstanding the negligence of A in signing the transfer deeds in blank, and in not taking notice of the stamp upon them, C who had taken an instrument on the face of it passing no interest and void in law was not entitled to rely on his purchase which was accordingly set assde, the court refusing to recognize an alleged custom between brokers and jobbers of accepting blank transfers in shares for the purpose of avoiding the stamp.

## REVIEW.

THE ATLAS; A weekly Family Journal devoted to News, Choice Literature, Entertainment, Improvement and Progress. Hamilton, C. W.

We have received the first number of this very neat and promising Journal. It is designed to supply a void which has hitherto existed in Canadian Literature,—a Canadian family paper. If well conducted, both as to selections and original articles, the people of this Province will, we are sure, be too glad to patronize this home production.

Up to this time, we have observed with regret the growing circulation in this Province of American trash dressed up to represent general literature. We have no confidence in such literature. Often do we find that in them the little wheat which one gathers is all but smothered with briars and thorns.

We welcome the Hamilton *Atlas*, and hope that notwithstanding the hardness of the times the object of the projectors will be fully and effectually attained.

## APPOINTMENTS TO OFFICE &c.

CORONERS.

JAMES SMITH, Esquire, M. D., Associate Coroner, County of Kent.—(Gazetted, May 15th, 1859.)

JAMES MILLER, Esquire, M. D., Associate Coroner for the County of Kent.—(Gazetted, May 21st, 1859.)

NOTARIES PUBLIC.

JOHN THOMPSON HUGGARD, of Straford, Esquire, to be a Notary Public in Upper Canada.

JOSEPH RYERSON BOSTWICK, of Port Stanley, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, May 14th, 1859.)

CALVIN DONALDSON HOLMES, of London, Esquire, Attorney at Law, to be a Notary Public in Upper Canada.—(Gazetted May 28th 1859.

## TO CORRESPONDENTS.

LEX.—Under "Division Courts."

A LAW STUDENT.—Too late for insertion in this number.